

Federal ICWA Regulations Impact on California Juvenile Dependency Cases

Judge L. Michael Clark, Santa Clara County CA

Judge William Thorne, Utah (Ret.)

Beyond the Bench 24: Uniting for a Better Future

San Diego, CA

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Authorities

- ▶ Indian Child Welfare Act (1978) - 25 USC §§1901 et seq.
- ▶ **Indian Child Welfare Act Regulations - 25 Code of Federal Regulations (CFR) §§ 23.1 – 23.144 – Dec. 2016**
- ▶ Guidelines for Implementing the ICWA (92 pages) – Federal Register, Vol. 81, No. 251, December 30, 2016, pp. 96476 – 96477. See <https://www.bia.gov/bia/ois/dhs/icwa>
- ▶ Calif. Welfare & Institutions Code (WIC) §§ 224 – 224.6, 305.5 (SB 678 in 2007)
- ▶ Calif. Rules of Court (ROC), Rules §§ 5.480 – 5.487 (effective 1/1/2008)
- ▶ Indian Child Welfare Act Judicial Benchbook 2017, National Council of Juvenile and Family Court Judges (NCJFCJ)

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Background to new ICWA regulations

- 1. Disproportionality is **continuing** for Indian children [2016 Report from NCJFCJ]
- **California** **2.0**
- **Alaska** **2.6**
- **South Dakota** **3.7**
- **North Dakota** **3.9**
- **Washington** **4.3**
- **Iowa** **4.8**

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Background to new ICWA regulations

- 2. Disproportionality **increasing** for Indian children
 - NCJFCJ in 2016: "American Indian disproportionality has increased over the last fourteen years from 1.5 to 2.7 [nationally]"
- | | 2000 | 2014 |
|-------------|------|------|
| ➤ Montana | 3.6 | 3.9 |
| ➤ Oregon | 3.2 | 4.0 |
| ➤ Wisconsin | 1.4 | 4.8 |
| ➤ Nebraska | 6.6 | 8.4 |
| ➤ Minnesota | 8.1 | 17.0 |

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Background to new ICWA regulations

- **3. Disparate interpretations of ICWA**
- Emergency placement
- When to notify Tribes
- Active efforts
- Use of Qualified Expert Witnesses
- Timing of tribal interventions
- Means of tribal interventions
- Tribal membership decisions

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Background to new ICWA regulations

- **3. Simply not following ICWA**
- **South Dakota: Oglala Sioux Tribe, et al v. Kuann Van Hunnik, et al. Civ 13-5020-JLV [March 30, 2015]**
 - “The court finds that [defendants] developed and implemented policies and procedures for the removal of Indian children...in violation of the mandates of the Indian Child Welfare Act...”
 - 823 Indian children removed in Pennington County, SD from 2010 to 2013.
 - State court refused to release transcripts to federal court.
 - Judge required to pay \$70,000 in costs and fees when resolved.
 - Federal Court findings:

Background to new ICWA regulations

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- Hearings w/in 2 days of removal – less than 5 min
- ▶ 100% of removal requests granted when custody not immediately transferred.
- ▶ At 48 hour hearing disclosure of ICWA affidavit and petition for temporary custody are not mentioned in 77 out of 78 cases, including when parents asked on the record.
- ▶ Practice was to do “informal” removals, without filing petitions, and court ordering continued DSS custody for 60 days.
- ▶ Parents never told they could contest state request for custody.
- ▶ State never required to present sworn live testimony.
- ▶ Court did not permit parents to speak to merits or custody at 48 hour hearing. Nor were documents admitted.
- ▶ At every 48 hour hearing Judge Davis ordered custody and found “active efforts have been made...”

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Goals of the New ICWA Regulations

- ▶ **Consistent application of ICWA across both state and county lines**
 - ▶ Set minimum federal floor for how Indian families are to be treated.
- ▶ **Consistent interpretation of ICWA requirements**
 - ▶ Federal standards applied now that states have dropped the ball
- ▶ **Closing loopholes created in various states**
 - ▶ Adding some clearly stated requirements

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Overview of Impact on California Juvenile Dependency Proceedings

- Although not retroactive per se, the new ICWA federal regulations apply to any "proceeding" filed on or after 12/12/2016. §23.143.
 - Note: This means if the juvenile dependency petition was filed before 12/12/16, but the § 366.26 selection and implementation hearing, or the adoption finalization hearing, was heard after 12/12/16, the Act applies to the latter hearings because they are separate "proceedings". See discussion of 23.2 below.

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- The new ICWA regulations affect non-dependency, pre-dependency and post-dependency proceedings.
 - Non-dependency = probate guardianship, private termination of parental rights under Family Code, private adoption, and family court custody awards to non-parents. § 23.2.
 - Pre-dependency = voluntary placement agreements and protective custody warrants
 - Post-dependency = adoption set aside cases

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- If state law imposes a "higher standard of protection," then state law must be followed. § 23.106(b); 25 USC § 1921.
- The Invalidation Clause under 25 USC § 1914 may be invoked by child, parent or Tribe regardless of whose rights were violated. § 23.137.
- The new ICWA regs affect: inquiry, notice, participation, removal standards, active efforts, qualified expert opinion, and placement preferences.

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NEW: What Constitutes a "Proceeding" Under ICWA?

- Definition of "proceeding" – 23 CFR § 23.2 - Lists FOUR types of "**child-custody proceedings**":
- "Child-custody proceeding" means and includes any action, other than an emergency proceeding, that may culminate in one of the following outcomes:
 - (i) **Foster-care placement**, which is any action removing an Indian child from his or her 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;
 - (ii) **Termination of parental rights**, which is any action resulting in the termination of the parent-child relationship;
 - (iii) **Preadoptive placement**, which is 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; or
 - (iv) **Adoptive placement**, which is the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption." § 23.2.

The commencement of each type of proceeding triggers anew the application of ICWA.

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NEW: What Constitutes an “Emergency Proceeding”?

- “**Emergency proceeding** means and includes any court action that involves an emergency removal or emergency placement of an Indian child.” § 23.2.
- An emergency proceeding can be terminated by one or more of the following actions:
 - (1) *Initiation of a child-custody proceeding subject to the provisions of the ICWA* [emphasis added];
 - (2) Transfer of the child to the jurisdiction of the appropriate Indian Tribe; or
 - (3) Restoring the child to the parent or Indian custodian. § 23.113(c).

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NEW: What Constitutes “reason to know the child is an Indian child?”

- **New Reg § 23.107(c): “A court ... has reason to know that a child ... is an Indian child if:**
 - Any “participant in the proceeding” informs court the child IS an Indian child;
 - Any “participant in the proceeding” informs ct it has discovered info indicating child IS an Indian child;
 - Child gives court reason to believe he or she IS Indian child;
 - Court is informed the child’s domicile or residence IS on a reservation or Alaska Native village;
 - Court is informed child IS or has been a ward of a tribal court; or
 - Court is informed that parent or child HAS an identification card indicating tribal membership. (23.107(c).)

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- ▶ NEW: If you have reason to know the child IS an Indian child under the new federal regulations, you must apply ICWA until such time as a final determination is made. § 23.107(b).

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- ▶ Recall that **WIC § 224.3(b)** lists three factors that trigger "reason to know" under CA law:
 - ▶ A person having an interest in the child "provides information suggesting the child is a member of a tribe or eligible for membership, or a parent, grandparent or great-grandparent are or were members of a tribe; or
 - ▶ The residence or domicile of a child, parents or Indian custodian is in a predominantly Indian community; or
 - ▶ The child or family has received tribal services or benefits.
- ▶ NOTE: Under Calif law, reason to know the child IS an Indian child triggers a duty to notice, but not a duty to apply the Act. See further discussion below.

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Before Protective Custody

- ▶ **Voluntary Placement Agreements** – §§ 23.124 – 23.128
 - ▶ EXPANDS requirements for written consent required by 25 USC § 1913(a). See § 23.126.
 - ▶ Imposes **NEW DUTY on social worker** to inquire regarding Indian status when considering a voluntary placement agreement. § 23.124; Guideline I.1. at p. 64.
 - ▶ Imposes **NEW DUTY on social worker** to apply ICWA to a voluntary placement agreement if social worker knows or has reason to know the child IS an Indian child. § 23.107(b)(2).
 - ▶ Recall six factors under § 23.107(c) or three factors under WIC § 224.3 which define “reason to know” child is Indian child
 - ▶ Imposes **NEW DUTY on court** to determine on the record whether there is reason to believe the child IS an Indian child. § 23.124(a).

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- ▶ Imposes **NEW DUTY on court** to ensure that the party seeking voluntary placement has taken **all reasonable steps to verify the child’s Indian status**. § 23.124(b)
- ▶ Imposes **NEW DUTY on court** to ensure that the voluntary placement of the child complies with the **placement preferences** described in §§ 23.129 – 23.132 unless there is good cause to depart from the preferences under the enhanced good cause standard. § 23.124(c); Guideline I-2 at p. 65. See further discussion below under Disposition.
- ▶ Imposes **NEW DUTY on court** to conduct **recorded hearings** to explain in detail and certify the terms and consequences of the consent to foster care. § 23.125; Guideline I-6 at p. 66-67.
- ▶ ISSUE: What is “voluntary”?
 - ▶ If Indian parent cannot immediately regain custody upon “demand” then the placement is not voluntary. Guideline B.2. at pp. 14.

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Before Protective Custody

- ▶ **Protective Custody Warrants** – § 23.113(d)
- ▶ Existing law: WIC § 224.3, ROC 5.481 already impose on the court, welfare department and probation an “affirmative and continuing duty” to inquire whether a child “for whom a petition . . . **is to be**, or has been filed . . .” is an Indian child.
- ▶ **NEW:** § 23.113(d) imposes **new substantive requirements** for a protective custody warrant if there IS reason to know the child IS an Indian child (per factors listed in § 23.113(c).)
- ▶ **NEW duty on social worker** to list steps taken to notify Tribe or Indian custodian

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- ▶ **NEW duty on social worker** to list active efforts to prevent need for removal
- ▶ **NEW duty on social worker** to list facts in support of finding that “*emergency removal or placement is necessary to prevent imminent physical damage or harm to the Indian child*”
- ▶ **NEW duty on social worker** to list facts in support of finding that “emergency removal or placement continues to be necessary to prevent such imminent physical harm or damage to the child” – § 23.113(d).

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Detention Hearing

- Regulations restrict removals without full suite of ICWA protections;
- Intention and purpose of the new regulations restriction on use of emergency removal authority

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Detention Hearing

- **Applicability**
 - **NEW: ICWA applies at a detention hearing** if there is reason to believe child IS an Indian child under the new federal regulations:
 - If there is reason to know the child IS an Indian child, based on one or more of the six factors listed in § 23.107(c), then ct "must treat the child as an Indian child, unless and until it is determined on the record that child does not meet the definition of an Indian child." § 23.107(b).

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- Question: If there is no reason to believe child IS an Indian child under the six federal factors listed in § 23.107(c), but there is reason to believe the child IS an Indian child under one of the three statutory factors listed in WIC § 224.3(b), must the ct proceed "as if" the child is an Indian child?
- Answer: NO. See *In re Abigail A.* (2016) 1 Cal.5th 83, which found invalid the former language in ROC 5.482(c) requiring the ct to proceed "as if the child is an Indian child" if ct received information that child was "eligible" for Tribal membership.
- However, WIC § 224.3 and ROC 5.482(a) require that if there is reason to believe child IS an Indian child based on three factors in § 224.3(b), then ct must not proceed until ICWA notice given.

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- **Conflict in law:** Although **ROC 5.482(a)(2)** permits the juv. ct to proceed with a detention hearing "without delay" so long as ICWA notice is given "as soon as possible" for a child for whom there is reason to know IS an Indian child, **new § 23.113(c)** states that any emergency proceeding terminates upon "initiation of a child-custody proceeding." This means that a detention hearing is no longer an "emergency hearing," and that ICWA applies to a detention hearings if there IS reason to know the child IS an Indian child under the federal regulations.
- The new NCJFJC ICWA Benchbook (2017) at p. 11 reaches a similar conclusion
- However, Guideline C.3 at p. 27 suggests that the "presumptive outer bound on the length of an emergency proceeding" is 30 days?

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- Question: If there is reason to believe the child MAY BE an Indian child, must the court apply ICWA at the detention hearing?
 - Answer: NO – § 23.107(b)(1): where there is reason to know the child MAY BE a member of a tribe or eligible for membership, ct must ensure agency uses “due diligence” to verify tribal membership.
 - Further, ROC 5.481(a)(4) provides that if SW has reason to know child MAY BE an Indian child, then SW has a duty to conduct further inquiry.

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- **Inquiry – § 23.107**
 - Same: Ct has affirmative and continuing duty to inquire whether child is or may be an Indian child. WIC § 224.3
 - **NEW: “ASK” AND “INSTRUCT”!**
 - **NEW duty of Court:** Ct must “**ask each participant**” whether they know or have reason to know the child IS an Indian child
 - Issue: Who is a “participant”? Attorneys? Relatives? Friends? Interpreters?
 - Guideline B.1. at p. 11 does not define “participant”
 - WIC § 224.3 simply imposes a duty to inquire, but does not specify who are the recipients of the inquiry;
 - Inquiry and responses “**should**” be made on the record. § 23.107(a).

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- ▶ **NEW duty of Court:** Ct must “**instruct the parties**” to inform court if they subsequently receive info that provides reason to know the child is an Indian child. § 23.107(a).
 - ▶ Current form ICWA-020 Parental Notification of Indian Status already contains a similar admonition – is that sufficient?
 - ▶ Judge Thorne’s recommendation: first ask, “Are you or your child a member of an Indian tribe?” If answer is no, then ask, “Do you have Indian ancestry?”
- ▶ **NEW duty of Court:** Ct must determine whether the department has used “**due diligence**” to identify tribes and verify membership. § 23.107(b)(1).
 - ▶ This will require CoCo to submit amended findings for detention hearings regarding ICWA notice.

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- ▶ **Notice** - §§ 23.11, 23.111, 23.112
 - ▶ ICWA notice required if there is reason to know the child IS an Indian child. § 23.11; WIC § 224.3 and ROC 5.482(a)
 - ▶ **NEW duty on SW:** Notice must contain the 15 specified items of information. § 23.111
 - ▶ Question: Does our Form ICWA-030 Notice of Child Custody Proceeding for Indian child comply with 23.111?
 - ▶ **NEW duty of court:** Ct must wait “at least 10 days after receipt” to proceed with detention hearing. § 23.112

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Question: WIC § 315 requires ct to conduct detention hearing on the next judicial day after the petition is filed, and WIC § 322 permits a one day continuance only, but WIC 224.3 and ROC 5.482(a) require 10 day ICWA notice if there is reason to believe child IS an Indian child - - How do juv ct's resolve this?

- Solution?? Ct may need to commence detention hearing, make required preliminary statutory findings under Calif law and ASFA (42 USC § 672(a) and 45 CFR § 1356.21), then set further detention hearing to comply with ICWA requirements

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■ **Participation** - § 23.133

- NEW: Ct "should" allow **alternative methods of participation** such as phone or videoconferencing. § 23.133
- NEW: Ct must provide **language access services** to a parent or Indian custodian who posses limited English proficiency. § 23.111(f).
- Same: Tribe may appear by attorney or Tribal representative. ROC 5.534(e).

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- ▶ **Removal standard at DH - § 23.113(a)**
 - ▶ **NEW duty of SW:** If there is reason to know the child IS an Indian child, ct receive evidence showing "*the emergency removal or placement is necessary to prevent imminent physical damage or harm to the child.*" 23.113(a)
 - ▶ c/f WIC § 319 removal standard: "substantial danger to physical health of child or child suffering serious emotional damage"

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- ▶ **Active efforts – § 23.2, 23.120**
 - ▶ Same: If there is reason to know the child IS an Indian child, then agency must prove active efforts were made to prevent the breakup of the Indian family and that those efforts have been unsuccessful – § 23.120
 - ▶ NEW: Enhanced definition: "Active efforts means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan...."

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- ▶ “To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe. Active efforts are to be tailored to the facts and circumstances of the case and may include, for example.... [see 11 factors to consider listed]” - § 23.2
 - ▶ See further discussion under Disposition below.

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- ▶ **Placement preferences** - §§ 23.129, 23.131
 - ▶ If there is reason to know the child IS an Indian child, then the agency must follow the ICWA foster care placement preferences, in the order listed. §§ 23.129, 23.131
 - ▶ Preferences = Indian child's extended family; foster home licensed or approved by tribe; Indian foster home; institution for children approved by tribe.
 - ▶ See further discussion under Disposition below.

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► **Qualified Expert Witness - §§ 23.121, 23.122**

- If there is reason to know the child IS an Indian child, then ct must receive testimony from a qualified expert witness that "continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child." §§ 23.121, 23.122
- Challenge: obtaining timely QEW testimony for a detention hearing.
 - Ct may need to set further detention hearing to receive QEW testimony.
 - See further discussion under Disposition below.

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► **Transfer to Tribal Court – §§ 23.115 – 23.119**

- Same Mandatory and Permissive Transfer rule per 25 USC § 1911
- **New duty of SW:** See expanded requirements for finding "good cause to deny transfer" – § 23.118
- **New duty of court:** State ct has duty to dismiss custody proceeding if child's residence or domicile is on a reservation where the Tribe exercises exclusive jurisdiction over child custody proceedings. § 23.110.

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Jurisdiction Hearing

► Inquiry

- Same as detention hearing: Ct has “affirmative and continuing duty to inquire whether child is or may be Indian child. WIC § 224.3.
- **NEW duty of court:** State courts must “**ask each participant**” whether they know or have reason to know the child is an Indian child, and “**instruct the parties**” to inform court if they subsequently receive info that provides reason to know child IS an Indian child. § 23.107(a).
- Question: must the ct. repeat the inquiry at each hearing?
 - Answer: NO: Guideline B.1. at p. 11: “The rule does not require an inquiry at each hearing within a proceeding.”

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► Notice

- ICWA notice requirements apply if there is reason to believe the child IS an Indian child AND a party seeks foster care placement. § 23.111.
- **NEW duty of court:** Ct cannot proceed with JX hrg until 10 days after notice received via registered or certified mail with return receipt, if ct has reason to know child is an Indian child. § 23.112.
 - Recall: a “child custody proceeding” is any action that “**may culminate**” in foster care placement. § 23.2.
 - Question: can ct proceed with JX if there is only reason to know child MAY BE an Indian child? YES, see det hrg.

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- **NEW duty of SW and Court:** State court must determine whether the department has used “**due diligence**” to identify tribes and verify membership. § 23.107(b)(1).
 - This will require CoCo to amend their standard proposed findings for hearings regarding ICWA notice.

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- **Participation - § 23.133**
 - NEW: Ct “should” allow **alternative methods of participation** such as phone or videoconferencing. § 23.133.
 - NEW: Ct must provide **language access services** to a parent or Indian custodian who poses limited English proficiency. § 23.111(f).
 - Same: Tribe may appear by attorney or Tribal representative. ROC 5.534(e).

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Other

- Since WIC § 355 limits the issues at a jurisdiction hearing to the question of whether the child is a person described by § 300, it does not appear that other provisions of ICWA affect the jurisdiction hearing.
 - However, if the disposition hearing will be continued, then ct should inquire regarding compliance with the ICWA placement preferences. § 23.129.

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Disposition Hearing**Inquiry**

- Same as detention and jurisdiction – see new standard above

Notice

- Same as detention and jurisdiction – see new standard above

Participation

- Same as detention and jurisdiction – see new standard above

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■ **ICWA Removal standard - § 23.121(a)**

- Same as before per 25 USC § 1912(e): "Continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage or harm to the child." (§ 23.121(a).)
- **NEW:** "The evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage" to the child. § 23.121(c).
- **NEW:** "Evidence that only shows the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute" sufficient evidence that continued custody is likely to result in serious emotional or physical damage to the child. § 23.121(d).

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- **NEW:** Guidelines G.1. at p. 53: "These provisions recognize that children can thrive when they are kept with their parents, even in homes that may not be ideal in terms of cleanliness, access to nutritious food, or personal space, or when a parent is single, impoverished, or a substance abuser. Rather, there must be a demonstrated correlation between the conditions of the home and a threat to the specific child's emotional or physical well-being."

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- **Active Efforts** - §§ 23.2, 23.120(b)
 - Same: Ct must find that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful. 25 USC § 1911(d).
 - **NEW duty of SW:** Active efforts must be "**documented in detail in the record.**" § 23.120(b)
 - **NEW:** "Active efforts" is not synonymous with "reasonable efforts." Active efforts has an enhanced definition in § 23.2:
 - "Active efforts" means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe."

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"Active efforts are to be tailored to the facts and circumstances of the case and may include, for example:

- (1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;
- (2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
- (3) Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;

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- ▶ (4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;
- ▶ (5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;
- ▶ (6) Taking steps to keep siblings together whenever possible;
- ▶ (7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;

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- ▶ (8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;
- ▶ (9) Monitoring progress and participation in services;
- ▶ (10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;
- ▶ (11) Providing post-reunification services and monitoring." § 23.2.5

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- **Qualified Expert Witness (QEW) - §§ 23.121, 23.122**
 - Same - QEW required to support finding by clear and convincing evidence that "continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child" prior to ordering foster care (CCE) or ordering termination or parental rights (BRD). 25 USC 1912(e); § 23.121(a).
 - § 23.122 says the QEW cannot be the social worker assigned to the case
 - Note: WIC 224.6(a) is stricter and says no employee of the social worker's agency may serve as the expert. The more restrictive state standard applies per 25 USC §1921 and 25 CFR 23.106(b) ("Where applicable State or other Federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Act, ICWA requires the State or Federal court to apply the higher State or Federal standard.")
 - In Calif we require QEW at disposition, where the order for foster care placement is made, and at the 366.26 hearing where parental rights are terminated.
 - "Foster-care placement" in 23.2 is defined as "... any action removing an Indian child from his or her 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."

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- Neither the federal statute nor the new regs contain a list of persons who CAN be designated as a QEW.
 - However, WIC § 224.6 does contain such a list: member of tribe, expert witness with substantial experience in the delivery of child and family services to Indians, or a professional person having substantial education and experience in the area of his or her speciality.
- The new regs do not contain any parallel to WIC 224.6(e) which requires a written stipulation by the parties before a court can accept a declaration or affidavit from the expert in lieu of testimony.
 - The more restrictive state standard applies per 25 USC §1921 and 25 CFR 23.106(b).

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► Issues

- New regs and Guidelines do NOT tell us: Whose witness is the QEW? What is the scope of investigation that should be conducted by the QEW?
- New regs do not address discovery of ICWA expert notes: Do Cal. CCP 2034.210 – 2034.31 apply governing DISCOVERY and providing expert reports in advance of hearings? What about discovery requests by parents for information in the Tribe's possession?
- Cal. ROC 5.546 requires liberal informal discovery between department and parents, and, upon motion, court can compel disclosure upon motion

NOTE: QEW required for probate guardianship and private termination of parental actions regarding Indian children.

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► Placement Preferences - §§ 23.129 – 23.132

- Same: The foster placement requirements remain the same per 25 USC 1915(b): least restrictive setting; most approximates a family setting; allows for child's special needs to be met; is within reasonable proximity to his home
- Same: The ICWA placement preferences remain the same per 25 USC § 1915(b)
 - Recall there is one set of preferences for foster placement and a different set for preferences adoptive placement. 25 USC 1915, 23.131.
 - Adoption: Indian child's extended family; other members of child's tribe; other Indian families. 23.130
 - Foster placement: Indian child's extended family; foster home licensed or approved by tribe; Indian foster home; institution for children approved by tribe. 23.131

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- **NEW:** "Preference must be given in descending order" unless tribe has specified by resolution a different order of preference – 23.130(a), 23.131(b).
 - This means the listed preferences are not equal!
- **NEW:** Preferences must be applied again each time there is a **change in placement.** § 23.131(a).
- **NEW:** Ct must **consider the preference of the Indian child or parent.** § 23.131(d).
 - "This language does not require a court to follow a child or parent's preference, but rather requires that it be considered where appropriate." Guidelines H.2. at p. 58.

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- **MODIFICATION:** "Good cause" to depart from placement preferences – § 23.132
 - Same: The good cause exception to the placement preferences described by 25 USC 1915 remains. However...
 - **NEW:** "Good cause" to depart from the placement preferences "should" be proven by **clear and convincing evidence.** § 23.132(b); Guidelines H.4 at p. 61.
 - **NEW:** No good cause to depart from placement preference "based solely on **bonding or attachment** that flowed from time spent in a non-preferred placement that was made in violation of ICWA." § 23.132(e); Guidelines H.5. at p. 63.

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- **NEW:** "Good cause" to depart from placement preferences also requires ct finding that "a **diligent search** was conducted to find suitable placements using the preference criteria." § 23.132(c)(5).
- **NEW:** Social worker must provide "**detailed documentation** of the efforts to comply with the placement preferences." § 23.141(b).

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- Question: what if Indian relative does not qualify under state Resource Family Approval (RFA) regs?
 - If denial is based on disqualification, then social worker must request waiver of statutory disqualifying provision. *In re Jullian B.* (2000) 82 Cal.App.4th 1337, and social worker must prove good cause to depart from ICWA placement preferences.
- Remember: The placement preferences also apply to probate guardianships, private adoptions, and family court custody awards to a non-parent. § 23.2

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6, 12, 18, or 24-Month Reunification Review Hearing

► Inquiry

- Same as at jurisdiction hearing – see new standard above

► Participation

- Same as at jurisdiction hearing – see new standard above

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► Notice

- No notice to Tribe required under federal statute, federal regulations, federal guidelines or WIC § 293.
- However, WIC § 224.2(b) requires notice to Tribe for “**every hearing thereafter**” through adoption.
 - Further, “While not required by the Act or rule, we recommend that State agencies and/or court provide notice to Tribes . . . of . . . [e]ach hearing within a proceeding.” **Guidelines D.1. at p. 31.**

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- ▶ **ISSUE: WIC § 224.3(e)(3)** permits court to make determination that ICWA does not apply **after 60 days** from the date the tribes received notice. However, the new regulations contain no similar provision.
- ▶ **Solution?** New Fed ICWA Guidelines, p. 22: “[I]f a tribe fails to respond to **multiple requests** for verification regarding whether a child is in fact a citizen (or a biological parent is a citizen and the child is eligible for citizenship), and the agency has sought the assistance of the [BIA] in contacting the tribe, a court may make a determination whether the child is an Indian child for purposes of the child-custody proceeding based on the information it has available.”
 - ▶ **Issue:** what constitutes “multiple requests”?
 - ▶ **NOTE:** Even if ct makes finding Act does not apply after 60 days, SW must give notice again if subsequent info received indicates child is an Indian child. WIC § 224.3(f).

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- ▶ **Continued out of home placement findings**
 - ▶ Same existing higher ICWA standard: “Continued custody by the child’s parent or Indian custodian is likely to result in serious emotional or physical damage or harm to the child.” (§ 23.121(a).)
- ▶ **Qualified Expert Witness**
 - ▶ Not required at this hearing. Only required for order for foster care placement or order for termination of parental rights. § 23.121.

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- **Active efforts**

- May or may not be required at this hearing....
- "The regulations reflect that the court must conclude that active efforts were made prior to ordering foster-care placement or TPR, but does not require such a finding at each hearing. It is, however, a recommended practice for a court to inquire about active efforts at every court hearing and actively monitor compliance with the active efforts requirement." Guidelines E.5. at p. 43.
- HOWEVER, if the SW recommendation is for termination of reunification services, then an active efforts finding is required under *In re Matthew Z.* (2000) 80 Cal.App.4th 545, 552-553 and *In re A.L.* (2015) 243 Cal.App.4th 628

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- **Placement preferences**

- Same as at disposition hearing – see new standard above
- NEW: any change in placement triggers new application of preferences. § 23.131(a)

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§ 366.26 Termination of Parental Rights Hearing

- ▶ **Inquiry**
 - ▶ Same as at jurisdiction hearing – see new standard above
- ▶ **Notice**
 - ▶ **NEW:** A proceeding to terminate parental rights is a new “proceeding” under § 23.2
 - ▶ This triggers a new duty to notice by registered or certified mail under § 23.11 and § 23.112
 - ▶ Notice to Tribe plus re-notice to any tribes that never responded to initial noticing efforts
- ▶ **Participation**
 - ▶ Same as at previous hearings – see new standard above

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▶ **Active Efforts**

- ▶ Same: Ct must find that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful, under enhanced definition. § 23.120(a).
 - ▶ “Even if a finding was made that sufficient active efforts were made to support the foster-care placement, circumstances may have changed such that the court may require additional active efforts prior to ordering TPR.” Guidelines E.5 at p. 43.
 - ▶ Cal. Rule of Ct 5.485(a) also requires an active efforts finding at the § 366.26 hearing.
- ▶ **NEW:** See enhanced definition of active efforts under § 23.2
- ▶ **NEW:** Active efforts must be “documented in detail in the record.” § 23.120(b).

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▀ Required Finding for Termination of Parental Rights

- ▀ Same: Evidence beyond a reasonable doubt that continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child. § 23.121(b); 25 USC § 1912(f).

▀ Qualified Expert Witness

- ▀ Same: QEW testimony required to support finding beyond reasonable doubt that continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child. § 23.121(b).
 - ▀ See discussion under Disposition

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▀ Placement Preferences

- ▀ Same: ICWA adoption placement preferences apply: member of Indian child's extended family; other member of Indian child's tribe; other Indian families. § 23.130, 25 USC 1915(a).
- ▀ **NEW:** Unless tribe has established by resolution a different order of preference, the statutory preferences must be applied (§ 23.130(c)), in order of preference, unless there is CLEAR AND CONVINCING EVIDENCE of good cause to depart from preferences (§ 23.132), supported by proof of a DILIGENT SEARCH (§ 23.132(b)(5)), based on "DETAILED DOCUMENTATION of the efforts to comply with the placement preferences." § 23.141(b).
 - ▀ State agencies should determine if the child's Tribe has established, by resolution, an order of preference different from that specified in ICWA." Guidelines H.1. at p. 56.

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- ▀ **Transfer to Tribal Court**

- ▀ Same. Since this is a new “proceeding” per § 23.2, the parents and Tribe retain the right to request transfer of the case to the Tribal court per § 23.115.

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366.3 Post-Permanency Hearing

- ▀ **Inquiry**

- ▀ Same as at jurisdiction hearing – see new standard above

- ▀ **Notice**

- ▀ While there is no duty to notice Tribe required under federal statute, federal regulations, federal guidelines, or WIC § 293, there is a duty to notice under WIC § 224.2(b) [“at every hearing thereafter”].
 - ▀ Further: “While not required by the Act or rule, we recommend that State agencies and/or court provide notice to Tribes . . . of . . . [e]ach hearing within a proceeding.” Guidelines D.1. at p. 31.

- ▀ **Participation**

- ▀ Same as at jurisdiction hearing – see new standard above

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- ▶ **Active Efforts**
 - ▶ Not required
- ▶ **Qualified Expert Witness**
 - ▶ Not required
- ▶ **Placement Preferences**
 - ▶ Same as at § 366.26 hearing – see new standard above
 - ▶ **NEW:** Any change in placement triggers new application of preferences. § 23.131(a).

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Adoption Hearing

- ▶ **Inquiry**
 - ▶ Same as at jurisdiction hearing - see new standard above
- ▶ **Notice**
 - ▶ **NEW:** A proceeding to finalize an adoption is a new “proceeding” under § 23.2.
 - ▶ This triggers a new duty to notice by registered or certified mail under § 23.11 and § 23.112.
 - ▶ Notice to Tribe plus re-notice to any tribes that never responded to initial noticing efforts.
- ▶ **Participation**
 - ▶ Same as at jurisdiction hearing – see new standard above

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- ▀ **Placement Preferences**
 - ▀ **NEW:** See discussion under § 366.26 hearings
- ▀ **Post Adoption Paperwork**
 - ▀ **New duty of state courts:** must send copy of final adoption decree to BIA within 30 days. § 23.140; Guidelines J.2 at p. 70.

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Post-Adoption Legal Proceedings: Adoption Set Aside

- ▀ Under existing 25 USC 1916(a), if an adoption decree is vacated or set aside, or the adoptive parents consent to termination of parental rights, then the bio parent or Indian custodian may petition for return of the child.
- ▀ **NEW:** § 23.139 imposes a **NEW DUTY on the court** to notify the child's Indian Tribe and biological parents required if the adoption decree for an Indian child is set aside or vacated, or the adoptive parent voluntarily consents to termination of parental rights for the Indian child
 - ▀ Permits a parent to waive his or her right to such notice, and to revoke any waiver of right to notice.

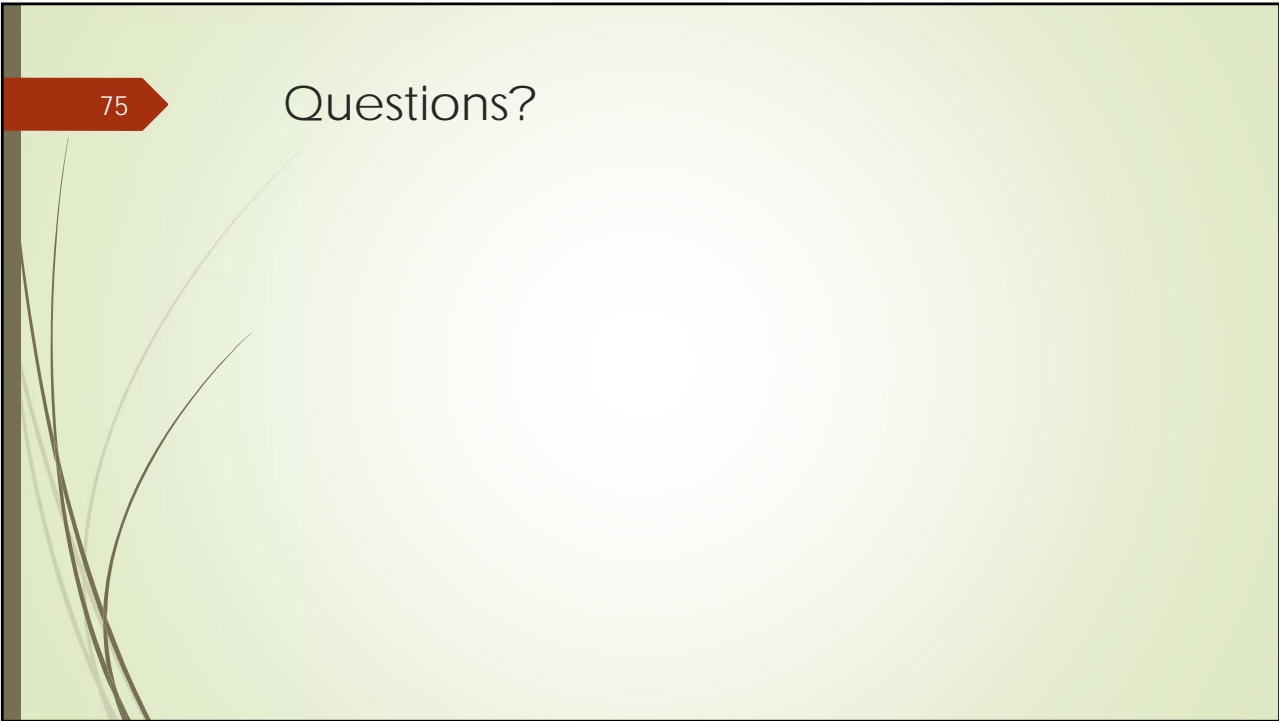
73

Document Retention/Storage/Access

- **NEW DUTY on the State to maintain a record** of every voluntary or involuntary foster care, preadoptive, and adoptive placement of an Indian child, and make the record available within 14 days of a request by the Indian child's tribe or the Secretary. § 23.141
- The record must contain, at a minimum, the petition or complaint, all substantive orders entered in the child-custody proceeding, the complete record of the placement determination (including, but not limited to, the findings in the court record and the social worker's statement), and, if the placement departs from the placement preferences, detailed documentation of the efforts to comply with the placement preferences. § 23.141(b).

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- **NEW DUTY on State** to make record available to Tribe or BIA within 14 days of a request. § 23.141(a).
- **ISSUE:** Does "state" refer to agency or court?
- Guidelines J.1. at p. 70: "It is recommended that State agencies coordinate with State courts and private agencies to identify who is best positioned to fulfil this duty."
- Same: An adopted Indian child who reaches age 18 already has right to request name of tribe and parents as may be necessary to protect any rights flowing from tribal relationship. 25 USC § 1917.



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Questions?