

Memorandum

From: John Guinn

To: Tom Bilteen

Date: November 2, 2021

Re: Does the 10 Day Notice Requirement of the Indian Child Welfare Act (ICWA) apply to Montana's Emergency Protective Services (EPS) Hearings?

Application of the ICWA

The Indian Child Welfare Act (ICWA) applies to child abuse and neglect cases involving an "Indian child." A 10 day notice requirement to parents, Indian custodians, and the Tribe is required for "child custody proceedings" in ICWA cases. However, "emergency proceedings," like Montana's Emergency Protective Services (EPS) hearings, are not child custody proceedings as defined by the ICWA. Therefore, the 10 day notice requirement should not prevent EPS hearings in Montana.

Indian Child

For the ICWA to apply to a child abuse and neglect case, the child must be an Indian child. Under the ICWA, an "Indian child" is an unmarried person under the age of 18 who is either:

1. A member of a federally recognized Tribe, or
2. Eligible for membership in a federally recognized Tribe and is the biological child of a member of a federally recognized Tribe. *25 U.S.C. 1903(4)*.

If there is "reason to know" a child may be a member of a federally recognized Tribe or eligible for membership, the child should be treated as an Indian child unless and until the child is determined not to be an Indian child under ICWA. *25 C.F.R. 23.107*. In other words, a child should be treated as an Indian child as long as there is a reason to believe they may be.

This process can make it challenging to determine accurately if a child is or is not an Indian child at the time of removal. In many child abuse and neglect cases, it takes time for a final determination to be made about the ICWA status. Thus, it can be difficult to determine if the case involves an Indian child subject to the ICWA at the time of an EPS hearing.

Child Custody Proceedings

In involuntary proceedings in a state court, where the Court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parents or Indian custodian and the Indian child's Tribe of the pending proceedings and their right of intervention. The ICWA provides 10 days from receipt of the notice for the parents, Indian custodian, or Tribe to respond to such notice, and they can request additional time to prepare for a child custody proceeding. *25 U.S.C. 1912(a)*. No child custody proceeding can occur during the 10 days after the notice is

received by parents, Indian custodians, or the Tribe. This requirement is sometimes referred to as the 10 day notice requirement.

The ICWA, including the 10 day notice requirement to parents, Indian custodians, and Tribes, applies to "child custody proceedings." Federal regulations define a child-custody proceeding to include "any action, **other than an emergency proceeding**, that may culminate in".... a foster care placement, termination of parental rights, pre-adoptive placement, or adoptive placement. *25 C.F.R. 23.2*. The 10 day notice requirement does not apply to emergency proceedings because those hearings are not child custody proceedings as defined by the ICWA.

Emergency Proceedings

"While states use different terminology (e.g., preliminary protective hearing, shelter hearing) for emergency hearings, the regulatory definition of emergency proceedings is intended to cover such proceedings as may be necessary to prevent "imminent physical damage or harm to an Indian child." *BIA Guidelines, C.1. at p. 23*.

An "emergency proceeding" is defined to include "any civil court action that involves an emergency removal or emergency placement of an Indian child." *25 CFR 23.2*. Emergency Protective Services (EPS) hearings, as the name implies, are emergency hearings for the purposes of the ICWA. Thus, 10 day notice requirements do not apply to EPS hearings. Notice should not be a reason to deny families affected by ICWA the right to an EPS hearing.

Federal Regulations and BIA Guidelines

Federal ICWA regulations require that a state court must find that an emergency removal is necessary to "prevent imminent physical damage or harm to a child." *25 C.F.R. 23.113(b)(1)*. State courts should also hold prompt hearings to determine if emergency removal or placement continues to be necessary. *25 C.F.R. 23.113(b)(2)*. This implies that Montana should be holding prompt hearings regarding emergency removal.

Among the items needed when filing a petition for emergency removal should be a list of steps taken to notify the parents, Indian custodians, and the Tribe about any emergency proceeding. *25 C.F.R. 23.113(d)(3)*.

"Neither the statute nor rule requires notice prior to an emergency removal because of the short timeframe in which emergency proceedings are conducted to secure the safety of the child (although there may be relevant State or due process requirements). In order to protect the parents', Indian custodians', and Tribes' due process and other rights in these situations, however, it is a recommended practice for the agency to take all practical steps to contact them. This likely includes contact by telephone or in person and may include email or other written forms of contact." *BIA Guidelines, C.9. at p. 29*.

