

PRELIMINARY PROTECTIVE 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 not legally established paternity;
- Indian custodian or other custodial adults; 25 U.S.C. §§ 1903(6) and 1912
- Extended relatives, as defined by child's tribe, other tribal members, or other Indian families who may serve as placement resource for child; 25 U.S.C. §§ 1903(2) and 1915(b)
- Expert witness under 25 U.S.C. § 1912(e);
- Assigned caseworker;
- Tribal caseworker;
- Agency attorney;
- Attorney for parents;
- Attorney for child's Indian tribe;
- GAL/CASA or advocate for the child;¹
- Court reporter; and
- Security personnel.

WHO MAY ALSO BE NEEDED:

- Interpreter;
- Age-appropriate children;
- Adoptive parents;
- Domestic violence advocate for parent;
- Judicial caseload management staff;
- Law enforcement officers;
- Services providers; and
- Other witnesses, including tribal members, elders, or child's extended relatives.

COURT CAN MAKE SURE PARTIES AND KEY WITNESSES ARE PRESENT BY:

- Requiring quick and diligent notification efforts by the agency.
- Requiring both oral and written notification in language understandable to each party and witness.
- Requiring notice to include reason for removal, purpose

of hearing, availability of legal assistance.

- Requiring caseworkers to encourage attendance of parents, Indian custodians, and other parties.

FILING THE PETITION:

- A sworn petition or complaint should be filed at or prior to the time of the preliminary protective hearing.
- The petition should be complete and accurate.

KEY INQUIRIES THE COURT SHOULD MAKE:

- Is the child under 18, unmarried and:
 - a member of a federally recognized tribe **or**
 - eligible for membership in a federally recognized Indian tribe and the biological child of a member of a federally recognized tribe? 25 U.S.C. § 1903(4)
- Was the child in the custody of an Indian custodian prior to the hearing? 25 U.S.C. § 1903(6)
- If child is an Indian child, does the child either reside or is the child domiciled on a reservation or is the child already a ward of a tribal court, depriving the court of jurisdiction? 25 U.S.C. § 1911(a) If the child resides or is domiciled on reservation but is temporarily off reservation, the court may order an emergency removal from the parent or Indian custodian to prevent imminent physical damage or harm to the child. 25 U.S.C. § 1922
- Has agency mailed proper notice to child's putative father, including father who has *acknowledged* paternity, even if he has not legally established paternity? 25 U.S.C. § 1903(9)
- Was proper notice and inquiry mailed to *all* tribes in which the child may be eligible for membership, including a family chart or genogram to facilitate the tribe's membership determination? 25 U.S.C. § 1912
- If the child's tribe is not known at this time, was written notice sent to the U.S. Secretary of the Interior? 25 U.S.C. § 1912
- What efforts, if any, have been made by the agency to identify extended family or other tribal members or Indian families, for placement of the child? Has the agency attempted to create a family chart or genogram,

soliciting assistance from neighbors, family, or members of the Indian community who may be able to offer information? 25 U.S.C. § 1915(b)

- Is the parent able to read and/or understand English? If not, what efforts have been made to ensure that the parent understands the proceedings and any action the court will order?

KEY DECISIONS THE COURT MUST MAKE:

- Has the agency made active efforts to identify responsible extended family or other tribal members or Indian families to serve as a placement for the child, if necessary? 25 U.S.C. § 1915(b)
- Is it in the best interest of the child to appoint counsel for the child? 25 U.S.C. § 1912(b)
- If the state law makes no provision for the appointment of counsel, has the court notified the Secretary upon appointment of counsel so that reasonable fees and expenses may be appropriated? 25 U.S.C. § 1912(b)
- In assessing whether an individual who meets the placement preferences is an appropriate placement for the child, has the agency relied upon the social and cultural standards of the Indian community in which the parent or extended family reside, or with which the parent or extended family maintain social and cultural ties? 25 U.S.C. § 1915(d)
- What additional efforts need to be made to ensure that the child is placed with extended family or within his/her tribal community?
- What culturally relevant services will allow the child to remain at home?
- Will parties voluntarily agree to participate in services?
- Are restraining orders or orders expelling an allegedly abusive parent from the home appropriate or necessary?
- Are orders needed for examinations, evaluations, or other immediate services?
- What are the terms and conditions of visitation by parents or Indian custodian?

