ADOPTION HEARING CHECKLIST FOR ICWA CASES

WHO SHOULD ALWAYS BE PRESENT AT THE UNCONTESTED ADOPTION HEARING:

- Judge;
- Adoptive parents;
- Assigned caseworker, if any;
- Tribal caseworker or representative;
- GAL/CASA or advocate for the child;[1]
- Court reporter or suitable technology; and
- The child.

WHO SHOULD ALWAYS BE PRESENT AT THE CONTESTED ADOPTION HEARING:

- Judge;
- Prospective adoptive parents;
- Assigned caseworker;
- Agency attorney;
- GAL/CASA or advocate for the child;
- Tribal representative and/or attorney;
- Parties contesting the adoption (including Indian custodian if there is one);
- Attorneys for all parties;
- Court reporter or suitable technology; and
- Security personnel.

WHO MAY ALSO BE NEEDED AT THE CONTESTED ADOPTION HEARING:

- The child;
- Interpreter;
- Judicial case management staff; and
- Other witnesses, including tribal elders, members of the child's extended family, and other tribal members.

KEY DECISIONS THE COURT MUST MAKE:

- Whether written notice was provided to the child's tribe by registered mail, return receipt requested, even if the child's tribe has not been a party to any prior proceedings related to the welfare of the child. 25 U.S.C. § 1912(a)

THE COURT'S WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW SHOULD:

- Determine whether the child is within the exclusive jurisdiction of a tribe because the child either resided or was domiciled on a reservation or was already a ward of a tribal court at the time that the child custody proceedings began, thereby depriving the state court of jurisdiction.
- Determine whether all the necessary consents to adoption have been provided, including the consent of the agency with the custody of the child, the consent of the child (if the child is old enough that consent is required under state law), and the consent of a parent or Indian custodian whose rights have not been terminated.
- Thoroughly describe the conditions and circumstances under which parental consent to adoption was obtained. When there has been no prior termination of parental rights, parental consent *must* be executed in writing in the presence of the judge and must be accompanied by the judge's certificate that the terms and consequences of the consent were fully explained in detail and that the parent or Indian custodian fully understood these terms. 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 adoption in English, or that it was interpreted into a language that the parent or Indian custodian understood. 25 U.S.C. § 1913(a)
- Certify that the consent to adoption was not given prior to or within ten days after the birth of the child, as the consent would not be valid under these circumstances. 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 adoption were explained. 25 U.S.C. § 1913(d)
- Determine whether the child is placed in an adoptive home where the adopting individual is a member of:
  - The child's extended family;
  - The child's tribe; or
  - Another Indian family.
- If the child is not placed in one of the placement preferences established by federal law, determine whether:
  - The agency made a diligent search to locate a placement that meets the preferences established within the ICWA. 44 Fed. Reg. at 67,595
  - There is good cause not to place the child according to the placement preferences. 25 U.S.C. § 1915(a)
  - The child's tribe established a different order of preference by resolution. 25 U.S.C. § 1915(c)
  - If the child's tribe established a different order of preference for placement, ascertain whether the placement is the least restrictive setting which most approximates a family and in which the child's special needs, if any, may be met. 25 U.S.C. § 1915(b) and (c)
  - The child's consenting parent evidenced a desire for anonymity, in which case the court shall give weight to that desire in applying the preferences. 25 U.S.C. § 1915(c)
- Determine that the child is doing well in the adoptive home and that the adoptive parents have made a clear and knowledgeable commitment to care for the child on a permanent basis.
- Determine that the adoptive parents fully understand the legal and financial consequences of adoption. Review with the parents and agency the need for and sufficiency of any adoption subsidy arrangements.
- Certify that the parent understands that he/she may withdraw consent to adoption for any reason prior to the entry of the final decree of termination or adoption, as the case may be, and that the child will be returned to the parent.
- At contested adoption hearings, determine whether the adoption should be granted. A contested adoption hearing must be conducted with procedural fairness, and should include notice to the parties and the child's

tribe even if the tribe has not yet become a party in previous stages of the child custody proceedings.

- Conclude the proceeding without undue delay, applying principles of case flow management.
- The court which enters the final decree of adoption must, upon application, inform the Indian child who has reached the age of 18 of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect the rights flowing from the individuals' tribal relationship. 25 U.S.C. § 1971

[1] The court should make every effort within its discretion to appoint an advocate for the child who is either a member of the child's tribe, or who is familiar with and respectful of the child's cultural needs.

TERMINATION OF PARENTAL RIGHTS HEARING CHECKLIST FOR ICWA CASES

WHO SHOULD ALWAYS BE PRESENT:

- Judge or judicial officer;
- Parents, including any putative father who has *acknowledged* paternity, even if he has not yet legally established paternity;
- Indian custodian, 25 U.S.C. § 1903(6), if there is one;
- Expert witness under 25 U.S.C. § 1912(e);
- Assigned caseworker;
- Caseworker or representative from child's Indian tribe;
- Agency attorney;
- Attorney(s) for parent(s);
- Attorney for child's Indian tribe;
- GAL/CASA or legal advocate for the child;[1]
- Court reporter; and
- Security personnel.

WHO MAY ALSO BE NEEDED:

- Interpreter;
- Domestic violence advocate for parent;
- Age-appropriate children whose testimony is required;
- Judicial case management staff;
- Law enforcement officers;
- Services providers; and
- Other witnesses, including tribal members, elders or the child's extended relatives. 25 U.S.C. § 1903(2)

KEY DECISIONS THE COURT MUST MAKE:

- Whether written notice was provided to the child's tribe by registered mail, return receipt requested. 25 U.S.C. § 1912(a)
- Whether written notice was provided to the parents or Indian custodian by registered mail, return receipt requested. 25 U.S.C. § 1912(a)
- Whether active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the family. 25 U.S.C. § 1912(d)
- Whether efforts were made to ensure that the parent understood the case plan if the parent does not read English.
- Whether the active efforts were unsuccessful. 25 U.S.C. § 1912(d)
- Whether there is evidence *beyond a reasonable doubt*, including testimony of an expert witness, 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. 25 U.S.C. § 1912(f)

THE COURT'S WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW SHOULD:

- Specify whether active and reasonable efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the family. 25 U.S.C. § 1912(d)
- Specify what evidence, including testimony of a qualified expert witness, supports the finding *beyond a reasonable doubt* that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(e)
- Specify any other state statutory grounds supporting termination of parental rights, if state law requires satisfaction of dual burden of proof.

