




INDIAN CHILD WELFARE ACT BASICS

**MEGAN HASSEN, JUVENILE LAW AND POLICY COUNSEL
MAY 4, 2016**



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OVERVIEW

INTRODUCTION

- Federal law passed in 1978
 - Alarming high number of Indian children were being removed from their homes
 - **25 to 35** percent
 - **85 to 90** percent placed in non-Indian homes
 - **Not due to abuse and neglect but because it was believed they would have a better life.**
 - Creates minimum standards state courts must follow
- New Bureau of Indian Affairs Guidelines released 2/25/15
 - Provide best practices for agencies and state courts



PURPOSE OF ICWA

- Prevent the unwarranted removal of Indian children from their families and Tribes because of cultural bias or ignorance
- Assure that children who are removed maintain affiliation with their culture and Tribe
- Maximize Tribal decision making regarding their Indian children
- Maintain Tribal sovereignty



WHY ICWA? RESULTS OF ASSIMILATION

- Devastating impact on Indian family
 - Loss of:
 - Language
 - Child's sense of his/her role in the extended family
 - Spirituality
 - Customs/traditions
 - Loss of cultural identity
 - Lead to:
 - Psychological problems
 - Cultural shame
 - Abnormal becoming acceptable



CONTINUED NEED FOR ICWA TODAY?

- Native American children are placed at more than 2 1/2 times the number one would expect based on their share of the population. [2013 Child Welfare Data Book](#), published September 2014
- The National Indian Child Welfare Association describes same problem nationally (51% of children in foster care in South Dakota). [Top 10 ICWA Myths Fact Sheet](#)
- [South Dakota class action highlights violations of the Indian Child Welfare Act](#) (ABA Journal, May 1, 2015)





Child custody proceeding

Indian Child

DHS obligation to inquire

Reason to know

Notice

Membership determination

State or tribal court



APPLICABILITY

PROCEEDINGS COVERED BY ICWA

- “Child custody proceeding” 25 U.S.C. §1903(1)
 - Foster care placement
 - Voluntary proceedings included if parent can’t regain custody upon demand.
 - Termination of parental rights
 - Preadoptive placement
 - Adoptive placement
- Does not include:
 - Delinquency proceedings (unless status offense)
 - Divorce proceedings



IS THE CHILD AN “INDIAN CHILD”?

- Indian child: 25 U.S.C. §1903(4)
 - Unmarried
 - Under 18
 - Member of, or eligible for membership in, tribe
 - If there are two tribes, one with which the child has the more significant contacts.
 - Tribe must be federally recognized
 - 9 in Oregon
 - Listed annually in federal register:
<http://www.bia.gov/cs/groups/public/documents/text/idc1-029079.pdf>
 - If eligible for membership, also must be biological child of a member of an Indian tribe. Parent defined at 25 U.S.C. §1903(9) (*includes Indian person who has adopted child*).; BIA Guidelines A.2
 - Does not include unwed father where paternity not acknowledged or established.

DHS PROCEDURE

- Identify whether child is Indian within 24 hours of case opening for assessment
- Form 1270
- If parents not available:
 - Case file
 - Consult with child/relatives/others/tribe
- Confirm tribe's status as federally recognized tribe
- Contact tribe to confirm eligibility for membership



STATE COURT PROCEDURE

- **Best practice: Inquire at every proceeding. BIA Guidelines A.3(c)**
 - Is the child an Indian child under the act?
 - Doesn't matter if child is placed at home. Early notice to tribe allows for more resources to family to prevent breakup.



REASON TO KNOW

- If the court has reason to know an Indian child is involved, the court shall enter an order:
 - requiring DHS to notify tribe of proceeding and right to intervene;
 - requiring the case be treated as an ICWA case until the court determines the case not subject to ICWA.
- ORS 419B.878



REASON TO KNOW

- BIA Guidelines B.2(c):
 - A party to the proceeding, Indian tribe, Indian organization or public or private agency informs the agency or court that the child is an Indian child;
 - Any child welfare or family support agency has discovered information suggesting child is an Indian child;
 - Child gives court or agency reason to believe;
 - Domicile of parents, child, or Indian custodian is known to be an Indian reservation or predominately Indian community; or
 - An employee of the agency or court has knowledge the child may be an Indian child.



