

The Indian Child Welfare Act
New Regulations!! - What's Different?



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ICWA IS ABOUT...

- The rights of the tribe – a separate government
- The preservation of tribes and native culture
- The child's right to political identity
- "Tribe" can also be "band," "nation," "community"
- §1903(8)



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FEDERAL LAW
ICWA 25 U.S.C.A.
§1901 -1963
1978

Predates the federal child welfare laws we all work with everyday!

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STATE LAW

- State can incorporate ICWA into state law
- State can add to fed
ICWA law – 25 USC §1921
- State cannot subtract from fed ICWA law
- Fed law applies to states even if there is no reference in state law

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WHY?

- Stop unnecessary removal of Indian children
- Don't disconnect child from culture and tribe
- Promote tribal involvement in Indian children's lives

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PRIOR TO ICWA

- Cultural bias in removals
- "Save" child by removing from tribal culture
- Policy of assimilation
- Boarding schools
- Infant Adoption programs



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What is “purpose?”

- Feds determined that stats clearly showed:
“an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children...by nontribal public and private agencies...”

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Well, that was 1978, isn't this now resolved?

- 2013 – Native American children are still represented in state foster care 2.5 times more than they are in the general population
- There are some states where the number is as high as 14.8 times their presence in the general population

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FEDERAL POLICY



- Protect Indian children
- Preserve Indian families
- Place Indian children where culture is valued

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WHAT?

Special requirements on state courts when Indian children are to be placed outside the home or freed for adoption.

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An ICWA child welfare case that remains in state court requires following state law and federal ICWA



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Requires

- Courts to make decisions that reflect value of tribe and Indian family connections – requires expert testimony to be heard and considered
- Agency to provide more than diligent efforts - “active efforts” to compensate for children having been more likely to be placed outside of the home
- Higher burdens of proof to remove children and free them for adoption

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RECENT BIG CHANGES

“Baby Veronica” SCOTUS 6/25/13

US Supreme Court interpreted ICWA in a private adoption case.

NEW REGULATIONS!

Effective 12/12/16 – does not affect proceedings filed before then



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Why after all the years are there now new regs?

- Continuing concern that ICWA is not being adhered to by state agencies and state courts
- Continuing concern of variations in state court application of ICWA
- A desire to clarify some of the issues and confusion in federal guidance from 1979
- Have the force of regs and not just a “guidance”

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CHANGES to ICWA

Interpretations

- What actually happened in Baby Veronica?
- The SCOTUS decision
- Then after Baby Veronica, feds issued new guidelines, right? Yes - on 2/25/15
- But now the old guidelines from 1979 AND the new guidelines from 2015 are replaced with - for the first time – ICWA **regulations** that go into effect this year

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The Key Questions

1. Is this an ICWA child?
2. Is this an ICWA action?
3. What is the proper jurisdiction?
4. Who needs to be noticed?
5. What are the special evidentiary rules if the matter stays in state court?
6. What are the placement preferences?

What is impacted by Baby Veronica SCOTUS decision or the new regulations?

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Question 1

- Is this an Indian child under the Indian Child Welfare Act?
- § 1903 (4)

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**WHO IS AN INDIAN CHILD?
A POLITICAL QUESTION**

- Unmarried and
- Under 18 years old and
- Member in a federally recognized tribe or
- Eligible to be a member and the biological child of a member
- NOTE: Statute uses term “member” some tribes use other terms like enrolled

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New Regulations

- If ICWA applied before age 18 and the proceedings continue after age 18, ICWA will continue to apply
- Requires that in every emergency, involuntary or voluntary proceedings, the court must inquire if anyone knows or has reason to know that the child may fit the ICWA definition
- If the court does not know, must make diligent efforts with tribes who may be child's tribe

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New Regulations

- If there is reason to think the child may be ICWA, court **MUST** apply ICWA until there is confirmation that the child is not ICWA
- WOW!

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OK, so what does that mean

- Court must ask all participants at the beginning of the proceeding and record responses on the record. Must instruct the parties to inform the court if they receive info.
- Confirm on the record due diligence of agency or other party to ID and work with tribes to determine membership/eligibility
- Treat the child as an ICWA child if reason to know

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“Reason to Know”

- Anyone in the case, any attorney, any tribe or tribal organization or agency says the child is Indian or that they have discovered info that indicates child is Indian
- Child gives the court reason to know
- Court learns that child or parent’s domicile is on a reservation
- Court learns child is or was a ward of a tribal court
- Child or parent has a tribal ID cards

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What makes a child a “member” or eligible to be a member?