THE COURT'S WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AT THE *UNCONTESTED* TERMINATION OF PARENTAL RIGHTS HEARING MUST *ALSO* INCLUDE:

If the parent was present and consented to termination of parental rights:

- Thoroughly describe the conditions and circumstances under which parental consent to termination of parental rights was obtained. Parental consent *must* be executed in writing in the presence of the judge and must be accompanied by the judge's certificate that the terms and consequences of the consent were fully explained in detail and that the parent or Indian custodian fully understood these terms. 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 termination of parental rights in English, or that it was interpreted into a language that the parent or Indian custodian understood. 25 U.S.C. § 1913(a)
- Certify that the consent to termination of parental rights was not given prior to or within ten days after the birth of the child, as the consent would not be valid under these circumstances. 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 termination of parental rights were explained. 25 U.S.C. § 1913(d)

If termination of parental rights was uncontested because the parent failed to appear, or appeared but neither contested nor consented to termination, adhere to the checklist for contested terminations listed above.

[1] The court should make every effort within its discretion to appoint an advocate for the child who is either a member of the child's tribe, or who is familiar with and respectful of the child's cultural needs.

PERMANENCY PLANNING HEARING CHECKLIST FOR ICWA CASES

WHO SHOULD ALWAYS BE PRESENT:

- Judge or judicial officer;
- Parents whose rights have not been terminated, including any putative father who has acknowledged paternity, even if he has no established paternity; 25 U.S.C. § 1903(9)
- Relatives with legal standing or other custodial adults as defined by 25 U.S.C. § 1903(6);
- Expert witness under 25 U.S.C. § 1912(e);
- Representative from child's tribe;
- Assigned caseworker;
- Attorney for child;
- Attorney for parents or Indian custodian;
- Attorney for child's tribe;
- CASA, GAL, or advocate for the child;[1]
- Court reporter; and
- Security personnel.

WHO MAY ALSO BE NEEDED:

- Interpreter;
- Age-appropriate children;
- Extended family members;
- Foster parents;
- Prospective adoptive parents;
- Judicial case management staff;
- Service providers; and
- Other witnesses, including tribal members or elders.

SUBMISSION OF REPORTS TO THE COURT:

Reports for a Permanency Planning Hearing should:

- Specify the relief being sought and address the issues that the judge needs to determine.
- Set forth a plan to carry out the placement decision.

When the petition or report requests that a child be returned home on a date certain, it should set forth:

- How the conditions or circumstances leading to the removal of the child have been corrected.
- A description of actions taken by the parent(s) or Indian custodian to correct the identified problems.
- A description of the active efforts made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, including efforts made by the tribe, an Indian organization, or any other agency or organization.
- The frequency of recent visitation and its impact on the child.
- A plan for the child's safe return home and follow-up supervision after family reunification.

When the petition or report requests termination of parental rights, it should set forth:

- Facts and circumstances supporting the grounds for termination;
- A description of the active efforts made to provide remedial services and rehabilitative programs designed to prevent the breakup of the family and an explanation why these efforts were unsuccessful.
- A description of the active efforts made to coordinate with the child's tribe or an Indian organization in assisting the Indian parent or custodian with services needed to avoid termination of parental rights and an explanation why these efforts were unsuccessful.
- An explanation of why the child cannot be protected from the identified problems in the home.
- A summary of the agency's understanding of the tribe's position regarding the permanency plan, including an attachment of any correspondence or supporting documentation sent by the tribe to the agency.
- An explanation of the active efforts made to contact the child's tribe, extended family, and other local Indian organizations for assistance in identifying and contacting extended family and other tribal members or Indian families about providing an appropriate placement for the child.
- If the child is not placed with an extended family member, another tribal member, or another Indian family, an explanation of why the child cannot be moved to a placement that meets the preferences established within the ICWA. 25 U.S.C. § 1915(a) and (b)
- A description of arrangements made by the agency to ensure visitation with extended family, and of all efforts made to support the child's cultural connections.
- A permanency plan for the child.

When another planned permanent living arrangement is proposed, the report should set forth:

- Facts and circumstances refuting the grounds for termination of parental rights and showing that although the child cannot be placed with parents, termination is not in the best interests of the child.
- A description of why the planned permanent living arrangement is in the best interests of the child.
- An explanation of the active efforts made to contact the child's tribe, extended family, and other local Indian organizations for assistance in identifying and contacting extended family and other tribal members or Indian families to identify a culturally appropriate placement for the child.
- If the child is not placed with an extended family member, another tribal member, or another Indian family, an explanation of why the child cannot be moved to a placement that meets the preferences established within the ICWA. 25 U.S.C. § 1915(a) and (b)
- A description of arrangements made by the agency to

ensure visitation with extended family, or, if there is no extended family, with other tribal members, to support the child's cultural connections.
- A summary of the agency's understanding of the tribe's position regarding the permanency plan, including an attachment of any correspondence or supporting documentation sent by the tribe to the agency.
- A plan to ensure the stability of the planned permanent living arrangement.

AFFIDAVIT DOCUMENTING ACTIVE EFFORTS:
When the agency recommends a permanency plan, an affidavit documenting active efforts made must be submitted. The following are some of the requisite elements of the affidavit:
- A description of the active efforts made to reunify the family since the last disposition or review hearing and, if those efforts were not successful, an explanation why. 25 U.S.C. § 1912(d)
- A description of the efforts made to coordinate with the child's tribe or any Indian organization in assisting the Indian parent or Indian custodian with services needed to avoid the need for placement, and an explanation why these services were unsuccessful.
- An explanation of why the child cannot be protected from serious emotional or physical damage if the child remains in the home even if services are provided to the child and family. 25 U.S.C. § 1912(e)
- An explanation of the diligent efforts made to contact the child's extended family about providing a placement for the child, or, if family members are not known, diligent efforts made to contact the child's tribe and other local Indian organizations for assistance in identifying and contacting extended family, other tribal members, or Indian families for placement.
- Efforts made by agency to ensure child's visitation with extended family, or, if none is available, with other tribal members, to ensure the child's ongoing participation in his/her culture.
- Efforts made by agency to coordinate with the child's tribe and family to a make arrangements for child to attend significant cultural and important familial events.

