

**RULE CHANGE 2023(20)**

**CHAPTER 28.3  
COLORADO RULES OF ICWA PROCEDURES**

**Rules 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11**

## Chapter 28.3

### Colorado Rules of ICWA Procedures

#### Rule 1. Title of Rules and Definitions

(a) These rules shall be known as the “Colorado Rules of ICWA Procedures.”

(1) The Indian Child Welfare Act of 1978 will be referred to throughout these rules as “ICWA.”

(2) The Bureau of Indian Affairs will be referred to throughout these rules as the “BIA.”

(b) For purposes of these rules, the following definitions apply:

(1) “Active efforts” means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. 25 C.F.R. § 23.2.

(2) “Agency” means a nonprofit, for-profit, or governmental organization and its employees, agents, or officials that performs or provides services to biological parents, foster parents, or adoptive parents to assist in the administrative and social work necessary for foster, preadoptive, or adoptive placements. 25 C.F.R. § 23.102.

(3) “Child custody proceeding” means and includes proceedings involving or seeking a foster care placement of a child, the termination of the parent-child legal relationship, the preadoptive or temporary placement of a child in a foster home or institution after the termination of parental rights but prior to or in lieu of adoptive placement, and the adoptive or permanent placement of a child. The term “child custody proceeding” does not include a placement based upon an act that, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents. 25 U.S.C. § 1903(1).

(4) “Emergency proceeding” means and includes any court action that involves an emergency removal or emergency placement of an Indian child. 25 C.F.R. § 23.2.

(5) “Foster care placement” means any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated. 25 U.S.C. § 1903(1)(i).

(6) “Indian child” means an unmarried person who is younger than eighteen years of age and is either (a) a member of an Indian tribe or (b) eligible for membership in an

Indian tribe and who is the biological child of a member of an Indian tribe. § 19-1-103(83), C.R.S.

- (7) “Indian child’s tribe” means (a) the Indian tribe in which an Indian child is a member or eligible for membership; or (b) 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 most significant contacts. § 19-1-103(84), C.R.S.
- (8) “Indian custodian” means any Indian 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).
- (9) “Indian tribe” means an Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the federal government services provided to Indians because of their status as Indians. § 19-1-103(85), C.R.S.
- (10) “Involuntary proceeding” means a child custody proceeding in which the parent does not consent of the parent’s free will to the foster care, preadoptive, or adoptive placement or termination of parental rights or in which the parent consents to the foster care, preadoptive, or adoptive placement under threat of removal of the child by a state court or agency. 25 C.F.R. § 23.2.
- (11) “Parent” means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established. 25 U.S.C. § 1903(9).
- (12) “Reservation” means Indian country as defined in 18 U.S.C § 1151 and any lands, not covered under that section, title to which is held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation. 25 C.F.R. § 23.2.
- (13) “Status offenses” means offenses that would not be considered criminal if committed by an adult; they are acts prohibited only because of a person’s status as a minor (e.g., truancy, incorrigibility). 25 C.F.R. § 23.2.
- (14) “Tribal court” means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe vested with authority over child custody proceedings. 25 U.S.C. § 1903(12).
- (15) “Voluntary proceeding” means a child custody proceeding that is not an involuntary proceeding, such as a proceeding for foster care, preadoptive, or adoptive placement that either parent, both parents, or the Indian custodian has, of his, her, or their free

will, without a threat of removal by a state agency, consented to for the Indian child, or a proceeding for voluntary termination of parental rights. 25 C.F.R. § 23.2.

## COMMENTS

The substantive and procedural requirements of ICWA are set forth in 25 U.S.C. §§ 1901–1963. See also § 19-1-126, C.R.S. Related ICWA regulations are set forth in part 23 of title 25 of the Code of Federal Regulations. These Colorado Rules of ICWA Procedures are intended to ensure compliance with ICWA, the related ICWA regulations, and corresponding state law.

