

**NYS- “TOP TEN” ICWA Questions
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FIRST -

Is this an Indian Child Under NYS ICWA?

- **Unmarried, under 18 when came into care and member or enrolled in a federally recognized or state recognized tribe OR**
- **Unmarried, under 18 when came into care and eligible to be a member or enrolled in a federally recognized tribe or state recognized tribe OR**
- **Unmarried, under 18 when came into care, resides on a reservation or tribal land and the biological child of a member of a federally or state recognized tribe**
- **NOTE –Tribe or BIA determine who is member, not court**

SECOND –

Is this an action in state court that is covered by ICWA?

- **Foster care placement or Art. 10 direct custody under Art. 10**
- **Transfer between foster care placements**
- **Destitute child being placed**
- **PINS and child is being placed**
- **“Voluntary” placements under SSL**
- **Surrenders**
- **Termination of parental rights**
- **Pre-adoptive placement**
- **Adoption – including private adoptions**
- **Custody to a non-parent**

THIRD – Is this a case that requires a notice? (some ICWA actions require it and some do not)

Has the tribe been properly notified? BIA? OCFS?

Have the parents/guardians also had proper ICWA notification?

FOURTH -

What is the correct jurisdiction?

- **Child is already a ward of a tribal court or child resides or is domiciled on reservation or Indian lands –exclusive tribal court jurisdiction**
- **Child does not live on reservation - state court jurisdiction BUT if parent and tribe want it transferred to tribal court then it is transferred AND if not requesting transfer, tribe can intervene in state proceedings**

FIFTH –

What are rules for state court to place an ICWA child into foster care?

Follow all state laws PLUS

- **Qualified expert witness must testify**
- **“likely to be serious emotional or physical damage” if not placed**
- **“active efforts”**
- **clear and convincing burden of proof**

SIXTH –

What are rules for state court to take the surrender of an ICWA child?

Follow all state law PLUS

- **in writing and before judge**
- **certificate by judge**
- **language parent speaks**
- **more than 10 days after child’s birth**
- **parent can revoke at any time before adoption and child returned**

SEVENTH –

What are rules for state court to do TPR of parents of an ICWA child?

Follow all state law PLUS

- **Qualified expert witness must testify**
- **“likely to be serious emotional or physical damage” if returned to parent**
- **Beyond a reasonable doubt burden of proof**

EIGHTH –

What are the preferences for placement of an Indian child out of his/her home?

- **Least restrictive setting**
- **Reasonable proximity to child’s home**
- **Special needs**
- **Placement preferences in order : 1). Extended family 2) Tribe’s foster home 3). Indian foster home 4.) Indian institution**

NINTH –

What are the preferences for placement of an Indian child for adoption? e)

- 1. extended family members**
- 2. members of the tribe**
- 3. other Indian families**

TENTH – Is the court and the agency doing what it should to make sure the tribe/nation is involved in the child’s plan and that the child is maintaining or creating a bond with the tribe/nation?