The Indian Child Welfare Act (25 U.S.C. 1901 to 1923):

Understanding the New Regulations

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BIA ICWA Regulations: 25 CFR 23
Final Rule – 81 FR 38778 (June 14, 2016)

- Updates §23.11 and adds §§ 23.101 – 23.144
- The rule is effective as of Monday, December 12, 2016. The rule affects all Indian child welfare proceedings initiated after that date. Regulations are binding law

BIA Guidelines

- The BIA also issued revised Guidelines interpreting the ICWA on December 12, 2016

- https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf

Definitions § 23.2: Active Efforts

- Affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family
- Assisting the parent(s) or Indian custodian through case plan steps & accessing/developing the resources needed to satisfy the case plan
- To maximum extent possible, consistent with prevailing social & cultural conditions & way of life of Tribe
- Should be conducted in partnership with Indian child, parents, extended family, and child's Tribe
- Tailored to facts & circumstances of the case

Active Efforts, continued

- 11 examples provided:
  - Comprehensive assessment of family; focus on safe reunification
  - Identify appropriate services & help overcome barriers
  - Identify, notify, invite child's Tribe to participate in providing support & services, & in meetings, planning, & placement issues
  - Conduct/cause to be conducted diligent relative search; contact & consult with relatives to provide family support & structure
  - Offer & employ all available & culturally appropriate family preservation strategies & facilitate remedial & rehabilitative services provided by tribe
  - Take steps to keep siblings together whenever possible
  - Support regular visits in most natural setting, trial home visits
  - Identify community resources & actively assist family in utilizing & accessing resources
  - Monitor progress and participation in services
  - Consider alternative ways to address parents' and family's needs of optimum services do not exist or are not available
  - Provide post-reunification services & monitoring

ICWA Statute: 25 U.S.C. §1912(d)

- "Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."

Definition of Indian Family

- BIA Regulations:

25 C.F.R. §23.2 "Active efforts" defining an Indian family as any family with an Indian child: "Active efforts means affirmative, active, thorough, and timely efforts intended primarily to reunite an Indian child with his or her family."

- BIA Guidelines:

§E5 Providing Active Efforts (interpreting 25 C.F.R. §23.120): "The child's family is an 'Indian family' because the child meets the definition of an 'Indian child.'"

- Oregon has a series of appellate cases addressing at what stage of the child custody proceeding active efforts must be shown, including permanency hearings and permanency plans under ASFA.

- Oregon has one of the original active efforts cases: *State ex. Rel. Juv. Dept. v. Charles*, 70 Or. App. 10, 688 P.2d 1354 (1984).

p. 15 "The arguments of the parties indicate that there is some confusion about at what point in the proceeding the showing of unsuccessful remedial services is required. Mother and amicus contend that it is required before *removal* of a child….[T]he showing required by §1912(d) need only be made in a hearing on the merits of foster care placement or parental rights termination."

Charles, p. 15:

- The language of the provision is unequivocal: The state "*shall* satisfy the court that active efforts have been made to provide remedial services." To do that, the state must show that the efforts have been made but have not worked. In the present case, the state did not make an explicit showing, but it points to testimony peppered throughout the hearing that indicates that some remedial efforts were made which were arguably unsuccessful and asks us to find on *de novo* review that the showing required by §1912(d) was made. We cannot conclude that the diffuse evidence to which the state points amounts to the affirmative showing that Congress contemplated when it enacted §1912(d).

The recent Oregon active efforts/permanency hearing cases are:

- *DHS v. J.G.*, 317 P.3d 936, 260 Or App 500 (2014).
- *In re L.M.G.M.*, 388 P.3d 1226, 283 Or App 353 (2017).
- *In re A.R.*, 381 P.3d 1059, 278 Or App 427 (2016).
- *In re J.S.B.*, 214 P.3d 827, 230 Or App 106 (2009).
- *In re W.H.F.*, 295 P.3d 78, 254 Or App 298 (2012), *rev. den.*, 353 Or. 428, 299 P.3d 889 (2013).
- *In re K.L.D.*, 207 P.3d 423, 228 Or App 70 (2009).
- *In re L.M.*, 338 P.3d 191, 266 Or. App. 453 (2014).

Several principles can be taken from these cases:

1. Where there is a "significant shift in legal rights" in a permanency hearing – from a permanency plan of reunification to permanent guardianship, termination of parental rights, adoption, or an Alternative Planned Permanent Living Arrangement (APPLA), or from temporary placement to TPR or adoption – the ICWA applies and an active efforts' showing must be made by the party advocating the change. *J.G.*

    a) Change from foster placement to permanent guardianship. J.G.

    b) Change from reunification to APPLA. A.R.

    c) Termination of parental rights. K.L.D.; W.H.F.

    d) Foster placement. L.M.G.M.

    e) Adoption. J.S.B.

2. Active efforts have to be shown at the initial removal and placement stage. *L.M.G.M, J.H.G., J.G.* Question whether active efforts have to be shown at shelter hearing, which usually takes place as an emergency proceeding under 25 U.S.C. §1922, under state law, but state law and applicable federal law require showing of attempts to keep the family together.

