

When Does ICWA Apply?

A “child custody proceeding” where the court knows or has reason to know that an “Indian child” is involved. 25 U.S.C. §§ 1903(1) & 1912, 25 C.F.R. §103, 2016 Guidelines B.2

What is a “Child Custody Proceeding” for purposes of ICWA?

25 U.S.C. § 1903(1)
25 C.F.R. §23.2(1)
2016 Guidelines B.2 & L.3

An action that may culminate in:

- Foster care placements
- Guardianships & conservatorships
- Termination of parental rights
- Pre-adoptive placements
- Adoptive placements (includes conversion from foster care to adoptive placement)
- Placements where parents can’t regain custody of child “upon demand”
- Proceedings concerning status offenses

ICWA requirements apply to an action that may result in one of the placement outcomes, even if it ultimately does not. 25 C.F.R. § 23.2(2), 2016 Guidelines L.3

ICWA not implicated in

- delinquency matters involving an act which would be deemed a crime if committed by an adult
- Divorce proceedings or custody disputes in which a parent will get custody
- D&N adjudicatory hearing. *People in Interest of L.L.*, 2017 COA 38, ¶ 53 (March 23, 2017).

An action that may culminate in foster care placement, TPR, pre-adoptive placement and adoptive placement is considered a separate child-custody. 25 C.F.R. § 23.2(2), 2016 Guidelines B.2 & L.3

What is an “Indian Child” for purposes of ICWA?

25 U.S.C. § 1903(4)
25 C.F.R. §§23.2 & 23.107
2016 Guidelines B.1 & B.2

- Unmarried person under the age of 18 and
- Member of a federally recognized tribe or eligible for membership in a federally recognized Tribe and is the biological child of a member of an Indian tribe

Due diligence: The court must confirm that the party pursuing the child custody proceeding used due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member or eligible for membership and to verify whether the child is in fact a member or eligible for membership in a Tribe. 25 C.F.R. § 23.107(b)(1).

Pending tribal verification: Treat the child as an Indian child if there is a **reason to know child is Indian child** unless and until it is determined on the record that the child is not an “Indian child.” 25 C.F.R. § 23.107(b)(2).

ICWA 25 U.S.C. §1912(a) applies **notice** requirements based on “reason to know” and CRS § 19-1-126(b) requires notice if the department “has reason to believe” that the child may be an Indian child. 2016 Guidelines B.2.

Tip: GAL’s independent investigation must include an inquiry into Indian heritage. See 25 C.F.R. § 23.107, CJD 04-06 IV. D.4.f. When in doubt, conduct further investigation into a child’s status early in the case to determine which standards apply to the case and minimize the potential for insufficient findings, delays or disrupted placements. See 2016 Guidelines B.1

“Reason to know” is not defined in ICWA. Please review 25 C.F.R. § 23.107(c), 2016 Guidelines B.1.

“Reason to know” includes:

- Any participant informs the court
 - The child is an Indian child
 - It has discovered information indicating that the child is an Indian child
 - The child, parent or Indian custodian is domiciled or resides on a reservation
- The parent or child possesses an identification card indicating membership in an Indian Tribe

Emergency Removal and/or Emergency Placement

25 U.S.C. § 1922
25 C.F.R. § 23.113
2016 Guidelines C

An emergency removal/placement of an Indian child under CRS § 19-3-403 does not require the full suite of ICWA protections, but does require the court to find removal/placement is **necessary to prevent imminent physical damage or harm to the child**.

Emergency removal/placement must **terminate** immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child. 25 U.S.C. § 1922, 25 C.F.R. § 23.113

Emergency removal/placement should not last more than 30 days unless:

- (1) Initiation of a child-custody proceeding subject to the provisions of ICWA,
- (2) Transfer of the child to the jurisdiction of the appropriate Indian Tribe, or
- (3) Restoring the child to the parent or Indian custodian.

ICWA does not require testimony of a qualified expert witness or impose a heightened burden of proof at the emergency removal hearing.

Practice tip: The GAL must ensure next hearing is scheduled prior to expiration of the 30 day emergency removal/placement in order to ensure consideration of the foster care placement provisions and compliance with the notice requirements. *See* 2016 Guidelines C.5

Placement Preferences

25 U.S.C. 1915(b)
25 C.F.R. § 23.131 & 132
2016 Guidelines H.4

Indian child foster care or preadoptive placement shall be the least restrictive setting which most approximates a family and in which his special needs, if any, may be met and within reasonable proximity to his or her home. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with

- Member of Indian child's extended family,
- foster home authorized by Tribe,
- Indian foster home licensed by non-Indian licensing authority, or
- Institution approved by tribe or operated by Indian organization.

25 U.S.C. 1915(b), 25 C.F.R. § 23.131.

The party seeking **departure from the placement preferences**

- Must state orally on the record or provide in writing the reasons for that belief or assertion
- Should bear the burden of proving by clear and convincing evidence that there is "good cause" to depart from the placement preferences.

Good cause includes:

- Request of the Indian child's parent or Indian child
- Presence of sibling attachment that can be maintained only through particular placement
- Extraordinary needs of the child
- Unavailability of a suitable placement after court determines diligent search conducted, but none located.

