

**Indian Child Welfare Act (ICWA) Requirements  
Judicial Bench Guide**

<b>Term</b>	<b>Federal ICWA 25 USC §§ 1901–1963 and Nebraska ICWA Neb. Rev. Stat. §§ 43-1501–43-1517</b>
<b>Definition of Indian Child</b>	Indian child shall mean 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. (Neb. Rev. Stat. § 43-1503(8))
<b>Indian Child’s Tribe or Tribes</b>	The Indian child’s Tribe or Tribes means a Tribe in which an Indian child is a member or eligible for membership. In the case of an Indian child who is a member of or eligible for membership in more than one Tribe, the Indian child’s primary Tribe is determined by the procedures enumerated at Neb. Rev. Stat. § 43-1504. (Neb. Rev. Stat. § 43-1503(5))
<b>Best Interests</b>	Must comply with Federal ICWA, Nebraska ICWA and other applicable laws designed to prevent the voluntary or involuntary out-of-home placement of an Indian child and try to the greatest extent possible to place an Indian child in a foster or adoptive home that is consistent with the intent of the law. (Neb. Rev. Stat. § 43-1503(2))
<b>Jurisdiction</b>	Tribes have exclusive jurisdiction over any child custody proceeding involving an Indian child who resides or is domiciled on a reservation, or over any child who is a ward of the Tribal court regardless of residence or domicile. Tribes have concurrent jurisdiction with state courts as to Indian children who reside or are domiciled off the reservation. (Neb. Rev. Stat § 43-1504)
<b>Notice</b>	Notice is required to be completed in clear and understandable language and sent by registered mail to all of the child’s Tribes, parents, and if applicable the Indian Custodian. The notice must include the information describe in 25 C.F.R. 23.111 and also be sent in voluntary foster care cases. Must also include information about: 1) attempts to locate certain familial information, 2) Tribal familial affiliation, 3) domicile and 4) Tribal court orders. Notice must be filed in court within three days of issuance in involuntary court proceedings. (Neb. Rev. Stat. §§ 43-1505(4), 43-1505.01, 43-1506(2)), (25 CFR 23.111)
<b>Voluntary Services/ Alternative Response</b>	The Nebraska ICWA applies to voluntary services such as Alternative Response and any other non-court involved proceedings in which DHHS or the State is facilitating a voluntary foster care placement or in-home services to families at risk of entering the foster care system. Only some protections of the ICWA will apply in voluntary foster care cases in Nebraska, including active efforts, notice, intervention, placement preferences, and additional procedural assurances for relinquishments and TPRs arising from a voluntary foster care placement. (Neb. Rev. Stat. §§ 43-1503(1), 43-1504, 43-1505, 43-1506)
<b>Good Cause to Deviate from Placement Preferences</b>	There are four listed examples of what may constitute good cause to deviate from the placement preferences in Nebraska’s statute including: 1) request of the biological parents, 2) request of the Indian child when the child is at least twelve years of age, 3) extraordinary physical or emotional needs of the Indian child, or 4) the unavailability of suitable families for placement after a diligent search has been made. Burden to show there is good cause to deviate must be met by clear and convincing evidence by the party urging preferences not be followed. (Neb. Rev. Stat. § 43-1508(4)) Federal regulation contemplates the presence of a sibling attachment as constituting good cause, but prohibits the consideration of socioeconomic status of a placement and “ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.” (25 CFR 23.132))
<b>Emergency Foster Care Placement</b>	<ul style="list-style-type: none"> <li>• ICWA applies in emergency foster care placements. (Neb. Rev. Stat. § 43-1503(3))</li> <li>• Should be severely limited, applying only in circumstances involving imminent physical damage or harm. (25 CFR 23.113)</li> <li>• ICWA applies in emergency placements if the court has reason to know the child is an Indian child. If the court does not have sufficient evidence to determine the child is or is not an Indian child, the court must treat the child as an Indian child until it is determined that the child does not meet the definition of Indian child. (25 CFR 23.107),</li> <li>• Emergency removal/placement must be as short as possible (30 days) unless: (1) the court determines reunification would result in imminent harm, (2) the court was unable to transfer the case to the Tribe, or (3) it has not been possible to initiate a child-custody proceeding. The removal must terminate as soon as it is no longer necessary to prevent imminent harm. (25 CFR 23.113)</li> </ul>
<b>Transfer</b>	<ul style="list-style-type: none"> <li>• In any state court proceeding for the foster care placement of, or TPR to, an Indian child not domiciled or residing within the reservation of the Indian child’s Tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the Tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child’s Tribe: Provided, that such transfer shall be subject to declination by the Tribal court of such Tribe. (Neb. Rev. Stat. § 43-1504(2))</li> <li>• A Parent, Indian custodian or Tribe can petition to transfer. <i>Id.</i></li> <li>• Right to transfer is available at any stage of a proceeding, including during an emergency removal and TPR. (<i>In re Interest of Zylena R.</i>, 284 Neb. 834 (2012)), (25 CFR 23.115)</li> <li>• Good cause may be found if either parent objects, Tribal court declines, or state court otherwise determines that good cause exists. (Neb. Rev. Stat. § 43-1504(2)), (25 CFR 23.118)</li> </ul>
<b>Inquiry</b>	<ul style="list-style-type: none"> <li>• In any case where a petition alleges the child is within the meaning of Neb. Rev. Stat. § 43-247(3)(a), or a TPR petition is filed, the court must inquire as to whether any party believes an Indian child is involved in the proceedings. (Neb. Rev. Stat. § 43-279.01(4))</li> <li>• The court, DHHS, or the Administrative Office of Probation (Probation) are required to ask each party to the case whether there is reason to believe that an Indian child is involved in the child custody proceeding. (25 CFR 23.107)</li> <li>• The court has reason to know a child is an Indian child if: (1) any participant in the proceeding, Indian Tribe or organization, or agency informs the court that the child is an Indian child, (2) any participant in the proceeding, Indian Tribe or organization, or agency has discovered information indicating the child is an Indian</li> </ul>