REASON TO KNOW: BIA GUIDELINES B.2

- Ask each party to certify on the record whether they know of any information that suggests the child is an Indian child.
- The court may require DHS to provide:
 - Genograms or ancestry charts for both parents;
 - Current and former addresses of the child, child's parents and grandparents, and places of birth and death;
 - Tribal affiliation for individuals on the charts;
 - Whether parents/Indian custodian are domiciled on or a resident of an Indian reservation or in a predominately Indian community.



NOTICE

- In any involuntary proceeding, where the court knows or has reason to know Indian child is involved, DHS shall notify:
 - Parent or Indian custodian, and
 - Indian child's tribe
 - Notice of the pending proceeding and right to intervene shall be provided by registered mail with return receipt requested.
 - If the identity or location of parent, Indian custodian, and tribe cannot be determined:
 - Notice shall be given to the Secretary of the Interior
- 25 U.S.C. §1912(a)



NOTICE

○ Indian Custodian:

- An Indian person who has legal custody of an Indian child under tribal law or custom or under State law; or to whom temporary physical care, custody and control has been transferred by the parent. 25 U.S.C. §1903(6).



NOTICE

- No foster care placement or termination proceeding shall be held until at least 10 days after receipt of notice by the parent/Indian custodian and tribe or the Secretary.
 - Parent/Indian custodian/tribe may request and be granted up to 20 additional days to prepare.



NOTICE

- No hearings regarding decisions for the foster care or termination of parental rights may begin until the waiting periods have passed. BIA Guidelines, B.7.



MEMBERSHIP DETERMINATION

- The tribe alone determines tribal membership.

BIA Guidelines B.3

- The only relevant factor is whether the tribe verifies that the child is a member or eligible for membership.
- The state court may not substitute its own determination regarding a child's membership or eligibility for membership in a tribe or tribes.



MEMBERSHIP DETERMINATION: MORE THAN ONE TRIBE

- If child is eligible for membership in more than one tribe: the tribe that has had the more significant contacts is designated as child's tribe. 25 U.S.C. §1903(5)
- If the child is a member of one tribe and not the other, deference should be given to the tribe in which the child is a member, unless otherwise agreed to by the tribes.
- Otherwise, if the tribes are able to reach an agreement, the agreed upon tribe should be designated as the child's tribe.

BIA Guidelines B.4(d)(i).



MEMBERSHIP DETERMINATION: MORE THAN ONE TRIBE

- Considerations if tribes not able to agree:
 - Preference of the parents or extended family members who are likely to become foster care or adoptive placements; and/or
 - Tribal membership of custodial parent or Indian custodian; and/or
 - If applicable, length of past domicile or residence on or near the reservation of each tribe; and/or
 - Whether there has been a previous adjudication with respect to the child by a court of one of the tribes; and/or
 - Self-identification of the child; and/or
 - Availability of placements.



STATE OR TRIBAL COURT? 25 U.S.C. §1911

Tribal Court

- Exclusive jurisdiction:
 - Residence or domicile on Warm Springs, Burns Paiute, Umatilla
 - Parent's domicile is child's.
Mississippi Choctaw Indians v. Holyfield., 490 U.S. 30 (1989)
 - Child already ward of tribal court
- If there is a motion to transfer to tribal court (parent, custodian, tribe). However...
 - Parents may object
 - State court may grant or find good cause not to transfer
 - Motion may be filed at any stage of proceeding
 - But see *State ex rel DHS v. Lucas*, 177 Or App 318 (2001)
 - See BIA Guidelines C for guidance on “good cause” and procedures for transfer.

