

**RULE 28. GENERAL RULES FOR MATTERS GOVERNED BY THE INDIAN CHILD WELFARE ACT****Rule 28.01. Purpose**

The Indian Child Welfare Act (ICWA), 25 U.S.C. sections 1901 to 1963, establishes minimum federal standards for the removal of Indian children from their families and the placement of Indian children in foster or adoptive homes. The Minnesota Indian Family Preservation Act (MIFPA), Minnesota Statutes, sections 260.751 to 260.835, provides state standards to protect the long-term best interests of Indian children, their families, and the child's tribe. This section of these rules provides procedures for the application of ICWA and MIFPA in juvenile protection matters concerning an Indian child.

**Rule 28.02. Party Status of Tribes**

Pursuant to Rule 32.01, subd. 1, an Indian child's tribe is a party to a case of an Indian child. Tribes do not need to file a motion to obtain party status.

**Rule 28.03. Tribal/State Agreement**

The Indian Child Welfare Act, 25 U.S.C. section 1919, provides that states and Indian tribes may enter into agreements with respect to the care and custody of Indian children and jurisdiction over child custody proceedings. The State of Minnesota has entered into a Tribal/State agreement which shall be available on the Minnesota Judicial Branch's website ([www.mncourts.gov](http://www.mncourts.gov)).

**Rule 28.04. Higher Standard Under ICWA**

**Subd. 1. Greater Protection under State Law.** The Indian Child Welfare Act (ICWA), 25 U.S.C. section 1921, provides that if state or federal law establishes a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the Indian Child Welfare Act, the court shall apply the state or federal standard. The Minnesota Indian Family Preservation Act (MIFPA), Minnesota Statutes, sections 260.751 to 260.835, may provide a higher level of protection than ICWA in ICWA proceedings.

**Subd. 2. Active Efforts.** Both ICWA and MIFPA require the court to make findings regarding active efforts, as defined in Rule 2.01(1), throughout the proceedings. The active efforts standard provides a higher level of protection than reasonable efforts. Active efforts include reasonable efforts, but reasonable efforts may be found without meeting the threshold for active efforts.

**Subd. 3. Standard of Proof.** Pursuant to ICWA, 25 U.S.C. section 1912(f), in a termination of parental rights matter involving an Indian child, the standard of proof is beyond a reasonable doubt. In all other juvenile protection matters concerning an Indian child, the standard of proof is clear and convincing evidence.

**Subd. 4. Notice Standards.** ICWA, 25 U.S.C. section 1912(a), and Rule 30.01 require the petitioner to provide an additional notice of the proceedings to the parent, Indian custodian, and the Indian child's tribe.

**Subd. 5. Placement Preferences.** The court shall follow the order of placement preferences required by ICWA, 25 U.S.C. section 1915, when placing an Indian child. The court may only place an Indian child outside of the order of placement preferences on a written finding of good cause pursuant to MIFPA, Minnesota Statutes, section 260.771, subdivision 7.

**Subd. 6. Appointment of Counsel.** Appointment of counsel for an Indian child, or for a parent or Indian custodian of an Indian child, who is the subject of a juvenile protection matter, shall be pursuant to ICWA, 25 U.S.C. section 1912(b).

**Rule 28.05. Best Interests of an Indian Child**

In proceedings involving an Indian child, the best interests of the child shall be determined consistent with the Indian Child Welfare Act, 25 U.S.C. sections 1901 to 1963. "Best interests of an Indian child" is defined in the Minnesota Indian Family Preservation Act, Minnesota Statutes, section 260.755, subdivision 2a.

**Rule 28.06. Qualified Expert Witness Requirement**

The Indian Child Welfare Act, 25 U.S.C. section 1912, and the Minnesota Indian Family Preservation Act, Minnesota Statutes, section 260.771, subdivision 6, require testimony from a qualified expert witness, as defined in Rule 2.01(29), before making the findings required by subd. 1 and subd. 2 of this rule.

**Subd. 1. Foster Care Placement.** In the case of an Indian child, foster care placement shall not be ordered in the absence of testimony of at least one qualified expert witness that supports a determination 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.

**Subd. 2. Termination of Parental Rights.** In the case of an Indian child, termination of parental rights shall not be ordered in the absence of testimony of at least one qualified expert witness that supports a determination 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.

