



Judicial Bench Card – Indian Child Welfare Act (ICWA) Requirements

Term	Federal ICWA – 25 USC §§ 1901-1963 and NM Children’s Code Sec. 32A-1 ff and 32A-4 ff
Applicability	Child custody proceeding, foster care placement, termination of parental rights, pre-adoptive and adoptive placement. ICWA § 1903(1)
Indian child, defined	Any unmarried person who is under 18 <i>and</i> is either : (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. ICWA § 1903(4)
Jurisdiction	Tribal court has <i>exclusive jurisdiction</i> over any child custody proceeding involving an Indian child residing or domiciled within the reservation, and over Indian child who is ward of tribal court notwithstanding residence/domicile of child. ICWA § 1911(a) When Indian child resides or is domiciled <i>off</i> the reservation, tribe and state have concurrent jurisdiction; yet state must transfer proceedings to tribal court on petition of parent, tribe or Indian custodian. (<i>See Right to Transfer below</i>)
Right to intervene	Indian custodian and tribe have right to intervene any time in the proceedings for foster care or TPR, including placement preferences. ICWA § 1911(c)
Right to counsel	If court determines indigency, parent or Indian custodian have right to court-appointed counsel in any removal, placement, or termination proceeding. ICWA § 1912(b) Court may appoint counsel for Indian child, if in best interest of child. ICWA § 1912(b)
Right to request transfer to Tribal Court	In cases of concurrent jurisdiction, State Court shall transfer proceedings to tribe’s jurisdiction upon petition of Indian child’s parent, Indian custodian or tribe, unless parent, Indian custodian, or tribe objects. Children’s Code § 32A-1-9D. Transfer is subject to acceptance by tribal court. ICWA § 1911(b)
Good cause	<u>Good cause not to transfer proceedings to tribal court</u> – possible reasons: if there is no tribal court; if proceedings at advanced stage and petitioner did not file promptly after receiving notice; if child over age 12 and objects; if hardship to present evidence when transferred; or if parents of child age 5 or older not available and child had little or no contact with tribe. Burden on party opposing transfer. BIA Guidelines for State Courts C.3, <i>Fed. Register</i> , Nov. 26, 1979, Part III
Right to review reports	All records/information concerning party to abuse/neglect proceeding shall be disclosed only to persons or entities of a tribe specifically authorized to inspect records according to ICWA. Children’s Code § 32A-4-33B(10)
Right to extra time to prepare	No foster care placement or TPR proceeding shall be held until at least 10 days <i>after</i> receipt of notice by parent or Indian custodian and the tribe or BIA. Court shall grant 20 days more to parent, Indian custodian or tribe, upon request, to prepare for proceeding. ICWA §1912(a)
Emergency removal	ICWA permits <u>emergency removal</u> of Indian child residing or domiciled <i>on</i> reservation, but temporarily located <i>off</i> the reservation, from parent or Indian custodian, or <u>emergency placement</u> in foster care, in order to prevent imminent physical damage or harm to child. When no longer necessary to prevent imminent damage or harm, the removal or placement terminates, and CYFD shall expeditiously begin custody proceedings, transfer the child to the tribe’s jurisdiction, or restore child to parent or Indian custodian. ICWA § 1922; Children’s Code § 32A-4-16
Taking into custody; investigation	In taking child into custody, CYFD shall make reasonable efforts to determine whether child is an Indian child. Children’s Code § 32A-4-6C CYFD shall investigate whether the child is eligible for enrollment as a member of an Indian tribe, and if so, shall pursue the enrollment on the child’s behalf. Children’s Code § 32A-4-22I Recipient of a report of child abuse/neglect must take immediate steps to ensure prompt investigation of report, ensure immediate steps taken to protect health/welfare of alleged abused/neglected child. Children’s Code § 32A-4-3C
Notice	In <i>involuntary</i> proceedings, when known or reason to know there is an Indian child in foster care/adoptive placement/TPR case, CYFD shall notify parent or Indian custodian, and Indian child’s tribe of proceedings. If identity/location of parent or Indian custodian and tribe cannot be determined, notice must be sent to Sec. of Interior (BIA). ICWA § 1912(a)
Placement Preferences – Foster Care, Pre-adoption	<u>Foster care or pre-adoptive placement</u> , child must be placed in the least restrictive setting that most approximates family, meets child’s special needs, and is within reasonable proximity of his/her home. Absent good cause, preference shall be given to: (1) Member of <i>child’s extended family</i> , as defined by law/custom of child’s tribe or, absent law or custom, shall be person age 18 or older who is child’s grandparent, aunt/uncle, brother/sister, brother/sister-in-law, niece/nephew, first/second cousin, or stepparent; ICWA § 1903(2) (2) Foster home licensed, approved or specified by the child’s tribe; (3) Indian foster home licensed or approved by authorized non-Indian licensing authority; or (4) Institution for children approved by an Indian tribe or operated by Indian organization which has a program suitable to meet child’s needs. ICWA § 1915(b) * The standards to be applied shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides, or with which the parent/extended family maintains ties. ICWA § 1915(d)
Good cause	<u>Good cause to modify placement preferences</u> – for foster care, pre-adoption or adoption, reasons are: placement shall be based on request of biological parents or child when of sufficient age; or extraordinary physical or emotional needs of child as testified by QEW; or unavailability of suitable families for placement after diligent search. Burden on party urging preferences <i>not</i> be followed. BIA Guidelines for State Courts F.3, <i>Federal Register</i> , Nov. 26, 1979, Part III



