



# **ICWA Case Stages in State Court & Permanency Options**

Tribal Child Welfare & Tribal Justice

Conference September 9, 2024



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## LIFE OF AN ICWA CASE

	What does the Office of Children's Services (OCS) do at each case stage?	Tribal ICWA Worker's Role
<b>INVESTIGATION</b> ↓	OCS policy states to invite the Tribe to participate in the investigation. During the investigations OCS determines if the children are safe. If OCS does not believe children are safe in the home, OCS files a Petition.	Confirm child's membership or eligibility for membership with the Tribe; Request a copy of the Protective Service Report (PSR); Support family during investigation; Provide OCS with additional information (family members, potential placements, other sources of information OCS may not be aware of)
<b>TEMPORARY CUSTODY (probable cause) HEARING</b>  <i>WITHIN 48 HOURS</i> ↓	OCS files Petition for Emergency Custody and a temporary custody hearing is held within 48 hours. When a non-emergency petition is filed, the probable cause hearing is held within a week. At this hearing parents are appointed an attorney if they cannot afford one. This temporary custody hearing is typically continued to give the parents time to meet with their attorneys. Unless parents stipulate to probable cause, judge holds a contested hearing and decides: <ul style="list-style-type: none"> <li>• If OCS has proven child has suffered abuse or neglect as defined by state law</li> <li>• If OCS has proven active efforts to prevent removal</li> <li>• If OCS has proven that either <ul style="list-style-type: none"> <li>○ Removal was necessary to prevent imminent physical harm, or</li> <li>○ With Qualified Expert Witness (QEW) that child likely to suffer serious emotional/physical harm if home</li> </ul> </li> <li>• If OCS has followed placement preferences or proven good cause not to</li> </ul>	-Share the Tribe's position on: <ul style="list-style-type: none"> <li>• Return of child to home or</li> <li>• Placement with Relatives if child stays in custody</li> </ul> -File Notice of Intervention if Tribe wants to intervene -Request and review discovery -May call or question witnesses in court -Consider transfer to Tribal court if the Tribe is able to take on management of the case
<b>ADJUDICATION HEARING</b>  <i>WITHIN 120 DAYS</i> ↓	Unless parents stipulate, judge holds contested hearing and decides: <ul style="list-style-type: none"> <li>• If OCS has proven that the child has suffered abuse or neglect as defined by state law</li> <li>• If OCS has proven (with QEW) that child likely to suffer serious emotional/physical harm if returned home</li> <li>• If OCS has followed placement preferences or has proven good cause not to</li> </ul>	-Share the Tribe's position on: <ul style="list-style-type: none"> <li>• whether child has suffered abuse or neglect as defined by state law</li> <li>• whether removal is necessary</li> <li>• current placement</li> </ul> -Request and review discovery -May call or question witnesses in court
<b>DISPOSITION HEARING</b>  <i>WITHIN 6 MONTHS</i> ↓	OCS files Disposition Report 15 days before hearing; Guardian Ad Litem (GAL) Report 10 days before hearing – both reports get served to the parties and the case plan is finalized. Unless parents stipulate, judge holds contested hearing and decides: <ul style="list-style-type: none"> <li>• What the requirements of the case plan are</li> <li>• If OCS has proven (with QEW) that child likely to suffer serious emotional/physical harm if returned home</li> <li>• If OCS has proven active efforts were provided</li> <li>• If OCS has followed placement preferences or proven good cause not to</li> <li>• How long child should be in state custody</li> </ul>	-Share the Tribe's position regarding continued custody by the state -Request and review discovery -May file Disposition Report -May call or question witnesses in court
<b>PERMANENCY HEARING</b>  <i>WITHIN 12 MONTHS OF REMOVAL</i> ↓	OCS files Permanency Report 10 days before hearing Unless parents stipulate, judge holds contested hearing and decides: <ul style="list-style-type: none"> <li>• Whether to approve OCS proposed permanency plan</li> <li>• If OCS has proven active efforts</li> <li>• If OCS has followed placement preferences or proven good cause not to</li> </ul>	-Share the Tribe's position on the permanency goal: reunification, guardianship, cultural adoption, state court adoption, or APPLA -Request and review discovery -May call or question witnesses in court
<b>TERMINATION HEARING</b>  <i>WITHIN 180 DAYS OF PETITION TO TERMINATE</i>	OCS files Petition to Terminate Parental Rights Unless parents relinquish rights, judge holds contested hearing and decides: <ul style="list-style-type: none"> <li>• If OCS has proven it provided active efforts and the parents were unsuccessful in addressing safety concerns</li> <li>• If OCS has proven <i>beyond a reasonable doubt</i> (with QEW) that custody with parent would likely result in serious emotional/physical harm to child</li> <li>• If termination is in the child's best interests</li> </ul>	-Share the Tribe's position on termination -Request and review discovery -May file Tribal Report regarding position on Termination -May call or question witnesses in court
<b>PLACEMENT REVIEW</b>	Any party or anyone who requested placement can ask for a hearing at any time Judge decides: <ul style="list-style-type: none"> <li>• Which placement is in the best interest of the child <i>[Note: all relatives are equal preference unless Tribal law, custom, or resolution specifies otherwise]</i></li> <li>• If the proposed placement IS a higher preference, is there good cause to deviate from that preference placement?</li> </ul>	-Share the Tribe's position for/against the person requesting placement -Request and review discovery -May call or question witnesses in court