### Rule 2. Application

These rules apply to all child custody proceedings. Such proceedings may include, but are not limited to, matters brought under the Uniform Dissolution of Marriage Act, the Colorado Probate Code, and the Colorado Children’s Code.

## COMMENTS

[1] Child custody proceedings to which these rules apply may commonly include cases in which a child may be placed with an agency or a person other than a biological parent or when the action may result in termination of the parent-child legal relationship or otherwise significantly impact the legal relationship between the biological parent and child. Examples include, but are not limited to, adoptions, dependency and neglect cases, allocations of parental responsibilities, cases under the Uniform Parentage Act, guardianship of a minor under the Colorado Probate Code, and delinquency cases solely based on a status offense as outlined in 25 C.F.R. § 23.103(a)(1)(iii).

[2] Multiple child custody proceedings can occur throughout a dependency and neglect case and may include, but are not limited to, shelter hearings, dispositional hearings, temporary or permanent placement hearings, hearings on motions to terminate the parent-child legal relationship, and preadoptive and adoptive placement hearings.

[3] Some of the provisions in these rules, such as Rule 3 (regarding required inquiries) and Rule 10 (regarding placement preferences), apply to voluntary proceedings, but others do not. For additional requirements applicable to voluntary proceedings, see 25 U.S.C. § 1913.

### Rule 3. Inquiry

(a) The court must ask each participant at each child custody proceeding throughout a case whether the participant knows or has reason to know that any child who is the subject of the proceeding is an Indian child. The court must:

(1) conduct such inquiry at the commencement of the proceeding and ensure that all responses are on the record; and

(2) instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.

- (b) A case may include more than one child custody proceeding, and the court must make the inquiry required by section (a) of this rule at each child custody proceeding within a case.
- (c) A court may conduct multiple hearings within a child custody proceeding. This rule does not require an inquiry at each such hearing. If, however, a new child custody proceeding (e.g., a proceeding to terminate parental rights or for adoption) is initiated for any child, then the court must inquire as to whether there is reason to know that the child who is the subject of the proceeding is an Indian child.
- (d) If the court has sufficient information to determine that the child who is the subject of the proceeding is an Indian child, then the court shall determine the identity of the Indian child's tribe and treat the child as an Indian child.
- (e) If there is reason to know the child is an Indian child but the court does not have sufficient evidence to determine that the child is or is not an Indian child, the court must:
- (1) Confirm by way of a report, declaration, or testimony included in the record that the petitioning or filing 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 in fact a member, or a biological parent is a member and the child is eligible for membership; and
  - (2) Treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an "Indian child."
- (f) In any case brought under the Colorado Children's Code, if the court receives information that the child may have Indian heritage but does not have sufficient information to determine that there is reason to know that the child is an Indian child, the court must direct the petitioning or filing party to:
- (1) exercise due diligence in gathering additional information that would assist the court in determining whether there is reason to know that the child is an Indian child; and
  - (2) make a record of the efforts taken to determine whether or not there is reason to know that the child is an Indian child.

### COMMENTS

[1] ICWA requirements apply whenever an Indian child is the subject of a child custody proceeding. See 25 C.F.R. § 23.103.

[2] For the criteria supporting a reason to know, see 25 C.F.R. § 23.107(c) and § 19-1-126(1)(a)(I)–(II), C.R.S.

[3] It is best practice to conduct the required investigation into a child's status early in the case. The results of the investigation help to establish which laws will apply to the case and minimize

the potential for delays or disrupted placements in the future. See § 19-1-126(3), C.R.S., and BIA, Guidelines for Implementing the Indian Child Welfare Act, § B.1 at 11 (Dec. 2016).

[4] A child may be a member of or may be eligible for membership in more than one tribe, and the inquiries required by this rule must recognize that possibility.

[5] The purpose of the inquiries required by this rule is to identify the tribe or tribes in which the child is a member or may be eligible for membership. The tribes, however, have the exclusive authority to determine whether the child is a member or eligible for membership. To assist in identifying federally recognized tribes, the BIA annually publishes in the Federal Register a list of recognized tribes and their agents for service.

