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# INDIAN CHILD WELFARE ACT (ICWA) CHECKLIST

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Purpose: ICWA was enacted in 1978 to protect the best interests of Indian children while promoting stability and security of Indian tribes and families by establishing minimum standards for removal and placement of Indian children that reflect the values of the Indian culture. 25 U.S.C. §1902.

## Pretrial Requirements

- State court shall make inquiries to determine if the child involved is a member of an Indian tribe, or if a parent of the child is a member of an Indian tribe and the child is “eligible” for membership in an Indian tribe.
- A child is an “Indian child” if they are an unmarried person who is under age 18 and is either:
  - a member of an Indian tribe, or
  - is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.
- Notice: If the child is determined to be a member of an Indian tribe (or is “eligible” for membership in an Indian tribe), notice of the proceeding shall be sent (by the party seeking the foster care placement of or TPR to an Indian child) to:
  - the parents and Indian custodians
  - any tribes that may be the Indian child’s tribe
- by registered mail with return receipt requested. If the identity or location of the parent or the tribe cannot be determined, such notice shall be given to the Secretary. 21 U.S.C. §1912

No foster care placement or termination of parental rights proceeding shall be held until at least ten (10) days after receipt of notice by the parent or Indian custodian and the tribe or Secretary. The tribe, parents or Indian custodians can request an additional twenty (20) days to prepare for such a proceeding.

## Burdens of Proof

- Foster care placement order: must be supported by clear and convincing evidence, including testimony of qualified expert witnesses, 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
- Termination of parental rights: must be supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, 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

### **Foster Care Placement**

- The department, seeking to effect a foster care placement, must satisfy the court that active efforts were made to provide remedial services and rehabilitative programs, designed to prevent the breakup of the Indian family; and these efforts have been proved unsuccessful
- Consent to foster care placement (or termination of parental rights) must be in writing, recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms were fully explained and understood by the parent or Indian custodian.
- Placement of a child in foster care shall be in the least restrictive setting that best approximates a family and which may meet his special needs.
- Placement preference shall be given (in the absence of good cause to the contrary) to a placement 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 or
  - 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

### **Best Interests of the Child**

- Has the court considered the child's cultural and tribal identity when determining the best interests of the child? 25 U.S.C. 1901 (5)

### **Jurisdiction**

- If the child is not living on the reservation, the tribe and the state court have concurrent jurisdiction, but the preference is for tribal jurisdiction

### **Intervention**

- In any state court proceeding for foster care placement of, or termination of parental rights to an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any stage of the proceeding.