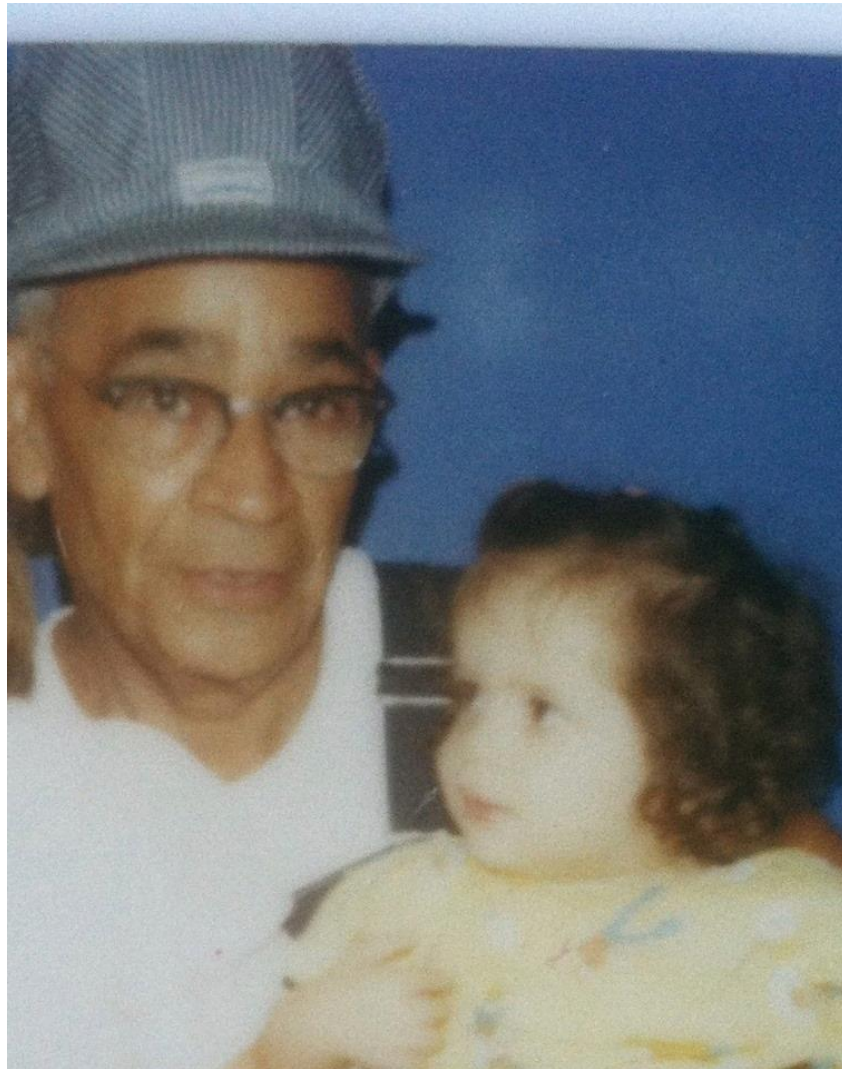


# Oklahoma Bench Guide To Indian Child Welfare 2018



For My Papa

## Practical Steps to ICWA Compliance

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## INTRODUCTION

Oklahoma's first published appellate opinion on ICWA was issued thirty-five years ago by the Court of Civil Appeals, and today Oklahoma remains a leading state in ICWA application. (See, *Duncan v. Wiley*, 1982 OK CIV APP 45, 657 P.2d 1212.) This bench reference provides an insightful approach to the standards and requirements of ICWA, OICWA and the new BIA Final Rule on ICWA.

Those participating in the drafting and review of this bench reference includes Tribal, Federal and State Representatives, former ICWA children now adults, non-governmental organizations (NGOs) and professionals in the fields of social work and law.

Since, the adoption of the federal act in 1978, Oklahoma has adopted OICWA, the Bureau of Indian Affairs adopted its Final Rule: Indian Child Welfare Proceedings, and the United States has signed the United Nations Declaration on the Rights of Indigenous People (UNDRIP). This bench guide provides an overview of how to approach ICWA proceedings. References will direct you to the specific sections of the Federal or State Act, the BIA Final Rule or the BIA Guideline for State Courts.