REQUIRED NOTICE AND ADVICE OF RIGHTS:

- Review notice to missing parties and relatives.
- Serve parties with copy of the petition.
- Advise parties of their rights:
 - Advise the parent and/or Indian custodian that they have a right to a court-appointed attorney if they are indigent. 25 U.S.C. § 1912(b)
 - Advise the parents of the content of the petition, their right to examination of reports and other documents under 25 U.S.C. § 1912(c), their rights to request an additional 20 days to prepare for the hearing under 25 U.S.C. § 1912(a), and all other admonitions as to the consequences of failure to comply with ASFA and state statutory requirements in order to prevent the filing and adjudication of a Petition to Terminate Parental Rights. This admonition would also include an explanation of the grounds for a Termination of Parental Rights proceeding. This admonition should be repeated in each subsequent hearing held after the Preliminary Hearing.
 - Advise the Indian custodian of his/her right to be a full party to the case. 25 U.S.C. § 1911(c)
 - Ensure that the agency mails notice of next scheduled hearing and a copy of the petition and advice of rights under the ICWA to the child's parent if he/she is not at the hearing. Notice must be sent by registered mail, return receipt. 25 U.S.C. § 1912
 - Ensure that the agency mails notice of next scheduled hearing and a copy of the petition and advice of rights under the ICWA to the Indian custodian if he/she is not at the hearing. Notice must be sent by registered mail, return receipt. 25 U.S.C. § 1912
 - Ensure that the agency mails notice of the next scheduled hearing and a copy of the petition and advice of rights under the ICWA to the child's tribe. Notice must be sent by registered mail, return receipt. 25 U.S.C. § 1912

PRELIMINARY PROTECTIVE HEARING CHECKLIST FOR ICWA CASES (cont.)

SUBMISSION OF REPORTS TO THE COURT:

- The court should require submission of agency and/or law enforcement reports at least one hour prior to the hearing.
- Reports to the court should describe all circumstances of removal, any allegations of abuse or neglect, and all efforts made to try to ensure safety and prevent need for removal.

KEY WRITTEN FINDINGS THE COURT MUST MAKE:

- Whether, at the time of removal, the child was already a ward of a tribal court (if known) thereby depriving the state court of jurisdiction. 25 U.S.C. § 1911(a)
- Whether, at the time of removal, the child was in the custody of an Indian custodian. 25 U.S.C. § 1903(6)
- Whether active efforts were made prior to removal of child to provide remedial services and rehabilitative programs designed to prevent the breakup of the family, and whether the efforts were successful. 25 U.S.C. § 1912(d)
- Whether there was *clear and convincing evidence*, including testimony of a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(e)
- Whether the parent, Indian custodian, or child's tribe requested an additional 20 days to prepare for the hearing. 25 U.S.C. § 1912(a)

IF CHILD IS PLACED OUTSIDE OF THE HOME:

- Specify why continuation of the child in the home would be contrary to the child's welfare.
- Specify whether child is to be placed in a home that meets the priority placement preferences mandated by 25 U.S.C. § 1915(b):
 - 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.
- If the child is not to be placed within the priority placements mandated by 25 U.S.C. § 1915(b), specify whether:
 - The child's tribe issued a resolution establishing different order of preference and the placement is the least restrictive setting appropriate to the particular needs of the child. 25 U.S.C. § 1915(c); or
 - There is *good cause* not to follow the placement preferences. 25 U.S.C. § 1915(a)
- Order the agency to make ongoing, diligent search to locate placement that meets the preferences established within the ICWA.
- Specify the terms of visitation with the parent(s), Indian custodian, and extended family.
- Order the agency to arrange for the child to visit with other tribal members if no extended family is available and to coordinate with the child's tribe to arrange for the child to attend significant cultural and familial events.

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

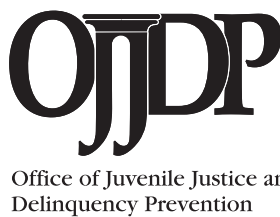


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**“Native American Resource Directory
for Juvenile and Family Court Judges”**
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Telephone: (775) 327-5300
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(Contains tribal contact information)