COMMITTEE FOR PUBLIC COUNSEL SERVICES

CHILDREN AND FAMILY LAW DIVISION

Prepared by Katy Krywonis, Esq.

January 2017

**CHILD WELFARE PROCEEDINGS UNDER THE INDIAN CHILD WELFARE ACT:**

**NEW REGULATIONS IN EFFECT**

On June 14, 2016, the Bureau of Indian Affairs (BIA) published new regulations to improve implementation of the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963, by state courts and child welfare agencies. These regulations went into effect on December 12, 2016, 180 days after publication in the Federal Register. They apply to all Indian child welfare proceedings initiated on or after the effective date, but do not affect proceedings initiated prior to that date. All CAFL attorneys must be familiar with the new regulations. What follows is a detailed memorandum discussing the changes.

These are the first comprehensive, binding regulations since the passage of the Act in 1978. Although ICWA has been in place for nearly four decades, its implementation and interpretation has been inconsistent across and even within states. Many issues that ICWA was intended to address continue to exist today. Indian children are still removed from their homes and communities at a disproportionately higher rate than other children, and differing interpretations of ICWA by individual states and state courts have created substantial variation in how the law is applied. As a result, an Indian child and his or her parents in one state can receive different rights and protections under federal law than an Indian child and his or her parents in another. This variation creates gaps in ICWA protections and is contrary to the uniform minimum federal standards Congress intended.

These regulations are designed to promote uniform application of ICWA and clarify the minimum federal standards established by the statute. They update definitions and notice provisions in the existing ICWA regulations, and add a new subpart I to 25 C.F.R. § 23 to address ICWA implementation by state courts.

The new regulations are located at [25 C.F.R. § 23](http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&r=PART&n=25y1.0.1.4.13).

In addition to these regulations, the BIA has also issued updated guidelines “to assist those involved in child custody proceedings in understanding and uniformly applying [ICWA] and [the regulations].” These guidelines do not impose binding requirements, but seek to encourage greater uniformity in the application of ICWA by explaining the statute and regulations and providing examples of best practices. These guidelines replace those issued in 1979 and 2015.

The new guidelines may be found on the BIA’s website, at:

<https://www.bia.gov/cs/groups/public/documents/text/idc2-056831.pdf>.

Table of Contents

[Does ICWA apply to this child?](#child) .................................................................................................... 3

[Does ICWA apply to young adults?](#PYA) .............................................................................................. 4

[Does ICWA apply to this proceeding?](#proceeding) .......................................................................................... 4

[What happens in an emergency?](#emergency) .................................................................................................... 5

[What do the regulations say about other child custody proceedings?](#other) ........................................... 7

[What are the requirements for notice?](#notice) ........................................................................................... 7

[How is jurisdiction determined?](#jurisdiction) .................................................................................................... 9

[What if the tribe has exclusive jurisdiction?](#exclusive) .................................................................................. 9

[What if jurisdiction is concurrent?](#concurrent) ............................................................................................... 10

[What if the parents consent?](#consent) ........................................................................................................ 11

[May parents withdraw consent?](#withdraw) ................................................................................................... 12

[What are the placement preferences?](#pp) .......................................................................................... 12

[When do the placement preferences apply?](#whenpp) ................................................................................. 13

[What standard of proof applies?](#sop) .................................................................................................. 14

[Can a court order be invalidated?](#invalidation) ................................................................................................ 16

[What if an Indian child’s adoption fails?](#adoption) ..................................................................................... 16

[What recordkeeping is required?](#recordkeeping) ................................................................................................. 17

[Where can I find additional information?](#information) .................................................................................... 18

**Does ICWA apply to this child?**

The applicability of ICWA to a child custody proceeding turns on the threshold question of whether the child is an Indian child.The regulations make clear that ICWA applies if the child meets the statutory definition of “Indian child.” An “Indian child” is one who is either (a) a member of a federally recognized Indian tribe, or (b) eligible for membership and is the biological child of a member. The regulations reflect the statutory definition of “Indian child,” but add the terms “citizen” and “citizenship.” The definition of “Indian child” is based upon a child’s political relationship with a tribe, and these terms are synonymous with “member” and “membership” in the context of tribal government. 25 U.S.C. §§ 1903(4), (8); 25 C.F.R. § 23.2.

There is no exception to the application of ICWA for cases in which the parents or subject child do not, in the court’s view, seem Indian enough (a practice in a small minority of states known as the “existing Indian family exception”). The regulations prohibit the court from considering the participation of the parents or the Indian child in tribal cultural, social, religious or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child’s blood quantum in determining whether ICWA applies. “Indian child” status is based *exclusively* on the statutory definition. This change was made in response to the United States Supreme Court’s decision in *Adoptive Couple v. Baby Girl,* 133 S.Ct. 2552 (2013). *See* 25 C.F.R. §§ 23.103(a), (c).

