

THE INDIAN CHILD WELFARE ACT

Indian Children and the Tribe

INDIAN CHILDREN AND THE TRIBE

Before 1978, as many as 25 to 35 percent of the Indian children in certain states were removed from their homes, and 85 to 90 percent of them were being placed in non-Indian homes by state courts, welfare agencies, and private adoption agencies. Non-Indian judges and social workers who did not understand traditional Indian child-rearing practices viewed day-to-day life in the children's Indian homes as contrary to the children's welfare.

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25 USC § 1901(3): “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children”

25 USC § 1902: “it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs”

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The reference to the “unique values of *Indian culture*” does not mean that the customs and values of individual Tribes are interchangeable.

For example, Navaho traditions and culture are not the same as Hopi traditions and culture, and a Navaho child is not the future of the Hopi Tribe.

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A child who is a member of an Indian tribe, or is eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe, is an “*Indian child*.” 25 USC § 1903(4)

When an “*Indian child*” is the subject of a dependency petition, special jurisdictional, standard-of-proof and placement requirements apply. 25 USC § 1901 *et seq*

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ORS 419B.878: “When a court conducts a hearing, the court shall inquire whether a child is an Indian child subject to the [ICWA]. If the court knows or has reason to know that an Indian child is involved, the court shall enter an order requiring the Department of Human Services to notify the Indian child’s tribe of the pending proceedings and of the tribe’s right to intervene and shall enter an order that the case be treated as an [ICWA] case until such time as the court determines that that the case is not an [ICWA] case.”

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Expert Testimony and Burden of Proof

EXPERT TESTIMONY and BURDEN-OF-PROOF

25 USC § 1912 (e): “No *foster care placement* may be ordered * * * in the absence of a determination, supported by *clear and convincing evidence, including testimony of qualified expert witnesses*, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.”

EXPERT TESTIMONY and BURDEN-OF-PROOF

25 USC § 1903 (1)(i): "[F]oster care placement" * * * shall mean *any action* removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator *where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated.*"

EXPERT TESTIMONY and BURDEN-OF-PROOF

25 USC § 1912 (f): “No *termination of parental rights* may be ordered in such proceeding in the absence of a determination, supported by *evidence beyond a reasonable doubt, including testimony of qualified expert witnesses*, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.”

EXPERT TESTIMONY and BURDEN-OF-PROOF

These expert witness and burden-of – proof requirements apply in SHELTER, JURISDICTION/ DISPOSITIONAL and TPR hearings and may apply at other stages of a dependency case. *See JCIP Model Forms JF2i, JF 3, JF4 and JF4B.*

WHO QUALIFIES AS AN EXPERT?

The B.I.A.'s Guidelines for State Courts, 44 Fed. Reg. at 67593, D.4.b., identify the following as likely to be qualified experts:

- “(i) 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 childrearing practices.

- “(ii) Any 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 childrearing practices within the Indian child's tribe.

- “(iii) A professional person having substantial education and experience in the area of his or her specialty.”

WHO QUALIFIES AS AN EXPERT?

State ex rel Juv. Dept. v. Charles, 70 Or App 10, 688 P2d 1354 (1984), rev dismissed 299 Or 341 (1985):

“We decline to adopt the specific recommendations of the ‘guidelines,’ but we agree with the general proposition that an expert witness within the meaning of that term in 25 U.S.C. § 1912(e) must possess special knowledge of social and cultural aspects of Indian life.”

State ex rel Juv. Dept. v. Tucker, 76 Or App 673, 710 P2d 793 (1985), rev den 300 Or 605 (1985):

“[W]hen cultural bias is clearly not implicated, the necessary proof may be provided by expert witnesses who do not possess special knowledge of Indian life. Here, the issue before the court was whether the continued custody of the child by mother would result in serious emotional harm to the child because of mother's mental illness. There was no dispute about that condition or its severity. Termination or not had nothing to do with mother's fitness to care for the child according to the cultural dictates of her tribe.”

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ICWA Placement Preferences

ICWA PLACEMENT PREFERENCES

25 USC § 1915(b): *“In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with”:*

- “a member of the Indian child's extended family”
- “ a foster home licensed, approved, or specified by the * * * 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.”

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Active Efforts

WHAT ARE ACTIVE EFFORTS?

25 USC § 1912(d): “Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that *active efforts* have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.”

The ICWA does not define “active efforts.”

