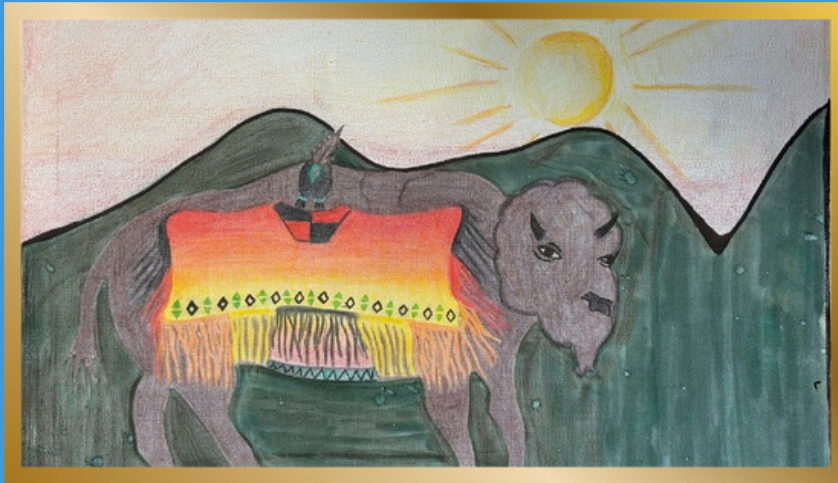


OKLAHOMA



Wisdom, Guidance, & Protection by Breona (Choctaw Nation)

Bench Guide To

Indian

Child

Welfare



Second Edition

Acknowledgement of Youth Artists



Majestic Dragon by Ben (Kaw Nation)

The Oklahoma Indian Child Welfare Association (OICWA), in partnership with the Court Improvement Program-Indian Child Welfare Act (CIP-ICWA) Taskforce, proudly acknowledges and celebrates the talented child and youth artists whose original works have been selected for inclusion in the Second Edition of the Oklahoma Bench Guide to the Indian Child Welfare Act.

This special edition of the Bench Guide features artwork created by American Indian and Alaska Native youth, all of whom are citizens of Federally Recognized Tribes, residents of Oklahoma, and have lived experience through Tribal or state custody, guardianship, or kinship care. These young artists not only demonstrate extraordinary creative talent, but also bring powerful, personal perspectives that enrich the Guide and deepen its purpose.

We are honored to provide this meaningful platform for youth expression, and we commend each artist for their courage, creativity, and contribution to this important work. Your voices matter, and your art will continue to inspire all who work to uphold the spirit and intent of the Indian Child Welfare Act.

With deep gratitude and respect,
The Oklahoma Indian Child Welfare Association (OICWA) & the CIP-ICWA Taskforce

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INTRODUCTION

Oklahoma's first published appellate opinion on the Indian Child Welfare Act (ICWA) was issued forty-three years ago by the Court of Civil Appeals, and today Oklahoma remains a leading state in ICWA application. (See, *Duncan v. Wiley*, 1982 OK CIV APP 45,657 P.2d1212.) This bench reference provides an insightful approach to the standards and requirements of ICWA, the Oklahoma Indian Child Welfare Act and the 2016 Bureau of Indian Affairs (BIA) Final Rule on ICWA.

Since, the adoption of the Federal Indian Child Welfare Act in 1978, Oklahoma has adopted the Oklahoma Indian Child Welfare Act, and the Bureau of Indian Affairs adopted both binding Regulations (hereafter, "Final Rule) and updated Guidelines. This Bench Guide provides an insightful overview of how to approach ICWA proceedings, including the standards and requirements found in ICWA, OICWA, and the new BIA Final Rule. References will direct you to the specific sections to each.

This revised and expanded Second Edition of the Oklahoma Bench Guide to Indian Child Welfare reflects the ongoing commitment to strengthening Indian Child Welfare Act (ICWA) practice across the state of Oklahoma. Developed through the collaborative efforts of the Oklahoma ICWA Partnership Grant Team—including the Oklahoma Indian Child Welfare Association (OICWA), the Court Improvement Program (CIP), and the Oklahoma Department of Human Services (DHS)—and in partnership with the CIP-ICWA Taskforce, this edition builds on the foundation of the original publication.

Newly added sections include Frequently Asked Questions, ICWA Court Principles, and the Casey Family Programs Gold Standard Principles. These additions are designed to support practitioners by providing practical guidance rooted in best practices and affirming ICWA as the leading model for child welfare systems. Together, these enhancements promote consistency, cultural integrity, and legal compliance—reinforcing a standard of excellence in serving American Indian and Alaska Native children and families.

Those participating in drafting, review and development of this Bench Guide reference includes Tribal, Federal and State Representatives, former ICWA children now adults, non-governmental organizations (NGOs), and professionals in the fields of social work and law.

I. Inquiry as to the Status of the Child as an Indian Child:

(25 U.S.C. §1903(4); 25 C.F.R. §§ 23.2, 23.105, & 23.107-23.109; 10 O.S. §§40.2-40.3)

- A. Ask at the beginning of the hearing: "Do you know, or is there a reason to know, the child is an 'Indian Child' under the Indian Child Welfare Act?"
- B. 'Indian child' (25 U.S.C. §1901(4)) is either a member of a Federally Recognized Tribe OR eligible for Tribal membership AND has a biological parent who is a member.
- C. Whether the child is an Indian child does not consider:
 1. Participation of the parent(s) or child in Tribal activities;
 2. Relationship between the parent(s) and child other than biological;
 3. If the parent ever had custody of the child; or,
 4. The child's blood quantum.
- D. "Reason to know" includes when:
 1. Anyone, including child, informs the court child is Indian child or there is other information indicating child is an Indian child;
 2. Domicile or residence of child or parent/Indian custodian is on an Indian reservation or in Alaska Native village;
 3. Child is, or has been, ward of a Tribal court; or,
 4. Either parent or child has an ID indicating Tribal membership.
- E. Until court receives confirmation from the Indian Tribe that the child is or is not a member, treat the child as an Indian child. See, *In the Matter of J.W.E.*, 419 P.3d 374, 2018 OK CIV APP 29

(Trial court and the State may not have been affirmatively informed of children's Tribal membership, but had reason to know at trial ICWA may apply and this warranted further investigation; Termination of parental rights reversed as ICWA applied when trial on termination of parental rights was held).

II. Make a Record/Determination as to Status of the Indian Child:

- A. Confirm on the record/make a determination as to the use of due diligence by the agency or party responsible to:
 - 1. Identify and work with all applicable Tribes when there is a reason to know the child may be a member or membership eligible;
 - 2. Verify whether the child is a member, or a biological parent is a member and the child is eligible; and,
 - 3. Determine the Indian child's Tribe for purposes of the Act.

III. Make a Record/Determination as to Notice of Proceeding: (25 U.S.C. §1912(a), 25 C.F.R. §§23.11 & 23.111; 10 O.S. §40.4)

- A. Notice of any involuntary foster care proceeding or termination of parental rights proceeding involving an Indian child must be given to:
 - 1. Parent or Indian custodian;
 - 2. Indian child's Tribe; and,
 - 3. Appropriate Regional Bureau of Indian Affairs Director.

