

The Indian Child Welfare Act

Compliance and Tips for Deprived Cases

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Indian Child Welfare Act



Indian Child Welfare Act

25 U.S.C. § 1901 et seq.

The Indian Child Welfare Act is a federal law specifically designed to protect the best interests of American Indian children and to promote stability and security for American Indian Tribes and American Indian families.

HISTORY OF SEPARATION

Before the Indian Child Welfare Act (ICWA) in 1978.

85%

of all Indian foster children were placed in non-Indian homes

91%

of Indian adoptees were placed in non-Indian homes

Native Americans...from removal to removal.

To accomplish this goal – assimilation - the federal government adopted a new policy – **Indian boarding schools** where Indian children would be forcibly taken from their homes and enrolled in schools designed to “Kill the Indian, save the man.” The architect of this philosophy was former Indian fighter, Colonel Richard H. Pratt.



Overview of Federal Law

- 1 CAPTA (1974)** — Child Abuse Prevention and Treatment Act, 42 U.S.C.A. §§ 5101–5116i. Provided federal funding and guidance to states supporting prevention, assessment, investigation, prosecution, and treatment activities.
- 2 ICWA (1978)** — Indian Child Welfare Act, 25 U.S.C.A. § 1901, et seq., implemented standards for state courts in cases involving removal of Indian children, to prevent the break-up of Indian families, protect the best interests of Indian children, and promote the continued existence of Indian Tribes. The term “active efforts” was created.
- 3 AACWA (1980)** — Adoption Assistance and Child Welfare Act, 42 U.S.C.A. § 671, placed substantial requirements on state child welfare systems, including case reviews every six months and periodic permanency hearings; the term “reasonable efforts” was created.

Overview of Federal Law (cont'd)

- 1 ASFA (1997)** — Adoption and Safe Families Act, 42 U.S.C.A. § 675, required, among other things, that judges make findings of reasonable efforts to finalize permanency.
- 2 ASFA Regulations (2000)** — 42 C.F.R. Part 1355, specified that judicial findings of “reasonable efforts,” including findings that such efforts are not required, must be explicitly documented on a case-by-case basis (in non-ICWA cases).

Oklahoma Authority

- **Oklahoma Children’s Code** — 10A O.S. § 1-1-101, et seq.
- **Oklahoma Indian Child Welfare Act (OICWA)** — 10 O.S. § 40, et seq., which clarified state policies and procedures for implementing OICWA.
- **Other** — Uniform Orders, OUII, and the Oklahoma Judge’s Benchbook (Revised 2025 and published in 2026).

Oklahoma Indian Child Welfare Act

10 O.S. § 40.1

“

It shall be the policy of the state to recognize that Indian tribes and nations have a valid governmental interest in Indian children regardless of whether or not said children are in the physical or legal custody of an Indian parent or Indian custodian at the time state proceedings are initiated.

“

It shall be the policy of the state to cooperate fully with Indian tribes in Oklahoma in order to ensure that the intent and provisions of the federal Indian Child Welfare Act are enforced.

Oklahoma Court Information System

June 30, 2026

Oklahoma Court Information System

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- [Bench Book - Children's Code](#)
- [Bench Book - Civil](#)
- [Bench Book - Criminal](#)
- [Bench Book - Juvenile Code](#)
- [Bench Book - Youthful Offender](#)
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- [Forms & Resources](#)
- [Forms for Court](#)
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Careers

Judicial Vacancies

OCCA Judge

Oklahoma Court of Criminal Appeals, District 3

District Judge

No Vacancy

Assoc. District Judge

No Vacancy

District Court Vacancies

Special Judges

Cleveland County

Oklahoma County

District Court Vacancies

File Clerk - Payne County

Court Reporters

Adair County

Beaver, Cimarron, Harper, and Texas County

Blaine, and Kingfisher County

Ryan County

Judiciary Budget Request - Senate - Posted: 01/28/2026

Rowe presents FY27 Judiciary budget request to the Senate Appropriation/Subcommittee on Public Safety and Judiciary. <https://vimeo.com/1159388538?share=copy&fl=sv&fe=ci>

Judiciary Budget Request - House - Posted: 01/14/2026

Chief Justice Rowe presents FY27 Judiciary budget request to House of Representatives. <https://vimeo.com/1154336407?share=copy&fl=sv&fe=ci>

New Decisions Section

For more New Decisions, click [here](#).

For New Decisions of the Oklahoma Court of Civil Appeals click [here](#), then scroll to the bottom of the page for new decisions.

