

Emergency Removal Hearings

- Specify whether the child is an Indian Child and provide details of how Indian Child status is known to the court. (25 U.S.C. § 1903(4))
 - Inquire if each participant in the proceeding (1) knows or (2) has reason to know that the child is an Indian child. All responses should be on the record.
- Whether the child currently resides or is domiciled on the reservation of their tribe, is a ward of the tribal court, or under an existing tribal court order. (25 U.S.C. § 1911(a))
- The tribal court has exclusive jurisdiction, but the child is temporarily located off the reservation from the child’s parent or Indian custodian and limited emergency jurisdiction is necessary to prevent imminent physical damage or harm. (25 U.S.C. § 1922)
- Make a finding that the removal or placement is necessary to prevent imminent physical damage to the child. (25 C.F.R. 23 § 23.113 (b)(1))
- Emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm.
- **An Emergency proceeding should not be continued for more than 30 days unless the court makes the following determinations:**
 - Restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm;
 - The court has been unable to transfer the proceeding to the jurisdiction of the appropriate tribe; and
 - It has not been possible to initiate a “child-custody proceeding” as identified in 25 C.F.R. §23.2.

Deprivation Hearings

&

Termination of Parental Rights (TPR) Hearings- Involuntary

- Specify whether the child is an Indian Child and provide details of how Indian Child status is known to the court. (25 U.S.C. § 1903(4))
 - Inquire if each participant in the proceeding (1) knows or (2) has reason to know that the child is an Indian child. All responses should be on the record.
 - If there is reason to believe the child is an Indian child, ensure that the party seeking placement has taken all reasonable steps to verify the child’s status.
- Whether the child currently resides or is domiciled on the reservation of their tribe, is a ward of the tribal court, or under an existing tribal court order. (25 U.S.C. § 1911(a))
- Whether proper notice of the hearing, a copy of the petition and advice or rights were sent to the parent(s), Indian custodian (if any) and the child’s tribe by certified or registered mail, return receipt. (25 U.S.C. § 1912(a))
- The hearing was held at least 10 days after receipt of notice.
- Whether the tribe has been afforded a full opportunity to participate in the proceedings and whether the tribe was provided copies of the petition, reports and information regarding the child. (25 U.S.C. § 1911(c,d) and (25 U.S.C. § 1912(a))
- Whether *active efforts* were made prior to removal to provide remedial services and rehabilitative programs designed to prevent the breakup of the family, and whether the efforts were successful. Specify the efforts with enough detailed information to justify why the court found active efforts by *clear and convincing evidence*.
- Specify why the court found by *evidence beyond a reasonable doubt* 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. Detail this evidence. (25 U.S.C. § 1912(f))
- Specify whether the child is to be placed in a home that meets the priority placement preferences of 25 U.S.C. § 1915(b)
- If placement is not within 25 U.S.C. § 1915(b) placement preferences, specify whether:
 - The child’s tribe issued a resolution establishing a different order of preference and the placement is the least restrictive setting appropriate to the particular needs of the child (25 U.S.C. § 1915(c)); or
 - There is good cause not to follow the placement preferences. (25 U.S.C. § 1915(a))

Termination of Parental Rights (TPR) Hearings- Voluntary

- Specify whether the child is an Indian Child and provide details of how Indian Child status is known to the court. (25 U.S.C. § 1903(4))
 - Inquire if each participant in the proceeding (1) knows or (2) has reason to know that the child is an Indian child. All responses should be on the record.
 - If there is reason to believe the child is an Indian child, ensure that the party seeking placement has taken all reasonable steps to verify the child's status.
- Ensure the child is to be placed in a home that meets the priority placement preferences of 25 U.S.C. § 1915(b)
- Thoroughly explain the conditions and circumstances under which parental consent to TPR was obtained.
 - Parental consent must be executed in writing in the presence of the judge and must be accompanied by the judge's certification that the terms and consequences of the consent were fully explained in detail and the parent or Indian custodian fully understood those terms and consequences. (25 U.S.C. § 1913(a))
- Certify that either the parent or Indian custodian fully understood the explanation of the terms and consequences of the consent to TPR in English, or that it was interpreted into a language the parent or Indian custodian understood. (25 U.S.C. § 1913(a))
- Determine whether the consent was voluntary and informed, that it was not obtained through fraud or duress, and that all alternatives to TPR were explained. (25 U.S.C. § 1913(d))

Motions to Intervene

- A child's Indian custodian or tribe has the right to intervene at any time in any state court proceeding for foster care placement or termination of parental rights. (25 U.S.C. § 1911(c))

Motions to Transfer Jurisdiction

- Indicate that the state court proceeding is either a foster care placement or termination of parental rights. (25 U.S.C. § 1911(b))
- Determine whether either parent objects, the tribal court declined jurisdiction, or good cause exists for the state court to decline the transfer of jurisdiction. (25 U.S.C. § 1911(b))
 - See the ICWA Final Rule 25 CFR § 23.118 for determination of good cause.
 - The best interest of the child is not an element of a good cause determination. (Interest of A.B., 2003 ND 98, 663 N.W.2d 625)



Overview of Key ICWA Specific Findings

- Ask in every child custody proceeding: "Do you know, or is there reason to know, the child is an 'Indian child' under the Indian Child Welfare Act (ICWA)?"**
 - Note:** If there is reason to know the child is an Indian child, treat the child as an Indian child unless and until it is determined on the record that the child is not an "Indian child."
- Confirm, on the record, that the agency used 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).
- Determine jurisdiction by inquiring if the child was domiciled on the reservation of their tribe, a ward of the tribal court, or under an existing tribal court order.
- Specify whether the child is to be placed in a home that meets the priority placement preferences.
- The record must include proof that clear and understandable notice was provided to the parents/custodian and Tribe by registered or certified mail, return receipt requested.
- Before ordering an involuntary foster care placement or TPR, the court must conclude that active efforts have been made to prevent the breakup of the Indian family. Active efforts must be documented in detail in the record.
- Foster Care placement and TPR may be ordered only if there is: ***clear and convincing evidence** (for foster care placement) or **evidence beyond a reasonable doubt** (for TPR)
- The evidence must show a *causal relationship* between the particular conditions in the home and likelihood that continued custody of the child will result in serious emotional/physical damage to the child.

