



INDIAN CHILD WELFARE ACT FROM THE TRIBAL PERSPECTIVE

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Discussion Outline

Overview of ICWA from the Tribal Perspective

Does ICWA Apply?

Notes on Hearings:

- Preliminary Hearing

- Adjudication

- Disposition

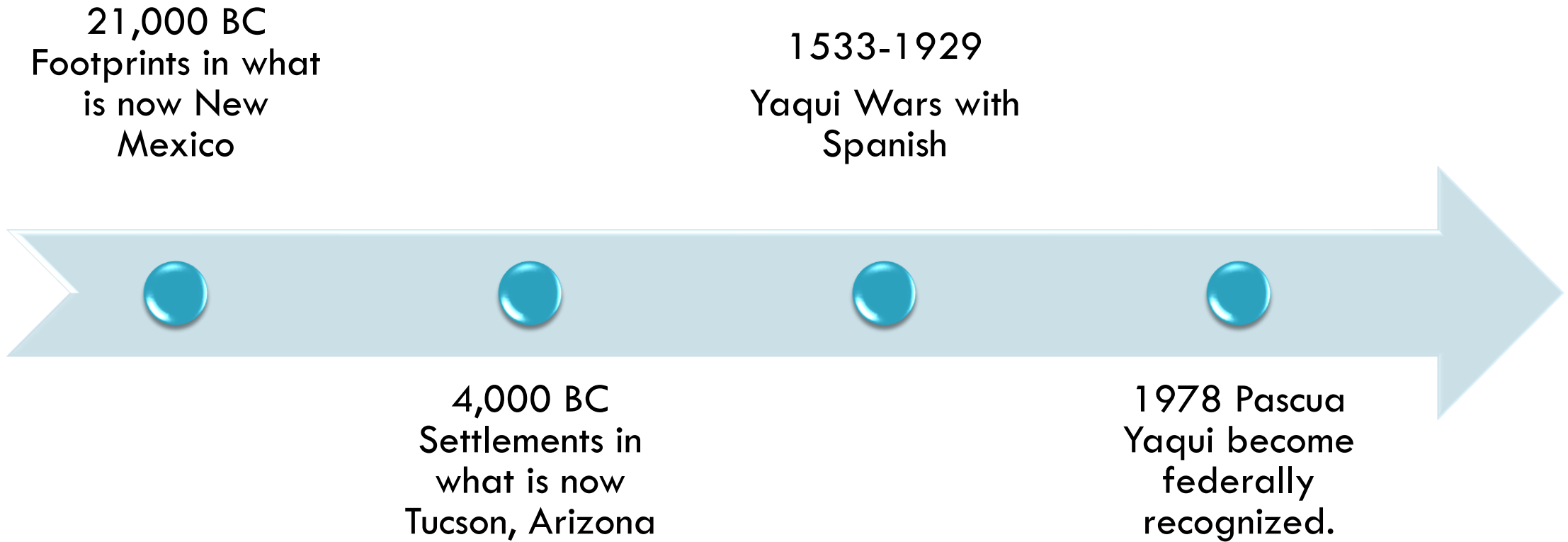
- Review Hearings

- Permanency Planning

- Termination

- Adoption

History of the Yaqui People



History of the Yaqui People



ICWA From the Tribal Perspective:

Critical Elements of an ICWA case:

Notice

Opportunity

Active Efforts

Placement

QEW

Case Plan

Does ICWA Apply to the Child?



Under 18 when case starts



Not married



Parent enrolled in a federally recognized tribe (paternity)



Enrolled or eligible for enrollment

Does ICWA Apply to the Case?



Foster Care
Placement



Pre-adoptive
placement



Termination
(adoptive placement)



Voluntary Proceeding
(maybe)



Emergency
Removal



Criminal custody



Child-Custody Proceeding

Any action that *may* culminate in one of these outcomes:

- Foster-care placement

- Termination of Parental Rights

- Pre-adoptive Placement

- Adoptive Placement

Child Custody Proceeding Defined

A child custody proceedings is any action where a child is removed from the parent:

- for temporary placement;
- in a home or institution;
- and where the parent cannot have the child returned upon demand but where parental rights have not been terminated.

