

ICWA Bench Checklist

ICWA applies to all “child custody” proceedings, regardless of where the child is placed. This includes:

Foster care placement; termination of parental rights; pre-adoption placements; adoptive placements, allocation of parental rights to a non-parent, status offenses (offenses that would not be a crime if committed by an adult, such as: truancy, under-age drinking, runaway, juvenile in possession of a weapon); emergency proceedings; and voluntary proceedings (a proceeding that could prohibit the parent or Indian custodian from regaining custody upon demand).

ICWA does NOT apply to:

Divorce proceedings where one of the parents will obtain custody of the child; a voluntary placement that does not prohibit the child’s parent or Indian custodian from regaining custody upon demand, and most juvenile delinquency proceedings (violations of criminal law).

Note: ICWA does not prevent emergency removal of an Indian child to prevent imminent physical harm.

- ◇ **At the commencement of the child custody proceeding, ask* each participant whether the child has any Indian heritage. That is, whether each participant knows/believes or has reason to know/believe that the child is an Indian child, with all responses on the record.**

- If there is no reason to know/believe the child is an Indian child, instruct parties to inform the court if they subsequently receive information that provides reason to know/believe.

**this is not the same thing as asking if they have filled out an “ICWA assessment form”*

- ◇ **In cases where there is a reason to know or believe that the child is an Indian child:**
NOTICE

- Ask if **proper notice** (see 25 CFR 23.111), registered or certified mail return receipt requested was received at least 10 days before each hearing by:
 - **The child’s parent**, including the putative father, or Indian custodian; **and**
 - **All tribes** with which the child may be affiliated; **and**
 - If the tribe is unknown, ask if notice was sent to the regional Bureau of Indian Affairs (BIA) office.
 - Ask if copies of the notices were sent to the **regional BIA office**.
 - Ask if copies of all notices were filed in the court.

EFFORTS

- Ask what **active efforts** the agency made to provide remedial services and rehabilitative programs designed to prevent the breakup of the family.
 - Ask if the efforts were successful.

- ◇ **A proceeding to terminate parental rights triggers a new duty of inquiry and notice.**

In all placements of Indian children, the court must:

- ◇ Authorize placement of the child by preferential order with:
 - A member of the Indian child’s extended family;
 - A foster home licensed, approved, or specified by the Indian child’s tribe;
 - An Indian foster home licensed or approved by an authorized non-Indian licensing authority;
 - An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child’s needs; or
 - Follow a different preference order if established by the Indian child’s tribe under tribal resolution.

UNLESS

- ◇ There is **good cause** not to follow the placement preferences, proven by clear and convincing evidence.