WHAT ARE ACTIVE EFFORTS?

B.I.A. Guidelines for State Courts, 44 Fed. Reg. at 67592, D.2.:

“These efforts shall take into account the prevailing social and cultural conditions and way of life of the Indian child’s tribe.”

ACTIVE EFFORTS and REASONABLE EFFORTS

Dept. of Human Services v. K.C.J., 228 Or App 70, 207 P3d 423 (2009): “[The] ICWA requires DHS to ‘satisfy the court that *active efforts* have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.’ 25 USC § 1912(d); *see also* ORS 419B.498(2)(b)(C) (incorporating that standard into Oregon's juvenile code). ‘*Active efforts*’ entails *more than ‘reasonable efforts’* and ‘impose[s] on the agency an obligation greater than simply creating a reunification plan and requiring the client to execute it independently.’”

State ex rel DHS v. R.O.W., 215 Or App 83, 168 P3d 322 (2007): “The type and sufficiency of efforts that the state is required to make and whether the types of actions it requires parents to make are *reasonable* depends on the particular circumstances.”

ACTIVE EFFORTS and REASONABLE EFFORTS (Per 2011 ICWA Training)

REASONABLE EFFORTS

- Referring to services -- typical AA regime.
- Providing list of required services.
- Managing a case.
- Meeting requirements set by policy.

ACTIVE EFFORTS

- Referring to tribal elders for services – Affirmatively assisting to access food, medical treatment, safe housing, emergency phone service, day care.
- Providing transportation to required services – *e.g.*, round trip bus tickets
- Proactively engaging the family and the child's tribe.
- Meeting individual needs of the child and family.

ACTIVE EFFORTS and REASONABLE EFFORTS

Dept. of Human Services v. J.G., --- Or App --, --- P3d --- (January 2, 2014) (The "active efforts" requirement in section 1912(d) of ICWA is met when a party seeking to effect the foster care placement of an Indian child satisfies the court that it made active efforts to prevent the breakup of the Indian family and that such efforts failed. When a juvenile court makes an "active efforts" finding at a permanency hearing in which it changes an Indian child's permanency plan from return to parent to establishment of a durable guardianship, section 1912(d) of ICWA does not require the juvenile court to renew that "active efforts" finding at a later proceeding in which the court effects that guardianship placement under ORS 419B.366.)

ACTIVE EFFORTS GUIDELINES

“ACTIVE EFFORTS – Principles and Expectations”

This document, published by the Oregon Judicial Department, was developed through the collaborative efforts of the federally recognized Tribes of Oregon, the Department of Human Services, and the Citizen Review Board, and provides concrete guidelines for use by courts, DHS staff, and CRBs in evaluating whether “active efforts” have been made in juvenile court dependency cases involving Indian children.

ACTIVE EFFORTS GUIDELINES

Initial service plans and visitation plans should be developed in conjunction with the tribe. The initial service plans shall be written within 60 days of the placement and should include a written visitation plan. Frequent contact among the child, parents, and siblings is imperative to maintain cultural and family ties; unless there is a safety risk or threat of harm to the child. (*“Active Efforts Principles and Expectations”*)

ACTIVE EFFORTS GUIDELINES

A service agreement or letter of expectation should be done in consultation with the child's tribe in every ICWA case. Consultation with the child's tribe and the tribe's recommendations for services should be documented in the case plan. Simply mailing the service agreement or a copy of the letter of expectation to the child's tribe will not be considered as active efforts; unless the child's tribe has not responded to diligent requests. Service referrals should be made immediately upon the entry of the court order or upon parents' agreement with the service agreement, whichever comes first. In order to achieve active efforts, workers should actively engage with families to help them connect to the services, including but not limited to, providing transportation to those services. Services must be culturally appropriate. Mere referrals to, and monetary expenditures for, services will not constitute an active efforts finding. The worker should check and document the status of service participation and progress and notify the child's tribe regularly. (*“Active Efforts Principles and Expectations”*)

ACTIVE EFFORTS GUIDELINES

All tribal or ICWA placement preferences shall be followed unless documented good cause to the contrary exists. Every effort shall be made to locate relatives and to support utilization of relative placements. Consultation with the child's tribe is critical but does not, in and of itself, meet the requirements for a diligent search. Efforts should be clearly documented in the case record.

("Active Efforts Principles and Expectations")

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Final Thoughts

Developing principles for meaningful application