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Directive #4-20

[Questions or comments may be directed to
609-815-2900 ext. 55350]

**To: Assignment Judges
Family Presiding Judges
Trial Court Administrators
Family Division Managers**

From: Glenn A. Grant, J.A.D. 

Date: January 6, 2020

**Re: Family -- Non-Dissolution (FD) - Indian Child Welfare Act (ICWA)
Supplemental Order**

This promulgates for immediate statewide use the following documentation to address the requirements of the federal Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C.A. §1901 through §1923, in non-dissolution cases:

- A supplemental order to be used in certain situations to address ICWA (“ICWA Supplemental Order”)
- A checklist to assist the court
- Instructions on the use of the Non-Dissolution FD ICWA Supplemental Order

Before the court may grant the custody of a minor child to a non-parent in a non-dissolution case, the court first must determine whether ICWA applies to that child. This directive sets forth the policy and the process for compliance with ICWA in a non-dissolution case.

ICWA Checklist

The attached ICWA checklist for judges sets out all of the steps necessary to assist the court in addressing ICWA. The checklist indicates when the court must make the finding of ICWA applicability. If ICWA may apply to a child, the court must ensure that the potentially involved Indian tribe and the birth parents receive proper notification of the proceedings.

If the court determines at first review that ICWA does not apply to the child

If upon completing its first review of the ICWA issue, the court determines that ICWA does not apply to a child, then the following language should be entered on a Uniform Summary Support order (USSO) to indicate that finding:

After appropriate inquiry of the parties, the court finds that there is no information to conclude that [child's name] is subject to the Indian Child Welfare Act.

For a first-time review and determination that ICWA does not apply to a child, the ICWA Supplemental Order is not to be used. Rather, the court will enter the above finding in Section 23 which is the free-form part of the USSO. Once the court has made this finding for a child, it will not be necessary to make this finding again for that child.

If the court determines that ICWA applies or may apply to the child

The ICWA Supplemental Order contains multiple checkboxes to address the potential scenarios where ICWA applies. In those cases where there is an assertion that ICWA may apply to the minor child, it is the responsibility of the party who made the claim to provide the proofs to the court. The attached instructions will assist the court in completing the ICWA Supplemental Order. In those cases where the court is unable to determine initially whether ICWA applies to the child in question, the court shall document its findings on the ICWA Supplemental Order, which will be appended to the court's USSO addressing the child.

Follow-up reviews to determine the ICWA status of the child

When the court is unable to determine a child's ICWA status upon the first review, the court will continue to consider the child's status at subsequent proceedings until the court is able to make a determination as to whether ICWA applies to the child. Upon making the final determination of ICWA status, the court shall document its findings on the ICWA Supplemental Order.

Any questions regarding this memo or the revised orders may be directed to the Family Practice Division at (609) 815-2900, ext. 55350. Thank you.

Attachments

cc: Steven D. Bonville, Chief of Staff
AOC Directors and Assistant Directors
Clerks of Court
Special Assistants to the Administrative Director
Amelia Wachter-Smith, Chief, Family Practice
Assistant Family Division Managers

Plaintiff

v.

Defendant

**Indian Child Welfare Act
(ICWA)
Supplemental Order**

- Indian Tribe, _____, responded/ did not respond
 Tribe's Representative, _____, appeared/ did not appear

It Is on This _____ Day of _____, 20____; The Court Finds That:

Select only one response and complete the corresponding information.

- If you select items 1 or 2, **go to the next page.**
- If you select item 3, **no other findings are required.**

1. The child, _____, whose date of birth is _____
_____ is a Native American child, who is subject to the **Indian Child Welfare Act of 1978**. The child's tribe is:

The tribe's response:

2. The child, _____, whose date of birth is _____
_____ **might be** a Native American child, who is subject to the **Indian Child Welfare Act of 1978**, based on the following facts: _____

The tribe's response:

3. The child, _____, whose date of birth is _____
_____ **is not** a Native American child subject to the **Indian Child Welfare Act of 1978** based on the following facts: _____

The tribe's response:

ICWA Supplemental Order

If you selected item #2 (the child's ICWA status has not been determined), **the following section must be completed:**

4. **It Is Ordered That** _____ take the following actions to ascertain if the child is subject to the **Indian Child Welfare Act of 1978** and to report all actions and responses to the court and all parties:
- a) Give notice to the Tribe by registered and certified mail with return receipt requested.
 - b) Send a copy of the notice to the Regional Director of Bureau of Indian Affairs.

