

Module 2: Determining Whether ICWA Applies

Module 2: Determining Whether ICWA Applies

- Types of Proceedings
- “Indian Child”
- Step 1 – Is the Child an “Indian Child”?
- Step 2 – Identify the “Indian Child’s Tribe”
- Step 3 – Determine Jurisdiction

This module will help you understand when ICWA applies and what court the proceeding will be in.

Module 2: Determining Whether ICWA Applies

Types of Proceedings

- ICWA and the rule have provisions applying to:
 - An emergency proceeding
 - Any court action that involves an emergency removal or emergency placement of an “Indian child”
 - Special statutory and regulatory rules apply
 - A child-custody proceeding
 - Any action (that is a non-emergency proceeding) that may culminate in one of the following outcomes:
 - Foster-care placement
 - TPR
 - Preadoptive placement (after TPR)
 - Adoptive placement

Module 2: Determining Whether ICWA Applies

Types of Proceedings

- **A child custody proceeding** (cont'd)
 - Each action that may culminate in one of these four outcomes (foster care, preadoptive care, TPR, or adoptive care) is considered a **separate child-custody proceeding** from an action that may culminate in a different one of these four outcomes
 - There may be several child-custody proceedings involving any given Indian child
 - ICWA and the rule have:
 - Provisions that apply to **involuntary** child custody proceedings and
 - Provisions that apply to **voluntary** child custody proceedings (see later slides for more information on voluntary and involuntary)

Module 2: Determining Whether ICWA Applies

Types of Proceedings

- ICWA only applies to proceedings involving an “Indian child”
- “Indian child” means the child is:
 - A member of a federally recognized Tribe or
 - Eligible for membership with a federally recognized Tribe* and has biological parent who is a member

(4) “Indian child” means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

*Note: BIA publishes a list of federally recognized Tribes in the Federal Register annually. The most recent list is at 81 Fed. Reg. 26826 (May 4, 2016).

Module 2: Determining Whether ICWA Applies

Types of Proceedings

- The final rule clarifies that “Indian child” status is based *exclusively* on the statutory definition
- In identifying whether the child is an “Indian child,” you may not look at factors such as:
 - Participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities;
 - Relationship between the Indian child and his or her parents;
 - Whether the parent ever had custody of the child, or
 - The Indian child’s blood quantum
 - These are factors that have been used in the so-called “Existing Indian Family” exception/doctrine

Module 2: Determining Whether ICWA Applies

Types of Proceedings

- **Child custody proceeding** (continued)
 - **Involuntary** means the parent either:
 - Does not consent of his or her free will to the foster-care, preadoptive, or adoptive placement TPR; or
 - Consents to the foster-care, preadoptive, or adoptive placement under threat of removal of the child by a State court or agency
 - **Voluntary** means either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, consented to the placement for the Indian child, or a proceeding for voluntary TPR
 - Unless child will be returned “upon demand” (see next slides)

Module 2: Determining Whether ICWA Applies

Types of Proceedings

- ICWA does not apply to:
 - A Tribal court proceeding;
 - A proceeding resulting from an Indian child's criminal act (if the act is not a status offense)*;
 - An award of custody of Indian child to one of the parents; or
 - Certain voluntary placements (see next slide)

* *Status offenses* mean offenses that would not be considered criminal if committed by an adult and are prohibited only because of a person's status as a minor (e.g., truancy, incorrigibility)

Module 2: Determining Whether ICWA Applies

Types of Proceedings

- ICWA does not apply to those voluntary placements:
 - That either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, has chosen for the Indian child **and**
 - That does not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand
 - *Upon demand* means that the parent or Indian custodian can regain custody simply upon verbal request, without any formalities or contingencies

Module 2: Determining Whether ICWA Applies

Step 1 – Is the Child an “Indian Child”?