State court

- Child is not a resident or domiciled on reservation, is not already a ward of tribal court, and there is no motion to transfer to tribal court.
- If tribal court jurisdiction not exclusive, tribe may intervene in the state court proceeding.
 - Intervening tribe is a party. ORS 419B.875(1)(a)(H).





Active efforts

Expert testimony

Voluntary placements

Burden of proof

Placement preferences



REQUIREMENTS

ACTIVE EFFORTS: 25 U.S.C. §1912(D)

- Applies to reunification:
 - Shelter and jurisdiction: efforts to prevent removal from the home
 - Triggered from the time the possibility arises that the child may be placed out of the home. Should be provided while investigating if child is an “Indian child”. BIA Guidelines B.1
 - State must show that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and those efforts have been unsuccessful.
 - Periodic review and permanency hearings: efforts to reunify family



ACTIVE EFFORTS

- “Active efforts” not defined by ICWA, but examples are provided in the BIA guidelines in section A.2.
- ASFA’s exceptions to reunification efforts do not apply to ICWA proceedings. BIA Guidelines A.2
- Active efforts not required for:
 - Efforts to finalize the permanency plan (reasonable efforts required)



ACTIVE EFFORTS

- “Active efforts”
 - Higher standard than “reasonable efforts”
 - Must assist the parent through steps of a reunification
 - The type and sufficiency of effort depends on the particular circumstances of the case.
 - To determine whether efforts were active, the court considers whether a parent is likely to benefit from a service in light of the nature of a parent’s problems.
Dept. of Human Services v. M.D., [266 Or App 789 \(2014\)](#)
- Additional resource to help you evaluate active efforts:
 - [Active Efforts Principles and Expectations](#)



ACTIVE VERSUS REASONABLE EFFORTS

Active efforts

- Engaging the tribe and family
- Referring to culturally appropriate services
- Helping parent set appointments and providing transportation
- Calling tribe and helping to complete application for enrollment

Reasonable efforts

- Referring to typical services
- Providing a list of required services and approved providers
- Meeting requirements set by policy
- Sending letter asking about child's eligibility for enrollment



ACTIVE EFFORTS: COURT FINDINGS

- In light of the circumstances of the child and the parent(s), having considered the child's health and safety to be the paramount concerns, and having considered whether placement of the child and referral to the Strengthening, Preserving and Reunifying Families Program is in the child's best interest (ORS 418.595) the Court finds that DHS:
 - ► ___ has made ___ has not made active efforts to provide remedial services and rehabilitative programs designed **to prevent the removal** of the child from the home and the breakup of the family. 25 USC §1912(d) and ORS 419B.185(1).
 - ► ___ has made ___ has not made active efforts, **since the removal of the child**, to provide remedial services and rehabilitative programs designed to make it possible for the child to safely return home. 25 USC §1912(d) and ORS 419B.185(1).
 - ► **The efforts to prevent removal/to safely return the child home include the following:**
 - Although no remedial/rehabilitative services were provided, the Court considers DHS to have made active efforts to **prevent the need for removal of the child from the home allow the child to safely return home** because, under the circumstances, active efforts would not have prevented or eliminated the need for protective custody. ORS 419B.185(1).



EXPERT TESTIMONY

- No foster care placement may be ordered unless the court has determined 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)
 - Must be supported by clear and convincing evidence, and
 - Include testimony by a qualified expert witness.



EXPERT TESTIMONY

○ Required when:

- Foster care placement. 25 U.S.C. 1912(e); ORS 419B.340(7)
 - Shelter
 - Jurisdiction
 - Guardianship. ORS 419B.366(3).
 - Does not apply to review or permanency hearings.
- Termination of parental rights. 25 U.S.C. 1912(f); ORS 419B.500.
 - Must find beyond a reasonable doubt that continued custody by the parent is likely to result in serious emotional or physical damage to the child.