See Designated Tribal Agents for Service of Notice, Federal Register Notice, available at www.bia.gov/bia/ois/dhs/icwa

B. Notice must be provided by registered or certified mail with return receipt requested; the notice and proof of service must be filed with the court clerk.
Note: ICWA itself reads notice by “registered mail with return receipt requested.”
25 U.S.C. §1912(a)

C. Notice must be in clear and understandable language, and include:

1. The child’s name, birthdate, and birthplace;
2. All names known (including maiden, married, and former names or aliases) of the parents, the parents’ birthdates and birthplaces, and Tribal enrollment numbers if known;
3. If known, the names, birthdates, birthplaces, and Tribal enrollment information of other direct lineal ancestors of the child, such as grandparents;
4. The name of each Indian Tribe in which the child is a member (or may be eligible for membership if biological parent is a member);
5. A copy of the petition, motion or other document by which the child custody proceeding was initiated and, if scheduled, information on the date, time, and location of any upcoming hearings; and,
6. Statements setting out:
 - a. The name of the petitioner and the name and address of petitioner’s attorney;
 - b. The right of any parent or Indian custodian to intervene, if not already a party to the child-custody proceeding;
 - c. The Indian Tribes’ right to intervene at any time in a state-court proceeding for foster care placement or termination of parental rights to an Indian child;

- d. The right of the parent or Indian custodian to a court appointed attorney upon a determination of indigence by the court;
- e. The right to be granted, upon request, up to 20 additional days to prepare for the child- custody proceedings;
- f. The right of the parent, Indian custodian, and Indian child's Tribe to petition the court for transfer of the proceedings to Tribal court;
- g. The mailing address and telephone numbers of the court and contact information for all parties and all individuals served under the notice;
- h. The potential legal consequences of the child custody proceedings on the future parental rights of the parent or Indian custodian; and,
- i. That the notice is confidential and should not be handled by anyone not needing information to exercise rights under ICWA.

D. Notice Requirements and Time Limits: (25 C.F.R. §23.112)

- 1. No foster care placement or termination of parental rights proceeding may be held until 10 days after receipt of notice by parents and by the Tribe.
 - a. Parent or Tribe can request an additional 20 days from date of receipt of notice.
- 2. In Oklahoma, notice, per 10 O.S. §40.4 (effective November 1, 2017) requires the court to ensure that the district attorney shall send notice to the parents or to the Indian custodians, if any, and to the Tribe that is or may be the Tribe of the Indian child, and to the appropriate Bureau of Indian Affairs area office, **by certified mail return receipt requested.** (See, Section III (B) Note on the ICWA language of registered mail.)
 - a. The notice shall be written in clear and understandable language and include the following information:

- 1) The name and Tribal affiliation of the Indian child;
- 2) A copy of the petition (or motion) by which the proceeding was initiated;
- 3) A statement of the rights of the biological parents or Indian custodians, and the Indian Tribe to:
 - a) Intervene in the proceeding;
 - b) Petition the court to transfer the proceeding to the Tribal court of the Indian child and;
 - c) Request an additional twenty (20) days from receipt of notice to prepare for the proceeding; further extensions of time may be granted with court approval;
- 4) A statement of the potential legal consequences of an adjudication on the future custodial rights of the parents or Indian custodians;
- 5) A statement that if the parents or Indian custodians are unable to afford counsel, counsel will be appointed to represent them; and,
- 6) A statement that Tribal officials should keep confidential the information contained in the notice.

b. Notice of **review hearings** shall be sent, via **regular first-class mail**, to the Tribe of the Indian child.

- 1) A Tribe's right to notice under this section is not dependent on intervention into the case.
 - 2) No mailing is required if the Tribe is present at the time the review hearing is set and consents to the date of the review.
 - 3) A certificate of mailing must be filed prior to the review hearing.
3. For information on Notice to be given of a change in the adopted Indian child's status, see 25 C.F.R. §23.139.

IV. Make a Record/Determination as to Domicile & Residence of the Indian Child;
Tribal Court Jurisdiction: (25 U.S.C. §1911(a)-(b); 25 C.F.R §§23.2 & 23.115-23.119)

- A. If domicile or residence of Indian child is on a reservation or if the child is a ward of a Tribal court, the Tribe exercises exclusive jurisdiction.
- B. If domicile or residence of Indian child is off reservation, or the child is a ward of state court, then the Tribe holds concurrent jurisdiction.
- C. Transfer to Tribal Court: Either parent, the Indian custodian or the Indian child's Tribe may request transfer of each distinct Indian child custody proceeding to Tribal court.
 - 1. Request may be made orally or in writing.
 - 2. Request may be made at any time.
 - 3. Transfer is available at any stage of the proceeding.
- D. Notify Tribal Court of Transfer Request: Upon receipt of request for transfer, promptly notify the Tribal court in writing of the request.
 - 1. May request a timely response regarding whether Tribal court wishes to decline transfer of the proceedings to Tribal court.
 - 2. Must transfer unless:
 - a. Either parent objects,
 - b. Tribal court declines transfer, or
 - c. Good cause to deny transfer exists.

E. Good Cause to Deny Transfer: Make record/determination as to good cause.

1. State on the record or provide in a detailed written order, the reason good cause to deny transfer exists.

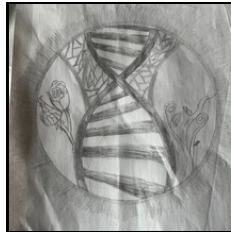
2. Reason must not include:

- a. Advanced stage of proceedings if the Indian child's parent, Indian custodian or Tribe did not receive notice.
- b. If, in prior proceedings involving child, no petition to transfer was filed.
- c. Effect on the placement of the child should Tribal court change the placement.
- d. Child's lack of cultural connections with the Tribe or its reservation.
- e. Socioeconomic conditions or any negative perception of Tribal or BIA social services or Tribal judicial system.

3. Give every party to the proceeding opportunity to be heard regarding good cause to deny transfer exists.

4. Oklahoma Case Law:

- a. In the Guardianship of C.H.S., 394 P.3d 278, 2016 OK CIV APP 72 (Failure to show by clear and convincing evidence good cause to deny the motion to transfer to Tribal court; lower court ruling denying reversed on appeal).



*Glass Marble by Nathaneal, age 11
(Choctaw Nation)*

- F. Tribal Court Acceptance of Transfer: If transfer is granted and the Tribal court accepts, expeditiously provide all court records to the receiving Tribal court.
- G. Physical Transfer of Child to Tribal Jurisdiction: Make an agreement with the Tribal court to smoothly and with minimal disruption of services to the family, transfer the child and the proceeding to the Tribe.
 - 1. When the child is in DHS custody, the Order Transferring Case to Tribal court should reflect that legal custody of the child remains with DHS until the Tribal court has formally accepted transfer of the state court case AND the child is placed in the physical custody of the Tribe via the Tribal worker.
 - 2. Tribal and DHS child welfare must coordinate efforts for child's transfer to a Tribal placement.

