

Beyond the Bench
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***California ICWA Update:
Understanding and Applying AB 3176***

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Goals for Today

- Understand what AB 3176 is
- Understand what AB 3176 does
- Review in summary key provisions of AB 3176
 - Full text of the statute may be located in the conference materials
 - This is not an ICWA 101 - we will only be walking through key changes to the law
- Address and note questions



AB 3176

What is it?



What is AB 3176?

- Tribally-sponsored bill, reflecting a collaborative effort with state and county partners.
- State law update incorporating the 2016 BIA ICWA regulations into California law
 - 2016 BIA ICWA regulations were effective immediately
- AB 3176 was effective January 1, 2019



What does AB 3176 do?

- Updates 32 sections of the Welfare & Institutions Code addressing ICWA, including:
 - Inquiry/Notice
 - Active Efforts
 - Qualified Expert Witness
 - Placement
- Clarifies the relationship between the federal regs. & CA law re:
 - Emergency removals/detentions of Indian children
 - Voluntary/involuntary placements



How is it being implemented?

- Core ICWA training
- CDSS Division 31 regulations
- Judicial Council of California Rules and Forms



Inquiry (WIC 224.2 (a))

*The court, county welfare department, and the probation department have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300, 601, or 602 may be or has been filed, is or may be an Indian child. The duty to inquire **begins with the initial contact**, including, but not limited to, asking the party reporting child abuse or neglect whether he or she has any information that the child may be an Indian child.*



Duty of Initial Inquiry

- **Starts:** By asking the Reporting Party whether he/she has any info that the child may be an Indian child (WIC 224.2(a))
- **Continues:** Child Welfare Agencies have a duty to ask the following individuals whether the child is or may be Indian and where the parents are domiciled (WIC 224.2(a)/(b)):
 - The child
 - The parents or guardian(s)
 - The Indian Custodian
 - Extended Family Members
 - Others who have an interest in the child
- This is more expansive than prior initial inquiry.



Further Inquiry (WIC 224.2 (e)) & Informal Notice

If the court, social worker, or probation officer has **reason to believe** that an Indian child is involved in a proceeding, the court, social worker, or probation officer shall make **further inquiry** regarding the possible Indian status of the child, and shall make that inquiry as soon as practicable. Further inquiry includes, but is not limited to, all of the following:

- (1) Interviewing the parents, Indian custodian, and extended family members...
- (2) Contacting the Bureau of Indian Affairs and the State Department of Social Services for assistance...
- (3) **Contacting the tribe or tribes** and any other person that may reasonably be expected to have information regarding the child's membership, citizenship status, or eligibility. Contact with a tribe shall, at a minimum, include telephone, facsimile, or electronic mail contact to each tribe's designated agent for receipt of notices under the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1901 et seq.). Contact with a tribe shall include **sharing information** identified by the tribe as necessary for the tribe to make a membership or eligibility determination, as well as information on the current status of the child and the case.



Further Inquiry/Investigation includes:

1. Interviewing parents and extended family members to gather the following information:
 - Name, birth date, and birthplace of the child
 - The name of the Indian tribe which the child is a member or may be eligible for membership
 - All names known of the Indian child's bio parents, grandparents, and great grandparents, including maiden, married, and former names or aliases, as well as their current and former addresses, birth dates, places of birth and death, **tribal enrollment info or other direct lineal ancestors of the child**
2. Contacting the **BIA** and **CDSS** for assistance in identifying the names and contact info of the tribes in which the child may be a member or eligible for membership
3. **Multiple** attempts to contact the **designated agent** for receipt of notices for the tribe or tribes, and contact with **any other person** that may reasonably be expected to have info regarding the child's membership or eligibility status by:
 - Telephone, and/or
 - Fax, and/or
 - E-mail



Reason to Know (WIC 224.2 (d))

The circumstances that may provide reason to know the child is an Indian child include the following:

- person having an interest in the child, including the child, an officer of the court, a tribe, an Indian organization, a public or private agency, or a member of the child's extended family informs the court that the child is an Indian child;
- The residence or domicile of the child, the child's parents, or Indian custodian is on a reservation or in an Alaska Native village;
- Any participant in the proceeding, officer of the court, Indian tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;
- The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;
- The court is informed that the child is or has been a ward of a tribal court; or
- The court is informed that either parent or the child possess an identification card indicating membership or citizenship in an Indian tribe.



