

TEMPORARY CUSTODY HEARINGS - CINA RULES 10 & 10.1

INITIAL HEARING IS CLOSED

Determine whether the hearing will be open or closed. *See* AS 47.10.070(c)(1)-(3); CINA R. 3(f)(2)(A)-(C). The initial hearing after the petition is filed is **closed**. For any non-parties permitted in the courtroom, order observers not to disclose the identity of the child. AS 47.10.070(f). Subsequent hearings are closed if a parent, child, or other party to the case is present but has not had an opportunity to obtain legal representation. CINA R. 3(f)(2)(B).

TIMING OF HEARING

Emergency custody hearings must be held within 48 hours of the filing of the petition. Non-emergency hearings must be held within 5 business days of the filing. *See* CINA R. 10(a)(1)(A)-(B); AS 47.10.142(d).

PERSONS ENTITLED TO NOTICE AND PARTICIPATION - CINA R. 2(l), 3 & 7(b)

- ✓ Parents whose rights have not been terminated. Under ICWA, “parent” means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. 25 U.S.C. § 1903(9). *See also* **Paternity**, below.
- ✓ Child – At each hearing the court **shall determine** if the child has received notice of the hearing and may continue the hearing if notice was not provided. CINA R. 3(a).
 - For a child 10 years of age or older, the child must be directly notified of the hearing by the child’s attorney or GAL. The right to be present may be waived by the child through the child’s attorney or GAL. CINA R. 3(a), (b).
 - For a child under 10, notice of the hearing must be provided by OCS to the placement, and the child’s presence may be waived by the GAL. CINA R. 3(a), (b).
- ✓ Legal guardian
- ✓ Indian custodian
- ✓ Indian child’s tribe
- ✓ OCS case worker
- ✓ Guardian ad Litem (GAL)/Court Appointed Special Advocate (CASA)
- ✓ Out-of-home care provider and grandparents (but court can limit presence pursuant to AS 47.10.070(e))
- ✓ Intervenor
- ✓ Parties’ attorneys

REQUIRED INQUIRIES AND ADVISEMENTS - CINA R. 10(b)(1) & (2)

Notice Inquiry. Determine whether CINA R. 7(b) notice was given to the parties, including absent parent(s). CINA R. 10(b)(1). If the court knows or has reason to know that the case involves an Indian child, OCS must notify the child’s tribe. 25 U.S.C. § 1912(a); *see also* CINA R. 7(f)(1) and **Indian Child Inquiry**, below.

Petition. Ensure all parties have a copy of the petition. CINA R.10(b)(1).

Nature of Proceedings & Child Support. Advise the parties of the possibility of a temporary custody or supervision order pending adjudication or disposition, and if the child is placed outside the home, the parents may be liable for child support. CINA R. 10(b)(1); *see also* AS 47.10.084(c).

Indian Child Inquiry. The court must ask whether any participant “knows or has reason to know that the child is an Indian child.” *Jimmy E. v. State, Dep’t of Health & Soc. Serv. Off. of Child. Serv.*, 529 P.3d 504, 513 (Alaska 2023) (*quoting* 25

C.F.R. § 23.107(a)). An “Indian child” is any unmarried person who is under the age of eighteen and is either (1) a child who is a member of an Indian tribe, or (2) a child who is eligible to be a member of an Indian tribe and is the biological child of a member of an Indian tribe. 25 U.S.C. § 1903(4).

If the child is an Indian child, the court should further determine:

- The identity of the Indian child’s tribe (*See* 25 U.S.C. § 1903(5), CINA R. 6(b)(2)),
- Whether the child is a ward of a tribal court (*See* 25 U.S.C. § 1911(a)), and
- Whether the child has an Indian custodian (*See* 25 U.S.C. § 1903(6)).

If the court cannot determine whether the child is an Indian child, the court must consider whether it has *reason to know*. *See* 25 C.F.R. § 23.107(c) (outlining six circumstances giving the court “reason to know” that a child is an Indian child); *see also Jimmy E.*, 529 P.3d at 513-520.

If there is reason to know and the court does not have sufficient information to make the Indian child determination, the court must treat the child as an Indian child. Where there is reason to know, OCS must investigate and exercise due diligence to identify and notify the relevant tribes. If the court cannot make determinations related to the Indian child inquiry, the court should set deadlines for OCS or other parties to provide the necessary information. *See Jimmy E.*, 529 P.3d at 513-520; 25 C.F.R. § 23.107.

Advisement of Rights. CINA R. 10(b)(2).

- ✓ Right to Counsel. Parents, guardians, and Indian custodians have the right to counsel (court-appointed if indigent). Note: The child may have a right to counsel under Rule 12.1.
- ✓ Right to hearing at which OCS is required to prove allegations in petition.
- ✓ Right to confront and cross-examine witnesses.
- ✓ Right to present witnesses on own behalf.
- ✓ Right to privilege against self-incrimination.
- ✓ Right to request a continuance.
- ✓ Child has the right to a GAL.
- ✓ Tribe and Indian custodian have the right to intervene.

