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Memo

To: County Directors, County Child Welfare
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Date: May 30, 2012

From: Rebekah Mason Visconti, Director, Office of Legal Services

Subject: Monthly Case Law Update

This month's case law update summarizes a Michigan Supreme Court opinion dealing with the Indian Child Welfare Act's notice requirements. This case law update also includes a reminder regarding written court orders.

Indian Child Welfare Act (ICWA) Notice Requirements

On May 4, the Michigan Supreme Court issued an opinion in the cases of *In re Morris* and *In re Gordon*. The Court provided detailed instructions on complying with 25 USC 1912(a), which states in part:

“In any involuntary proceeding 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 parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner”

If DHS seeks foster care placement or termination of parental rights in a case, DHS must provide notice in the manner and to the parties specified in this federal statute. 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.” Only an Indian tribe may determine who is a member or eligible for membership, so

notifying any identified tribe or the Secretary of the Interior is therefore crucial to allow a tribe to assert its rights under ICWA.

In the *Morris* and *Gordon* cases, the Court provided answers to four questions.

1. When does a court “have reason to know” that an Indian child is involved in the proceeding? “[S]ufficiently reliable information of virtually any criteria on which tribal membership might be based suffices to trigger the notice requirement.”
2. May a parent waive a tribe’s right to notice of the proceedings? No. Tribes have interests protected by ICWA that are separate and distinct from parental interests.
3. What are the record-keeping requirements to document compliance with the notice provision? A court must maintain at least the original or a legible copy of each notice sent and any return receipt or other proof of service. The record should also include copies of any correspondence between DHS, the court, and a tribe or other person or entity entitled to notice.
4. What is the appropriate remedy for violation of ICWA’s notice requirements, contained in 25 USC 1912(a) (quoted above)? The appropriate remedy is to conditionally reverse the termination of parental rights and remand the case to the trial court for resolution of the notice issue.

A Reminder Regarding Written Court Orders

Courts must issue written orders directing DHS to take custody of a child, reunify a child with a parent, or take other similar action. Oral orders directed to departmental employees are insufficient.

All court orders must be in writing, dated, and signed by the court. MCR 2.602(A)(1). It is a well-established legal rule that courts speak through their written orders, not their oral statements.