**Rule 28.07. Particularized Findings in Cases Involving an Indian Child**

**Subd. 1. Emergency Proceedings.** In emergency proceedings involving an Indian child, the court shall make initial findings regarding whether active efforts were made by the social services agency, pursuant to Minnesota Statutes, section 260.762, to prevent the child's out-of-home placement. Emergency proceedings shall not be continued for more than 30 days unless the court makes findings pursuant to the Indian Child Welfare Act regulations, 25 C.F.R. section 23.113(e).

**Subd. 2. Emergency Removal and Placement Authority for Indian Child Ward, Resident, or Domiciliary.**

(a) **Finding.** If the district court finds from review of the petition or other information that an Indian child resides or is domiciled on an Indian reservation or that an Indian child is a ward of tribal court but is temporarily located off the reservation, the district court may order emergency removal of the child from the child's parent or Indian custodian and emergency out-of-home placement.

(b) **Required Actions for Ward of the Tribal Court.** If the district court finds from review of the petition or other information that an Indian child is a ward of tribal court, the court shall order that the child be expeditiously returned to the jurisdiction of the Indian child's tribe and shall consult with the tribal court regarding the child's safe transition pursuant to Rule 31.02, subd. 1.

**Subd. 3. Child in Need of Protection or Services Proceedings.** In a child in need of protection or services proceeding, the standard of proof is clear and convincing evidence. Foster care placement shall not be ordered in the absence of testimony of at least one qualified expert witness that supports a determination 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.

**Subd. 4. Permanency Proceedings.**

(a) **Termination of Parental Rights.** Pursuant to the Indian Child Welfare Act, 25 U.S.C. section 1912(f), in a termination of parental rights matter involving an Indian child, the standard of proof is beyond a reasonable doubt. The court shall make specific findings regarding the following:

(1) **Active Efforts.** 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 proved unsuccessful.

(2) **Serious Emotional or Physical Damage.** 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, as supported by qualified expert witness testimony in the termination of parental rights proceeding pursuant to Rule 28.06.

(b) **Other Permanency Proceedings.** In permanency proceedings involving an Indian child other than termination of parental rights, the standard of proof is clear and convincing evidence. The court shall make specific findings regarding the following:

(1) **Active Efforts.** 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 proved unsuccessful.

(2) **Serious Emotional or Physical Damage.** 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, as supported by qualified expert witness testimony pursuant to Rule 28.06.

#### **Rule 28.08. Voluntary Termination of Parental Rights Under ICWA**

When the child is an Indian child and the matter is governed by the Indian Child Welfare Act, 25 U.S.C. section 1913, the following procedures apply to a voluntary termination of parental rights by an Indian parent.

**Subd. 1. Procedures for Consent.** The consent to terminate parental rights by the parent shall not be valid unless:

(a) executed in writing;

(b) recorded before the judge; and

(c) accompanied by the presiding judge's certificate that the terms and consequences of the consent were explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that the parent or Indian custodian fully understood the explanation in English or that it was translated into a language that the parent or Indian custodian understood.

**Subd. 2. Timing of Consent.** Any consent to termination of parental rights given prior to, or within ten days after, the birth of the Indian child shall not be valid.

**Subd. 3. Parent's Right to Withdraw Consent.** Any consent to termination of parental rights by a parent of an Indian child may be withdrawn by the parent at any time prior to the filing of the final order terminating the parent's rights.

#### **Rule 28.09. Invalidation of Action Under ICWA**

**Subd. 1. Petition or Motion.** Pursuant to 25 U.S.C. section 1914, any Indian child who is the subject of any action for foster care placement or termination of parental rights, any parent or Indian custodian from whose custody an Indian child was removed, or the Indian child's tribe may seek

to invalidate the action upon a showing that the action violates the Indian Child Welfare Act, 25 U.S.C. sections 1911 to 1913.

(a) **Motion.** A motion to invalidate may be brought regarding a pending juvenile protection matter.

(b) **Petition.** A petition to invalidate may be brought regarding a juvenile protection matter in which juvenile court jurisdiction has been terminated.

**Subd. 2. Form and Service.** A motion or petition to invalidate shall be in writing pursuant to Rule 14.01 and shall be filed and served pursuant to Rule 14.02. Both a motion and a petition to invalidate shall be processed by the court as a motion. Upon receipt of a petition to invalidate a proceeding in which juvenile court jurisdiction has been terminated, the court administrator shall re-open the original juvenile protection file related to the petition.