V. Intervention in the Proceeding: (25 U.S.C. §1911(c))

- A. At any point in any proceeding for foster care placement (adjudication) of, or termination of parental rights to, an Indian child, the right to intervene is conferred to:
 - 1. The Indian custodian; and,
 - 2. The Indian child's Tribe.
- B. Lack of response from Tribe to the initial notice of the state court proceeding does not preclude intervention at a later time.

- C. When a Tribe explicitly declines to intervene, the Tribe may change its position later and would then be entitled to intervene at the later date. The Tribal right to intervene continues for the life of the state court proceeding.

NOTE: A case can morph from an emergency removal to foster care placement quickly. In other words, the type of proceeding and stage of proceeding can change at various points in a case. This can become detail laden in cases spanning a lengthy timeframe. It can be good practice to quickly make a determination for the record on the type of and stage of proceeding at each hearing in a case.

- D. **Special note as to Emergency Removal:** (25 C.F.R. §23.113; 10 O.S. §40.5)
1. The court may, under state law, grant an emergency removal of an Indian child who is a resident or domiciled on reservation, but temporarily located off reservation, in order to prevent imminent physical damage or harm to the child.
 - a. This applies even when exclusive jurisdiction rests with the Tribal court.
 2. In Oklahoma, the Emergency Order must be accompanied by an affidavit. (10 O.S. §40.5). The affidavit must contain:
 - a. Name, Tribal affiliations, and address of the Indian child, parent and any Indian custodian;
 - b. Specific and detailed account of the circumstances that lead the responsible agency to remove the child: and,
 - c. A statement of what actions have been taken to help parents or Indian custodians so child may safely be returned;

3. In Oklahoma, a state court Emergency Order can only stay in effect for 30 days, but may be extended up to 90 days. (25 C.F.R. §23.113; 10 O.S. §40.5)
 - a. To extend an Emergency Order beyond 30 days, the court must determine that custody of the child by the parent is likely to cause serious emotional or physical damage to the child.
 - b. This must be shown by clear and convincing evidence, and requires testimony of one qualified expert witness. See information below as to who may serve as a qualified expert witness.
 - c. *Key to Emergency Removal is imminent physical damage under ICWA* which may include endangerment of the child's health, safety and welfare, bodily injury or death. Once removal is no longer necessary to prevent imminent physical damage or harm to the child, the emergency removal or placement must terminate immediately.

NOTE: ICWA §40.5 language reads "physical or emotional harm."

4. The court may terminate the emergency removal or placement by either:
 - a. Expeditiously initiating a state court child custody proceeding under ICWA;
 - b. Transferring jurisdiction to the appropriate Indian Tribe upon Tribal court acceptance; or,
 - c. Restoring the child to the parent or Indian custodian.

VIII. Make a Record/Determination as to Active Efforts:

(25 U.S.C. §1912(d); 25 C.F.R. §§23.2 & 23.120)

- A. Party seeking foster care placement of, or termination of parental rights to an Indian child must show Active Efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that Active Efforts were unsuccessful.
 - 1. Active Efforts must be documented in detail in the court record.
- B. According to (25 CFR § 23.2, § 23.120), Active Efforts must be:
 - 1. Affirmative;
 - 2. Active;
 - 3. Thorough; and,
 - 4. Timely.
- C. Where an agency, such as DHS or a “private” agency, is involved with the child custody proceeding, Active Efforts must include:
 - 1. Assisting parents through the steps of a case plan; and,
 - 2. Assisting parents with accessing or developing the resources necessary to satisfy the case plan
- D. To the maximum extent possible, Active Efforts should be:
 - 1. Consistent with the prevailing social and cultural conditions and way of life of the Indian child’s Tribe; and,

2. Conducted in partnership with the:
 - a. Indian child;
 - b. Parents;
 - c. Indian custodian;
 - d. Extended family members; and,
 - e. Tribe.

3. Active Efforts are tailored to the facts and circumstances of the case and may include:
 - a. Conducting comprehensive assessment of the circumstances, with a focus on reunification as the most desirable goal;
 - b. Identifying appropriate services and helping parents overcome barriers, including actively assisting the parents in obtaining services;
 - c. Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;
 - d. Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;
 - e. Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;
 - f. Taking steps to keep siblings together whenever possible;

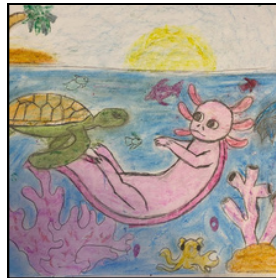
- g. Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal consistent with the need to ensure the health, safety, and welfare of the child;
- h. Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;
- i. Monitoring progress and participation in services;
- j. Considering alternative ways to address the needs of the Indian child's parents and where appropriate, the family, if the optimum services do not exist or are not available; and/or,
- k. Providing post-reunification services and monitoring.

VIII. Make a Record/Determination as to Standard of Evidence for Continued Custody by a Parent or Indian Custodian: (25 U.S.C. §1912(e) & (f); 25 C.F.R. §23.121)

- A. The type of evidentiary standard required will depend on the type of proceeding involved for the court's determination that the child's continued custody by a parent or Indian custodian is likely to result in serious emotional or physical damage to the child:
 - 1. If foster care placement – clear and convincing evidentiary standard;
 - 2. If termination of parental rights – evidence beyond a reasonable doubt; and,
 - 3. Both require testimony of a qualified expert witness. (See, Section IX for recent Oklahoma case law on when qualified expert witness testimony did and did not meet the evidentiary requirements.)

NOTE: “Continued custody” means physical or legal custody or both, under any applicable Tribal law or custom or state law, that a parent or Indian custodian already has or had at any point in the past. The biological mother of a child has had custody of the child. 25 C.F.R. 23.2. In some instances, a biological father may also have custody of the child under Tribal law, and this is a matter that the court should inquire of with the child’s Tribe.

- B. To the determination that the child’s continued custody by parent or Indian custodian is likely to result in serious emotional or physical damage to the child:
1. There must be a causal relationship between the conditions in the home and the likelihood that continued custody will result in the damage to the particular child who is subject of the proceeding;
 2. Without causal relationship, the standard of evidence is not met; and,
 3. Evidence of only community or family poverty, or isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence.



Axolotl friend by Gabrielle, age 14 (Choctaw Nation)

C. Oklahoma case law: There is a line of Oklahoma case law in termination matters indicating that the heightened standard of proof of ICWA applies only to the factual determination “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,” whereas the lesser state-law mandated burden of proof, is applicable to all other state law requirements for the proceeding. In other words, as to the state court evidentiary standard for termination of parental rights to the child must be based on state law. Thus, for termination of parental rights the standard is clear and convincing evidence.

