

# Family Law and ICWA Issues

Justice Track Workshop Presentation  
Kawerak, Inc. Regional/Rural Providers' Conference  
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Presented by:

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# Tununak II (*Native Village of Tununak v. State of Alaska, OCS*)

## Background

- 4 month old “Dawn” (AK Native) placed in emergency foster care
- Native Village of Tununak (NVT) intervened and provided maternal grandma’s name to OCS as placement option
- Grandma ruled out as placement b/c of adult son’s criminal record—he lived with her.
- Dawn placed with non-Native foster family in ANC while mom worked case plan
- Adult son moved out of grandma’s home—grandma notified OCS
- Court terminated parental rights of mom. NVT requested placement with grandma. Foster family filed petition to adopt in State Court
- Though grandma requested placement, she never filed petition to adopt in state court

# Tununak II

## Court's Ruling

- AK Supreme Court agreed with OCS's interpretation of "Baby Veronica" case.
- Because grandma did not file correct legal papers to petition to adopt Dawn, ICWA placement preferences do not apply.
- Foster family's petition to adopt was only valid petition—thus preferences no applicable
- Court said grandma should have filed adoption petition—placement requests to OCS and testimony in court not enough

# Tununak II

## What it means for AK Tribal Members

- Important to identify, ASAP after child taken into State custody, any family, tribal members, or other Native homes willing to take the child
- Best practice: as soon as OCS decides primary plan for child is adoption (not reunification), family seeking placement MUST file an adoption petition in state superior court.
- Consider transferring CINA cases to tribal court

# Tununak II

## Is this case still in effect?

- Native Village of Tununak has requested a re-hearing in front of AK Supreme Court
- No Order yet
- Case is still good law

However...

# Governor's Emergency Regulations

- In effect: April 15, 2015 through August 12, 2015
- No formal adoption request required...instead can
  - ◆ Make placement/adoption request at any court hearing in Child In Need of Aid (CINA) case
  - ◆ Make placement/adoption request to OCS via phone, mail, fax, email, or in person
  - ◆ Tribe can make request on behalf of family member

# Governor's Emergency Regulations

- Expires in August
- Steps in place to make permanent
- Legislation introduced—will be addressed when Legislature re-convenes for the second half of the session next year.

*“...maintaining connections with extended family, Tribe, and culture promotes the mental and behavioral health of a Native child, and the long-term health of the child’s Tribe. What is in the best interests of Alaska Native and American Indian children, including for those children to be raised within their families and communities, is in the best interests of Tribes and the State of Alaska.”*

- Finding of Emergency , Filed Emergency Regulations: Petition of Adoption of children in state custody

# New Proposed ICWA Regulations

- Indian Child Welfare Act (25 U.S.C. § 1901 *et seq.*) (ICWA) was enacted in 1978.
- 1979, the Bureau of Indian Affairs (BIA) issued Guidelines for implementing ICWA. In 2014 further Guidelines were issued.
- March 20, 2015, Department of Interior published a Proposed Rule in the Federal Register “Regulations for State Courts and Agencies in Indian Child Custody Proceedings” which are proposed regulations at 25 C.F.R 23. (*see* 80 Fed. Reg. 14880 (Mar. 20, 2015))
- Deadline for comments to the Proposed Rule closed on May 19. Tribes and others nationally provided comments. Kawerak, AFN and the State of Alaska provided comments. Tribes are overwhelmingly in support of these regs.
- Following are just some of the highlights...

# New Proposed ICWA Regulations

## Highlights:

- They are regulations, not guidelines. Regulations have the force of law, unlike Guidelines. State courts and agencies must comply with these once enacted.
- Active Efforts. Parties to ICWA cases have struggled for years to understand Active Efforts and what it actually requires. New Regs have definition of Active Efforts with fifteen examples. Many of these are focused on actively engaging with the family of the parents. They also include inviting the child's tribe to participate in reunification efforts.
- No more existing Indian Family doctrine. Confirms there is no "existing Indian family doctrine." Courts may no longer use this as a reason to conclude ICWA does not apply at all.
- Early ID of child as Indian Child. Agencies and courts must ask if the child is an Indian Child at each proceeding from the beginning of child protection cases and conduct an investigation to determine if the child is. This will promote earlier compliance with ICWA.

# New Proposed ICWA Regulations

## Highlights (cont.):

- Notice in voluntary proceedings. ICWA applies to voluntary proceedings like adoptions. But until now, no requirement for tribes to receive notice. Regs now require notice.
- Determining child is tribal member. Makes clear that only the tribe, and no one else including the State and its agencies, can decide if a child is a member of a tribe or eligible for membership.
- Transfers to Tribal Court. Available at every proceeding, no matter how far along. Can't deny a transfer because of placement. Can't deny due to child's lack of previous contacts with the tribe. Or because of perceived inadequacy of the tribal judicial system.
- Qualified Expert Witnesses. Expert witnesses must have specific knowledge of the tribe's social and cultural standards and customs. We and others asked to clarify that standard is not met just by asking tribe for an expert.
- Placement Preferences. Good cause to deviate can't be due to ordinary bonding while with current non-compliant placement.

# New Proposed ICWA Regulations

## Reactions:

- Kawerak, AFN, and other tribes and tribal orgs were overwhelmingly in favor of these new regs. Copies of Kawerak and AFN comments are available.
- The State of Alaska's comments were generally positive. The State commented that they hope the new regs will increase ICWA compliance for placement of Alaska Native children. The State expressed concern regarding new provisions about qualified expert witnesses. The concern is finding qualified experts for each village, and possible delays keeping kids in custody longer. Their comments are available.

## Moving Forward:

- It will be interesting to see how the State Office of Children's Services and the Courts incorporate compliance with these regs. There may need to be some court rule changes (such as CINA Rule 23) and almost certainly OCS policy changes (e.g. experts, active efforts, etc.)

# Frequently Asked Questions

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# Alaska Legal Services Corporation (ALSC)

Who are we?

- Private, non-profit law firm that provides free legal assistance in civil matters to low-income and elder Alaskans.

What do we do?

- Advice and counsel, brief service, through full representation
- No criminal cases



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# ALSC: What types of cases do we handle?

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- **Public Benefits**: Veteran benefits, healthcare, income maintenance, food assistance, and disability benefits.
- **Elder Advocacy**: power of attorney, Millers Trusts, living wills and testamentary wills
- **AK Native Law**: Subsistence, ICWA, wills and allotments.

# ALSC: How to Apply/Eligibility

- Contact our office to request an application—can apply over the phone, online, via fax, in person
- Eligibility: based on income, assets, and household size

# ALSC Contact info



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