#### **Rule 4. Membership or Eligibility for Membership in Multiple Tribes**

(a) 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.

(b) If the Indian child meets the definition of "Indian child" through more than one tribe, deference should be given to the tribe in which the Indian child is already a member, unless otherwise agreed to by the tribes.

(c) If an Indian child meets the definition of "Indian child" through more than one tribe because the child is a member in more than one tribe or the child is not a member of but is eligible for membership in more than one tribe, the court must provide the opportunity in any involuntary child custody proceeding for the tribes to determine which should be designated as the Indian child's tribe.

(1) If the tribes are able to reach an agreement, the agreed-upon tribe should be designated as the Indian child's tribe.

(2) If the tribes are unable to reach an agreement, the state court must designate, for the purposes of ICWA, the Indian tribe with which the Indian child has the more significant contacts as the Indian child's tribe, taking into consideration:

(A) preference of the parents for membership of the child;

(B) length of past domicile or residence on or near the reservation of each tribe;

(C) tribal membership of the child's custodial parent or Indian custodian;

(D) interest asserted by each tribe in the child custody proceeding;

(E) whether there has been a previous adjudication with respect to the child by a court of one of the tribes; and

(F) self-identification by the child, if the child is of sufficient age and capacity to meaningfully self-identify.

(3) A determination of the Indian child's tribe for purposes of ICWA and its related regulations does not constitute a determination for any other purpose.

### **COMMENTS**

This rule is derived from and tracks 25 C.F.R. § 23.109.

#### **Rule 5. Emergency Removal or Placement of Child**

- (a) In any case involving an emergency removal or placement of an Indian child, the parties must follow the procedures set forth in 25 U.S.C. § 1922 and 25 C.F.R. § 23.113. Before authorizing such emergency removal or placement, the court must make a finding that the emergency removal or placement of an Indian child is necessary to prevent imminent physical damage or harm to the child.
- (b) The State authority, official, or agency involved must insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

#### **Rule 6. Notice Required for All Child Custody Proceedings**

- (a) The petitioning or filing party must disclose in the complaint, petition, commencing pleading, or other pleading seeking placement that is filed with the court whether there is reason to know that the child who is the subject of the proceeding is an Indian child or what efforts the petitioning or filing party has made in determining whether the child is an Indian child. If there is reason to know that the child is an Indian child, then the petitioning or filing party must identify the Indian child's tribe, if known, and any other information related to Native American ancestry.
- (b) If the court knows or has reason to know that the child who is the subject of the proceeding is an Indian child, then the court must verify that the petitioning or filing party sent notice by registered or certified mail, return receipt requested, to the parent or Indian custodian of the Indian child and to the tribal agent of the Indian child's tribe as designated in 25 C.F.R. § 23.12. If no tribal agent has been designated, then the petitioning or filing party must contact the tribe to be directed to the appropriate office or individual to be notified.
- (c) Whenever there is reason to know that the child is an Indian child, including cases in which the Indian child's tribe cannot be ascertained, notice must be sent to the appropriate regional director of the BIA by registered or certified mail, return receipt requested, or by personal



delivery. The court must ensure that the petitioning or filing party complies with the notice requirements of 25 C.F.R. § 23.111.

(d) If there is reason to know that the child who is the subject of the proceeding is an Indian child, then the petitioning or filing party must identify on the record what efforts have been made to provide the notices referred to in sections (b) and (c) of this rule.

(e) The postal receipts indicating that notice was properly sent by the petitioning or filing party to the parent or Indian custodian of the Indian child and to the Indian child's tribe must be attached to the complaint, petition, commencing pleading, or other pleading seeking placement that is filed with the court; except that, if notification has not been perfected at the time the initial complaint, petition, commencing pleading, or other pleading seeking placement is filed with the court, or if the postal receipts have not been received from the post office at the time of such filing, then the petitioning or filing party must promptly file the postal receipts with the court, upon receipt thereof.

