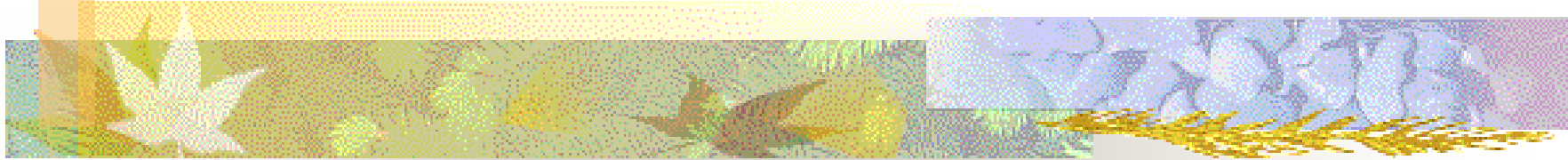


Introduction to the 2016 ICWA Regulations & Guidelines



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ICWA & Related Law

■ Federal

- 25 U.S.C. § 1901 et seq.
- 25 C.F.R. § 23.1 et seq.
- BIA Guidelines for State Courts
- Cases
 - U.S. Supreme Court (2)
 - 9th Circuit Court of Appeal

■ State Law

- SB 678 (Welf. & Inst. Code, Fam. Code, Prob. Code)
- Tribal Customary Adoption, etc.
- California Rules of Court, rules 5.480-5.487
- Cases
 - CA Supreme Court (3)
 - Court of Appeal



Key Developments

- US DOJ ICWA Compliance Initiative led to:
 - New federal regulations (25 CFR Part 23)
 - New BIA Guidelines (Dec. 2016)
- ICWA Defense Project
 - NICWA, NARF, NCAI, MSU



Background to ICWA Regulations & Guidelines

- ICWA enacted 1978
- Dept. of Interior issued 25 CFR part 23 in 1979
- BIA published Guidelines in 1979
 - 44 Fed.Reg. 67584 (Nov. 26, 1979)
- Comments invited in 2014 after *Adoptive Couple v. Baby Girl*
- New Guidelines published 2015
 - 80 Fed.Reg. 10146 (Feb. 25, 2015)
- Regulations Amended 12/12/16
- 2016 Guidelines Replace Earlier Ones



Purpose of New Regulations

“[T]he Department has found that implementation and interpretation of the Act has been inconsistent across States and sometimes can vary greatly even within a State. This ... creates significant gaps in ICWA protections and is contrary to the uniform minimum Federal standards intended by Congress.”



Purpose (cont'd)

“In addition, some State court interpretations of ICWA have essentially voided Federal protections for groups of Indian children to whom ICWA clearly applies.”



Effective Date of Regulations

- Apply in all ICWA proceedings initiated after December 12, 2016
- For proceeding initiated prior to December 12:
 - Regulations apply to any subsequent proceedings in the same matter; and
 - Some provisions duplicate ICWA standards so they apply even before December 12.



Major Amendments to Regulations

- New and revised definitions
- Amended notice provision
- Addition of New Subpart I
 - 25 CFR section 23.101 – 23.144



New Definitions

- Active efforts
- Continued custody
- Custody
- Domicile
- Emergency proceeding
- Hearing
- Indian foster home
- Involuntary proceeding
- Status offenses
- Upon demand
- Voluntary proceeding



Revised Definitions

- Child custody proceeding
- Extended family member
- Indian child
- Indian child's tribe
- Indian custodian
- Parent
- Reservation
- Secretary
- Tribal court



Subpart I: ICWA Proceedings

- General Provisions
- Pretrial Requirements
- Petitions to Transfer to Tribal Court
- Adjudication of Involuntary Proceedings
- Voluntary Proceedings
- Disposition
- Access
- Post-trial Rights and Responsibilities
- Record Keeping



Purpose (25 CFR §23.101)

“The regulations in this subpart clarify the minimum Federal standards governing implementation of the Indian Child Welfare Act (ICWA) to ensure that ICWA is applied in all States consistent with the Act's express language, Congress's intent in enacting the statute, and to promote the stability and security of Indian tribes and families.”



Application in juvenile delinquency

- ICWA only applies to such proceedings:
 - involving status offenses; and
 - resulting in out-of-home placement
- May affect holding in *In re W.B.* (2012) 55 Cal. 4th 30
 - ICWA applies to “rare section 602 cases that proceed to a termination of parental rights or that result in a foster care placement motivated solely by concerns about parental abuse or neglect”

25 CFR §23.103 (a)(1)(iii) and (b)(ii)



Application to Placements with Other Parent in Juvenile Court

- ICWA applies in an involuntary custody proceeding
- ICWA does not apply to “an award of custody of the Indian child to one of the parents including, but not limited to, an award in a divorce proceeding”

25 CFR §23.103 (a)(1)(ii) and (b)(iii)



Application to Non-Minor Dependents

“If ICWA applies at the commencement of a proceeding, it will not cease to apply simply because the child reaches age 18 during the pendency of the proceeding.”