Indian and non-Indian parents are equally entitled to all of the federal protections of ICWA provided their child is an “Indian child.” However, an unwed father who has not acknowledged or established paternity is not treated as a parent under ICWA. *See* 25 U.S.C. § 1903(9); 25 C.F.R. § 23.2.

Even if a party does not assert that ICWA may apply, the regulations require the court to ask each participant, at the beginning of each proceeding, if they know or have reason to know the child is an Indian child. “Participant” may include attorneys, social workers, parents, custodians, relatives or other witnesses, depending on who is involved in the case. However, this requirement is not an exception to the principles of attorney-client confidentiality pursuant to the Rules of Professional Conduct. Counsel must consult with the client and gain the client’s permission to disclose this information. *See* 25 C.F.R. § 23.107(a).

The court has “reason to know” that a child is an Indian child if:

* anyone, including the child, tells the court the child is an Indian child or there is information indicating the child is an Indian child;
* the domicile or residence of the child, parent, or Indian custodian is on a reservation or in an Alaska Native village;
* the child is or has been a ward of a tribal court;
* either parent or the child possesses identification indicating tribal membership.

25 C.F.R. § 23.107(c).

If the court has “reason to know” that a child is an Indian child, then certain obligations under the statute and regulations are triggered. Most significantly, the court must treat the child as an Indian child pending verification. This means that if ICWA is raised, its heightened standard of proof applies and the placement preferences must be followed, unless and until it is determined that the child is not an Indian child. Additionally, the court must confirm, on the record, that DCF used due diligence to identify and work with all of the tribes of which there is reason to know the child may be a member or eligible for membership, to verify whether the child is a member or a biological parent is a member and the child is eligible for membership. 25 C.F.R. §§ 23.107(b)(1), (2).

The tribe is the authority on whether the child is a member, or a parent is a member and the child is eligible for membership. The court then makes a judicial determination as to whether the child is an “Indian child” based on the tribe’s final say in response to requests for verification. The court may rely on tribal membership cards or enrollment documentation as definitive proof of Indian status. 25 C.F.R. § 23.108.

If there is no reason to know the child is an Indian child, then ICWA does not apply. The court must instruct the parties to inform it if they later discover information that provides reason to know the child is an Indian child. Additionally, if the same child is involved in a later proceeding, the court must inquire again, in case there is newly discovered information. 25 C.F.R. § 23.107(a).

**Does ICWA apply to young adults?**

The regulations interpret the statutory definition of “Indian child” to mean that the person must be under the age of 18 only at the commencement of a proceeding. This means that where state and/or federal law allows DCF to continue providing foster care to young adults after they turn eighteen, ICWA will not stop applying to the proceeding simply because of the child’s age. Therefore, if ICWA applies to an underlying child welfare case and that child signs in to DCF for young adult services upon turning 18, application of ICWA will not be discontinued. The tribe may participate, and most importantly, the placement preferences apply. *See* 25 C.F.R. § 23.103(d).

**Does ICWA apply to this proceeding?**

ICWA applies to both “emergency proceedings” and “child custody proceedings.” The statute and regulations have different provisions that apply to each. The regulations include a table which clearly identifies what sections apply to each type of proceeding. *See* 25 C.F.R. § 23.104.

**What happens in an emergency?**

The full suite of ICWA protections do not apply to emergency proceedings. The regulations define “emergency proceeding,” and distinguish the requirements for emergency proceedings from other child custody proceedings. An “emergency proceeding” is “any court action that involves an emergency removal or emergency placement of an Indian child.” The court must make a finding on the record that the emergency proceeding is necessary to prevent imminent physical damage or harm to the child. 25 U.S.C. § 1922; 25 C.F.R. §§ 23.2, 23.113(b)(1).