**I. Inquiry as to the Status of the Child as an Indian Child:**

[25 U.S.C. §1903(4); 25 C.F.R. §§ 23.2, 23.105, & 23.107-23.109; 10 O.S. §§40.2-40.3]

- A. Ask at the beginning of the hearing: "Do you know, or is there a reason to know, the child is an 'Indian Child' under the Indian Child Welfare Act?"
- B. 'Indian child' (25 U.S.C. §1901(4)) is either a member of a federally recognized tribe OR eligible for tribal membership AND has a biological parent who is a member.
- C. Whether the child is an Indian child does not consider:
  - 1. Participation of the parent(s) or child in tribal activities;
  - 2. Relationship between the parent(s) and child other than biological;
  - 3. If the parent ever had custody of the child; or,
  - 4. The child's blood quantum.
- D. "Reason to know" includes when:
  - 1. Anyone, including child, informs the court child is Indian child or there is other information indicating child is an Indian Child;
  - 2. Domicile or residence of child or parent/Indian custodian is on an Indian reservation or in Alaska Native village;
  - 3. Child is, or has been, ward of a tribal court; or,
  - 4. Either parent or child has an ID indicating tribal membership.
- E. Until court receives confirmation from the Indian tribe that the child is or is not a member, treat the child as an Indian child.

**II. Make a Record/Determination as to Status of the Indian Child:**

- A. Confirm on the record/make a determination as to the use of due diligence by the agency or party responsible to:
  - 1. Identify and work with all applicable tribes when there is a reason to know the child may be a member or membership eligible;
  - 2. Verify whether the child is a member, or a biological parent is a member and the child is eligible; and,
  - 3. Determine the Indian child's tribe for purposes of the Act.

### **III. Make a Record/Determination as to Notice of Proceeding:**

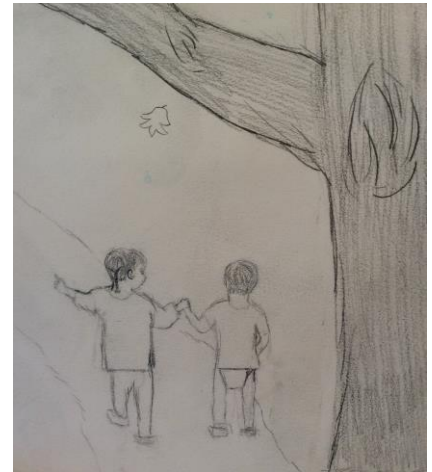
[25 U.S.C. §1912(a), 25 C.F.R. §§23.11 & 23.111; 10 O.S. §40.4]

- A. Notice of any involuntary foster care proceeding or termination of parental rights proceeding involving an Indian child must be given to:
  - 1. Parent or Indian custodian;
  - 2. Indian child's Tribe; and,
  - 3. Appropriate Regional Bureau of Indian Affairs Director.  
*See, Designated Tribal Agents for Service of Notice, Federal Register Notice, March 8, 2017 at [www.bia.gov/bia/ois/dhs/icwa](http://www.bia.gov/bia/ois/dhs/icwa)*
  
- B. Notice must be provided by registered or certified mail with return receipt requested, and the notice and proof of service filed with the court clerk.
  
- C. Notice must be in clear and understandable language, and include:
  - 1. The child's name, birthdate, and birthplace;
  - 2. All names known (including maiden, married, and former names or aliases) of the parents, the parents' birthdates and birthplaces, and Tribal enrollment numbers if known;
  - 3. If known, the names, birthdates, birthplaces, and Tribal enrollment information of other direct lineal ancestors of the child, such as grandparents;
  - 4. The name of each Indian Tribe in which the child is a member (or may be eligible for membership if biological parent is a member);
  - 5. A copy of the petition, motion or other document by which the child custody proceeding was initiated and, if scheduled, information on the date, time, and location of any upcoming hearings; and,
  - 6. Statements setting out:
    - a. The name of the petitioner and the name and address of petitioner's attorney;
    - b. The right of any parent or Indian custodian to intervene, if not already a party to the child-custody proceeding;
    - c. The Indian Tribes' right to intervene at any time in a State-court proceeding for foster care placement or termination of parental rights to an Indian child;
    - d. The right of the parent or Indian custodian to a court appointed attorney upon a determination of indigence by the court;
    - e. The right to be granted, upon request, up to 20 additional days to prepare for the child-custody proceedings;
    - f. The right of the parent, Indian custodian, and Indian child's Tribe to petition the court for transfer of the proceedings to Tribal court;
    - h. The mailing address and telephone numbers of the court and contact information for all parties and all individuals served under the notice;
    - i. The potential legal consequences of the child custody proceedings on the future parental rights of the parent or Indian custodian; and,
    - j. That the notice is confidential and should not be handled by anyone not needing information to exercise rights under ICWA.