- Step 1 – Is there a “reason to know” the child is an Indian child?
 - Court asks each participant in the proceeding whether they know or have a reason to know the child is an Indian child
 - See factors indicating a “reason to know” (next slide)

Module 2: Determining Whether ICWA Applies

Step 1 – Is the Child an “Indian Child”?

- Factors indicating a “reason to know”
 - Anyone, including the child, tells the court the child is an Indian child or there is information indicating the child is an Indian child
 - The domicile or residence of the child or parent/Indian custodian is on a reservation or in an Alaska Native village
 - The child is, or has been, a ward of Tribal court
 - Either parent or the child possesses an ID indicating Tribal membership

Module 2: Determining Whether ICWA Applies

Step 1 – Is the Child an “Indian Child”?

- If there is no “reason to know” the child is an Indian child
 - ICWA does not apply
 - Participants in a child-welfare proceeding must inform the court if they are subsequently made aware of information giving them reason to know that the child is an Indian child
 - If the same child is involved in a later proceeding, the court must ask the question again in case there is newly discovered information

Module 2: Determining Whether ICWA Applies

Step 1 – Is the Child an “Indian Child”?

- If there is a “reason to know” but there isn’t sufficient evidence to determine if the child is an “Indian child” then, the court must:
 - (1) Confirm, on the record, that the agency or other party used due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to **verify** whether:
 - The child is a member **or**
 - A biological parent is a member and the child is eligible for membership
 - (2) Treat the child as an Indian child, unless and until it is determined on the record that the child is not an “Indian child”

Module 2: Determining Whether ICWA Applies

Step 1 – Is the Child an “Indian Child”?

- If there is a “reason to know” – what constitutes sufficient evidence that the child is an Indian child?
 - **Verification from Tribe** – Tribes have the final say on whether a child is a member, or a parent is a member and the child is eligible for membership
 - Tribes are sovereigns that determine their own citizenship
 - The State court makes a judicial determination as to whether the child is an “Indian child” based on Tribe’s final say in response to requests for verification
 - State court may rely on Tribal documentation, such as a Tribal membership card or enrollment documentation

Module 2: Determining Whether ICWA Applies

Step 2 – Identify “Indian Child’s Tribe”

- Step 2 - Identify the “Indian child’s Tribe”
 - If the Indian child is a member or eligible for membership in only one Tribe, that Tribe must be designated as the Indian child’s Tribe
 - If the Indian child meets the definition of “Indian child” through more than one Tribe, defer to the Tribe in which the child is already a member, unless otherwise agreed to by the Tribes
 - If the child is a member in more than one Tribe **or** if the child is not a member but is eligible for membership in more than one Tribe:
 - Provide the Tribes the opportunity to determine which is designated the child’s Tribe

Module 2: Determining Whether ICWA Applies

Step 3 – Determine Jurisdiction

- Step 3 – Determine Jurisdiction
 - Determine jurisdiction in involuntary or voluntary proceedings
 - If emergency, proceed under emergency provisions
 - Is the Indian child’s domicile or residence on a reservation?
 - Is the child a ward of Tribal court?
 - If either is yes:
 - (1) notify the Tribal court of the pending dismissal based on the Tribe’s exclusive jurisdiction, (2) dismiss the State-court child-custody proceeding, and (3) send the Tribal court all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record
 - If both are no:
 - The State court has concurrent jurisdiction with the Tribe (proceed to Module 3)

Module 2: Determining Whether ICWA Applies Key Points to Remember

[Key Points to Remember being
developed]

Module 2: Determining Whether ICWA Applies

Key Points to Remember

- ICWA applies to proceedings involving custody of an “Indian child”
 - Including emergency proceedings, voluntary proceedings, and involuntary proceedings
- “Indian child” means the child is:
 - A member of a federally recognized Tribe **or**
 - Eligible for membership with a federally recognized Tribe* **and** has biological parent who is a member
- Courts must ask if there is a reason to know the child is an “Indian child” at the beginning of each proceeding
- The Tribe is the authority on whether a child or parent is a member
- Courts must determine whether the Tribe has exclusive jurisdiction