The regulations make recommendations for the content of emergency petitions (or attachments, i.e. an affidavit). A petition for a court order authorizing emergency removal or continued emergency placement *should* contain:

* a statement of the risk of imminent physical damage or harm to the Indian child and any evidence that the emergency removal or placement continues to be necessary to prevent such imminent physical damage or harm to the child;
* the name, age, and last known address of the child;
* the name and address of the parents and Indian custodians, if any;
* the steps taken to provide notice to the parents, Indian custodians, and tribe about the emergency proceeding;
* if the parents and Indian custodians are unknown, a detailed explanation of what efforts have been made to locate and contact them, including contact with the BIA Regional Director;
* the residence and domicile of the child;
* if either the residence or domicile of the child is believed to be on a reservation or in an Alaska Native village, the name of the tribe affiliated with that reservation or village;
* the tribal affiliation of the child and parents or Indian custodians;
* a specific and detailed account of the circumstances that led DCF to take emergency action;
* if the child is believed to reside or be domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, a statement of efforts that have been made and are being made to contact the tribe and transfer the child to the tribe’s jurisdiction; and
* a statement of the efforts that have been taken to assist the parents or Indian custodians so the child may safely be returned to their custody.

25 C.F.R. § 23.113(d).

Notice is not required prior to an emergency removal. However, to protect the parents’, Indian custodians’, and tribes’ due process and other rights in these situations, it is recommended that DCF take all practical steps to contact them. This may include contact by telephone or in person, as well as e-mail or other written communication. This means that DCF cannot routinely proceed ex parte where the social worker knows or has reason to know that the child is an Indian child, and that the parties may participate in emergency hearings, as in the Boston Juvenile Court. *See* ICWA Guidelines, §§ C.4, C.7, C.9.

Similarly, the placement preferences do not apply to emergency proceedings. However, if DCF knows or has reason to know that the child is an Indian child, it should try to provide an initial placement that meets ICWA’s placement preferences, to prevent subsequent disruptions. This includes identifying extended family or others with whom the child is already familiar for emergency placement, and determining if licensed Indian foster homes are available. If, in an emergency, the Indian child is placed in a non-preferred placement because a preferred placement is unavailable or has not yet satisfied background check or licensing requirements, DCF should concurrently plan for placement as soon as possible in a preferred setting. ICWA Guidelines, § C.6.

Because they do not include the full suite of ICWA protections, emergency proceedings must be as short as possible. The regulations limit emergency proceedings to 30 days, unless the court determines that (1) restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm; (2) the court has been unable to transfer the proceeding to the tribe’s jurisdiction; and (3) it has not been possible to initiate a “child custody proceeding” subject to ICWA’s notice and other requirements. The intent of this presumptive outer bound is to ensure that ICWA’s safeguards are not evaded by use of long-term emergency proceedings. Therefore, an emergency proceeding ends when a temporary custody hearing is scheduled and notice is sent. 25 C.F.R. § 23.113(e); ICWA Guidelines, § C.5.

The regulations reflect the court’s continuing obligation under the statute to evaluate whether the emergency situation has ended at each opportunity to revisit that issue. An emergency proceeding must terminate immediately when it is no longer necessary to prevent imminent physical damage or harm to the child. If new information indicates that the emergency situation has ended, the court must hold a hearing. At any court hearing during the emergency proceeding, the court must determine whether the emergency continues. An emergency proceeding can be terminated by initiating a child custody proceeding subject to the provisions of ICWA, transferring the child to the tribe’s jurisdiction, or returning the child to the parent or Indian custodian. 25 U.S.C. § 1922; 25 C.F.R. §§ 23.113(a), (b)(2), (b)(3), b(4), (c).

**What do the regulations say about other child custody proceedings?**

A “child custody proceeding” is any non-emergency action that may result in a foster care placement, termination of parental rights, a preadoptive placement, or an adoptive placement. A child custody proceeding may be voluntary or involuntary. The regulations clarify that ICWA applies to CRAs if the subject Indian child is placed out-of-home, and to private guardianships, which are included in the definition of “foster care placement.” 25 U.S.C. § 1903(1); 25 C.F.R. § 23.2.

If there are multiple proceedings within a case, ICWA applies to all of them. For example, where there is a care and protection and a guardianship petition is filed, ICWA’s notice and other requirements must be followed in both. 25 C.F.R. § 23.2.

**What are the requirements for notice?**

The new regulations incorporate the statutory and existing regulatory requirements for notice. If the court or DCF knows or has reason to know that the child is an Indian child, DCF must promptly give notice of each proceeding to each tribe where the child may be a member or eligible for membership if a biological parent is a member. DCF must also give notice to the parents and the Indian custodian, if there is one. 25 U.S.C. § 1912(a); 25 C.F.R. §§ 23.11, 23.111(a)(1), 23.111(b).

An “Indian custodian” may be informal. This right to notice is broader than state law in that it requires notice to an Indian custodian who may not be the child’s legal guardian under state law, but who has custody of the child pursuant to tribal custom or law, or to whom temporary physical care, custody, and control has been transferred by the parent of such child with the parent’s consent. ICWA also requires that the court appoint counsel for indigent Indian custodians. *See* 25 U.S.C. §§ 1903(6), 1912(a), 1912(b); 25 C.F.R. § 23.2.

