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Fr: James A. Keedy, Executive Director
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Dt: May 19, 2015

Re: Proposed Indian Child Welfare Act Regulations

Introduction

Michigan Indian Legal Services is a non-profit legal aid office that provides services to low-income Native Americans and tribes through the state of Michigan. We represent Native parents and guardians ad litem across the state in both state ICWA and tribal court child welfare matters. Only non-LSC funds were used to supply these comments and we offer these comments on the ICWA Regulations with the goal of strengthening the implementation of ICWA for the future, and ensuring clarity and certainty for Native families.

On February 21, 2014, Secretary Kevin Washburn sent a "Dear Tribal Leader" letter asking for comments on the Bureau of Indian Affairs Guidelines for the Indian Child Welfare Act. 25 U.S.C. §§ 1901 et seq. As a result of those comments and testimony, on March 20, 2015, the Bureau of Indian Affairs released a proposed rule that would add a new subpart to the Department of the Interior's regulations implementing ICWA. Specifically, this proposed rule would establish a new subpart to the regulation implementing ICWA at 25 CFR Part 23 to address Indian child welfare proceedings in state courts. This tremendous step forward in ICWA enforcement is appreciated. The inconsistency in state court interpretation of ICWA provisions has led to tremendous litigation that requires the constant vigilance and dedicated efforts of ICWA attorneys. The inconsistency in state court interpretation of ICWA provisions has led to uncertainly for children, tribes, and the state. Federal regulations that strongly support the goals and intent of ICWA will provide a strong underpinning to the work of our judicial forum.

Congress passed the Indian Child Welfare Act (ICWA) in 1978 to address the widespread practice of State entities removing American Indian children from their

homes without an understanding of traditional American Indian child-rearing practices. Throughout the 1960s and 1970s, American Indian / Alaskan Native children were six times more likely to be placed in foster care than other children. *See* H.R. Rep. No. 95-1386 (1978), at 9. Congress found "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions . . .." 25 U.S.C. § 1901(4).

Congress enacted ICWA to "*protect the best interests of Indian children* and to promote the stability and security of Indian tribes and families by establishing minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes or institutions which will reflect the unique values of Indian culture." H. Rep. 95-1386, at 8 (emphasis added). ICWA thus articulates a strong "federal policy that, where possible, an Indian child should remain in the Indian community." *Mississippi Band of Choctaw Indians* v. *Holyfield,* 490 U.S. 30, 37 (1989) (citing H. Rep. 95-1386 at 24). We are hopeful that federal regulations supporting this policy will help create clarity and certainty in ICWA decisions throughout the states.

The Regulatory Authority of the Bureau of Indian Affairs

The Indian Child Welfare Act states "[w]ithin [180] days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter." 25 U.S.C. § 1952. Under this section, the Secretary of the Interior has a broad grant of authority from Congress to issue rules in order to ensure the statute [ICWA] is fully and properly implemented.

In addition, the Secretary of the Interior is also charged with "the management of all Indian affairs and of all matters arising out of Indian relations," 25 U.S.C. § 2, and may "prescribe such regulations as [s]he may think fit for carrying into effect the various provisions of any act relating to Indian affairs." 25 U.S.C. § 9

Furthermore, as stated by Congress in ICWA, "the United States has a direct interest, as trustee, in protecting Indian children." 25 U.S.C. § 1901(3). The regulations, promulgated by the Secretary of the Interior, are intended to improve the implementation of ICWA and uphold "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." 25 U.S.C. § 1902.

These proposed regulations are not the first time the Department of the Interior has issued regulations. Following ICWA's enactment in July 1979, the Department of the Interior issued regulations addressing notice procedures for involuntary child custody proceedings involving Indian children, as well as governing the provision of

funding for, and administration of, Indian child and family service programs authorized by ICWA. *See* 25 CFR Part 23. In addition, the Bureau of Indian Affairs in 1979 also published guidelines for State courts to use in interpreting ICWA's requirements in Indian child custody proceedings, which have since been replaced by updated guidelines. *See* 44 Fed. Reg. 67584 (Nov. 26, 1979) and 80 Fed. Reg. 10,146-02 (Feb. 25, 2015).

Under this legal and policy background, we recommend the Department of Interior add the following elements and questions to the ICWA regulations in order to create a more comprehensive national standard

Proposed ICWA Regulations

Section 23.2: *Definitions*.

A. Active Efforts

The DOI proposes to define "active efforts" as "actions intended primarily to maintain and reunite an Indian child with his or her family or tribal community and constitute more than reasonable efforts as required by Title IV-E of the Social Security Act (42 U.S.C. 671(a)(15))." Active efforts may include for example: engaging the child, parents, extended family members, or custodians; taking steps to keep the siblings together; providing services; identifying, notifying, and inviting representatives of the child's tribe; employing family preservation strategies; and many more.