D. Notice Requirements and Time Limits

[25 C.F.R. §23.112]

1. No foster care placement or termination of parental rights proceeding may be held until 10 days after receipt of notice by parents and by the Tribe.
  - a. Parent or Tribe can request an additional 20 days from date of receipt of notice.
2. In Oklahoma, notice, per *10 O.S. §40.4 (effective November 1, 2017)* requires the court to ensure that the district attorney shall send notice to the parents or to the Indian custodians, if any, and to the tribe that is or may be the tribe of the Indian child, and to the appropriate Bureau of Indian Affairs area office, **by certified mail return receipt requested**.
  - a. The notice shall be written in clear and understandable language and include the following information:
    - 1) The name and tribal affiliation of the Indian child;
    - 2) A copy of the petition (or motion) by which the proceeding was initiated;
    - 3) A statement of the rights of the biological parents or Indian custodians, and the Indian tribe to:
      - a) Intervene in the proceeding;
      - b) Petition the court to transfer the proceeding to the tribal court of the Indian child, and;
      - c) Request an additional twenty (20) days from receipt of notice to prepare for the proceeding; further extensions of time may be granted with court approval;
    - 4) A statement of the potential legal consequences of an adjudication on the future custodial rights of the parents or Indian custodians;
    - 5) A statement that if the parents or Indian custodians are unable to afford counsel, counsel will be appointed to represent them; and,
    - 6) A statement that tribal officials should keep confidential the information contained in the notice.
  - b. Notice of **review hearings** shall be sent, via **regular first-class mail**, to the tribe of the Indian child.
    - 1) A tribe's right to notice under this section is not dependent on intervention into the case.
    - 2) No mailing is required if the tribe is present at the time the review hearing is set and consents to the date of the review.
    - 3) A certificate of mailing must be filed prior to the review hearing.
3. For information on Notice to be given of a change in the adopted Indian child's status, see *25 C.F.R. §23.139*.



**IV. Make a Record/Determination as to Domicile & Residence of the Indian Child;  
Tribal Court Jurisdiction:** [25 U.S.C. §1911(a)-(b); 25 C.F.R §§23.2 & 23.115-23.119]

- A. If domicile or residence of Indian Child is on a reservation or if the child is a ward of a tribal court, the tribe exercises exclusive jurisdiction.
- B. If domicile or residence of the Indian Child is off a reservation, or the child is a ward of State court, then the tribe holds concurrent jurisdiction.
- C. Transfer to Tribal Court. Either parent, the Indian custodian or the Indian child's tribe may request transfer of each distinct Indian child custody proceeding to tribal court.
  - 1. Request may be orally or in writing.
  - 2. Request may be made at any time.
  - 3. Transfer is available at any stage of proceeding.
- D. Notify Tribal Court of Transfer Request. Upon receipt of request for transfer, promptly notify the tribal court in writing of the request.
  - 1. May request a timely response regarding whether tribal court wishes to decline transfer of the proceedings to tribal court.
  - 2. Must transfer unless:
    - a. Either parent objects,
    - b. Tribal court declines transfer, or
    - c. Good cause to deny transfer exists.
- E. Good Cause to Deny Transfer.  
Make a record/determination as to good cause.
  - 1. State on the record or provide in a detailed written order, the reason good cause to deny transfer exists.
  - 2. Reason must not include:
    - a. Advanced stage of proceedings if the Indian child's parent, Indian custodian or Tribe did not receive notice.
    - b. If, in prior proceedings involving child, no petition to transfer was filed.
    - c. Effect on the placement of the child should tribal court change the placement.
    - d. Child's lack of cultural connections with the tribe or its reservation.
    - e. Socioeconomic conditions or any negative perception of tribal or BIA social services or Tribal judicial system.
  - 3. Give every party to the proceeding opportunity to be heard regarding whether good cause to deny transfer exists.
- F. Tribal Court Acceptance of Transfer. If transfer is granted and the tribal court accepts, expeditiously provide all court records to the receiving tribal court.

- G. Physical Transfer of Child to Tribal Jurisdiction. Make an agreement with the tribal court to smoothly and with minimal disruption of services to the family, transfer the child and the proceeding to the Tribe.
1. When the child is in DHS custody, the Order Transferring Case to Tribal Court should reflect that legal custody of the child remains with DHS until the Tribal Court has formally accepted transfer of the state court case AND the child is placed in the physical custody of the Tribe via the Tribal worker.
  2. Tribal and DHS child welfare must coordinate efforts for child's transfer to a Tribal placement.