If you selected items 1 or 2 and the court is granting custody of the minor child to a non- parent, **the following section must be completed:**

5. The court's granting of custody to a non-parent of this child(ren), who is subject to the **Indian Child Welfare Act of 1978**, out of the parents' home is based on clear and convincing evidence, including the testimony of the qualified expert witness that continued custody in the home would likely result in serious emotional or physical damage to the child.
6. The court's granting of custody to a non-parent of this child(ren) is made in accordance with the placement priorities of the **Indian Child Welfare Act of 1978** in that:

And It Is Further Ordered That:

Date _____

J.S.C.

Indian Child Welfare Act (ICWA) Checklist

This checklist provides guidance for ICWA policy. The Indian Child Welfare Act, 25 U.S.C.A. §1901 - §1923, and Amendments to the Code of Federal Regulations, 25 CFR 23.1 et seq. effective December 12, 2016 are the authority on ICWA.

1. Is this an Indian Child under ICWA?

An “Indian Child” is any unmarried person under the age of 18 and either (1) Is a member or citizen of a federally recognized American Indian Tribe; or (2) Is eligible for membership or citizenship in a federally recognized American Indian Tribe and is the biological child of a member/citizen of a Tribe.

NOTE: The Indian Tribe determines whether the child is a member, is eligible for membership and if a parent is a member. This is not the role of the State court. §23.109. If ICWA applies at the commencement of a proceeding, it will not cease to apply because the child reaches 18.

2. When is it necessary to make an ICWA finding?

- Foster care placement, where the child has been removed, parental rights have not been terminated and where the parents cannot have the child returned upon demand (FN Complaints filed by DCPD for Custody)
- Other child protection cases where the possibility exists that the child may be removed and where the parents would not be able to have the child returned upon demand (FN Complaints filed by DCPD under Title 30 or Title 9 Care and Supervision)
- Transfer between foster care placements
- Surrender for adoption
- Termination of parental rights
- Pre-adoptive placement, where TPR already has occurred
- Adoption placement
- Custody to a non-parent
- Proceedings for status offenses resulting in out-of-home placement

NOTE: The court is required to ask each participant at the outset of the proceeding whether the participant knows or has “reason to know” the child is an Indian child. All responses should be on the record. The court must instruct parties to inform the court if they subsequently receive information on this topic. If there is “reason to know”, the court must confirm the agency or party used due diligence to work with all applicable Tribe(s) to verify, and must treat the child as an Indian child until such time it is determined the child is not. §23.107.

3. When is it not necessary to make an ICWA finding?

- Proceedings for a criminal act that is not a status offense
- An award of custody to one parent

- A voluntary placement that a parent/guardian has made of free will without a threat of removal by a state agency that does not prohibit a parent/guardian from regaining custody upon demand.

4. Notice

- Where the court knows or has reason to know that an Indian child is involved, the party seeking placement or TPR must notice the Tribe and parent/guardian.
- Sufficient notice is by registered or certified mail with return receipt requested and must include the information set forth in §23.111.
- Tribes designate agents for service of notices at www.bia.gov.
- Copies of these notices must also be sent to the Regional Director of Bureau of Indian Affairs. For NJ proceedings, the address is as follows: Eastern Regional Director, Bureau of Indian Affairs, 545 Marriott Drive, Suite 700, Nashville, Tennessee 37214.
- Upon request, the Regional Director will attempt to locate the parent/guardian or Tribe.

5. When must a State court dismiss an action?

- If the residence and domicile of the Indian child is on a reservation, or if the child is a ward of the Tribal court, the State court must dismiss and transfer the file to the Tribal court.
- If the Tribe's jurisdiction and the State's jurisdiction are concurrent, the State court must transfer the proceeding to the Tribe upon request of the Tribe or parent/guardian, unless there is good cause to the contrary.
- If considering "good cause", the State court may not consider (1) the advance state of the proceeding if the parents or Tribe did not receive notice until the case was advanced; (2) whether there were prior proceedings involving the child for which no petition to transfer was filed; (3) whether transfer could result in a change in the placement of the child; (4) the child's cultural connections with the Tribe or reservation; or (5) socio-economic conditions or any negative perception of Tribal or BIA services or judicial systems.

