

Understanding Applicable Laws in Child Protection and Child Welfare Cases: Presentation at TCAP Tribal Courts Conference – Minneapolis August 20, 2015

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Inherent Sovereignty

Tribal right to make decisions and exercise jurisdiction over child welfare matters – essential part of inherent sovereignty long recognized by United States courts

- *Fisher v. District Court* (U.S. Supreme Court, 1976) – tribal court – exclusive jurisdiction over adoption proceeding involving tribal members who were reservation residents
- *U.S. v. Quiver* (U.S. Supreme Court, 1916) - personal and domestic relations of the Indians with each other shall be dealt with according to their tribal customs and laws.

Federal child welfare statutes

Tribal participation in federal child welfare programs can create legal obligations in regard to tribal codes and tribal court proceedings.

Many tribes participate in Title IV-B or Title IV-E child welfare programs.

Overview of Titles IV-B and IV-E

Basic federal child welfare statutes provide core funding for state child welfare systems

Establish requirements routinely included in child welfare systems -- for example, case plans, case review systems, reasonable efforts requirements, focus on child health and safety and expedited permanent placements.

Overview of Titles IV-B and IV-E

Title IV-B, Part 1 – Provides funding for child and family services that promote the safety, permanence and well-being of children, including preventive services

Title IV-B, Part 2 – Provides funding for family support, family preservation, time-limited family reunification and adoption promotion and support

Title IV-E - Provides money for foster care, adoption assistance and relative guardianship payments and related training and administration on an entitlement basis and grant money for services to children aging out of foster care

Tribal Participation

Title IV-B

- Almost 400 tribes receive Title IV-B funding directly or through a multi-tribal entity

Title IV-E

- 6 tribes have been approved for direct federal funding
- 20 additional tribes have received planning grants to prepare to apply for federal funding
- As of December 2013, 267 tribes were parties to Title IV-E tribal-state agreements, but not all of those agreements are currently active.

Title IV-B Legal Requirements

- Child and Family Services Plan
- Broad consultation with public, non-profit and community-based organizations
- Subject to HHS evaluation
- Provide for training
- Coordinate with other federally-funded programs serving children and families
- Case plans, case reviews, permanency hearings

IV-E Legal Requirements

- Required Title IV-E plan has almost 200 separate legal elements
- Most requirements need to be met by reference to documents in written form
- Can be tribal codes, rules and regulations, manuals, policies, agreements statements, or other documents depending upon the requirement.

IV-E Legal Requirements

- Determination that a child is in need of care
 - Defined case plan
 - Eligibility determination form
 - Court proceedings

- Removal a child from the home
 - Contrary to the welfare of the child
 - Reasonable efforts to prevent removal
 - Tribal *nunc pro tunc*

IV-E Legal Requirements

Placement preferences

- Relatives
- Multi-Ethnic Placement Act – ICWA exception
- Least restrictive setting in close proximity to the parent's home
- Siblings

IV-E Legal Requirements

- Termination of parental rights
 - Foster care placement – 15 of 22 months
 - Exceptions – case-by-case
 - Modification of parental rights permitted
- Kinship care/guardianships
- Adoptions
 - Customary adoptions
- Voluntary placements – 180 days

IV-E Legal Requirements

Judicial/Administrative Proceedings:

- Case review systems – 6 months
- Permanency Hearing
 - 12 months
 - Reasonable efforts to achieve permanency
- Appeals – Denial of benefits/ eligibility

IV-E Legal Requirements

Judicial/Administrative Proceedings:

- Licensing of foster and adoptive homes, guardianships and child care institutions
 - Tribal standards
 - Limitations on who can be approved
 - Indian Child Protection and Family Violence Prevention Act (ICPFVPA)

IV-E Legal Requirements

Judicial/Administrative Proceedings:

- Payment level – set by tribe
- Maximum number of children in foster care
- Providing services
- Training
 - foster parents
 - agency and court personnel
 - adoptive parents and guardians
- Eligibility determinations – 1996 AFDC trigger

IV-E Legal Requirements

Judicial/Administrative Proceedings:

- Reports and evaluation
- Chafee program
 - Direct access
 - Access through tribal-state agreement
- Cross-system coordination
 - Tribal-state coordination
 - Intra-tribal coordination

IV-E Legal Requirements

Jurisdictional issues:

- Who is subject to the jurisdiction of the court (personal jurisdiction)
 - Age
 - Non-tribal members
- Definition of territorial jurisdiction
 - Service area
- Tribal court structure

IV-E Legal Requirements

Third Party Rights/Obligations

- Foster parents, preadoptive parents and relatives – right of notice, opportunity to be heard for those providing care; all relatives receive notice
- Hold harmless – families currently receiving benefits
- Reporting of child abuse and neglect
- Medicaid
- Privacy

Title IV-B and IV-E Legal Requirements

New legislation:

- Sex Trafficking
- Reasonable and Prudent Parenting Standard
- Limits on APPLA
- Document rights of older children

Indian Child Protection and Family Violence Protection Act

- Requires mandatory reporting and background checks for individuals who have contact or control over AI/AN children (including foster and adoptive homes)
- Restrictions on who may be hired (licensed)
- Never funded

Other laws indirectly related to child welfare with impacts upon tribes

Among the other federal laws that are peripherally related to children's issues are the following:

- Adam Walsh Act – sex offender registries
- Tribal Law and Order Act – enhanced sentencing; some focus on juvenile justice issues
- Violence Against Women Act

For Further Information

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