

ICWA 101

MCAA CHIPS Conference – September 2018
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BASICS

- Spirit of ICWA
 - “Education for Extinction” by David Wallace
 - Our Spirits Don’t Speak English
 - Duluth ICWA Child Welfare Scholar Program – Two Conferences
- 11 Tribes in Minnesota: 7 are Ojibwe/Chippewa/Anishinaabe and 6 are Sioux
- Get to know the Indian Community closest to your office. Be proactive about it.
- Minnesota Family Indian Preservation Act (“MIFPA”) at *Minn. Stat.* 260.751-835.
- Indian Child Welfare Act (“ICWA”) at 25 *U.S.C.* 1901-1963.
- BIA Regulations – July 2016 Regulations
- BIA Guidelines – December 2016 Guidelines
- Written materials in packet

BEGIN BEFORE THE BEGINNING

of the court case, that is

BEGIN BEFORE THE BEGINNING

- ICWA Inquiry
 - Applies to all service contacts
 - Must be done in each and every case by the CP Intake Investigator/Agency first contact on the case
 - Must also be done at each and every court hearing
- ICWA/MIFPA tab in MNCIS
- If there is reason to believe a child is an Indian child the case must be treated as an ICWA case until determined otherwise.

BEGIN BEFORE THE BEGINNING

MINNESOTA DEFINITION OF INDIAN CHILD IS DIFFERENT FROM THE FEDERAL DEFINITION.

Minnesota:

- The child must be eligible for membership in a federally recognized tribe. *Minn. Stat. 260.755, subd. 8.*
- Irrelevant whether the parent/s is an enrolled member or not.
 - Check eligibility letters from out-of-state tribes carefully.

Federal:

- The child must be a member of a federally recognized tribe
- OR
- The child must be eligible for membership in a federally recognized tribe AND a biological child of a member of a federally recognized tribe.

BEGIN BEFORE THE BEGINNING

- Make an active effort to reach out to the tribal representative/attorney regarding the case. Advise your workers to reach out to the tribal representative repeatedly and inquire as to what the tribes' position is on issue in the case (placement, case planning, visitation, etc.)
- Don't 'forget' about the tribe until the last minute and then tell them what has already been done. That gets old fast. And, is contrary to the laws and spirit of the ICWA/MIFPA.
- If you frequently have cases with a particular tribe, see if they would be interested in having regular 'staffings' to discuss cases. This also helps to create more trusting relationships and to get to know each other better. If you can have food – even better!

BEGIN BEFORE THE BEGINNING

- The county's ICWA inquiry is vital.
- Only a tribe can determine whether a child is eligible for membership.

JURISDICTION

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- State court does not have jurisdiction if child resides or is domiciled on reservation or a ward of tribal court.
 - It's possible that you may need to remind a tribal representative of this and that you (the state) can't initiate a court action.
 - Emergency action is acceptable.

JURISDICTION

- Transfer of jurisdiction to tribal court is granted absent good cause to do so.
 - Good cause is limited.

NOTICES

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NOTICES

- MIFPA and ICWA and Court
- MIFPA and petitioners' ICWA notices are both within county responsibility.
- There are 2 samples of the MIFPA notices in your packet
- DHS is currently revising them, and they are not in SSIS right now. DHS has indicated that the BIA form should be used.
- Must include a Family Tree and as much information as possible when sending any Notices. The more information the better.

NOTICES

- **MIFPA Notices** - *Minn. Stat. 260.761*, subd. 2.
- Provided to all possible tribes
 - Required **immediately** for all assessments or investigations under *Minn. Stat. 626.556*; email or fax, and verbal.
 - Required **within seven days** of having a reason to believe a child receiving services is an Indian child; email or fax.
- Contents include reason for county involvement and heritage information.
 - Name, date of birth, tribal affiliations for: child; parents; grandparents (at least)
- Eligibility inquiry and request for assistance

NOTICES

- **Petitioner's ICWA Notices** – 25 *U.S.C.* 1912 and Fed Reg 23.111.
- Must be provided in all involuntary court cases where there is reason to believe a child is an Indian child.
- Provided to all identified tribes (or BIA); parents and/or Indian custodians.

NOTICES

- **Petitioner's ICWA notice (cont.)**
- A copy of the petition must accompany the Petitioner's Notice.
- Content includes but is not limited to:
 - Parties and tribes
 - Statement of rights under the ICWA
 - Heritage information
 - All known names, birth dates and birth places, death dates and death places, and tribal affiliations of: child, parents, and if known grandparents and other lineal ancestors.