[Oklahoma Supreme Court \(3\)](#) [Oklahoma Court of Criminal Appeals \(1\)](#) [Oklahoma Court of Civil Appeals \(1\)](#)

New Decisions - Oklahoma Supreme Court (3 recent)

Oklahoma Supreme Court

STATE OF OKLAHOMA ex rel. OKLAHOMA BAR ASSOCIATION v. LOWERY, SCBD-8075, 2026 OK 50,
Decided: 24 Jun 2026

¶10 Complainant, State of Oklahoma ex rel. Oklahoma Bar Association, initiated this disciplinary proceeding pursuant to Rule 7.7 of the Rules Governing Disciplinary Proceedings, after the Illinois Supreme Court disbarred Respondent. Upon review of the record and consideration of Respondent's objection and aggravating circumstances, we disbar Respondent from the practice of law.

[\(Read Opinion\)](#) | [\(Top of Section\)](#) | [\(Home\)](#)

Oklahoma Supreme Court

RICHARDS v. FOREMOST INSURANCE CO. et al. v. BROWN & SON MOBILE HOME SVC, LLC et al., 121293, 2026 OK 52,

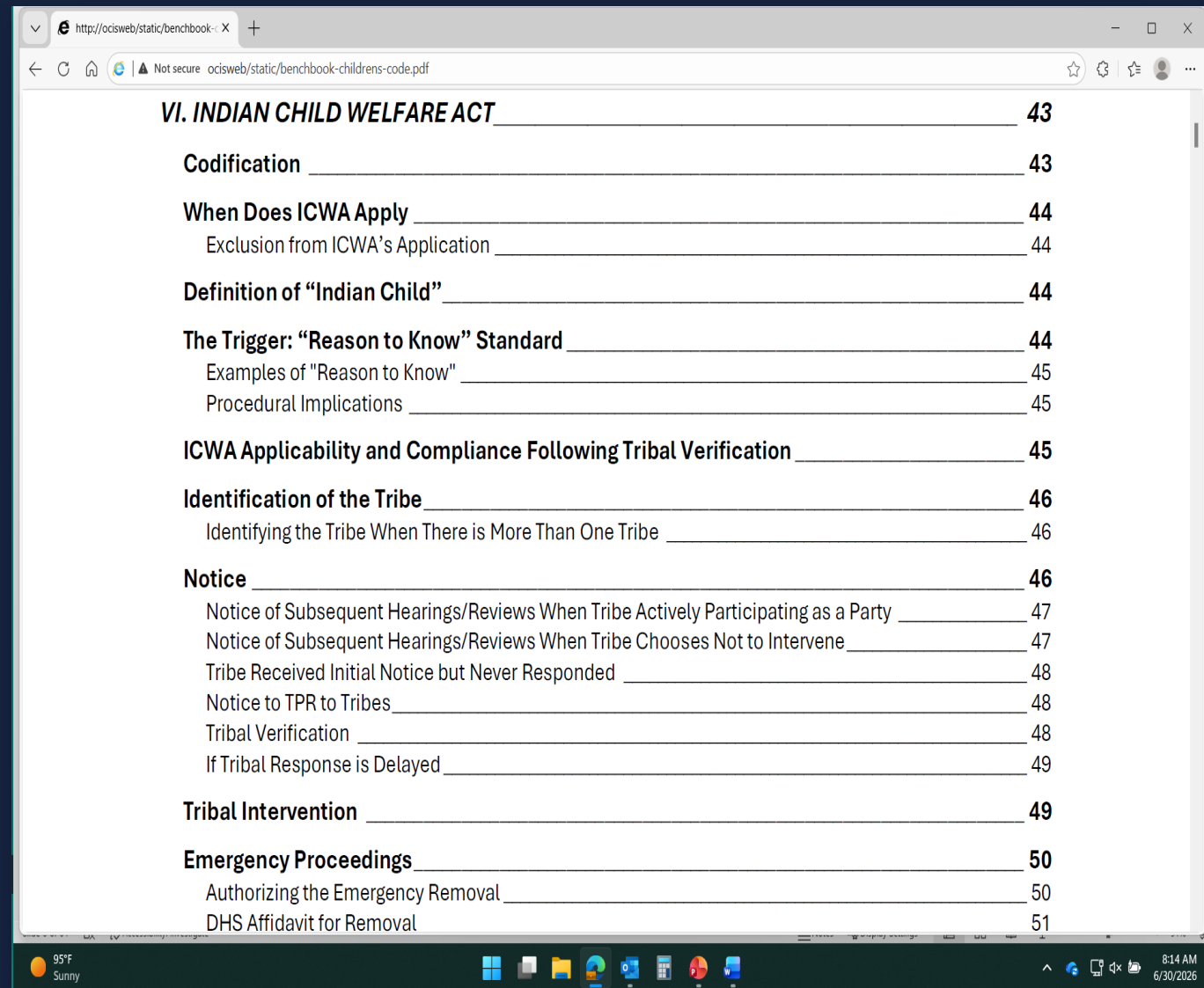
95°F
Sunny



8:17 AM
6/30/2026

REFERENCE RESOURCE

Juvenile Bench Book



The screenshot shows a PDF document with a table of contents for the section 'VI. INDIAN CHILD WELFARE ACT'. The document is viewed in a browser window with the address bar showing 'http://ocisweb/static/benchbook-childrens-code.pdf'. The table of contents lists various sub-sections and their corresponding page numbers.

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Why Do Indians Get “Special Protection”...?

Historically

- Tribes have always had a government-to-government relationship with the United States based on treaties.
- Guardian/ward relationship.
- Political classification — not racial.

U.S. Congress & States

- U.S. Constitution, Article I, Section 8, Clause 3 — the “Indian Commerce Clause.”
- No Equal Protection violation (*Haaland v. Brackeen*).
- States have no authority over Tribes without express Congressional consent.

Haaland v. Brackeen

599 U.S. 255 (2023)

- The petitioners — including Texas, Indiana, Louisiana, and several non-Native couples — argued ICWA violated the Equal Protection Clause by treating Native children differently from other children, and that Congress overstepped its authority by commandeering state child welfare law. **They claimed the law's preference system was based on race rather than political sovereignty.**
- **The Court rejected these claims in a 7–2 decision.** The majority, led by Justice Amy Coney Barrett, held that:
 - Congress has constitutional authority to enact ICWA.
 - The law does not improperly commandeer state governments.
