

PERMANENCY PLANNING HEARING CHECKLIST FOR ICWA CASES

WHO SHOULD ALWAYS BE PRESENT:

- Judge or judicial officer;
- Parents whose rights have not been terminated, including any putative father who has acknowledged paternity, even if he has no established paternity; 25 U.S.C. § 1903(9)
- Relatives with legal standing or other custodial adults as defined by 25 U.S.C. § 1903(6);
- Expert witness under 25 U.S.C. § 1912(e);
- Representative from child's tribe;
- Assigned caseworker;
- Attorney for child;
- Attorney for parents or Indian custodian;
- Attorney for child's tribe;
- CASA, GAL, or advocate for the child;¹
- Court reporter; and
- Security personnel.

WHO MAY ALSO BE NEEDED:

- Interpreter;
- Age-appropriate children;
- Extended family members;
- Foster parents;
- Prospective adoptive parents;
- Judicial case management staff;
- Service providers; and
- Other witnesses, including tribal members or elders.

SUBMISSION OF REPORTS TO THE COURT:

Reports for a Permanency Planning Hearing should:

- Specify the relief being sought and address the issues that the judge needs to determine.
- Set forth a plan to carry out the placement decision.

When the petition or report requests that a child be returned home on a date certain, it should set forth:

- How the conditions or circumstances leading to the removal of the child have been corrected.
- A description of actions taken by the parent(s) or Indian custodian to correct the identified problems.
- A description of the active efforts made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, including efforts made by the tribe, an Indian organization, or any other agency or organization.
- The frequency of recent visitation and its impact on the child.
- A plan for the child's safe return home and follow-up supervision after family reunification.

When the petition or report requests termination of parental rights, it should set forth:

- Facts and circumstances supporting the grounds for termination;

- A description of the active efforts made to provide remedial services and rehabilitative programs designed to prevent the breakup of the family and an explanation why these efforts were unsuccessful.
- A description of the active efforts made to coordinate with the child's tribe or an Indian organization in assisting the Indian parent or custodian with services needed to avoid termination of parental rights and an explanation why these efforts were unsuccessful.
- An explanation of why the child cannot be protected from the identified problems in the home.
- A summary of the agency's understanding of the tribe's position regarding the permanency plan, including an attachment of any correspondence or supporting documentation sent by the tribe to the agency.
- An explanation of the active efforts made to contact the child's tribe, extended family, and other local Indian organizations for assistance in identifying and contacting extended family and other tribal members or Indian families about providing an appropriate placement for the child.
- If the child is not placed with an extended family member, another tribal member, or another Indian family, an explanation of why the child cannot be moved to a placement that meets the preferences established within the ICWA. 25 U.S.C. § 1915(a) and (b)
- A description of arrangements made by the agency to ensure visitation with extended family, and of all efforts made to support the child's cultural connections.
- A permanency plan for the child.

When another planned permanent living arrangement is proposed, the report should set forth:

- Facts and circumstances refuting the grounds for termination of parental rights and showing that although the child cannot be placed with parents, termination is not in the best interests of the child.
- A description of why the planned permanent living arrangement is in the best interests of the child.
- An explanation of the active efforts made to contact the child's tribe, extended family, and other local Indian organizations for assistance in identifying and contacting extended family and other tribal members or Indian families to identify a culturally appropriate placement for the child.
- If the child is not placed with an extended family member, another tribal member, or another Indian family, an explanation of why the child cannot be moved to a placement that meets the preferences established within the ICWA. 25 U.S.C. § 1915(a) and (b)
- A description of arrangements made by the agency to

ensure visitation with extended family, or, if there is no extended family, with other tribal members, to support the child's cultural connections.

- A summary of the agency's understanding of the tribe's position regarding the permanency plan, including an attachment of any correspondence or supporting documentation sent by the tribe to the agency.
- A plan to ensure the stability of the planned permanent living arrangement.

AFFIDAVIT DOCUMENTING ACTIVE EFFORTS:

When the agency recommends a permanency plan, an affidavit documenting active efforts made must be submitted. The following are some of the requisite elements of the affidavit:

- A description of the active efforts made to reunify the family since the last disposition or review hearing and, if those efforts were not successful, an explanation why. 25 U.S.C. § 1912(d)
- A description of the efforts made to coordinate with the child's tribe or any Indian organization in assisting the Indian parent or Indian custodian with services needed to avoid the need for placement, and an explanation why these services were unsuccessful.
- An explanation of why the child cannot be protected from serious emotional or physical damage if the child remains in the home even if services are provided to the child and family. 25 U.S.C. § 1912(e)
- An explanation of the diligent efforts made to contact the child's extended family about providing a placement for the child, or, if family members are not known, diligent efforts made to contact the child's tribe and other local Indian organizations for assistance in identifying and contacting extended family, other tribal members, or Indian families for placement.
- Efforts made by agency to ensure child's visitation with extended family, or, if none is available, with other tribal members, to ensure the child's ongoing participation in his/her culture.
- Efforts made by agency to coordinate with the child's tribe and family to make arrangements for child to attend significant cultural and important familial events.

KEY DECISIONS THE COURT SHOULD MAKE:

- Can the child be safely returned home on a specific date?
- Whether active efforts were made to provide remedial services and rehabilitative programs to prevent the breakup of the family?
- If the child cannot be safely returned home, is there a placement option with a member of the child's family, as defined by Indian custom?

- If placement can not be found within the child's family, can placement be found with a member of the child's tribe?
- Will the child be legally freed for adoption?

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

- Indicate whether the agency has identified the child's tribe.
- Specify whether the agency sent proper notice of the hearing and a copy of the petition and advice of rights to the parent(s), Indian custodian (if any), and child's tribe by registered mail, return receipt. 25 U.S.C. § 1912(a)
- Specify whether the tribe has been afforded a full opportunity to participate in the proceedings and, if so, whether the agency provided the child's tribe with copies of the petition, reports, and information concerning the child. 25 U.S.C. § 1911(c and d) and § 1912(a)
- Set forth findings as to why the child is in need of either continued placement outside the parent's home or continued supervision, articulating the *clear and convincing evidence* that continued custody of the child by the parent or Indian custodian would likely result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(e)
- Set forth detailed findings of fact and conclusions of law as to whether active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and eliminate the need for placement of the child outside the home of the parent or Indian custodian and whether the efforts were successful. 25 U.S.C. § 1912(d)
- Set forth detailed findings as to whether the agency has made an ongoing, diligent search to locate extended family, a tribal member, or other Indian family for placement if the child is not already within a preference placement. 25 U.S.C. § 1915(b)
- Be written in easily understandable language that allows the parent(s) or Indian custodian to fully understand what action they must take to have the child returned to their care (interpreter should be provided for parent or Indian custodian whose first language is not English).
- Set forth the court's determination of permanency and provide documentation for the plan to return home, proceed to termination of parental rights, or plan another permanent living arrangement.

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
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(Contains tribal contact information)