**V. Intervention in the Proceeding:**

[25 U.S.C. §1911(c)]

- A. At any point in any proceeding for foster care placement (adjudication) of, or termination of parental rights to, an Indian child, the right to intervene is conferred to:
1. The Indian custodian; and,
  2. The Indian child's Tribe.
- B. Lack of response from tribe to the initial notice of the state court proceeding does not preclude intervention at a later time.
- C. When a tribe explicitly declines to intervene, the tribe may change its position later and would then be entitled to intervene at the later date. The tribal right to intervene continues for the life of the State court proceeding.

**VI. Make a Record/Determination of the Type of Proceeding:**

[25 U.S.C. §1903(1); 25 C.F.R. §23.2]

- A. Determine if it is an Involuntary or Voluntary Proceeding?
- B. Determine if it is an Emergency Removal, Foster Care Placement, Termination of Parental Rights, Preadoptive Placement, or Adoptive Placement.
- C. As soon as the parent or Indian Custodian can no longer have the child returned upon request, a voluntary proceeding then becomes an involuntary matter.

NOTE: A case can morph from an emergency removal to foster care placement quickly. In other words, the type of proceeding and stage of proceeding can change at various points in a case. This can become detail laden in cases spanning a lengthy timeframe. It can be good practice to quickly make a determination for the record on the type of and stage of proceeding at each hearing in a case.



**D. Special note as to Emergency Removal:** [25 C.F.R. §23.113; 10 O.S. §40.5]

1. The court may, under State law, grant an emergency removal of an Indian child who is a resident or domiciled on reservation, but temporarily located off reservation, in order to prevent imminent physical damage or harm to the child.
  - a. This applies even when exclusive jurisdiction rests with the tribal court.
2. In Oklahoma, the Emergency Order must be accompanied by an affidavit. (10 O.S. §40.5). The affidavit must contain:
  - a. Name, tribal affiliations, and address of the Indian child, parent and any Indian custodian;
  - b. Specific and detailed account of the circumstances that lead the responsible agency to remove the child; and,
  - c. A statement of what actions have been taken to help parents or Indian custodians so child may safely be returned;
3. In Oklahoma, a state court Emergency Order can only stay in effect for 30 days, but may be extended up to 90. (25 C.F.R. §23.113; 10 O.S. §40.5)
  - a. To extend an Emergency Order beyond 30 days, the court must determine that custody of the child by the parent is likely to cause serious emotional or physical damage to the child.
  - b. This must be shown by clear and convincing evidence, and requires testimony of one qualified expert witness. See information below as to who may serve as a qualified expert witness.
  - c. *Key to Emergency Removal is imminent physical damage* which may include endangerment of the child's health, safety and welfare, bodily injury or death. Once removal is no longer necessary to prevent imminent physical damage or harm to the child, the emergency removal or placement must terminate immediately.
4. The court may terminate the emergency removal or placement by either:
  - a. Expeditiously initiating a State court child custody proceeding under ICWA;
  - b. Transferring jurisdiction to the appropriate Indian tribe upon tribal court acceptance; or,
  - c. Restoring the child to the parent or Indian custodian.



**VII. Make a Record/Determination as to Active Efforts:**

[25 U.S.C. §1912(d); 25 C.F.R. §§23.2 & 23.120]

- A. Party seeking foster care placement of, or termination of parental rights to an Indian child must show active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that the active efforts were unsuccessful.
  1. Active efforts must be documented in detail in the Court record.

- B. Active efforts must be:
  - 1. Affirmative;
  - 2. Active;
  - 3. Thorough; and,
  - 4. Timely.
  
- C. Where an agency, such as DHS or a “private” agency, is involved with the child custody proceeding, active efforts must include:
  - 1. Assisting parents through the steps of a case plan; and,
  - 2. Assisting parents with accessing or developing the resources necessary to satisfy the case plan.
  