Under ICWA, no foster care or termination proceeding may be held until at least ten days after the tribe and parent or Indian custodian have received the required notice of the proceeding. The regulations restate the minimum notice periods required by the statute, but clarify that no foster care or termination proceeding may be held until at least ten days after receipt of the notice *of that particular proceeding*. However, if state law provides greater protections to parents’ rights than ICWA, then state law controls. Therefore, if the court gives DCF emergency custody of an Indian child, the parent or Indian custodian still has the right to a hearing within seventy-two hours, notwithstanding the ten-day waiting period. The tribe may then request that the hearing be reopened so that it can exercise its right under ICWA to participate in the proceeding. 25 U.S.C. §§ 1912(a), 1921; 25 C.F.R. § 23.112(b).

The regulations permit notice to be sent by registered mail with return receipt requested or certified mail with return receipt requested. Notice by electronic or personal service are allowed as good practice, but are not a substitute for official notice by either registered or certified mail, return receipt requested. 25 C.F.R. §§ 23.11(a), 23.111(c); ICWA Guidelines, § D.2.

An original or copy of each notice must be filed with the court, with any return receipts or other proof of service. A copy of each notice must also be sent to the BIA Regional Director, by registered or certified mail with return receipt requested or by personal service, but a duplicate copy to the BIA Central Office is no longer required. This requirement is significant in that it will increase the BIA’s involvement as a repository of ICWA notices, in addition to its work to help locate and provide notice to parents, Indian custodians, and tribes as needed. 25 C.F.R. §§ 23.11(a), 23.111(a)(2), 23.111(e).

The regulations modify the required content of notice. Notice must now include:

* the child’s name, birthdate, and birthplace;
* parents’ information – all names known (including maiden, married, and former names or aliases), birthdates and birthplaces, and tribal enrollment numbers if known.
* other direct lineal ancestors’ (e.g. grandparents) information, if known;
* the name of each tribe in which the child is a member or may be eligible for membership if a biological parent is a member;
* a copy of the petition, complaint, or other document by which the child custody proceeding was initiated;
* the date, time and location of any hearing(s) scheduled at the time notice is sent;
* the name of the petitioner and the name and address of the petitioner’s attorney;
* a statement of the right of any parent or Indian custodian to intervene if not already a party;
* a statement of the right of the tribe to intervene at any time;
* a statement that the indigent parent or Indian custodian has the right to court-appointed counsel;
* a statement of the right to be granted, upon request, up to 20 additional calendar days to prepare;
* a statement of the right of the parent or Indian custodian and tribe to request that the proceeding be transferred to tribal court;
* the mailing addresses and telephone numbers of the court and information related to all parties;
* a statement of the potential legal consequences of the proceedings on the future parental and custodial rights of the parent or Indian custodian; and
* a statement that all parties notified must keep the information contained in the notice confidential and that the notice should not be handled by anyone not needing the information to exercise rights under ICWA.

25 C.F.R. §§ 23.111(d), 162.101.

Notice must be in clear and understandable language. If there is a reason to know that a parent or Indian custodian possesses limited English proficiency, the court must provide a translator or interpreter. 25 C.F.R. §§ 23.111(d), (f).

If a parent or Indian custodian appears in court without an attorney, the court must inform him or her of his or her applicable rights, including the right to appointed counsel, the right to request that the proceeding be transferred to tribal court, the right to object to such transfer, the right to request additional time to prepare for the proceeding, and the right (if the parent or Indian custodian is not already a party) to intervene in the proceeding. 25 C.F.R. § 23.111(g).

**How is jurisdiction determined?**

ICWA provides that if the child’s residence or domicile is on a reservation, or the child is a ward of the tribal court, the tribe has exclusive jurisdiction over the child custody proceeding. The regulations require the court, in any child custody proceeding involving an Indian child, to determine the Indian child’s residence and domicile. 25 U.S.C. § 1911(a); 25 C.F.R. § 23.110.

The regulations define “domicile.” An Indian child’s domicile is the domicile of his or her parents or Indian custodian or guardian. In the case of an Indian child whose parents are not married to each other, his or her domicile is the domicile of his or her custodial parent. The domicile of a parent or Indian custodian is “the place at which [they have] been physically present and [regard] as home; [their] true, fixed, principal, and permanent home, to which [they intend] to return and remain indefinitely even though [they] may be currently residing elsewhere.” 25 C.F.R. § 23.2.