KEY DECISIONS THE COURT SHOULD MAKE:
- Can the child be safely returned home on a specific date?
- Whether active efforts were made to provide remedial services and rehabilitative programs to prevent the breakup of the family?
- If the child cannot be safely returned home, is there a placement option with a member of the child's family, as defined by Indian custom?
- If placement can not be found within the child's family, can placement be found with a member of the child's tribe?
- Will the child be legally freed for adoption?

THE COURT'S WRITTEN FINDING OF FACT AND CONCLUSIONS OF LAW SHOULD:
- Indicate whether the agency has identified the child's tribe.
- Specify whether the agency sent proper notice of the hearing and a copy of the petition and advice of rights to the parent(s), Indian custodian (if any), and child's tribe by registered mail, return receipt. 25 U.S.C. § 1912(a)
- Specify whether the tribe has been afforded a full opportunity to participate in the proceedings and, if so, whether the agency provided the child's tribe with copies of the petition, reports, and information concerning the child. 25 U.S.C. § 1911(c and d) and § 1912(a)
- Set forth findings as to why the child is in need of either continued placement outside the parent's home or continued supervision, articulating the *clear and convincing evidence* that continued custody of the child by the parent or Indian custodian would likely result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(e)
- Set forth detailed findings of fact and conclusions of law as to whether active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and eliminate the need for placement of the child outside the home of the parent or Indian custodian and whether the efforts were successful. 25 U.S.C. § 1912(d)
- Set forth detailed findings as to whether the agency has made an ongoing, diligent search to locate extended family, a tribal member, or other Indian family for placement if the child is not already within a preference placement. 25 U.S.C. § 1915(b)
- Be written in easily understandable language that allows the parent(s) or Indian custodian to fully understand what action they must take to have the child returned to their care (interpreter should be provided for parent or Indian custodian whose first language is not English).
- Set forth the court's determination of permanency and provide documentation for the plan to return home, proceed to termination of parental rights, or plan another permanent living arrangement.

[1] The court should make every effort within its discretion to appoint an advocate for the child who is either a member of the child's tribe, or who is familiar with and respectful of the child's cultural needs.

REVIEW HEARING CHECKLIST FOR ICWA CASES

WHO SHOULD ALWAYS BE PRESENT:

- Judge or judicial officer;
- Parents whose rights have not been terminated, including any putative father who has *acknowledged* paternity, even if he has not yet legally established paternity;
- Indian custodian, 25 U.S.C. § 1903(6), or other custodial adults;
- Extended relatives, as defined by child's tribe, 25 U.S.C. § 1903(2), or other tribal members or Indian families who may serve as a placement for the child;
- Foster parents;
- Assigned caseworker;
- Tribal caseworker or representative;
- Agency attorney;
- Attorney(s) for parent(s);
- Attorney for child's Indian tribe;
- GAL/CASA or legal advocate for the child;[1]
- Court reporter; and
- Security personnel.

WHO MAY ALSO BE NEEDED:

- Interpreter;
- Age-appropriate children;
- Adoptive parents;
- Domestic violence advocate for parent, if any;
- Judicial caseload management staff;
- Law enforcement officers;
- Services providers; and
- Other witnesses, including extended relatives, tribal members or elders.

SUBMISSION OF REPORTS TO THE COURT:

- A statement of family changes needed to correct the problems necessitating state intervention, with timetables for accomplishing them.
- A description of services to be provided to assist the family, specifically identifying those made available with assistance from the tribe or an Indian organization.
- A description of services to be provided to ensure the child's ongoing connection to his/her culture while placed outside of his/her family, including attendance at significant cultural events.
- A description of actions to be taken by the parents to correct the identified problems, and of the parents' compliance with the case plan thus far.

AFFIDAVIT DOCUMENTING ACTIVE EFFORTS:

When the agency recommends continued foster placement, an affidavit documenting active efforts made must be submitted. The following are some of the requisite elements of the affidavit:

- A description of the active efforts made to reunify the family since the last disposition or review hearing and, if those efforts were not successful, an explanation why. 25 U.S.C. § 1912(d)
- A description of the efforts made to coordinate with the child's tribe or any Indian organization in assisting the Indian parent or Indian custodian with services needed to avoid the need for placement, and an explanation why these services were unsuccessful.
- An explanation of why the child cannot be protected from serious emotional or physical harm if the child remains in the home even if services are provided to the child and family. 25 U.S.C. § 1912(e)
- An explanation of the diligent efforts made to contact the child's extended family about providing a placement for the child, or, if family members are not known, diligent efforts made to contact the child's tribe and other local Indian organizations for assistance in identifying and contacting extended family, other tribal members, or Indian families for placement.
- Efforts made by agency to ensure child's visitation with extended family, or, if none is available, with other tribal members, to ensure the child's ongoing participation in his/her culture.
- Efforts made by agency to coordinate with the child's tribe and family to a make arrangements for child to attend significant cultural and important familial events.

KEY DECISIONS THE COURT MUST MAKE:

- Whether there is a need for continued placement of the child.
- Whether active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the family and, if so, whether the services were successful. 25 U.S.C. § 1912(d)
- Whether efforts were made to ensure that the parent understands the case plan if the parent does not read English.
- Whether the court-approved, long-term permanent plan for the child remains the best plan for the child.
- Whether the services set forth in the case plan and the responsibilities of the parties need to be clarified or modified due to the availability of additional information or changed circumstances.

- Whether the child is placed according to the placement preferences in the ICWA, and, if not, whether the child should not be moved into a preference placement. 25 U.S.C. § 1915(b)
- Whether the terms of visitation need to be modified.
- Whether any additional court orders need to be made to move the case toward successful completion.
- What time frame should be established for goals to achieve reunification or other permanent plan for each child.