Voluntary Proceedings

Withdrawal of Consent

- If the parent consents to:
 - Voluntary termination of parental Rights
 - (parent can withdraw prior to entry of final decree)
 - Voluntary foster care placement
 - (parent can withdraw anytime)
 - Voluntary adoptive placement
 - (parent can withdraw prior to entry of final decree of adoption)

Voluntary Consent

Requirements for the Court

- Consent must be executed in writing and recorded before a court of competent Jurisdiction.
- Court must explain terms and consequences.
- Court must certify that terms and consequences were fully understood.
- Court must address confidentiality if raised.
- Court cannot accept consent given 10 days before or after the birth of the child.
- Withdrawal must be in writing or done in open court. 23.127(b)
- If a parent withdraws consent, the court must ensure return of the child 23.127(c)

When ICWA Does Not Apply

Voluntary Placement w/o Return

ICWA does not apply to:

A voluntary placement that:

- the parent has, of their own free will,
- without a threat of removal by a State agency,
- chosen for the Indian child and
- that does not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand.

"Upon demand" means upon simple verbal request without any formalities or contingencies. 25 C.F.R. § 23.2

When ICWA Does Not Apply

Tribal court, Divorce, Crimes

ICWA does not apply to:

- (1) A Tribal court proceeding;
- (2) A proceeding regarding a criminal act that is not a status offense;
- (3) An award of custody of the Indian child to one of the parents including, but not limited to, an award in a divorce proceeding;



Active Efforts

Intended primarily to maintain or reunite

Tailored to the facts

In partnership with the Tribe

Consistent with prevailing social and cultural conditions


Agencies must assist parents, not just advise

Reason to Know?

A court has
reason to
know
when:

- Domicile of child or parent is on a reservation or AN village;
- The court learns the child is or was a ward of a Tribal court; or
- The court learns that either parent or the child possesses an identification card.

Reason to Know?



A court has
reason to
know
when:

- A party informs the court that the child is an Indian child;
- A party discovered information indicating that the child is an Indian child;
- The child gives the court reason to know;

When to Ask About ICWA?

When is an ICWA inquiry required?

The inquiry is made at the commencement of the proceeding and all responses should be on the record.

(a) State courts *must* ask **each participant** whether they know or have reason to know that the child is an Indian child in an:

- Emergency child custody proceeding or
- Voluntary child custody proceeding or
- involuntary child-custody proceeding:

Who Decides Tribal Membership

- Tribes have sole authority to determine their own membership. The state court may not substitute its own determination. 23.108(b)
- To make a *judicial determination* of the Indian child's tribe, the state court may rely on documents or testimony indicating membership.
- Compare Arizona Rules of Evidence

How to Determine Domicile?

