

INDIAN CHILD WELFARE ACT

When Does ICWA Apply?

- In a “child custody proceeding” defined as an action effecting foster care placement, termination of parental rights, pre-adoptive placement or adoptive placement; and [25 U.S.C. § 1903\(1\)](#)
- Involving an “Indian child” defined as
 - Unmarried, under the age of 18, and a member of a federally-recognized Indian Tribe; or
 - Unmarried, under the age of 18, *eligible* for membership in a Tribe and is the biological child of a member of a federally-recognized Indian Tribe. [25 U.S.C. § 1903\(4\)](#)

Each of the 500-plus federally-recognized tribes determines eligibility for membership or enrollment, not the court.

If ICWA applies, please refer to NCJFCJ ICWA Checklists:

<http://www.ncjfcj.org/sites/default/files/ICWAChecklistFullDoc.pdf>

Notice 25 U.S.C. § 1912(a)

- The child’s parent, Indian Custodian, and Tribe have been notified by registered mail, return receipt requested.
- If Tribe cannot be determined, the court must ensure notice to the Secretary of the Interior and the Bureau of Indian Affairs by registered mail, return receipt requested.
- Finding on the record that timely notice was or was not provided as required.

If not sure, but there is reason to believe the child might be an Indian child, NOTIFY!

Placement Preferences 25 U.S.C. § 1915(a)-(b)

- Placement according to ICWA Preferences, defined in descending order (extended family, tribal foster home, or tribal community) unless good cause shown for child to be moved.

Special Evidentiary Rules

- Threshold for Removal of the Child 25 U.S.C. § 1912(e)**
 - Clear and convincing evidence that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
 - Must include testimony of a “qualified expert witness” defined by ICWA in descending preferential order, with the highest preference given to a member of the child’s tribe who is recognized by the tribal community as knowledgeable in tribal customs in childrearing practices. [25 U.S.C. § 1912\(e\)](#)
 - Finding of “Active Efforts” to prevent removal from the home. [25 U.S.C. § 1912\(d\)](#)
- Threshold for Termination of Parental Rights**
 - Evidence **beyond a reasonable doubt** that custody of the child by the parent of Indian custodian is likely to result in serious emotional or physical damage to the child. [25 U.S.C. § 1912\(f\)](#)
 - Supported by testimony of a “qualified expert witness”. [25 U.S.C. § 1912\(f\)](#)
 - Finding that “Active Efforts” have been made to return the child to the home. [25 U.S.C. § 1912\(d\)](#)

Best practices for Active Efforts include: (i) early contact and active engagement with the child’s tribe; (ii) higher level of efforts using methods and providing services that are culturally appropriate; and (iii) commitment to the spirit of ICWA in the context of the historical trauma.