

ICWA HEARING ESSENTIALS

WHEN DOES ICWA APPLY?

If a child is an enrolled member of a federally recognized tribe, **or** is the biological child of an enrolled member **and is eligible for enrollment** (tribe decides if enrolled/if eligible)

The tribe decides whether parent is enrolled and whether child is eligible to enroll. If information before court shows a reason to believe that a child or parent is enrolled and/or child eligible to enroll but status is not yet confirmed by tribe, find "reason to know" (RTK) and treat as ICWA case until verification. * See RTK vs. Undetermined flow chart.

WHAT ARE THE ICWA FINDINGS?

Removal requires a finding in court-authorized removal order, temporary orders or at first hearing that removal was necessary to prevent imminent physical damage or harm. See 25 U.S.C. § 1922, and 25 C.F.R. § 23.114. Thereafter, three core findings apply depending on the hearing. Clear and convincing proof required for (1) & (3) and for good cause to deviate from ICWA placement in (2):

- 1. ACTIVE EFFORTS:** Petitioner made/did not make active but unsuccessful efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. See 25 U.S.C. § 1912(d); 25 C.F.R. § 23.2
- 2. PLACEMENT:** Placement complies with ICWA preferences OR does not comply but good cause to deviate from ICWA preferences exists - see 25 USC § 1915
- 3. CONTINUED CUSTODY:** Continued custody of the child by the parent is/is not likely to result in serious emotional or physical damage to the child - see 29 U.S.C. § 1912(f)

WHEN ARE ICWA FINDINGS MADE?

IMMINENT HARM FINDING AT INITIAL/REMOVAL HEARING: If ICWA applies or RTK, judge checks the removal order attached to petition for prior finding that removal was necessary due to risk of imminent physical damage or harm. If finding is not in removal order, check temporary orders. If the finding was made and is not contested at hearing, judge may affirm finding. If prior finding was not made, judge finds from report/record whether returning child to parent as of hearing date would subject the child to substantial and immediate danger or threat of danger. Parent may contest the imminent harm finding; if contested, judge holds prompt imminent harm evidentiary hearing. Expert/QEW testimony is NOT required for findings. For specific findings to be made, see imminent harm contested hearing clerk order.

PLEA/PRETRIAL ADJUDICATION: Do not adjudicate parent except John Doe without qualified expert (QEW) testimony and findings on (1) active efforts, (2) placement, and (3) continued custody, by clear and convincing proof. If QEW testimony is not available for a plea or no-show, preserve findings and set timely QEW testimony hearing to adjudicate.

REVIEW HEARINGS: Make findings on (1) whether Petitioner is making active efforts and (2) whether placement is ICWA-compliant. No expert testimony is taken for review hearing findings, but tribal attorney or tribal caseworker may give a position on active efforts and placement. Court may defer findings at reviews but making finding is best practice.

CONTESTED DEPENDENCY: May not adjudicate dependency without qualified expert witness testimony and all ICWA findings made on clear and convincing proof: (1) active efforts, (2) placement, and (3) continued custody by parent.

TERMINATION OF PARENTAL RIGHTS: Must have qualified expert witness testimony and find, by clear and convincing proof, both (1) active efforts and (2) ICWA-compliant placement and must find beyond a reasonable doubt that (3) custody of the child by the parent is likely to result in serious emotional or physical damage to child. NOTE: parent may admit or plead no contest to a termination motion, but relinquishment requires a written/in person ICWA process.

GUARDIANSHIP: Same expert testimony requirement and mandatory findings as for termination – active efforts, ICWA-compliant placement, and continued custody -- but ALL findings must be made beyond a reasonable doubt.

NOTE: If a tribe never responds to notice or never confirms ICWA applies in an RTK case, judge must decide when to no longer continue as an RTK case and find, after lapse of time/lack of tribal or BIA confirmation, that ICWA does not apply.