Indian Child Welfare Act (ICWA)

ICWA and ICPC—Private Voluntary Placements

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Private placement vs. foster care placements

- Private placements are usually voluntary placements.
- Foster care placements are usually involuntary placements.
- State Assistant AGs who advise your offices likely have never been involved in a private adoptive placement.

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Regulation 12—Private placements

- Requires "[v]erification of compliance with Indian Child Welfare Act . . . ."
- But, what does that mean?
- Who is charged with determining compliance?
- And, when does compliance occur?

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Verification of compliance

- Regulation 12 does not say ICPC determines what compliance is required.
- Court in the state of finalization will determine what compliance is required
- New BIA Regulations make it clear the court is to determine if the child is an Indian child and, if the child is, that ICWA is followed.

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Indian child

- The ICWA applies only when the proceeding involves an "Indian child."
- An Indian child is "…any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is 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)" (emphasis added).

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How to verify compliance?

- If child is not an Indian child, that is easy; a statement from the birth mother that neither she nor the birth father is a member of a tribe should suffice.
- If child is or may be an Indian child, a letter or statement from the attorney for the adoptive parents or agency stating what will be done to comply with ICWA and an ICWA at-risk signed by the adoptive parents should be sufficient.
- Similar to what is done when the case involves a putative father; termination of rights hasn't happened yet, but you at least know the process that will be followed.

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Why is this sufficient?

- Not always known at the commencement of a case if the child is an Indian child
- Neither the federal ICWA nor any state ICWA requires a letter of inquiry to a tribe about a child's status—but some ICPC offices want to see one.
- BIA Regulations also do not require an inquiry of the tribe
- Making inquiry of a tribe, without a birth parent's permission, would constitute a clear violation of his or her rights of privacy and could subject the attorney or agency to a lawsuit.
- The BIA regulations place the duty on the court hearing the adoption to determine what inquiry must be made, if any.

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Why is this sufficient? (Continued)

- The federal ICWA does not require notice to the child's tribe of a voluntary placement; tribes also usually do not have intervention rights.
- The BIA Regulations did not change this.
- Like an inquiry letter, notice to the tribe without the birth parent's permission would violate the birth parent's rights of privacy.
- The court, not the ICPC office, is charged with determining how best to balance the birth parent's right to privacy with the need to comply with ICWA
- Even state ICWAs do not require notice to the tribe *prior to* ICPC; the notice required is of a hearing to be held in court, and that may not be set yet.

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What about placement preferences?

- Whether to follow or depart from the ICWA placement preferences is a determination for the court to make
- A court may depart from the placement preferences if it finds good cause to do so.
- A birth parent's choice to place with a non-Indian family is sufficient good cause under the federal ICWA to depart from the placement preferences.
- Thus, an ICPC office should not be holding up approval based on the preferences.

Thank You!

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