(f) Any responses sent by the tribal agents must promptly be distributed to all parties and filed with the court.

#### **COMMENTS**

[1] For guidance on filing notice and return receipts with the court, see § 19-1-126(1)(c), C.R.S.

[2] When notice is required pursuant to subsection (e) of this rule, the court should ordinarily advise pro se parties seeking placement of an Indian child of their obligation to send notice and may refer them to any resources that may assist them with such notice.

#### **Rule 7. Intervention**

In any proceeding for the foster care placement of or termination of parental rights to an Indian child, the Indian custodian of the child and the Indian child's tribe have a right to intervene at any time, upon written or oral motion filed with the court or made on the record.

#### **COMMENTS**

If the child is a member of or eligible for membership in more than one tribe, only one tribe can be designated as the Indian child's tribe. See 25 U.S.C. § 1903(5) and 25 C.F.R. § 23.109. For the procedures to be employed when a child is a member of or is eligible for membership in more than one tribe, see Rule 4 of these rules.

#### **Rule 8. Transfer**

(a) Either parent, the Indian custodian, or the Indian child's tribe may request at any time, orally on the record or in writing, that the court transfer a foster care or termination of parental rights proceeding to the jurisdiction of the child's tribe.

- (b) The right to request a transfer is available at any stage in each foster care or termination of parental rights proceeding.
- (c) Upon request for transfer, the state court must ensure that the tribal court is promptly notified in writing of the transfer request and that a copy of the notification is provided to all parties to the proceeding. The notification provided by the state court or at its direction to the tribal court may request a timely response regarding whether the tribal court wishes to decline the transfer.
- (d) The state court must transfer the child custody proceeding to the tribal court unless the state court determines that transfer is not appropriate because:
- (1) either parent objects to the transfer;
  - (2) the tribal court declines the transfer; or
  - (3) good cause exists for denying the transfer.
- (e) If the state court believes, or if any party asserts, that good cause exists for denying the transfer, then the reasons for that belief or assertion must be stated orally on the record or provided in writing on the record and to the parties to the child custody proceeding.
- (f) The basis for any court decision to deny transfer must be stated orally on the record or in a written order.

### COMMENTS

[1] For further guidance on transfer to a tribal court, see 25 U.S.C. § 1911(b) and 25 C.F.R. §§ 23.115–23.119.

[2] This rule uses both “child custody proceeding” and “foster care or termination of parental rights proceeding.” The rule’s language follows the federal regulations, 25 C.F.R. §§ 23.115–23.119, which use both phrases.

[3] For guidance regarding what the court must not consider in determining whether good cause exists to deny transfer, see 25 C.F.R. § 23.118(c).

### Rule 9. Required Evidence and Determinations

- (a) A court may not order the foster care placement of an Indian child absent a determination supported by clear and convincing evidence, including testimony of qualified expert witnesses, 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.
- (b) A court may not order the termination of parental rights to an Indian child absent a determination supported by evidence beyond a reasonable doubt, including testimony of

qualified expert witnesses, 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.

(c) Before ordering foster care placement or termination of parental rights, a court must also determine that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have been unsuccessful.

(d) A qualified expert witness 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 and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's tribe.

(1) A person may be designated by the Indian child's tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's tribe.

(2) The social worker regularly assigned to the Indian child may not serve as a qualified expert witness in child custody proceedings concerning the child.

### **COMMENTS**

[1] Subsections (a) and (b) of this rule track the language of 25 U.S.C. § 1912(e) and (f).

[2] 25 U.S.C. § 1912(d) requires, but does not define, active efforts. *But see* Rule 1 of these rules and 25 C.F.R. § 23.2 for a definition and further guidance regarding active efforts; *see also* BIA, *Guidelines for Implementing the Indian Child Welfare Act*, §§ E.5–E.6 at 42–44 (Dec. 2016).