THE COURT'S WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW SHOULD:

- Indicate whether the agency has identified the child's tribe.
- Specify whether the agency sent proper notice of the hearing and a copy of the petition and advice of rights to the parent(s), Indian custodian (if any), and child's tribe by registered mail, return receipt. 25 U.S.C. § 1912(a)
- Specify whether the tribe has been afforded a full opportunity to participate in the proceedings and, if so, whether the agency provided the child's tribe with copies of the petition, reports, and information concerning the child. 25 U.S.C. § 1911(c and d) and § 1912(a)
- Set forth findings as to why the child is in need of either continued placement outside the parent's home or continued supervision, articulating the *clear and convincing evidence* that continued custody of the child by the parent or Indian custodian would likely result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(e)
- Set forth findings as to whether family reunification and an end to court supervision continues to be the long-term case goal, and why.
- Set forth detailed findings of fact and conclusions of law as to whether the agency has made active efforts to provide remedial services and rehabilitative programs designed to eliminate the need for placement of the child outside the home of the parent or Indian custodian and whether the efforts were successful. 25 U.S.C. § 1912(d)
- Set forth detailed findings as to whether the agency has made ongoing, diligent search to locate extended family, a tribal member, or other Indian family for placement if the child is not already within a preference placement. 25 U.S.C. § 1915(b)
- Set forth orders for the agency to make additional efforts necessary to meet the needs of the family and move the case toward completion, including culturally relevant services that may be available with assistance from the tribe or local Indian/native organization.
- Be written in easily understandable language that allows the parent(s) or Indian custodian to fully understand what action they must take to have the child returned to their care (interpreter should be provided for parent or Indian custodian whose first language is not English).
- Approve proposed changes in the case plan and set forth any court-ordered modifications needed as a result of information presented at the review.
- Identify an expected date for final reunification or other permanent plan for the child.
- Where the state's case plan conflicts with or does not meet the requirements of the ICWA, disapprove or modify the agency's proposed case plan to conform to the requirements of the ICWA.
- Make any necessary orders to resolve the problems that are preventing reunification or the completion of another permanent plan for the child.
- Set date and time for next hearing, if needed.

[1] The court should make every effort within its discretion to appoint an advocate for the child who is either a member of the child's tribe, or who is familiar with and respectful of the child's cultural needs.

DISPOSITION HEARING CHECKLIST FOR ICWA CASES

WHO SHOULD ALWAYS BE PRESENT:

- Judge or judicial officer;
- Parents whose rights have not been terminated, including any putative father who has *acknowledged* paternity, even if he has not yet legally established paternity. 25 U.S.C. § 1903(9)
- Indian custodian, 25 U.S.C. § 1903(6), or other custodial adults;
- Extended relatives, as defined by child's tribe, 25 U.S.C. § 1903(2), or other tribal members or Indian families who may serve as a placement for the child;
- Assigned caseworker;
- Tribal caseworker or representative;
- Agency attorney;
- Attorney(s) for parent(s) or Indian custodian;
- Attorney for child's Indian tribe;
- GAL/CASA or advocate for the child;[1]
- Court reporter; and
- Security personnel.

WHO MAY ALSO BE NEEDED:

- Interpreter;
- Age-appropriate children;
- Adoptive parents;
- Domestic violence advocate for parent;
- Judicial caseload management staff;
- Law enforcement officers;
- Services providers; and
- Other witnesses, including tribal members, elders, or child's extended relatives.

SUBMISSION OF PREDISPOSITION REPORTS TO THE COURT SHOULD INCLUDE:

- A statement of family changes needed to correct the problems necessitating state intervention, with timetables for accomplishing them;
- A description of services to be provided to assist the family, including those that the tribe or an Indian organization may offer and make available;
- A description of services to be provided to ensure the child's ongoing connection to his/her culture, including attendance at significant cultural events, while placed outside of his/her family; and
- A description of actions to be taken by parent(s) or Indian custodian to correct the identified problems and any steps the parent or Indian custodian has taken thus far.

WHEN THE AGENCY RECOMMENDS FOSTER PLACEMENT, AN AFFIDAVIT DOCUMENTING ACTIVE EFFORTS SHOULD BE SUBMITTED. THE FOLLOWING ARE SOME KEY ELEMENTS OF THE AFFIDAVIT:

- A description of the active efforts made by the agency to provide remedial services and rehabilitative programs designed to prevent the breakup of the family and an explanation why these efforts were unsuccessful. 25 U.S.C. § 1912(d)
- A description of the efforts made to coordinate with the child's tribe or any Indian organization in assisting the Indian parent or Indian custodian with services needed to avoid the need for placement, and an explanation if the services were unsuccessful.
- An explanation of why the child cannot be protected from the identified problems in the home even if services are provided to the child and family.
- An explanation of the active efforts made to contact the child's tribe, extended family, and other local Indian organizations for assistance in identifying and contacting extended family and other tribal members or Indian families about providing an appropriate placement for the child.
- A description of arrangements made by the agency to ensure visitation with extended family, or, if there is no family in the area, with other tribal members, to support the child's cultural connections.
- A description of the agency's plan to coordinate with the child's tribe and family to identify significant cultural and important familial events and arrange for the child's attendance.

KEY DECISIONS THE COURT MUST MAKE:

- Does the agency's proposed case plan address the needs of the child and the parent(s) or Indian custodian?
- Is the parent able to read the proposed case plan and, if not, what efforts will be made to ensure that the parent fully understands the requirements of the plan?
- Is removal of the child necessary to prevent serious emotional or physical damage to the child? 25 U.S.C. § 1912(e)
- Where should the child be placed?

