Indian Child Welfare Act (ICWA) Checklist

When Does ICWA Apply?

- ☐ In a "child custody proceeding" defined as any action, other than an emergency proceeding, that may result in a foster care placement, termination of parental rights, pre-adoptive placement or adoptive placement as defined in 25 U.S.C. § 1903(1), 25 C.F.R. § 23.2, and Tex. Fam. Code § 152.102.
- ☐ Involving an "Indian child" defined as:
  - Unmarried, under the age of 18, and a member of an Indian Tribe; or
  - Unmarried, under the age of 18, eligible for membership in an Indian Tribe, and is the biological child of a member of a federally recognized Indian Tribe. 25 U.S.C. § 1903(4); 25 C.F.R. §23.2.

> **Note:** *Each Tribe determines eligibility criteria for membership or enrollment (not the court). If ICWA applies, please also refer to the NCJFCJ ICWA Checklists.*

Notice Requirements 25 U.S.C. § 1912(a); 25 C.F.R. § 23.11

- ☐ The child's parent, Indian custodian, and Tribe must be notified by registered mail or certified mail, return receipt requested, with copies to the appropriate Bureau of Indian Affairs (BIA) Regional Directors. Upon request of a party, the BIA will make a reasonable attempt to identify and locate the Tribe, parents, or Indian custodian.
- ☐ Finding on the record that timely notice was or was not provided as required.

> **Best Practice:** *If there is reason to believe that the child might be an Indian child, NOTIFY all of the above and make a finding on the record.*

Foster Care or Pre-adoptive Placement Preferences 25 U.S.C. § 1915(a)-(b); 25 C.F.R. §§ 23.129 - 23.132

- ☐ Child must be placed in the least restrictive setting that most approximates a family, taking into consideration sibling attachment; allows the Indian child's special needs (if any) to be met; and is in reasonable proximity to the Indian child's home, extended family, or siblings.
- ☐ Where the Tribe has not established a different order, preference for placement must be given in descending order to (1) extended family; (2) a foster home approved by the Tribe; (3) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (4) 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.
- ☐ The court must, where appropriate, also consider the preference of the Indian child or the Indian child's parent.
- ☐ If any party asserts that there is good cause not to follow the placement preferences, the reasons for that belief or assertion must be stated orally on the record or provided in writing to the parties and the court. The party seeking departure from the placement preferences should bear the burden of proving by clear and convincing evidence that there is "good cause" to depart from the placement preferences. A court's determination of good cause to depart from the placement preferences must be made on the record or in writing and should be based on one or more of the following considerations:
  1. The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;

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continued

1. The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;
2. The presence of a sibling attachment that can be maintained only through a particular placement; or
3. The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live.

Special Evidentiary Rules

☐ **Threshold for Removal of the Child** 25 U.S.C. § 1912(e)

- *Clear and convincing evidence* that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage. 25 C.F.R. § 23.121.
- Must include testimony of a "qualified expert witness" who is qualified to testify about 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 and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. 25 U.S.C. § 1912(e); 25 C.F.R. § 23.122.
- Finding of "*Active Efforts*" to prevent to prevent the breakup of the Indian family and that those efforts have been unsuccessful. 25 U.S.C. § 1912(d); 25 C.F.R. § 23.120.

☐ **Threshold for Termination of Parental Rights**

- *Evidence beyond a reasonable doubt* that custody of the child by the parent of Indian custodian is likely to result in serious emotional or physical damage to the child and a causal relationship between the particular conditions in the home and the likelihood of serious emotional or physical damage to the child as a result. 25 U.S.C. § 1912(f); 25 C.F.R. § 23.121(b-c).
- Supported by testimony of a "qualified expert witness." 25 U.S.C. § 1912(f); 25 C.F.R. § 23.122(b).
- Without a causal relationship identified, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child. 25 C.F.R. § 23.121(d).
- Finding that "*Active Efforts*" have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful. 25 U.S.C. § 1912(d); 25 C.F.R. § 23.120.

Best Practices for Active Efforts include: *(i) early contact and active engagement with the child's Tribe; (ii) higher level of engagement and support for parents providing services that are specific to the needs of the family; and (iii) commitment to the spirit of ICWA. Remember that active efforts must be documented in detail in the record.*