2017 ICWA Webinar

OFFICE OF THE CHILD'S REPRESENTATIVE
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Goals of Webinar

- Overview of current federal authority and guidance
  - Indian Child Welfare Act (ICWA)
  - Department of Interior's Final Rule on ICWA (effective December 12, 2016)
  - Bureau of Indian Affairs Guidelines (December 2016)
- Colorado efforts to ensure compliance with ICWA
  - CAR 3.4(f)(1)(E)
  - CIP
  - Juvenile Rules

Presumption that ICWA is in BI of Child

We have heard that some GALs have expressed concern with the presumption underlying ICWA (i.e., that ICWA codifies the child's best interests)

However, your legal best interests advocacy must be rooted in the law and application of the law to the facts you discover in your independent investigation

Role of GAL

- Under ICWA, Parties/Participants have affirmative duties
- Consistent with overall goal of Title 19
- Consistent with your independent investigation
  - Efforts to understand the child's unique situation
  - Efforts to find siblings, familial supports/placements
  - Efforts to ensure all appropriate services, resources & activities are available to the child & her family
  - Efforts to ensure permanency for children
  - Obtain copies of all documents (Relative Affidavit, ICWA Affidavit & Notices with Attachments, Postal Return Receipts, Tribal & BIA Responses)

GAL's Independent Investigation

Ask has anyone in your family

- Ever lived on tribal land?
- Participated in tribal events?
- Received services from a tribal office/agency or the federal Indian Health Service?
- Received benefits from a tribe?

Strength-based approach: "If your child is eligible to enroll with a tribe, there may be additional services and support."

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When does ICWA apply?

An involuntary foster placement or termination of parental rights ("child custody proceeding") where the court knows or has reason to know that an "Indian child" is involved. 25 U.S.C. §§ 1903(1), 1912(a), (e) & (f), Final Rule 25 C.F.R. § 23.103, 2016 Guideline B.2

Voluntary vs Involuntary

ICWA applies in voluntary proceedings. 25 U.S.C. § 1913, Final Rule 25 C.F.R. § 23.103, 2016 Guidelines B.2

Voluntary must be of parent(s)/Indian custodian's free will

- Without threat of removal by a state agency and
- Regain custody "upon demand"

Final Rule 25 C.F.R. § 23.103, 2016 Guidelines B.2

Court's Inquiry

- State court must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. Final Rule 25 C.F.R. § 23.107(a), 2016 Guideline B. 1
  - Should be on the record. *Id.*
  - CAR 3.4

- State courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child. Final Rule 25 C.F.R. § 23.107(a), 2016 Guideline B.1

Some courts ask at each hearing: If no "reason to know" then inquiry not necessary at each hearing. See 2016 Guideline B.1.

What is a “Child Custody Proceeding” for purposes of ICWA

1. Foster care placements – “any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated.” 25 U.S.C. § 1903(1)(i).
2. Guardianships & conservatorships. 2016 Guidelines B.2
3. Termination of parental rights. 25 U.S.C. § 1903(1)(ii).
4. Pre-adoptive placements -- the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement” 25 U.S.C. § 1903(1)(iii)
5. Adoptive placements - the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption. 25 U.S.C. § 1903(1)(iiv)
7. Proceedings concerning status offenses. Final Rule 25 C.F.R. § 23.2 (2), 2016 Guidelines L.3.

Several Child Custody Proceeding within Case

An action that may culminate in foster care placement, TPR, pre-adoptive placement and adoptive placement is considered a separate child-custody. Final Rule 25 C.F.R. § 23.2(2), 2016 Guidelines B.2 & L.3

The definition further makes clear that a child-custody proceeding that may culminate in one outcome (e.g., a foster-care placement) would be a separate child-custody proceeding from one that may culminate in a different outcome (e.g., a TPR), even though the same child may be involved in both proceedings. 2016 Guideline L.3

ICWA does not apply to

Delinquency matters involving an act which would be deemed a crime if committed by an adult. 25 U.S.C. § 1903(1)

Divorce proceedings or custody disputes in which a parent will get custody. 25 U.S.C. § 1903(1)

What is an "Indian child" for purposes of ICWA?

Unmarried person under the age of 18 and member of a federally recognized tribe or eligible for membership in a federally recognized Tribe and is the biological child of a member of an Indian tribe. 25 U.S.C. § 1903(4), Final Rule C.F.R. § 23.2

- "ICWA does not apply simply based on a child or parent's Indian ancestry. Instead, there must be a political relationship to the Tribe." It's the child's "political ties to a federally recognized tribe" that is at issue. 2016 Guidelines B.1
- The Indian Tribe determines whether child is a member or eligible for membership. Final Rule C.F.R. § 23.108(a), 2016 Guidelines B.7
- **When in doubt**, it is better to conduct further investigation into a child's status early in the case; this establishes which laws will apply to the case and minimizes the potential for delays or disrupted placements in the future. 2016 Guidelines B.1

What is "reason to know"

Final Rule 25 C.F.R. § 23.107(c):

(1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child;

(2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;

(3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;

(4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village;

(5) The court is informed that the child is or has been a ward of a Tribal court; or

(6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe.