[3] For guidance regarding who may serve as a qualified expert witness, *see* 25 C.F.R. § 23.122 and BIA, *Guidelines for Implementing the Indian Child Welfare Act*, § G.2 at 53–55 (Dec. 2016).

[4] The testimony of a qualified expert witness is required absent an emergency removal of the child pursuant to 25 U.S.C. § 1922 and Rule 5 of these rules.

[5] The court or any party may request the assistance of the Indian child's tribe or the BIA office serving the Indian child's tribe in locating persons qualified to serve as expert witnesses, *see* 25 C.F.R. § 23.122.

### **Rule 10. Placement Preferences**

(a) The party seeking the placement of the Indian child must:

(1) specify a placement within the placement preferences in 25 U.S.C. § 1915, 25 C.F.R. § 23.130, and 25 C.F.R. § 23.131, or another preferred placement established by resolution by the Indian child's tribe, except as set forth in section (b) of this rule;

(2) inform the court whether the Indian child’s tribe has established, by resolution, a different order of preference, and if so, the tribe’s preferred order; and

(3) except in the case of an adoptive placement, provide evidence that the proposed placement is the least restrictive placement that

(A) most approximates a family, taking into consideration sibling attachment;

(B) allows the Indian child’s special needs (if any) to be met; and

(C) is in reasonable proximity to the Indian child’s home, extended family, or siblings.

(4) The court must, where appropriate, also consider the placement preference of the Indian child or Indian child’s parent.

(b) If any party asserts that good cause not to follow the placement preferences exists, then the reasons for that belief or assertion must be stated orally on the record or provided in writing to the parties to the child custody proceeding and the court, as provided in 25 U.S.C. § 1915 and 25 C.F.R. § 23.132.

(c) In the case of a voluntary placement requiring court approval, when a consenting parent requests anonymity, the court must give weight to such desire in applying the placement preferences.

### **COMMENTS**

[1] For further guidance regarding placement preferences, see 25 C.F.R. §§ 23.130–23.132.

[2] For the factors that a court should consider, and factors that a court may not consider, in making a good cause determination under section (b) of this rule, see 25 C.F.R. § 23.132.

[3] For information regarding confidentiality requirements that may apply in voluntary proceedings in which a parent has requested anonymity, see 25 C.F.R. § 23.107(d).

### **Rule 11. Appointment of Counsel**

In any removal, placement, or termination proceeding in which the court determines that a parent or Indian custodian of an Indian child is indigent, the parent or Indian custodian has the right to court-appointed counsel. In addition, if the court is not required to appoint counsel for the child pursuant to applicable law, then the court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child.

## COMMENTS

For guidance regarding the appointment and payment procedures for court-appointed counsel under titles 12, 13, 14, 15, 19 (adoption and special respondents in dependency and neglect only), 22, 22.5, and 27, C.R.S., see CJD 04-05.

## Chapter 28.3

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- (d) If the court has sufficient information to determine that the child who is the subject of the proceeding is an Indian child, then the court shall determine the identity of the Indian child's tribe and treat the child as an Indian child.
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  - (2) Treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an "Indian child."
- (f) In any case brought under the Colorado Children's Code, if the court receives information that the child may have Indian heritage but does not have sufficient information to determine that there is reason to know that the child is an Indian child, the court must direct the petitioning or filing party to:
  - (1) exercise due diligence in gathering additional information that would assist the court in determining whether there is reason to know that the child is an Indian child; and
  - (2) make a record of the efforts taken to determine whether or not there is reason to know that the child is an Indian child.

## COMMENTS

[1] ICWA requirements apply whenever an Indian child is the subject of a child custody proceeding. *See* 25 C.F.R. § 23.103.

[2] For the criteria supporting a reason to know, *see* 25 C.F.R. § 23.107(c) and § 19-1-126(1)(a)(I)–(II), C.R.S.