6. What time limits, extensions and exceptions apply?

- No foster care placement or TPR proceeding may be held until at least 10 days after receipt of notice by the parent/guardian and Tribe, which may be extended an additional 20-30 days upon request. §23.112
- Exception applies to **emergency proceedings**. §23.113 The State court must make a finding on the record that emergency removal is necessary to prevent imminent physical harm to the child; promptly hold a hearing on whether the emergency removal should continue; and at every hearing, determine whether the emergency removal is no longer necessary to prevent imminent harm. Absent this finding, the emergency removal must immediately terminate.
- Emergency proceedings are initiated by the filing of a petition, the requirements of which are found in §23.113.

7. What are rules for the State court to adjudicate involuntary placements?

- Prior to ordering an involuntary placement of an Indian child or TPR, the court must conclude that “**active efforts**” have been made to prevent the breakup of the Indian family and those efforts have been unsuccessful. Active efforts as defined in §23.2 must be detailed in the record.
- The court must not order a foster care placement unless **clear and convincing evidence** is presented, including testimony of a qualified expert, that continued custody by the parent is likely to result in serious emotional or physical damage.
- The court must not order TPC unless evidence **beyond a reasonable doubt** is presented including testimony of a qualified expert that continued custody by the parent is likely to result in serious emotional or physical damage.
- The rules established a qualified expert witness should have specific knowledge of the prevailing social and cultural standards of the Tribe. §23.122.

8. What actions must a State court undertake in voluntary proceedings?

- Participants must state on the record whether the child is an Indian child or there is reason to believe.
- Court must ensure the party seeking placement has taken steps to verify the child’s status.
- A parent’s consent must be in writing and follow the requirements of §23.126.
- Prior to accepting the consent, the court must voir dire the parent on the record, following the requirements set forth in §23.125.
- A parent may withdraw consent to voluntary placement at any time.
- A parent may withdraw consent to TPR or adoption prior to entry of final order.

9. What are the ICWA placement preferences?

- For adoptions, in descending order: (1) Member of child’s extended family, (2) Other Tribe members, (3) Other Indian families.
- For foster care or pre-adoptive placements, the child must be in the least restrictive setting that: (1) Most approximates a family, considering sibling attachment, (2) Allows special needs to be met, (3) Is in proximity to the child’s home, extended family or siblings’ home. Preference in descending order is: (1) Member of child’s extended family, (2) Foster home approved by Tribe, (3) Indian foster home, (4) Children’s’ institution approved by Tribe.
- For both, a Tribe may establish a different order or preference which would govern.
- For both, the court may consider the preference of the child or parents.

10. May the court deviate from placement preferences”?

- The court may deviate on application of a party who must establish that “good cause” exists for departure, so long as the procedures and factors set forth in §23.132 are followed.

11. Do the rules affect a parent's right to choose who adopts their child in voluntary adoptions?

- No. Parents may choose adoptive parents as long as they attest that they have reviewed the placement preferences. The BIA recommends that Tribes be provided notice in voluntary proceedings; however, the final rule does not require it.

12. May adoptions be vacated?

- Adoptions based on consent having been obtained through fraud or duress may be vacated. The procedure and requirements are found in §§23.136 - 23.127.

13. What information must States furnish to the Bureau of Indian Affairs?

- Once an adoption is finalized, a copy of the decree and additional information set forth in §23.140 must be sent and marked "Confidential" to the BIA.

14. What records must the State maintain?

- A record of every voluntary or involuntary foster care, pre-adoptive placement and adoptive placement must be maintained.
- The State court or agency designated to be the repository should notify the BIA whether maintained by the court or agency.

