



QEW Testimony


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Why is QEW testimony
needed in ICWA cases?







History of cultural ignorance and biases within the child welfare system unnecessarily caused the breakup of Indian families.

Failure to recognize essential Tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

· 25 U.S.C. §1901(5)





What is Qualified Expert Witness Testimony?



Qualified Expert Witness testimony serves a specific purpose:

To provide the court with evidence regarding whether the child's **continued custody** by the parent or Indian custodian is **likely to result in serious emotional or physical damage** to the child.

· 25 U.S.C. § 1912 (e) - (f)



Qualified Expert Witness testimony should be informed by the **prevailing social and cultural standards** of the Indian child's Tribe.

- 25 C.F.R. § 23.122(a)



Additional, non-QEW, Testimony Needed From the Tribe

- Active Efforts
- Recommendations regarding culturally appropriate services
- Placement preferences and options




When is QEW Testimony Required?

Child Custody Proceedings

What is a child custody proceeding?

Any action, *other than an emergency proceeding*, that may culminate in one of the following outcomes:

- (i) Foster-care placement (including placements due to status offenses),
- (ii) Termination of parental rights,
- (iii) Pre-adoptive placement, or
- (iv) Adoptive placement.

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- An action that may culminate in one of these four outcomes is considered a separate child-custody proceeding from an action that may culminate in a different one of these four outcomes.
 - There may be several child-custody proceedings involving any given Indian child. Within each child-custody proceeding, there may be several hearings.
 - If a child is placed in foster care or another out-of-home placement as a result of a status offense, that status offense proceeding is a child-custody proceeding.

· 25 U.S.C. § 23.2

Foster Care Placement

No foster care placement may be ordered without clear and convincing evidence, including testimony from a qualified expert witness, 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.

- 25 U.S.C. 1912(e)
- ORS 419B.185(1)
- OAR 413-115-0130(1)(a)

Guardianships

DHS v. J. G., 260 Or App 500, (2014)

A guardianship placement is a “foster care placement” for ICWA purposes.


Therefore, §1912(e) qualified expert witness testimony, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, is required.

· OARs 413-115-0130(1)(b) & 413-115-0130(2)(a)

Termination of Parental Rights

No termination of parental rights may be ordered without 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.

- 25 U.S.C. 1912(f)
- ORS 419B.521(4)
- OAR 413-115-0130(2)(b)



QEW testimony is **not** required at permanency hearings or at shelter hearings on §1922 emergency removals.

Other testimony will likely be needed from the Tribe, however.

25 U.S.C. §1922 – Emergency Removals or Placements


23 C.F.R. § 23.2, Emergency proceeding: Any court action that involves an emergency removal or emergency placement of an Indian child.

23 C.F.R. § 23.113(b)(1): A removal that is **necessary to prevent imminent physical damage or harm** to the child.

23 C.F.R. § 23.113(a): Must terminate immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm.

23 C.F.R. § 23.113(c), Emergency removals may be terminated by:

- (1) **Initiation of a child-custody proceeding subject to ICWA;**
- (2) Transfer of the child to Tribe's jurisdiction; or
- (3) Restoring child to parent or Indian custodian.




25 C.F.R. § 23.113 – Emergency Proceeding Standards

An emergency proceeding should not be continued for more than 30 days **unless** the court makes the following determinations:

- (1) Restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm;
- (2) The court has been unable to transfer the proceeding to the jurisdiction of the appropriate Indian Tribe; **and**
- (3) **It has not been possible to initiate a “child-custody proceeding”** as defined in § 23.2.




Who May Serve as a Qualified Expert Witness?



The QEW must be:

- Qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child
 - Qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe.
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- A person may be designated by the Indian child's Tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe.
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- 25 C.F.R. § 23.122



- The social worker regularly assigned to the Indian child *may not* serve as a qualified expert witness in child-custody proceedings concerning the child.

- 25 C.F.R. §23.122(c)
- BIA ICWA Guidelines: Guideline G.2

- Department staff may not serve as a QEW in any child custody proceeding.

- OAR: 413-115-0130(3)(c)
- BIA ICWA Guidelines, Guideline G.2

Preferred Qualified Expert Witness


A member of the Indian child's Tribe who is recognized by the Tribal community as knowledgeable in Tribal customs & norms as they relate to family organization & child-rearing practices, and who is familiar with the child.

However, separate expert witnesses may be used to testify regarding potential emotional or physical damage to the child & the prevailing social and cultural standards of the Tribe

- BIA ICWA Guidelines, Guideline G.1



QEW Selection Process



The Department must work with the Indian child's tribe to determine who should be designated to testify as a QEW.

If the Indian child's tribe declines or is unable to designate a QEW, the Department will identify a QEW.

• OAR 413-115-0130(3)(b)

QEW Resources

- **ICWA:** 25 U.S.C. 1912(e) & (f)
- **Regulations:** 25 C.F.R. §23.122
- **BIA Guidelines for Implementing the Indian Child Welfare Act: Guideline G.2**
<https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf>
- **OARs:** 413-115-0000(31) & 413-115-0130