**What if the tribe has exclusive jurisdiction?**

The regulations establish the steps the court must take if it does not have jurisdiction. If the tribe has exclusive jurisdiction, the court must “expeditiously” notify the tribal court of the pending dismissal, dismiss the state court proceeding, and send all information regarding the proceeding to the tribal court including the pleadings and any court record. The regulations do not specify when the state court proceeding must be dismissed. The timing of dismissal may depend upon coordination with the tribal court. 25 C.F.R. § 23.110.

The regulations provide an exemption from dismissal in “emergency proceedings” to ensure the child is not subjected to imminent physical damage or harm resulting from dismissal before the tribe has asserted jurisdiction. An exemption is also provided for agreements between states and tribes pursuant to 25 U.S.C. § 1919. 25 C.F.R. § 23.110.

**What if jurisdiction is concurrent?**

Where the state and tribe have concurrent jurisdiction, the regulations reinforce the statutory requirement that the state court must transfer jurisdiction of the case to the tribal court if requested by the tribe or parent or Indian custodian, unless a parent objects to the transfer, the tribal court voluntarily declines jurisdiction, or there is good cause to deny the transfer. 25 U.S.C. § 1911(b); 25 C.F.R. § 23.117.

The tribe or parent or Indian custodian may request transfer, orally on the record or in writing, at any stage and at any time in a foster care or termination proceeding. The court must ensure that the tribal court is promptly notified in writing of the transfer request. This notification may request a timely response regarding whether the tribal court wishes to decline jurisdiction. 25 C.F.R. §§ 23.115, 23.116.

If the tribal court accepts jurisdiction, the state court should expeditiously provide the tribal court with all records related to the proceeding including the pleadings and any court record, and coordinate with the tribal court to ensure that transfer of the custody of the child and of the proceeding is accomplished smoothly and in a way that minimizes the disruption of services to the family. 25 C.F.R. § 23.119.

The regulations establish standards to guide the determination of whether good cause exists to deny transfer. Like the statute, the regulations do not define “good cause.” The regulations instead limit what the court may consider in determining whether good cause exists. The court has discretion to determine good cause based on the specific facts of a case. The regulations make clear that the court must ***not*** consider:

* the advanced stage of the proceeding if the parent, Indian custodian, or tribe did not receive notice until an advanced stage;
* whether there have been prior proceedings involving the child for which no transfer request was made;
* predictions of whether transfer could affect the child’s placement;
* the child’s perceived cultural connections with the tribe or its reservation; or
* socioeconomic conditions within a tribe or reservation or any perceived inadequacy of tribal judicial systems.

25 C.F.R. § 23.118(c).

If the court believes, or any party asserts, that good cause to deny transfer exists, the reason(s) must be stated orally on the record or provided in writing on the record and provided to the parties. Any party must have the opportunity to provide the court with views on whether good cause exists. 25 C.F.R. §§ 23.118(a), (b).

The basis for denying transfer must be stated on the record or in a written order. 25 C.F.R. § 23.118(d).

**What if the parents consent?**

Even if the parents or Indian custodian voluntarily agree to placement or termination, certain provisions of ICWA still apply. The regulations define “voluntary proceeding” and clarify ICWA’s applicability to those proceedings. A proceeding is voluntary only if the parent(s) or Indian custodian consents to placement or termination of his or her or their free will and without threat of removal by DCF or the court. This may occur, for example, in private guardianships, CRAs, or G.L. c. 119, § 23(a)(1) proceedings. In voluntary proceedings, the regulations require the court to determine whether the child is an “Indian child” as provided in 25 CFR 23.107. If the child is an “Indian child,” then the placement preferences apply. Additionally, the tribe may intervene. 25 U.S.C. § 1911(c); 25 C.F.R. §§ 23.2, 23.124.

Notice to the tribe is not required in voluntary proceedings. However, communication with the tribe may be necessary to verify the child’s Indian status. Additionally, notice to the tribe in voluntary proceedings is best practice, although not required, to allow the tribe’s participation in identifying preferred placements and to promote the child’s continued connections to the tribe. If a voluntary proceeding becomes involuntary, then ICWA’s notice requirements are triggered. 25 U.S.C. § 1912(a); 25 C.F.R. §§ 23.11, 23.111; ICWA Guidelines, §§ D.1, I.3.