[3] It is best practice to conduct the required investigation into a child's status early in the case. The results of the investigation help to establish which laws will apply to the case and minimize

the potential for delays or disrupted placements in the future. *See* § 19-1-126(3), C.R.S., and BIA, *Guidelines for Implementing the Indian Child Welfare Act*, § B.1 at 11 (Dec. 2016).

[4] A child may be a member of or may be eligible for membership in more than one tribe, and the inquiries required by this rule must recognize that possibility.

[5] The purpose of the inquiries required by this rule is to identify the tribe or tribes in which the child is a member or may be eligible for membership. The tribes, however, have the exclusive authority to determine whether the child is a member or eligible for membership. To assist in identifying federally recognized tribes, the BIA annually publishes in the Federal Register a list of recognized tribes and their agents for service.

#### **Rule 4. Membership or Eligibility for Membership in Multiple Tribes**

- (a) 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.
- (b) If the Indian child meets the definition of "Indian child" through more than one tribe, deference should be given to the tribe in which the Indian child is already a member, unless otherwise agreed to by the tribes.
- (c) If an Indian child meets the definition of "Indian child" through more than one tribe because the child is a member in more than one tribe or the child is not a member of but is eligible for membership in more than one tribe, the court must provide the opportunity in any involuntary child custody proceeding for the tribes to determine which should be designated as the Indian child's tribe.
  - (1) If the tribes are able to reach an agreement, the agreed-upon tribe should be designated as the Indian child's tribe.
  - (2) If the tribes are unable to reach an agreement, the state court must designate, for the purposes of ICWA, the Indian tribe with which the Indian child has the more significant contacts as the Indian child's tribe, taking into consideration:
    - (A) preference of the parents for membership of the child;
    - (B) length of past domicile or residence on or near the reservation of each tribe;
    - (C) tribal membership of the child's custodial parent or Indian custodian;
    - (D) interest asserted by each tribe in the child custody proceeding;
    - (E) whether there has been a previous adjudication with respect to the child by a court of one of the tribes; and

- (F) self-identification by the child, if the child is of sufficient age and capacity to meaningfully self-identify.
- (3) A determination of the Indian child's tribe for purposes of ICWA and its related regulations does not constitute a determination for any other purpose.

### **COMMENTS**

This rule is derived from and tracks 25 C.F.R. § 23.109.

#### **Rule 5. Emergency Removal or Placement of Child**

- (a) In any case involving an emergency removal or placement of an Indian child, the parties must follow the procedures set forth in 25 U.S.C. § 1922 and 25 C.F.R. § 23.113. Before authorizing such emergency removal or placement, the court must make a finding that the emergency removal or placement of an Indian child is necessary to prevent imminent physical damage or harm to the child.
- (b) The State authority, official, or agency involved must insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

#### **Rule 6. Notice Required for All Child Custody Proceedings**

- (a) The petitioning or filing party must disclose in the complaint, petition, commencing pleading, or other pleading seeking placement that is filed with the court whether there is reason to know that the child who is the subject of the proceeding is an Indian child or what efforts the petitioning or filing party has made in determining whether the child is an Indian child. If there is reason to know that the child is an Indian child, then the petitioning or filing party must identify the Indian child's tribe, if known, and any other information related to Native American ancestry.
- (b) If the court knows or has reason to know that the child who is the subject of the proceeding is an Indian child, then the court must verify that the petitioning or filing party sent notice by registered or certified mail, return receipt requested, to the parent or Indian custodian of the Indian child and to the tribal agent of the Indian child's tribe as designated in 25 C.F.R. § 23.12. If no tribal agent has been designated, then the petitioning or filing party must contact the tribe to be directed to the appropriate office or individual to be notified.
- (c) Whenever there is reason to know that the child is an Indian child, including cases in which the Indian child's tribe cannot be ascertained, notice must be sent to the appropriate regional director of the BIA by registered or certified mail, return receipt requested, or by personal

delivery. The court must ensure that the petitioning or filing party complies with the notice requirements of 25 C.F.R. § 23.111.