NOTICES

- **Petitioner's ICWA notice (cont.)**
- Must be sent registered or certified mail return receipt requested (green cards).
- Must be received at least ten days before foster care or termination of parental rights proceeding.
 - This doesn't always happen. Remember the spirit of ICWA and do your best to follow that even if all the rules and regulations and statutes of MIFPA/ICWA/Regulations are not followed to a 'T'.

NOTICES

- **Notices to Tribes from court**
 - The court has specified duties under MIFPA.
 - Notify the tribal social services agency by telephone and email/fax about emergency hearings.
 - These are sometimes confused with petitioner's MIFPA/ICWA notices.

PLACEMENT

REMOVAL

- Emergency removal can take place without the petitioner's MIFPA/ICWA notice process.
 - However, an investigation/assessment always requires the immediate MIFPA notices.
- The standard for removing a child is imminent risk of physical damage or harm. 25 *Fed. Reg.* 23.113. It is a higher standard than non-ICWA cases.
- Must also articulate the active efforts the Agency did to prevent the out of home placement.
 - Ends when no longer necessary to prevent imminent physical damage or harm.
 - Requires hearing if conditions change.
 - Encourage your workers to be creative and think outside the box. Examples.

REMOVAL

- Emergency proceedings end when:
 - Child custody proceeding subject to ICWA provisions begin; Typically this is when the parent admits the CHIPS petition or defaults and the Agency is granted custody. The standard for placement in foster care under custody is serious emotional or physical damage, which is a lower standard than the EPC standard.
 - Transfer of the child to the jurisdiction of the appropriate Tribe; OR
 - Child is reunited with parent or Indian custodian

PLACEMENT PREFERENCES

- Foster care (descending order of preference):
 - A member of the child's family – there is no legal preference between the Indian or non-Indian side of the family;
 - Foster home licensed, approved, or specified by child's tribe;
 - A Native foster home licensed or approved by an authorized non-Indian licensor;
 - Note: Native foster home requires tribal membership by at least one of the adults on the foster care license.
- OR
- An institution for children approved by a tribe or operated by an Indian organization with a suitable program
- If a tribe has a different order of preference, that controls.

PLACEMENT PREFERENCES

- Adoptive (in order of descending preference):
- A member of the child's extended family;
 - Other members of the child's tribe; OR
 - Other Indian families
- Tribe's preferences control

PLACEMENT PREFERENCES

- A county must defer to the child's tribe as to suitability of any particular placement. *Minn. Stat. 260C.215, subd. 6(b)*.
- County must establish good cause to go outside the placement preferences. *Minn. Stat. 260.771, subd. 7*.
 - Written materials – script for when you need to ask for a good cause deviation. Typically occurs at the initial EPC hearing if you haven't been able to find a relative yet.
 - The testimony to support a good cause deviation must be taken at each and every hearing.

ACTIVE EFFORTS

- Clearly defined in MIFPA.
- No definition in ICWA.
 - Covered in 2016 BIA regs at 23.2.
- Best practices is to state those active efforts on the record.

QUALIFIED EXPERT WITNESS

QEW

- Required for involuntary foster care placements and involuntary terminations of parental rights.
 - Discussion as to whether it's legally required for TOC matters. Some tribes want to provide one and it doesn't hurt.
- Evidence from a qualified person that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical harm to the child 25 U.S.C. 1912.
- The qualified person should be the person that the tribe designates. Be "professionally persistent" in getting the QEW. May need to draft up a template to send to tribal representative to edit and sign.

QEW

- Minnesota requires the county or any other party to make **diligent efforts** to obtain and present a QEW designated by the child's tribe. *Minn. Stat. 260.*
- If diligent efforts has failed to obtain a tribally designated QEW, may offer (in descending order of preference):
 - A member of the child's tribe recognized by the tribe as knowledge in tribal custom on family and child-rearing practices.
 - An Indian person from an Indian community with substantial experience in delivery of child and family services and extensive knowledge of child-rearing standards of the child's tribe.

OR

- A person who would constitute an expert witness under Minn. R. Evid. 702 with substantial experience providing services to Indian families and of the custom and child-rearing practices of the child's tribe.

BURDENS OF PROOF

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- Clear and convincing
 - Proceedings except TPR
 - Also for:
 - Good cause to deviate from placement preferences
 - Establishing cannot secure tribally designated QEW or that diligent efforts have not secured preferred QEW (tribal member or Indian service provider)

BURDENS OF PROOF

- For involuntary termination of parental rights: beyond a reasonable doubt.
 - Conceptually, generally must eliminate all reasonable alternatives.
 - Highly unlikely to have in involuntary TPR trial since the vast majority of tribes do not support a state court, involuntary TPR. If you don't have a QEW supporting an involuntary TPR, then the court cannot terminate and the child will not be available for adoption.
 - Tribes have provided QEWs in support of a state court involuntary TPR in a limited number of cases.