Conclusion

An argument has been made that EPS hearings cannot be held within 5 business days of an Indian child's removal due to the 10 day notice requirement of the ICWA. However, emergency hearings like EPS hearings are not child custody proceedings that require a 10 day notice. For this reason, the vast majority of states hold an initial emergency hearing within a few days of removal. Those states do so without violating the requirements of the ICWA. Similarly, EPS hearings would not violate the notice requirements of ICWA.

In addition, federal law, regulations, and BIA guidelines make it clear that there is no federal notice requirement for an emergency hearing within a few days of removal. However, the Court needs to receive information about the efforts to notify the parents, Indian custodians, and Tribe about the emergency hearing. Such notification by CFSD can take the form of in person contact, written reports, emails, texts, etc. In addition, providing written notification of the EPS hearing through a written Notice of Removal could be effective.

The Court should make inquiries at the EPS hearings to determine if the child is or may be an Indian child. If there is "reason to know" a child may be an Indian child, the child should be treated as an Indian child until a final determination can be made about ICWA status after receiving responses from all potential tribes.

For emergency placement or removal to continue following an EPS hearing, the Court must also find that the removal of the Indian child is necessary to "prevent imminent physical damage or harm to a child." Such language should be required for findings in EPS hearings involving an Indian child. Otherwise, the child should be returned home.

When enacted in 1978, ICWA was intended to alleviate historical inequities resulting in alarmingly high rates of removals for Native American children. The ICWA was intended to protect the best interest of Indian children and to promote the stability and security of Indian tribes and families. *25 U.S.C. 1902*. It is meant to benefit Indian children, families, and Tribes, not deny them equal rights under the law.

EPS hearings are intended to provide Montana families with an opportunity to address the need for continued removal of their child at an early court hearing. EPS hearings are held within 5 business days of removal. With EPS hearings, families do not have to wait up to 20 days from the filing of a child abuse and neglect petition to appear in court for a show cause hearing. EPS hearings are a significant new right for Montana families faced with the removal of their child. Denying families impacted by ICWA the opportunity to have an EPS hearing is contrary to the stated intent of the ICWA.

§ 23.113 What are the standards for emergency proceedings involving an Indian child?

(a) Any emergency removal or placement of an Indian child under State law must terminate immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(b) The State court must:

(1) Make a finding on the record that the emergency removal or placement is necessary to prevent imminent physical damage or harm to the child;

(2) Promptly hold a hearing on whether the emergency removal or placement continues to be necessary whenever new information indicates that the emergency situation has ended; and

(3) At any court hearing during the emergency proceeding, determine whether the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(4) Immediately terminate (or ensure that the agency immediately terminates) the emergency proceeding once the court or agency possesses sufficient evidence to determine that the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(c) An emergency proceeding can be terminated by one or more of the following actions:

(1) Initiation of a child-custody proceeding subject to the provisions of ICWA;

(2) Transfer of the child to the jurisdiction of the appropriate Indian Tribe; or

(3) Restoring the child to the parent or Indian custodian.

(d) A petition for a court order authorizing the emergency removal or continued emergency placement, or its accompanying documents, 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 petition or its accompanying documents should also contain the following information:

(1) The name, age, and last known address of the Indian child;

(2) The name and address of the child's parents and Indian custodians, if any;

(3) The steps taken to provide notice to the child's parents, custodians, and Tribe about the emergency proceeding;

(4) If the child's parents and Indian custodians are unknown, a detailed explanation of what efforts have been made to locate and contact them, including contact with the appropriate BIA Regional Director (see *www.bia.gov*);

(5) The residence and the domicile of the Indian child;

(6) If either the residence or the domicile of the Indian 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;

(7) The Tribal affiliation of the child and of the parents or Indian custodians;

(8) A specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the child to take that action;

(9) 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

(10) A statement of the efforts that have been taken to assist the parents or Indian custodians so the Indian child may safely be returned to their custody.

(e) An emergency proceeding regarding an Indian child should not be continued for more than 30 days unless the court makes the following determinations:

(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 jurisdiction of the appropriate Indian Tribe; and

(3) It has not been possible to initiate a "child-custody proceeding" as defined in § 23.2.

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C.9 Notice in emergency situations

Regulation:

No regulatory requirements for notice by registered or certified apply in emergency proceedings; however, § 23.113(c) requires agencies to report to the court on their efforts to contact the parents, Indian custodian, and Tribe for the emergency proceeding.

Guidelines:

Neither the statute nor rule requires notice prior to an emergency removal because of the short timeframe in which emergency proceedings are conducted to secure the safety of the child (although there may be relevant State or due process requirements). In order to protect the parents', Indian custodians', and Tribes' due process and other rights in these situations, however, it is a recommended practice for the agency to take all practical steps to contact them. This likely includes contact by telephone or in person and may include email or other written forms of contact.