- (d) If there is reason to know that the child who is the subject of the proceeding is an Indian child, then the petitioning or filing party must identify on the record what efforts have been made to provide the notices referred to in sections (b) and (c) of this rule.
- (e) The postal receipts indicating that notice was properly sent by the petitioning or filing party to the parent or Indian custodian of the Indian child and to the Indian child's tribe must be attached to the complaint, petition, commencing pleading, or other pleading seeking placement that is filed with the court; except that, if notification has not been perfected at the time the initial complaint, petition, commencing pleading, or other pleading seeking placement is filed with the court, or if the postal receipts have not been received from the post office at the time of such filing, then the petitioning or filing party must promptly file the postal receipts with the court, upon receipt thereof.
- (f) Any responses sent by the tribal agents must promptly be distributed to all parties and filed with the court.

#### **COMMENTS**

[1] For guidance on filing notice and return receipts with the court, *see* § 19-1-126(1)(c), C.R.S.

[2] When notice is required pursuant to subsection (e) of this rule, the court should ordinarily advise *pro se* parties seeking placement of an Indian child of their obligation to send notice and may refer them to any resources that may assist them with such notice.

#### **Rule 7. Intervention**

In any proceeding for the foster care placement of or termination of parental rights to an Indian child, the Indian custodian of the child and the Indian child's tribe have a right to intervene at any time, upon written or oral motion filed with the court or made on the record.

#### **COMMENTS**

If the child is a member of or eligible for membership in more than one tribe, only one tribe can be designated as the Indian child's tribe. *See* 25 U.S.C. § 1903(5) and 25 C.F.R. § 23.109. For the procedures to be employed when a child is a member of or is eligible for membership in more than one tribe, *see* Rule 4 of these rules.

#### **Rule 8. Transfer**

- (a) Either parent, the Indian custodian, or the Indian child's tribe may request at any time, orally on the record or in writing, that the court transfer a foster care or termination of parental rights proceeding to the jurisdiction of the child's tribe.

- (b) The right to request a transfer is available at any stage in each foster care or termination of parental rights proceeding.
- (c) Upon request for transfer, the state court must ensure that the tribal court is promptly notified in writing of the transfer request and that a copy of the notification is provided to all parties to the proceeding. The notification provided by the state court or at its direction to the tribal court may request a timely response regarding whether the tribal court wishes to decline the transfer.
- (d) The state court must transfer the child custody proceeding to the tribal court unless the state court determines that transfer is not appropriate because:
  - (1) either parent objects to the transfer;
  - (2) the tribal court declines the transfer; or
  - (3) good cause exists for denying the transfer.
- (e) If the state court believes, or if any party asserts, that good cause exists for denying the transfer, then the reasons for that belief or assertion must be stated orally on the record or provided in writing on the record and to the parties to the child custody proceeding.
- (f) The basis for any court decision to deny transfer must be stated orally on the record or in a written order.

### **COMMENTS**

[1] For further guidance on transfer to a tribal court, *see* 25 U.S.C. § 1911(b) and 25 C.F.R. §§ 23.115–23.119.

[2] This rule uses both “child custody proceeding” and “foster care or termination of parental rights proceeding.” The rule’s language follows the federal regulations, 25 C.F.R. §§ 23.115–23.119, which use both phrases.

[3] For guidance regarding what the court must not consider in determining whether good cause exists to deny transfer, *see* 25 C.F.R. § 23.118(c).

### **Rule 9. Required Evidence and Determinations**

- (a) A court may not order the foster care placement of an Indian child absent a determination supported by clear and convincing evidence, including testimony of qualified expert witnesses, 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.
- (b) A court may not order the termination of parental rights to an Indian child absent a determination supported by evidence beyond a reasonable doubt, including testimony of

qualified expert witnesses, 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.