 - The preference system is based on tribal political sovereignty, not race.

Even after forty years of ICWA, Indian children are still three times more likely to be removed by state child welfare than non-Native children.



Applicable Proceedings

ICWA — 25 U.S.C. § 1903(1) Child Custody Proceedings

- Foster care placement
- Termination of parental rights
- Pre-adoptive placement
- Adoptive placement

OICWA — 10 O.S. § 40.3

- Applies to **ALL** state voluntary and involuntary child custody proceedings except:
 - Divorce (unless third-party placement)
 - Delinquency adjudication (unless parental termination involved)
 - Criminal cases
 - Paternity actions

Indian Status Determination

“

25 U.S.C. § 1903(5), “Indian Child”: means 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.

“

10 O.S. § 40.3(C) & (E): The court shall seek a determination of Indian status. The determination shall be made as soon as practicable to ensure compliance with the notice requirements of Section 40.4.



ASK!..... EARLY & OFTEN...

What to Ask?

- 1** Ask whether the child is of Native heritage. Make sure a final determination has been made. Continue to ask until a definitive answer is given. Follow up with tribal and state workers.
- 2** Ask whether the child or parent is enrolled or eligible for enrollment in a federally recognized Tribe. Continue to ask state and tribal agencies to make a determination about the child's enrollment status.
- 3** If the child is enrolled or eligible for enrollment, consistently ask whether the requirements of the Indian Child Welfare Act are being followed. Ask whether the child is eligible for tribal services through the Tribe or other federal Indian services such as Indian Health Services and educational services.

Who determines tribal membership requirements?



Tribal Sovereignty

- Tribal Nations determine citizenship requirements as foreign nations do — and these may vary broadly.
- Some Tribes have specific blood quantum requirements (e.g., 1/16th is most common), require proof of ancestry (e.g., a family member historically listed on Tribal rolls); some are determined by patrilineal and matrilineal descent.

“Existing Indian Family” Exception

Legislatively overruled by 1994 OICWA amendments

- Matter of S.C., Adoption of Baby Boy D., and Adoption of D.M.J. formerly promulgated the “Existing Indian Family” exception, now overruled.
- Matter of Baby Boy L. — the Oklahoma Supreme Court upheld that the “Existing Indian Family” exception is no longer valid in Oklahoma.