**Subd. 3. Hearing.** Within 30 days of the filing of a motion or petition to invalidate, the court shall hold an evidentiary hearing of sufficient length to address the issue raised in the motion or petition. A motion filed 30 or more days prior to trial shall be heard prior to trial and the decision shall be issued prior to trial. A motion filed less than 30 days prior to trial shall not delay commencement of the trial and the decision shall be issued as part of the trial decision.

**Subd. 4. Findings and Order.** Within 15 days of the conclusion of the evidentiary hearing on the motion or petition to invalidate, the court shall issue findings of fact, conclusions of law, and an order regarding the petition or motion to invalidate.

#### ***2019 Advisory Committee Comment***

*"Juvenile Protection Matters Governed by the Indian Child Welfare Act" is a new section in the Rules of Juvenile Protection Procedure. The rules in this section were added in 2019 as part of a revision of the rules. This section was added to consolidate rules for proceedings governed by the Indian Child Welfare Act (ICWA), 25 U.S.C. sections 1901 to 1963, and the Minnesota Indian Family Preservation Act (MIFPA), Minnesota Statutes, sections 260.751 to 260.835. The ICWA rules have been updated to reflect the 2016 BIA ICWA regulations, and the 2015 amendments to MIFPA.*

*Rule 28.04, subd. 2, states that "[a]ctive efforts include reasonable efforts, but reasonable efforts may be found without meeting the threshold for active efforts." This rule contemplates situations where the threshold for active efforts has not been met, but reasonable efforts have occurred, and Title IV-E funding can be made available.*

*Rule 28.06 recognizes the unique requirements for and qualifications of the qualified expert witness whose testimony must be presented to the court before the court may order foster care placement or termination of parental rights under ICWA. Compliance with the requirement for a qualified expert witness is best achieved by timely notice to the child's tribe, ensuring that the county agency works with the child's tribe to discuss the need for placement, identifying extended family who can serve as placement resources and support for the family, ensuring that culturally appropriate services are delivered to the family, and requesting qualified expert witness testimony from the tribe or elsewhere. When the court has determined that ICWA applies, but the child's tribe has not participated in planning for the child, or when the child's tribe does not support placement of the child in foster care or termination of parental rights, the requirements of this rule may be met by a person who meets the criteria of Rule 2.01(29).*

*Rules 28.06 and 28.07 state that the qualified expert witness's testimony must support a determination that continued custody of the child by the parent or Indian custodian is likely to*

*result in serious emotional or physical damage to the child. The Minnesota Supreme Court has held that ICWA and MIFPA, 25 U.S.C. section 1912(f) and Minnesota Statutes, section 260.771, subdivision 6, paragraph (a), require the qualified expert witness testimony to support this determination, but that the qualified expert witness is not required to "opine on the ultimate issue of whether the State met its burden of proof" to show a likelihood of serious emotional or physical damage to the child. In re S.R.K. and O.A.K., 911 N.W.2d 821, 829 (Minn. 2018) (quotations and citations omitted). In S.R.K., the Minnesota Supreme Court interpreted the requirements of ICWA and MIFPA as they apply to termination of parental rights proceedings. 911 N.W.2d at 827-28 & n.6. Rules 28.06 and 28.07 apply the same requirement to foster care placements and to terminations of parental rights. The committee believes this is appropriate, because the language in ICWA and MIFPA requiring qualified expert witness testimony for foster care placements (25 U.S.C. section 1912(e) and Minnesota Statutes, section 260.771, subdivision 6, paragraph (a)) is identical to the language, analyzed in S.R.K, requiring qualified expert witness testimony for terminations of parental rights (25 U.S.C. section 1912(f) and Minnesota Statutes, section 260.771, subdivision 6, paragraph (a)).*

*Grounds for Invalidation. Rule 28.09 establishes a procedure for filing a petition or motion to invalidate an action under ICWA. 25 U.S.C. section 1914. Section 1914 of ICWA permits an Indian child, the Indian child's parent or Indian custodian, or the Indian child's tribe to petition the court to invalidate any action for foster care placement or termination of parental rights upon a showing that the action violated ICWA section 1911 (dealing with exclusive jurisdiction and transfer to tribal court), section 1912 (dealing with notice to the Indian child's tribe regarding the district court proceedings, appointment of counsel, examination of reports, and testimony of a qualified expert witness), or section 1913 (dealing with voluntary consent to foster care placement and termination of parental rights). Section 1914 of ICWA is silent about the time for bringing a petition to invalidate, the relief available, and whether relief is available even if there was no objection below.*