25 CFR §23.103 (d)



Existing Indian Family Exception

“If a proceeding listed in paragraph (a) of this section concerns a child who meets the statutory definition of ‘Indian child,’ then ICWA will apply to that proceeding. In determining whether ICWA applies to a proceeding, the State court may not consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum.”

25 CFR §23.103 (c)



Determining “reason to know”

- Duty of inquiry in every case confirmed
- All responses should be on the record

25 CFR §23.107



“reason to know” exists when:

- Court informed that child is an “Indian child”
- Court “has discovered information indicating that the child is an Indian child”
- minor gives the court reason to know he or she is an Indian child
- the child, the child's parent, or the child's Indian custodian resides on a reservation or in an Alaska Native village
- court is informed that child is or was a ward of tribal court or either parent or the child possesses an tribal membership card



When “reason to know” exists:

- court must
 - confirm, by way of a report, declaration, or testimony that the petitioner used due diligence to identify and work with all of the potential Tribes to verify whether the child is in fact an Indian child; and
 - Treat the child as an Indian child, unless and until it is determined on the record that the child is not an “Indian child”



Membership determinations

“The determination by a Tribe of whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member, is solely within the jurisdiction and authority of the Tribe, except as otherwise provided by Federal or Tribal law. The State court may not substitute its own determination regarding a child's membership in a Tribe, a child's eligibility for membership in a Tribe, or a parent's membership in a Tribe.”

25 CFR §23.108 (b)



When Multiple Tribes May Have Standing

Provisions for determining which Tribe will have standing in the proceeding when the Tribes agree and when they do not

25 CFR §23.109



Limits on State Jurisdiction

- Affirms state court lacks jurisdiction when and must dismiss action when:
 - Child resides or is domiciled on a reservation where the Tribe holds exclusive jurisdiction; or
 - Child is ward of tribal court

25 CFR §23.110



Notice Requirements

- “when court knows or has reason to know” an Indian child is involved
- copy of notice and any return receipts must be filed with court
- personal or electronic service allowed but not in lieu of mail service
- Must include info re. “other direct lineal ancestors of the child, such as grandparents”

25 CFR §§23.11 and 23.111



Notice (cont'd)

- Must be sent to BIA Regional Director if there is “reason to know” and identity or location of parent, Indian custodian or Tribes are unknown
- “as much information as is known regarding the child's direct lineal ancestors should be provided”
- BIA “may, in some instances, be able to identify Tribes to contact.”

25 CFR §23.111(e)



Notice (cont'd)

- “Secretary will make reasonable documented efforts to locate and notify the child’s Tribe and the child’s parent or Indian custodian”
- “Upon request from a party ... the Secretary will make a reasonable attempt to identify and locate the child’s Tribe, parents, or Indian custodians”

25 CFR §§23.11(c) and (d)



Notice (cont'd)

- “If a parent or Indian custodian of an Indian child appears in court without an attorney, the court *must* inform him or her of his or her [ICWA] rights”
 - right to appointed counsel,
 - right to request transfer to Tribal court and right to object to such transfer
 - right to request continuance

25 CFR §23.111(g)



Standards for Emergency Proceedings (Detention Phase)

- Emergency removal only allowed when “necessary to prevent imminent physical damage or harm to the child”
- at each hearing prior to jurisdiction, court must assess “whether the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child”

25 CFR §23.113



Emergency jurisdiction (cont'd)

- Emergency proceeding can be terminated by:
 - Initiating child custody proceeding
 - Transfer to Tribal Court
 - Return to parent or Indian custodian



Removal Petition Must Include:

- statement of the risk of imminent physical damage or harm and any evidence that the emergency removal continues to be necessary to prevent such imminent harm
- specific and detailed account of the circumstances that led the agency to remove
- statement of the efforts that have been taken so the Indian child may safely be returned



Emergency proceeding (cont'd)

- An emergency proceeding should not be continued for more than 30 days unless court finds:
 - Return would subject the child to imminent physical damage or harm;
 - It has been unable to transfer the proceeding to the jurisdiction of the appropriate Tribe; and
 - It has not been possible to initiate a “child-custody proceeding”



Improper Removal

- If any party asserts or the court has reason to believe that the Indian child may have been improperly removed or has been improperly retained, the court must expeditiously determine whether there was improper removal or retention
- Termination of proceeding and immediate return required unless “substantial and immediate danger or threat of such danger”

25 CFR §23.114



Adjudication of Involuntary Proceedings

- §23.120 How does the State court ensure that active efforts have been made?
- §23.121 What are the applicable standards of evidence?
- §23.122 Who may serve as a qualified expert witness?