# Probable Cause (PC) -State's role

Every CINA case begins with a Temporary Custody Hearing, also called a Probable Cause Hearing. The initial PC hearing is closed to the public.

Parents are appointed an attorney if they cannot afford one and the hearing is typically continued to give the parents time to meet with their attorneys.

The Judge may inquire about whether notice was provided to all necessary individuals including whether the Tribe was identified and provided notice of the hearing.



# If the Child is Removed From the Home, OCS Must Show That:

Removal is necessary to prevent imminent physical damage or harm *or* there is clear and convincing evidence, including testimony of qualified expert witnesses, that the child is likely to suffer serious emotional or physical damage if left in the home

The child is placed in a home that complies with ICWA placement preferences and if not, that there is “good cause to deviate”

Active efforts were provided to prevent removal



# Probable Cause (PC)

## -Tribe's Role

Share the Tribe's position on placement (return of child to home or placement with relatives if child stays in custody)

File "Notice of Intervention" if Tribe wants to become a party in the CINA case

The Tribe will name an attorney or non-attorney representative (such as an ICWA Worker), or both, to be the Tribe's point of contact

CINA Rule 8 asks the intervening Tribe to disclose names and contact information for extended family, potential placements, and a summary of Tribal services or Tribal court actions involving the family

Can request up to 20 additional days to prepare for the proceedings

Consider transfer to Tribal court if the Tribe has capacity to take on management of the case

Peremptory challenge –must be filed within 5 days from Tribe's intervention



# How is the Indian child's Tribe Determined? 25 CFR\* § 23.109

- If the Tribes are unable to reach an agreement, the State court will take into consideration:
  - Preference of the parents for membership of the child;
  - Length of past domicile or residence on or near the reservation of each Tribe;
  - Tribal membership of the child's custodial parent or Indian custodian; and
  - Interest asserted by each Tribe in the child-custody proceeding;
  - Whether there has been a previous adjudication with respect to the child by a court of one of the Tribes; and
  - Self-identification by the child, if the child is of sufficient age and capacity to meaningfully self-identify.

\*Code of Federal Regulations



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# Intervention Process

The Indian child's Tribe has the right to intervene at any point in the State foster care or termination of parental rights proceeding.

The earlier the Tribe intervenes the sooner they will become a legal party and receive discovery (documentation). It allows the Tribe to advocate to the court and to the parties about the Tribe's positions throughout the case.