THE COURT'S WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW SHOULD:

- Determine the legal disposition of the case, including the custody of the child, based upon the statutory options provided under federal law, unless state law provides a higher degree of protection, 25 U.S.C. § 1921, or unless there is a governing state-tribal agreement.
- State the long-term plan for the child (e.g., maintenance of the child in the home of a parent or Indian custodian, reunification with a parent (or Indian custodian), guardianship or permanent placement with a relative or other tribal member or Indian family, or placement of child in a permanent adoptive home).
- Identify the active efforts that have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian child's family. 25 U.S.C. § 1912(d)
- Specify that there is *clear and convincing evidence* that continued custody of the child by the parent (or Indian custodian) would likely result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(e)
- Specify whether the child was placed within the placement preferences under the ICWA, 25 U.S.C. § 1915(b), and, if not, whether the child's tribe issued a resolution establishing a different order of preference, as long as the placement is the least restrictive setting appropriate to the particular needs of the child. 25 U.S.C. § 1915(c)
- Specify whether the agency relied upon the social and cultural standards of the Indian community in which the parent or extended family reside or with which the parent or extended family maintain social and cultural ties when the agency determined whether an individual is an appropriate placement for the child.
- If the child's tribe did not issue a resolution indicating a different order of preference for the placement of the child, specify the reasons why there is good cause to deviate from the placement preferences. 25 U.S.C. § 1915(b)
- If there is not good cause to deviate from the placement preferences, and there is no tribal resolution re-ordering the placement preferences, order the agency to move the child to a home that complies with the placement preferences. 25 U.S.C. § 1915(b)
- If placement or services are ordered that were not agreed upon by the parties, specify the evidence or legal basis upon which the order is made.
- If applicable, specify why continuation of the child in the home would be contrary to the child's welfare.
- If the state's case plan conflicts with or does not meet the requirements of the ICWA, disapprove or modify the agency's proposed case plan.

[1] The court should make every effort within its discretion to appoint an advocate for the child who is either a member of the child's tribe, or who is familiar with and respectful of the child's cultural needs.

ADJUDICATION HEARING CHECKLIST FOR ICWA CASES

WHO SHOULD ALWAYS BE PRESENT:

- Judge or judicial officer;
- Parents whose rights have not been terminated, including any putative father who has *acknowledged* paternity, even if he has not legally established paternity; 25 U.S.C. § 1903(9)
- Indian custodian or other custodial adults; 25 U.S.C. § 1903(6)
- Extended relatives, as defined by child's tribe; 25 U.S.C. § 1903(2)
- Expert witness under 25 U.S.C. § 1912(e);
- Assigned caseworker;
- Tribal caseworker or representative;
- Agency attorney;
- Attorney for parents or Indian custodian;
- Attorney for child's tribe;
- GAL/CASA or advocate for the child;[1]
- Court reporter; and
- Security personnel.

WHO MAY ALSO BE NEEDED:

- Interpreter;
- Age-appropriate children;
- Adoptive parents;
- Domestic violence advocate for parent;
- Judicial caseload management staff;
- Law enforcement officers;
- Services providers; and
- Other witnesses, including tribal members, elders, or child's extended relatives.

KEY DECISIONS THE COURT SHOULD MAKE:

- Whether child is an Indian child under the ICWA. 25 U.S.C. § 1903(4)
- Whether state court lacks jurisdiction because child is already a ward of a tribal court. 25 U.S.C. § 1911(a)
- Which allegations of the petition have been proved or admitted.
- Whether there is a legal basis for continued court and agency intervention.
- Whether the agency made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the family. If so, were these efforts successful? 25 U.S.C. § 1912(d)
- Whether parent is able to read English.

ADDITIONAL DECISIONS:

If the disposition hearing will not occur within a short time after the adjudication hearing, the judge will need to make temporary decisions at the conclusion of the adjudication, such as:

- Determine where the child is to be placed prior to disposition hearing.
- Order further testing or evaluation of the child, parent(s), or Indian custodian in preparation for the disposition hearing and ensure that all assessments or evaluations are culturally appropriate.
- Make sure the agency is, in preparation for disposition, making prompt and diligent efforts to identify and evaluate extended family or, if no family member is available, other tribal members or other Indian families, as caretaker.
- Order the alleged perpetrator to stay out of the family home and have no contacts with the child.
- Direct the agency to continue its efforts to notify non-custodial parents, including unwed fathers whose paternity has been acknowledged or established. 25 U.S.C. § 1903(9)
- Set terms for visitation, support, and other intra-family communication including parent-child and sibling visits when the child is in foster care prior to disposition.

THE COURT'S WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW MUST:

- Specify whether the child is an Indian child under ICWA and, if not known, whether the child's tribe has been provided adequate notice, sufficient information, and an opportunity to determine the child's membership eligibility. 25 U.S.C. § 1903(4)
- Specify what efforts, if any, have been made to identify the child's tribe.
- Specify whether the agency has mailed notice and necessary information to *all* tribes in which the child may be eligible for membership to enable each tribe to ascertain whether child is either a member or eligible for membership. 25 U.S.C. § 1912(a)

- Specify whether written notice was sent to the U.S. Secretary of the Interior if the child's tribe is not yet known. 25 U.S.C. § 1912
- Specify whether child either resides or is domiciled on a reservation, or is already a ward of a tribal court, thereby depriving the state court of jurisdiction. 25 U.S.C. § 1911(a)
- Specify whether the child was in the custody of an Indian custodian at the time of removal. 25 U.S.C. § 1903(6)
- Specify whether the agency mailed notice of the hearing and a copy of the petition and advice of rights to the Indian custodian, registered mail, return receipt. 25 U.S.C. § 1912
- Specify whether the agency mailed notice of the hearing and a copy of the petition and advice of rights to the child's Indian tribe, if known, by registered mail, return receipt. 25 U.S.C. § 1912
- Ascertain whether the child's tribe seeks to intervene in the proceedings and, if so, grant that request. 25 U.S.C. § 1911(c) If the child is eligible for membership in more than one tribe, ascertain which tribe is the child's tribe for purposes of the ICWA. 25 U.S.C. § 1903(5)
- Ascertain whether the child's Indian custodian, if there is one, seeks to intervene in the proceedings and, if so, grant that request. 25 U.S.C. § 1911(c)
- If child's tribe, parent, or Indian custodian requested an additional 20 days in which to prepare for the hearing, grant that request and reschedule the hearing. 25 U.S.C. § 1912(a)
- Specify whether a parent, Indian custodian, or the child's tribe has filed a motion or petition to transfer the case to tribal court. 25 U.S.C. § 1911(b)
- If the court declined to transfer the case, specify whether either parent vetoed the transfer, the tribal court declined to accept jurisdiction, or the reasons, if any, why there is good cause not to transfer the case to the tribal court. 25 U.S.C. § 1911(b)
- Specify whether the court advised the parent(s) or Indian custodian that they have a right to a court-appointed attorney if they are indigent. 25 U.S.C. § 1912(b)
- Provide sufficiently detailed information to justify why the court found by *clear and convincing evidence*, including testimony from an expert witness, 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. 25 U.S.C. § 1912(e)
- Provide sufficiently detailed information to justify agency and court choices for treatment and services.
- Be written in easily understandable language so that all parties know how the court's findings relate to subsequent case planning.
- Indicate whether the parent can read English and, if not, what steps will be taken to ensure that the parent understands the court's written order.
- Set date and time of next hearing.