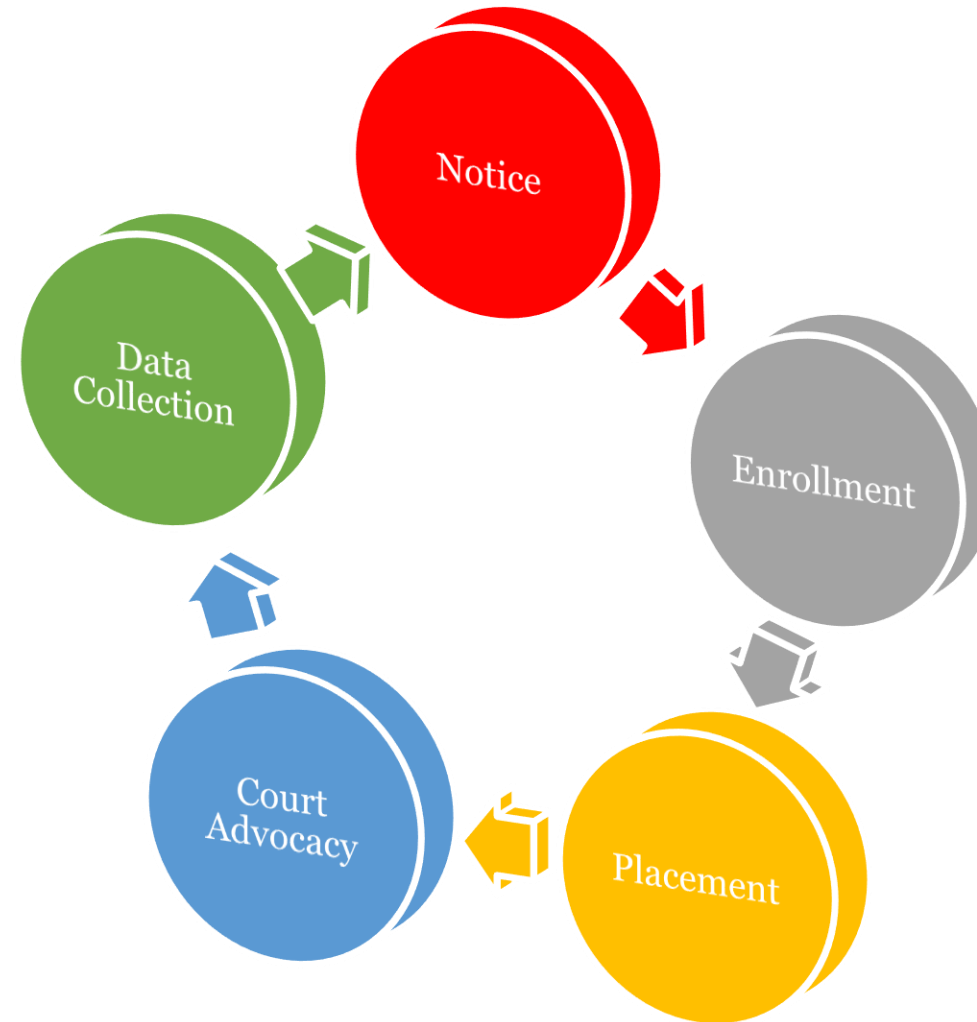
(1) Parent: the place at which a person has been physically present and that the person regards as home;

- a person's true, fixed, principal, and permanent home, to which that