The Tribe submits a "Notice of Intervention" and a proposed order "Accepting and Acknowledging the Tribe's Notice of Intervention" for the judge to sign

These documents specify that the child is an Indian child as defined by 25 U.S.C. §1903(4) and AS §47.10.990(16)



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# Service of Documents

## -Telling the Other Parties in Writing

- Anything filed with the court will also need to be served on the legal parties, usually by mailing them copies.
- Service protects due process by providing parties with notice and an opportunity to respond.



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# Adjudication (What's the concern?)

## -State's role

Held within 120 days after temporary custody.

At the Adjudication hearing, the Judge will determine if maltreatment occurred and if the child is a "child in need of aid".

Can be agreed to by a stipulation by the parents or by trial if the parents contest.

Findings are specific to subsection of 47.10.011.

- Physical abuse, substance abuse, domestic violence, neglect, abandonment.

Parents can stipulate to abuse/neglect under one subsection and contest abuse/neglect under a different subsection.



# Adjudication (What's the concern?) -Tribe's role

- If the Tribe has recently intervened, the Tribe can request additional time to prepare for the Adjudication Hearing.
- Does the Tribe agree that OCS' petition for removal is true/accurate?
- Does the Tribe agree that the child is a Child In Need of Aid?
- Does the Tribe agree that the child should be removed from the home?
- Does the Tribe agree with the child's placement?
- Has OCS been making active efforts?
  - Are parents getting the services and supports they need?
  - Are the children getting the supports they need?



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# Disposition (What's the plan?)

## -State's role

OCS files Disposition Report 15 days before hearing; Guardian Ad Litem (GAL) files report 10 days before hearing – both reports get served on the parties.

If the other parties disagree, they have the right to object to the report/contest at the hearing.

At the Disposition hearing, the case plan for the parents and the children is finalized.

The purpose of the Disposition Hearing is to determine what direction the case will move in.

OCS will also ask for a term (an amount of time) for custody, typically "not to exceed 2 years."





# Disposition (What's the plan?)

## -Tribe's role

- Share the Tribe's position on continued custody by the state.
- May write and file a predisposition report 10 days prior to the Disposition Hearing.
  - It can be helpful if the Tribe wants to add, correct, or clarify OCS' or the GAL's report.
  - If the Tribe does not have enough reasonable time to review the reports before the hearing, then the Tribe can ask for a continuance (a delay) of the

# Permanency – Permanency Plan for the Child

- The primary and secondary goals outline the permanency plan for the child and are important benchmarks on how a case is going.
- Permanency findings determine whether the permanency goal is in the child's best interest.
- If the current permanency goal is not in the child's best interest, the permanency goal should be changed to whatever goal is in the child's best interest



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## Permanency Options

- Reunification – child is returned to one or both parents/legal guardians/Indian custodian.
- Adoption – adoptive parents become legal parents of child and bio parental rights are terminated/given up.
- Guardianship. Parental rights are suspended, but not terminated. CINA case is closed, but parents must still go before the state court if they want to get child back.
- Permanent placement with a fit and willing relative – relative becomes the permanent placement. Parental rights are not terminated. CINA case may remain open or may be closed.
- Another Permanent Planned Living Arrangement – available for child 16 and older. Child may opt for APPLA if no other permanency goal makes sense and child is going to age out in custody.



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# Permanency (Plan for the child)

## -State's role

Permanency Report is due 10 days before the hearing

Permanency findings must be made by the Court within one year of removal and annually thereafter

Permanency findings define what the permanent plan for the child will be (reunification, guardianship, adoption, permanent placement with a fit and willing relative, or APPLA - another permanent planned living arrangement)

OCS must tell the Judge:

- Is the child still a Child In Need of Aid?
- What is the plan for the child?
- Is the child's placement appropriate and in the child's best interests?
- Has OCS made active efforts to provide services to the family?
- Have parents made significant progress to remedy the problem that caused removal?
- Has OCS made reasonable efforts to finalize the Permanency Plan for the child?