[1] The court should make every effort within its discretion to appoint an advocate for the child who is either a member of the child's tribe, or who is familiar with and respectful of the child's cultural needs.

PRELIMINARY PROTECTIVE HEARING CHECKLIST FOR ICWA CASES

WHO SHOULD ALWAYS BE PRESENT:

- Judge or judicial officer;
- Parents whose rights have not been terminated, including any putative father who has *acknowledged* paternity, even if he has not legally established paternity;
- Indian custodian or other custodial adults; 25 U.S.C. §§ 1903(6) and 1912
- Extended relatives, as defined by child's tribe, other tribal members, or other Indian families who may serve as placement resource for child; 25 U.S.C. §§ 1903(2) and 1915(b)
- Expert witness under 25 U.S.C. § 1912(e);
- Assigned caseworker;
- Tribal caseworker;
- Agency attorney;
- Attorney for parents;
- Attorney for child's Indian tribe;
- GAL/CASA or advocate for the child;[1]
- Court reporter; and
- Security personnel.

WHO MAY ALSO BE NEEDED:

- Interpreter;
- Age-appropriate children;
- Adoptive parents;
- Domestic violence advocate for parent;
- Judicial caseload management staff;
- Law enforcement officers;
- Services providers; and
- Other witnesses, including tribal members, elders, or child's extended relatives.

COURT CAN MAKE SURE PARTIES AND KEY WITNESSES ARE PRESENT BY:

- Requiring quick and diligent notification efforts by the agency.
- Requiring both oral and written notification in language understandable to each party and witness.
- Requiring notice to include reason for removal, purpose of hearing, availability of legal assistance.
- Requiring caseworkers to encourage attendance of parents, Indian custodians, and other parties.

FILING THE PETITION:

- A sworn petition or complaint should be filed at or prior to the time of the preliminary protective hearing.
- The petition should be complete and accurate.

KEY INQUIRIES THE COURT SHOULD MAKE:

- Is the child under 18, unmarried and:
  - a member of a federally recognized tribe **or**
  - eligible for membership in a federally recognized Indian tribe and the biological child of a member of a federally recognized tribe? 25 U.S.C. § 1903(4)
- Was the child in the custody of an Indian custodian prior to the hearing? 25 U.S.C. § 1903(6)
- If child is an Indian child, does the child either reside or is the child domiciled on a reservation or is the child already a ward of a tribal court, depriving the court of jurisdiction? 25 U.S.C. § 1911(a) If the child resides or is domiciled on reservation but is temporarily off reservation, the court may order an emergency removal from the parent or Indian custodian to prevent imminent physical damage or harm to the child. 25 U.S.C. § 1922
- Has agency mailed proper notice to child's putative father, including father who has *acknowledged* paternity, even if he has not legally established paternity? 25 U.S.C. § 1903(9)
- Was proper notice and inquiry mailed to *all* tribes in which the child may be eligible for membership, including a family chart or genogram to facilitate the tribe's membership determination? 25 U.S.C. § 1912
- If the child's tribe is not known at this time, was written notice sent to the U.S. Secretary of the Interior? 25 U.S.C. § 1912
- What efforts, if any, have been made by the agency to identify extended family or other tribal members or Indian families, for placement of the child? Has the agency attempted to create a family chart or genogram,

soliciting assistance from neighbors, family, or members of the Indian community who may be able to offer information? 25 U.S.C. § 1915(b)

- Is the parent able to read and/or understand English? If not, what efforts have been made to ensure that the parent understands the proceedings and any action the court will order?

KEY DECISIONS THE COURT MUST MAKE:

- Has the agency made active efforts to identify responsible extended family or other tribal members or Indian families to serve as a placement for the child, if necessary? 25 U.S.C. § 1915(b)
- Is it in the best interest of the child to appoint counsel for the child? 25 U.S.C. § 1912(b)
- If the state law makes no provision for the appointment of counsel, has the court notified the Secretary upon appointment of counsel so that reasonable fees and expenses may be appropriated? 25 U.S.C. § 1912(b)
- In assessing whether an individual who meets the placement preferences is an appropriate placement for the child, has the agency relied upon the social and cultural standards of the Indian community in which the parent or extended family reside, or with which the parent or extended family maintain social and cultural ties? 25 U.S.C. § 1915(d)
- What additional efforts need to be made to ensure that the child is placed with extended family or within his/her tribal community?
- What culturally relevant services will allow the child to remain at home?
- Will parties voluntarily agree to participate in services?
- Are restraining orders or orders expelling an allegedly abusive parent from the home appropriate or necessary?
- Are orders needed for examinations, evaluations, or other immediate services?
- What are the terms and conditions of visitation by parents or Indian custodian?

