

## WHEN DOES THE INDIAN CHILD WELFARE ACT APPLY?

### THE INDIAN CHILD WELFARE ACT APPLIES WHEN:

- The proceedings are child custody proceedings as the ICWA defines that term 25 U.S.C. § 1903(1); **and**
- The child is an “Indian child” as the ICWA defines that term under 25 U.S.C. § 1903(4).

If the proceedings are not child custody proceedings, or the child does not meet the definition of Indian child, the ICWA does not apply.

### THE FOLLOWING ARE “CHILD CUSTODY PROCEEDINGS” UNDER THE ICWA:

- Foster care placements – this includes any action where child is removed from its parent or Indian custodian for temporary placement in a home or institution, including guardianship and conservatorship, **and** where parent or custodian cannot have child returned upon demand but where parental rights have not been terminated. 25 U.S.C. § 1903(1)(i)
- Termination of parental rights. 25 U.S.C. § 1903(1)(ii)
- Pre-adoptive placements. 25 U.S.C. § 1903(1)(iii)
- Adoptive placements. 25 U.S.C. § 1903(1)(iv)

### THE FOLLOWING ARE **NOT** “CHILD CUSTODY PROCEEDINGS” UNDER THE ICWA:

- An award of custody pursuant to a divorce where one of the parents will obtain custody of the child. 25 U.S.C. § 1903(1)
- A placement based upon an act which, if committed by an adult, would be deemed a crime. 25 U.S.C. § 1903(1)

### CONSTRUCTION/APPLICATION

- A placement that meets the definition of foster care placement under the ICWA and results from an act that *would not* be deemed a crime if committed by an adult, such as a status offense, is a child custody proceeding under the ICWA.

- A child custody placement pursuant to a divorce *where someone other than one of the parents* will obtain custody of the child is also a child custody proceeding under the ICWA.

### THE CHILD IS AN “INDIAN CHILD” UNDER THE ICWA IF:

- He or she is an unmarried person who is under the age of 18, and
- The child is a member of a federally recognized Indian tribe; **or**
- The child is the biological child of a member of a federally recognized Indian tribe **and** child is eligible for membership in any federally recognized Indian tribe. 25 U.S.C. § 1903(4)

### DEFINITIONS UNDER THE ICWA:

- “**Extended family member:**” defined by the law or custom of the Indian child’s tribe, or in the absence of such law or custom, is a person who has reached the age of 18 and who is the Indian child’s grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or step-parent. 25 U.S.C. § 1903(2)
- “**Indian:**” any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation. 25 U.S.C. § 1903(3) For purposes of the ICWA, tribes are arbiters of their own membership. (In The Interest of J.W., 498N.W.2d 417, 1993 Iowa App. Lexus 8)
- “**Indian child’s tribe:**” the Indian tribe in which an Indian child is a member or eligible for membership, or in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts. 25 U.S.C. § 1903(5)
- “**Indian custodian:**” any person who has legal custody of an Indian child under tribal law or custom or under State law; or to whom temporary physical care,

custody and control has been transferred by the parent of such child. 25 U.S.C. § 1903(6)

- **“Indian tribe:”** any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary of the Interior because of their status as Indians. 25 U.S.C. § 1903(8)
- **“Qualified expert witness:”** although not defined under the ICWA, a House Report prepared in conjunction with the ICWA states that the phrase “is meant to apply to expertise beyond the normal social worker qualifications.” H.R. No. 95-1386, 95<sup>th</sup> Cong., 2d Sess., reprinted in 6 U.S.C.C.S.A.N. 7530, 7454 (1978) In addition, the Bureau of Indian Affairs has promulgated “Guidelines for State Courts” which interpret the ICWA. The following characteristics are set forth at 44 Federal Register 67,593 (1979) as those most likely to qualify a witness as an expert under the ICWA:
  - a) A member of the Indian child’s tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child rearing practices.
  - b) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and child rearing practices within the Indian child’s tribe.
  - c) A professional person having substantial education and experience in the area of his or her specialty.

Thus, a “qualified expert witness” is not an *expert on the ICWA*, but an *expert on the child’s tribe*.

# 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)