

To: ICWA Attorneys and Other Interesting Parties
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Subj.: ICWA Attorney Payments for Indigent Parents

I. Issue Presented

Under the Indian Child Welfare Act's appointment of counsel provision, § 1912(b), are indigent parents being required to pay the attorneys' fees after the appointment?

II. Brief Answer

Under § 1912(b), indigent Indian parents do have the right to have an attorney appointed for them. If the state or county court has a system in place for appointing indigent parents attorneys in cases of involuntary parental rights, the process should align with the state's statutory scheme. If the state does not have a system, the court must notify the BIA Area Director that an attorney has been appointed and funds will be allocated, *if available*. However, as Congress has not appropriated enough funds for this purpose, individual Indian parents have, in at least one instance, been sent a bill for their attorney's service.

III. Discussion

A. ICWA & Federal Regulations Statutory Provisions

Section 1912(b) of ICWA requires that indigent Indian parents be appointed an attorney "in any removal, placement, or termination proceeding." Indian Child Welfare Act § 1912(b). The section notes that if the state law does not generally appoint indigent parents attorneys in such proceedings, "the court shall promptly notify" the Secretary of the Interior when the attorney is appointed and the Secretary is required, "shall pay," the resulting expenses. *Id.* The section does not specify whether the state law must appoint attorneys in ICWA cases or only in child protection/ termination of parental rights cases generally.

The Federal Regulations regarding ICWA, promulgated in 1988, reflect this section and offer more detail regarding how attorney payment is to be processed. The Regulations require a notice to be sent to the BIA Area Director from the court. 25 C.F.R. § 23.13(a). The notice must include 1) the contact information for the appointed attorney, 2) the contact information for the client, 3) the relationship of the client to the Indian child, 4) the name of the Indian child's tribe, 5) a copy of the petition or complaint in the case, 6) a certification that state law does not provide appointment of counsel for indigent persons in similar situations, and 7) a certification that the Indian parent is indigent. *Id.* § 23.13(a)(1)-(7). The Regulations then require that the appointed attorney be paid, unless the Area Director can show one of six reasons: 1) it is not the proper type of litigation, 2) the child is not an Indian child under ICWA, 3) the client is not the Indian child, the Indian parent, or the Indian custodian, 4) state law already provides for the appointment of counsel, 5) the notice from the court was incomplete, or 6) "funds are not available for the particular fiscal year." *Id.* § 23.13(b). The Area Director is required to respond within 10 days regarding its decision whether or not to pay for counsel. *Id.* § 23.13(c). If it will not pay for counsel, an appeal may be filed with the Assistant Secretary of the Interior and the Interior Board of Indian Appeals. *Id.* If a request for payment is granted, the court must then submit a payment voucher to the Area Director within 90 days of the conclusion of the attorney's service detailing the amounts to be paid. *Id.* § 23.13(d)(2).

One recent Interior Board of Indian Appeals case has interpreted § 1912(b) of ICWA and the Regulations. In *Kern County Public Defender's Office v. Pacific Regional Director, Bureau of Indian Affairs*, the Pacific Regional Director denied payment under ICWA for a court-appointed attorney in an ICWA guardianship proceeding because the California Superior Court had not sent notice to the Regional Director until after the case was closed and the request for

payment was submitted. 56 IBIA 121, 123 (Jan. 25, 2013). The IBIA held that the Regulations were clear that a request for payment could be denied because a court failed to submit the notice required shortly after the attorney had been appointed. *Id.* at 126; *see also James P. Brinkoetter, Jr. v. Midwest Regional Director, Bureau of Indian Affairs*, 52 IBIA 59 (Aug. 25, 2010) (reaching the same conclusion). The IBIA makes no mention about the amount of appropriations granted for this purpose each year. However, the IBIA does mention that “neither the Court nor Appellant [the Public Defender’s Office] provided BIA with a notice of appointment,” suggesting possibly that an appointed attorney could notice the BIA if the Court was taking too long. *Kern County*, at 125.