- D. To the maximum extent possible, active efforts should be:
  - 1. Consistent with the prevailing social and cultural conditions and way of life of the Indian child’s Tribe; and,
  - 2. Conducted in partnership with the:
    - a. Indian child;
    - b. Parents;
    - c. Indian custodian;
    - d. Extended family members; and,
    - e. Tribe.
  - 3. Active efforts are tailored to the facts and circumstances of the case and may include:
    - a. Conducting comprehensive assessment of the circumstances, with a focus on reunification as the most desirable goal;
    - b. Identifying appropriate services and helping parents overcome barriers, including actively assisting the parents in obtaining services;
    - c. Identifying, notifying, and inviting representatives of the Indian child’s Tribe to participate in providing support and services to the Indian child’s family and in family team meetings, permanency planning, and resolution of placement issues;
    - d. Conducting or causing to be conducted a diligent search for the Indian child’s extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child’s parents;
    - e. Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child’s Tribe;
    - f. Taking steps to keep siblings together whenever possible;
    - g. Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;
    - h. Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively

- assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;
- i. Monitoring progress and participation in services;
  - j. Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available; and/or,
  - k. Providing post-reunification services and monitoring.

**VIII. Make a Record/Determination as to Standard of Evidence for Continued Custody by a Parent or Indian Custodian:** [25 U.S.C. §1912(e) & (f); 25 C.F.R. §23.121]

- A. The type of evidentiary standard required will depend on the type of proceeding involved for the court's determination that the child's continued custody by a parent or Indian custodian is likely to result in serious emotional or physical damage to the child:
1. If foster care placement – clear and convincing evidentiary standard;
  2. If termination of parental rights – evidence beyond a reasonable doubt; and,
  3. Both require testimony of a qualified expert witness.

**Note:** “Continued custody” means physical or legal custody or both, under any applicable Tribal law or custom or State law, that a parent or Indian custodian already has or had at any point in the past. The biological mother of a child has had custody of the child. 25 C.F.R. 23.2. In some instances, a biological father may also have custody of the child under tribal law, and this is a matter that the court should inquire of with the child's tribe.

- B. To the determination that the child's continued custody by parent or Indian custodian is likely to result in serious emotional or physical damage to the child:
1. There must be a causal relationship between the conditions in the home and the likelihood that continued custody will result in the damage to the particular child who is subject of the proceeding;
  2. Without causal relationship, the standard of evidence is not met; and,
  3. Evidence of only community or family poverty, or isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence.

**NOTE:** In Oklahoma, there is ongoing “discussion” on the “when” the applicable standard of evidence under ICWA applies to the case verses when to apply a state standard of evidence. Since the adoption of the Final Rule, perhaps this is a question that very well might face future appellate decision. However, this bench guide will reference the Oklahoma case law and offer a potential approach to resolving any perceived conflict of whether to apply a state or ICWA standard of evidence.

- C. Oklahoma case law: There is a line of Oklahoma case law in termination matters indicating that the heightened standard of proof of ICWA applies only to the *factual* determination “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,” whereas the lesser state-law mandated burden of proof, is applicable to all other state law requirements for the proceeding. In other words, as to the state court evidentiary standard for termination of parental rights to the child must be based on state law. Thus, for termination of parental rights the standard is clear and convincing evidence.
1. Termination Proceeding: *“That heightened standard of proof, which is absent from the language of § 1912(d), applies only to the factual determination required by 25 U.S.C. § 1912(f) to be made in ICWA termination cases, i.e., “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,” whereas the lesser standard of “clear and convincing” evidence, the state-law mandated burden of proof, is applicable to all other state law requirements for termination.” In re J.S., 177 P.3d 590, 591; 2008 OK CIV APP 15 (heightened standard of beyond a reasonable doubt as it applies to termination proceeding under ICWA.*
  2. Termination Proceeding - Adoption without Consent: *“Because no provisions of the ICWA displace the burden of proof on other issues, we can find no proper basis for imposing a higher standard of proof on Petitioners than they would have if this case did not involve an Indian child. In so concluding, we join the courts of numerous other states, which have held that the state-law mandated burden of proof is applicable to state law requirements for termination and that the burden of proof provided in §1912(f) applies only to the specific factual determination required by that section [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].”(Internal citation omitted.) In re Adoption of R.L.A., 2006 OK CIV APP 138, ¶15, 147 P.3d 306.*
  3. Termination of Parent-Child Relationship and Adoption without Consent: *A hearing on eligibility for adoption without consent is not a termination proceeding, and not due the higher standard of evidence of ICWA. However, a hearing on the petition for adoption is a proceeding which may result in the termination of the parent-child relationship, and a proceeding in which court may grant a final decree of adoption therefore, “evidence relative to matters included in subsection (f) of Section 1912[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] must be proven ‘beyond a reasonable doubt’ in order to support a determination that parental rights should be terminated, including the testimony of an expert witness.” In re Adoption of G.D.J., 2011 OK 77, ¶¶35,36, 261 P.3d 1159*

4. Oklahoma Juvenile Jury Instruction No. 5.2: The jury instruction recognizes dual burdens of proof for termination of parental rights proceedings in an ICWA case: “The State has the burden of proving beyond a reasonable doubt that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. The State has the burden of proving by clear and convincing evidence all of the other requirements for the termination of parental rights.”

