

ICWA Quick Reference Guide

Involuntary Proceedings in Utah's Juvenile Courts

Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-63; ICWA Proceedings Final Rule, 25 CFR 23

ICWA applies to an Indian child subject to a child custody proceeding who is not a ward of tribal court and is not domiciled on a reservation.

Indian Child: Unmarried under 18 years old &: 1. Member/citizen of Tribe, OR 2. Eligible for membership AND biological child of member	Child custody proceeding: 1. Foster-care placement 2. Termination of parental rights 3. Preadoptive & Adoptive Placements 4. Status offenses/out-of-home placement	Indian Child's Domicile: • That of parent, custodial parent (if the parents unmarried), Indian custodian, or guardian	Exclusive Tribal Jurisdiction if: • Resides/domiciled on reservation, OR • Ward of tribal court
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EMERGENCY REMOVAL STANDARD: Necessary to prevent imminent physical damage or harm to the child.

Court must: 1. Make a finding on the record. 2. Promptly hold a hearing when information shows emergency ended. 3. Immediately terminate proceeding when there sufficient evidence shows emergency removal/placement is no longer necessary. Time Limits -No longer than 30 days unless the Court determines that: 1. Restoring the child to parent or Indian custodian would subject child to imminent physical damage or harm. 2. Court has been unable to transfer jurisdiction. 3. It has not been possible to initiate a child-custody proceeding.	A petition for emergency removal or continued emergency placement must comply with 25 CFR § 23.113(d). QEW is NOT required. Actions that terminate an Emergency Proceeding: 1. Initiate a child-custody proceeding. 2. Transfer to Tribe. 3. Restore child to parent or Indian custodian.
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INQUIRY

At commencement of each hearing, Court must: 1. Ask if anyone knows/has reason to know if child is an Indian child. 2. Instruct all parties to inform the court of subsequent information. <i>If there is a reason to know, but insufficient evidence:</i> 3. Confirm DCFS used due diligence to identify & work with all tribes 4. Treat as Indian child unless & until the court can determine otherwise. A Court has reason to know if: • Anyone informs the court • Anyone discovers information • Child informs court • Child resides/domiciled on a reservation • Child is ward of tribal court • Either parent possesses tribal identification card

ACTIVE EFFORTS

Active efforts are meant to: • Begin at INQUIRY if there is a reason to know a child is an Indian child. • Be tailored to the facts and circumstances of individual cases. • Be affirmative, active, thorough, timely. • Reunite an Indian child with his or her family. Courts must conclude that DCFS made active efforts, documented in the record.

PROPER REMOVAL & RETENTION

<ul style="list-style-type: none">• The Court must expeditiously determine whether removal or retention was proper: <i>returning an Indian child to parents or Indian custodian would subject the child to substantial and immediate danger or threat of such danger.</i>• If improper, the court must terminate proceedings and immediately return child to parents or Indian custodian.• Improper removal may be asserted at any time by any party.
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TIME LIMITS AND EXTENSIONS

<ul style="list-style-type: none">• No foster-care placement or TPR proceedings may be held until at least 10 days after receipt of notice.• Parents, Indian custodians, Tribes or Secretary have a right to an additional 20 days for preparation.• Additional time may be available under State law or pursuant to extensions granted by court.

DETERMINATION OF TRIBAL MEMBERSHIP

Tribes have sole jurisdiction and authority to determine membership or eligibility. The Court: <ul style="list-style-type: none">• May not substitute its own determination.• May rely on facts or documents indicating membership. To make a judicial designation of Indian child's tribe: <ul style="list-style-type: none">• If only one tribe: the court must designate as Indian child's tribe.• If 2+ tribes:<ul style="list-style-type: none">○ the court should give deference to the tribe in which child is already a member unless otherwise agreed to by tribes○ the court must provide the opportunity for the Tribes to determine which should be designated as the Indian child's Tribe

NOTICE

Courts must ensure: <ol style="list-style-type: none">1. Party seeking placement:<ol style="list-style-type: none">a. Promptly sends notice of each hearing by registered or certified mail with return receipt requested to each potential Tribe, parent, and Indian custodian.b. Files with the court originals or copies with any return receipts or proof of service.2. Notice is in clear and understandable language and conforms to requirements at 25 U.S.C. § 1903; 25 CFR 23.2.3. Notice sent to BIA Regional Director if identity or location of parents, Indian custodian or Tribe(s) unknown.4. Language access provided for Limited English Proficient (LEP) individuals.5. Parent or Indian custodian is informed of rights if appearing without attorney.