State courts are encouraged to interpret the factors expansively. 2016 Guidelines B.1

GAL Practice Tips

- Ask the Court to make a finding of whether there is a "reason to know"
- Ensure timely completion of the ICWA Affidavit
  - Caseworker can assist [see JDF 567 & 568 & local forms]
  - RPC and Parent's GAL (if any)
- Conduct GAL independent investigation
  - GAL practice tip: BIA is required to help identify
  - GAL practice tip: State statute = petitioner, Federal Rules & 2016 Guidelines it's the party seeking foster care placement!

What Do Federal ICWA Sources Require if "reason to know" child is an Indian Child

- 25 U.S.C. 1912(a) imposes notice requirements "where the court knows or has reason to know that an Indian child is involved, … ."
- "Reason to know" triggers certain statutory & regulatory obligations Final Rule C.F.R§ 23.107(b)(2); 2016 Guideline B.1

What if "reason to know"

- 1) **Due diligence**: The court must confirm that the party seeking foster care placement used due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member or eligible for membership, to verify whether the child is in fact a member or eligible for membership in a Tribe. Rule 25 C.F.R. § 23.107(b)(1).
  - If "reason to know" court must follow up with inquiry
  - Document, document, document
- (2) **Pending tribal verification**: Treat the child as an Indian child if there is a reason to know child is Indian child unless and until it is determined on the record that the child is not an "Indian child." Rule 25 C.F.R. § 23.107(b)(2)

See also 2016 Guideline B.1.

Emergency Removal Proceedings

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. 25 U.S.C. § 1922

2016 Guideline C.1

The statute and regulations recognize that emergency proceedings may need to proceed differently from other proceedings under ICWA. Specifically, section 1922 of ICWA was designed to "permit, under applicable State law, the emergency removal of an Indian child from his parent or Indian custodian or emergency placement of such child in order to prevent imminent physical harm to the child notwithstanding the provisions of" ICWA. While States use different terminology (e.g., preliminary protective hearing, shelter hearing) for emergency hearings, the regulatory definition of emergency proceedings is intended to cover such proceedings as may be necessary to prevent imminent physical damage or harm to the child.

At Emergency Proceeding

- Court must inquire Final Rule 25 C.F.R. § 23.107(a), 2016 Guideline B. 1
- Court must make a finding on the record that the emergency removal or placement is necessary to prevent imminent physical damage or harm to the child. Final Rule 25 C.F.R. § 23.113(a), 2016 Guidelines C.1
- At any hearing during emergency, court must determine whether the emergency removal/placement is no longer necessary to prevent imminent physical damage or harm to the child. Final Rule 25 C.F.R. 23.113(3), 2016 Guideline C.3

Emergency Removal/Placement do not require all of ICWA Protections

No FC placement may be order unless supported by clear & convincing evidence, including the testimony of QEW that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C. § 1912(e)

No need for QEW at emergency proceedings

No increased burden of proof at emergency proceedings

No ICWA notice at emergency proceedings

Restrictions on Emergency Removal Proceedings

- Emergency removal/placement must terminate immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child. 25 U.S.C. § 1922, Final Rule C.F.R. § 23.133, 2016 Guideline C
- Should not continue for more than 30 days unless
  - Return would subject the child to imminent physical harm or damage
  - The court has been unable to transfer the proceeding
  - It has not been possible to initiate a "child-custody proceeding"

Final Rule 25 C.F.R. § 23.113, 2016 Guidelines C.5

Restrictions on Emergency Removal Proceedings

- Can terminate:
  - Initiation of a child-custody proceeding subject to the provisions of ICWA;
  - Transfer of the child to the jurisdiction of the appropriate Indian Tribe; or
  - Restoring the child to the parent or Indian custodian.

Final Rule 23.113(c), 2016 Guideline C.6

GAL Practice Tips

- Set ICWA foster care placement hearing within 30 days

  At that hearing, you need to comply with 1912(e) and other provisions of ICWA:

  Notice, QEW, active efforts & clear and convincing evidence and placement preferences

- At hearings during emergency placement, must address whether emergency removal remains appropriate or not appropriate under ICWA, Final Rule and Guidelines

Adjudication

What is purpose of the hearing?

an action removing an Indian child from his/her parent or Indian custodian and placements where the parent can't regain custody of the Indian child "upon demand." 25 U.S.C. § 1903(1), 25 C.F.R. §23.2(1), 2016 Guidelines L.3.

Can the hearing result in foster care placement?

