

## Beyond the Bench 23 ICWA: Hot Topics

December 3, 2015  
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### Goals

- ▶ Gain familiarity with updated BIA Guidelines – they are effective now!
- ▶ Understand the issues in Abbigail A.
- ▶ Walk away with concrete recommendations for best practices/approaches to ICWA cases

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### Historical Timeline

- ▶ ICWA was passed in 1978
- ▶ Guidelines first published in 1979
- ▶ California passed Senate Bill 678 in 2006, which incorporated the ICWA and Guidelines into state law and provided heightened standards in some areas
- ▶ Updated Guidelines published February 25, 2015 are in many ways consistent with existing state law

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## Updated Guidelines

- ▶ 2015 Guidelines supersede and replace the 1979 Guidelines
- ▶ New Guidelines apply not only to state courts, but also to placing agencies
- ▶ Effective immediately

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## 2015 Guidelines: General Themes

- ▶ Clarify minimum federal standards
- ▶ Intended to increase compliance with the language and intent of the ICWA
- ▶ Focus on:
  - Early intervention
  - Tribal jurisdiction

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## 2015 Guidelines: Active Efforts

- ▶ Term “active efforts” has had varying interpretations, which updated Guidelines clarify
- ▶ Active efforts are more than the reasonable efforts required by Title IV-E
- ▶ Provides 15 examples of active efforts

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### A.3. When Does ICWA Apply

- ▶ Updated Guidelines clarify that ICWA applies even in proceedings where the child is not removed
  - Investigations
  - Differential response
  - Alternate response
- ▶ And, that tribes may intervene in pre-removal stages of a case to assist in preventing breakup of the family.

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### A.3. When Does ICWA Apply Cont'd

- ▶ Where agencies and state courts have reason to know that a child is an Indian child, they must treat that child as an Indian child unless and until it is determined that the child is not an Indian child.
- ▶ Consistent with existing Cal. Rules of Court

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### A.4. How do I contact a tribe under these guidelines?

- ▶ This is a new section
- ▶ Notify representative designated in BIA list of tribal agents for service of ICWA notice, published in Federal Register
- ▶ Contact tribe if they are not named on the above list
- ▶ Contact the BIA where you don't have accurate contact info or tribe(s) fail to respond to written inquiries

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## NO Existing Indian Family

- ▶ EIF was a judicially-created doctrine
- ▶ Not an issue in California since the passage of SB 678
- ▶ New Guidelines specifically state that it is not valid

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## B.1. When does the requirement for active efforts begin?

- ▶ At the moment the possibility arises that an Indian child may be removed
- ▶ Active efforts must be conducted while investigating whether child is an Indian child

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## B.2. Inquiry

- ▶ (a) Agencies/courts must ask whether there is reason to believe a child that is subject to a child custody proceeding is an Indian child.
- ▶ (b)(2) Court must confirm that the agency used active efforts to work with all tribes of which the child may be a member to verify membership.

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### B.3. Membership in Tribe

- Tribal membership determinations are left exclusively to the tribe
- Formal enrollment not required
- State cannot substitute its judgement for a tribe
- BIA can no longer provide membership determination

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### B.4. Membership in Tribe

- ▶ Where child is eligible for membership in more than one tribe:
  - Notify all tribes specifying the other tribe(s) the child may be eligible for membership in.
  - Tribes given opportunity to make determination.
  - Consider significant contacts:
    - Preference of the parents
    - Length of domicile or residence on or near the reservation
    - Tribal membership of custodial parent or Indian custodian
    - Interest asserted by each tribe in response to ICWA notice.

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### B.4. Membership in Tribe

- ▶ Agency should take steps necessary to obtain membership for the child in the tribe that is designated as the Indian child's tribe. (d)(iii)
- ▶ Consistent with Cal. Rules of Court 5.482(c) and 5.484(c)(2), which are currently before the Cal. Supreme Court (*In re Abbigail A.*)

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*In re Abbigail A.*

- ▶ Does Agency have an obligation to assist in enrolling children in their Indian tribe when they do not yet meet the technical definition of Indian child because a parent is not yet enrolled?
- ▶ Agency is the only entity with the authority to obtain necessary documentation for enrollment; under foster care bill of rights agency should assist with enrollment since benefits flow (both intangible and tangible benefits).

