

TO: Dependency Alternative Program – ICWA committee members

DATE: November 8, 2019

MEETING DATE: November 14, 2019

MEMORANDUM OF LAW

An Indian child is:

- 1) a member of a federally recognized tribe; or
- 2) eligible for membership in a federally recognized tribe and has a biological parent who is a member.

APPLICABILITY OF THE INDIAN CHILD WELFARE ACT (ICWA)

ISSUE: Does ICWA apply to Title 25 In Loco Parentis and Title 14 Guardianship proceedings that come through the DAP program in light of Parents' voluntary consent to these proceedings? If ICWA does apply, does the DAP program have procedures in place to ensure compliance with ICWA?

RULE: 25 CFR 23.103 states:

(a) ICWA includes requirements that apply whenever an Indian child is the subject of:

- (1) A child-custody proceeding, including:
 - (i) An involuntary proceeding;
 - (ii) A voluntary proceeding that could prohibit the parent or Indian custodian from regaining custody of the child upon demand;...
- (2) An emergency proceeding.

(b) ICWA does not apply to:

- (1) A Tribal court proceeding;
- (2) A proceeding regarding a criminal act that is not a status offense;
- (3) An award of custody of the Indian child to one of the parents including, but not limited to, an award in a divorce proceeding or
- (4) A voluntary placement that either parent, both parents or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, chosen for the Indian child and that does not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand.

25 U.S.C. § 1903 defines Child Custody Proceeding to mean and include:

(i) "foster care placement" ...any action removing an Indian Child from its 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, but where parental rights have not been terminated;

ANALYSIS: In both Title 25 In Loco Parentis and Title 14 Guardianship proceedings, children are being removed from their parent and are being placed in the home of a third party and in both of these

proceedings, the parent cannot have the children returned upon demand, they have to take the additional step of asking the court to set a hearing to either dissolve the Title 14 Guardianship or to change the In Loco Parentis orders. Therefore, ICWA applies to DAP cases, as these two proceedings are usually what is produced from DAP proceedings in lieu of pursuing a dependency petition. For DAP cases where custody is being exchanged between parents, ICWA does not apply as the child is still with a parent.

While DAP proceedings are considered voluntary and we don't proceed unless we have everyone's voluntary consent to participate, the ICWA guidelines indicate that for a voluntary proceeding to be truly voluntary, not only must it be of the parent's free will, but it also has to be absent threat of removal by a state agency. For DCS referral cases to DAP, it is arguable that there is a threat of removal by a state agency. Additionally, the ICWA guidelines indicate that any provision in a voluntary foster care placement consent, attempting to limit the parent or Indian custodian's right to withdraw his or her consent, would be invalid under ICWA.

CONCLUSION: Where ICWA applies to DAP proceedings, it would appear that these proceedings should be classified as involuntary proceedings since the parent or Indian Custodian would not be able to obtain return of the child upon demand. We need to set up procedures within DAP to ensure compliance with ICWA.

COMPLIANCE WITH ICWA

INTAKE: ICWA cases need to be carefully screened so that we know from the very beginning whether or not the ICWA applies to the family

Issues to be discussed:

- 1) DCS referrals – Can DCS ensure that the Nation has been notified of the first DAP hearing and that the Nation is involved in the staffing process/TDM?
- 2) Private referrals – How do we ensure ICWA has been verified and what efforts should be made to secure notice to the tribe for the first DAP hearing?
- 3) Jurisdictional questions – We need to ensure the children aren't already subject to proceedings in tribal court

NOTICE: Where ICWA applies, parents, the Nation or the BIA need to be properly served prior to the entry of final orders. For service to be proper, notice must be provided to the parents and tribe by registered or certified mail, return receipt requested, of the proceeding. Service must be completed at least 10 days before the hearing.

Issue to be discussed:

- 1) Does DAP want to restrict ICWA cases only to those that we are able to confirm the attendance of the Nation at the first DAP hearing?
- 2) Is it acceptable to obtain temporary orders at the first DAP proceeding while we wait for advisory counsel to effectuate service on the Nation/BIA to obtain final orders at the return hearing?

ACTIVE EFFORTS: If we are classifying Title 25 and Title 14 proceedings as involuntary proceedings, the ICWA guidelines indicate that the court must conclude that active efforts have been made to prevent the breakup of the Indian family and those efforts have been unsuccessful. These efforts must be documented in detail in the record.

Issues to be discussed:

- 1) If the DAP referral is from DCS, will DCS make their expert witness available for ICWA testimony?
- 2) If the DAP referral is a result of a private filing, how will advisory counsel secure ICWA testimony for active efforts?
- 3) Who is the party responsible for making active efforts if there is no DCS involvement?

PLACEMENT PREFERENCES: In cases where the potential Title 14 guardian or Title 25 third party is not a family member, the court will need to make a finding that there is good cause to deviate from the placement preferences by clear and convincing evidence

Issues to be discussed:

- 1) Is it sufficient for advisory counsel to flush out via testimony the viable and nonviable relatives to meet the placement preferences to establish a diligent search for suitable preferred placements in order to allow the court to find good cause to deviate?
- 2) Defer to the Nation regarding placement preference?

CONSENTS: Advisory counsel must obtain written consents that are then recorded before the Judge and the Judge certifies that the terms and consequences of the consent were fully explained and understood by the parent. The Judge must also certify that the parent fully understood the explanation in English or that an interpreter was provided provide translation to the parent in the language that the parent understands.

Issues to be discussed:

- 1) Is the attached sample consent sufficient as a baseline for us to use to draft our Title 14 and Title 25 consents?
- 2) Can the consents be executed prior to the actual DAP hearing with the Judge or does the parent have to sign in front of the Judge?