Due Diligence Required (224.2 (g))

When there is reason to know the child is an Indian child, but the court does not have sufficient evidence to determine that the child is or is not an Indian child, the court shall confirm, by way of a report, declaration, or testimony included in the record that the agency or other party 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 whether a biological parent is a member and the child is eligible for membership.



Treat Child as an Indian Child (WIC 224.2 (i))

*(1) When there is reason to know that the child is an Indian child, **the court shall treat the child as an Indian child unless and until** the court determines on the record and after review of the report of due diligence as described in subdivision (g), and a review of the copies of notice, return receipts, and tribal responses required pursuant to Section 224.3, that the child does not meet the definition of an Indian child as used in Section 224.1 and the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1901 et seq.).*



Notice (formal notice by registered or certified mail)

When it is known, or there is reason to know the child is an Indian child specific ICWA notice by registered or certified mail return receipt requested must be sent for the dispositional hearing (see WIC 291(g)), 297(b)(2); the selection and implementation hearing (see WIC 294 (i)); a hearing on a section 388 petition that may result in a foster care placement, termination of parental rights, preadoptive placement or adoptive placement (see WIC 297(c)(2)).



Active Efforts (WIC 224.1 (f))

“Active efforts” means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. If an agency is involved in an Indian child custody proceeding, active efforts shall involve assisting the parent, 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 shall be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child’s tribe and shall be conducted in partnership with the Indian child and the Indian child’s parents, extended family members, Indian custodians, and tribe. Active efforts shall be tailored to the facts and circumstances of the case and may include, but are not limited to, any of the following:



Active Efforts – WIC 224.1 (f) cont’d

- (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 overcome barriers, including actively assisting the parents in obtaining those 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.
- (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.
- (8) Identifying community resources, including housing, financial assistance, transportation, mental health and substance abuse services, 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 postreunification services and monitoring.



Active Efforts

- Defined – 25 C.F.R. §23.2; WIC 224.1 (f) – affirmative, active, thorough and timely;
- 11 specific examples
- Must include assisting parents through case plan & removing barriers...



Active Efforts – new

- Must begin at first contact with family when “reason to know” (WIC §§306(f)(4), 319(e)(2));
- Must be documented in detail in the court record (WIC §361.7(a));
- Must be reviewed at each review hearing;



Active efforts – WIC 361.7

- Must be culturally appropriate;
- Must be tailored to the case;
- Must take account of tribe's social and cultural values and conditions; and
- Must utilize the available resources of tribe, extended family and Indian agencies.



Qualified Expert Witness (224.6(c))

Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:

- (1) A person designated by the Indian child's tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's tribe.
- (2) A member or citizen of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices.
- (3) An expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and child-rearing practices within the Indian child's tribe.



Emergency Proceeding AB 3176

- Includes when agency takes temporary custody under WIC 306;
- Includes a detention hearing (WIC 224.2 (I));
- Requires finding of “imminent risk of physical harm or damage”



Detention – Emergency Hearing

- An initial petition hearing under section 319 of the Welfare and Institutions Code is an “emergency removal” under ICWA if it is known, or there is reason to know that the child is an Indian child.



Emergency Proceedings

- 25 C.F.R. §23.2 Definition:
Means and includes any court action that involves an emergency removal or emergency placement of an Indian child.
- 25 C.F.R. §23.113 – sets requirements and limitations on emergency proceedings



Detention (cont'd)

- In addition to the other requirements to justify detention, if it is known, or there is reason to know the child is an Indian child, the evidence submitted to the court must include:
 - (1) A statement of the risk of imminent physical damage or harm to the Indian child and any evidence that the emergency removal or placement continues to be necessary to prevent the imminent physical damage or harm to the child.
 - (2) The steps taken to provide notice to the child's parents, custodians, and tribe about the hearing pursuant to this section.
 - (3) If the child's parents and Indian custodians are unknown, a detailed explanation of what efforts have been made to locate and contact them, including contact with the appropriate Bureau of Indian Affairs regional director.