ICWA requires that a parent’s or Indian custodian’s voluntary consent to placement or termination be in writing and recorded before the judge. The judge must certify that the terms and consequences were fully explained to and fully understood by the parent. The judge must also certify either that the parent fully understood the explanation in English or that the explanation was interpreted into a language that the parent understands. The regulations repeat the statutory requirements for consent, and further require that written consent clearly set out any conditions to the consent, and include:

* the name and birthdate of the child;
* the name of the tribe;
* the tribal enrollment number for the parent and the child, if known, or some other indication of the child’s membership in the tribe;
* the name, address, and other identifying information of the consenting parent or Indian custodian;
* the name and address of the person or entity who arranged the placement; and
* the name and address of the prospective foster parents, if known at the time of consent.

Additionally, the regulations require that the judge explain the right to withdraw consent and the point at which that right ends before accepting the parent’s or Indian custodian’s consent. 25 U.S.C. § 1913(a); 25 C.F.R. §§ 23.125, 23.126.

**May parents withdraw consent?**

ICWA provides that a parent may withdraw his or her consent to the child’s placement in foster care “at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.” A parent’s voluntary consent to termination or to an adoptive placement “may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.” 25 U.S.C. §§ 1913(b), (c).

The regulations repeat the statutory provisions for withdrawing consent, and add that the parent or Indian custodian must file a written withdrawal of consent with the court, or otherwise testify before the court. Additionally, the regulations clarify that when a parent or Indian custodian withdraws consent to the child’s placement in foster care, the court must ensure the child is returned as soon as practicable. When a parent or Indian custodian withdraws consent to termination or an adoptive placement, the court must promptly notify DCF, and the child must be returned as soon as practicable. If DCF believed the child was at serious risk of harm, it would have to initiate a new proceeding. 25 C.F.R. §§ 23.127, 23.128.

**What are the placement preferences?**

If the child cannot return home, ICWA mandates that the child be placed in the least restrictive, most family-like setting possible to meet the child’s needs, within reasonable proximity to his or her home. Preference must be given in the following order to a placement with:

* the child’s extended family (including non-Indian family);
* a foster home approved by the tribe;
* an Indian foster home approved by a non-Indian authority; or
* a residential program approved by the tribe or operated by an Indian organization.

The regulations restate the statutory mandates for placement of Indian children, with the added requirement that sibling relationships be considered. 25 U.S.C. § 1915(b); 25 C.F.R. §§ 23.129, 23.131.

The placement preferences allow siblings to remain together, even if only one is an Indian child under the statute, because the regulations provide that the child must be placed in the least restrictive setting that most approximates a family, allows his or her special needs to be met, and is in reasonable proximity to his or her home, extended family, or siblings. Because keeping siblings together contributes to a family-like setting, “sibling attachment” must be considered in choosing a setting that “most approximates a family.” *See* 25 C.F.R. § 23.131(a).

If it is not possible to place siblings together, then the regulations mandate that the child should be placed in a setting that is within reasonable proximity to his or her sibling(s). Additionally, if a child’s sibling is age 18 or older, that sibling would qualify as a preferred placement, as extended family. 25 C.F.R. § 23.131(a)(3); ICWA Guidelines, § H.2.

ICWA also requires that in selecting an adoptive placement, preference must be given, in the following order, to extended family, members of the child’s tribe, or other Indian families. 25 U.S.C. § 1915(a).

The new regulations make clear that the placement preferences are listed in descending order, most preferred to least preferred. Each preference must be considered, without being skipped, in that order. 25 C.F.R. §§ 23.130(a), 23.131(b).

**When do the placement preferences apply?**

The court must apply the placement preferences unless there is a determination on the record that there is good cause not to. The regulations lay out five factors upon which courts may base a determination of good cause to deviate from the placement preferences: (1) the request of the parent(s); (2) the request of the child; (3) a sibling attachment; (4) the extraordinary physical, mental, or emotional needs of the child; and (5) the unavailability of a suitable preferred placement. 25 U.S.C. § 1915(b); 25 C.F.R. §§ 23.129(c), 23.132(c).

If DCF relies on the unavailability of a preferred placement as the basis for a good cause determination, it must be able to demonstrate that it conducted a diligent search. The standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the tribe. This provision seeks to address biases of the non-Indian community about what is, or is not, safe for a child. It trumps some requirements about what constitutes an adequate placement, for example, the physical conditions of the home or perceptions about the role of extended family members in raising an Indian child. This means that the social worker needs to check within the tribal community about what is “safe,” rather than draw conclusions about a prospective placement based only upon his or her point of view. It does not, though, eliminate other requirements under state or federal law for ensuring safety, such as criminal background checks. 25 U.S.C. § 1915(d); 25 C.F.R. § 23.132(c)(5); ICWA Guidelines, § H.4.