What are the tribes membership?

Again – may use different terms, such as enrollment

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ISSUES

- Is membership about blood quantum?
- How will agency, court learn membership rules?
- What about MEPA?

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MORE ISSUES

- What about Canadian tribes?
- What if one sibling is an Indian child but the other is not?
- What if the child is raised in tribal culture but is not enrollable?
- Do tribes have to follow ICWA?

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REMEMBER...

There are over 500 other federally recognized tribes in the US, and any child in your state could be a member or eligible to be a member of any of those

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Bottom Line:

- Only the sovereign entity of the tribe can determine if the child is an ICWA child as only they can determine if child is a member or enrollable as a member and a child of a member
- Reinforced by the new regs. – state courts MAY NOT substitute the judgment of a tribe regarding a child being a member, being eligible to be a member or that a parent is a member

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Question 2

- Is this an action or proceedings that requires the application of the Indian Child Welfare Act?
- § 1903(1)

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TO WHAT LEGAL PROCEEDINGS DOES IT APPLY?

- Child being placed in foster care due to abuse/neglect (or transferred)
- Child being placed on status offenses or voluntary where child cannot be returned upon demand

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MORE APPLICATIONS

- Child custody with non-parent
- Termination proceedings
- Pre-adoptive placements
- Adoptions—including stepparent, public and private

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Does NOT apply to:

- Divorce or Custody Between Two Parents
- Juvenile Delinquency, Criminal Acts
- Paternity/Support
- Domestic Violence
- Totally Voluntary/At Will Placements
- **Baby Veronica - Private Adoptions where only objecting parent never had physical or legal custody and abandoned before birth**

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New Regs

- Clarifies that ICWA applies to a placement that might be “consented to” by the parent or Indian custodian but this was done under threat of removal by the court or the agency
- Clarifies that “upon demand” means that a mere verbal request returns the child and if there is anything more needed then a verbal request, the placement is NOT voluntary

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New Regs (cont'd)

- While a “voluntary” placement into foster care that strictly allows the child to be returned upon verbal request of the parent or custodian is not covered by ICWA – unless there was a threat of removal by the court or the agency – a “voluntary” adoption is always covered by ICWA
- Parties in a voluntary placement must state on the record if the child is an Indian child or they have reason to think so and state court must ensure that steps are taken to verify tribal status

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PROTECTS:

- Indian children
- Bio parents of Indian children (even if they are non-Indian)
- Indian custodians

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NOT PROTECTED BY ICWA:

- Unwed fathers who have not acknowledged paternity.
- Non-Indian parents who adopted an Indian child.
- **But SCOTUS raised issue of parents who have never had legal or physical custody?? Only in adoptions?**

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Does Baby Veronica change this question?

- The decision indicates that ICWA does not apply where the parent raising the ICWA application question has not ever had legal or physical custody of the child
- Caution – Does this really apply in most child welfare cases? Most times it is **both** parents who oppose **governmental** action

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What do the new regs have to say on this point?

- In determining that the matter is ICWA, the state court may not consider if the parents participate in tribal activities, may not consider the relationship of the child with the Indian parent, if the parent has ever had custody or the child's blood quantum
- Also says that "continued custody" includes legal or physical custody or both as interpreted by tribal law, custom or state law

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- ICWA issues may well be relevant in matters even though statute need not be applied.
- Applies to terminations and adoptions even if it did not apply to original placement.

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Question 3

- Where is the case heard? Who has jurisdiction? State court? Tribal court? Both?
- § 1911

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Concepts

- Exclusive jurisdiction – only can be handled by a tribal court
- Transfer – can be moved from state court to tribal court
- Right to Intervene – tribe can be involved in the state court action

§ 1911

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INDIAN TRIBE EXCLUSIVE JURISDICTION

- § 1911(a)
- Indian child who is a ward of a tribal court
- Indian child who resides or domiciled on a tribal reservation where tribe exercises exclusive jurisdiction over child custody proceedings – state court can determine residence or domicile

Mississippi Band of Choctaw v Holyfield
490 US 30 (1989)