1. *Termination Proceeding – Adoption without Consent*: “Because no provisions of the ICWA displace the burden of proof on other issues, we can find no proper basis for imposing a higher standard of proof on Petitioners than they would have if this case did not involve an Indian child. In so concluding, we join the courts of numerous other states, which have held that the state-law mandated burden of proof is applicable to state law requirements for termination and that the burden of proof provided in §1912(f) applies only to the specific factual determination required by that section (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).” (Internal citation omitted.) *In re Adoption of R.L.A.*, 2006 OK CIV APP 138, ¶15, 147 P.3d 306.
2. *Termination of Parent-Child Relationship and Adoption without Consent*: A hearing on eligibility for adoption without consent is not a termination proceeding, and not due the higher standard of evidence of ICWA. However, a hearing on the petition for adoption is a proceeding which may result in the termination of the parent-child relationship, and a proceeding in which court may grant a final decree of adoption

therefore, “evidence relative to matters included in subsection (f) of Section 1912 (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) must be proven ‘beyond a reasonable doubt’ in order to support a determination that parental rights should be terminated, including the testimony of an expert witness.” In re Adoption of G.D.J., 2011 OK 77, ¶¶35,36, 261 P.3d 1159; See also, In the Matter of the Adoption of B.T.S., 371 P.3d 1145, 2016 OK CIV APP 21 (clear and convincing standard applicable in determination of eligibility to adopt without consent)

- 3. Oklahoma Juvenile Jury Instruction No. 5.2: The jury instruction recognizes dual burdens of proof for termination of parental rights proceedings in an ICWA case: “The State has the burden of proving beyond a reasonable doubt that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. The State has the burden of proving by clear and convincing evidence all of the other requirements for the termination of parental rights.”*

IX. Make a Record/Determination as to Qualified Expert Witness (25 U.S.C. §1912(e) & (f); 25 C.F.R §23.122)

- A. The Qualified Expert Witness (QEW) must be qualified to testify regarding child’s continued custody by the parent or Indian custodian likely to result in serious emotional or physical damage to child, and qualified to testify as the prevailing social and cultural standards of the Indian child’s tribe.**

The QEW:

1. May not be the State DHS former or current worker regularly associated with the child;
2. However, the Tribe may designate a representative to speak for the Tribe, and often this will be the Tribal child welfare worker assigned to the child.

B. Certain determinations either under ICWA or OICWA require testimony of a QEW. These include proceedings concerning:

1. Emergency Removal:

- a. Determine if the continued custody of the child by the parent or Indian custodian is likely to cause serious emotional or physical damage to the child.
- b. In Oklahoma, this must be shown by clear and convincing evidence, and requires testimony of at least one qualified expert witness.

2. Foster Care Placement and Termination of Parental Rights:

- a. Must make the determination that the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
- b. Must be a causal relationship between the conditions in the home and the likelihood that continued custody will result in the damage to the particular Indian child who is subject of the proceeding.

C. Who may serve as a QEW?

1. 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;
2. Should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe;
3. Tribe may designate a person as qualified to testify to the prevailing social and cultural standards;
4. The court or any party can request assistance from BIA or the Tribe in locating a qualified expert witness;

NOTE: Oklahoma case law supports that ICWA does not require the QEW testimony be the sole basis for the court finding the §1912 requirement that continued custody will likely result in serious emotional or physical damage; ICWA simply requires that the testimony support that conclusion. Additional information on QEW is provided in section XV below.

- D. Oklahoma Case Law: There is Oklahoma case law from 2018 going to when a witness met and did not meet the status of qualified expert witness in termination proceedings.
1. In the matter of I.W., 419 P.3d 362; 2018 OK CIV APP 6 (ICWA §1912 evidentiary requirement not met; while the QEW could speak to the social and cultural standards of the Indian Child's tribe, did not show continued custody was likely to result in serious emotional or physical damage to each particular child; reversed termination of parental rights).
 2. In the matter of V.D., 431 P.3d 381, 2018 OK CIV APP 72 (ICWA §1912 evidentiary requirement met; the two QEW's were able to speak to the social and cultural standards of the Indian Child's Tribe, and stated specific reasons why continued custody would result in serious emotional or physical harm; upheld termination of parental rights).

X. If a placement is voluntary, make a determination/record:
(25 U.S.C. § 1913; 25 C.F.R §23.124)

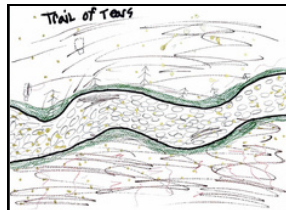
- A. Have participants state on the record whether the child is an Indian child or whether there is reason to believe the child is an Indian child.
1. If reason to believe, ensure the party seeking placement has taken all reasonable steps to verify the child's status.

2. Ask if the Tribe has been contacted to verify the child's status.
3. If a parent requests anonymity, relevant documents and information must be kept confidential by all parties, including by the Tribe.
4. Make a record as to ensuring the placement for the child complies with the applicable placement preferences.

B. Consent by Indian parent or custodian: (25 U.S.C. §1913(b)-(c); 25 C.F.R §§23.125-23.126, 23.127-23.128)

1. Make a record that consent was not given prior to, or within ten days after, the birth of an Indian child. Otherwise, the consent is not valid.
2. Make a record that the court is a court of competent jurisdiction.
3. Make a record that the voluntary consent to foster care placement or termination of parental rights is executed in writing and recorded before a judge of the court with competent jurisdiction.
4. Before accepting the consent, explain to the parent or Indian custodian:
 - a. The terms and consequences of the consent in detail;
 - b. Limitations that apply to the proceeding for which consent is being given.
5. State conditions for withdrawal of consent:
 - a. For consent to foster-care placement, the parent or Indian custodian may withdraw consent for any reason, at any time, and have the child returned;
 - b. For consent to termination of parental rights, the parent or Indian custodian may withdraw consent for any reason, at any time prior to the entry of the final decree of termination and have the child returned; or,
 - c. For consent to an adoptive placement, the parent or Indian custodian may withdraw consent for any reason, at any time prior to the entry of the final decree of adoption, and have the child returned.

6. Any conditions to the consent, must be clearly set out in the written consent.
7. A written consent for Foster Care should also contain:
 - a. The name and birthdate of the Indian child;
 - b. The name of the Indian child's Tribe and the Tribal enrollment; number for the parent and for the Indian Tribe, or some other indication of the child's membership;
 - c. The name, address, and other identifying information of the consenting parent or Indian custodian;
 - d. The name and address of the person or entity, if any, who arranged the placement, and,
 - e. The name and address of the prospective foster parent, if known.
8. Make sure the consent is accompanied by a judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian:
 - a. Certify that the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language the parent or Indian custodian understand.
9. If confidentiality is indicated or requested, the proceeding involving consent should be closed to the public and must be made before a court of competent jurisdiction.



Trail of Tears by William, age 9 (Choctaw Nation)

XI. Collateral attack after final adoption decree: (25 U.S.C. §1913(d))

- A. A parent may petition to vacate the final decree.
- B. In general, a parent may also withdraw consent on the grounds consent was obtained by fraud or duress.
 - 1. Make a record of court finding as to consent obtained through fraud or duress; and,
 - 2. If finding of fraud or duress, then return the child to the parent.
- C. A final adoption for at least two years may not be invalidated under this provision of ICWA unless otherwise allowed by state law.