E. Not a conflict! There is a simple fix: While the discussion on applicable standard of evidence may not fully be resolved in Oklahoma, a simple means to address any conflict on the matter is to make a record/determination at hearings by reflecting the standard of evidence that is being met for each the State requirement and the ICWA requirement.

#### **IX. Make a Record/Determination as to Qualified Expert Witness**

[25 U.S.C. §1912(e) & (f); 25 C.F.R §23.122]

A. The Qualified Expert Witness (QEW) must be qualified to testify regarding child’s continued custody by the parent or Indian custodian likely to result in serious emotional or physical damage to child, and qualified to testify as the prevailing social and cultural standards of the Indian child’s Tribe. The expert:

1. May not be the state DHS former or current worker regularly associated with the child;
2. However, tribe may designate a representative to speak for the tribe, and often this will be the tribal child welfare worker assigned to the child.

B. Certain determinations either under OICWA or ICWA require testimony of a QEW. These include proceedings concerning:

1. Emergency Removal:
  - a. Determine if the continued custody of the child by the parent or Indian custodian is likely to cause serious emotional or physical damage to the child.
  - b. In Oklahoma, this must be shown by clear and convincing evidence, and requires testimony of at least one qualified expert witness.
2. Foster Care Placement and Termination of Parental Rights:
  - a. Must make the determination that the child’s continued custody by parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
  - b. Must be a causal relationship between the conditions in the home and the likelihood that continued custody will result in the damage to the particular Indian child who is subject of the proceeding.



C. Who may serve a QEW?

1. Must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child;
2. Should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe;
3. Tribe may designate a person as qualified to testify to the prevailing social and cultural standards;
4. The court or any party can request assistance from BIA or the Tribe in locating a qualified expert witness;

**Note:** BIA Guidelines for State Courts offers insight, instructional but non-binding guidance about who may serve as QEW at 80 F.R. 10146, 10157 (2015) at D.4.

**X. If a placement is voluntary, make a determination/record:**

[25 U.S.C. § 1913; 25 C.F.R §23.124]

A. Have participants state on the record whether the child is an Indian child or whether there is reason to believe the child is an Indian child.

1. If reason to believe, ensure the party seeking placement has taken all reasonable steps to verify the child's status.
2. Ask if the Tribe has been contacted to verify the child's status.
3. If a parent requests anonymity, relevant documents and information must be kept confidential by all parties, including by the Tribe.
4. Make a record as to ensuring the placement for the child complies with the applicable placement preferences.

B. Consent by Indian parent or custodian:

[25 U.S.C. §1913(b)-(c); 25 C.F.R §§23.125-23.126, 23.127-23.128]

1. Make a record that consent was not given prior to, or within ten days after, the birth of an Indian child. Otherwise, the consent is not valid.
2. Make a record that the court is a court of competent jurisdiction.
3. Make a record that the voluntary consent to foster care placement or termination of parental rights is executed in writing and recorded before a judge of the court with competent jurisdiction.
4. Before accepting the consent, explain to the parent or Indian custodian:
  - a. The terms and consequences of the consent in detail;
  - b. Limitations that apply to the proceeding for which consent is being given.
5. State conditions for withdrawal of consent:
  - a. For consent to foster-care placement, the parent or Indian custodian may withdraw consent for any reason, at any time, and have the child returned;
  - b. For consent to termination of parental rights, the parent or Indian custodian may withdraw consent for any reason, at any time prior to the entry of the final decree of termination and have the child returned; or,

- c. For consent to an adoptive placement, the parent or Indian custodian may withdraw consent for any reason, at any time prior to the entry of the final decree of adoption, and have the child returned.
6. Any conditions to the consent, must be clearly set out in the written consent.
7. A written consent for Foster Care should also contain:
  - a. The name and birthdate of the Indian child;
  - b. The name of the Indian child's tribe and the Tribal enrollment; number for the parent and for the Indian tribe, or some other indication of the child's membership;
  - c. The name, address, and other identifying information of the consenting parent or Indian custodian;
  - d. The name and address of the person or entity, if any, who arranged the placement, and,
  - e. The name and address of the prospective foster parent, if known.
8. Make sure the consent is accompanied by a judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian:
  - a. Certify that the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language the parent or Indian custodian understand.
9. If confidentiality is indicated or requested, the proceeding involving consent should be closed to the public. Still must be made before a court of competent jurisdiction.

