

## The Indian Child Welfare Act: New Binding Federal Regulations You Need to Know About!

In 1978, Congress enacted the Indian Child Welfare Act (ICWA). [25 U.S.C. §§ 1901 – 1963](#). Through ICWA, Congress declared

it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture....

25 U.S.C. § 1902.

For the first time since its passage, ICWA now has federal regulations that states must follow. [25 CFR Part 23](#). One of the purposes of these new regulations is to ensure the consistent application of ICWA protections across the states. 25 CFR 23.101. The regulations become effective on **December 12<sup>th</sup>** and **apply to all “child custody proceedings” and “emergency proceedings”** starting on or after that date. 25 CFR 23.103, 23.143.

This post highlights some of the changes. For much more information about the new regulations, including on-demand training slides, quick reference guides, frequently asked questions, and the final rule with comments and responses, visit the Department of Interior, Bureau of Indian Affairs (BIA) website [here](#).

### What is a child custody proceeding under ICWA?

For purposes of ICWA, “child custody proceeding” is defined as *any action*, other than an emergency proceeding, that *may result in*

- a foster care placement (including a foster care placement that may result from a status offense, which in North Carolina is an undisciplined juvenile action),
- a pre-adoptive or adoptive placement, or
- a termination of parental rights.

25 U.S.C. § 1903(1); 25 CFR 23.2.

ICWA defines foster care placement broadly. Foster care includes the temporary placement in a foster home, institution, or home of a guardian or conservator where the parent (whose rights have not been terminated) or an Indian custodian (if applicable) cannot have the child returned upon demand. 25 U.S.C. § 1903(1); 25 CFR 23.2; see 25 CFR 23.2 “upon demand” defined.

ICWA **specifically excludes** juvenile delinquency and divorce actions between the child's parents from the definition of child custody proceeding. 25 U.S.C. § 1903(1); 25 CFR 23.2. Through its response to public comments, the BIA clarified that custody actions between the child's parents that occur outside of a divorce proceeding are also excluded from ICWA because the custody of a child to either parent is not a placement in foster care. 81 FR 38800 (Jun 14, 2016). See also 25 CFR 23.103(b)(3).

### **What is an emergency proceeding?**

An emergency proceeding is "any court action that involves emergency removal or emergency placement of an Indian child." 25 CFR 23.2.

### **ICWA applies to an Indian child.**

An **Indian child** is

- 17 or younger,
- not married, and
- either
  - a member of an Indian tribe, or
  - eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe\*.

25 U.S.C. § 1903(4); 25 CFR 23.2.

This definition requires more than how a parent or child identifies him or herself or whether a relative (other than the child's biological parent) may have been or is a member of a tribe.

**Indian tribe** is defined by ICWA as those tribes or bands that are federally recognized as eligible for services. 25 U.C.S. § 1903(8). There are 566 such tribes. 81 FR 5019. In North Carolina, there is only one Indian tribe that meets this definition: the Eastern Band of Cherokee Indians. It is possible that an Indian child from another federally recognized tribe may be the subject of a child custody proceeding in North Carolina. You can find a list of the tribes [here](#).

### **Determination of Indian child is made by the Indian tribe.**

The Indian tribe determines

- whether the child is a member or
- whether the child's parent is a member and whether the child is eligible for membership.

25 CFR 23.108.

The court must defer to the tribe's determination of membership (or eligibility for membership) and may rely on documentation from the tribe. *Id.* The court is prohibited from considering certain factors, some of which had been previously recognized and relied upon by courts, when determining if ICWA applies. Those **prohibited factors** include

- the relationship between the Indian child and his/her parents,
- the parent's or child's participation in the Tribe's activities, and
- an Indian child's blood quantum.

25 CFR 23.103(c).

### **Mandatory inquiry in all child custody and emergency proceedings.**

To make a timely determination as to whether ICWA applies, at the start of a child custody or emergency proceeding, the court must ask each participant if he or she knows or has reason to know that the child is Indian child. 25 CFR 23.107, 23.124. The responses should be part of the record. 25 CFR 23.107. A court has "**reason to know**" the child is an Indian child if it is notified that

- the child is an Indian child or a participant discovers information that indicates the child is an Indian child;
- the child's, parent's, or Indian custodian's domicile or residence is on a reservation or in an Alaska Native village;
- the child is or has been a ward of tribal court; or
- the child or parent has a membership card for a recognized tribe.

*Id.*

If there is reason to know the child is an Indian child, the party seeking placement of the child must make diligent efforts to verify the child's status. *Id.* The court must treat the child as an Indian child and apply ICWA protections until and unless it is determined by the tribe that the child is not an Indian child. *Id.*

### **ICWA Procedures and Standards**

The new regulations add to and clarify the statutory procedures and standards that apply under ICWA and address

- **notice** to the tribe, the child's parents, and the child's Indian custodian (if applicable), with copies to the appropriate Regional Director at the BIA; what must be included in the notice; and the requirement that the notice be sent by registered or certified mail, return receipt requested (25 CFR 23.11, 23.111)

- The BIA maintains a list of the recognized tribes and their agents, which you can find [here](#). The different regions and contact information for the various regional directors are in 25 CFR 23.11(b)
- The BIA can assist with identifying and contacting the tribe, parent, and Indian custodian (if applicable) (25 CFR 23.105, 23.111)
- **time limits** related to the receipt of the ICWA notice and the hearing addressing a foster care placement or termination of parental rights (25 CFR 23.112)
- the court's documentation of the "**active efforts**" (now defined at 25 CFR 23.2) that were made to prevent the breakup of the Indian family before it orders a child in foster care or terminates a parent's rights (25 CFR 23.120)
- qualifications for the **expert** who testifies about whether continued custody with the Indian parent or custodian would cause **serious emotional or physical damage to the child** (25 CFR 23.122) and the factors a court may not solely consider when determining what would cause serious emotional or physical damage to the child (25 CFR 23.121)
- **placement preferences** for foster care, pre-adoptive, and adoptive placements, and good cause to deviate from those preferences (25 CFR 23.129 through 23.132)
- standards and procedures that apply to **emergency proceedings**, including time limits and a finding that "the emergency removal or placement is necessary to prevent imminent physical damage or harm to the child" (25 CFR 23.113)
- determining and responding to an **improper removal** of an Indian child (25 CFR 23.114)
- **voluntary proceedings**, including a parent's consent and withdrawal of consent to a placement (25 CFR 23.124 through 23.128)
- tribal versus state court **jurisdiction**, including requests to transfer to tribal court (25 CFR 23.110, 23.115 through 23.119) and
- a **petition to invalidate the action** as a result of an ICWA violation (25 CFR 23.137).

### The take-away for you...

The regulations impact various types of proceedings in North Carolina, including

- abuse, neglect, dependency;
- termination of parental rights;
- adoption;
- guardianship; and
- undisciplined juvenile actions.

Don't rely on your past practice. Be sure to familiarize yourself with the various changes made by these new regulations, starting Monday, December 12, 2016.

*\* This post was amended on March 4, 2017 to correct the definition of Indian child. The child's biological parent is not required to be a member of the same Tribe that the child is eligible to be a member of.*