XII. Review and Make a record of Placement Preferences: (25 U.S.C. §1915; 10 O.S. 40.6)

- A. Placement preferences apply in all foster, preadoptive and adoptive placements.
 - 1. Diligent search for preferred placements should be conducted. (BIA Guidelines for Implementing the Indian Child Welfare Act at H.3; December 2016)
 - 2. The prevailing social and cultural standards of the Indian community apply to placement. (25 U.S.C. §1915(d))
- B. Oklahoma ICWA reinforces federal placements and requires the placing agency or person seeking placement to utilize to the maximum extent possible the services of the Tribe to secure placement consistent with the preferences. (10 O.S. §40.6)

- C. Identifying a home that meets the placement preferences of the Tribe is one of the quickest and easiest way to avoid later case delay.
1. As available, first ask the Indian Child's Tribe if they have an order of preference for the placement preferences established by resolution, codification or public act of the Tribe. (25 U.S.C. §1915(c); 25 C.F.R. § 23.130(b) & 23.131(c))
- D. Placement according to the Preferences must be made unless Good Cause to deviate from placement preferences exists. (See below for more information)
1. Parental request (if ICWA options have been reviewed) or child request.
- E. For Foster Care or Pre-adoptive Placement: (25 U.S.C. §1915; 25 C.F.R. §§ 23.129–23.131)
1. Child must be placed in least restrictive setting that:
 - a. Most approximates a family, taking into consideration sibling attachment;
 - b. Meets the Indian child's special needs; and,
 - c. Is in reasonable proximity to the Indian child's home, extended family or siblings; and,
 2. Unless the child's Tribe has established a different placement preference, the child must be placed in accord with the following preferences in descending order:
 - a. A member of the Indian child's extended family;
 - b. A foster home that is licensed, approved, or specified by the Indian child's Tribe;
 - c. An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
 - d. An institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

F. For Adoptive Placement: (25 U.S.C. §1915; 25 C.F.R. §§23.129, 23.131)

1. Generally, the preferences for an adoptive placement are:

- a. Member of the Indian child's extended family;
- b. Other members of the Indian child's Tribe; or,
- c. Other Indian families.

2. Where appropriate, may consider the Indian child or the child's parents' preferences. (25 U.S.C. §1915(a); 25 C.F.R. §23.130)

3. For information on Notice to be given of a change in the adopted Indian child's status, see 25 C.F.R. §23.139.

XIII. Make a Determination if Good Cause to Deviate from Placement Preferences exists: (25 U.S.C. §1915(a) & (b); 25 C.F.R. §23.132)

A. *Good cause to deviate from placement preferences exists/may exist when:*

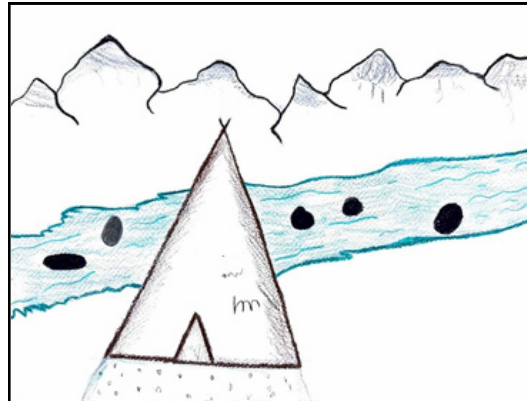
1. Parental request (if ICWA options have been reviewed) or child request deviation from placement preference;
2. Sibling attachment;
3. Extraordinary physical, mental, or emotional needs of child;
4. No preferred placement available;
5. No deviation based solely on ordinary bonding in non-preferred placement

B. Party asserting good cause must state orally on record or provide in writing to all parties and the court. (25 C.F.R. §23.132(a))

C. Party seeking departure has burden of proving by clear & convincing evidence. (25 C.F.R. §23.132(b)) See, In the Matter of M.K.T., 368 P.3d 771, 2016 OK 4 (Clear and convincing evidentiary standard applied to placement determination).

D. Court's determination of good cause must be on the record & should be based on one or more of the following: (25 C.F.R. §23.132(c))

1. Request of one or both Indian child's parents after reviewing complying placements;
2. Request of the child if they are able to understand the decision;
3. Presence of sibling attachment extraordinary physical, mental or emotional needs of the child;
4. Unavailability of suitable placement after court determines a diligent search has been made;
5. Placement may not depart from the preferences based only on: (25 C.F.R. §23.132 (d)-(e))



Choctaw Living by Kaselyn (Choctaw Nation)

XIV. Additional Considerations

- A. **Pretrial Requirements:** Additional information on Pre-trial Requirements can be found at 25 C.F.R §§23.17–23.119.
- B. **Dismissal of an Action:** Additional information on when a state court must dismiss an action can be found at 25 C.F.R. §23.110.
- C. **Examination of Records:** Each party to a foster care placement or termination of parental rights has the right to all reports or other documents filed with the court upon which any decision with respect to such action may be based. (25 U.S.C §1913(c); 25 C.F.R. §23.134)
- D. **Full faith and Credit:** Full faith and credit is due to the public acts, records, and judicial proceedings of any Indian Tribe applicable to Indian child custody proceedings to same extent as given full faith and credit to the public acts, records, and judicial proceedings of other entity. (25 U.S.C. §1912(d))
- E. **Appointment of Counsel:** Where the court determines indigence, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. When not mandated by state law, counsel for a child may be appointed on the grounds of best interest of the child. Where state law does not allow appointment of counsel in such proceedings, the ICWA establishes a process for payment via the Secretary of the Bureau of Indian Affairs. (25 U.S.C. §1913(b)).

F. Invalidation of certain action by filing of Petition: (25 U.S.C. §1914; 25 C.F.R. §23.137)

1. A Petition to Invalidate any action in violation of 25 U.S.C. §§1911–1913 may be filed;
2. In any court of competent jurisdiction;
3. By either:
 - a. Any Indian child that is the subject of any action for foster care placement or termination;
 - b. Any parent or Indian custodian that had the child removed; or,
 - c. The Indian Child's tribe.

G. Post-Trial Rights and Responsibilities: Additional information on Post-Tribal Rights and Responsibilities can be found at 25 C.F.R. §§23.136 –23.139.

H. Record Keeping: Additional Information on record keeping requirements can be found at 25 C.F.R. §§23.140–23.142.

I. Opportunity to be Heard: Under State or Federal law, the acts of one parent should not automatically deny the other parent their opportunity to be heard. See generally, In the matter of J.C., 417 P.3d 1218, 2018 OK CIV APP 32 (Stipulation to allegations of a child as deprived by the mother does not deny the Father his opportunity to be heard on why the Indian child would not be deprived-under state and ICWA standards – if allowed to remain in the Father's Custody: Father raised Stanley v. Illinois, 405 U.S. 645 (1972); Oklahoma appeal court cited Matthews v. Eldridge, 424 U.S. 319 (1976), reversing trial court for its denial of Father's request for non-jury trial on State's petition to adjudicate child deprived.)