- (c) Before ordering foster care placement or termination of parental rights, a court must also determine that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have been unsuccessful.
- (d) A qualified expert witness 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 and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's tribe.
  - (1) A person may be designated by the Indian child's tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's tribe.
  - (2) The social worker regularly assigned to the Indian child may not serve as a qualified expert witness in child custody proceedings concerning the child.

#### COMMENTS

[1] Subsections (a) and (b) of this rule track the language of 25 U.S.C. § 1912(e) and (f).

[2] 25 U.S.C. § 1912(d) requires, but does not define, active efforts. *But see* Rule 1 of these rules and 25 C.F.R. § 23.2 for a definition and further guidance regarding active efforts; *see also* BIA, *Guidelines for Implementing the Indian Child Welfare Act*, §§ E.5–E.6 at 42–44 (Dec. 2016).

[3] For guidance regarding who may serve as a qualified expert witness, *see* 25 C.F.R. § 23.122 and BIA, *Guidelines for Implementing the Indian Child Welfare Act*, § G.2 at 53–55 (Dec. 2016).

[4] The testimony of a qualified expert witness is required absent an emergency removal of the child pursuant to 25 U.S.C. § 1922 and Rule 5 of these rules.

[5] The court or any party may request the assistance of the Indian child's tribe or the BIA office serving the Indian child's tribe in locating persons qualified to serve as expert witnesses, *see* 25 C.F.R. § 23.122.

#### Rule 10. Placement Preferences

- (a) The party seeking the placement of the Indian child must:
  - (1) specify a placement within the placement preferences in 25 U.S.C. § 1915, 25 C.F.R. § 23.130, and 25 C.F.R. § 23.131, or another preferred placement established by resolution by the Indian child's tribe, except as set forth in section (b) of this rule;

- (2) inform the court whether the Indian child's tribe has established, by resolution, a different order of preference, and if so, the tribe's preferred order; and
  - (3) except in the case of an adoptive placement, provide evidence that the proposed placement is the least restrictive placement that
    - (A) most approximates a family, taking into consideration sibling attachment;
    - (B) allows the Indian child's special needs (if any) to be met; and
    - (C) is in reasonable proximity to the Indian child's home, extended family, or siblings.
  - (4) The court must, where appropriate, also consider the placement preference of the Indian child or Indian child's parent.
- (b) If any party asserts that good cause not to follow the placement preferences exists, then the reasons for that belief or assertion must be stated orally on the record or provided in writing to the parties to the child custody proceeding and the court, as provided in 25 U.S.C. § 1915 and 25 C.F.R. § 23.132.
- (c) In the case of a voluntary placement requiring court approval, when a consenting parent requests anonymity, the court must give weight to such desire in applying the placement preferences.

### **COMMENTS**

[1] For further guidance regarding placement preferences, *see* 25 C.F.R. §§ 23.130–23.132.

[2] For the factors that a court should consider, and factors that a court may not consider, in making a good cause determination under section (b) of this rule, *see* 25 C.F.R. § 23.132.

[3] For information regarding confidentiality requirements that may apply in voluntary proceedings in which a parent has requested anonymity, *see* 25 C.F.R. § 23.107(d).

### **Rule 11. Appointment of Counsel**

In any removal, placement, or termination proceeding in which the court determines that a parent or Indian custodian of an Indian child is indigent, the parent or Indian custodian has the right to court-appointed counsel. In addition, if the court is not required to appoint counsel for the child pursuant to applicable law, then the court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child.

## COMMENTS

For guidance regarding the appointment and payment procedures for court-appointed counsel under titles 12, 13, 14, 15, 19 (adoption and special respondents in dependency and neglect only), 22, 22.5, and 27, C.R.S., *see* CJD 04-05.



**Amended and Adopted by the Court, En Banc, December 14, 2023. Effective January 1, 2024.**

**By the Court:**

**Richard L. Gabriel  
Justice, Colorado Supreme Court**