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# Permanency (Plan for the child) -Tribe's Role

- If the Tribe has not received OCS' report before the Permanency Hearing, the ICWA Worker can email the OCS caseworker and request the report or ask for a continuance (delay) at the hearing.
- Does the Tribe agree with OCS' permanency plan?
- Does the Tribe agree that OCS has made active efforts to achieve the permanency plan? For example, has OCS taken reasonable steps to move towards reunification or finalize an adoption?
- Does the Tribe agree with the child's placement and is it ICWA compliant?
- Is the child still a Child In Need of Aid?
- Have the parents made progress on their case plans?
- Does the Tribe have any other concerns about this case?



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# Trial Home Visit and Reunification

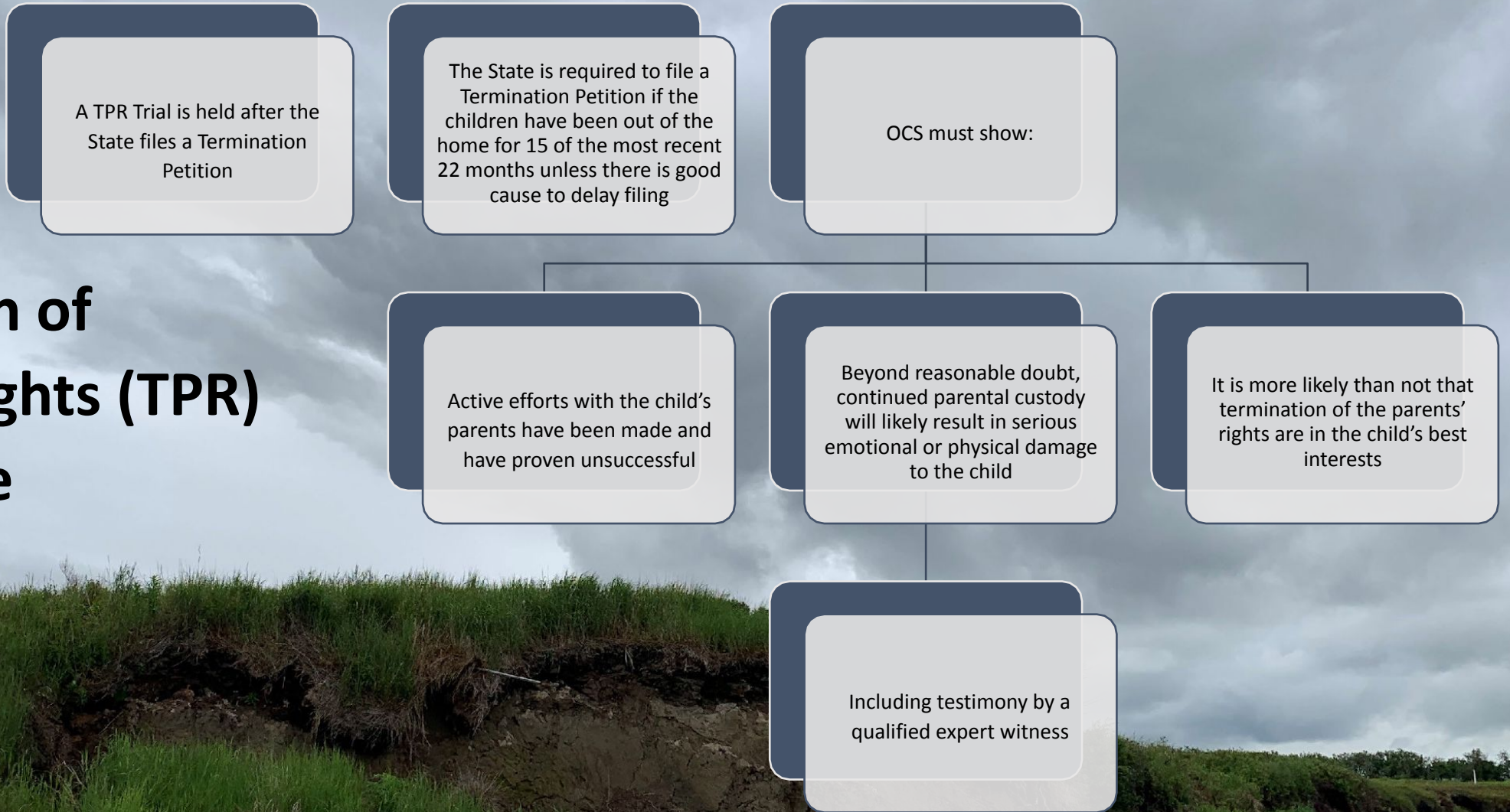
- Parents are doing well and demonstrating behavior change
- Team-Decision-Making meeting
- Implementation of an in-home-safety plan
- Transition to Trial-Home-Visit
- Reunification



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# Termination of Parental Rights (TPR) -State's role





# Termination of Parental Rights

## -Tribe's Role

- Share the Tribe's position on termination.
- Does the Tribe oppose the termination of parental rights?
- Does the Tribe think that OCS has made active efforts to help the parents reunify?
  - If the Tribe does not think that sufficient active efforts have been made to help parents reunify, are there suggestions the Tribe would like to offer to OCS to help support the family?
- Does the Tribe think that continued custody by the parents would result in harm to the child?
- Does the Tribe think that termination is in the child's best interests?
- May file Tribal Report regarding position on Termination.
- May help identify a QEW and call or question witnesses in court.
  - Designation of a Cultural Expert Witness.



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# Relinquishment

Parents can agree in court to relinquish their parental rights.

The agreement must be in-writing and in front of a Judge to be valid.

The relinquishing parent can retain rights and privileges such as visitation, information/updates, cards/gifts/letters.

A parent can change their mind and withdraw the relinquishment within 10 days after signing.

The Judge cannot sign the order until 10 days after the parents have signed.

- The relinquishment does not specify who is adopting. The adoptive placement can change and the relinquishment is still fully valid.



# Consent to adoption

Parents can agree in court for their child to be adopted by a specific individual.

The agreement must be in-writing and in front of a Judge to be valid.

Generally, there are very few retained rights that a biological parent can keep after consenting to an adoption.

Commonly, a parent will specify who they want to adopt their child; however, the parent will not necessarily get notice of the Adoption Hearing.

Consent can be withdrawn at any time up until the moment when the adoption is finalized.

If the person(s) are ultimately not able to adopt the child, the consent is null and void.



# Adoption options

Cultural Adoption Packet	Tribal Court Adoption Order
Adoption is considered by tribal council	Adoption considered by tribal council or tribal court (may be the same for some tribes)
Parents on birth certificate <i>must</i> sign consent forms unless an exception applies (deceased or had notice of adoption, but could not be contacted)	Parents <i>do not need</i> to sign consent forms. The tribal court can order adoption despite a parent's objection, so long as the court provides due process.
Adoption approved through <i>Tribal Resolution Form</i> <ul style="list-style-type: none"> <li>• Pre-printed from Alaska Health Analytics &amp; Vital Records</li> </ul>	Adoption approved through <i>Tribal Court Order</i> <ul style="list-style-type: none"> <li>• Tribe writes its own order</li> </ul>
State of Alaska is custodian of original documents <ul style="list-style-type: none"> <li>• Will not give copies to parents or child without tribal permission</li> <li>• All certified copies needed for most legal purposes cost \$30</li> </ul>	Tribe is the custodian of original documents <ul style="list-style-type: none"> <li>• Tribe decides who and how child and parents will access records</li> </ul>





## **Actions that can be taken by the Tribe or certain other legal parties throughout the case:**

- Request a Placement Review Hearing.
- File a Motion to Transfer Jurisdiction to the Tribe.
- File a Motion for the Court to order an appropriate remedy.
  - For example, file a motion to compel the production of discovery; or
  - File a motion for a finding of no active efforts.
- Schedule a deposition to gain information from a legal party.
- Subpoena witnesses to testify at hearings.





# THANK YOU

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