EXPERT TESTIMONY

- Qualified expert defined:
 - Legislative history indicates reference is to an expert with particular and significant knowledge of and sensitivity to Indian culture.
 - Witness needs to have expertise beyond the normal social worker qualifications. *State ex rel Juvenile Dept. v. Charles*, 70 Or App 10 (1984).
 - Limited exception where cultural factors not implicated. *See, State ex rel. Juvenile Dept. v. Tucker*, 710 P.2d 793 (Or. Ct. App. 1985) (mother so severely developmentally disabled that her parental rights would have been terminated under any standard)



EXPERT TESTIMONY

- Qualified expert according to BIA Guidelines (D.4):
 - Member of Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices;
 - Member of another tribe recognized to be a QEW by the child's tribe based on their knowledge of the delivery of child and family services to Indians and the child's tribe.
 - Lay person recognized by the Indian child's tribe as having substantial experience in the delivery of child and family services to Indians and knowledge of prevailing social and cultural standards and childrearing practices w/in the child's tribe.
 - Professional person having substantial education and experience in the area of his or her specialty who can demonstrate knowledge of the prevailing social and cultural standards and childrearing practices within the Indian child's tribe.



EXPERT TESTIMONY/EMERGENCY REMOVAL

○ Exception:

- Removal of child is necessary to prevent imminent physical damage or harm to the child. 25 U.S.C. §1922. *See also* BIA Guidelines B.8. Applies to all children, regardless of whether they reside on a reservation (unless tribe has exclusive jurisdiction). *State ex rel Juv. Dept v. Charles*, [70 Or App 10](#), *rev. denied*, 312 Or 150 (1984).

○ Limitations:

- Emergency removal must terminate when it is no longer necessary to prevent imminent physical damage or harm to the child.
- Temporary emergency custody should not be continued for more than 30 days unless extraordinary circumstances exist. BIA Guidelines, B.8.



EXPERT TESTIMONY/EMERGENCY REMOVAL

- Emergency removal: “Imminent physical damage or harm”: BIA Guidelines A.2.
 - Present or impending risk of serious bodily injury or death that will result in severe harm if safety intervention does not occur.
 - Best practice - supporting affidavit that includes: (*See* BIA Guidelines B.8(d) for additional requirements)
 - Facts sufficient to determine child’s residence and domicile
 - Tribal affiliation
 - Specific and detailed account of circumstances that led to emergency removal
 - Statement of imminent physical damage or harm expected and any evidence that the removal or emergency custody continues to be necessary



COURT FINDINGS

- **INDIAN CHILD WELFARE ACT (ICWA) - FINDINGS AND ORDER:**
- The ICWA applies to this case, because the Court **has determined has reason to know** that the child is an “Indian child” under the ICWA, and is an enrolled member of, or is eligible for membership in, the following tribe(s):
_____, 25 USC § 1903(4). The tribe **__has been __has not been** notified of this proceeding, as required by 25 USC § 1912(a). This Court **__has ___does not have** jurisdiction under 25 USC § 1911 to proceed with the case. This Court **__has ___does not have** temporary emergency removal/placement jurisdiction under 25 USC § 1922.



EXPERT TESTIMONY: COURT FINDINGS

- The Court finds that the child cannot be safely returned home/maintained in the home and that the continued custody of the child by the parent(s), or Indian custodian(s), is likely to result in serious emotional or physical damage to the child.placement or continuation in substitute care is in the child's best interest and for the child's welfare: 25 USC §1912(e); ORS 419B.185(1) and 419B.340(7).
- The Court's finding 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: **__ is based** on evidence that included the testimony of an expert witness within the meaning of ORS 419B.340(7) **___is not based** on evidence that included the testimony of an expert witness within the meaning of ORS 419B.340(7), because....and the expert testimony requirements of ORS 419B.340(7) shall be satisfied in the following manner:
_____ 25 USC §1912(e) and ORS 419B.340(7).