**XI. Collateral attack after final adoption decree: [25 U.S.C. §1913(d)]**

- A. A parent may petition to vacate the final decree.
- B. In general, a parent may also withdraw consent on the grounds consent was obtained by fraud or duress.
  1. Make a record of court finding as to consent obtained through fraud or duress; and,
  2. If finding of fraud or duress, then return the child to the parent.
- C. An adoption final for at least two years may not be invalidated under this provision of ICWA unless otherwise allowed by State law.

**XII. Review and Make a record of Placement Preferences:** [25 U.S.C. §1915; 10 O.S. 40.6]

- A. Placement preferences apply in all foster, preadoptive and adoptive placements.
  - 1. Diligent search for preferred placements should be conducted. [BIA Guidelines for Implementing the Indian Child Welfare Act at H.3; December 2016]
  - 2. The prevailing social and cultural standards of the Indian community apply to placement. [25 U.S.C. §1915(d)]
- B. Oklahoma ICWA reinforces federal placements and requires the placing agency or person seeking placement to utilize to the maximum extent possible the services of the tribe to secure placement consistent with the preferences. [10 O.S. §40.6]
- C. Identifying home that meets the placement preferences of the tribe is one of the quickest and easiest way to avoid later case delay.
  - 1. As available, first ask the Indian Child's Tribe if they have an order of preference for the placement preferences established by resolution, codification or public act of the tribe. [25 U.S.C. §1915(c); 25 C.F.R. § 23.130(b) & 23.131(c)]
  - 2. If not, apply the applicable placement preferences of the ICWA.
- D. Placement according to the Preferences must be made unless ***Good cause to deviate from placement preferences exists.*** (See below for more information)
  - 1. Parental request (if ICWA options have been reviewed) or child request
- E. For Foster Care or Preadoptive Placement:  
(25 U.S.C. §1915; 25 C.F.R. §§ 23.129–23.131)
  - 1. Child must be placed in least restrictive setting that:
    - a. Most approximates a family, taking into consideration sibling attachment;
    - b. Meets the Indian child's special needs; and,
    - c. Is in reasonable proximity to the Indian child's home, extended family or siblings; and,
  - 2. Unless the child's Tribe has established a different placement preference, the child must be placed in accord with the following preferences in descending order:
    - a. A member of the Indian child's extended family;
    - b. A foster home that is licensed, approved, or specified by the Indian child's Tribe;
    - c. An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
    - d. An institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the child's needs.





F. For Adoptive Placement:

(25 U.S.C. §1915; 25 C.F.R. §§23.129, 23.131)

1. Generally, the preferences for an adoptive placement are:
  - a. Member of the Indian child's extended family;
  - b. Other members of the Indian child's Tribe; or,
  - c. Other Indian families.
2. Where appropriate, may consider the Indian child or the child's parents' preferences. (25 U.S.C. §1915(a); 25 C.F.R. §23.130)
3. For information on Notice to be given of a change in the adopted Indian child's status, see 25 C.F.R. §23.139.

**XIII. Make a Determination if Good Cause to Deviate from Placement Preferences exists:** [25 U.S.C. §1915(a) & (b); 25 C.F.R. §23.132]

A. ***Good cause to deviate from placement preferences exists/may exist when:***

1. Parental request (if ICWA options have been reviewed) or child request deviation from placement preference;
2. Sibling attachment;
3. Extraordinary physical, mental, or emotional needs of child;
4. No preferred placement available;
5. No deviation based solely on ordinary bonding in non-preferred placement

B. Party asserting good cause must state orally on record or provide in writing to all parties and the court. [25 C.F.R. §23.132(a)]

C. Party seeking departure has burden of proving by clear & convincing evidence. [25 C.F.R. §23.132(b)]

D. Court's determination of good cause must be on the record & should be based on one or more of the following: [25 C.F.R. §23.132(c)]

1. Request of one or both Indian child's parents after reviewing complying placements;
2. Request of the child if they are able to understand the decision;
3. Presence of sibling attachment extraordinary physical, mental or emotional needs of the child;
4. Unavailability of suitable placement after court determines a diligent search has been made;
5. Placement may not depart from the preferences based only on:  
[25 C.F.R. §23.132 (d)-(e)]
  - a. Socioeconomic status of any placement relevant to another placement; or,
  - b. Ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.