person intends to return and remain indefinitely even though the person may be currently residing elsewhere.

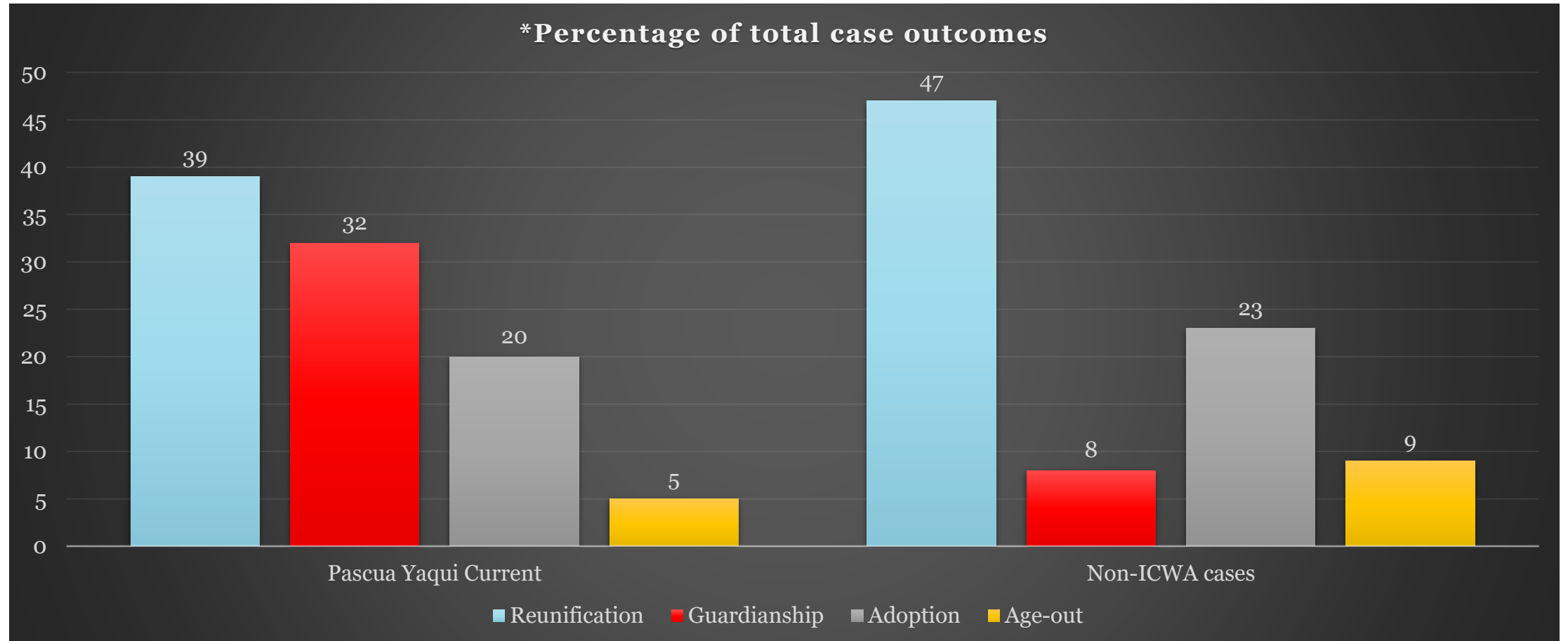
(2) Child: the domicile of the Indian child's custodial parent.

