



Children's Justice Initiative Revised Bureau of Indian Affairs Guidelines

September 29, 2015

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Bureau of Indian Affairs (BIA) Guidelines

- **These guidelines clarify the minimum Federal standards, and best practices, governing implementation of the Indian Child Welfare Act (ICWA) to ensure that it is applied in all States consistent with the Act's express language.**
- **Originally signed in 1979.**
- **They were revised on February 25, 2015. Federal Register, Vol. 80, No. 37.**
- **They are also on DHS' public website.**



BIA Guidelines

- **Congress' intent in enacting the statute, and the canon of construction that statutes enacted for the benefit of Indians are to be liberally construed to their benefit**



Active efforts

- ***Active efforts*** are intended primarily to maintain and reunite an Indian child with his or her family or tribal community and constitute more than reasonable efforts as required by Title IV–E of the Social Security Act (42 U.S.C. 671(a)(15). See also **Indian Child Welfare Act, 25 U.S. C. §1912 (d)**, active efforts shall be made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts have proved unsuccessful. See also recent MIFPA Amendments, 260.762. Active Efforts.



Recent Minnesota Indian Family Preservation Act Amendment

- **260.762 DUTY TO PREVENT OUT-OF-HOME PLACEMENT AND PROMOTE FAMILY REUNIFICATION; ACTIVE EFFORTS. Subdivision 1.**
- **Active efforts.**
- Active efforts includes acknowledging traditional helping and healing systems of an Indian child's tribe and using these systems as the core to help and heal the Indian child and family.

Active Efforts- what does that mean?

- **Engage the entire family, child, parents, extended family members and Indian custodian.**
- **Keep siblings together.**
- **Help find resources that help parents to overcome barriers including actively helping them get those services.**
- **Do a diligent search of extended family members for help in finding others and for possible placement.**



Active Efforts

- **Use the prevailing social and cultural conditions and way of life and ask tribal representatives who are so designated by the child's tribe and who have the knowledge about the culture, to help your agency.**
- **Utilize all available and culturally appropriate prevention strategies to prevent removal.**
- **Do a comprehensive assessment of the family's circumstances (find out what is happening with the family, has there been a recent death in the family, is there recent trauma?) with a focus on safely reunifying the children with the family as a goal.**



Active Efforts

- **Notify and consult with extended family member for cultural connections and as possible placement.**
- **Identify community resources including: housing, financial, transportation, mental health, substance abuse, peer support services and actively helping the family to get those resources.**



Active Efforts

- **If services are non-existing, consider other ways to address the needs of the parents and extended family.**
- **Provide post-reunification services and post-monitoring services.**
- **Help family visit naturally.**
- **Continue monitoring.**



Foster Care Placement

***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, although parental rights have not been terminated; See also Indian Child Welfare Act, 25 U.S.C. §1903 (1).**



Domicile

Under the principle for determining the domicile of an Indian child, it is entirely logical that “[o]n occasion, a child’s domicile of origin will be in a place where the child has never been.” See *Mississippi Band of Choctaw vs. Holyfield*, 490 U.S. at 48.



What is an extended family member?

Extended family member is defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, is a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent. See Indian Child Welfare Act, 25 U.S.C. §1903(2).



What is an Indian child?

Any unmarried person who is under age eighteen and is either: (1) a member of an Indian tribe; or (2) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe. See Indian Child Welfare Act 25 U.S.C. §1903 (4).

Minnesota Indian Family Preservation Act, §260.755, subd. 8, Indian child means an unmarried person who is a tribal member or is eligible to be a tribal member.



Recent Minnesota Indian Family Preservation Act Amendment

- Minnesota Indian Family Preservation Act, 260.755, Subd. 8, was amended:
- **Indian child also includes an unmarried person who satisfies either clause (1) or (2), is under age 21, and is in foster care pursuant to section 260C.451.**

What is an Indian child's tribe?

(1) the Indian tribe in which an Indian child is a member or eligible for membership; or (2) in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has more significant contacts. See also Indian Child Welfare Act 25 U.S.C. §1903(5).



What is a parent?

Any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include an unwed father where paternity has not been acknowledged or established. See Indian Child Welfare Act, 25 U.S.C. §1903(9). To qualify as a parent, an unwed father need only take reasonable steps to establish or acknowledge paternity. (i.e. file an action or DNA testing).



Recent Minnesota Indian Family Preservation Act Amendment

- **260.755, Subd. 14**, Paternity has been acknowledged when an unmarried father takes any action to hold himself out as the biological father of an Indian child.

When is ICWA applicable?

Whenever an Indian child is the subject of a State child custody proceeding as defined by the Act.

ICWA also applies to proceedings involving status offenses or juvenile delinquency proceedings if any part of those proceedings results in the need for placement of the child in a foster care, preadoptive or adoptive placement, or termination of parental rights. See also 25 U.S.C. §1903(1).



What is the existing family doctrine?

There is no exception to application of ICWA based on the so called “existing Indian family doctrine.”

Some examples are: whether the family is “Indian enough” by practicing tribal customs, voting in tribal elections or attends tribal community events, contributes to tribal/Indian charities, subscribes to tribal newsletters, participates in religious, social, cultural or political events, keeps in touch with other tribal members or the relationship between the child and parents, whether the parents has current ties with the tribe, whether the parent ever had custody of the child and the level of involvement of the tribe in state court.