Detention cont'd

- (4) The residence and the domicile of the Indian child.
- (5) If either the residence or the domicile of the Indian child is believed to be on a reservation or in an Alaska Native village, the name of the tribe affiliated with that reservation or village.
- (6) The tribal affiliation of the child and of the parents or Indian custodians.
- (7) A specific and detailed account of the circumstances that caused the Indian child to be taken into temporary custody.
- (8) If the child is believed to reside or be domiciled on a reservation in which the tribe exercises exclusive jurisdiction over child custody matters, a statement of efforts that have been made and that are being made to contact the tribe and transfer the child to the tribe's jurisdiction.
- (9) A statement of the efforts that have been taken to assist the parents or Indian custodians so the Indian child may safely be returned to their custody.



Detention cont'd

- If the court knows or has reason to know the child is an Indian child, the detention hearing cannot be continued beyond 30 days unless the court finds all of the following:
 - (1) Restoring the child to the parent, parents, or Indian custodian would subject the child to imminent physical damage or harm;
 - (2) The court is unable to transfer the proceeding to the jurisdiction of the appropriate Indian tribe; and
 - (3) It is not possible to have a hearing with all of the substantive ICWA protections such as a showing of active efforts, testimony of a qualified expert witness, etc. within that time.



Detention (cont'd) - Placement

- If the child is ordered detained, the placement must comply with the ICWA placement preferences unless the court finds good cause exists not to follow the placement preferences for detention. "...This finding does not affect the requirement that a diligent search be made for a subsequent placement within the placement preferences."



Disposition: Within 30 days (WIC 352(b))

Notwithstanding any other law, if a minor has been removed from the parents' or guardians' custody, a continuance shall not be granted that would result in the dispositional hearing, held pursuant to Section 361, being completed longer than 60 days, or 30 days in the case of an Indian child, after the hearing at which the minor was ordered removed or detained, unless the court finds that there are exceptional circumstances requiring a continuance. If the court knows or has reason to know that the child is an Indian child, the absence of the opinion of a qualified expert witness shall not, in and of itself, support a finding that exceptional circumstances exist. The facts supporting a continuance shall be entered upon the minutes of the court. The court shall not grant continuances that would cause the hearing pursuant to Section 361 to be completed more than six months after the hearing pursuant to Section 319.



Placement (WIC 319 (h)(1)(C))

*If the court knows or has reason to know that the child is an Indian child, the Indian child shall be **detained** in a home that complies with the placement preferences set forth in Section 361.31 and in the federal Indian Child Welfare Act of 1978, unless the court finds good cause exists pursuant to Section 361.31 not to follow the placement preferences. If the court finds good cause not to follow the placement preferences for detention, this finding does not affect the requirement that a diligent search be made for a subsequent placement within the placement preferences.*



Placement (WIC 361.31(a))

If an Indian child is removed from the physical custody of his or her parents or Indian custodian pursuant to Section 361, the child's placement shall comply with this section. **The placement shall be analyzed each time there is a change in placement.**



Placement (WIC 361.31)

- (l) A placement shall not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a nonpreferred placement that was made in violation of [ICWA].



Placement - Good Cause to Deviate

The court may deviate from the preference order only for good cause, which may include the following considerations:

- The unavailability of suitable families within the placement preferences based on a documented diligent effort to identify families meeting the preference criteria. The standard for determining whether a placement is unavailable shall conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.



Voluntary/Involuntary

- 25 C.F.R. §23.2 definitions; WIC 224.1 (n), (p) & (q) – define involuntary, upon demand & voluntary
- Can't be voluntary if:
 - There was a threat of removal;
 - Parent can't have child returned "upon demand" ie. no contingencies or formalities.
- Agency suggests/requires guardianship?



Voluntary/Involuntary

- WIC §§224.1(n) & (q) – incorporates definitions;
- WIC §16507.4(b)(3) – clarifies requirements re. voluntary foster care placements.
- Any consent must be taken before a judge.



Thank you