Pascua Yaqui

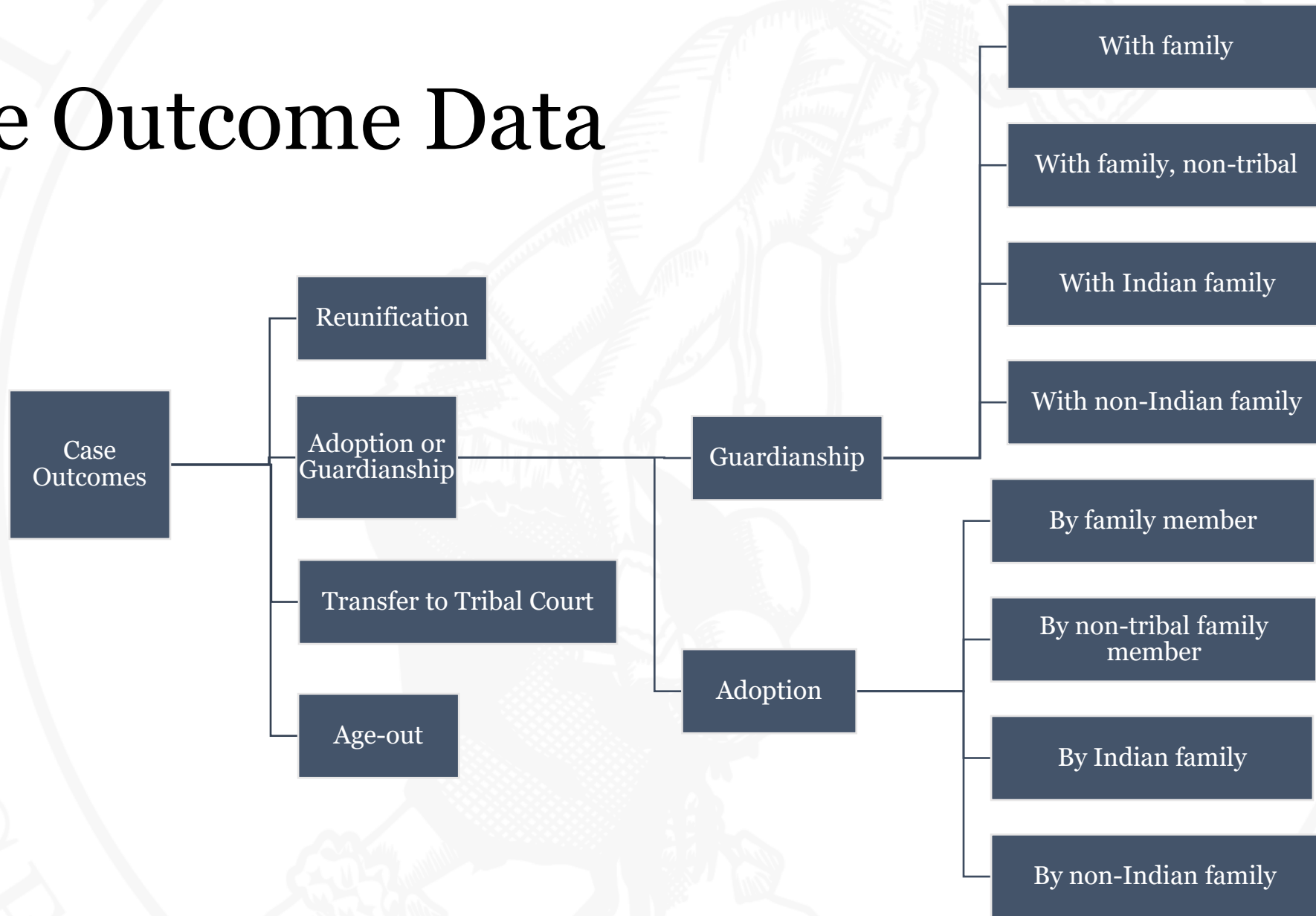
ICWA Case Engagement



Pascua Yaqui ICWA Case: Outcomes Compared to General Population



Case Outcome Data





Qualified Expert Witness

§ 23.122 Qualified expert witness

- The QEW, Continued Custody, Cultural Standards
 - A qualified expert witness **must** be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and **should** be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. A person may be designated by the Indian child's Tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe.
- BIA Assistance
 - The court or any party may request the assistance of the Indian child's Tribe or the BIA office serving the Indian child's Tribe in locating persons qualified to serve as expert witnesses.
- No Dual Roles
 - The social worker regularly assigned to the Indian child **may not** serve as a qualified expert witness in child-custody proceedings concerning the child.



Qualified Expert Witness

§ 23.121 Standards of evidence

- Clear and Convincing, QEW, Serious Harm
 - The court must not order a foster-care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
- Beyond Reasonable Doubt, QEW, Serious Harm
 - The court must not order a termination of parental rights for an Indian child unless evidence beyond a reasonable doubt is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Recurring Questions

Does the Court know or have reason to know the child is an Indian child?

Was there proper notice?

Was notice timely?

Do the parents and the Tribe have access to hearings?

If the Tribe cannot be contacted, whether copies of these notices were sent to the *appropriate* BIA Regional Director?

Common Definitions



Termination of parental rights 25 U.S.C. § 1903(1)(ii)

Pre-adoptive placements 25 U.S.C. § 1903(1)(iii)

Adoptive placements 25 U.S.C. § 1903(1)(iv)

Status offenses 25 C.F.R. § 23.103(a)(iii)

Voluntary proceedings – a proceeding that could prohibit the parent or Indian custodian from regaining custody upon demand. 25 C.F.R. § 23.103(a)(ii)

Emergency proceedings – this includes any time a child is removed on an emergency basis from the home. 25 U.S.C. § 1922

Commencing An ICWA Case



Emergency Proceeding - Standards

- Is Continued Removal necessary?
 - At any court hearing during the emergency proceeding, (the court must) determine whether the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

Compare with standards for involuntary proceedings

- Likely and Serious
 - 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.
- 23.121(a)

Emergency Proceeding - Dismissal

- The court must decide if the emergency proceeding should be terminated and the Indian child returned because:
 - the threat of imminent physical harm passed, or
 - the tribal court asserted jurisdiction.
- If the child remains in care, the court must expeditiously schedule a hearing in conformity with 25 U.S.C. § 1912(e).