REQUIRED NOTICE AND ADVICE OF RIGHTS:

- Review notice to missing parties and relatives.
- Serve parties with copy of the petition.
- Advise parties of their rights:
  - Advise the parent and/or Indian custodian that they have a right to a court-appointed attorney if they are indigent. 25 U.S.C. § 1912(b)
  - Advise the parents of the content of the petition, their right to examination of reports and other documents under 25 U.S.C. § 1912(c), their rights to request an additional 20 days to prepare for the hearing under 25 U.S.C. § 1912(a), and all other admonitions as to the consequences of failure to comply with ASFA and state statutory requirements in order to prevent the filing and adjudication of a Petition to Terminate Parental Rights. This admonition would also include an explanation of the grounds for a Termination of Parental Rights proceeding. This admonition should be repeated in each subsequent hearing held after the Preliminary Hearing.
  - Advise the Indian custodian of his/her right to be a full party to the case. 25 U.S.C. § 1911(c)
  - Ensure that the agency mails notice of next scheduled hearing and a copy of the petition and advice of rights under the ICWA to the child's parent if he/she is not at the hearing. Notice must be sent by registered mail, return receipt. 25 U.S.C. § 1912
  - Ensure that the agency mails notice of next scheduled hearing and a copy of the petition and advice of rights under the ICWA to the Indian custodian if he/she is not at the hearing. Notice must be sent by registered mail, return receipt. 25 U.S.C. § 1912
  - Ensure that the agency mails notice of the next scheduled hearing and a copy of the petition and advice of rights under the ICWA to the child's tribe. Notice must be sent by registered mail, return receipt. 25 U.S.C. § 1912

PRELIMINARY PROTECTIVE HEARING CHECKLIST FOR ICWA CASES (cont.)

SUBMISSION OF REPORTS TO THE COURT:

- The court should require submission of agency and/or law enforcement reports at least one hour prior to the hearing.
- Reports to the court should describe all circumstances of removal, any allegations of abuse or neglect, and all efforts made to try to ensure safety and prevent need for removal.

KEY WRITTEN FINDINGS THE COURT MUST MAKE:

- Whether, at the time of removal, the child was already a ward of a tribal court (if known) thereby depriving the state court of jurisdiction. 25 U.S.C. § 1911(a)
- Whether, at the time of removal, the child was in the custody of an Indian custodian. 25 U.S.C. § 1903(6)
- Whether active efforts were made prior to removal of child to provide remedial services and rehabilitative programs designed to prevent the breakup of the family, and whether the efforts were successful. 25 U.S.C. § 1912(d)
- Whether there was *clear and convincing evidence*, including testimony of a qualified expert witness, 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. 25 U.S.C. § 1912(e)
- Whether the parent, Indian custodian, or child's tribe requested an additional 20 days to prepare for the hearing. 25 U.S.C. § 1912(a)

IF CHILD IS PLACED OUTSIDE OF THE HOME:

- Specify why continuation of the child in the home would be contrary to the child's welfare.
- Specify whether child is to be placed in a home that meets the priority placement preferences mandated by 25 U.S.C. § 1915(b):
  - A member of the Indian child's extended family;
  - A foster home licensed, approved, or specified by the Indian child's tribe;
  - An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
  - An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.
- If the child is not to be placed within the priority placements mandated by 25 U.S.C. § 1915(b), specify whether:
  - The child's tribe issued a resolution establishing 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)
- Order the agency to make ongoing, diligent search to locate placement that meets the preferences established within the ICWA.
- Specify the terms of visitation with the parent(s), Indian custodian, and extended family.
- Order the agency to arrange for the child to visit with other tribal members if no extended family is available and to coordinate with the child's tribe to arrange for the child to attend significant cultural and familial events.

[1] The court should make every effort within its discretion to appoint an advocate for the child who is either a member of the child's tribe, or who is familiar with and respectful of the child's cultural needs.

WHEN DOES THE INDIAN CHILD WELFARE ACT APPLY?

THE INDIAN CHILD WELFARE ACT APPLIES WHEN:

- The proceedings are child custody proceedings as the ICWA defines that term 25 U.S.C. § 1903(1); **and**
- The child is an "Indian child" as the ICWA defines that term under 25 U.S.C. § 1903(4).

If the proceedings are not child custody proceedings, or the child does not meet the definition of Indian child, the ICWA does not apply.

THE FOLLOWING *ARE* "CHILD CUSTODY PROCEEDINGS" UNDER THE ICWA:

- Foster care placements – this includes any action where child is removed from its parent or Indian custodian for temporary placement in a home or institution, including guardianship and conservatorship, **and** where parent or custodian cannot have child returned upon demand but where parental rights have not been terminated. 25 U.S.C. § 1903(1)(i)
- Termination of parental rights. 25 U.S.C. § 1903(1)(ii)
- Pre-adoptive placements. 25 U.S.C. § 1903(1)(iii)
- Adoptive placements. 25 U.S.C. § 1903(1)(iv)

THE FOLLOWING ARE *NOT* "CHILD CUSTODY PROCEEDINGS" UNDER THE ICWA:

- An award of custody pursuant to a divorce where one of the parents will obtain custody of the child. 25 U.S.C. § 1903(1)
- A placement based upon an act which, if committed by an adult, would be deemed a crime. 25 U.S.C. § 1903(1)

CONSTRUCTION/APPLICATION

- A placement that meets the definition of foster care placement under the ICWA and results from an act that *would not* be deemed a crime if committed by an adult, such as a status offense, is a child custody proceeding under the ICWA.
- A child custody placement pursuant to a divorce *where someone other than one of the parents* will obtain custody of the child is also a child custody proceeding under the ICWA.

THE CHILD IS AN "INDIAN CHILD" UNDER THE ICWA IF:

- He or she is an unmarried person who is under the age of 18, and
- The child is a member of a federally recognized Indian tribe; **or**
- The child is the biological child of a member of a federally recognized Indian tribe **and** child is eligible for membership in any federally recognized Indian tribe. 25 U.S.C. § 1903(4)

DEFINITIONS UNDER THE ICWA:

- **"Extended family member:"** defined by the law or custom of the Indian child's tribe, or in the absence of such law or custom, is a person who has reached the age of 18 and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or step-parent. 25 U.S.C. § 1903(2)
- **"Indian:"** any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation. 25 U.S.C. § 1903(3) For purposes of the ICWA, tribes are arbiters of their own membership. (In The Interest of J.W., 498N.W.2d 417, 1993 Iowa App. Lexus 8)
- **"Indian child's tribe:"** the Indian tribe in which an Indian child is a member or eligible for membership, or in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts. 25 U.S.C. § 1903(5)
- **"Indian custodian:"** any person who has legal custody of an Indian child under tribal law or custom or under State law; or to whom temporary physical care,

custody and control has been transferred by the parent of such child. 25 U.S.C. § 1903(6)