> **We recommend the DOI include a section that states there are no time limits on "active efforts" to distinguish ICWA cases from other cases where the Adoption and Safe Families Act (ASFA) may impose timelines.**

The definition and requirements of "active efforts" varies from State to State. Although ASFA and ICWA have many similar provisions, some of their technical terms regarding timelines and definitions contradict one another. By setting a separate standard, the DOI will ensure that State Courts do not deviate from ICWA by applying ASFA standards to Indian children.

> **We also recommend the DOI add a section that active efforts include assisting the child in establishing the paternity of the biological father, if that has not yet been established, as this is sometimes critical to determining whether ICWA applies.**

B. Continued Custody

The DOI proposes to define "continued custody" as "physical and/or legal custody that a parent already has or had at any point in the past." In addition, "continued custody" also refers to when "the biological mother of a child has had custody of a child."

> **We recommend the DOI include a provision that allows a putative father who either acknowledges or establishes he is the biological father to assert custodial rights.**

By including this provision, the proposed ICWA regulations do not create a presumption that only a mother may have custody of a child, while a father does not. In addition, by including this provision, the proposed ICWA regulations will take into account that sometimes an Indian child's heritage may come from a father who is unknown or not established at the time of the child custody proceedings.

C. Domicile

The DOI proposes to define domicile as "[f]or a parent or any person over the age of eighteen, physical presence in a place and intent to remain there;" and "[f]or an Indian child, the domicile of the Indian child's parents. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child's mother."

> **We recommend the DOI change the domicile definition to the common law definition of domicile. For example, "[t]he place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere."** *See* DOMICILE, Black's Law Dictionary (10th ed. 2014).

By including this provision, the DOI will take into consideration the American Indian / Alaskan Native population that may only leave the reservation for a short period of time to obtain education, pursue work, or enter the military. Although they are physically located away from the reservation, this change in location may not establish a permanent domicile, and should not deprive them of domicile on a reservation when these situations may be only temporary.

This was mentioned in the Supreme Court case *Mississippi Band of Choctaw Indians v. Holyfield*, where the Court stated " 'domicile' is not necessarily synonymous with 'residence,'" and "[f]or adults, domicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there." 490 U.S. 30, 48 (1989); *see also Texas v. Florida*, 306 U.S.

398, 424 (1939). The Court stated that "[o]ne acquire a 'domicile of origin' at birth, and that domicile continues until a new one (a 'domicile of choice') is acquired." *Id.*

By changing the regulations to state "was physically present" rather than "physically present" the regulations will take into consideration the differences between "domicile of choice" and "domicile of origin" as elaborated in *Holyfield*.

We also recommend the DOI change the second part of the domicile definition to state that the Indian child has the domicile of the custodial parent.

This way the ICWA regulations take into account that a father or Indian custodian may have obtained custody of a child. As stated in *Holyfield*, domicile for children and minors are "determined by that of their parents." 490 U.S. at 48. In addition, it is only "[i]n the case of an illegitimate child" that the child's domicile "has traditionally meant the domicile of its mother." *Id.*

Section 23.103: *When does ICWA apply?* The DOI proposes that "ICWA applies whenever an Indian child is the subject of a State child custody proceeding as defined by the Act. ICWA also applies to proceedings involving status offenses or juvenile delinquency proceedings if any part of those proceedings results in the need for placement of the child in a foster care, preadoptive or adoptive placement, or termination of parental rights."

We recommend the DOI include as a proceeding that ICWA applies to (1) "any domestic violence protection order proceeding in which the Court restricts the parent's access to the Indian child during the minority of the child," and (2) "any placement of an Indian child in foster care as the result of a juvenile delinquency proceeding in which a state court determines that it is not safe to return a child to the parental or guardian's home, or that it is inconsistent with the rehabilitation of the child."

In addition, we recommend the DOI also include third party custody or guardianship actions; and termination of parental rights actions brought by the other parents, third parties, or Indian custodians, which are all actions when the child cannot be returned upon demand of the parent.

By including these specific child custody proceedings, the proposed ICWA regulations would clarify what may be considered within the definition of a child custody proceeding. There is confusion in many jurisdictions regarding the extent to which ICWA covers involuntary proceedings.

Section 23.103(f): *Voluntary Placements*. The DOI proposes that "[v]oluntary placements that do not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand are not covered by ICWA." In addition, "[s]uch placements should be made pursuant to a written agreement, and the agreement should state explicitly the right of the parent or Indian custodian to regain custody of the child upon demand."

> **We recommend the DOI include a section that states: "In general it is not appropriate for an involuntary proceeding to be commenced based upon an assertion that a parent consented to a previous voluntary placement of the child as proof of abandonment of the child."**

Including this language into the proposed ICWA regulations will give protection to parents that enter into voluntary placements, from having that placement used as evidence against them in another child custody proceeding. If voluntary placements are not covered by ICWA, using voluntary placements as evidence should also be prohibited.