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Placement Preferences – Adoption	<u>Adoptive placement</u> , absent good cause (<i>see Good Cause section above</i>), preference shall be given to: (1) Member of child’s extended family, as defined by law/custom of child’s tribe or, absent law or custom, shall be person age 18 or older who is child’s grandparent, aunt/uncle, brother/sister, brother/sister-in-law, niece/nephew, first/second cousin, or stepparent; ICWA § 1903(2) (2) Other members of the Indian child’s tribe; or (3) Other Indian families. ICWA § 1915(a) * The standards to be applied shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides, or with which the parent/extended family maintains ties. ICWA § 1915(d)
Different order of placement preferences	If the child’s tribe established a different order of preference by resolution, CYFD or court shall follow that different order so long as it is the least restrictive setting appropriate for the child; also when appropriate, the child’s or parent’s preference shall be considered. ICWA § 1915(c) Placement within child’s own tribe is preferable. A diligent attempt to find a suitable family includes at a minimum, contact with the child’s tribe’s social service program, a search of all county and state listings of available Indian homes, and contact with nationally known Indian program with available placement resource. BIA Guidelines for State Courts F.1, <i>Federal Register</i> , Nov. 26, 1979, Part III
Custody Hearing	Court shall determine whether child is an Indian child, tribal affiliation, residence or domicile on or off reservation for jurisdiction/transfer, notice requirements met, and use of placement preferences. NM Child Welfare Handbook, Ch. 13.8
Adjudicatory Hearing	Burden of proof – clear and convincing evidence. At foster care placement, court must find that <u>active efforts</u> were made to provide remedial services and rehabilitative programs designed to prevent breakup of Indian family and such efforts proved unsuccessful, including testimony of <u>qualified expert witness</u> that continued custody by parent or Indian custodian likely to result in serious emotional or physical damage to child. ICWA § 1912(d)-(e); <i>State ex rel. CYFD v. Marlene C.</i> , 2009-NMCA-058, 146 N.M. 588, 212, P.3d 1142 <u>Note:</u> Evidence showing <i>only</i> the existence of community or family poverty, crowded/inadequate housing, alcohol abuse, or nonconforming social behavior does <u>not</u> constitute <i>clear and convincing evidence</i> that continued custody is likely to result in serious emotional or physical damage to the child. To be <i>clear and convincing</i> , evidence <i>must</i> show existence of <i>particular</i> conditions in child’s home likely to result in serious emotional or physical damage to the child, and the cause and effect relationship between those conditions and damage likely to result. BIA Guidelines for State Courts D.3, <i>Federal Register</i> , Nov. 26, 1979, Part III
ASFA hearings	ASFA does not alter ICWA’s active efforts requirement, even where ASFA may relieve the State from proving reasonable efforts. Active efforts are required in every ICWA case.
Termination of Parental Rights, Permanent Guardianship	Burden of proof – beyond reasonable doubt. In any proceedings involving child subject to ICWA, grounds for any attempted termination or permanent guardianship shall be proved beyond a reasonable doubt and shall meet the requirements set forth in ICWA § 1912(f) which states that a court must find that <u>active efforts</u> were made to provide remedial services and rehabilitative programs designed to prevent breakup of Indian family and such efforts proved unsuccessful, including testimony of <u>qualified expert witness</u> that continued custody by parent or Indian custodian likely to result in serious emotional or physical damage to child. Children’s Code § 32A-4-29I, 32A-4-32E
Qualified Expert Witness (QEW)	To remove Indian child from family, evidence must include competent testimony from one or more experts qualified to speak specifically to issue of continued custody by parents/custodian likely to result in serious physical/emotional damage to child. Characteristics of person(s) most likely to meet QEW requirements: (1) member of child’s tribe recognized by tribal community as knowledgeable in tribal customs pertaining to family organization/childrearing; (2) any expert witness with substantial experience in delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing within child’s tribe; (3) a professional person with substantial education and experience in area of his/her specialty. Court or any party may request assistance of child’s tribe or BIA to locate QEW. ICWA § 1912(e)-(f); BIA Guidelines for State Courts D.4, <i>Federal Register</i> , Nov. 26, 1979, Part III
Vol. placement or termination	In <i>voluntary</i> proceedings for termination of parents rights to or adoptive placement of an Indian child, consent of parent may be withdrawn for any reason at any time prior to the entry of final decree of termination or adoption, and child must be returned to parent. ICWA § 1913(c)
Invalidation of proceedings	Any Indian child, any parent or Indian custodian from whose custody the child was removed, and Indian child’s tribe may petition any court of competent jurisdiction to invalidate such action, by showing violations of jurisdiction, pending court proceedings (§ 1912), or parental rights (§ 1913). ICWA § 1914
Return of custody	When final adoption decree of Indian child is vacated/set aside, or adoptive parents voluntarily consent to TPR, court shall grant petition for return of child by a biological parent or prior Indian custodian unless not in child’s best interest. ICWA § 1916
Improper removal	When Indian child has been improperly removed from parent or Indian custodian or improperly retained in custody after visit, court must return child to parent or Indian custodian unless would subject child to substantial and immediate danger or threat of immediate danger. ICWA § 1920
IGAs	Some tribes may have intergovernmental agreements with the state that specifically address these types of child custody proceedings. ICWA § 1919(a)