



Juvenile Dependency Benchmark Series

ICWA: Shelter and Jurisdiction

If the court knows or has reason to know that the child is an “Indian child” under the Indian Child Welfare Act, the ICWA protections must be applied. The Tribe determines membership. If there are multiple Tribes, the court must provide the Tribes an opportunity to determine which Tribe should be designated for the child.

1. Did DHS give the parents and Tribe 10 days notice of the dependency proceeding and of the right to intervene in the case? The court may hold a hearing without the 10 day notice if there is a basis for emergency jurisdiction (see item 7), however, proof of the notice must be provided at the next hearing. See 25 C.F.R. §23.111 for notice requirements.
2. Does a Tribe have exclusive jurisdiction because the child resides or is domiciled on a reservation or is a ward of a Tribal court?
3. If state has concurrent jurisdiction, does the Tribe or the parent want the case transferred to the Tribal court? This can happen at any stage of the proceeding.
4. If the Tribe intervenes, it becomes a legal party. The Tribe maintains the right to participate as an interested party or intervene at any point in the case.
5. All of the court’s findings must be made by clear and convincing evidence.
6. If the child is to be placed in substitute care, the court must qualify and take testimony from a “Qualified Expert Witness” and make a finding that continued custody by parent is likely to result in serious emotional or physical damage to child. This is a requirement at shelter and jurisdiction.
7. The court can exercise temporary emergency jurisdiction over a child without expert testimony if DHS establishes and the court finds that the child is in “imminent danger of physical damage or harm.” A second hearing with expert testimony must occur within 30 days or when new information indicates the emergency has ended.
8. Determine if DHS made active efforts to (1) prevent removal; (2) return the child to the parent. Active efforts must be documented in detail in the record. DHS should provide documentation of their active efforts.
9. Determine whether the placement is appropriate. The placement must be the least restrictive which most approximates a family and in which the child’s special needs may be met, in reasonable proximity to the child’s home. In addition, a preference shall be given to placement with the Tribe’s placement preference if established by resolution, or as follows: a member of the child’s extended family, a foster home approved or specified by the Tribe, an Indian foster home, or an institution approved by a Tribe or operated by an Indian Tribe or organization with a program to meet child’s needs. If any party asserts good cause to deviate from the placement preferences, that party bears the burden of proof.

Questions for Qualified Expert Witness

A Qualified Expert Witness is a witness who is uniquely qualified to testify regarding cultural aspects involved in the decision to remove or place, or to terminate parental rights involving Indian children as defined in ICWA. The QEW offers specialized knowledge to assist the Court in understanding and interpreting cultural child-rearing customs to help the court ensure that there will not be bias in the interpretation of information or behavior. QEW testimony is required when a foster care placement is ordered. 25 U.S.C. §1912 (e). This includes shelter, jurisdiction, guardianship and termination of parental rights hearings. The social worker regularly assigned to the child may not serve as a QEW.

Does the witness qualify as an expert?

1. Are you a member of the child's Tribe? Are you recognized by the Tribe as being knowledgeable about the Tribe's customs as they pertain to family organization and child rearing?
2. Are you a member of another Tribe? Are you recognized by the child's Tribe as a qualified expert witness based on your knowledge of the child's Tribe's customs as they pertain to family organization and child rearing?
3. If you are not a member of any Indian Tribe, what is your connection with the child's Tribe?
 - a. Describe your experience in the delivery of child and family services to Indians.
 - b. Describe your familiarity with the social and cultural customs and practices of the child's Tribe with respect to child rearing.
 - c. Does the child's Tribe recognize you as having substantial experience in the delivery of child and family services to Indians and being knowledgeable in the Tribe's customs?
4. If you are professional, what is your education and experience? Describe your knowledge of the prevailing social and cultural standards and child rearing practices of child's Tribe.

Will continued custody of the child by a parent or Indian custodian likely result in serious emotional or physical damage to the child?

5. Do you have current knowledge of the case and, if so, how did you acquire this knowledge?
6. Is it culturally appropriate in the child's Tribe to (insert allegations of petition)?
7. At the time of removal, was the child at risk of serious physical or emotional risk or harm?
8. Did DHS provide active efforts (1) to prevent the removal of the child, (2) to make it possible for the child to return home and (3) to maintain the child's ties to the child's Tribe?
9. Will returning the child home today to his/her parents or Indian custodian likely result serious physical and/or emotional risk or harm?
10. Does the child's Tribe support the current out-of-home placement of the child?

Questions?

Contact the Juvenile Court Improvement Program, 503.986.6403

Last updated: July, 2017