ICWA Notice

25 U.S.C. § 1912(a) & 10 O.S. § 40.4

- In all child custody proceedings of the OICWA, including voluntary court proceedings and review hearings, the court shall ensure that the district attorney or other person initiating the proceeding shall send notice by registered or certified mail, return receipt requested, to:
 - Parents or Indian custodian (if any)
 - Tribe(s)
 - BIA area office

ICWA Notice SHALL INCLUDE:

- 1 Child's name
- 2 Possible tribal affiliation(s)
- 3 Petition
- 4 Statement of rights to parents, Indian custodian, and Tribe(s)
- 5 Right to intervene

ICWA Notice SHALL INCLUDE: (cont'd)

- 1 Petition to transfer to tribal court
- 2 Request for 20 additional days from receipt of notice to prepare for the proceeding; further extensions may be granted by the court
- 3 Statement of legal consequences of adjudication
- 4 Statement that counsel will be appointed to parents and Indian custodians who cannot afford counsel
- 5 Statement of confidentiality to tribal officials

Emergency Custody

- Did the Tribe receive notice?
- Did you hear expert testimony?
- Were there efforts to prevent the breakup of an Indian family? Did those efforts fail?
- Was there cultural bias?
- Was the placement ICWA compliant?

Emergency Hearing Under § 40.5

10 O.S. § 40.5(B)

- No pre-adjudicatory custody order shall remain in force or in effect for more than thirty (30) days without a determination by the court —
 - supported by **clear and convincing evidence**, and
 - the testimony of at least one qualified expert witness —
- that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
- However, the court may, for good and sufficient cause shown, extend the effective period of such order for an additional period of sixty (60) days.

Emergency Hearing Under § 40.5 cont'd —

10 O.S. § 40.5(B)

THE TESTIMONY OF AT LEAST ONE QUALIFIED EXPERT WITNESS IS REQUIRED TO CONTINUE OUT-OF-HOME PLACEMENT OF INDIAN CHILDREN.

Who is a qualified expert witness (QEW)?

Qualified Expert Witness

10 O.S. § 40.5(B)

The ICWA itself does not define “qualified expert witness,” but Bureau of Indian Affairs (BIA) Guidelines identify three main categories — who can serve as a QEW for a § 40.5 hearing or TPR proceeding?

- 1 Tribal Members** — Recognized by the tribal community as knowledgeable in tribal customs related to family and child-rearing practices.
- 2 Lay Experts** — Individuals with substantial experience delivering child and family services to Indian children and extensive knowledge of the child’s tribal social and cultural standards.
- 3 Professional Experts** — Professionals with substantial education and experience in their specialty, such as social work, psychology, or child welfare, who understand Indian child-rearing practices.

Expert Witness

- Have specific knowledge of the Indian Tribe's culture and customs.
- **Persons with the following characteristics are presumed to meet the requirements for a qualified expert witness:**
- Member of the Indian child's Tribe, recognized by the Tribe as knowledgeable in Tribal customs as they pertain to child-rearing practices.
- Member of another Tribe who is recognized to be a qualified expert.

Expert Testimony

IT IS REQUIRED...!

- Required for Adjudication (N.L.)? Or Foster Care Placement?
- **Good Cause Hearings:** “...clear and convincing evidence, including testimony of qualified expert witnesses...” (25 U.S.C. § 1912(e))
- **Terminations:** N.L., J.S., and R.A.L.

*Emergency Hearing Under
10 O.S. § 40.5(B)*

Can the court accept a stipulation as to the qualified expert testimony?

<https://www.youtube.com/watch?v=2uwBNKGDx0>

Initial Placement

DHS Policy

- Family safety meeting prior to emergency show cause hearing.
- Formally request a good cause hearing — expert testimony.
- Tribal code preferences apply.

Placement Preferences — 25 U.S.C. § 1915

- SHALL apply to all placements, as well as pre-adoptive, adoptive, and foster care placements:
 - Child's extended family member
 - Foster home licensed, approved, or specified by the Indian child's Tribe
 - Indian foster home licensed or approved by an authorized non-Indian licensing authority
 - Institution for children approved by an Indian Tribe and operated by an Indian organization

Good Cause Hearings

- A party asserting good cause not to follow the placement preferences must state reasons on the record or in writing and bears the burden of proving by clear and convincing evidence the existence of “good cause” to deviate from the placement preferences.
- **Good cause to depart must be based on:**
 - Request of the parents
 - Request of the child
 - Extraordinary physical or emotional needs of the child

Reasonable vs. Active Efforts

Both federal and Oklahoma law do not define the terms “reasonable” or “active efforts.”

- **Reasonable Efforts — Arkansas:** “Reasonable efforts” are measures taken to preserve the family and can include reasonable care and diligence on the part of the Department of Human Services or agency to utilize all available services related to meeting the needs of the juvenile and the family. Ark. Ann. Code § 9-27-303.
- **Colorado** has a good definition (but is much too long to include here). It can be found at Colo. Rev. Stat. § 19-1-103(89), (10).

Reasonable vs. Active Efforts (cont'd)

Both federal and Oklahoma law do not define the terms “reasonable” or “active efforts.”