J. **Tribal Courts and Tribal Law:** Tribes have inherent jurisdiction over and regularly adjudicate cases involving their member children, including child in need of aid cases. In these cases, Tribes apply their own individual Tribal law which is customary, traditional, and may be written or unwritten. Many Tribes have extensive codes, including children's codes governing the disposition of children's cases. Some Tribes have incorporated into their codes provisions of other laws and authorities such as ICWA, the Indian Civil Rights Act, and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP or the "Declaration"). As highlighted in section (D) above, Section 1911(d) of ICWA requires state courts must give public acts, records, and judicial proceedings of any Indian Tribes full faith and credit as they would orders from other states.

K. **International Sources:** In 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples, which has been endorsed by approximately 150 nations. United Nations Declaration on the Rights of Indigenous Peoples - G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 2007). In 2010, the President of the United States affirmed the United States (was) lending its support to this declaration.

Resource: [The Rights of Indigenous Peoples \(Jan. 12, 2011\)](https://2009-2017.state.gov/s/srgia/154553.htm), available at <https://2009-2017.state.gov/s/srgia/154553.htm>.

In 1989, the United Nations General Assembly adopted the Convention on the Rights of the Child ("CRC" or the "Convention"). 1577 U.N.T.S 3 (entered into force Sept. 2, 1990) No provision of either instrument directly addresses the procedures required by ICWA; however, both instruments generally address the rights of Indigenous peoples and their children. Declaration at arts. 3, 7.2, 14.2-14.3, 17.2, 21.2, 22.1-22.2; Convention at art. 30.

L. References: The Bureau of Indian Affairs website on ICWA contains the ICWA regulations, the BIA Guidelines sample forms, Frequently Asked Questions, Memorandum of Understanding's Tribal service agents, online training modules and other useful information. See [Bureau of Indian Affairs](#)

XV. Practice Pointer: Qualified Expert Witness
(81 FR 38829-38832 (June 14, 2016))

A. BIA Qualified Expert Witness (QEW) Guidelines

1. **Qualifications:** Per Congress, the QEW is meant to apply to expertise beyond normal social worker qualifications.
2. **Specific tribal knowledge:** The QEW should have specific knowledge of the prevailing social and cultural standards of the Indian child's Tribe, but is not required to be a citizen of the child's Tribe.
 - a. The court's determinations are NOT to be based on "a white, middle-class standard" which, in many cases, forecloses placement with (an) Indian family.
 - b. Relevant cultural information must be provided to the court that is contextualized within the social and cultural standards of the Indian child's Tribe.
 - c. The Indian child's Tribe may designate a person as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe.
3. **Not a past or present state social worker assigned to case:** The QEW may NOT be the past or present social worker regularly assigned to the Indian child. This is because Congress wanted to ensure that state courts hear from experts (other than the state social workers who are recommending the action) before placing an Indian child in foster care or ordering the TPR.
4. **Familiarity with the child:** The QEW should be someone familiar with the Indian child who is the subject of the proceeding. If the QEW contacts the parents, observes parent/child interactions and meets with extended family members in the child's life, the expert will be able to provide a more complete picture to the court.

5. Exceptions to QEW knowledge specific to Indian child's tribe occurs when such cultural knowledge is plainly irrelevant to the particular circumstances at issue in the proceeding. For example:
 - a. An expert regarding sexual abuse of children may not need to know about specific Tribal social and cultural standards in order to testify as a QEW regarding whether return of a child to a parent who has a history of sexually abusing the child is likely to result in serious emotional or physical damage to the child.
6. Separate QEW's may be used to testify regarding potential emotional or physical damage to the child AND the prevailing social and cultural standards of the Tribe. The court may accept expert testimony from multiple QEW's.



Native Landscape by Tatum (Choctaw Nation)

Oklahoma Children's Court Improvement Program ICWA Taskforce



Court Improvement Program



INDIAN CHILD WELFARE ACT FAQ'S

Frequently Asked Questions for Courts

These FAQ's are a quick reference and not comprehensive. ICWA and OICWA citations are included for further exploration

PURPOSE

Those involved in an Indian Child Welfare Act (ICWA) case must possess a heightened knowledge of the requirements of Federal and State laws that guide their work to ensure that remedial services and rehabilitative programs are offered and provided to prevent the breakup of the families who appear in state courts. Many questions arise when presented with an ICWA case that requires answers to ensure compliance with these laws.

Through the work of the Oklahoma ICWA Partnership Grant, interviews were conducted of both Tribal and state judiciary court partners and personnel, Department of Human Services Child Welfare, Tribal Child Welfare, and others to ascertain the issues and concerns in Oklahoma with the application and requirements of the Indian Child Welfare Act.

This guide was developed as a companion to the *Oklahoma Bench Guide to Indian Child Welfare*. It is our hope that this guide of Frequently Asked Questions will assist courts with keeping children connected to their families, Tribal community, and culture.

The guide emphasizes the requirement of Active Efforts, which involves diligent steps by child welfare agencies and courts to prevent the breakup of Indian families. Additionally, it addresses the cultural perspectives underlying ICWA, recognizing the importance of culturally responsive services. Placement preferences are also discussed, guiding judges in determining suitable placements that meet the child's needs while preserving their Tribal identity. Lastly, the guide clarifies the role of Qualified Expert Witness testimony, highlighting their expertise in Indian child welfare issues and cultural practices.

Active Efforts

The Indian Child Welfare Act is labeled the “Gold Standard” in protecting the rights of Indian children, their families and Tribal Nations. In court determinations, Active Efforts are key to preventing removal or reunifying families. Per BIA, Active Efforts are affirmative, active, thorough, and timely efforts intended primarily to maintain and reunite an Indian child with his or her family. To the maximum extent possible, Active Efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child’s tribe.

Q1 Are Tribes required to prove Active Efforts in State courts?

In a child custody proceeding, the burden of meeting Active Efforts falls upon the state agency or petitioning party to assist the parents or Indian custodian through the steps of a case plan and assessing or developing resources necessary to satisfy the case plan. Active Efforts are tailored to the facts and circumstances that are necessary to correct the conditions of removal of the case while considering prevailing social and cultural conditions for the family including the Indian child’s Tribe. Families are best served when the child’s Tribe is included and has the opportunity to participate in the support of the family and culturally appropriate services, diligent search, placement decisions, visitation, monitoring the case, and more.

Q2 How should Active Efforts be provided?

Active Efforts start with preventing removal when possible, placing with close family members, initiating a safety plan, and engaging with service providers. Should removal be necessary, Active Efforts must consider the family and understanding their circumstances which led to the child custody proceeding. The state or petitioning party is to conduct a thorough assessment of the circumstances which led to the child custody proceeding with a cultural lens (social and cultural standards and child-rearing practice) and identifying services within the community. Working in conjunction with the child's Tribe or representative is ideal to identify strategies which meet the family's specific strengths and needs in providing support to meet Active Efforts for rehabilitation and reunification. Key areas not inclusive include, seeking culturally appropriate services, family visitation and ongoing connection in natural settings, customary spiritual related practices (eg. ceremonies, rites of passage, etc.) which include family and/or extended family, or engaging in Tribal cultural activities, web-based information, classes, services, etc.

Q3 When should a finding of Active Efforts be made?

Active Efforts should be determined and reviewed at each removal and review hearing listed within the order, attached to the progress report or by affidavit. Every time an Active Efforts finding is determined, it would be best practice to have the Tribe's input if Active Efforts addresses the needs of the family. Active Efforts should be documented at each hearing. According to OKDHS policy (OAC 340:75-6 and OAC 340:75-19-18) state workers shall contact Tribal counterparts every 30 days at a minimum.

Q4 What happens when there is a finding that Active Efforts have not been provided?

If there is a finding that Active Efforts have not been provided or are not sufficient to meet the needs of the family, the court must then decide what changes need to be made in order to ensure that the Active Efforts are providing the family with remedial services in order to reunify the family. For best practice that incorporates culturally appropriate family preservation strategies, the court should include the Tribe's input on what Active Efforts are needed to better assist the family. Once the court determines what Active Efforts are needed, the state or petitioning party must comply in providing those Active Efforts to the family.

Q5 What happens when there is a judicial finding that Active Efforts have been proven unsuccessful?

A finding that Active Efforts have been provided to the family but have been proven unsuccessful must be made in order to terminate the rights of the respective parent(s). The state or petitioning party must prove that Active Efforts are unsuccessful at the termination trial. Once the court determines that Active Efforts were provided to the family and that the Active Efforts have been proven unsuccessful, the court may terminate the parental rights of the respective parent(s) and adopt a permanency plan for the child(ren) in accordance with the placement preferences of 25 U.S.C. § 1915.

Cultural Perspectives underlying ICWA

When Tribal children are removed from their families and Tribal communities and placed in non-ICWA placements, the separation from their core values, beliefs, and traditions creates additional trauma. ICWA was enacted to promote stability and security of Tribes and families through placement. When Tribal or relative placement is not possible, culturally responsive services provide grounding and stability for the child, while establishing and supporting ongoing connections with their kin, tribal communities, and preservation of Tribal culture.

Q1 Are culturally responsive services required for meeting best interests or standards of evidence for the Indian Child? (25 U.S.C. § 1912 (e) & (f); 25 C.F.R. § 121)

Providing culturally responsive services is important in every area of a family's case to understand the causal relationship of the conditions in the home and serious emotional or physical damage to the child. The services can support a standard of evidence for continued custody by a parent or Indian custodian through the consideration of the prevailing social and cultural standards of the child's Tribe.

Q2 What do culturally responsive services look like?

Culturally responsive services encompass various elements that seamlessly integrate cultural adaptation, trauma-informed approaches, engagement in promising practices, and support through practice-based evidence. These services prioritize the inclusion of Tribal-based practices and emphasize community engagement. To effectively address trauma and foster resilience, it is crucial to have trained treatment providers who possess a deep understanding and knowledge of indigenous practices, beliefs, traditions, and ceremonies. It is universally recognized that Tribes thrive through relational connections and a strong sense of community.

Q3 What is the benefit of culturally responsive services?

When families have a connection to a treatment provider who understands the impact of intergenerational trauma, colonization, cultural erosion, and assimilation, the family member is more likely to participate and find healing for themselves and their children. The culturally appropriate remedial services and rehabilitative programs address underlying causes to meet Active Efforts with better outcomes and greater chances of successful reunification. Engaging families through Active Efforts supports court testimony when services are consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe.

Q4 What Culturally Responsive Services are available?

Many Tribes have behavioral health programs and information for those programs can be found by contacting the child's Tribal behavioral health division, urban Indian Health Services, and community based Tribal services. Collaboration with the Tribal Child Welfare workers can assist in identifying culturally responsive services. When culturally responsive services are unavailable in the area, request treatment provider agencies seek training and staff development to best serve the Native population. Practice based evidence and cultural promising practices are available from various sources. In Oklahoma, a Tribal Resource Guide is available at <https://beaneighbor.ok.gov/s/> as well as Tribal Domestic Violence Programs at <https://oknaav.org/tribalprograms>

Placement of Tribal Children in State Custody

Court decisions on placement either preserve or disrupt a Tribal child's connection to their Tribal community, relatives, traditions, language, customs, and history. Tribes have historically taken care of their own and this is reflected in Tribal Adoption and Foster Care programs. Tribal foster care and adoptive home studies are usually conducted by Tribal Child Welfare staff who can apply a cultural lens to this process. Many times, Tribal Child Welfare staff may have specific knowledge of the families through the Tribal community.

Q1 Do ICWA placement preferences apply to all Tribes?

Yes. Tribes have the right to establish their own placement preferences by Tribal resolution according to 1915 (c) of the Indian Child Welfare Act (25 U.S.C. 1915; 10 O.S. 40.6). In Oklahoma, Tribes provide their specific order of Tribal placement preferences as an attachment to their Tribal State Agreement.

Q2 Do Tribes and State Child Welfare use the same foster and adoptive home study standards?

As Sovereign Nations, Tribal Child Welfare programs have the authority to develop and implement standards specific to their Tribe. Although there may be some differences in licensing standards of the state and individual Tribes, Tribal standards include safety requirements that meet or exceed those established in Title IV-E. Additionally, Tribes are also required to meet the requirements of the Native American Child Safety Act (NASCA) of 2017. NASCA requires Tribes to check for any criminal history in any Tribal jurisdiction in which potential Tribal foster or adoptive applicants have resided during a relevant time (Bureau of Indian Affairs best practice recommendation is a timeframe of the last 5 years).

Q3 How are decisions made about placement of Tribal children in Tribal foster or adoptive homes?

The best practice for placement of Tribal children in state custody is through joint decision making which will ensure compliance with the placement preferences within ICWA. OKDHS and ICW works together to diligently search for relatives of the child and assess suitability. If a relative is unavailable for placement of a child, then non-related foster homes are sought. If the child's Tribe does not have an available resource, foster homes from other Tribes should be sought prior to placing in a non-Indian home. It is preferable to place with a resource family who can keep the Tribal child as closely connected to his or her Tribe as possible.

To place a state custody child with a Tribally approved foster home, the Tribe must grant permission to OKDHS. It is not necessary for the Tribal foster home to also be approved as an OKDHS foster home. Tribes are also responsible for providing placement resources for Tribal custody children as they can only be placed in Tribally approved foster or adoptive homes. Ensuring that there is an adequate pool of Tribal foster homes for a Tribe's Tribal custody children can influence the availability of homes for OKDHS custody children.

Q4 What are possible reasons why Tribes are requesting a placement change of a child in State custody, even though there had been prior agreement by the Tribe for a "Good Cause to depart from the preferred placement"?

There may be several reasons why a child's Tribe may want to request a change in placement for a Tribal child in OKDHS custody. Some possible reasons may include:

- the identification of a relative who was not available earlier in the case
- a Tribal foster home becomes available
- a change in the case status, such as Termination of Parental Rights (TPR) in which consideration had been given to the proximity of the non-ICWA compliant placement to promote visitation when reunification was the goal
- the case plan goal changes to adoption and there is a Tribal adoptive placement available
- other individual situations and/or changes in case circumstances.