Section 23.111(h): *What are the notice requirements for a child custody proceeding involving an Indian child?* The DOI proposes to require "[n]o substantive proceedings, rulings or decisions on the merits related to the involuntary placement of the child or termination of parental rights may occur until the notice and waiting periods in this section have elapsed."

> **We recommend the DOI include in this section the parents' right to have judicial review of an emergency removal of an Indian child that was not approved by a judicial officer.**
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> **Recommended language: "…except when State law provides an earlier hearing for the parents or Indian custodians. In that case, the State court must attempt to ensure compliance with notice requirements of the law. A State may notify a tribe of an emergency hearing via telephone or email in addition to the legally required registered mail notice. When notice cannot be provided as required at an emergency removal hearing, no finding of the State court made at the hearing shall be binding upon the Tribe or other party who was not notified of said hearing."**

In some jurisdictions, parents right to have a judicial review of an emergency removal of an Indian child that was not approved by a judicial officer. In these cases, states may have hearings between 24 and 48 hours after the removal of the child. At those emergency hearings, decisions are made about continuing the out of home placement of the child. Because these hearings occur and are decided within

such a short period of time, it is impossible to notify a Tribe by registered mail, return receipt requested, and give them adequate time to intervene or transfer. Due to the rapid decisions rendered in these cases, when the Court has not provided notice to a Tribe, these decisions should not be binding on the Tribe or party who was not notified of the hearing and decision.

Section 23.117(e): *How is a determination of "good cause" not to transfer made?* The DOI proposes to require "[t]he burden of establishing good cause not to transfer is on the party opposing the transfer."

> **We recommend the DOI add "clear and convincing evidence" to the end of this statement.**

By adding this standard of evidence to the determination of "good cause" it will give State Courts more guidance regarding the level of scrutiny they should apply when evaluating "good cause." In addition, by establishing a federal standard to be applied, it will prevent State Courts from adopting a lesser standard of evidence based on State common law, and keep the regulations in uniformity across the nation.

Section 23.123: *What actions must an agency and State court undertake in voluntary proceedings?* The DOI regulations propose to require "[a]gencies and State courts must provide the Indian tribe with notice of the voluntary child custody proceedings, including applicable pleadings or executed consents, and their right to intervene under § 23.111 of this part."

> **We recommend the DOI add "in order to permit the Tribe to determine whether the child involved in the voluntary proceeding is an Indian child."**

Under ICWA, a Tribe may only receive notice if the pending court proceeding is an "involuntary proceedings." 25 U.S.C. § 1912(a). By adding this language, although the DOI regulation would be placing limitations on the right to notice, it would preserve the language of ICWA and its purpose.

Section 23.129: *What placement preference applies in adoptive placements?* In any adoptive placement of an Indian child under State law, "preference must be given in descending order, as listed below, to placement of the child with: (1) A member of the child's extended family; (2) Other members of the Indian child's tribe; or (3) Other Indian families, including families of unwed individuals." In addition, the court should, where appropriate, "also consider the preference of the Indian child or parent."

We recommend the DOI include a provision that allows consideration of the Tribe's recommended placement for an Indian child.

By adding the "Tribe's recommended placement" to this provision, the ICWA regulations will take into consideration Tribal custom, law, and practice when determining the welfare of Tribal children. Currently under ICWA, an "Indian child's tribe shall establish a different order of preference by resolution." 25 U.S.C. § 1915(c).

Section 23.130: *What placement preferences apply in foster care or preadoptive placements?* In any foster care or preadoptive placement of an Indian child, preference is given to a member of the Indian child's extended family; a foster home, licensed, approved or specified by the Indian child's tribe, whether on or off the reservation; an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or 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."

We recommend the DOI include a provision that allows consideration of the Tribe's recommended placement for an Indian child.

By adding the "Tribe's recommended placement" to this provision, the ICWA regulations will take into consideration Tribal custom, law, and practice when determining the welfare of Tribal children. Currently under ICWA, an "Indian child's tribe shall establish a different order of preference by resolution." 25 U.S.C. § 1915(c).

Section 23.131(c): *How is a determination for "good cause" to depart from the placement preferences made?* Under this section, the DOI proposes that determination of "good cause" to depart from placement preferences must be based the request of the parent, or the request of the child.

In regards to (c)(1) and (2) we recommend the DOI include a provision that allows consideration of a Tribe's request to deviate from placement preferences.

By adding this provision, the proposed ICWA regulations will take into consideration the Tribe's placement preference. Tribes should have a say in determining the welfare of Tribal children.

Conclusion

We are proud to note the numerous places where the proposed regulations mirror various ICWA state laws, especially Michigan's which we helped draft. We applaud the work of the Department of Interior to propose regulations that will help state courts achieve consistency and clarity in their Indian child welfare cases. These proposed regulations can only help Native children, families, and tribes.