Other state: *People in the Interest of S.R.*, 323 N.W.2d 885 (SD 1982)

- GAL Practice Tip – seek court ruling prior to hearing

Foster Care Placement Hearing

- ICWA Notice
- clear & convincing evidence demonstrating the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
- QEW testimony
- A causal relationship between the particular conditions in the home & likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child (e.g., poverty, isolation, crowded or inadequate housing, substance abuse, nonconforming social behavior) Final Rule § 23.121(c) & (d)

Notice

- The party seeking the foster care placement of an Indian child shall notify the parent or Indian custodian and the Indian child's tribe by registered mail with return receipt requested. 25 U.S.C. § 1912(a); Rule 25 C.F.R. § 23.111(a), 2016 Guideline D
- The Rule authorizes notice by certified mail with return receipt. 25 C.F.R. § 23.11(a).
- Contents – Extensive Requirements

  Include a copy of the Petition

Timing of Notice

- The court cannot hear the matter sooner than 10 days after receipt of the notice by parent, Indian Custodian and Tribe. 25 U.S.C. § 1912(a); Rule 25 C.F.R. § 23.112; 2016 Guideline D.7

- Continuance: Parent/Indian custodian/Tribe have a right, upon request, to up to 20 additional days

Qualified Expert Witness

- Defined in Rule at 25 C.F.R. § 23.122 and the 2016 BIA Guidelines G.2.

  The rule does not strictly limit who may serve as a qualified expert witness to only those individuals who have particular Tribal social and cultural knowledge. 2016 Guidelines G.2.

- The social worker regularly assigned to the Indian child does not qualify as a QEW.

- GAL Tip: work with the Tribe

  Shared resource

Active Efforts

- The Court must find 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. 25 U.S.C. § 1912(d); 25 C.F.R. § 23.120
- Active efforts is defined in Rule at 25 C.F.R. § 23.2 & the 2016 BIA Guidelines E.1 but not ICWA statute.
  - The active efforts standard requires more than the reasonable efforts standard. *People ex rel. A.R.*, 310 P.3d 1007 (COA 2012).
  - Active efforts are affirmative, active, thorough and timely efforts intended to maintain or reunite an Indian child with his/her family, 2016 Guidelines L.1., and must be documented in detail in the record, 25 C.F.R. § 23.120.
  - Active efforts include: a comprehensive assessment of the Indian child's family circumstances, inviting representatives of the Indian child's Tribe to participate in providing support & services and case events and offering and employing all available & culturally appropriate family preservation strategies. See 25 C.F.R. § 23.2 (1) – (11).

Placement Preferences

Indian child foster care or preadoptive placement shall be the least restrictive setting which most approximates a family and in which his special needs, if any, may be met and within reasonable proximity to his or her home. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to placement with

- Member of Indian child's extended family;
- foster home authorized by Tribe;
- Indian foster home licensed by non-Indian licensing authority or
- Institution approved by tribe or operated by Indian organization.

25 U.S.C. 1915(b), 25 C.F.R. § 23.131, 2016 Guidelines H.2

Departure from Placement Preferences

- The party seeking departure from the placement preferences
  - must state the specifics of its assertion that good cause to depart orally on the record or in writing and
  - bears the burden of proving by clear and convincing evidence that there is "good cause" to depart from the preferences.

  Rule 25 C.F.R. § 23.132(b).
- Must be on record or in writing Final Rule 25 C.F.R. § 23.132, 2016 Guideline H.4
- Good cause to depart from the preferences requires a detailed explanation of all efforts to comply with the preferences and is limited to enumerated considerations. Rule 25 C.F.R. § 23.132.

Good Cause

- Good cause includes:
  - Request of the Indian child's parent
  - **Request of the child**, if the child is of sufficient age and capacity to understand the decision that is being made
  - Presence of sibling attachment that can be maintained only through particular placement
  - Extraordinary needs of the Indian child
  - Unavailability of a suitable placement after court determines diligent search conducted, but none located.

Final Rule C.F.R. § 23.132(c), 2016 Guideline H.4

- Good cause does not include "socioeconomic status of any placement" or "ordinary bonding" Final Rule C.F.R. § 23.132(d) & (e), 2016 Guideline H.5

Termination of Parental Rights

- Separate child custody proceeding under ICWA
- Need:
  - ICWA Notice
  - Proof beyond a reasonable doubt
  - Causal connection between the conditions & likelihood that continued custody will result in serious emotional/physical damage
  - QEW
  - Active efforts to prevent breakup
- 20-day continuance by parent/Indian custodian/Tribe as of right

Transfer

The court shall transfer the proceeding to the jurisdiction of the tribe upon the petition of either parent, Indian custodian or Indian child's tribe unless good cause supports denial of the transfer. 25 U.S.C. § 1911(b), Rule 25 C.F.R. § 23.115.

- Denial of Transfer:
  - Objection by either parent,
  - Tribal court declines or
  - good cause exists for denial.

  Final Rule 25 C.F.R. § 23.117, 2016 Guideline F.4

Good Cause to Deny Transfer

- Must be on record or provided in writing Final Rule 25 C.F.R. § 23.118(a), 2016 Guideline F.5
- Good Cause: ICWA does not define good cause.
- The Final Rule precludes consideration of
  - Advanced stage if no notice
  - Prior proceedings where no transfer requested
  - Affect the child's placement
  - Indian child's cultural connections with the Tribe
  - Socioeconomic conditions or an negative perception of Tribal or BIA social services or judicial systems.

25 C.F.R. § 23.118, 2016 Guideline F.5

Shared Knowledge

Please share your experiences, motions, court procedures, questions, comments, etc.