- **Connecticut:** The term ‘reasonable efforts’ refers to the services to be provided to the parents and the steps the parents take to address the problems that prevent the child from safely reuniting with the parents. Conn. Gen. Stat. § 46b-129.
- **Oklahoma Law:** “What comprises active and reasonable efforts must be decided on a case-by-case basis.” Matter of V.D., 2018 OK CIV APP 72, 431 P.3d 381, 383, ¶ 6 (Mitchell).

Active Efforts

25 C.F.R. § 23.2

Active efforts means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe.

Active Efforts

Question: Are active efforts and reasonable efforts the same, or does one make greater demands upon the state?

- While this question is discussed in many state appellate opinions, most agree that active efforts require more “effort” than reasonable efforts. See *In re Interest of K.P.*, 2012 OK CIV APP 32, 275 P.3d 161 (Fischer); see also *In re J.S.*, 2008 OK CIV APP 15, 177 P.3d 580 (Adams), for a good discussion of this point.

Active Efforts

- Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal.
- Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services.
- Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues.
- Conducting a diligent search for the Indian child's extended family members, and contacting and consulting with them to provide family structure and support for the Indian child and the Indian child's parents.

Active Efforts (cont'd)

- Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe.
- Taking steps to keep siblings together whenever possible.
- Supporting regular visits with parents or Indian custodians in the most natural setting possible, as well as trial home visits during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child.

Active Efforts (cont'd)

- Identifying community resources — housing, financial, transportation, mental health, substance abuse, and peer support services — and actively assisting the family in utilizing and accessing those resources.
- Monitoring progress and participation in services.
- Considering alternative ways to address the needs of the family if optimum services do not exist or are not available.
- Providing post-reunification services and monitoring.

Active Efforts — Best Practice

- Use Active Effort Affidavit, but specifically refer to their content and the items which reflect whether reasonable efforts were made to prevent removal.
 - The active efforts portion of the DHS Report is NOT the same as an Affidavit.
- Avoid stating “see attached affidavit” or “per affidavit.”
- Include specifics in your order.
- Encourage your DHS workers to use affidavits — sworn statements to the court that help the court make its findings.
- Also avoid stating “per statute.”

Tribal Intervention

- Tribes and Indian custodians have rights to intervene at any time in foster care and termination proceedings, including appeals.
- A Tribe's waiver of the right to intervene should not be inferred and cannot be based upon the Tribe's failure to intervene. Waiver must be express and cannot be waived by a third party.
- Tribes have the right to intervene over the objection of either parent.

Right to Inspect DHS Records

10 O.S. § 40.9

DHS shall establish a single location where all records of every involuntary foster care, pre-adoptive placement, and adoptive placement by the courts of any Indian child in the custody of DHS or under DHS supervision will be available within seven (7) days of a request by the Tribe of the Indian child or by the Secretary of Interior.

Request to Transfer to Tribal Court

The State Court “shall transfer...”

- Parents, Indian custodians, and Tribes have the right to petition for transfer.
- There is a judicial presumption that a proceeding should be heard in tribal court (Holyfield).
- Parental objection blocks transfer.
- Formally request a good cause hearing.
- Request transfer to tribal court.

Standards of Review & Reversible Error

- Improper notice divests the state court of jurisdiction (Duncan v. Wiley).
- Notice without statements of rights violates due process (Baby Girl B.).
- Denial of intervention.
- Using a lower burden of proof.

Standards of Review (cont'd)

- Remand for a corrected order for failure to include a mandatory finding as to compliance with ICWA (T.L. & L.M.; M.D.R.).
- Adoption orders are subject to “collateral attack and return of custody” for two years if consent was obtained by fraud or duress (25 U.S.C. § 1913(d)).

Native Child Factsheet — Educate Yourself!

Name of Tribe(s); Location of Tribal headquarters & Tribal facilities; Tribal history & important traditions; Current Tribal Leaders; Tribal Resources; Contact information for Tribal service providers; Calendar of Events; Media, and age appropriate reading materials.



Keep Asking...

You can require increased connections with a Native child's Tribe, extended family, and culture.

- Transportation to cultural events.
- Culturally appropriate services.
- Tribal education resources — language, traditional foods and activities.
- Tribal newsletters and event calendars.

Never assume that lawyers, caseworkers, and other child welfare service providers are aware of ICWA requirements.



Time is Everything....

- **Emergency Custody:** thirty (30) days.
- **Burdens of Proof (expert testimony) —**
- **Adjudication:** Clear and convincing.
- **Termination:** Beyond a reasonable doubt, only as to whether return of the child to the home will result in serious physical or emotional harm.

ICWA Bench Book!



Questions?



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