Preliminary Hearing

- Emergency Removal?
- Reason to Know?
- Notice to Tribe(s)
 - Requirement of Certified Mail
 - Domicile
 - Active Efforts to Prevent Removal
 - Transfer to Tribal Court or an active Tribal court case?
- Findings

Preliminary Hearing

Key Decisions

- Whether each participant knows or has reason to know that the child is an Indian child.
 - Inquiry made at the commencement of the proceeding and on the record. 25 C.F.R. § 23.107(a)
 - Proper notice. 25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(b)(2)
- Whether proper notice was received *at least 10 days prior* to a hearing.
25 U.S.C. § 1912(a); 25 C.F.R. § 23.111(b)
- If the tribe was unknown, was notice sent to the regional BIA office?
25 C.F.R. § 23.111(e)
- Whether copies of the notices were sent to the *appropriate* BIA Regional Director? 25 C.F.R. § 23.11(a) & (b)

Preliminary Hearing Notice to Tribes

- Petitioner Obligations:
 - The party seeking the foster care placement of, or termination of parental rights to an Indian child **shall notify** the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention.
- Adequate Notice
 - Service be completed at least 10 days prior to an initial hearing.
 - Compare Arizona
- Extension of Time
 - If a notified parent, Indian custodian, or Tribe subsequently requests additional time to prepare for a hearing, the court must adjourn the case for up to 20 additional days.
- See also ICWA Regulations § 23.112(a) for time limit extensions.

Preliminary Hearing

Findings

- Domicile - Whether at the time of removal, the child lives or is domiciled on a reservation or is already a ward of a tribal court thereby depriving the state court of jurisdiction. 25 U.S.C. § 1911(a)
- Indian Custodian - Whether at the time of removal, the child was in the custody of an Indian custodian. 25 U.S.C. § 1903(6)
- Harm - Whether the removal or placement is necessary to prevent imminent physical damage or harm to the child. 25 U.S.C. § 1922; 25 C.F.R. § 23.113(b)(1)
- Notice - If all notice was properly done prior to the hearing.

Preliminary Hearing Findings

- 20 Day Request – Did the parent or tribe request an additional 20 days? 25 U.S.C. § 1912(a)
- Active Efforts – Efforts made to prevent the breakup of the family, and whether the efforts were successful. 25 U.S.C. § 1912(d)
- Custody and Serious Emotional Harm - Whether there was clear and convincing evidence, supported by the testimony of a qualified expert witness, 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. 25 U.S.C. § 1912(e)

Preliminary Hearing

Best-Practice Determinations

- Does the parent understand the case plan?
- Is the long-term permanent plan still the best plan for the child?
- Do case plan services match parenting deficiencies?
- Whether the child is in a preferred placement. 25 U.S.C. § 1915(b)14
- Do the visitation terms need to be modified to match customs?
- What is the time frame for the permanency plan?



Placement Preferences

Tribal Placement Preferences Control

Different rules for foster-care placements vs adoptive placements

Preferences apply in any placement that is:

- pre-adoptive,

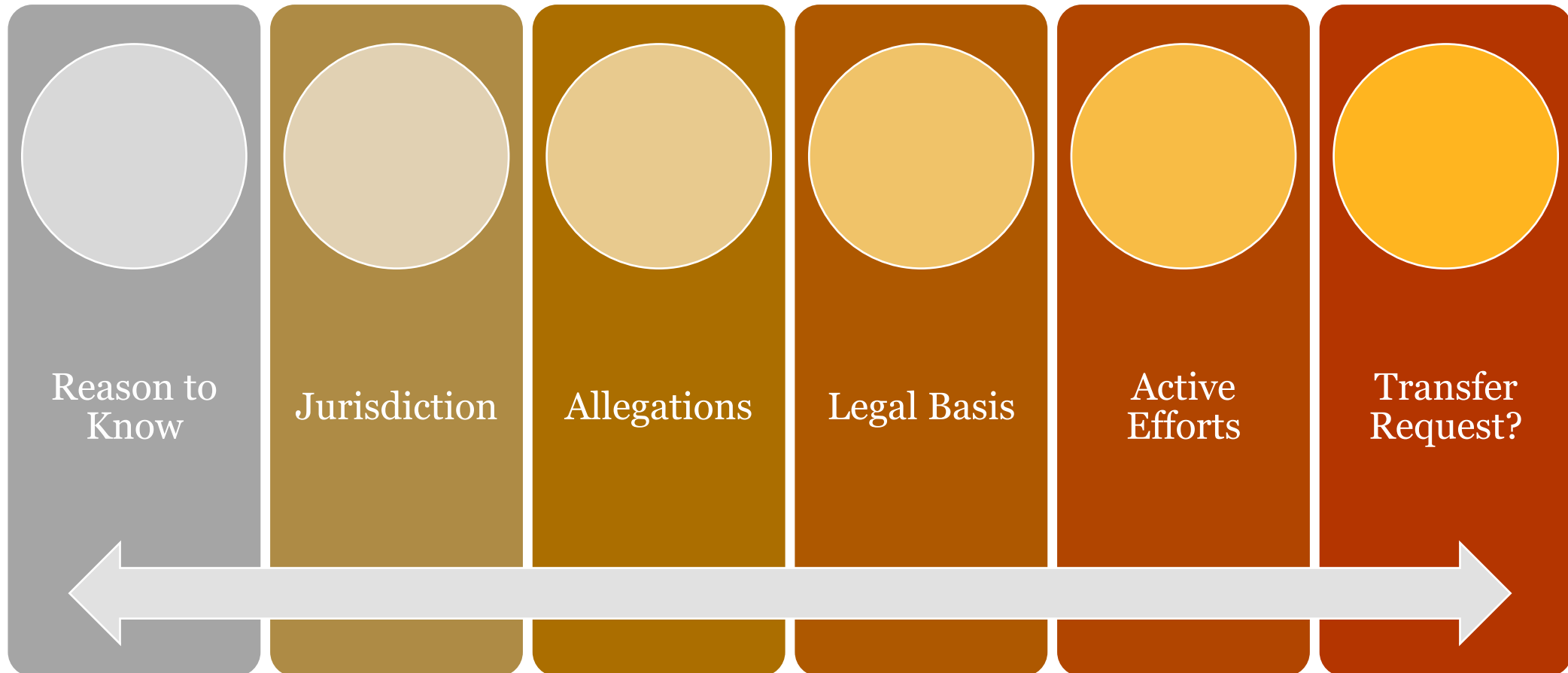
- adoptive,

- or foster-care placement

Apply Tribal or statutory preferences unless there is good cause not to follow

Adjudication Hearing

Key Decisions



Adjudication Hearing Considerations

- Indian Child
 - Specify whether the child is an Indian child under ICWA.
- Identify Tribe
 - Specify what efforts, if any, have been made to identify the child's tribe.
- Domicile
 - Specify whether the child either resides or is domiciled on a reservation or is already a ward of a tribal court.
- Notice to BIA
 - Specify whether written notice was sent to the appropriate regional BIA office if the child's tribe is not yet known.

Adjudication Hearing Considerations

- Placement and Placement Preferences:
 - Does placement meet placement preferences?
 - Has the tribe passed a Resolution with a different preferred order?
- Good Cause Not to Follow Placement Preference:
 - Made orally on the record or in writing.
 - Party seeking departure has burden of proof by clear and convincing.
- Testing
 - Order any necessary testing or evaluation of the child and parent(s) in preparation for the disposition hearing and ensure that all assessments or evaluations are culturally appropriate.
- Indian Custodian
 - Specify whether the child was in the custody of an Indian custodian at the time of removal.

Adjudication Hearing Considerations

- Family Placement
 - Active efforts to identify extended family, other tribal members or other Indian families to serve as caretakers?
- Dual Tribal Enrollment
 - If the child is eligible for membership in more than one tribe, ascertain which tribe is the child's tribe for purposes of ICWA. 25 U.S.C. § 1903(5); 25 C.F.R. § 23.109
- Intervention
 - The Indian custodian and Tribe have the right to intervene. 25 U.S.C. § 1911(c)
- Notice
 - Specify whether the agency mailed notice of the hearing and a copy of the petition and advice of rights to the parent or Indian custodian, registered or certified mail, return receipt requested. 25 U.S.C. § 1912; 25 C.F.R. § 23.111(c)

Disposition Hearing

- Is there is a need for continued out-of-home placement?
- Does the case plan address the needs of the child and the parent?
- Does this plan meet the requirements of active efforts?
- Do the parents understand the case plan?
- Is the continued removal of the child necessary to prevent serious emotional or physical damage to the child?
- Is the child placed within the tribal placement preferences?