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**Tribes may authorize another tribe for ICWA purposes**

- ▶ The Indian child's tribe may authorize another tribe to act as a representative for the tribe in a child custody case, including having a representative tribe perform home studies or expert witness services for the Indian child's tribe. (B.4.(d))

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**B.5. Notice**

- ▶ Required for each proceeding
- ▶ Should include genogram for both parents
- ▶ If child is transferred interstate, both states are required to provide notice

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## B.8. Emergency Removal

- ▶ Allowable only as necessary to *prevent imminent physical damage or harm to the child.*
- ▶ Requires a showing of active efforts
- ▶ Temporary emergency custody should not be continued for more than 30 days, unless:
  - A hearing, noticed in accordance with the Guidelines, is held and results in a determination by the court, supported by *clear and convincing evidence* and the *testimony of at least one qualified expert witness*; or
  - Extraordinary circumstances exist

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## C.2. Transfer to Tribal Court

- ▶ State court must transfer the case unless:
  - Either parent objects;
  - The tribal court declines the transfer; or
  - The state court determines that good cause exists for denying the transfer

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## C.3. Good Cause to Deny Transfer

- ▶ Court may not consider:
  - Whether or not the case is at an advanced stage;
  - The Indian child's contacts with the tribe or reservation;
  - Socio-economic conditions or any perceived inadequacy of the tribal or BIA social services or judicial systems; or
  - The tribal court's prospective placement
- ▶ Burden of establishing good cause not to transfer is on the party opposing the transfer

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## D – Involuntary Proceedings

- ▶ D.2. Requires detailed documentation that active efforts were provided prior to removal/TPR
  - Active efforts should include the available resources of the tribe, extended family, and Indian caregivers

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## D – Involuntary Proceedings Cont'd

- ▶ D. 3. Applicable standards of evidence/proof:
  - ▶ Foster care = clear and convincing evidence, including testimony of qualified expert witness...
  - ▶ Termination of Parental Rights = beyond a reasonable doubt, including testimony of a qualified expert witness...

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## D – Involuntary Proceedings Cont'd

- ▶ D.3. (c) Must show a causal relationship between the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the child
  - The following, on their own, do not constitute clear and convincing evidence: isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or non-conforming social behavior

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## D – Involuntary Proceedings Cont’d

### ▶ D.4. (a) Qualified Expert Witness

Should have knowledge of the particular tribe’s culture and customs

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## D – Involuntary Proceedings Cont’d

### ▶ D.4.(b) QEW: preferential order

1. Member of the child’s tribe recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices
2. Member of another tribe recognized by the child’s tribe as a QEW...
3. Layperson recognized by the child’s tribe...
4. A professional person having substantial education and experience in the area of his or her specialty who can demonstrate knowledge of the prevailing social and cultural standards and childrearing practices in the child’s tribe.

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## F. 1. Placement Preferences

### ▶ (b) Agency/Court must follow the placement preferences.

- If this can’t be done, Agency must demonstrate by clear and convincing evidence that a diligent search was made to locate ICWA-compliant placement
- Consistent with WIC 361.31(k) – active efforts required to comply with placement preferences

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## Placement Preferences

- ▶ F.1. (d): Good cause finding required by court prior to departing from the placement preferences
- ▶ F.4. (b) burden to establish good cause is on party seeking the departure

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## Placement Preferences

- ▶ F.4.(c) Good cause must be based on:
    - Request of parent
    - Request of child
    - Extraordinary physical or emotional needs of the child... as established by a QEW
    - CANNOT include ordinary bonding or attachment that occurs in a non-ICWA compliant placement
- \*\*\* Good cause does not include independent consideration of best interest because the preferences reflect the best interests of an Indian child in light of the purposes of the Act \*\*\*

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## Placement Preferences

- ▶ F.4.(c) In making a good cause determination, a court may not consider:
  - The socio-economic status of any placement relative to another placement

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## G.2. Invalidation

- ▶ Indian child, parent or tribe may petition to invalidate any action that includes a violation of sections 1911, 1912 or 1913 of the Act.
- ▶ Any party may challenge a violation of any other party's rights – a party whose rights are violated is not required to bring such a challenge themselves

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**Thank you!**

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