Because there may be extraordinary circumstances where there is good cause to deviate from the preferences based on some reason outside of these five factors, the regulations say that good cause “should” be based on one or more of these factors, but leave open the possibility that a court may determine, in light of the particular facts of a case, that there is good cause to deviate for some other reason. Therefore, the court and DCF still have discretion to consider any unique needs of a particular Indian child in making a placement decision. 25 C.F.R. § 23.132(b).

A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another. Additionally, ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA cannot be the *sole* metric to continue a placement that violates ICWA (e.g. where it was not determined that ICWA applies until late in the case). 25 C.F.R. §§ 23.132(d), (e).

If any party asserts that good cause not to follow the placement preferences exists, the reasons for that belief or assertion must be stated orally on the record or in writing to the parties and court. 25 C.F.R. § 23.132(a).

Additionally, the regulations advise that the party seeking departure from the placement preferences “should” bear the burden of proving clearly and convincingly that there is good cause to depart from them. This is not a firm requirement, but is most consistent with Congress’s intent in ICWA to maintain Indian families and tribes intact. 25 C.F.R. § 23.132(b); *see also* ICWA Guidelines, § H.4.

**What standard of proof applies?**

ICWA requires higher standards of proof at temporary custody hearings and adjudications, and in proceedings to terminate parental rights. First, before granting temporary custody to DCF or adjudicating a child in need of care and protection, the court must find by *clear and convincing evidence* that continued custody by the parent is likely to result in serious emotional or physical damage to the child. In proceedings to terminate parental rights, DCF must prove *beyond a reasonable doubt* that continued custody is likely to result in serious emotional or physical damage to the child. 25 U.S.C. §§ 1912(e), (f).

The regulations require that the evidence also show a causal relationship between the particular conditions in the home and the likelihood that continued custody will result in serious emotional or physical damage to the child. This is our nexus requirement. Evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself meet the applicable standard of evidence. 25 C.F.R. §§ 23.121(b), (c), (d).

Second, the evidence must be supported by the testimony of one or more qualified expert witnesses. The statute is ambiguous as to who is a “qualified expert witness.” The new regulations do not define the term, but provide that a qualified expert witness *must* be qualified to testify regarding whether the child’s continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and *should* be qualified to testify to the prevailing social and cultural standards of the child’s tribe. This applies at seventy-two-hour hearings, adjudications, and termination proceedings. 25 U.S.C. §§ 1912(e), (f); 25 C.F.R. § 23.122(a).

The regulations continue to provide the court with discretion to determine what qualifications are necessary in a particular case. Although the question of whether continued custody by the parent or Indian custodian is likely to result in serious physical or emotional damage to the child should be examined in the context of the prevailing cultural and social standards of the tribe, there may be circumstances where this knowledge is plainly irrelevant. For example, an expert on issues regarding sexual abuse of children may not need to know about specific tribal social and cultural standards to testify regarding whether return of a child to a parent who has sexually abused him or her is likely to result in serious emotional or physical damage. The tribe may designate a qualified expert witness. However, the regulations prohibit the social worker regularly assigned to the child from serving as a qualified expert witness in that case. 25 C.F.R. §§ 23.122(a), (c); ICWA Guidelines, § G.2.

Finally, DCF must demonstrate that it made active efforts to prevent the breakup of the Indian family and that those efforts have been unsuccessful. The regulations define and provide 11 examples of “active efforts.” Active efforts are “affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family.” DCF must assist the parent(s) or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. Active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the child’s tribe, and conducted in partnership with the child, parents, extended family members, Indian custodians, and tribe. Active efforts must be tailored to the facts and circumstances of the case. Active efforts may include:

* conducting a comprehensive assessment of the family’s circumstances, with a focus on safe reunification as the most desirable goal;
* identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
* identifying, notifying, and inviting representatives of the tribe to participate in providing support and services to the family and in family team meetings, permanency planning, and resolution of placement issues;
* conducting a diligent search for extended family members, and contacting and consulting with extended family members to provide family structure and support for the child and parents;
* offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the tribe;
* taking steps to keep siblings together whenever possible;
* supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;
* identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the parents or, when appropriate, family, in utilizing and accessing those services;
* monitoring progress and participation in services;
* considering alternative ways to address the needs of the parents and, where appropriate, the family, if the optimum services do not exist or are not available;
* providing post-reunification services and monitoring.

25 U.S.C. § 1912(d); 25 C.F.R. § 23.2.

Proof of active efforts is required at seventy-two-hour hearings, adjudications, and termination proceedings. Active efforts must be documented in detail on the record. 25 U.S.C. § 1912(d); 25 C.F.R. § 23.120(b).