Review Hearings

Is the placement in compliance with ICWA

Has the agency made Active Efforts?

- (1) Comprehensive assessment with a focus on safe reunification?
- (2) Identifying appropriate services and actively assisting the parents?
- (3) Identifying, notifying, and inviting Tribe to participate in providing support and services?
- (4) Diligent search for the Indian child's extended family members?
- (5) Culturally appropriate family preservation strategies?
- (6) Taking steps to keep siblings together whenever possible?
- (7) Regular visits with parents in the most natural setting possible as well as trial home visits?
- (8) Identifying community resources and actively assisting in accessing those resources?
- (9) Monitoring progress and participation in services?
- (10) Considering alternative ways to address the needs of the Indian child's parents?
- (11) Providing post-reunification services and monitoring.

Does the Tribe agree with the case plan goal?

Permanency Planning

When the petition or report requests termination of parental rights, it should set forth:

- Facts and circumstances supporting the grounds for termination;
- A detailed description of the active efforts;
- An explanation of why these efforts were unsuccessful;
- A detailed description of the active efforts to identify, notify, and invite the child's tribe to permanency planning meetings; 25 USC 23.2(3)
- An explanation of why the efforts to notify were unsuccessful;
- An explanation of why the child cannot be protected from the identified problems in the home.

Termination of Parental Rights

- Active efforts documented in the record;
- Sufficiency of evidence beyond reasonable doubt, including from QEW;
 - That continued custody is *likely* to result in serious damage.
- Evidence must show causal relationship, behavior to harm;
- These alone are not enough to terminate:
 - Existence of community poverty, single parenthood, crowded housing, custodian age, inadequate housing, substance abuse, nonconforming social behavior, etc.

Voluntary Termination

Key Decisions if parents consent to termination:

- Did parents understand the terms and consequences?
- Was consent to termination given within 10 days of the birth of the child? If so, invalid.
- Consent given without fraud or duress?



Adoptions

Placement Preferences

Good Cause to Depart Placement Preferences

Key Decisions

Adoptions

Placement Preference

If the Tribe has not established placement preferences, preference must be given in descending order, as listed below, to placement:

- (1) A member of the Indian child's extended family;
- (2) Other members of the Indian child's Tribe; or
- (3) Other Indian families.

If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply.

The court must, where appropriate, also consider the placement preference of the Indian child or Indian child's parent.

Adoptions

Good Cause to Depart Placement Preferences

- If any party asserts good cause not to follow the placement preferences, the reason for that belief or assertion must be stated orally on the record or provided in writing.
- The burden is on the proponent by clear and convincing evidence. 25 C.F.R. § 23.132(b)
- Court ruling should be made on the record and should consider:
 - The request of one or both of the Indian child's parents;
 - The request of the child;
 - The presence of a sibling attachment maintained only through a particular placement;
 - The extraordinary physical, mental, or emotional needs of the Indian child;
 - The unavailability of a suitable placement after a diligent search
- A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement.
- A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.

Adoptions

Decisions on the Record

- Is the child within the exclusive jurisdiction of a tribe? 25 U.S.C. § 1911(a)
- Proper Notice?
- Consents to adopt provided?
 - Thoroughly describe the conditions and circumstances the parental consent to adoption was obtained.
 - Consents must be executed in writing in the presence of the judge and must be accompanied by the judge's certificate that the parent or Indian custodian fully understood the terms. 25 U.S.C. § 1913(a)
- Certify that the parent understood. 25 U.S.C. § 1913(a)
- Certify consent to termination was not given within 10 days of the birth of the child. 25 U.S.C. § 1913(a)
- Determine whether consent was voluntary and informed; no fraud or duress. 25 U.S.C. § 1913(d)

THANK YOU