Active Efforts Finding

- Active efforts must be documented in detail in the record
- New definition of “active efforts” provides detailed examples of what is entailed

25 CFR §23.120(b)



Detriment Finding:

- evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the minor
- evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior is not by itself sufficient to support detriment finding

25 CFR §23.121(c) and (d)



Qualified Expert Witness:

“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.”

25 CFR §23.122



Qualified Expert Witness (cont'd)

- Tribe may designate a person as qualified to testify re. the Tribe's prevailing social and cultural standards
- court or any party may request the assistance of the Indian child's Tribe or the BIA in locating qualified expert witnesses.
- the social worker regularly assigned to the Indian child may not serve as a qualified expert witness



Dispositions

- §23.129 When do the placement preferences apply?
- §23.130 What placement preferences apply in adoptive placements?
- §23.131 What placement preferences apply in foster-care or preadoptive placements?
- §23.132 How is a determination of “good cause” to depart from the placement preferences made?



Placement Preferences

- If any party asserts that good cause not to follow the placement preferences exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing to the parties to the child-custody proceeding and the court.
- The party seeking departure from the placement preferences should bear the burden of proving by clear and convincing evidence that there is “good cause” to depart from the placement preferences.

25 CFR §23.132(a) and (b)



Placement Preferences (cont'd)

- 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.



Good Cause Finding:

- “must be made on the record or in writing and should be based on one or more of the following considerations:”
 - request of one or both of the Indian child's parents, “if they attest that they have reviewed the placement options, if any, that comply with the order of preference”
 - request of the child, “if the child is of sufficient age and capacity to understand the decision that is being made”

25 CFR §23.132(c)



Additional factors (cont'd)

- a sibling attachment that can be maintained only through a particular placement;
- extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live;
- unavailability of a suitable placement after a determination by the court that a diligent search was conducted and none located



Access

- court should allow alternative methods of participation, such as participation by telephone, videoconferencing, or other methods.
- Each party has a right to timely examine all reports and other documents filed or lodged with the court upon which any decision with respect to such action may be based.

25 CFR §§23.133 and 23.134



Post-Trial Rights & Responsibilities

- §23.136 What are the requirements for vacating an adoption based on consent having been obtained through fraud or duress?
- §23.137 Who can petition to invalidate an action for certain ICWA violations?
- §23.138 What are the rights to information about adoptees' Tribal affiliations?
- §23.139 Must notice be given of a change in an adopted Indian child's status?



Invalidation Petitions

- “Upon a showing that an action for foster-care placement or termination of parental rights violated any provision of 25 U.S.C. 1911, 1912, or 1913, the court must determine whether it is appropriate to invalidate the action.”
- “To petition for invalidation, there is no requirement that the petitioner's rights under ICWA were violated; rather, a petitioner may challenge the action based on any violations of 25 U.S.C. 1911, 1912, or 1913 during the course of the child-custody proceeding.”

25 CFR §23.137(b) and (c)



Voluntary Proceedings

- §23.124 What actions must a State court undertake in voluntary proceedings?
- §23.125 How is consent obtained?
- §23.126 What information must a consent document contain?
- §23.127 How is withdrawal of consent to a foster-care placement achieved?
- §23.128 How is withdrawal of consent to a termination of parental rights or adoption achieved?



Petitions to Transfer to Tribal Court

- §23.115 How are petitions for transfer of a proceeding made?
- §23.116 What happens after a petition for transfer is made?
- §23.117 What are the criteria for ruling on transfer petitions?
- §23.118 How is a determination of “good cause” to deny transfer made?
- §23.119 What happens after a petition for transfer is granted?



New BIA Guidelines

“While not imposing binding requirements, these guidelines provide a reference and resource for all parties involved in child custody proceedings involving Indian children. These guidelines explain the statute and regulations and also provide examples of best practices for the implementation of the statute, with the goal of encouraging greater uniformity in the application of ICWA. These guidelines replace the 1979 and 2015 versions of the Department’s guidelines.”



Status of Guidelines

The Guidelines do not have binding legislative effect. However, they are entitled to great weight, and the Court of Appeal has expressly found the Guidelines' provisions to be persuasive.

(See, e.g., In re Louis S. (2004) 117 Cal.App.4th 622, 629; In re Karla C. (2003) 113 Cal.App.4th 166, 175.)



Resources

- ICWA Laws, Regulations and Rules
 - <http://www.courts.ca.gov/8709.htm>
- Final Rule
 - <https://www.federalregister.gov/documents/2016/06/14/2016-13686/indian-child-welfare-act-proceedings>
- BIA Guidelines for State Courts
 - <https://www.bia.gov/cs/groups/public/documents/text/idc2-056831.pdf>
- Tribal Customary Adoption
 - <http://www.courts.ca.gov/12569.htm>
- ICWA Job Aides
 - <http://www.courts.ca.gov/8103.htm>
- ICWA Education
 - <http://www.courts.ca.gov/8075.htm>



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