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New Regs on “Domicile”

- For parent – place person regards as home, place person intends to return and live indefinitely even if person may be currently residing elsewhere
- For child – the domicile of the child’s parents, if born out of wedlock, domicile of the custodial parent

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EXCEPTIONS TO EXCLUSIVE JURISDICTION RULE

- Older federal law allowed for concurrent jurisdiction with state courts but now some tribes have retroceded



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New Regs

- If exclusive jurisdiction – state court must notify the tribal court that it will dismiss, must then dismiss and make sure all info is sent to the tribal court such as pleadings and court record

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STATE COURT JURISDICTION

Indian child who does not live on the reservation BUT subject to transfer to a tribal court or to intervention by tribe in state court proceeding

So if it is not exclusive jurisdiction to tribal court the two options are:

Transfer or Intervention

§ 1911 (b) and (c)

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Transfers to Tribal Court

- Tribe or parent can ask for the transfer at any time
- Either parent (tribal or not) can oppose and stop the transfer
- State court must transfer if both tribe and parents want it and can only retain jurisdiction if there is “good cause”
- Court can transfer case but child can stay in state care
- Adoptive placement transfers?—courts have split

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New Regs

- Transfer request can be made orally or in writing
- Available “at any stage” in each proceeding
- Notify the tribal court of the transfer request and may request timely response if tribal court wants to decline

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Good Cause to Refuse Transfer?

- Either parent or tribe says NO
- “Advanced Stage” if notice was not provided until advanced stage - NO
- Not sufficient connection to tribe – NO
- Prior proceeding where no request was made – NO
- Transfer might affect placement – NO
- Socioeconomic conditions or negative perceptions of tribes social services or court – NO

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Transfer

- Entity seeking refusal must state their good cause arguments on the record, other parties must be given opportunity to respond
- Court must state basis if denying transfer on the record
- If transferred – all records go to tribal court

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TRIBAL INTERVENTION IN STATE COURT

- Tribe's right
- At any time – including appeals!
- Parent, agency, child, court cannot prevent
- Even where not going to appear in person
- Not specifically listed for adoption proceedings

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REMEMBER

ICWA APPLIES EVEN IF TRIBE
DOES NOT APPEAR OR IS
UNABLE TO BE INVOLVED

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Has this been affected by Baby Veronica?

- Seems not as there was no argument about jurisdiction between the courts
- **BUT – IF** SCOTUS is saying that ICWA does not apply to some types of cases that we thought it did apply to in the past, then it would impact if there is a jurisdiction question to argue – are they saying that or are they saying only certain provisions are not applicable?

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Question 4

- Who gets noticed?
- § 1912
 - The parents or Indian custodian
 - The child’s tribe
 - By registered mail with return receipt requested OR NEW under the guidelines – certified mail with return receipt requested

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New Regs

- Copies of the notices are to be sent to the Regional Director in each BIA Regional office and the BIA is to help locate Indian parents and the tribe if possible also by registered or certified mail with return receipt requested or by personal delivery
- BIA Regional office will make reasonable and documented efforts to help locate the child’s tribe, the parents/the Indian custodian, within 15 days will inform the court about verification

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Notice

- Formal notice must be done exactly as law describes
- Each “new” proceeding requires notice
- Notice goes to all parents and custodians – even if not tribal
- Do not need to notice if it is a wholly voluntary placement in foster care
- Can ALSO do electronic or personal delivery – but not as a substitute

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NOTICE QUESTIONS

- Member of more than one tribe?
- Not sure if child is a member or eligible for membership?
- Child’s parents?
- Unwed fathers?
- Timing?
- Who actually sends the notice out?

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New Regs

- Party seeking placement sends the notices
- Court who knows or has reason to know child is Indian must ensure that party has sent notice by copies filed with the court and the return receipt
- Must include list of info from the regs, copies of pleadings, list of rights
- If tribe or parent cannot be IDed – notice must be sent to regional BIA with as much info as possible

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Question 5

- What are the special evidentiary rules that have to be applied if the matter stays in state court?

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REMOVAL ISSUES

- § 1912 (d) and (e)
- Qualified expert witness
- Likely to result in serious emotional or physical damage if child remains
- Clear and convincing burden of proof
- “Active efforts” – New Regulations give examples, stress in accessing services and using culturally appropriate services
- Must cease immediately if placement is no longer necessary to prevent harm - new hearing

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What are “active efforts”?