INSTRUCTIONS FOR THE INDIAN CHILD WELFARE ACT of 1978 SUPPLEMENTAL ORDER IN NON-DISSOLUTION CASES

In non-dissolution cases where custody will be granted to a non-parent, a determination is required as to whether the Indian Child Welfare Act of 1978 (ICWA) applies to a child. This Supplemental Order must be attached to the Uniform Summary Support Order (USSO) and is not intended for stand-alone use.

When is this Supplemental Order Used?

- If, at the time that the court is granting custody of a minor child to a non-parent, the court has determined that the child is definitively not an ICWA child, then the Supplemental Order is not to be used. Enter the finding on the USSO granting custody to the non-parent. Once the court has made this finding for a child, it will not be necessary to make this finding again for that child.
- If the court determines that ICWA applies to a child, then the court must complete the Supplemental Order and attach it to the appropriate order for the proceeding. The Supplemental Order must be completed at the hearing when the ICWA determination was made.
- If the court cannot determine the child's ICWA status, then the court must complete the Supplemental Order at each hearing until the status is determined. If, at a subsequent hearing, the court determines definitively that ICWA does not apply to the child, then the court must complete the Supplemental Order to document the finding and it will not be necessary to use the order again for that child. If ICWA does apply, the court must complete the Supplemental Order and attach it to the USSO for the proceeding.

The Supplemental Order should reflect if the court has determined that the child is an ICWA child. If "yes," the Supplemental Order should document the child's tribe and the tribe's position. If ICWA status has not yet been determined, then the Supplemental Order should document this and describe efforts being made to make the determination. If, at a subsequent hearing, the answer is "no," this determination should be documented on the Supplemental Order and it will not be necessary to complete the Supplemental Order again.

When should the Court address ICWA?

The Court should address ICWA in all cases where custody is sought by a non-parent.

ICWA applies when a child under the age of 18 is:

- a member of a federally recognized American Indian tribe OR
- eligible to be a member of a federally recognized American Indian tribe and the child of a member of a federally recognized American Indian tribe.

Completing the Supplemental Order

1. Opening paragraph:

- If known, indicate the Indian Tribe's name and check "responded" or "did not respond."
- Indicate the name and title of the Tribe Representative and check "appeared" or "did not appear."

2. Court findings:

Paragraph 1 - If it is determined that ICWA applies to the child, check and complete Paragraph 1. The tribe's response and position should be documented on the lines provided, check and complete Paragraph 6.

Paragraph 2 - If the child's ICWA status has not yet been determined, check and complete Paragraph 4. All supporting information as well as the tribe's position should be documented on the lines provided.

NOTE: Also, complete the relief section ("IT IS ORDERED that . . .") of this Supplemental Order. This section is at the bottom of page 2 of the Supplemental Order.

Paragraph 3 - If it is determined at a subsequent hearing that ICWA does not apply to the child, check and complete Paragraph 3. All known facts as well as the tribe's position should be documented on the lines provided. If Paragraph 3 is checked, no other findings are required and it is not necessary to complete this supplemental order for this child again.

3. If Paragraph 1 or 2 is checked on the order and if this order supplements the **USSO**, check and complete Paragraph 5 of the Supplemental Order. The court must also make findings that the granting of custody to a non-parent is in accordance with the placement priorities of the ICWA.

A proper "qualified expert witness" (QEW) must testify on this issue.

A QEW is defined as:

1. A member of the child's tribe who is recognized as being knowledgeable about the tribe's rearing and family practices.
2. A layperson (person who is not a member of the child's tribe) who has had experience in providing social services to tribes and is knowledgeable about the tribe's rearing practices.
3. An expert who is recognized in his or her field of expertise.

4. Paragraph 4 - ("IT IS ORDERED that . . .") - If paragraph 2 is checked on the Order **(the child's ICWA status has not yet been determined)**, complete the Relief section of the Supplemental Order. The first lines indicate the parties/entities

responsible for follow up action. On the lines provided, set forth the actions ordered by the court to ascertain the child's ICWA status.

5. Paragraph 5 – The court finds by clear and convincing evidence that continued custody in the home would likely result in serious emotional or physical damage to the child.
6. Paragraph 6 - The court must also find that the placement was made in accordance with the ICWA placement priorities and documented on the lines provided. (See ICWA Checklist #9.)