B. Commonly Repeated Information

Much of the information available to help attorneys, judges, and parents understand ICWA merely repeats the above provisions of law, without going into detail regarding how the payment process for indigent parents works in a particular jurisdiction or whether there are indigent parents being mailed bills for their appointed counsel. *See e.g.*, Mont. Child & Fam. Servs. Pol’y Manual: Legal Procedure, Indian Child Welfare Act at 8-9 (Oct. 2009), *available at* <http://www.dphhs.mt.gov/cfsd/icwa/305-1.pdf>; Flaherty Legal Group, LLC, *Involuntary Child Custody Proceedings Under the Indian Child Welfare Act*, <http://www.flgfamilylaw.com/newsletters/child-custody-and-support/involuntary-child-custody-proceedings-under-the-indian-child-welfare-act/>; Ida. Ct. Bench Card, *Indian Child Welfare Act (ICWA)* at 2, <http://www.isc.idaho.gov/cp/benchcards/ICWA%20FINAL%2010-24-13.pdf>; Edward L. Thompson, *Protecting Abused Children: A Judge’s Perspective on Public Law Deprived Child Proceedings and the Impact of the Indian Child Welfare Acts*, 15 Am. Indian L. Rev. 1, 73 (1990).

C. States that Offer Indigent Parent Attorney Appointments

Every state, with the exception of Mississippi, make statutory allocations for the appointment of counsel for indigent parents or guardians in involuntary termination proceedings. See Laura Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 Clearinghouse Rev. J. of Poverty L. and Pol'y 245, 252-262 (2006), available at http://brennan.3cdn.net/2f2ca53878e9299012_67m6ib9tv.pdf (offering a survey of the civil right to, and appointment of, counsel). For example, Michigan's Court Rules allow a court to appoint an attorney for an indigent parent in any child protection proceedings after the first appearance. Mich. Ct. R. 3.915(B)(1)(b) (2010). Thus, in some ICWA cases in Michigan the state statute would require the state to fulfil the appointed attorney without BIA involvement because if the parents were not Indian, appointed counsel would be required. *Id.*

However, ICWA requires appointment of an attorney in any "removal, placement, or termination proceeding." Indian Child Welfare Act, 25 U.S.C. § 1912(b). While some states, such as Florida and Maine, require appointment in earlier stages of the proceedings, other states, such as Georgia, South Carolina, and Tennessee, require appointment only in termination proceedings, not in any preceding proceedings, such as removal or placement. Fla. Stat. Ann. § 39.013 (2010); ME Rev. Stat. Ann. tit. 22, ch. 1071, § 4005(2) (2011); Ga. Code Ann. 15-11-98 (2010); S.C. Code Ann. § 63-7-2560 (2010); Tenn. R. Juv. P. § 39(e)(2) (2010). Additionally, as noted above, it is unclear whether the process outlined in the Federal Regulations applies when the state makes no provision at all for indigent parents in the particular proceeding, or only if the state makes no provision for indigent Indian parents. Similarly, neither the text of ICWA, the Federal Regulations, nor any case law mentions situations in which the state has procedures for appointing indigent parents counsel, but then requiring the parents to pay the court back over

time. For example, while *In re Welfare of S.L.J.* explicitly requires that the county “is obligated to pay the fees of private counsel appointed for the indigent [Indian] parent in this juvenile protection proceeding,” it does not make any mention of Minnesota’s fee payment provision. 782 N.W.2d 549, 557 (Minn. 2010). Minnesota statute allows courts the discretion to “order the appropriate person [parent, guardian, or custodian] to pay attorney fees” after an indigent-certified court appointment in a juvenile proceeding. Minn. Stat. Ann. 260C.331 subd. 5(b) (2013).

IV. Conclusion

In at least one case, an indigent parent has been appointed an attorney, successfully gained back custody of the child, and then been forwarded a bill for the attorney services because the BIA did not have appropriate funds available at the time to pay for the attorney. There is no publicly available information regarding any congressional appropriations to the BIA to pay for indigent parents’ attorneys. There is a deficiency of information available to both the courts and parents regarding the correct procedures for appointing indigent parents attorneys under ICWA and how those parents are ultimately supposed to be paid. More information and guidance is needed regarding which situations the BIA will provide funding for indigent parents’ attorney, including the requirements in states that later require indigent parents to pay-back the courts for their expenses in paying the appointed attorneys, and whether there is any funding available to ensure that indigent Indian parents *always* receive their required appointment of counsel under ICWA.