Good cause does not include "ordinary bonding or attachment"

Child Custody Proceeding -- Foster-care placement

25 U.S.C. § 1912(e)
C.F.R. § 23.2(1).

Includes any action removing an Indian child from his/her parent or Indian custodian for temporary placement in a foster home or institution. 25 U.S.C. § 1903(1), 25 C.F.R. § 23.2(1).

Notice: the party seeking the foster care placement of an Indian child shall notify the parent or Indian custodian and the Indian child's tribe by registered mail with return receipt requested. 25 U.S.C. § 1912(a), 25 C.F.R. § 23.111(a). The Rule authorizes notice by certified mail with return receipt. 25 C.F.R. §

Timing of notice: The court cannot hear the matter sooner than 10 days after receipt of the notice by parent, Indian Custodian or Tribe. 25 U.S.C. § 1912(a), 25 C.F.R. § 23.112.

Continuance: Parent/Indian custodian/Tribe have a right, upon request, to up to 20 additional days.

QEW: Must be qualified to testify

23.11(a).

Burden of proof: Clear and convincing evidence. 25 U.S.C. §1912(e).

Testimony of Qualified Expert Witness (QEW) that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C. §1912(e).

Causal connection: The evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding. 25 C.F.R. § 23.121(c).

Active Efforts: The Court must find active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. 25 U.S.C. § 1912(d), 25 C.F.R. § 23.120

The active efforts standard requires more than the reasonable efforts standard. *People ex rel. A.R.*, 310 P.3d 1007 (COA 2012). Active efforts must be documented in detail in the record. 25 C.F.R. § 23.120.

regarding whether the child's continued custody by the parent is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe 25 C.F.R. § 23.122, *see also* 2016 BIA Guidelines G.2.

The social worker regularly assigned to the Indian child does not qualify as a QEW. 25 C.F.R. § 23.122(c)

Active Efforts are affirmative, active, thorough and timely efforts intended to maintain or reunite an Indian child with his/her family, 2016 Guidelines L.1., and must be documented in detail in the record, 25 C.F.R. § 23.120. Active efforts include: a comprehensive assessment of the Indian child's family circumstances, inviting representatives of the Indian child's Tribe to participate in providing support & services and case events and offering and employing all available & culturally appropriate family preservation strategies. *See* 25 C.F.R. § 23.2.

Child Custody Proceeding -- Termination of Parental Rights
25 U.S.C. §1912(f)
25 C.F.R. § 23.121

Notice: See Foster Care Placement" above.

Burden of proof: Beyond a reasonable doubt. 25 U.S.C. § 1912(f).

Testimony of Qualified Expert Witness (QEW): that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C. §1912(f).

Causal connection: the evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding. 25 C.F.R. § 23.121(c).

Active Efforts: The Court must find active efforts have been made to provide remedial services and prevent the breakup of the Indian family and that these efforts have proved unsuccessful. 25 U.S.C. § 1912(d), 25 C.F.R. § 23.120(a). Active efforts must be documented in detail in the record. 25 C.F.R. § 120(b).

Continuance: SAA

QEW: SAA

Active Efforts: SAA

Note: TPR is a separate "child custody proceeding" under ICWA. 25 C.F.R. § 23.2(2), 2016 Guidelines B.2 & L.3

Transfer

25 U.S.C. § 1911(b),
25 C.F.R. § 23.115

The court shall transfer the proceeding to the jurisdiction of the tribe upon the petition of either parent, Indian custodian or Indian child's tribe unless good cause supports denial of the transfer. 25 U.S.C. § 1911(b), 25 C.F.R. § 23.115.

Standard of Evidence: Neither ICWA nor the Rule specifies the standard of evidence to be applied for the determination of whether there is good cause to transfer a proceeding to the Tribal court. However, there is a strong trend in State courts to apply a "clear and convincing" standard of evidence.
2016 Guidelines F.5

Denial of Transfer:

- Objection by either parent,
- Tribal court declines transfer, or
- Good cause exists for denial. 25 C.F.R. § 23.117, 2016 Guidelines F.4

Good Cause: ICWA does not define good cause. The court **cannot** consider:

- Whether the proceeding is at an advanced stage if proper notice received until advanced stage.
 - Prior proceedings for which transfer not requested
 - Effect on the child's placement
 - Socioeconomic conditions or a negative perception of Tribal or BIA social services or judicial systems
- 25 C.F.R. § 23.118, 2016 Guidelines F.5

Reasons or belief that good cause exists must be stated orally on the record or provided in writing
25 C.F.R. § 23.118(a), 2016 Guidelines F.5

Tribe's Exclusive Jurisdiction: The Indian child resides or is domiciled within the reservation or is a ward of the tribal court. 25 U.S.C. § 1911(a), 25 § 23.110, 2016 Guidelines F.1

Request for transfer is available at any stage in each foster-care or termination of parental rights proceeding. 25 C.F.R. § 23.115, 2016 Guidelines F.2

See Rule for procedures. 25 C.F.R. §§ 23.116 & 23.119, 2016 Guidelines F.3 and F.6

Note: "advanced stage" refers to the proceeding rather than the case as a whole; "advanced stage" is a measurement of the stage within each proceeding. 25 C.F.R. § 23.118, 2016 Guidelines F.5

C.R.S. § 19-1-126(4)(a)(I)(B) allows the court to consider whether the proceeding is at an "**advanced stage.**" The rule qualifies the factor by requiring proper notice. 25 C.F.R. § 23.118(c)(1).