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STANDARDS OF EVIDENCE Foster-care placement = Clear and convincing; Termination of parental rights = Beyond a reasonable doubt

The court must not order a foster-care placement or termination of parental rights unless the evidence shows a **causal relationship** that conditions in the home **likely will result in serious emotional or physical damage to child**.

Without causal relationship, evidence that shows only the following **does not** meet standards of evidence: community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior.

QUALIFIED EXPERT WITNESS (QEW)

QEW must be qualified to testify to the following:

1. Continued custody of parent or Indian custodian is likely to result in serious emotional or physical damage to child
2. Prevailing social and cultural standards of the Indian child's Tribe

Who can be a QEW? *Please note that the final regulations do not include the preference list of QEWs that appear in the 2015 Guidelines.

1. May be a person designated by Tribe
2. Court or any party may request assistance of Tribe or BIA office to locate QEW
3. The regularly assigned DCFS caseworker **may not** serve as QEW.

When is QEW Required?

Foster care placements and termination of parental rights. A QEW is NOT required for emergency proceedings.

PLACEMENT PREFERENCES *The court must consider, where appropriate, child or parents' preferences.*

Adoptive - In descending order:

1. Member of child's extended family
2. Other members of child's Tribe
3. Other Indian families

Foster-care or Preadoptive

Least restrictive setting that:

- Most approximates a family, considering sibling attachment
- Allows child's special needs to be met
- In reasonable proximity to child's home, extended family or siblings

In descending order:

1. Member of child's extended family
2. Foster home licensed, approved or specified by child's Tribe
3. Indian foster home licensed or approved by an authorized non-Indian licensing authority
4. Institution for children approved by an Indian Tribe or operated by an Indian organization whose program is suitable to meet child's needs.

To Depart from the Placement Preferences:

1. Apply Tribe's order of placement preferences if established by resolution
2. Court determines good cause on the record or in writing.

Good cause to Depart from Placement Preferences

- Any party asserting good cause must state orally on the record or in writing
- Party seeking departure has burden to prove by clear and convincing evidence
- A court's determination must be made on the record or in writing and should be based on one or more of the following:
 - a. Parents' request if they viewed placement options
 - b. Child's request, if of sufficient age and capacity
 - c. Sibling attachment
 - d. Extraordinary physical, mental or emotional needs of the Indian child
 - e. Unavailability of suitable placement after diligent search. Analysis must conform to prevailing social and cultural standards of the child or family's Indian community

A placement preference may not depart based on:

1. Socioeconomic status relative to another placement
2. Ordinary bonding or attachment that flowed from time spent in non-preferred placement in violation of ICWA.

TRANSFER TO CHILD'S TRIBE Available at any stage of the proceeding.

Who may request:

1. Parent, Indian custodian or Tribe orally on the record or in writing

Notice to Tribal Court

- State court must ensure child's Tribe receives prompt notice of the transfer petition.
- State court may request a timely response from the Tribal court's wishes to decline transfer.

Ruling on Transfer Petitions

- State court must transfer the proceeding unless one or more criteria met:
 1. Either parent objects
 2. Tribal court declines
 3. Good cause exists

Good cause not to transfer

- State court or any party must assert orally on record or in writing reasons that good cause exists
- Any party must have right to provide the court with views regarding good cause
- The court **must not consider**:
 1. Advanced stage of proceeding, if parent, Indian custodian or Tribe did not receive notice until an advanced stage
 2. Prior proceedings involving child in which no petition to transfer was filed
 3. Change in placement
 4. Child's cultural connections with Tribe or reservation
 5. Socioeconomic conditions or negative perception of Tribe or BIA social services or judicial systems