	child, (3) the child gives reason to know he or she is an Indian child, (4) the court is informed that the domicile of the child, or the child's parent, or custodian is on a reservation or Alaskan Native village, (5) the court is informed the child is or has been a ward of a Tribal court, or (6) the court is informed that the child or either parent has an Indian Tribe membership identification card. (25 CFR 23.107) <ul style="list-style-type: none"> <li>• The Child Abuse and Neglect Hotline must inquire as to whether the individual calling believes an Indian child is involved. (Neb. Rev. Stat. § 43-1514)</li> </ul>
<b>Applicability</b>	ICWA is applicable to child custody proceedings, which includes foster care placement, termination of parental rights, pre-adoptive or adoptive placement, and voluntary foster care when an Indian child is involved. (Neb. Rev. Stat. § 43-1503(3)), ( <i>In re Interest of Zylena R.</i> , 284 Neb. 834 (2012))
<b>Right to extra time to prepare</b>	No foster care placement or TPR proceeding shall be held until at least 10 days after receipt of notice by parent or Indian custodian and the Tribe, or BIA. Court shall grant 20 days more to parent, Indian custodian or Tribe, upon request, to prepare for proceeding. (Neb. Rev. Stat. § 43-1505(1))

### Active Efforts

Include:

- a concerted level of casework, prior to and after the removal of an Indian child, consistent with prevailing social and cultural conditions and way of life of the Indian child's Tribe;
- a request to convene traditional and customary support and services; actively engaging, assisting, and monitoring the family's access to and progress in culturally appropriate resources;
- identification of and provision of information to the Indian child's extended family members concerning appropriate community, state, and federal resources;
- identification of and attempts to engage Tribal representatives; consultation with extended family members to identify family or Tribal support services; and exhaustion of all available Tribally appropriate family preservation alternatives. (Neb. Rev. Stat. § 43-1503(1))
- The Department, State, or, in some cases, Probation is required to provide written report of its attempts to provide active efforts at every hearing involving an Indian child. Any party seeking to effect a foster care placement of, or TPR to, an Indian child under state law shall satisfy the court that active efforts have been made to prevent the breakup of the Indian family, or unite the parent or custodian with Indian child, and that these efforts have proved unsuccessful. (Neb. Rev. Stat. § 43-1505(4))
- Any written evidence showing that active efforts have been made shall be admissible. Prior to the court ordering placement of the child in foster care or TPR, the court shall make a determination that active efforts have been provided or the party has demonstrated attempts were made to provide active efforts to the extent possible under the circumstances. (Neb. Rev. Stat. § 43-1505(4))
- An additional, non exhaustive, list of active efforts has also been provided by the BIA regulations. (25 CFR 23.2)

### Placement Preferences: Foster Care & Preadoptive

In any foster care or preadoptive placement, preference shall be given, in the absence of good cause to the contrary, to a placement with the following *in descending priority order*:

- a member of the Indian child's extended family;
- other members of the Indian child's Tribe or Tribes;
- a foster home licensed, approved, or specified by the Indian child's Tribe or Tribes;
- an Indian foster home licensed or approved by an authorized non-Indian licensing authority;
- a non-Indian family committed to enabling the child to have extended family time and participation in the cultural and ceremonial events of the Indian child's Tribe;

- an Indian facility or program 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;
- or a non-Indian facility or program for children approved by an Indian Tribe. (Neb. Rev. Stat. § 43-1508(2))

### Placement Preferences: Adoptive

In any adoptive placement of an Indian child under state law, a preference shall be given, in the absence of good cause to the contrary, to a placement with the following *in descending priority order*:

- a member of the Indian child's extended family;
- other members of the Indian child's Tribe *or Tribes*; other Indian families;
- *or*; a non-Indian family committed to enabling the child to have extended family time and participation in the cultural and ceremonial events of the Indian child's Tribe or Tribes. (Neb. Rev. Stat. § 43-1508(1))

### Qualified Expert Witness (QEW)

In order to initiate a foster care placement proceeding, the moving party must show that the child is likely to suffer "serious emotional or physical damage" in the custody of the parent or Indian custodian, by clear and convincing evidence, through the testimony of a QEW. In a TPR proceeding, this showing must be made beyond a reasonable doubt. (Neb. Rev. Stat. §§ 43-1505(5) and (6))

A QEW must be one of the following persons *in descending priority order*:

- a member of the Indian child's Tribe or Tribes who is recognized by the Tribal community as knowledgeable in Tribal customs as they pertain to family and childrearing practices;
- a member of another Tribe who is recognized to be a qualified expert witness by the Indian child's Tribe or Tribes based on his or her knowledge of the delivery of child and family services to Indians and the Indian child's Tribe or Tribes;
- a lay expert witness that possesses substantial experience in the deliver of child and family services to Indians and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's Tribe or Tribes;
- a professional person having substantial education and experience in the area of his or her specialty who can demonstrate knowledge of the prevailing social and cultural standards and childrearing practices within the Indian child's Tribe or Tribes;
- and any other professional person having substantial education in the area of his or her specialty. (Neb. Rev. Stat. § 43-1503(15))
- Note: A court may still assess the credibility of individual QEW *Id.*
- QEW should have specific knowledge of the Indian Tribe's culture and customs. (25 CFR 123.122)