- Efforts by the state to provide remedial services and rehabilitative programs that have not been successful
- MORE than “reasonable efforts”
- CLEARLY meant to include working with tribe and seeking tribal resources
- New Regulations say must be done up to start of proceedings – gives examples – requires that court must document them on the record

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Removal – New Regs

- Must show casual connection between conditions in the home and that continued custody by the parent or Indian custodian would result in serious emotional or physical harm
- Poverty or age of custodian without proof of a causal connection is not enough

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When are ICWA experts (QEWs) used?

Required to testify in court where ICWA child and requested Removal from Home or Termination of Parental Rights

Possibly advise agency, tribe and court where on placement decisions for ICWA child

Can ask the tribe, or the local BIA regional office for help in locating a QEW

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Who is this QEW and what are they supposed to do?

- **NEW REGS - MAJOR CHANGES HERE!!**
- Person must be able to testify as to prevailing social and cultural standards of the child's tribe and testify to continued custody likely to result in serious emotional or physical damage
- Can be designated by the child's tribe
- Cannot be the state social worker assigned to the Indian child's matter

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Who has to offer the expert's testimony? Is it paid for? Can there be more than one witness? If there is no objection to what is occurring, will there still have to be a QEW testifying?

Court should determine if offered person is proper QEW and make that ruling

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What is the expert supposed to testify about?

- Removal of an Indian child from his or her family must be based on competent testimony from one or more experts qualified to speak specifically to the issue of whether continued custody or return to custody of parent or Indian custodian is likely to result in serious physical or emotional damage to the child

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Why do you need an "expert" on Indian issues to prove likely damage to a child?

The party who is seeking to have the child removed or parental rights terminated must prove to the court that active efforts, in the context of the prevailing social and cultural conditions and way of life of the Indian tribe, have been made and that available family and tribal services and been used and that the risk is still present

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So what kind of things would an expert need to know about?

| | |
|--------------------------------------|------------------------------------|
| the tribe's history | family's history |
| how children are viewed by the tribe | protective issues in family |
| child rearing in the tribe | particular incidents |
| use of discipline | this child's needs |
| cultural expectations | agency responses |
| tribe's services | tribe and family view of situation |

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QEW should be asked THE opinion question

Do you have an opinion within a reasonable degree of certainty as to whether continued custody/return to custody by the child's parents would likely result in serious physical or emotional damage? What is that opinion?

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Absent extraordinary circumstances, no emergency or temporary removal of an ICWA child should occur for more than 30 days without the proper ICWA removal procedures

What happens if you do not know the child is ICWA for longer than 30 days? – Remember, the court is supposed to be following ICWA if there is reason to believe child may be ICWA

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VOLUNTARY PLACEMENT OR SURRENDER ISSUES

- Consent must be in writing and before a family court type judge for voluntary placements or surrenders with record kept
- Judge’s certificate, language of parent
- More than ten days after the birth for a surrender
- Explain terms, consequences and limits on the record
- Can be in closed court if parent wants

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Voluntary Placement or Surrender

- Can withdraw consent to a voluntary surrender at any time; can file a written document or testify--child is to be returned
- Can revoke surrender/consent to an adoption before adoption occurs; can file a written document or testify--child is to be returned

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Termination of Parental Rights (TPR) ISSUES

- Adoption and Safe Families Act (ASFA) applies – including the exceptions!
- § 1912 (f) -
- Qualified expert
- Return home would likely result in serious emotional or physical damage
- Beyond a reasonable doubt burden of proof
- Active efforts – must be documented by the court



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TPR – New Regs

- Must show casual connection between conditions in the home and that continued custody by the parent or Indian custodian would result in serious emotional or physical harm
- Poverty or age of custodian without proof of a causal connection is not enough

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ADOPTION ISSUES



- Revocable before final decree—
return to parent
- Adoption can be vacated on fraud/duress grounds-notice, hearing-return to parent
- No adoption can be vacated after two years
- Where a parent who is consenting to an adoption wants anonymity, court and tribe must keep info confidential. Also, court can be closed.

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- What if an adoptive parent later surrenders an ICWA child?
There can be a petition to return the child to the birth parents

25 USC § 1916

Court must notice birth parent if adoption is vacated or set aside, or adoptive parent surrenders child. Give info to allow parent to participate – this could be waived and waiver can be revoked

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Baby Veronica apply to this question?

- **YES**, this seems the **most** affected. SCOTUS said that the heightened standard of proof did not apply to a parent who had never had prior legal or physical custody and that “active efforts” did not apply where parent had abandoned child before birth and never had physical or legal custody
- **BUT** – what does this mean in our typical child welfare matter? New regs?

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Question 6

- What are the placement preferences?

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Concepts

- Placements in descending order
- Don't move to the next one without documenting reason
- Specify why moving to next level in court order
- There are good cause arguments
- Tribe can change preferences and child and parent's positions can be considered

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FOSTER CARE PLACEMENTS

- Family setting, sibling attachment
- Reasonable proximity to their home, family, sibs
- Special needs
- Preferences -25 USC § 1925 (b)
 1. extended family – Indian and non-Indian family
 2. foster home licensed, approved, or specified by tribe
 3. Indian foster parents licensed or certified by state/county/ authorized agency. NEW – reg. says at least one of the foster parents must be Indian as per ICWA definition
 4. institution approved by a tribe or operated by a tribe

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Foster Care Placements

- Tribal resolution can establish different preferences and they would then apply provided it is least restrictive and appropriate to the child’s needs
- Must consider the preference of the child or the parent

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ADOPTIVE PLACEMENTS

- Preferences – 25 USC§1915 (a)
 1. Extended family members – Indian and non Indian family
 2. Members of child’s tribe
 3. Other Indian families
- If tribe has a resolution for different order of preferences, tribal preferences will apply
- Can consider parent/child’s wishes

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New Regs – When can you depart from preferences?

- NEW- Party who wants to deviate must state why/reason for deviation on the record, in court, or in writing to all the parties and must show by clear and convincing evidence that there is good cause to deviate
- Court that is going to deviate must state good cause on the record

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NEW REGS – Can you deviate?

- Tribe has described different preferences by tribal resolution
- Request of parents for anonymity in a voluntary procedure - court gives weight
- Request of parent after reviewing options
- Request of mature child
- Presence of sibling attachment
- Extraordinary needs of the child
- Nothing available at each level after diligent search and active efforts to locate

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New Regs – When can you deviate from preferences?

- When determining that there is no suitable placement, a level of preference must conform to the prevailing social and cultural standards of the Indian community of the parents
- Good cause to deviate must include that a diligent search was conducted to find suitable placement within the preferences but none was located

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Not Good Cause -

- **“Ordinary” bonding** with placement family that did not comply with ICWA – **NO!**
- Court may not deviate due to **socio-economic differences in placement alternatives**

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What did Baby Veronica say?

- SCOTUS said that the adoption preferences are not triggered until some party in that particular case, within the preferences, also seeks to adopt
- SO – does this part of the decision only apply to adoptions?
- What does it mean to placements in foster care – must there be an alternative placement being offered? When?

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New Regs

- State court should allow persons to participate by telephone, video conference

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25 USC § 1912 (b)
Right to counsel for parents and
custodians



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RIGHTS OF
ADULT ADOPTEES
TO RECORDS
25 USC § 1917



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New Regs

- Adoptee over 18 can ask the court that did the adoption for information that would provide tribal affiliations and state court must inform

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NEW Regs

- State court must provide a copy of an order regarding a voluntary or an involuntary adoption of an ICWA child within 30 days to BIA
- The BIA will now have central files of state adoptions of Indian children

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New Regs

- States must maintain records of all voluntary and involuntary placements in foster care, placements in pre-adoptive homes, and adoptive placements of ICWA children and must make those records available within 14 days to the child's tribe or the BIA if they ask for the records

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FAILURE TO FOLLOW ICWA?

- Parent, Indian custodian, or tribe may petition to invalidate a courts order which was in violation of Sections 1911,1912, or 1913
- NEW – Regs say child can petition to invalidate
- Also, new Regs say person who moves to invalidate, need not prove that his or her rights were violated, only that the law was violated

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ASK and TELL !



- Caseworkers, court and attorneys should make it routine to ask
- ICWA findings at every stage clearly documented in court order

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STEPS

- Training
- Agency forms and procedures
- Court procedures



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