**Can a court order be invalidated?**

ICWA provides that a parent, Indian custodian, child, or tribe may file a motion to invalidate a court order transferring custody of an Indian child to DCF if any of the provisions of Sections 1911, 1912, or 1913 have been violated. For example, if DCF knew or had reason to know that the child was an “Indian child” but failed to provide the tribe notice of the proceeding, the parent, Indian custodian, child, or tribe could request that the court invalidate the temporary custody order. Similarly, if “active efforts” were not made by DCF prior to removal of the child from the home as required by 25 U.S.C. § 1912(d), or if the burden of proof required by 25 U.S.C. § 1912(e) is not established at the seventy-two-hour hearing, the custody order may be invalidated upon motion by any party. In addition, if the parent’s consent to temporary custody did not satisfy the requirements of 25 U.S.C. § 1913(a), the stipulation is invalid and unenforceable. If the court invalidates the order, the child must be returned home unless DCF initiates a new request for emergency custody and meets the heightened burden of proof under ICWA. *See* 25 U.S.C. § 1914.

The regulations repeat the statutory provisions for invalidation, and clarify that upon a showing that any of the provisions of Sections 1911, 1912, or 1913 have been violated, the court must determine whether it is appropriate to invalidate the action. The court is not required to invalidate the action. *See* 25 C.F.R. § 23.137; ICWA Guidelines, § K3.

**What if an Indian child’s adoption fails?**

 ICWA provides that if the adoption of an Indian child is subsequently vacated or the adoptive parents’ rights are terminated, the birth parent may petition the court for a return of custody. In that event, the court must return custody to the parent unless doing so would result in serious emotional or physical damage to the child. The regulations require the court to notify, by registered or certified mail with return receipt requested, the biological parent (or prior Indian custodian) and tribe if an Indian child’s adoption fails. The notice must: (1) state the current name, and any former name, of the child; (2) inform the recipient of the right to petition for return of custody; and (3) provide sufficient information to allow the recipient to participate in any scheduled hearings. 25 U.S.C. § 1916(a); 25 C.F.R. §§ 23.139(a), (b).

A parent or Indian custodian may waive his or her right to this notice by executing a written waiver and filing that waiver with the court. Before accepting the waiver, the judge must explain the consequences of the waiver and how the waiver may be revoked, and certify that the terms and consequences of the waiver and how the waiver may be revoked were explained in detail in English (or the language of the parent or Indian custodian, if English is not their primary language), and were fully understood by the parent or Indian custodian. A biological parent or Indian custodian may revoke their waiver at any time by filing a written notice of revocation with the court. A revocation does not affect any child custody proceeding that was completed before the notice of revocation was filed. 25 C.F.R. § 23.139(c).

**What recordkeeping is required?**

The regulations impose two primary vital record requirements on states. First, states must maintain a record of *every* placement of an Indian child, and make the record available within 14 days of a request by the tribe or BIA. The record must include:

* the petition or complaint;
* all substantive orders entered in the child custody proceeding;
* the complete record of the placement determination, including the findings in the court record and the social worker’s statement; and
* if the placement departs from the placement preferences, detailed documentation of efforts to comply with the placement preferences.

These records may be maintained within the court system or by a designated state agency. 25 C.F.R. § 23.141.

Second, the court or designated state agency must automatically provide the BIA with the adoption decree of each adopted Indian child within thirty 30 days of entry. No request is needed to trigger this requirement. The decree must be provided to the BIA in an envelope marked “confidential,” with the following information:

* birth name and birthdate of the child, and tribal affiliation and name of the child after adoption;
* names and addresses of the biological parents;
* names and addresses of the adoptive parents;
* name and contact information for any agency having files or information relating to the adoption;
* any affidavit signed by the biological parent(s) asking that their identity remain confidential; and
* any information relating to the child’s tribal membership or eligibility for tribal membership.

25 C.F.R. § 23.140(a).

**Where can I find additional information?**

Counsel not familiar with ICWA should read MCLE’s Child Welfare Practice in Massachusetts, Volume II, Appendix A, Child Welfare Proceedings Under the Indian Child Welfare Act.

The BIA website has numerous resources, including the complete text of the regulations and guidelines, reference guides, PowerPoints, and advisory letters at:

<https://www.bia.gov/WhoWeAre/BIA/OIS/HumanServices/IndianChildWelfareAct/index.htm>.

Also, visit the website of the National Indian Child Welfare Association (NICWA) at:

<http://www.nicwa.org>.