

ADOPTION HEARING CHECKLIST FOR ICWA CASES

WHO SHOULD ALWAYS BE PRESENT AT THE UNCONTESTED ADOPTION HEARING:

- Judge;
- Adoptive parents;
- Assigned caseworker, if any;
- Tribal caseworker or representative;
- GAL/CASA or advocate for the child;¹
- Court reporter or suitable technology; and
- The child.

WHO SHOULD ALWAYS BE PRESENT AT THE CONTESTED ADOPTION HEARING:

- Judge;
- Prospective adoptive parents;
- Assigned caseworker;
- Agency attorney;
- GAL/CASA or advocate for the child;
- Tribal representative and/or attorney;
- Parties contesting the adoption (including Indian custodian if there is one);
- Attorneys for all parties;
- Court reporter or suitable technology; and
- Security personnel.

WHO MAY ALSO BE NEEDED AT THE CONTESTED ADOPTION HEARING:

- The child;
- Interpreter;
- Judicial case management staff; and
- Other witnesses, including tribal elders, members of the child's extended family, and other tribal members.

KEY DECISIONS THE COURT MUST MAKE:

- Whether written notice was provided to the child's tribe by registered mail, return receipt requested, even if the child's tribe has not been a party to any prior proceedings related to the welfare of the child. 25 U.S.C. § 1912(a)

THE COURT'S WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW SHOULD:

- Determine whether the child is within the exclusive jurisdiction of a tribe because the child either resided or was domiciled on a reservation or was already a ward of a tribal court at the time that the child custody proceedings began, thereby depriving the state court of jurisdiction.
- Determine whether all the necessary consents to adoption have been provided, including the consent of the agency with the custody of the child, the consent of the child (if the child is old enough that consent is required under state law), and the consent of a parent or Indian custodian whose rights have not been terminated.
- Thoroughly describe the conditions and circumstances under which parental consent to adoption was obtained. When there has been no prior termination of parental rights, parental consent *must* be executed in writing in the presence of the judge and must be

accompanied by the judge's certificate that the terms and consequences of the consent were fully explained in detail and that the parent or Indian custodian fully understood these terms. 25 U.S.C. § 1913(a)

- Certify that either the parent or Indian custodian fully understood the explanation of the terms and consequences of the consent to adoption in English, or that it was interpreted into a language that the parent or Indian custodian understood. 25 U.S.C. § 1913(a)
- Certify that the consent to adoption was not given prior to or within ten days after the birth of the child, as the consent would not be valid under these circumstances. 25 U.S.C. § 1913(a)
- Determine whether the consent was voluntary and informed, that it was not obtained through fraud or duress, and that all alternatives to adoption were explained. 25 U.S.C. § 1913(d)
- Determine whether the child is placed in an adoptive home where the adopting individual is a member of:
 - The child's extended family;
 - The child's tribe; or
 - Another Indian family.
- If the child is not placed in one of the placement preferences established by federal law, determine whether:
 - The agency made a diligent search to locate a placement that meets the preferences established within the ICWA. 44 Fed. Reg. at 67,595
 - There is good cause not to place the child according to the placement preferences. 25 U.S.C. § 1915(a)
 - The child's tribe established a different order of preference by resolution. 25 U.S.C. § 1915(c)
 - If the child's tribe established a different order of preference for placement, ascertain whether the placement is the least restrictive setting which most approximates a family and in which the child's special needs, if any, may be met. 25 U.S.C. § 1915(b) and (c)
 - The child's consenting parent evidenced a desire for anonymity, in which case the court shall give weight to that desire in applying the preferences. 25 U.S.C. § 1915(c)
- Determine that the child is doing well in the adoptive home and that the adoptive parents have made a clear and knowledgeable commitment to care for the child on a permanent basis.
- Determine that the adoptive parents fully understand the legal and financial consequences of adoption. Review with the parents and agency the need for and sufficiency of any adoption subsidy arrangements.
- Certify that the parent understands that he/she may withdraw consent to adoption for any reason prior to the entry of the final decree of termination or adoption, as the case may be, and that the child will be returned to the parent.
- At contested adoption hearings, determine whether the adoption should be granted. A contested adoption hearing must be conducted with procedural fairness, and should include notice to the parties and the child's

tribe even if the tribe has not yet become a party in previous stages of the child custody proceedings.

- Conclude the proceeding without undue delay, applying principles of case flow management.
- The court which enters the final decree of adoption must, upon application, inform the Indian child who has reached the age of 18 of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect the rights flowing from the individuals' tribal relationship.

25 U.S.C. § 1971

¹ The court should make every effort within its discretion to appoint an advocate for the child who is either a member of the child's tribe, or who is familiar with and respectful of the child's cultural needs.

Indian Child Welfare Act Checklists for Juvenile and Family Court Judges

“These Indian Child Welfare Act Checklists were created to assist juvenile and family court judges in assuring that the necessary inquiries are being made to determine as early as possible in every case whether the Indian Child Welfare Act applies. These checklists will help judges ensure that the necessary parties have been notified and are present in all cases where the ICWA may be applicable.

It is in the best interests of the child that the required inquiries be made from the time of the initial removal hearing, and that the inquiries continue throughout every stage of the case. Failure to make the necessary inquiries, notify the necessary parties, and follow the standards established within the ICWA can result in the case having to start over from the beginning, to the obvious detriment of the child. The checklists are designed to help avoid this result by assisting judges on a step-by-step basis in meeting the ICWA requirements at each hearing stage.

Leadership by the court is essential to ensure ICWA compliance. These children should not be subject to their placements and permanency plans being disrupted well into the final stages of the case. Because this affects cases in every state, the checklists have been drawn from the RESOURCE GUIDELINES and formatted so that they can be used by courts throughout the country, whether in a state with no tribes within its borders and small Native American populations, or states such as Alaska, where 60 percent of the children in the state dependency system are Alaska Natives for whom the ICWA applies.

Much has been written in recent years about the impact to affected children if the requirements of the ICWA are not met, most notable the significant delay in achieving permanency for these children as well as widespread non-compliance with the requirement that a qualified expert testify at hearings including the initial removal hearing. Because there are disproportionately high numbers of Native American and Alaska Native children in juvenile dependency systems in every state in the country, no court can overlook the requirement to make the necessary ICWA inquiries. The NCJFCJ Permanency Planning for Children Department hopes that you will find these new checklists to be useful to you in assuring compliance with the ICWA on all cases that come before your respective courts.”

Honorable Dale R. Koch, Multnomah County Circuit Court, Portland, Oregon



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**“Native American Resource Directory
for Juvenile and Family Court Judges”**
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Telephone: (775) 327-5300
Web site: www.pppncjfcj.org
(Contains tribal contact information)