



JUDICIAL COUNCIL OF CALIFORNIA

OPERATIONS AND PROGRAMS DIVISION
CENTER FOR FAMILIES, CHILDREN & THE COURTS

New federal regulations governing Indian Child Welfare Act

This information is intended for practitioners and judicial officers with knowledge and experience of the requirements of the Indian Child Welfare Act to inform them of the requirements of the new federal regulations governing court proceedings covered by the Indian Child Welfare Act (ICWA) (25 U.S.C. 1901 et seq.) that become effective December 12, 2016. The substantive provisions of the new regulations are attached.¹ This document is not intended to be a complete analysis of the new federal regulations or how they relate to existing California law and practice. The purpose of this document is to highlight some issues of immediate importance.

When do the new regulations apply?

The new regulations apply to proceedings initiated after December 12, 2016. “Proceeding” is defined as including four separate types of “proceedings” that may all take place within a single ongoing case: the foster care placement, termination of parental rights, preadoptive placement and adoptive placement phase of a case. (See 25 U.S.C. 1903 (1); Regulations 23.143 and 23.2) Thus, if a case has been filed **before** December 12, 2016, the new regulations will apply as long as the child’s adoption has not been finalized when the case moves from one of the four separate “proceedings” defined by ICWA. When a case procedurally moves from the foster care placement phase (reunification) to the termination of parental rights (TPR) phase or from TPR to adoptive placement, the new regulations will apply to the new phase of the case as it is considered a new “proceeding” for ICWA purposes. The new regulations may pose a challenge for courts in determining when a new proceeding has started for ICWA purposes within an ongoing case.

How do the new requirements relate to California law and practice?

The new regulations are binding upon state courts as the minimum federal standard that must be followed. Regulation 23.106 confirms section 1921 of the Act itself, that where applicable state or other federal law provides a higher standard of protection, the higher standard shall apply.

¹ This information, provided at the 2016 Juvenile Law Institute and Pre-Institute ICWA Roundtable and at other multidisciplinary educational programs, is not intended as a complete analysis of the new federal ICWA regulations and how they relate to existing California law and practice. Further guidance on the implications of the new federal ICWA regulations will be forthcoming, but the purpose of this document is to alert courts to the potential need for immediate changes to court practice and procedure to comply with the new federal requirements. The regulations can be found online at <https://www.gpo.gov/fdsys/pkg/FR-2016-06-14/pdf/2016-13686.pdf>. For more information, see <http://www.courts.ca.gov/3067.htm>.

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Applying ICWA:

Consistent with California law, the new regulations require ICWA inquiry at the beginning of each proceeding.² (Regulation 23.107) If there is “reason to know” that the child is an Indian child, but the status is not confirmed, the new regulations require the court to obtain evidence from the agency on the efforts made to determine the child’s status (Reg. 23.107(b)(1)), and “[t]reat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an “Indian child.” (Reg. 23.107(b)(2) This means that pending confirmation of the child’s status, all ICWA requirements must be met.

Emergency Removals (detentions):

As a general rule, an Indian child cannot be removed from parental custody without compliance with ICWA requirements. The only exception is for “emergency proceedings.” (25 U.S.C. 1922; see also chart at pages 38868-38869 of the regulations)

The new regulations limit the emergency removal power whenever there is “reason to know” that the child involved may be an “Indian child.” (Regulation 23.113) The petition seeking emergency removal must contain specific factual information and allegations including the basis for belief that the child is at risk of imminent physical damage or harm, interactions with the tribe, and efforts made to assist the parents to have the child returned. (Regulation 23.113 (d))

The court must make a specific finding that the removal or placement is necessary to prevent imminent physical damage or harm to the child. (Regulation 23.113 (b)(1))

As a general rule, an emergency removal cannot last more than 30 days without compliance with ICWA requirements unless the court makes certain findings. (Regulation 23.113 (e)) This means that the court must consider evidence of active efforts, testimony of a qualified expert witness, and evidence of whether the placement follows the placement preferences at a hearing that is within 30 days of the date the child was removed from the parent’s physical custody by the agency.

Jurisdiction:

California courts may not have jurisdiction over proceedings (other than emergency proceedings) involving an Indian child if the child resides or is domiciled within the reservation of a tribe that exercises exclusive jurisdiction over child custody matters or if the child is already a ward of a tribal court. Regulation 23.110 clarifies that in a situation where the court lacks jurisdiction, the court must expeditiously inform the tribal court of the matter, dismiss the state court proceeding and provide the tribal court with all information regarding the proceeding including, but not limited to, the pleadings and any court records.

Active Efforts:

Regulation 23.2 defines active efforts and describes eleven examples of active efforts.

Qualified Expert Witness:

² Note that regulation 23.107 requires inquiry at the start of each “proceeding”, not each “case”.

Regulations 23.121 and 23.122 discuss the requirements for qualified expert witness testimony as well as who can serve as a qualified expert witness.

Placement Preferences:

Regulations 23.129 through 23.132 address placement preferences for an Indian child. Important changes to note include: clarification that the issue of placement must be reassessed each time a change in placement is required and at each separate phase of the “proceedings.” This means the court must reassess whether the child’s placement complies with the placement preferences when a case moves through each of the four ICWA phases – foster care placement, termination of parental rights, pre-adoptive placement and adoptive placement.

The new regulations place limitations on the factors that the court can consider in making a determination that there is “good cause” to deviate from the placement preferences. In particular, the court may not depart from the placement preferences based on the socioeconomic status of any placement relative to another placement (Reg. 23.132 (d)), nor may the court find good cause to deviate from the placement preferences “based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.” (Reg. 23.132(e))

Transfers to Tribal Court:

Regulations 23.115 through 23.119 discuss transfers to tribal court. Particular issues to note are that the right to seek a transfer to tribal court may be exercised at any time, but attaches separately at the foster care placement and termination of parental rights phases of the case. (Reg. 23.115) Further, the regulations require the tribal court be promptly notified of the petition to transfer (Reg. 23.116), all parties have an opportunity to be heard, any “good cause” reasons to deny transfer are stated on the record, and the court’s decision be on the record or in a written order. (Reg. 23.118)

The new regulations list five factors that the court must not consider in determining whether “good cause” exists not to transfer jurisdiction: (1) whether the proceedings are at an advanced stage if the Indian child’s parent, Indian custodian, or tribe only recently received notice of the proceedings; (2) whether there was an earlier “proceeding” (i.e. foster care phase of the case) at which no petition to transfer was filed; (3) whether the transfer could affect the child’s placement; (4) the child’s cultural connections with the tribe; and (5) the socioeconomic conditions or any negative perception of tribal social services or judicial system. (Reg. 23.118)