

INDIAN CHILD WELFARE ACT AND 2016 FEDERAL REGULATIONS

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Overview of Discussion

- Indian Child Welfare Act history
- 2016 Federal Regulations



ICWA History



History



ICWA Purpose

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

25 USC § 1902 (2006)



Safeguards for Indian Children

- Protective dual jurisdictional scheme
- Mandates to ID Indian children as soon as possible in the case
- Higher service provision standards (active vs reasonable efforts) to avoid the breakup of the family
- Standards of evidence higher
- Placement preferences clearly defined
- Right to Intervene and Right to Transfer
- QEW testimony



Why the Need for Regulations?

- Native kids still disproportionately more likely to be removed from their homes
- Inconsistent implementation and interpretation of law across country and even within states
- 2015 Guidelines non-binding



Regulations

- Citation: 25 C.F.R. 23
- Final Rule promulgated June 14, 2016
- Take effect December 12, 2016
- Available at <https://www.gpo.gov/fdsys/pkg/FR-2016-06-14/pdf/2016-13686.pdf>

State laws that provide higher protections of the parents control over the regulations. 23.106



Applicability

- **Is this an Indian child?** At the earliest stages of contact between Dept and a family, was there an inquiry of each party re whether this child is or could be Indian. At every hearing, every stage of any case, the court must repeat this inquiry. 23.107(a); Unless and until determined not to be Indian child, treat as though is. 23.107(b)(2)
- Only Tribe can determine if a child is Indian child. 23.108
- Definition of Child Custody Proceedings 23.103
- “Custody” and “Continued Custody” 23.103
- Domicile: domicile follows the parent or custodian. Court determines domicile 23.110(a)



Initial Inquiry – Active Efforts

- Regs include 11 examples of active efforts, emphasizing the engagement of families in accessing services (§ 23.2 Definitions)
- *Active efforts* means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family.
- Definition emphasizes using culturally appropriate services and working with the child's Tribe to provide services
- Prior to ordering involuntary FC placement or TPR, court must conclude that active efforts have been made to prevent the breakup of the family and that they have been unsuccessful. 23.120(a)
- Active efforts must be documented in court record before requesting foster care or TPR 23.120(b)



Initial Inquiry – Standards of Evidence

- To place Indian child in FC, C&C evidence must be presented, supported by QEW that continued custody likely to result in serious emotional or physical damage to child. 23.121(a)
- TPR requires evidence beyond a reasonable doubt + QEW 23.121(b)
- Evidence must show causal relationship between the particular conditions in the home and the likelihood that continued custody will result in serious emotional or physical damage to the child. 23.121(c)



Emergency Proceedings 23.113

- *Emergency proceeding* means and includes any court action that involves an emergency removal or emergency placement of an Indian child.
- Are authorized to protect child in ***imminent physical damage or harm***, but should cease immediately when the placement is no longer necessary to prevent harm.
23.113(b)(1)
- Can be terminated by initiation of child custody proceeding subject to ICWA; transfer of case to Tribe; or Return home
- Emergency removals should not last longer than 30 days unless court has made certain findings 23.113(10)(e)



Notice 23.11

- In any ***involuntary proceeding*** in a State court where the court knows or ***has reason to know*** that an Indian child is involved, and where the identity and location of the child's parent or Indian custodian or Tribe is known, ***the party seeking the foster-care placement*** of, or termination of parental rights to, an Indian child ***must directly notify the parents, the Indian custodians, and the child's Tribe by registered or certified mail with return receipt requested***, of the pending child-custody proceedings and their right of intervention.
- For child-custody proceedings in Washington, notices must be sent to:



Portland Regional Director, Bureau of Indian Affairs
911 NE 11th Avenue, Portland, Oregon 97232

Qualified Expert Witnesses 23.122

- QEW must be able to testify that parent's continued custody of child is likely to result in serious emotional or physical damage to child
- QEW must be able to testify re prevailing cultural and social standards ***of the child's Indian tribe***
- Tribes may designate QEW
- Assigned agency social worker ***may not serve as QEW.***
23.122(c)



What if you think removal improper?

- 23.114



Transfer 23.115-119

- Request for Transfer must be made orally on the record in court, or in writing by the parent, custodian, or the child's Tribe
- Right to transfer is available **at any stage of the proceedings** 23.115(b)
- Courts must transfer unless parent objects, tribal court declines transfer, or good cause exists not to. 23.117.
- Courts **cannot consider** whether the proceedings are at an advanced stage when the petitioned didn't get notice until advanced stage; whether transfer was requested previously; whether transfer could impact child's placement; child's cultural connections to Tribe; socioeconomic conditions or perceptions of the tribal/BIA social services/judicial body. 23.118



Placement Preferences

- Statutory preferences apply in any foster care, pre-adoptive, and adoptive placement of Indian child, ***unless good cause*** exists ***or*** child's Tribe has a different placement preference order 23.131(c)
- What is good cause? 23.132
- Party seeking deviation must state on the record in court or in writing the reason for that request. Bears burden to show by C&C evidence that good cause exists. 23.132(b)
- Court's determination of good cause must be made on record or in writing 23.132(c)

- Indian Foster Home – at least one foster parent must be an Indian person as defined under ICWA



Voluntary Proceedings 23.124-128

- Child custody proceeding that is not involuntary, such as foster care, preadoptive, or adoptive placement that either or both parents, or the Indian custodian has of their own free will, ***without the threat of removal by a State agency***, consented to.
- Parent must be able to have child returned to them “Upon demand”, which is defined as upon verbal request, without any contingencies.



Information and Recordkeeping

- All states must maintain records of every involuntary and voluntary foster care, pre-adopt, and adoptive placement of an Indian child
- On request of a Tribe or Sec. of Interior, must make the record available within 14 days



Standards of Proof

- “Active Efforts” to prevent family breakup. s. 1912(d)
- Clear and convincing proof WITH support of “qualified expert” that the continued custody of the child by parent is likely to result in emotional or physical damage to child. 1912(e)
- Standard of proof to terminate Indian parent’s rights: beyond a reasonable doubt. 1912 (f)



Questions?

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