CONTINUANCE FINDING

The court may grant a **continuance** on a showing of “good cause” why a parent/guardian/Indian custodian is not prepared to respond to the allegations in the petition. AS 47.10.142(d).

The court shall determine whether placement in the home during a continuance would be “**contrary to the welfare**” of the child. AS 47.10.142(d).

HEARSAY EVIDENCE - CINA R. 10(b)(3)

Otherwise inadmissible hearsay will be admitted if probative of a material fact, has circumstantial guarantees of trustworthiness, and the parties have a fair opportunity to meet it.

REQUIRED FINDINGS AND ORDERS - CINA R. 10(c); AS 47.10.142(e)

CINA Determination. Determine whether probable cause exists to believe that the child is in need of aid, and specify which subsection(s) of AS 47.10.011 apply.

Legal standard for probable cause: Considering all circumstances, is there a "fair probability or substantial chance" that the child is in need of aid? *See Matter of J.A.*, 962 P.2d 173, 176 (Alaska 1998).

- **If no probable cause:** Order the child released from state custody and returned to the home. AS 47.10.142(e); CINA R. 10(c)(1).
- **If probable cause:** Explain reasons to the child, parent, guardian, or Indian custodian. AS 47.10.142(e).

Custody Finding. Determine whether to commit the child to OCS for “temporary placement,” or order the child returned to the parent/guardian/Indian custodian with OCS supervision. *See* AS 47.10.142(e), (f).

- **If custody not to OCS:** Specify the terms and conditions to be required of the parent(s), guardian, or Indian custodian, and child. AS 47.10.142(f).
- **If custody to OCS:** Specify the terms, conditions, and duration of placement. AS 47.10.142(f).

Removal Findings: Contrary to Welfare/Imminent Harm Findings. To approve removal from the child’s home, the court must determine that continued placement in the home is “contrary to the welfare” of the child. CINA R. 10(c)(3); *see* AS 47.10.142(e).

- The court must inform the child and parents, guardian, or Indian custodian of its reasons for the contrary to the welfare finding. AS 47.10.142(e).
- **Removal of an Indian child.** The court may remove an Indian child only if 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 home. CINA R. 10(c)(3), *see also* 25 U.S.C. § 1912(e).

Reasonable/Active Efforts Findings. If the court authorizes removal from the home, the court must determine:

- Whether OCS made **reasonable efforts** to prevent removal, or that it was not possible under the circumstances to make efforts to prevent removal. AS 47.10.086(a); CINA R. 10.1; *and*
- If the child is an **Indian child**, whether OCS made **active efforts** required by 25 U.S.C. § 1912(d) to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, and whether they were unsuccessful.

A finding that OCS failed to make reasonable/active efforts is not in itself grounds for returning the child and does not affect the court’s ability to proceed to adjudication. CINA R. 10.1(a)(2), (b)(2). The court may order OCS to make reasonable/active efforts “within a reasonable time.” *Id.* If OCS fails to comply with the order, the court may impose appropriate sanctions. *Id.*

ICWA Placement Preference Findings. If the court authorizes removal of an Indian child, the court must determine whether OCS complied with ICWA placement preferences, or whether there is good cause to deviate from those preferences. CINA R. 10.1(b)(1)(A); 25 U.S.C. § 1915(b). The court may order OCS to comply with ICWA placement preferences “within a reasonable time.” CINA R. 10.1(b)(2). If OCS fails to comply with the order, the court may impose appropriate sanctions. CINA R. 10.1(b)(2).

ADDITIONAL ORDERS & CONSIDERATIONS

Paternity. Is the person identified as the father listed on the child’s birth certificate or were the parents married at the time of the child’s birth? Should the court order DNA testing? For purposes of appointing counsel, paternity may be established through the presentation of legally sufficient evidence (even in the absence of scientific evidence of paternity). *See Off. of Pub. Advoc. v. Superior Ct., Third Jud. Dist.*, 462 P.3d 1000, 1005 (Alaska 2020). Under ICWA, “parent” does not include the unwed father where paternity has not been acknowledged or established. 25 U.S.C. § 1903(9).

If a child is committed to OCS, order the parents to disclose information about **relatives** willing to care for the child. AS 47.10.080(r)(5). Ask the tribe for information about relatives.

Inquire whether OCS has identified preliminary elements of a **case plan**.

OCS shall provide **reasonable visitation**. The court may order OCS to file a visitation plan. *See* AS 47.10.080(p) and (t); AS 47.10.084(c).

SET FUTURE HEARINGS AND DATES

- ✓ Set **adjudication trial** to be *completed* within 120 days. CINA R. 15(a).
- ✓ Set pretrial conference per CINA R. 13(a); and
- ✓ Set meeting of the parties at least 30 days before pretrial conference. CINA R. 13(a).