#### **XIV. Additional Considerations**

- A. **Pretrial Requirements.** Additional information on Pretrial Requirements can be found at *25 C.F.R §§23.17-23.119*.
- B. **Dismissal of an Action.** Additional information on when a State court must dismiss an action can be found at *25 C.F.R. §23.110*.
- C. **Examination of Records.** Each party to a foster care placement or termination of parental rights has the right to all reports or other documents filed with the court upon which any decision with respect to such action may be based. [*25 U.S.C §1913(c); 25 C.F.R. §23.134*]
- D. **Full faith and Credit.** Full faith and credit is due to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to same extent as given full faith and credit to the public acts, records, and judicial proceedings of other entity. [*25 U.S.C. §1912(d)*]
- E. **Appointment of Counsel.** Where the court determines indigence, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. When not mandated by State law, counsel for a child may be appointed on the grounds of best interest of the child. Where State law does not allow appointment of counsel in such proceedings, the ICWA establishes a process for payment via the Secretary of the Bureau of Indian Affairs. [*25 U.S.C. §1913(b)*].
- F. **Invalidation of certain action by filing of Petition.**  
[*25 U.S.C. §1914; 25 C.F.R. §23.137*]
  - 1. A Petition to Invalidate any action in violation of 25 U.S.C. §§1911-1913 may be filed;
  - 2. In any court of competent jurisdiction;
  - 3. By either:
    - a. Any Indian child that is the subject of any action for foster care placement or termination;
    - b. Any parent or Indian custodian that had the child removed; or,
    - c. The Indian Child's tribe.
- G. **Post-Trial Rights and Responsibilities.** Additional information on Post-Tribal Rights and Responsibilities can be found at *25 C.F.R. §§23.136 -23.139*.
- F. **Record Keeping.** Additional Information on Recordkeeping requirements can be found at *25 C.F.R. §§23.140-23.142*.

- H. **United Nations Declaration on the Rights of Indigenous People (UNDRIP).** While somewhat beyond the scope of this Bench Guide, it should be noted that many Indian tribes have adopted in part or whole UNDRIP (as well at times other international declarations), and as a public act of a tribe such is due full faith and credit of any provisions applicable to the removal and/or placement of Indian Children.
- I. **References.** The BIA website on ICWA contains the ICWA regulations, state court guidelines, sample forms, FAQs, MOUs, Tribal service agents, online training modules and other useful information. See <https://www.bia.gov/bia/ois/dhs/icwa>

## XV. Practice Pointer: Qualified Expert Witness

[81 FR 38829-38832 (June 14, 2016)]

### A. BIA Qualified Expert Witness (QEW) Guidelines

1. **Qualifications.** Per Congress, the QEW is meant to apply to expertise beyond normal social worker qualifications.
2. **Specific tribal knowledge.** The QEW should have specific knowledge of the prevailing social and cultural standards of the Indian child's Tribe, but is not required to be a citizen of the child's Tribe.
  - a. The Court's determinations are NOT to be based on "a white, middle-class standard" which, in many cases, forecloses placement with [an] Indian family.
  - b. Relevant cultural information must be provided to the court that is contextualized within the social and cultural standards of the Indian child's Tribe.
  - c. The Indian child's Tribe may designate a person as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe
3. **Not a past or present State social worker assigned to case.** The QEW may NOT be the past or present social worker regularly assigned to the Indian child. This is because Congress wanted to ensure that State courts hear from experts (other than the State social workers who are recommending the action) before placing an Indian child in foster care or ordering the TPR.
4. **Familiarity with the child.** The QEW should be someone familiar with the Indian child who is the subject of the proceeding. If the QEW contacts the parents, observes parent/child interactions and meets with extended family members in the child's life, the expert will be able to provide a more complete picture to the court.



5. Exceptions to QEW knowledge specific to Indian child's Tribe occurs when such cultural knowledge is plainly irrelevant to the particular circumstances at issue in the proceeding. For example:
  - a. An expert regarding sexual abuse of children may not need to know about specific Tribal social and cultural standards in order to testify as a QEW regarding whether return of a child to a parent who has a history of sexually abusing the child is likely to result in serious emotional or physical damage to the child.
6. Separate QEWs may be used to testify regarding potential emotional or physical damage to the child AND the prevailing social and cultural standards of the Tribe. The court may accept expert testimony from multiple QEWs