VOLUNTARY PLACEMENTS

- When parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights:
 - Must be in writing, and
 - Recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained and fully understood by the parent or Indian custodian.
 - Any consent signed prior to the expiration of 10 days after the birth of the Indian child shall not be valid.

25 U.S.C. §1913(a)



BURDEN OF PROOF

- Dependency: clear and convincing. ORS 419B.340(7)
- Termination of parental rights: beyond a reasonable doubt. ORS 419B.521(4)



PLACEMENT PREFERENCES

- Foster care or pre-adoptive placements: 25 U.S.C. 1915(a)
 - A member of the child's extended family
 - A foster home licensed, approved or specified by the tribe
 - An Indian foster home licensed or approved by an authorized non-Indian licensing authority, or
 - An institution for children approved/operated by an Indian tribe or organization which has a program suitable to meet child's needs.
- Tribe may establish a different order of preference.



PLACEMENT PREFERENCES

- Adoptive placements
 - Member of the child's extended family
 - Other members of the child's tribe, or
 - Other Indian families



PLACEMENT PREFERENCES

- Extended family member:
 - Defined by the law or custom of the Indian child's tribe, or in the absence of such law or custom, a person who has reached age 18 and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent. 25 U.S.C. § 1903(2)



PLACEMENT PREFERENCES

- Good cause exceptions
 - BIA Guidelines, F.4:
 - Party requesting deviation should state reason on the record or in writing provided to the parties.
 - Party bears the burden of proving by clear and convincing evidence.
 - Determination of good cause must be based on one of the following:
 - Preference of the child or parent shall be considered where appropriate. 25 U.S.C. 1915(c) Parents should attest they have reviewed the placement options that comply with the order of preference.
 - Extraordinary needs of the child, such as specialized treatment services, as established by expert testimony (does not include attachment to foster parent**)
 - Active efforts to locate a placement meeting the placement criteria have been unsuccessful.



PLACEMENT PREFERENCES

- However, the BIA Guidelines are not an “exclusive statement of the considerations that are pertinent to a “good cause” determination under ICWA. *DHS v. Three Affiliated Tribes of Fort Berthold*, 236 Or App 535 (2010).
 - The following considerations were relevant in this case in determining whether good cause existed to deviate from the placement preferences: (1) the serious and lasting harm that will result from the removal of the children from their current home, and (2) significant potential that the preferred caretakers will engage in conduct or conditions that will exist in their home that would be seriously detrimental to the children.



PLACEMENT PREFERENCES

- Best practice:
 - Ensure placement preferences are followed early in the case to avoid circumvention of ICWA placement preferences.



PLACEMENT PREFERENCES: COURT FINDINGS

- The Court finds that the selected placement **___does comply** **_____does not comply** with the placement preference(s) established by 25 USC §1915.
- The Court further finds that the selected placement **__ is** **__is not** the least restrictive, most family-like setting that meets the health and safety needs of the child and in reasonable proximity to the child's home.



FINALITY

- Adoption: collateral attack. 25 U.S.C. §1913(d).
 - For up to two years following judgment, parent may withdraw consent and petition court to vacate judgment when consent obtained through fraud or duress.
- Foster care placement or termination of parental rights.
 - Tribe, parent or child may petition the court to invalidate any actions in violation of 25 U.S.C. §§ 1911, 1912, 1913. 25 U.S.C. §1914.



RESOURCES

- Oregon Online module:

 - <https://intranet.ojd.state.or.us/ojdintra/media/osca/cpsd/JCIPeLearning/ICWAeMod/payer.html>

- ICWA: <https://www.law.cornell.edu/uscode/text/25/chapter-21>

- BIA Guidelines

 - <http://www.bia.gov/cs/groups/public/documents/text/idc1-029637.pdf>

- DHS Procedure Manual:

 - https://www.dhs.state.or.us/policy/childwelfare/icwa/icwa_manual_procedure.pdf

- NCJFCJ Bench Cards

 - <http://www.nrc4tribes.org/files/ICWA%20Checklist%20Full%20Doc.pdf>