What does making an inquiry mean?

- **Social Service agencies and State courts must ask whether the child could be Indian and do an investigation to find out if he/she is an Indian child with tribal ties.**
- **Social Services agencies may also use genograms.**
- **Minnesota Indian Family Preservation Act, §260.761, subdivision 1, is amended to read: Subdivision 1. Inquiry of tribal lineage.**



Why is inquiry important?

- **Even in those cases in which the child is not removed from the home, such as when an agency opens an investigation or the court orders the family to engage in services to keep the child in the home as part of a diversion, differential, alternative response or other program, agencies and courts should follow the verification and notice provisions of these guidelines.**



Why is tribal involvement and notice important?

- **Providing notice allows tribes to intervene as early as possible in a child custody proceeding and provides an opportunity for the tribe to bring resources to bear to assist the family in preventing a breakup of the family.**



Treat the child as if he or she is an Indian

- **If there is any reason to believe the child is an Indian child, the agency and State court must treat the child as an Indian child, unless and until it is determined that the child is not a member or is not eligible for membership in an Indian tribe.**



How do I provide notice to a tribe?

- **Many tribes designate an agent for receipt of ICWA notices. The Bureau of Indian Affairs publishes a list of tribes' designated tribal agents for service of ICWA notice in the Federal Register each year and makes the list available on its Web site at *www.bia.gov*.**



What does applying a standard mean?

- **In any child custody proceeding 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 that the State court must apply the higher standard.**



When does active efforts start?

- **From the moment the possibility arises that an agency case or investigation may result in the need for the Indian child to be placed outside the custody of either parent or Indian custodian in order to prevent removal.**
- **It must start at the same time the agency is making an inquiry about tribal membership for parent and child.**



Recent Minnesota Indian Family Preservation Act Amendment

- Minnesota Indian Family Preservation Act, 260.761, Subd. 1, inquire of the child, the child's parents and custodians, and other appropriate persons whether there is any reason to believe that a child brought to the agency's attention may have lineage to an Indian tribe. This inquiry shall occur at the time the child comes to the attention of the local social services agency.

Who determines who is an Indian child?

- **The determination by a tribe of whether a child is a member, is eligible for membership, or whether a biological parent is or is not a member of that tribe, is solely within the jurisdiction and authority of the tribe.**
- **No other entity may determine whether child is a tribal member except the tribe. If tribe verifies, then, courts must accept that.**
- **The child does not need former tribal contacts or does not have to possess certain blood quantum.**



What is the procedure for determining which is the eligible tribe if there is more than one tribe?

- **Agencies must notify all potential tribes where the child may be a tribal member.**
- **Significant contacts could be preference of the parents, length of past domicile or living on/near the reservation, tribal member of the custodial parent/Indian custodian.**
- **If child is not a member, give tribes a chance to determine membership.**



Notice requirements

- **A social service agency or court, if they have a reason to know that the child is an Indian child, the court/agency must send notice to the tribe, the parents/Indian custodian by registered mail, return receipt requested. See also 25 U.S. C. §1912(a).**
- **Notice may be done electronically or personal service.**



Transfer of jurisdiction

- **Parties have a right to transfer to tribal court unless that court declines, if a parent objects or if the court finds good cause for denying the transfer. See also 25 U.S. C. §1911(b).**
- **The reasons must be stated on the record or in writing.**
- **Whenever a parent or tribe seeks to transfer the case it is presumptively in the best interest of the Indian child, consistent with the Act, to transfer the case to the jurisdiction of the Indian tribe.**



Time limits

- **Additional time limits apply: Tribes, parents/Indian custodians may request an additional 20 days after they receive notice to prepare. See also 25 U.S.C. §1912(a).**
- **The proceeding may not begin until 30 days after the parent/Indian custodian and/or tribe has received notice (which includes the 10 plus 20 days).**



Voluntary proceedings

- **Agencies and State courts should provide the Indian tribe with notice of the voluntary child custody proceedings, including applicable pleadings or executed consents, and their right to intervene under these guidelines. See also Minnesota Indian Family Preservation Act, 260.765, Subd. 2.**



Placement preferences

- **If the Indian child's tribe has established by resolution a different order of placement preference than that specified under ICWA, the agency or court must follow tribal placement preferences. See also 25 U.S.C. §1915(b).**
- **The agency must show a diligent search was conducted to find relatives.**



Good Cause exceptions

- **Extraordinary physical or emotional needs of the child does not include ordinary bonding or attachment that may have occurred as a result of a placement or the fact that the child has, for an extended amount of time, been in another placement that does not comply with the Act.**
- **Good Cause – See also 25 U.S.C. §1915(b).**



Good cause

- **The good cause determination does not include an independent consideration of the best interest of the Indian child because the preferences reflect the best interests of an Indian child in light of the purposes of the Act.**
- **The court must determine that active efforts were made by the agency to find placements meeting the placement preference criteria.**



Standards of evidence

- **Clear and convincing evidence 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 particular child who is the subject of the proceeding.**
- **Evidence of poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or non-conforming social behavior does not by itself constitute clear and convincing evidence that if the child stayed with the parent/Indian custodian would result in serious emotional or physical damage to the child.**



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