

Quick Reference Sheet for Voluntary Proceedings



U.S. Department of the Interior, Bureau of Indian Affairs
Final Rule: Indian Child Custody Proceedings
25 CFR 23

Voluntary proceedings. A proceeding is “voluntary” only if either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, consented to the placement for the Indian child, or if the proceeding is for voluntary termination of parental rights. The Indian Child Welfare Act (ICWA) and the regulations include provisions that apply to voluntary proceedings (highlighted by this guide).

The only voluntary placement to which ICWA does **not** apply to is a voluntary placement where the parent or Indian custodian can regain custody of the child **upon demand** – meaning simply upon verbal request, without any formalities or contingencies.

Inquiry. At the outset of the proceeding, the court will ask whether you know, or if there is a reason to know, the child is an “Indian child” under ICWA.

An “**Indian child**” is:

- A member of a federally recognized Tribe or
- Eligible for membership in a federally recognized Tribe and has a biological parent who is a member.

Indications of “reason to know” include—

- Anyone, including the child, tells the court the child is an Indian child or there is information indicating the child is an Indian child;
- The domicile or residence of the child or parent/Indian custodian is on a reservation or in an Alaska Native village;
- The child is, or has been, a ward of Tribal court; or
- Either parent or the child has an ID indicating Tribal membership.

Whether a child is an “Indian child” does not consider factors outside the definition, such as:

- Participation of the parents or the Indian child in Tribal activities;
- Relationship between the Indian child and his or her parents;
- Whether the parent ever had custody of the child, or
- The Indian child’s blood quantum.

Pending verification. If there is a reason to know the child is an Indian child, the court will treat the child as an Indian child, unless and until it is determined on the record that the child is not an “Indian child” under ICWA.

Due diligence to identify “Indian child’s Tribe” and verify membership/eligibility. Use due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is a member **or** a biological parent is a member and the child is eligible for membership.

Effect of a request for anonymity. A request for anonymity does not relieve the court, agency, or other party from any duty of compliance with ICWA, including the obligation to verify whether the child is an “Indian child.” If the consenting parent provides a written request for anonymity, the court must keep relevant documents pertaining to the inquiry required under this section confidential and under seal and the Tribe receiving information related to this inquiry must keep documents and information confidential.

Inquire as to domicile and residence. The court will look at whether the Indian child's domicile or residence is on a reservation **or** the child is a ward of Tribal court to determine whether the Indian child's Tribe has exclusive jurisdiction.

Notice. ICWA and the regulations do not necessarily require notice to the other parent or Tribe, but the Department recommends notice to promote compliance with the placement preferences and stability for the Indian child.

Placement Preferences. Seek to identify placements that meet ICWA's placement preferences (or the Indian child's Tribe's placement preferences established by resolution, if applicable). The court will apply the placement preferences in any preadoptive, adoptive, or foster-care placement of an Indian child.

**ICWA's top preferred placement is a member of the Indian child's extended family.
For the remaining preferences, see 25 U.S.C. 1915 or 25 CFR §§ 23.129-131.**

The court will allow for deviations of the placement preferences only for *good cause* described on the record. Good cause should be shown by clear and convincing evidence and based on one or more of the considerations at § 23.132(c). Note that:

- A prerequisite to finding good cause based on the *unavailability* of a suitable preferred placement is that a diligent search for suitable preferred placements must have been conducted. The standards for determining whether a placement is *unavailable* must conform to the prevailing social and cultural standards of the Indian community.
- If the Indian child's parent(s) wants to request a placement that departs from the placement preferences, the parent(s) must attest that they have reviewed the placement options, if any, that comply with the order of preference.

A placement may not depart from the preferences:

- Based on the socioeconomic status of any placement relative to another placement
- Based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.

Consent Safeguards. A parent's or Indian custodian's consent to a voluntary termination of parental rights or to a foster-care, preadoptive, or adoptive placement must be executed in writing, include the contents listed at § 23.126, and be recorded before a court of competent jurisdiction. Prior to accepting the consent, the court must:

- Explain to the parent or Indian custodian the terms and consequences of the consent in detail; and
- Explain to the parent or Indian custodian the limitations on withdrawal of consent listed in § 23.125(b)(2);
- Certify that the terms and consequences of the consent were explained on the record in detail (in the appropriate language) and were fully understood by the parent or Indian custodian.

A consent given prior to, or within 10 days after, the birth of an Indian child is not valid.

Withdrawal of Consent. The rule provides information for how a parent may withdraw consent to a voluntary foster-care placement, voluntary termination of parental rights, and voluntary adoption. See §§ 23.127 - 23.128. For example, a parent or Indian custodian may withdraw consent to an adoption any time prior to entry of the final adoption decree by filing a written document with the court of otherwise testifying before the court. Additional methods of withdrawing consent may be available under State law.

Adult Adoptees' Right to Information. An Indian who has reached age 18 who was the subject of an adoptive placement may apply to the court that entered the final adoption decree for information, and the court must inform such individual of the Tribal affiliations, if any, of the individual's biological parents and provide such other information necessary to protect any rights, which may include Tribal membership, resulting from the individual's Tribal relationship.