Consistent review and court rulings regarding the status of the placement can help in ensuring that Tribal children are placed in the most appropriate placement at the earliest opportunity to help mitigate concerns with separation and trauma. Both OKDHS and ICW should work together to transition any changes in placement to be the least disruptive for the child.

Q5 **What happens when a Tribal child’s case is transferred to Tribal court?**

When a deprived case involving a Tribal child is transferred into Tribal court, the Tribe is solely responsible for all case planning and decisions for the child including placement from the date of the transfer. Best practice includes joint planning between all partners (state court, Tribal court, ICW specialists, state child welfare specialists) prior to transfer to ensure there are no disruptions in placements, services, or resources for the Tribal child. Following the entry of an order of transfer, the court “should expeditiously provide the Tribal court with all records related to the proceeding, including, but not limited to, the pleadings and any court record.” 25 C.F.R. § 23.119. States and Tribes have legal agreements that may provide for foster care reimbursement and other services for the Tribal custody child when placed in a Tribally approved foster home.

NOTE: A case is not officially transferred until it has been formally accepted by the Tribal court.

Qualified Expert Witness:

The purpose of a Qualified Expert Witness (QEW) is to provide testimony in court determinations which are not bias and to ensure the testimony includes the prevailing social and cultural standards of the Indian child's Tribe and the continued custody by the parent or Indian custodian likely to result in serious emotional and physical damage to the child.

Q1 Who should the court allow to be a Qualified Expert Witness in the child's case?

Best practice is for the court to include a QEW designee from the child's member Tribe only. If the Tribe does not have a QEW designee, the court should work with the Tribe to identify someone within or recommended by the Tribe who knows the Tribe's history, Tribal roles and customs, services, values, protective and safety thresholds and child rearing practices according to prevailing social and cultural standards. The last option would be a qualified expert witness who has experience and cultural knowledge in working with Native American families and communities.

Q2 Who determines that the Tribal designee meets the requirements to be a Qualified Expert Witness?

Each individual Tribe qualifies their own QEW designee. In general, Oklahoma Tribal child welfare programs designate the ICW staff to serve as a QEW. Some Oklahoma Tribal child welfare programs have identified elders, laypersons, or others, who have knowledge of Tribal customs and child rearing practices including safety thresholds. Other Tribes may require their designee to attend specific training to gain knowledge. The best resource is to inquire from the child's Tribe as to the availability of a QEW.

To qualify an expert witness, the 2015 BIA Guidelines provide insight which is instructional but non-binding (80 F.R. 10146, 10157 D.4):

- a) A qualified expert witness should have specific knowledge of the Indian Tribe's culture and customs
- b) Persons with the following characteristics, in descending order, are presumed to meet the requirements for a qualified expert witness:
 - (1) A member of the Indian child's Tribe who is recognized by the Tribal community as knowledgeable in Tribal customs as they pertain to family organization and childrearing practices.
 - (2) A member of another Tribe who is recognized to be a qualified expert witness by the Indian child's Tribe based on their knowledge of the delivery of child and family services to Indians and the Indian child's Tribe.

(3) A layperson who is recognized by the Indian child's Tribe as having substantial experience in the delivery of child and family services to Indians, and knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's Tribe.

(4) A professional person having substantial knowledge and experience who can demonstrate knowledge of the prevailing social and cultural standards and childrearing practices within the Indian child's Tribe.

Q3 What is meant by expertise beyond normal social worker qualifications? (81 FR 38829-38831)

The following list was established as a guide to understand the intent of the QEW in meeting standards of evidence through their expert testimony. Per Congress, a QEW is meant to have expertise beyond normal social worker qualifications, which includes specific knowledge of the prevailing social and cultural standards of the Indian child's Tribe, but is not required to be a citizen of the child's Tribe.

- The court's determinations are NOT to be based on "a white, middle-class standard" which, in many cases, precludes placement with (an) Indian family.
- Relevant cultural information must be provided to the court that is contextualized within the social and cultural standards of the Indian child's Tribe.

- The Indian child's Tribe may designate a person as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe.
- The QEW may NOT be the past or present state social worker regularly assigned to the Indian child. This is because Congress wanted to ensure that state courts hear from experts (other than the state social workers who are recommending the action) before placing an Indian child in foster care or ordering the TPR.
- The QEW should be someone familiar with the Indian child who is the subject of the proceeding. If the QEW contacts the parents, observes parent/child interactions and meets with extended family members in the child's life, the expert will be able to provide a more complete picture to the court.
- Exceptions to QEW knowledge specific to Indian child's Tribe occurs when such cultural knowledge is plainly irrelevant to the circumstances at issue in the proceeding. For example: An expert regarding sexual abuse of children may not need to know about specific Tribal social and cultural standards to testify as a QEW regarding whether return of a child to a parent who has a history of sexually abusing the child is likely to result in serious emotional or physical damage to the child.
- Separate QEW's may be used to testify regarding potential emotional or physical damage to the child AND the prevailing social and cultural standards of the Tribe. The court may accept expert testimony from multiple QEW's.

Keeping the Sage Burning Film

The Oklahoma Indian Child Welfare Association and Oklahoma Human Services collaborated to create impactful ICWA training for Oklahoma foster parents.

The training includes a short film, *Keeping the Sage Burning*, which features Tribal child welfare workers who share about the importance of ICWA and cultural connections.

Filming took place on the Cherokee Nation Reservation. The production of this film was supported by the Oklahoma ICWA Partnership Grant.



Scan QR code to
watch
*Keeping the Sage
Burning.*

Key Principles of ICWA Courts

The National Council of Juvenile and Family Court Judges (NCJFCJ) identified five key principles of ICWA Courts:

- 1) Judicial Leadership
- 2) Tribal Engagement
- 3) ICWA Training
- 4) Gold Standard Practice
- 5) Data Collection

While each of these principles is evident in ICWA court practice, they are by no means limited to a specialty court. All courts should strive to practice these principles in order to fulfill the spirit and promise of ICWA for Tribal children and families.

All jurisdictions can improve their ICWA outcomes and serve American Indian/Alaskan Native families better by improving Tribal communication, organizing their hearings and collaborating with cultural humility, and providing culturally relevant services.

Resource: [What lessons can we learn from ICWA courts? \(link to pdf\)](#)



Shukvtti by Victoria, 6 months (Choctaw Nation)

Principles of the Indian Child Welfare Act as the “Gold Standard”

Principle 1: Children’s right to their families and communities

Principle 2: “Active efforts” to preserve and reunify families

Principle 3: Valuing inclusive and diverse cultural practices

Principle 4: Authentic engagement with Tribes



Live, Laugh, Love
by Joseph, age 12
(Choctaw Nation)

Resource: [How can child welfare systems apply the principles of the Indian Child Welfare Act as the “gold standard” for all children?](#) (link to Casey Family Programs pdf)



Thank you for your unwavering service and commitment to Oklahoma's Native American children. Your dedication to preserving cultural connections, supporting Tribal sovereignty, and strengthening partnerships is vital to upholding both the protections of the Indian Child Welfare Act and the rule of law. Together, we honor the spirit and intent of ICWA—protecting rights, preserving heritage, and building a stronger, more just future for generations to come.