- **"Indian tribe:"** any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary of the Interior because of their status as Indians. 25 U.S.C. § 1903(8)
- **"Qualified expert witness:"** although not defined under the ICWA, a House Report prepared in conjunction with the ICWA states that the phrase "is meant to apply to expertise beyond the normal social worker qualifications." H.R. No. 95-1386, 95th Cong., 2d Sess., reprinted in 6 U.S.C.C.S.A.N. 7530, 7454 (1978) In addition, the Bureau of Indian Affairs has promulgated "Guidelines for State Courts" which interpret the ICWA. The following characteristics are set forth at 44 Federal Register 67,593 (1979) as those most likely to qualify a witness as an expert under the ICWA:
  a) 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 child rearing practices.
  b) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and child rearing practices within the Indian child's tribe.
  c) A professional person having substantial education and experience in the area of his or her specialty.

  Thus, a "qualified expert witness" is not an *expert on the ICWA*, but an *expert on the child's tribe.*

Checklists Developed by:

Donna J. Goldsmith, J.D.
Executive Director, Alaska Inter-Tribal Council

Reviewers and Contributors:

Honorable Michael Anderegg, Marquette County Probate Court, Marquette, Michigan
Mr. Terry Cross, Executive Director, National Indian Child Welfare Association
Professor Christine Zuni-Cruz, J.D., Supervising Attorney, Clinical Law Programs, University of New Mexico School of Law
Honorable Leonard P. Edwards, Santa Clara County Superior Court, San Jose, California
Honorable Cheryl Demmert Fairbanks, Chief Justice, Yavapai-Apache Tribal Court
Ms.Toby Grossman, J.D., Senior Staff Attorney, University of New Mexico School of Law
Honorable Thomas E. Hornsby, Professor, Florida Coastal School of Law
Honorable Dale R. Koch, Multnomah County Circuit Court, Portland, Oregon
Honorable John W. Larson, Fourth Judicial District, Department 3, Missoula, Montana
Honorable Stephen M. Rubin, Pima County Juvenile Court, Tucson, Arizona
Professor Maylinn Smith, Director, Indian Law Clinic, University of Montana School of Law
Honorable William Thorne, Utah Court of Appeals
Professor Gloria Valencia-Weber, Director, Indian Law Certificate Program, University of New Mexico

Appreciation to:

Mr. Lawrence R. Baca, J.D., Federal Bar Association, Indian Law Section

For additional copies of this ***Technical Assistance Brief,***
please contact the
Training and Technical Assistance Resource Division
of the Permanency Planning for Children Department,
National Council of Juvenile and Family Court Judges.

Telephone: (775) 327-5300
Facsimile: (775) 327-5306
E-Mail: ppcd@ncjfcj.org
Web site: www.pppncjfcj.org

NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES
P.O. Box 8970
Reno, Nevada 89507

Technical Assistance Brief

Indian Child Welfare Act Checklists

for Juvenile and Family Court Judges

Permanency Planning for Children Department

National Council of Juvenile and Family Court Judges

June 2003

Indian Child Welfare Act Checklists for Juvenile and Family Court Judges

"These Indian Child Welfare Act Checklists were created to assist juvenile and family court judges in assuring that the necessary inquiries are being made to determine as early as possible in every case whether the Indian Child Welfare Act applies. These checklists will help judges ensure that the necessary parties have been notified and are present in all cases where the ICWA may be applicable.

It is in the best interests of the child that the required inquiries be made from the time of the initial removal hearing, and that the inquiries continue throughout every stage of the case. Failure to make the necessary inquiries, notify the necessary parties, and follow the standards established within the ICWA can result in the case having to start over from the beginning, to the obvious detriment of the child. The checklists are designed to help avoid this result by assisting judges on a step-by-step basis in meeting the ICWA requirements at each hearing stage.

Leadership by the court is essential to ensure ICWA compliance. These children should not be subject to their placements and permanency plans being disrupted well into the final stages of the case. Because this affects cases in every state, the checklists have been drawn from the RESOURCE GUIDELINES *and formatted so that they can be used by courts throughout the country, whether in a state with no tribes within its borders and small Native American populations, or states such as Alaska, where 60 percent of the children in the state dependency system are Alaska Natives for whom the ICWA applies.*

Much has been written in recent years about the impact to affected children if the requirements of the ICWA are not met, most notable the significant delay in achieving permanency for these children as well as widespread non-compliance with the requirement that a qualified expert testify at hearings including the initial removal hearing. Because there are disproportionately high numbers of Native American and Alaska Native children in juvenile dependency systems in every state in the country, no court can overlook the requirement to make the necessary ICWA inquiries. The NCJFCJ Permanency Planning for Children Department hopes that you will find these new checklists to be useful to you in assuring compliance with the ICWA on all cases that come before your respective courts."

Honorable Dale R. Koch, Multnomah County Circuit Court, Portland, Oregon

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Honorable David B. Mitchell
Executive Director
National Council of Juvenile
and Family Court Judges

Mary Mentaberry
Director
Permanency Planning for Children Department

OJJDP
Office of Juvenile Justice and Delinquency Prevention

U.S. DEPARTMENT OF JUSTICE
OFFICE OF JUSTICE PROGRAMS

NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES
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Contact Information:

Department of the Interior
Gale Norton, Secretary of the Interior
United States Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240
Telephone: (202) 208-7351
Web site: www.doi.gov

Bureau of Indian Affairs
Aurene Martin, Acting Director
1849 C Street, N.W.
Mail Stop 6218, MIB
Washington, D.C. 20240
Telephone: (202) 208-3711
Web site: www.bia.gov

National Indian Child Welfare Association
Terry Cross, Executive Director
5100 Southwest Macadam Avenue, Suite 300
Portland, Oregon 97201
Telephone: (503) 222-4007
Web site: www.nicwa.org

"Native American Resource Directory for Juvenile and Family Court Judges"
PPCD-NCJFCJ
Telephone: (775) 327-5300
Web site: www.pppncjfcj.org
(Contains tribal contact information)