3. Active efforts have to be shown at each stage of the proceeding. If reunification is the plan, the court must make an active efforts finding at each permanency hearing. (First permanency hearing changed the permanency plan from reunification to concurrent plan of adoption; Second permanency hearing changed the permanency plan from adoption to permanent guardianship). *J.S.B.*

4. If a permanency hearing is just a continuation of an existing permanency plan, say adoption, no new showing of active efforts is required at each permanency hearing. Continuation of a permanency plan is not a foster placement as defined by the ICWA. *L.M.*, *W.H.F.*
5. A permanency hearing is not a termination of parental rights proceeding or an action to effect a foster placement, even when the permanency plan calls for initiating a TPR petition in the future. *W.H.F.*

6. Active efforts showing at a permanency hearing where active efforts showing is required cannot rely on old active efforts finding. The court must either find that the circumstances regarding reunification have not changed since the last permanency hearing, or make a new updated finding based on actions that have occurred and services provided since the last hearing. The court cannot deny reunification based on circumstances that may no longer exist. *J.S.B.* Active efforts finding does not have to be updated where efforts were provided before and failed (e.g., parent declined to participate in services), and opinion is given that parents would not benefit from further services. *L.M.G.M.* In this situation, active efforts can end early. *Id.*

7. Where active efforts showing was made at the permanency hearing where the permanency plan was changed to permanent guardianship, there was no need to make an additional active efforts finding in a later proceeding where the placement is actually ordered or a judgment of guardianship is entered. *J.G*

8. When a permanency plan was changed from reunification to removal or a permanent placement before the court knew that the child was an Indian child under the ICWA, there was no need to go back and provide active efforts before the permanency plan is changed. *A.R.* If the court had known that the child was Indian before the permanency plan was changed, and active efforts finding would have been required. *Id.*

9. The details of what would constitute active efforts is discussed in *L.M.* If it is shown that the child will not be able to return home within a reasonable period of time, the active efforts standard has been met. *J.S.B.* There is no fixed time period in which active efforts have to be provided. *L.M.G.M.* The type and sufficiency of active efforts depends on the particular circumstances of each case. *Id.* The ICWA simply requires a showing at certain fixed points of a proceeding that active efforts have been made and have failed. *Id.*

Definitions: Emergency Proceeding

- Any court action that involves an emergency removal or emergency placement of an Indian child.

Emergency Proceedings, §23.113

- May be used only when necessary to prevent "imminent physical damage or harm to the child"
- Any emergency removal or placement of an Indian child must terminate immediately once no longer necessary to prevent imminent physical damage or harm
- When new information indicates emergency has ended, a hearing must be held promptly
- At any court hearing during the emergency, the court must determine whether the emergency continues

Emergency Proceedings, continued

- Emergency proceedings may be terminated by:
  - Initiation of child custody proceeding subject to the ICWA
  - Transfer of child to Tribe's jurisdiction, or
  - Restoring child to parent or Indian custodian

- Emergency proceedings should not be continued beyond 30 days unless the court determines:
  - Restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm
  - The court has been unable to transfer to the Tribe, *AND*
  - It has not been possible to initiate a child-custody proceeding

The Kansas court of Appeals laid out how the emergency removal provisions of ICWA work in:

- *In the Interest of D.E.J., et. al.*, (Kan.App. 4-24-17) (unpublished) (Cow Creek Band of Umpqua Tribe of Indians) (unpublished)

No active efforts showing required "to prevent the breakup of the family if emergency removal of a child is necessary to prevent imminent physical damage to the child. However, when the threat of imminent physical damage subsides the State must comply with the active efforts requirement to continue removal."

Placement Preferences & Good Cause; § 23.129 – 23.132

- Placement preferences apply in any foster (voluntary or involuntary), pre-adoptive, or adoptive placement of an Indian child
- Where a consenting parent requests anonymity in a voluntary proceeding, the court must give weight to the request in applying the preferences.
- The court must apply the preferences, unless the court determines on the records that good cause exists

Placement Preferences & Good Cause, continued

- Foster Care and Preadoptive Placements:
  - 1. A member of the Indian child's extended family,
  - 2. A foster home licensed, approved, or specified by the Indian child's Tribe,
  - 3. An Indian foster home licensed or approved by an authorized non-Indian licensing authority, or
  - 4. An institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

- Adoptive Placements: In descending order:
  - 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 Tribe has established by resolution a different order of preference than specified in the ICWA, the Tribe's placement preferences apply.

Placement Preferences & Good Cause, continued

- The party asserting good cause bears the burden of proof by clear & convincing evidence.
- Limits on the court's determination:
  - 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 the ICWA.

Placement Preferences & Good Cause, continued

- The court's determination should be based on one or more of the following:
  - The request of a parent, if they attest that they have reviewed the placement options, if any, that comply with the preference order.
  - The request of the child, if the child is of sufficient age and capacity to understand the decision.
  - A sibling attachment that can only be maintained in a particular placement.
  - Extraordinary physical, mental or emotional needs of the child (ex. availability of treatment services).
  - Unavailability of a suitable preferred placement after the court concludes a diligent search was conducted.

Some recent placement good cause cases, both before the new Regulations and Guidelines:

- *In re Nery V.*, 864 N.W.2d 728, 22 Neb.App. 959 (2015)
- *Native Village of Tununak v. State*, 303 P.3d 431(Alaska 2013)

Resources

- BIA Regulations: https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc1-034238.pdf
- BIA Guidelines: https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf