



CALIFORNIA JUDGES' BENCHGUIDE

THE INDIAN CHILD WELFARE ACT



Mary J. Risling, Esq.

LAW OFFICES OF
CALIFORNIA INDIAN LEGAL SERVICES

*787 North Main St., Suite D
Bishop, CA 93514
(760) 873-3581*

*609 S. Escondido Blvd.
Escondido, CA 92025
(760) 746-8941*

*324 F Street, Suite A
Eureka, CA 95501
(707) 443-8397*

*510 16th St., 4th Floor
Oakland, CA 94612
(510) 835-0284*

www.calindian.org

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Honorable Patricia Bresee, Commissioner
San Mateo Superior Court
Juvenile Division
San Mateo, California

Honorable Abby Abinanti, Commissioner
San Francisco Superior Court
Juvenile Division
San Francisco, California

Ms. Toni Hertz, J.D.
Children's Services Administrator
Department of Children & Family Services
Los Angeles County

Mary Jane Risling, Directing Attorney for the Eureka office of California Indian Legal Services, served as principal author of the Benchguide. The assistance of Ms. Reina Milligan and Ms. Jennifer Carpenter in the development of the Benchguide is gratefully acknowledged. As well the assistance of Ms. Sonia Montero in the initial development and this recent revision of the Bench Guide is acknowledged. Her constant contribution of time and effort in review and consultation on the guide was essential to its completion.

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I. Scope and Use of Benchguide

This benchguide provides an overview of the procedures for handling Indian child custody cases subject to the requirements of the Indian Child Welfare Act, 25 U.S.C. §1901 et seq..

Under its definition of "child custody proceeding", the Act specifies the types of custody cases to which it applies and the types of custody cases to which it does not apply. The focus is not on what a proceeding is called, or whether it is a private action or an action brought by a public agency, but on whether the proceeding meets a definition set forth in the Act. (25 U.S.C. §1903(1).) The Act covers *any* temporary placement where the child need not be returned upon demand, and includes placement in a foster home or institution or the home of a guardian or conservator. The Act also covers *any* proceeding resulting in adoption or termination of parental rights. This would generally include juvenile, family court and probate guardianship actions. However, by its terms, the Act does NOT apply to all custody cases. The Act expressly excepts custody disputes between parents in divorce (dissolution) proceedings, and placements based on criminal acts (most Welf. & Inst. Code §602 proceedings.) (See Benchguide, §IV.B.3.)

The benchguide includes frequently asked questions, procedural checklists, a summary of the law, a section on practical solutions to Indian Child Welfare Act issues, resource information, and forms. Some information is provided which is specific to application of the Act in the context of particular types of California proceedings. However, a discussion of California custody proceedings is beyond the scope of this benchguide.

The text of the Act, regulations, guidelines for state courts, rules of court and State Department of Social Services All-County information are included as Appendices. Also included as an appendix is an Indian Child Welfare Act Outline addressing the minimum federal standards for state court proceedings. This is provided as a quick reference to authority.

II. Frequently Asked Questions

A. General Questions About Indians and Tribes.

1. Who is considered an Indian?

In general, to be an Indian, a person must have some Indian blood and must be considered an Indian by his/her community. **No single Federal or tribal criterion establishes a person's status as an Indian.** Government agencies use differing criteria to determine who is an Indian eligible to participate in their programs. Tribes also have varying eligibility criteria for membership. To determine what the criteria might be for agencies or Tribes, you must contact them directly.

Indian status determinations **can be complex** undertakings, with **outcomes differing depending on the particular circumstances** surrounding an inquiry. The ICWA, a single federal statute contains multiple definitions of Indian (See Benchguide §IV.C.1.a.):

- C Section 1903(3) defines Indian as *a member of an Indian tribe*. Section 1903(4) defines Indian child as *a member or eligible for membership and the child of a member of an Indian tribe*.
- C Section 1934 contains a special (and broader) definition of Indian for purposes of eligibility for Child and Family Services funded under Title II of the Act.
- C Section 1912 requires that notice be provided as required under the ICWA *"whenever the court knows or has reason to know the child may be an Indian."*

2. What is a Federally recognized Indian Tribe; how does a Tribe gain recognition, and why is recognition important?

There are more than 550 Federally recognized Tribes in the United States, including 223 village groups in Alaska. There are over 100 federally recognized Tribes in California. "Federally recognized" means that these tribes and groups have a special, legal relationship with the U.S. government. This relationship is referred to as a government-to-government relationship. Indians must be members, i.e., "citizens" of a tribal government in order to be subject to many of the special laws governing Indians and tribes.

In the early 1980's the Bureau of Indian Affairs adopted regulations which require periodic publication of a list of recognized tribes in the Federal Register. The list must be published once every three years, with the most current list generally available through the BIA. The most recent list of federally recognized tribes is published in 65 Fed. Reg. 13298 (March 13, 2000). The regulations (which continue to evolve) also establish a procedure for "unrecognized tribes" to petition for recognition. 25 C.F.R. Part 83. In recent years "federally recognized" has commonly come to mean that a tribe is included on the Part 83 list. A Tribe can gain recognition (have their status as a tribe acknowledged or restored) by successfully petitioning under the regulations, or in some cases by securing status clarification from the Bureau through other means, through litigation or through legislation. See Benchguide § IV.C.1.b. for a discussion of the unique history of tribes in California.

3. Who governs an Indian Tribe and how does a Tribe take formal action?

Courts often struggle with issues that have at their core, this question. The question may arise in a variety of contexts, such as:

- a. *How is a court to determine if a non-attorney is a valid representative of a tribe?*
- b. *How does the court know if someone is considered an expert by a tribe?*
- c. *How does the court know if a tribe approves a placement?*

Most tribal governments are organized democratically, that is, with an elected leadership. The governing body is generally referred to as a “council” and comprised of persons elected by vote of the eligible adult tribal members. The presiding official is the “chairperson,” although some tribes use other titles. An elected tribal council, generally operating pursuant to a Tribal Constitution and recognized as such by the Secretary of the Interior, has authority to speak and act for the tribe and to represent it in negotiations with Federal, State and local governments. Most formal tribal council action is reflected in council meeting minutes and corresponding resolutions and ordinances or tribal statutes. **Resolutions** will commonly confirm a tribal action or designate an official with authority to represent the tribe for designated purposes. (For a common form of a tribal resolution, see Benchguide §VIII.H.) The form of tribal governmental organization and the procedures and processes followed by tribes may vary. However, tribes are governments. Upon inquiry, the tribe can clarify what the particular processes of its government are.

B. Questions about an Indian child’s Best Interests

4. The Act requires the best interests of Indian children be protected. Is the best interest standard established by the Act the same as for non-Indian children?

No. The two purposes of the Indian Child Welfare Act - to promote “the ‘best interests of Indian children’ and the ... ‘stability and security of Indian tribes and families’ - are intertwined” with the underlying premise being that “**it is in the best interest of an American Indian child that the role of the tribal community in the child’s life be protected.**” See 25 U.S.C. §1902. The Indian child has an interest in his or her tribe that Congress has sought to protect by, among other things, the imposition of minimum federal standards, in order to assure that cultural bias and misunderstanding does not adversely impact an Indian child’s relationship with his or her Indian family and tribe. What the Act attempts to do is to eliminate biased subjectivity by imposing minimum standards for state court proceedings. As a matter of federal law, if these standards are met, the best interests of Indian children will be advanced. If they are not, then the action is not in the best interest of the Indian child regardless of the belief of the state court judge to the contrary. This approach was formally adopted by California in 1999, with passage of AB 65. The bill, codified in Fam. Code §7810 and Welf. & Inst. Code §§305.5 and 360.6, directs the courts to strive to promote the stability and security of Indian tribes and families and to comply with ICWA in all Indian child custody proceedings as specified by the Act.

5. What is the effect and importance of keeping half-siblings together when they may have different Indian heritages; or when some may be Indian children and others not? May the court consider the needs of the children to stay together over the interests of the tribe in a particular Indian child?

The Act establishes a “good cause” standard for both transfer of jurisdiction and for application of placement preferences. To the extent the needs of the Indian child present good cause to deny transfer to tribal court or placement in accordance with the preferences in the Act, the needs can be accommodated. However, in applying the good cause standard, a court should carefully bear in mind the likely outcome of the proceeding. In situations where children may ultimately be split up and adopted out because reunification has failed, no objective that advances the interests of the Indian child will be met by failure to apply the protection set forth in the Act.

As well, as discussed above, *it is misguided to view the interest of the tribe as opposed to those of the child*, and to view the application of the Act as only in the tribe’s interest. The Indian child has an interest in his or her tribe that Congress has sought to protect. It is important to keep this in mind. It is the child’s political status that allows application of different laws and that requires adherence to those laws, even though other family members may not be entitled to similar rights or protections.

6. Why apply the Act if the child has always lived with a non Indian parent and had little or no contact with their Indian heritage or tribe?

Congress found that “the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the *essential tribal relations* of Indian people *and* the *cultural and social standards* prevailing in Indian communities and families.” 25 U.S.C. §1901(5).

This finding sets forth two important but distinct considerations that underlie the provisions of the Act and the federal best interest standard, and that render application of the Act to all Indian children important.

a. Cultural considerations.

C Concern for tribal culture and heritage are relevant to a proper application of the Indian Child Welfare Act. See, 25 U.S.C. §1912, §1915. (Assessment, treatment and placement standards require adherence to cultural dictates.)

C However, the Act is not simply an effort to strengthen Indian culture.

b. Political status. The Act acknowledges a *special relationship* between tribes and the federal government and seeks to protect *essential tribal relations*.

C The nature of these relationships, both between tribes and the federal government and between tribes and their members, are premised on more than mere cultural considerations.

C Indians as members of tribes are not simply separate racial or cultural groups, but also separate *political* groups. Indian tribes stand in a government to government relationship with the United States. An Indian child is a “citizen” of a tribe and entitled to the incidents of that status as determined both by the laws of the federal

government and the tribe. The Act is very much concerned with these legal/political relationships.

As U.S. citizenship is significant to a U.S. citizen, even one residing outside the United States, so Indian status and a relationship with one's tribe, is important to and in the best interest of an Indian child.

7. Under the ICWA Indians are treated differently than anyone else. Why is this not a violation of equal protection?

The Constitution of the United States establishes principals that require equality under the law. However, Indians are subject to many laws that apply only to Indian people. The principle case establishing the permissibility of this situation was a case involving laws allowing Indian employment preferences.

Indian employment preference means discrimination in favor of Indians. Why is this permitted? A group of non-Indian BIA employees asked this question in 1974. Their case, Morton v. Mancari, was presented to the U.S. Supreme Court. *Morton v. Mancari* (1974) 417 U.S. 535. There, the judges unanimously agreed that Indian Employment Preference is acceptable because of the unique nature of Indians and tribes.

(Indian employment preference) does not constitute "racial discrimination." Indeed, it is not even a "racial" preference. Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government. . . The preference, as applied, is granted to Indians not as a discrete racial group, but, rather as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.

What makes tribes so special are political facts, not racial or cultural. A tribe is an ethnic group - - a cultural entity - - but also has the political right to self-government. Statutes passed for Indians may have incidental benefits of advancing Indian religion, culture, race, etc. However, they survive challenge because they are not based on these impermissible criteria, but on the unique relationship between tribes (as political entities) and the federal government.

C. Questions About Confirming a Child's Indian Status

8. How is the court to know if a child is an Indian and what is the court's obligation to determine an Indian child's status?

Indian status determinations can be very complicated. For this reason, the ICWA attempts to create a situation in which tribes, and in their absence, the Bureau of Indian Affairs (BIA), have the opportunity to determine if a child is an Indian. In the first instance, the Act does not require the court to make a final determination. Rather, if the court knows or has reason to know that the child is an Indian, then notice to the tribe(s) and BIA is required. Reason to know may involve a number of factors discussed at length in Section IV. E of the Benchguide. The Rules of Court impose an affirmative duty on the court to make inquiry in juvenile dependency cases. As well, failure to properly identify an Indian child and follow the Act, subjects the proceeding to invalidation.

Because Indian status determinations are complex, in juvenile cases, the California Rules of Court distinguish between children who may simply be of Indian descent, and Indian children, that is, children that may meet the definition of Indian set forth in the Act. When a child is simply of Indian descent, all that is required is notice to the Bureau of Indian Affairs and further inquiry. However, whenever the court has reason to believe a child may be *Indian*, that is, *a member or eligible for membership in an Indian tribe*, the rule specifies that the court should proceed in accordance with the Act. For cases that may involve Indian children, the rule essentially creates a presumption, thereby providing a basis for treating the case as an Indian case, in the absence of a definitive response from tribes or the Bureau of Indian Affairs. In this manner, if the minimum standards are complied with, then the case will not be subject to invalidation when it is later confirmed that the child is Indian. (See, California Rules of Court, rule 1439(e).)

9. How does the court find out the address of the tribe and if a child is enrolled?

23 C.F.R. §23.12 requires an annual publication in the Federal Register of the name and address of designated tribal agents for service. A current list of such agents is required to be available through the Bureau of Indian Affairs (BIA) Area Offices. Unfortunately, the list is not regularly published. Nevertheless, current addresses of tribes can generally be provided by the relevant BIA Area Office. In California, the Sacramento Area Office, can either provide the necessary address or assist in identifying the proper Area Office to call to obtain a tribe's current address.

In addition the local child welfare agency has access to tribal addresses via the Case Management System\Child Welfare System (CMS\CWS). This system lists the tribes, the addresses, the phone numbers and the name of the individual designated for service.

To determine if a child is enrolled in a tribe, one must generally contact the tribe. Tribes vary in their level of development and in their ability to provide an immediate answer. The law distinguishes between enrollment and "membership or eligibility for membership." **FORMAL ENROLLMENT IS NOT REQUIRED IN ORDER FOR THE CHILD TO BE A MEMBER OR ELIGIBLE FOR MEMBERSHIP IN A TRIBE.**

10. What if the questions regarding whether the child may be an Indian child have been asked, with a consistent negative answer, until it is time to terminate reunification services, at which point tribal membership is confirmed? Do we have to start all over again? Or, do we assume a tribe has been identified by a party, and notified, but determined that the child is neither a member nor eligible for membership? The party then identifies a different tribe as a possible source of membership. How many times must the court pursue this?

The notice requirements of the Act are triggered when the court knows or has reason to know a child may be an Indian. There may be factors other than a party's response that suggest a child may be Indian. Certainly, a mistaken answer or a negative answer given in an attempt to conceal Indian status, does not defeat application of the Act. Still, if a court has no reason to know a child is Indian, there is probably no violation of the notice requirement.

Other minimum federal standards, aside from notice, apply when an Indian child is involved in the case, whether or not the court is aware of the child's status. If these minimum standards are not complied with, the child, the parent, the Indian custodian or the Tribe may petition to invalidate the proceeding. The Tribe and Indian custodian may intervene at any point in the proceeding, including intervening late in the

proceeding to seek invalidation. If a case is invalidated, the basis for the invalidation would impact what must happen in the case and whether a court must “start over.” See, *In re Desiree F.* (2000) 83 CA4th 460, 475. [The failure to give the Tribe notice as required by ICWA requires that we invalidate those juvenile court orders to which the Tribe objects.”]

Because Indian status determinations are complex, in juvenile cases, the Rules of Court specify that the court should proceed in accordance with the Act whenever they have reason to believe a child may be Indian, that is, a member or eligible for membership in an Indian tribe and the child of a tribal member. The rule provides a basis for treating such case (as distinguished from cases where there is only a suggestion of Indian ancestry) as an Indian case. In this manner, if the minimum standards are complied with, then the case will not be subject to invalidation at such time as it may later be confirmed that the child is Indian.

D. Questions about the Minimum Federal Standards for State Courts

11. To which child custody cases does the ICWA apply?

The ICWA does not contain a definition of “custody” per se. Under its definition of “child custody proceeding”, the Act specifies the types of custody cases to which it applies and to which types of custody cases it does not apply. The *focus is not on what a proceeding is called, or whether it is a private action or an action brought by a public agency, but on whether the proceeding meets a definition set forth in the Act.* 25 U.S.C. §1903(1).

- a. *Does the Act apply to private (probate) guardianships, private adoptions, or other proceedings involving child custody where children are not abused or neglected?*

The Act covers any child custody proceeding that meets the definitions of foster care placement, pre-adoptive placement, adoption or termination of parental rights. Foster care placement is defined to mean *any* temporary placement where the child need not be returned upon demand, and includes placement in a foster home or institution or the home of a guardian or conservator. This clearly includes probate guardianships. Likewise, the definitions of adoption and termination of parental rights reference *any* proceeding resulting in adoption or termination of parental rights. This would include family court actions.

- b. *Does the Act apply to custody disputes between parents?*

By its terms, the Act does NOT apply to all cases involving custody. The Act expressly excepts **custody disputes between parents in divorce proceedings**, and placements based on criminal acts.

While marriages in California are ended by dissolution and not “divorce,” the Act is clearly **not** applicable to a custody dispute between parents in a dissolution action, a proceeding involving termination of a marriage. However, a dissolution proceeding may be covered if a third party seeks custody. See Benchguide, §IV.B.3. It is unsettled whether the ICWA applies to family law custody disputes between parents who were never married. To the extent such proceedings are like divorce cases, the Act probably does not apply. However, it has been held to apply to other types of proceedings, such as termination of parental rights, even when the action is between parents.

c. *Does the Act apply to Welf. & Inst Code §602 proceedings?*

By its terms, the Act does NOT apply to all cases involving custody of an Indian child. The Act expressly excepts **placements based on an act which, if committed by an adult, would be deemed a crime**. Hence, proceedings under Welfare and Institutions code §602 (delinquency cases) are not subject to the Act when placement is based on a criminal act. However, not all California delinquency cases involve removals based on criminal acts. (Remember, the focus is not on what a proceeding is called, but on whether the proceeding meets a definition set forth in the Act.) 1999 changes to California law make it clear that some removals in delinquency cases are “placements” which meet the requirements for federal foster care funding, in that they are made for the child’s welfare after reasonable efforts have been made to prevent the need for removal of the child from his or her home. (See, e.g., Welf. & Inst §636.) In effect, the findings required to qualify the placement for federal foster care funding, also bring the proceeding within the federal definition of child custody proceeding covered by the Indian Child Welfare Act. The source of funding brings other requirements as well, including permanency planning requirements and the option of terminating parental rights. Termination of parental rights is, of course, a proceeding subject to the Act. Finally, California law now allows the granting of guardianships in delinquency proceedings. The granting of a guardianship is not limited to “placement” cases. Guardianship falls within the Act’s definition of foster care placement and is covered by the Act. Given the Act’s express exclusion of placements based on crimes, it is unlikely that all delinquency proceedings are brought within the Act’s scope simply because any such proceeding could lead to guardianship. However, at such time as any delinquency case moves to guardianship, the proceeding would, at that point, be subject to the Act.

12. How can the court determine if proper notice has been given?

There are specific steps prescribed in the ICWA and further clarified in the Guidelines for State Courts, the California Rules of Court, rule 1439, and in California Department of Social Service Regulations. Notice must be sent by registered mail, return receipt requested to the child’s parents, tribe(s), Indian custodian **and** the Bureau of Indian Affairs (BIA). Information to be included in the notice is specified in detail, *including notification of a right to intervene*.

Filing of proof of service, including the return receipt and the written notice, would allow the court to assure that notice is procedurally accurate.

An inquiry of the parties should also be made in an attempt to determine whether the proper tribe has been noticed. This is particularly important where there may be multiple tribes or where a child is not enrolled in a tribe but may be eligible for enrollment. If the identity of the child’s tribe(s) is known, notice served only on the BIA is not sufficient. Notice must be provided to both the BIA and every tribe in which a child is a member or eligible for membership. Alternatively, if the court has reason to know the child is Indian but has a record to show it does not have reason to know who the child’s tribe is, notice to the BIA is sufficient to meet the notice requirements of the Act. The court can then proceed to apply other provisions of the Act.

If the court has reason only to know that the child may be of Indian heritage, as opposed to a member or eligible for membership in an Indian tribe, all that is required is notice to the BIA and further inquiry. (Cal. Rules of Court, rule 1439(e).)

13. What if a petition is filed, but neither detention nor removal is recommended or contemplated? Should the tribe still be noticed?

California Rules of Court, rule 1439(f)(5) requires that “notice shall be sent whenever there is reason to believe the child may be an Indian child, and for every hearing thereafter unless it is determined that the child is not an Indian child.” California Department of Social Services Regulations also require compliance with ICWA notice requirements at the time the petition is filed. This is consistent with the purpose and intent of the Act.

Even if removal is not recommended, notice is appropriate to ascertain other relevant determination, such as whether the state court has jurisdiction of the case and to inquire about culturally relevant services. For example, it is possible that the child may be a ward of the tribal court and therefore in that court’s exclusive jurisdiction.

14. When may a tribe intervene in a case? *Can the tribe intervene between a .26 termination of parental rights and the adoption? After the adoption? If a tribe had proper notice at jurisdiction and failed to respond or intervene, may it do so at the .26?*

A tribe may intervene “at any point in the proceeding.” 25 U.S.C. §1911(c). A tribe may also petition a court to invalidate a proceeding conducted in violation of designated provisions of the Act. 25 U.S.C. §1914. Hence, a tribe could intervene via a petition to invalidate. Finally, even when parental rights have been terminated, the Act still applies and requires compliance with placement preferences. Tribes may have a right to intervene under the Act to enforce placement preferences. Even in voluntary adoptions, California case law allows for permissive intervention for this purpose.

15. What is the tribe’s role in a state court proceeding, and who can appear in court on behalf of a tribe?

If an Indian child is involved in a proceeding covered by the Act, the Act applies, whether or not the child’s tribe opts to become involved. A tribe may choose to participate in a state court proceeding in several capacities:

- C A tribe may petition to transfer the case to a tribal forum.
- C The child’s tribe may, without intervening, exercise rights granted under the Act to alter the minimum federal standards, which the state court must then follow. (Examples include altering placement preferences by resolution, and re-defining various definitions contained in the Act that reference tribal law or culture.)
- C The child’s tribe has a right to intervene as a party at any point in an Indian child custody proceeding covered by the Act. An intervening tribe may fully participate as a party to a proceeding.
- C A tribe may provide evidence and testimony.
- C Many tribes operate child and family service programs. Representatives of these programs may be available, not as a representative of the child’s tribe, but as support service providers. Depending upon how the tribal program is designed, service providers may be available in cases involving Indian children from other tribes.

Case law and rules of court for juvenile court authorize non attorneys, as well as attorneys, to appear on behalf of tribes. Tribes may clarify the authority of a tribal representative via resolution or other appropriate documentation. See Benchguide §VIII.F. for forms designating tribal representatives.

16. We have very few Indian cases, and therefore we have no readily available “experts.” How do we determine who can qualify?

California Evidence Code section 801 allows experts to offer testimony in the form of an opinion when the opinion is “related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” There are many issues that may arise in an Indian child custody proceeding where the testimony of an expert may be appropriate. Because the Act involves tribal law and Indian standards, not subjects within the common experience of most state court judges, any issue involving such matters, for example placement assessments under §1915, may benefit from expert testimony. However, there are mandatory findings that must be made where expert testimony is particularly appropriate or required. These include the services requirements of §1912(d) of the Act (active efforts to provide services to prevent break-up of the Indian family), and the expert witness requirement of §§1912(e) and (f) (expert testimony that continued custody is likely to result in serious emotional or physical damage to the child.)

A “qualified expert” is meant to apply to a person with expertise beyond the normal social worker qualifications. Persons likely to meet the requirements of a qualified expert include:

- a. A tribal member knowledgeable in family organization and child rearing;
- b. A lay expert with experience in Indian child and family services and a knowledge of the social and cultural standards of the child’s tribe;
- c. A professional person with substantial education and experience working with Indian families and familiar with Indian social and cultural standards, particularly those of the child’s tribe; or
- d. A professional person.

Standard rules of evidence apply to qualifying experts. To meet ICWA burdens, the court should look for testimony from a witness who can inform the court about culturally appropriate interpretations of behavior. The Tribe, the Bureau of Indian Affairs, and Indian organizations can aid in identifying “experts.”

E. Questions about Tribal Courts and Jurisdiction

17. What is the extent of tribal intervention with regard to jurisdiction and conflicts of law?

The ICWA lays out a jurisdictional scheme that provides for exclusive and referral tribal jurisdiction under designated factual circumstances. Case law establishes that concurrent jurisdiction also exists. As appropriate, a tribe may seek transfer of jurisdiction to a tribal forum. In a tribal forum, tribal law applies. Tribes are not subject to the minimum federal standards established by the Act for state court proceedings. In state proceedings, mandatory minimum federal standards are prescribed. Under the Su-

premacry Clause of the U.S. Constitution, these standards must be applied even if they conflict with state law. These standards may by their terms be varied somewhat by tribal action (e.g. tribal variation of the definition of extended family). Such actions must be recognized by state courts. Additionally, the Act resolves many potential conflicts problems by specifying that the state or federal standard that provides the highest level of protection to Indian families is to be applied.

18. If the matter is transferred to a tribal court, does the state court dismiss its petition? If the tribe is in another state, does the Interstate Compact on the Placement of Children apply?

Once a case is transferred to a tribal court, it would be appropriate for a state court to dismiss its petition. If the state court transfers the proceeding, it should forward its court file and all available information to the tribal court. *Guidelines*, §C.4.(d). Before transfer, the Guidelines suggest written communication between the state and tribal court systems to confirm that the tribal court will accept transfer. This obviously should occur prior to the state court forwarding the case file. *There is no standard procedure for accomplishing transfer*. Discussions may be in order to determine how costs associated with the transfer will be apportioned and how physical custody of the child will be transferred. Finally, depending on the facts of the case, particularly if there is a need for a transition period, concurrent jurisdiction may be appropriate to allow the child access to necessary financial resources.

As a general matter, tribes are not subject to the Interstate Compact on the Placement of Children. A state court should consult with the particular tribal court involved.

19. Can the state court transfer to the tribal court without the tribe’s permission or specific request? If the matter is transferred to a tribal court how is the child to be transported?

Some tribes, in states where jurisdiction is not otherwise vested in the State by Federal law, have exclusive jurisdiction over child custody proceedings involving an Indian child who resides or is domiciled within the reservation of such tribe. Where there is exclusive tribal jurisdiction, a state court would need to dismiss or transfer a child custody case involving an Indian child. This would not be contingent upon a request of the tribe. California is a Public Law 280 state and has concurrent jurisdiction.

Except in situations involving exclusive tribal jurisdiction, the ICWA makes transfer “subject to declination by the tribal court of such tribe.” 25 U.S.C. §1911(b).

Details on transport of a child whose case is transferred to tribal court should be arranged in consultation with the particular tribe involved, as systems will vary among tribes.

III. Procedure

A. Checklist: Determination of Indian Status and Child's Tribe.

L JUDICIAL TIP: *Indian status determination can be one of the most complex issues in an ICWA case. This is because there are many different definitions of "Indian" that apply in varying circumstances. IT IS IMPORTANT TO BE AWARE THAT DIFFERENT DEFINITIONS MAY APPLY IN DIFFERENT CIRCUMSTANCES. For example, §§1903(3) & (4) of the ICWA define the terms "Indian" and "Indian child", respectively. These are the definitions reflected in this checklist. However, it should be noted that §1934 contains a second and broader definition of Indian which is applicable to §§1932 & 1933 (involving Indian Child and Family Programs) of the ICWA. Finally, §1912(a) (involving minimum standards for state proceedings) creates what is essentially a third definition. One need only have "reason to know" an Indian child is involved to activate the notice requirements of §1912(a) of the Act.*

- (1) " The child is unmarried and under 18.
- (2) The court knows or has reason to know the child is
 - (a) " a member or eligible for membership in an Indian tribe.
 - or -
 - (b) " eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe.
 - " the parents are unmarried but the paternity of the Indian father has been
 - " established or " acknowledged. 25 U.S.C. §1903(9).

L JUDICIAL TIP: *The tribe must be a federally recognized Indian tribe, group or community. [Eligible for federal services provided to Indians by the Secretary of the Interior. 25 U.S.C. §1903(8). See 65 Fed. Reg. 13298 (March 13, 2000) [a periodic publication of the list of "recognized tribes."]*

L JUDICIAL TIP: *The ICWA refers to "membership" in a tribe. 25 U.S.C. §§1903(3), (4), & (5). "Enrollment" is a common means of establishing membership in a tribe, but it is not the only means. A person may be a member of a tribe without being enrolled. In re Junious M. (1983) 144 CA3d 786,796. Membership criteria may be established by tribal constitutions and elaborated upon in tribal ordinances and may be unique to that tribe. The BIA may be able to establish whether a person is enrolled, but may not otherwise be able to establish a person's membership in a tribe.*

- (c) " Both parents, the child, and any agency representative have been asked if the child is American Indian or has American Indian ancestors. Cal. Rules of Court, rule 1439(d).
- (d) " Available information has been reviewed for any indication of Indian heritage. Indicators include, but not limited to self-identification by the child or parent(s); information provided by any party or Indian or public or private agency; and, the residence or domicile of the child or his parents in an area know to be a predominately Indian community. *Guidelines for State Courts: Indian Child Custody*

(3) Indian status determination. (Apply the ICWA if any box is checked.)

" Confirmed by child's tribe(s): _____
_____.

" Confirmed by Bureau of Indian Affairs. (Identity or location of tribe unknown.)

" No confirmation but facts sufficient to provide the court "reason to know that an Indian child is involved. 25 U.S.C. §1912; Cal. Rules of Court, rule 1439(e).

" No confirmation, possible Indian heritage only, and no facts sufficient to provide the court reason to know the child is a member or eligible for membership in an Indian tribe. (Cal. Rules of Court, rule 1439(e).

(4) Determination of child's tribe.

" The following Indian Tribe(s) has/have confirmed the child is a member or eligible for membership (**Each of these tribes must DIRECTLY receive notice of this Indian child custody proceeding**): _____

" While confirmation has not been obtained, there is reason to believe the child may be a member or eligible for membership in the following tribe(s). (**Each of these tribes must DIRECTLY receive notice of this Indian child custody proceeding**):

" Inquiry has been made regarding all of the facts set forth below. Checked marks indicate affirmative responses recorded as to the above listed tribes:

" (Optional) Whether the parent, Indian custodian or other interested party has reviewed the federal register listing of recognized tribes to assist in identifying the child's tribe.

" Whether the parent, Indian custodian or other interested party has indicated that the child is a member of or eligible for membership in an Indian tribe that is listed on the federal register listing of recognized tribes.

Name of tribe(s): _____

" Whether there is any documentary or other basis indicating that the child is a member of or eligible for membership in an Indian tribe that is listed on the federal register listing of recognized tribes. Name of tribe(s):

“ Whether the child is identified as descended from an historical tribe that corresponds to the name or a portion of the name of a federally recognized tribe, as listed in the Federal Register list of recognized tribes. Name of tribe(s):

L JUDICIAL TIP: *Because a child may be a member or eligible for membership in more than one tribe and each such tribe is entitled to direct notice if their identity and location is known, the recommended practice is to create a record to support decisions on what, if any, tribe(s) receive notice. The above inquiries are suggestions to use in eliciting a factual record.*

“ (Optional) Circumstances require a determination of one tribe as the “Indian child’s tribe” as defined by the ICWA. The Tribe with the most significant contacts is:_____

L JUDICIAL TIP: *A child may be a member of more than one tribe. Even if a child is not enrolled, it is not uncommon for a child to be eligible for membership in more than one tribe. Nothing prevents more than one tribe from participating as a party to a proceeding. Participation of multiple tribes may provide increased service resources for the child. However, if a tribe seeks transfer of the case to its tribal court or if a tribe seeks to assert rights to alter standards established by the Act, as authorized by the Act, then it may be necessary to determine which tribe meets the definition set forth in the Act, i.e., the tribe with the most significant contacts. 25 U.S.C. §1903(5).*

B. Checklist: State or Tribal Jurisdiction.

L JUDICIAL TIP: *Tribes function as governments whose powers are shaped by a unique relationship to the federal government. To a significant extent, general jurisdictional principles applicable to interactions between governments apply to interactions with tribal governments. However, these principles are impacted by special federal laws relating to Indians and tribes. The ICWA establishes jurisdictional requirements that provide for exclusive, concurrent or referral tribal jurisdiction in varying circumstances. If an Indian child resides or is domiciled on a reservation with exclusive jurisdiction over child custody matters, or if the child is already a ward of a tribal court, state courts lack jurisdiction and the case must be dismissed. 25 U.S.C. §1911(a). When the child has been taken into custody in an emergency, the case may be transferred to tribal court in lieu of dismissal. 25 U.S.C. §1922. In all other cases, jurisdiction is concurrent, but presumptively tribal. Mississippi Choctaw Indian Band v. Holyfield (1989) 490 U.S. 30, 104 L.Ed.2d 29, 38-39. Absent good cause to the contrary, transfer to tribal court shall occur, subject to veto by the parents or decline of the transfer by the tribal court. 25 U.S.C. §1911(b).*

L JUDICIAL TIP: *Public Law 280 (P.L. 280), codified at 18 U.S.C. §1162 and 28 U.S.C. §1316, conferred criminal and some civil jurisdiction over reservation Indians to designated states, including California. The civil section of P.L. 280 made state laws of general application applicable to reservation Indians. The U.S. Supreme Court has ruled that the statute did nothing more than authorize reservation Indians to resolve their disputes in state courts should they choose to. Bryan v. Itasca County (1976) 426 U.S. 373. Under P.L. 280, tribes retain concurrent jurisdiction. Native Village of Venetie IRA Council v. Alaska (9th Cir. 1990) 918 F.2d 797. While tribes in California have legal authority to exercise jurisdiction over child custody cases, as a result of P.L. 280 and the accompanying absence of financial resources, most tribes in California have not maintained tribal court systems and do not opt to exercise concurrent jurisdiction. Only a few California tribes have formal court systems. Presently, most transfer proceedings involve tribes from other states. However, increasing numbers of tribes in California are actively working on tribal court development. Since nothing requires a formal court system to support an assertion of tribal jurisdiction, tribes will occasionally seek transfer based on judicial acts of the tribal governing body.*

(1) “ State jurisdiction declined. The petitioner has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody. Pursuant to ICWA, the court must decline jurisdiction over such petition. 25 U.S.C. §1920.

“ The court shall immediately return the child to his or her parents or Indian custodian.

- or -

“ Returning the child to the parent or Indian custodian would subject the child to substantial and immediate danger or the threat of such danger such that the court should “ transfer jurisdiction to the tribe (exclusive jurisdiction), or “ initiate a state ICWA proceeding.

(2) “ Transfer of Jurisdiction.

“ The child must be transferred to the jurisdiction of the tribal court because the Indian child is:

“ a ward of a tribal court, or

“ resides or is domiciled on a reservation where the tribe exercises exclusive Indian child custody jurisdiction.

“ The parent, Indian custodian or Indian child’s tribe has petitioned for transfer of the proceeding to the jurisdiction of the tribe.

“ The petition should be granted, subject to the tribe’s right to decline the transfer.

- or-

“ The petition should be denied because:

“ a parent objects to the transfer, or

“ the court finds good cause to deny the petition.

L JUDICIAL TIP: *Factors in determining good cause to deny a transfer petition are set out in the Guidelines for State Courts. 44 Fed. Reg. 67590-91; See also, Benchguide §IV D.*

L JUDICIAL TIP: *There is no one or standard procedure for transfer of a case to a tribal court. Indian tribes are not parties to the Interstate Compact for the Placement of Children. Tribes vary widely in their practices and resources. The tribe involved must be contacted to determine that tribe’s procedure and to coordinate how costs involved in the transfer will be apportioned. A sample transfer order is included in section VIII.*

(3) “ State court jurisdiction is proper in this case.

(4) “ Tribal Participation in state proceeding.

Tribe exercises its option of participating in State court proceeding as:

“ Intervening party to case. 25 U.S.C. §1911(c).; or

“ Permissive participation by tribal representative pursuant to leave of court. Cal. Rules of Court, rule 1412(i).

(5) “ Full faith and credit given to the public acts, records, and judicial proceedings of Indian tribes applicable to Indian child custody proceedings. 25 U.S.C. §1911(d).

C. Checklist: Child Custody Proceedings Subject to the ICWA

L JUDICIAL TIP: *The ICWA does not contain a definition of “custody” per se. However, by its terms, it does NOT apply to all cases involving custody. Significantly, the Act does not apply to custody disputes between parents in divorce (dissolution) proceedings, nor to placements based on criminal acts. Through its definition of “child custody proceeding”, the Act specifies to which types of custody cases it applies and to which types of custody cases it does not apply. The focus is on whether the proceeding meets a definition set forth in the Act, and not upon what the proceeding is called. 25 U.S.C. §1903(1). It is unsettled whether the ICWA applies to family law custody disputes between parents who were never married. To the extent such proceedings are like divorce cases, the Act probably does not apply. However, it has been held to apply to other types of proceedings, such as termination of parental rights, even when the action is between parents.*

(1) Child Custody Proceedings covered by the Act:

- “ **Foster care placements**, defined in the ICWA to mean *any* action removing an Indian child from a parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator to which the child need not be returned upon demand, but where parental rights have not been terminated. [E.g., Welf. & Inst. §300 (dependency); Welf. & Inst. §601 (truants and status offenders); Prob. §1500 et. seq. (probate guardianships); some Welf & Inst. §602 cases (delinquency placements funded by federal foster care monies; Welf & Inst. §§636, 727(a), 727.31, 728.)]
- “ **Termination of parental rights**, defined in the ICWA to mean *any* action resulting in the termination of the parent-child relationship. E.g., Fam.C. §7802 et. seq.; Fam.C §§7660-7664, §8605; Welf. & Inst. §366.26, 727.31.
- “ **Pre-adoptive placement**, defined in the ICWA to mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement.
- “ **Adoptive placement**, defined in the ICWA to mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption. E.g., Fam. C. §8500 et. seq; Welf. & Inst. §366.26, 727.31.

(2) ICWA coverage exceptions:

- “ An award of custody to one parent as part of a divorce proceeding. 25 U.S.C. §1903(1).

L JUDICIAL TIP: *The Act clearly does NOT apply to a dissolution proceeding where two parents vie for custody. The Act expressly excludes a case where the following two elements are present: (1) two parents, and (2) divorce (dissolution) action. However, attention must be paid to what is occurring in a proceeding. The fact two parents are involved or (as opposed to “and”) that the matter is a family law action, does not necessarily eliminate the proceeding from the Act’s coverage. For example, an action by one parent to terminate parental rights of other parent is covered by the Act. In Re Crystal K. (1990) 226 CA3d 655 (review denied Mar. 14, 1991); In re Adoption of Lindsay C. (1991) 229 CA3d 404.*

“ A placement based on an act by a child which would be a crime if committed by an adult. E.g., Welf. & Inst. §602 *et. seq.* (Delinquency).

L JUDICIAL TIP: The Act clearly does NOT apply to a placement based on an a criminal act. However, not all California delinquency cases involve removals based on criminal acts. 1999 changes to California law make it clear that some removals are “placements” which meet the requirements for federal foster care funding, in that they are made for the child’s welfare after reasonable efforts have been made to prevent the need for removal of the child from his or her home. (See, e.g., Welf. & Inst §636.) In effect, the findings required to qualify the placement for federal foster care funding, also bring the proceeding within the federal definition of child custody proceeding covered by the Indian Child Welfare Act. As well, California law now allows guardianships and termination of parental rights in delinquency proceedings. Guardianship and termination of parental rights are proceedings covered by the act. Given the Act’s express exclusion of placements based on crimes, it is unlikely that all delinquency proceedings are brought within the Act’s scope simply because any such proceeding could, for example, lead to guardianship. However, at such time as any delinquency case moves to guardianship, it would at that point be subject to the Act.

D. Checklist: Minimum Federal Standards for Involuntary Proceedings.

L JUDICIAL TIP: *The ICWA applies to both involuntary and voluntary “child custody proceedings,” as that term is defined in the Act. (Remember, by its terms, the Act exempts from its coverage custody disputes between parents in divorce proceedings. See Checklist C.) Some of the provisions of the Act apply to both types of child custody proceedings (e.g., the placement preference requirements of 25 U.S.C. §1915.) Some provisions, by their terms, apply only to involuntary proceedings, and others to only voluntary proceedings. This checklist discusses standards applicable to involuntary proceedings.*

(1) Notice 25 U.S.C. §1912(a).

“ Notice of the *proceeding* **and** of the *right to intervene* has been provided directly to the “ parent “ child’s tribe(s) “ Indian custodian “ Bureau of Indian Affairs by **registered/certified mail, return receipt requested.**

“ The identity or location of the “ parent “ child’s tribe(s) “ Indian custodian is unknown. Substitute notice was served by registered/certified mail, return receipt requested, on the Bureau of Indian Affairs with notice that pursuant to the Act, the Bureau has 15 days to locate the party on whose behalf they were served.

L JUDICIAL TIP: *Federal Regulations specify extensive and specific information to be included in notices, if available. Consult 25 C.F.R. §23.11(d). The Bureau of Indian Affairs periodically publishes a list of designated agents for service of process in the Federal Register. (The latest listing is at 64 Fed Reg 11490 (March 9, 1999).)*

“ Tribal notice directed to “ tribal Chairman -OR- “ agent for service of process designated “ in the Federal Register “ by resolution or official communication from an authorized tribal official.

“ Registered/certified mail receipts have been filed with the court confirming receipt of notice by the “ parent “ child’s tribe “ Indian custodian “ Bureau of Indian Affairs **at least ten days prior to the hearing date** for which notice was provided.

“ The “ parent, “ Indian custodian or “ child’s tribe has requested a continuance to allow preparation for this proceeding. Hearing in this matter is continued to_____. (Date must allow at least an additional 20 days.)

(2) Information Access 25 U.S.C. §1912(c).

Full access to all reports or other documents filed with the court upon which any decision with respect to such action may be based has been given to:

“ Tribe(s)

“ Parent(s)

“ Indian custodian

L JUDICIAL TIP: *All parties to an Indian child custody proceeding and their attorneys have the right to examine all reports or other documents filed with the court on which any decision to order foster placement or termination of parental rights may be based. 25 U.S.C. §1912(c). Cal. Rules of Court, rule 1439(h)(2). As well, A non-party representative designated by the child's tribe may be permitted access to court documents and participate in the proceedings. Cal. Rules of Court, rule 1412(1)(2).*

(3) Appointed Counsel 25 U.S.C. §1912(b).

" The " Parent(s) " Indian custodian have been advised of their right to appointed counsel, if they are indigent.

" Good cause exists for discretionary appointment of counsel for the minor(s).

" Counsel appearances noted as follows:

" Child(ren): _____

' Counsel _____ " Apptd. " Retained

' Parent(s): _____

' Counsel _____ " Apptd. " Retained

" Indian Custodian(s): _____

" Counsel _____ " Apptd. " Retained

L JUDICIAL TIP: *An "Indian custodian" means any Indian person who has legal custody under tribal law or custom or under state law or to whom temporary physical care, custody, and control has been transferred by the parent of such child. Like parents, Indian custodians are entitled to the protections established by the Act. As well, an Indian person who has adopted an Indian child under state law, or tribal law or custom is considered a parent for purposes of the ICWA. 25 U.S.C. §§1903(6) & (9). Various provisions of the Act require accommodation of tribal action and, hence, tribal action may impact a state proceeding, whether or not a tribe has intervened as a party.*

L JUDICIAL TIP: *The child's tribe(s) may intervene as a party and may be represented by counsel. The Act does not provide for appointed counsel for indigent tribes. Cal. Rules of Court, rule 1410 and 1412 authorize a tribal representative to be present at juvenile hearings and, in cases subject to the Act, to participate either as a party or in other capacities, with counsel or via non-attorney representatives.*

" The parent(s) or Indian custodian is entitled to appointed counsel under ICWA but state law does not authorize appointment of counsel in this type of proceeding. (E.g. probate guardianship.)

" Indian party entitled to appointed counsel: _____

' Counsel appointed and Court certification provided that the Indian client is indigent and that state law makes no provision for appointment of counsel in the proceeding.

L JUDICIAL TIP: *In involuntary cases where state law does not provide for appointment of counsel as required by the ICWA, such as private guardianship actions, the ICWA authorizes the Bureau of Indian Affairs to compensate counsel. A process is set forth in 25 C.F.R. §23.13. It should be noted that a basis for denying a compensation claim is unavailability of funds and the Bureau may not adequately budget to make these payments*

- " Child's Tribe
 - " Intervened as party
 - " Tribal Official/Representative _____
 - " Counsel _____
 - " No formal intervention (California Rules of Court, rule 1412.)
 - " Tribal Official/Contact _____
 - " Indian program representative _____
- " Authorizing resolution or letter from child's tribe designating official capacity of any tribal representative(s) attached.

L JUDICIAL TIP: *Tribal representatives or individual Indians may be present in various and/or multiple capacities. They may or may not be familiar with state law and legal principles, such as legal capacity and standing. An Indian person in the court room may be present in any of a number of different capacities, such as a family member, a witness, the duly authorized representative of an intervening tribe, or as a tribal social service provider. Clarifying the role and capacity of Indian people present in the court room is encouraged. To assist with this function, a questionnaire is included in §VIII.*

(4) Active Efforts 25 U.S.C. §1912(d).

- " Timely remedial services and rehabilitative programs designed to prevent breakup of the Indian family — including resources of the extended family, the tribe, Indian social service agencies, and individual Indian care givers — have been provided to parents, Indian custodian and child. 44 Fed. Reg. 67592; Cal. Rules of Court, rule 1439(l).
- " The services and programs have proved unsuccessful. (The efforts must have proved unsuccessful before removal can be ordered.)
- " The court considered the prevailing social and cultural conditions of the Indian child's tribe or community. That tribe or community is the _____.

L JUDICIAL TIP: *The ICWA contemplates an effort beyond the passive service normally provided by states, and imposes an additional federal requirement in this regard. H.R. Rep. No. 1386, 95th Cong. 2d Sess. 22 (1978). The rehabilitative effort should take into account the prevailing social and cultural conditions and way of life of the child's tribe. 44 Fed. Reg. 67582(D2). These requirements are meant to assure that both evaluation of a problem and development of treatment plan are culturally appropriate and not tainted by cultural bias.*

- " The parties stipulate to waive services requirements and the court is satisfied that the party has been fully advised of the requirements of the Act, and has knowingly, intelligently and voluntarily waived them. Cal. Rules of Court, rule 1439(i)(4).

L JUDICIAL TIP: *At least one California case has held that a parent may waive the ICWA right to receive services. The ICWA Rule of Court allows a knowing and intelligent waiver. As well, Welf.&Inst. Code §361.5(13) now requires that, as a matter of state law, “[t]he court shall not accept the waiver of services unless it states on the record its finding that the parent or guardian has knowingly and intelligently waived the right to services.” Section 1921 of the ICWA requires that the parent or Indian custodian be afforded the highest level of protection provided by either the Act or state law. The court should exercise caution with waivers. If a tribe has not received proper notice or intervened as a party, the tribe cannot join in a waiver. Since the tribe has an independent interest in securing compliance with the requirements of the ICWA and may intervene at any point in a proceeding, a Tribe may intervene late in a proceeding and petition to invalidate when the Act has not been fully complied with. See, *In re Desiree F.* (2000) 83 CA4th 460, 471. [“There is nothing in either the ICWA or the case law interpreting it which enables anyone to waive the tribe’s right to notice and right to intervene in child custody matters.”]*

(5) Evidentiary Requirements 25 U.S.C. §§1912(e) & (f).

L JUDICIAL TIP: *No foster placement may be ordered in the absence of “clear and convincing evidence,” including testimony of qualified expert witnesses, that continued custody is likely to result in serious emotional or physical damage. 25 U.S.C. §1912(e). No termination of parental rights may be ordered in the absence of “evidence beyond a reasonable doubt, including expert testimony that continued custody is likely to result in serious emotional or physical damage to the child.” 25 U.S.C. §1912(f).*

“ **Foster Care, including Guardianship.** The court finds by clear and convincing evidence that continued custody of the child by the parent or Indian custodian is likely to cause the Indian child serious emotional or physical damage.

“ **Termination of Parent Rights.** The court finds by proof beyond a reasonable doubt that continued custody of the child by the parent or Indian custodian is likely to cause the Indian child serious emotional or physical damage.

L JUDICIAL TIP: *The Act does not define the term custody per se. However, it is clear that the term involves more than physical custody. At least one California appellate court and the Cal. Rules of Court, rule 1439(a)(5) define “custody” to mean legal or physical custody or both as provided by state law or tribal law or custom.*

“ The expert is qualified under the Act as follows:

“ a member of a tribe with knowledge of Indian family organization and Indian child rearing practices.

“ a lay expert with substantial experience in Indian child and family services and extensive knowledge of the social and cultural standards and child-rearing practices of Indian tribes.

“ a professional person with substantial education and experience in Indian child and family services and in the social and cultural standards of Indian tribes. Cal. Rules of Court, rule 1439(a)(10)(C).

“ a professional person having substantial education and experience in the area of his or her specialty.

L JUDICIAL TIP: A “qualified expert” is meant to apply to expertise beyond the normal social worker qualifications and should not be the referring social worker. *H.R. Rep. No. 1386 at 22; Manual of Policies and Procedures, California Department of Social Services §31-515.14.141.*

L JUDICIAL TIP: “By imposing these standards, Congress has changed the rules of law of many states with respect to the placement of Indian children. A child may not be removed simply because there is someone else willing to raise the child who is likely to do a better job or that it would be “in the best interests of the child” for him or her to live with someone else. Neither can a placement or termination of parental rights be ordered simply based on a determination that the parents or custodians are “unfit parents.” . . . “[M]ere non-conformance with [non-Indian family and child rearing stereotypes], or the existence of other behavior or conditions that are considered inappropriate, does not justify removal. See, *Guidelines for State Courts, 44 Fed. Reg. 67582-3 (D3).*”

“ The parties stipulate to waive service requirements and the court finds that the party entering the waiver has been fully advised of the requirements of the Act, and has knowingly, intelligently and voluntarily waived them. Cal. Rules of Court, rule 1439(i)(2) & (m)(2); Calif. Welf. & Inst Code §361.5(13).

L JUDICIAL TIP: *At least one California case has found that a parent may waive the ICWA right to receive services. The ICWA Rule of Court allows a knowing and intelligent waiver. As well, Welf. & Inst. Code §361.5(13) now requires that, as a matter of state law, “[t]he court shall not accept the waiver of services unless it states on the record its finding that the parent or guardian has knowingly and intelligently waived the right to services.” Section 1921 of the ICWA requires that the parent or Indian custodian be afforded the highest level of protection provided by either the Act or state law. The court should exercise caution with waivers. If a tribe has not received proper notice or intervened as a party, the tribe cannot join in a waiver. Since the tribe has an independent interest in securing compliance with the requirements of the ICWA and may intervene at any point in a proceeding, a Tribe may intervene late in a proceeding and petition to invalidate when the Act has not been fully complied with. See, *In re Desiree F. (2000) 83 CA4th 460, 471. [“There is nothing in either the ICWA or the case law interpreting it which enables anyone to waive the tribe’s right to notice and right to intervene in child custody matters.”]**

E. Checklist: Voluntary Proceedings

L JUDICIAL TIP: *Bureau of Indian Affairs Guidelines for State Courts specify extensive and specific information to be included in a consent. Consult 44 Fed. Reg. 67593; See Benchguide §VIII.D., form - Consent to Placement.) The criteria below reflect the requirements expressly mandated by the 25 U.S.C. §1913.*

Voluntary Consent Placements

- " A voluntary consent to " foster care placement or " termination of parental rights has been executed in writing and recorded in the presence of a judge of a court of competent jurisdiction. 25 U.S.C. §1913.
- " The consent is accompanied by the judge's certificate stating that the terms and consequences of the consent were:
 - " fully explained to the parent or Indian custodian.
 - " that the parent or Indian custodian fully understood the consent.
 - " that the consent was fully understood in English or that it was interpreted into a language that the parent or Indian custodian understood.
- " The consent was not given prior to, or within 10 days after, birth of the Indian child. (Any consent given within this period is invalid.)
- " The consent and the judge's certificate have been filed with the court.
- " Withdrawal of Consent has been submitted.
 - " The child shall be returned to the parent or Indian custodian.
 - " The court is without further jurisdiction in this matter and the case is dismissed.
 - " Returning the child to his parent or custodian would subject the child to substantial and immediate danger or threat of such danger
 - " The child shall remain placed in the current placement pending a proceeding conducted in accordance with the provisions of the ICWA governing involuntary proceedings.

L JUDICIAL TIP: *The Guidelines for State Courts indicate a notarized statement of intent to withdraw consent should be filed with the court; the clerk of the court should notify the party through whom placement was arranged; and that party shall arrange return of the child. 44 Fed. Reg. 67594. In California, it may be appropriate to set a hearing to enter withdrawal of consent, obtain an order for return of the child and to dismiss the action. 25 U.S.C. §1920 provides that the court shall decline jurisdiction and order return of the child whenever a child has been improperly removed or improperly retained after a*

temporary relinquishment of custody, “unless returning the child to his parent or custodian would subject the child to substantial and immediate danger or threat of such danger.” Hence, to maintain custody when consent has been withdrawn, the petitioner must first meet the substantial and immediate danger or threat of danger test. Thereafter, following the emergency provisions of §1922 of the Act, the petitioner must proceed with an involuntary action in accordance with the requirements of the ICWA.

F. Checklist: Placement Preferences

L JUDICIAL TIP: *Every time an Indian child is removed from a parent or Indian custodian, and every time a child is moved from one placement to another, the relevant provisions of the ICWA must be followed. 25 U.S.C. §1915(b). In every placement, diligent efforts must be made to place the child in a first preference home. Only if that is not possible can a child be placed in a home in the next preference category. Standards of the American Indian community are to be applied in accepting or rejecting a particular placement. 25 U.S.C. §1915(d).*

Placement Preference 25 U.S.C. §1916.

- " The Tribe has been contacted to determine if it has established an order of preference by resolution. The Tribe " has " has not established its own placement preferences.

- " The Tribe has been sent written notice prior to initial placement and prior to any change in placement. 25 U.S.C. §§1912 & 1916(b).

- " The placement meets the placement preference requirements of the Indian Child Welfare Act.
 - " As specified by the child's Tribe.
- or-**
- " Foster or Preadoptive Placement Preferences (The placement must be in reasonable proximity to the child's home, and the least restrictive setting which most approximates a family.)
 - " A member of the child's extended family (includes both Indian and non-Indian extended family, unless specified otherwise by the child's tribe.)
 - " A foster home licensed or approved by the Indian child's tribe
 - " An Indian foster home licensed or approved by non-Indian licensing authority
 - " A children's institution approved by the tribe or operated by an Indian organization which has a program suitable to meet the child's needs

- " Adoptive Placement
 - " A member of the child's extended family
 - " Other members of the child's tribe
 - " Other Indian families.

- " The placement does not meet the placement preference requirements of the Act and good cause exists for modifying the preference order.
 - " A diligent search, including inquiry to tribe, extended family, and Indian service agencies, has failed to locate a suitable Indian home. [An Indian child may be placed in a non-Indian home only if the court makes a finding that a "diligent" search has failed to find an Indian

home. 44 Fed. Reg. 67584(F3); Cal. Rules of Court, rule 1439(j)(3).]

- " As appropriate, the request of a biological parent or the child (if sufficient age), has been considered, including the request of a parent for anonymity.
- " Extraordinary physical or emotional needs of the child, as established by qualified experts.
- " If the tribe has designated a placement preference by resolution, the placement is not the least restrictive setting which most approximates a family and in which the child's special needs, if any, are met. 25 U.S.C. §1915(c).
- " If the child is not yet in an Indian home, a diligent search for an Indian home is on-going. 44 Fed. Reg. 67595.
- " The prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties were used to evaluate placements. 25 U.S.C. §1915(d).
- " A record of efforts to comply with placement preferences has been filed with the court and shall be made available to the child's tribe of the Secretary of Interior upon request. 25 U.S.C. §1915(e).
- " Placement qualifies for state and federal AFDC-FC payments for the eligible Indian child.

L JUDICIAL TIP: *Placement options are broader for Indian children. Because the Act mandates placements that might not otherwise be authorized by state law or be eligible to receive foster care payments, tribes (whether or not they intervene as parties) can act to qualify a home for both placement and payment. Under state law, placements made "pursuant to the Act" are eligible to receive placement and payment. These placements may include a state licensed or approved facility and any home of a relative or nonrelative located on or off the reservation which is licensed, approved or specified by the Indian child's tribe. Cal. Welf. &Inst. §11401; SDSS All County Letter No. 95-07, February 9, 1995. **The court may want to request a Tribal Council resolution approving or specifying a placement as a means to verify the necessary official tribal action.***

G. Checklist: ICWA Issues at Juvenile Dependency Hearings

The juvenile dependency system in California is set forth in a comprehensive statutory scheme designed around definite hearing phases. Each phase is required by statute to address specified issues and requirements. Various ICWA issues are relevant at the different hearings. This checklist identifies ICWA issues that commonly arise at the various hearings.

(1) Initial Appearance of Tribal Representative. A Tribe may intervene *at any point* in the proceeding. When a tribal representative first appears, regardless of whether it is a detention hearing or a selection and implementation hearing, the issues listed below should be considered and clarified.

- " Child's Indian Status. See Checklist A.
- " Identification of Child's Tribe(s). See Checklist A.
- " Tribal Jurisdiction. See Checklist B.
- " Capacity of Tribal Representative. Cal. Rules of Court, rule 1412(i).
" Tribal Intervention " Permissive Participation
- " Continuance. 25 U.S.C. §1912(a).
- " Information Access. 25 U.S.C. §1912(c).
- " Invalidation Motion or Petition. 25 U.S.C. §1914.

(2) Detention/Initial Appearance. If a child is detained pending court proceedings, an initial "detention hearing" is held to consider whether the child must continue to be detained out of the home pending further court proceedings. The court is required to order the release of the child from custody unless it makes one of the specific findings set forth in applicable provisions of the Welfare and Institutions Code.

- " Issues to be determined at the first hearing held in the case (these issues may arise whether or not the child's tribe appears):
 - " Child's Indian Status. See Checklist A.
 - " Identification of Child's Tribe(s). See Checklist A.
 - " Tribal Jurisdiction. See Checklist B.
 - " Capacity of any Tribal Representative. Cal. Rules of Court, rule 1412(i).
" Tribal Intervention " Permissive Participation
 - " Indian Custodian. 25 U.S.C. §1903(6).
- " Notice. 25 U.S.C. §1912(a); Cal. Rules of Court, rule 1439(f)(5).
- " Appointment of Counsel. 25 U.S.C. §1912(b).
- " Information Access. 25 U.S.C. §1912(c).
- " Placement. 25 U.S.C. §1915.

L JUDICIAL TIP: *The ICWA applies in a dependency action involving an Indian child. The child's Indian status triggers the Act, whether or not a child's tribe responds to notice or otherwise opts to become involved in the proceeding. Hence, it is important to identify Indian children at the earliest opportunity. This may be at the detention hearing or at the jurisdiction hearing where a child has not been detained. As well, it is important to identify the child's tribe as early as possible to minimize possible violation of the Act. The tribe has rights independent of other parties, has standing to intervene at any point in the proceeding, and may petition to invalidate the proceeding for certain violations of the Act.*

L JUDICIAL TIP: *Section 1922 of the Act authorizes emergency removal of an "Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation." While this could perhaps be read as a limitation on the exercise of emergency removal authority, the better view is to read it as a grant of limited jurisdiction to state courts in situations where a tribe might otherwise possess exclusive jurisdiction. Nothing in the Act impairs a state's reliance on inherent judicial authority to act in an emergency situation to detain a child as necessary to prevent imminent physical damage or harm to the child. Consistent with this approach, a recent appellate court decision directs application of section 1922 to emergency removal of Indian children not residing or domiciled on a reservation. (Desiree F. (2000) 83 CA4th 460.)*

(3) Jurisdiction. The purpose of the jurisdictional hearing is to determine whether or not sufficient grounds exist for the court to declare the child a dependent of the court.

" Issues to be determined at the first hearing (if not previously addressed at a detention hearing):

" Child's Indian Status. See Checklist A.

" Identification of Child's Tribe(s). See Checklist A.

" Tribal Jurisdiction. See Checklist B.

" Capacity of Tribal Representative. Cal. Rules of Court, rule 1412(i).

" Tribal Intervention " Permissive Participation

" Indian Custodian. 25 U.S.C. §1903(6).

" Notice. 25 U.S.C. §1912(a); Calif. Rules of Court, rule 1439(f)(5).

" Appointment of Counsel. 25 U.S.C. §1912(b).

" Information Access. 25 U.S.C. §1912(c).

" Knowing and Intelligent Waiver. Calif. Rules of Court, rule 1439(i)(2) & (j)(2); Welf. & Inst. §361.5(13).

" Placement Preferences. 25 U.S.C. §1915. [If child is detained, confirm or address availability of ICWA placement.]

(4) Disposition. If the child is found to be a person described in Welf. & Inst. §300, a disposition hearing must be held to hear evidence on the question of the proper disposition to be made in the case. The object of the hearing is to determine what plan should be made for the child and the family. Considerations for the court may include whether the child can remain at, or be returned to the home, and what services should be ordered to maintain the child at home. If the court determines that the child must be removed from the home, then, absent exceptional circum-

stances, the court is required to order reunification services.

“ Notice. 25 U.S.C. §1912(a); Calif. Rules of Court, rule 1439(f)(5).

“ Active Efforts Services Requirements. 25 U.S.C. §1912(d).

“ Evidentiary Standards, including expert testimony. 25 U.S.C. §1912(e).

“ Foster care/guardianship - clear and convincing testimony that continued custody is likely to result in serious emotional or physical damage to the child.

“ Right to Counsel. 25 U.S.C. §1912(b).

“ Placement Preferences. 25 U.S.C. §1915.

“ Knowing and Intelligent Waiver. Calif. Rules of Court, rule 1439(i)(2) & (j)(2); Welf. & Inst. §361.5(13).

L JUDICIAL TIP: *California law has expanded the circumstances when services may be denied to parents, including when previous reunification efforts involving the same parent have failed. (Calif. Welf. & Inst. Code §361.5.) The only California case to consider the interplay between California law and ICWA requirements has specified that the phrase active efforts, requires that timely and affirmative steps be taken to remedy problems which might lead to severance of the parent-child relationship. **The active efforts showing must be made.** The state may rely upon recent but unsuccessful reunification efforts with the same parent but a different child where substantial but unsuccessful efforts have just been made to address the parent’s entrenched problem and the parent has shown no desire to change. The law does not require the performance of idle acts. (In re Letitia V. v. Superior Court (2000) 81 CA4th 1009.)*

L JUDICIAL TIP: *California Evidence Code section 801 allows experts to offer testimony in the form of an opinion when the opinion is “related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” There are many issues that may arise in an Indian child custody proceeding where the testimony of an expert may be appropriate. Because the Act involves tribal law and Indian standards, not subjects within the common experience of most state court judges, any issue involving such matters, for example placement assessments under §1915, may benefit from expert testimony. However, there are mandatory findings that must be made where expert testimony is particularly appropriate or required. These include the services requirements of section 1912(d) of the Act (culturally relevant services), and the expert witness requirement of section 1912(e) and (f).*

(5) Periodic Review. The status of every child adjudged to be a dependent of the juvenile court must be reviewed periodically in accordance with statutory time frames, generally every six months.

“ Notice. 25 U.S.C. §1912(a); Calif. Rules of Court, rule 1439(f)(5).

“ Information Access. 25 U.S.C. §1912(c).

“ Active Efforts Services Requirements. 25 U.S.C. §1912(d).

“ Right to Counsel. 25 U.S.C. §1912(b).

- " Placement Preferences. 25 U.S.C. §1915.
- (6) Twelve or Eighteen Month Review. At the twelve month review, sometimes extended to the eighteen month review, (and in designated circumstances at the disposition hearing) if the court does not return the child, the court must terminate reunification efforts and set the matter for a hearing pursuant to §366.26 for the selection and implementation of a permanent plan for the child.
- " Notice. 25 U.S.C. §1912(a); Calif. Rules of Court, rule 1439(f)(5).
 - " Information Access. 25 U.S.C. §1912(c).
 - " Active Efforts Services Requirements. 25 U.S.C. §1912(d).
 - " Right to Counsel. 25 U.S.C. §1912(b).
 - " Placement Preferences. 25 U.S.C. §1915.
 - " Knowing and Intelligent Waiver. Calif. Rules of Court, rule 1439(i)(2) & (j)(2); Welf. & Inst. §361.5(13).
- (7) Selection and Implementation Hearing, §366.26. The §366.26 hearing is held to consider what permanent plan is in the child's best interest - adoption, guardianship or long term foster care. The juvenile court may terminate parental rights and order the child placed for adoption, appoint a guardian of the person, or order the child remain in long term foster care.
- " Notice. 25 U.S.C. §1912(a); Calif. Rules of Court, rule 1439(f)(5).
 - " Right to Counsel. 25 U.S.C. §1912(b).
 - " Information Access. 25 U.S.C. §1912(c).
 - " Active Efforts Services Requirements. 25 U.S.C. §1912(d); Calif. Rules of Court, rule 1439(m)(4).
 - " Evidentiary Standards, including qualified ICWA expert. 25 U.S.C. §§1912(e) or (f).
 - " Foster care /guardianship - clear and convincing testimony that continued custody is likely to result in serious emotional or physical damage to the child.
 - " Termination of parental rights - proof beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child.
 - " Placement Preferences. 25 U.S.C. §1915.
 - " Knowing and Intelligent Waiver. Calif. Rules of Court, rule 1439(m)(2) & (m)(4).
- (8) Petition to Change, Modify or Set Aside Order, §388. Any parent or other person having an interest in a child who is a dependent child of the juvenile court or the child may, upon grounds

of change of circumstance or new evidence, petition the court for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court.

- " Indian Status. See Checklist A.
- " Placement Preferences. 25 U.S.C. §1915.
- " Invalidation Motion or Petition. 25 U.S.C. §1914. [The ICWA provides a separate and independent statutory basis for a petition to invalidate. However, a §388 petition provides a familiar option for seeking invalidation.]
- " Other Issues as Warranted by the Facts of the Case.

L JUDICIAL TIP: *To avoid procedural barriers from frustrating proper application of the Indian Child Welfare Act, clarity regarding the interplay of ICWA and state law is essential. The Act must be applied in the context of California's comprehensive statutory scheme. It is important to know which issues may arise at which hearings in order both to adhere to the Act and to properly advise parties of their rights, including their right to appeal.*

Under Welfare and Institutions Code §395, every judgment in a dependency proceeding is appealable (other than the hearing terminating reunification services and referring the case for a selection and implementation hearing - which requires a writ). Notice of appeal must be filed within 60 days after the making of an appealable order. An appeal from the most recent order entered in a dependency matter may not challenge prior orders for which the statutory time for filing an appeal has passed. *In re Elizabeth M.* (1991) 232 CA3d 443, 563.

H. Checklist: Post-Proceeding Actions

(1) Petition to Invalidate. 25 U.S.C. §1914.

“Had the mandate of the ICWA been followed in 1986, of course, much potential anguish might have been avoided, and in any case the law cannot be applied so as automatically to ‘reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation.’” *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 109 S.Ct. 1597, 161, 490 U.S. 30, 104 L.Ed.2d 29, quoting Supreme Court of Utah.

- “ Invalidation petition brought before a court of competent jurisdiction. (Superior court without jurisdiction to entertain petition while dependency matter is before juvenile court. *Slope v. Inyo County Juvenile Court* (1991) 230 CA3d 263.)
- “ Petitioner is the “ Indian child, “ parent, “ Indian custodian from whose custody the child was removed, “ the Indian child’s tribe.
- “ Basis for invalidation. (The invalidation is mandatory on a showing that any of the following rights was violated.)

25 U.S.C. §1911:

- “ Tribe has exclusive jurisdiction. 25 U.S.C. §1911(a).
- “ Trial court failed to grant a petition to transfer jurisdiction to tribal court when neither parent objected and there was not “good cause” to deny transfer. 25 U.S.C. §1911(b)
- “ Child, Indian custodian or the tribe was denied right to intervene at any point in the proceedings. 25 U.S.C. §1911(c)
- “ Court failed to give full faith and credit to public acts, records or judicial proceedings of a tribe. 25 U.S.C. §1911(d)

25 U.S.C. §1912:

- “ Court failed to give proper notice to parent, Indian custodian, tribe, or BIA, including information on right to intervene. 25 U.S.C. §1912(a).
- “ Proceedings took place too soon after notice. 25 U.S.C. §1912(a).
- “ Indigent parent or Indian custodian not provided court appointed counsel. 25 U.S.C. §1912(b).
- “ Child not provided court appointed attorney and appointment was in best interests of child. 25 U.S.C. §1912(b).
- “ Any party denied right to examine all reports or other documents filed with the court. 25 U.S.C. §1912(c).

- " Party seeking placement failed to show (1) that it made active efforts to provide remedial services and rehabilitative programs designed to prevent family breakup and (2) that those efforts have proven unsuccessful. 25 U.S.C. §1912(d).
- " Lack of qualified expert testimony that continued custody by parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C. §§1912(e) & (f).
- " Incorrect burden of proof applied. 25 U.S.C. §§1912(e) & (f).

25 U.S.C. §1913:

- " Invalid voluntary consent to placement. 25 U.S.C. §1913(a).
 - " Consent given prior to or within 10 days of birth
 - " Consent not in writing
 - " Consent not recorded in court, and not accompanied by judge's certificate
- " Parent or Indian custodian not allowed to withdraw consent to foster care placement. 25 U.S.C. §1913(b).
- " Child not returned to parent or Indian custodian after consent to placement withdrawn. 25 U.S.C. §1913(b).
- " Parent not allowed to withdraw consent to termination of parental rights or adoptive placement prior to entry of decree. 25 U.S.C. §1913(c).
- " Child not returned to parent if consent to termination of parental rights or adoptive placement withdrawn within ten days or prior to entry of decree, whichever occurs later. 25 U.S.C. §1913(c).
- " Adoption decree not vacated if parent withdraws consent due to fraud or duress within two years of date adoption was granted. 25 U.S.C. §1913(d)
- " Child not returned to parent after finding that consent to adoption was obtained through fraud or duress. 25 U.S.C. §1913(d).
- " Upon application by an Indian who has reached 18 years of age and who was the subject of an adoptive placement, the court that entered the final decree shall inform that individual of the tribal affiliation of his or her biological parents and provide other information necessary to protect any rights deriving from the tribal relationship. 25 U.S.C. §1917.

L JUDICIAL TIP: *Application for adoptive information may be made by petitioning to open adoption records and securing a certified copy of an original birth record under §1917 of the ICWA, and under Family Code §9200, and under California Health and Safety Code §10275.*

I. Checklist: Adoptions

- " Jurisdiction:
 - " Inquiry had been made to determine if child is ward of tribal court. 25 U.S.C. §1911.
 - " Inquiry has been made to determine if child resides or is domiciled on a reservation with jurisdiction over child custody matters. 25 U.S.C. §1911.

L JUDICIAL TIP: *If parents are domiciled on a reservation the child is also domiciled there, even if born off the reservation, and even if the child never resided on the reservation. Mississippi Band of Choctaw Indians v. Holyfield (1989) 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d.*

- " Tribe has been properly notified
 - " Tribe received full notice of all proceedings for termination of parental rights. 25 U.S.C. §1912; See Checklist D.
 - " Tribe received notice of adoptive action as required for compliance with placement preference provisions of the Act. 44 Fed. Reg. 67594.
 - " If adoption requires termination of parental rights of a parent or Indian custodian, minimum federal standards have been complied with. See Checklist D.
 - " If adoption is voluntarily initiated by birth parents, Voluntary Placement Checklist has been followed
 - " Adoptive placement preference:
 - " The Tribe has been contacted to determine if it has established an order of preference by resolution. The Tribe " has " has not established its own placement preferences.
 - " The placement meets the placement preference requirements of the Indian Child Welfare Act.
 - " As specified by the child's Tribe
- or-**
- " As set forth in the ICWA:
 - " a member of the child's extended family
 - " other members of the child's tribe
 - " other Indian families.

- “ The placement does not meet the placement preference requirements of the Act and good cause exists for modifying the preference order.
- “ A diligent search, including inquiry to tribe, extended family, and Indian service agencies, has failed to locate a suitable Indian home. [An Indian child may be placed in a non-Indian home only if the court makes a finding that a “diligent” search has failed to find an Indian home. 44 Fed. Reg. 67584(F3); Cal. Rules of Court, rule 1439(j)(3).]
- “ As appropriate, the request of a biological parent or the child (if sufficient age), has been considered, including the request of a parent for anonymity.
- “ Extraordinary physical or emotional needs of the child, as established by qualified experts.
- “ If the tribe has designated a placement preference by resolution, the placement is not the least restrictive setting which most approximates a family and in which the child’s special needs, if any, are met. 25 U.S.C. §1915(c).
- “ The prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties were used to evaluate placements. 25 U.S.C. §1915(d).
- “ A record of efforts to comply with placement preferences has been filed with the court and shall be made available to the child’s tribe of the Secretary of Interior upon request. 25 U.S.C. §1915(e).
- “ Copy of adoption decree to be sent to BIA, along with (25 U.S.C. §1951(a).):
 - “ Name and tribal affiliation of child
 - “ Names and addresses of biological parents
 - “ Names and addresses of adoptive parents
 - “ Identity of any agency having files or information relating to the adoptive placement
 - “ Affidavit of biological parent(s) who request confidentiality
- “ Parties have been advised:
 - “ If adoption is set aside or adoptive parents voluntarily terminate parental rights, biological parent or prior Indian custodian shall be informed and shall be granted custody if he or she petitions for custody unless party opposing return of child meets minimum federal standards for involuntary proceedings. 25 U.S.C. §1916; 44 Fed. Reg. 67595.

“ Any adult who was adopted as a child shall be informed of tribal affiliation of biological parents and any other information necessary to protect that person’s rights flowing from tribal membership. 25 U.S.C. §1917; 44 Fed. Reg. 67595.

L JUDICIAL TIP: *Sections 1951(a) and 1917 of the ICWA both govern information access for purposes of securing tribal enrollment. Enrollment is often required to trigger eligibility for tribal benefits ranging from health services to tribal per capita payments. It is in the Indian child’s interest to complete the tribal enrollment process as early as possible. Courts should urge or require completion of the enrollment process prior to granting the adoption.*

J. Checklist: Statutory Construction

- " State or federal law that provides higher standard of protection to rights of parent or Indian custodian must be applied. 25 U.S.C. §1921. [E.g., At least one California court has held that a parent may waive their ICWA right to services by stipulation or by failing to object. Cal. Welf.& Inst. Code §361.5(13) allows a waiver of services but requires an express *finding* that any waiver is *knowing and voluntary*. This higher standard would apply to the right to services provided by ICWA.]
- " ICWA, BIA Guidelines for State Courts, federal regulations implementing the ICWA, and all state statutes, regulations and rules implementing the ICWA shall be liberally construed in favor of result consistent with the following preferences, 44 Fed. Reg. 67586:
 - " Indian children should be kept with their families;
 - " State courts should defer to tribal judgment on matters concerning the custody of tribal children; and
 - " Indian children who must be removed from their homes should be placed within their own families or tribes.
- " Statutes passed to benefit Indians must be liberally construed to effectuate their purposes; doubtful expressions are to be resolved in favor of Indians. *Bryan v. Itasca County*, (1976) 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710.
- " State law definitions of terms cannot be used to frustrate the policies of the ICWA. *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 109 S.Ct.1597, 104 L.Ed.2d 29.
- " Remedial statutes should be broadly construed to effectuate their purpose. *Tcherepnin v. Knight* (1967) 389 U.S. 332, 88 S.Ct. 548, 19 L.Ed.2d 564.
- " The ICWA does not preempt state law unless there is an express preemption clause, implied preemption ("occupation of the field"), or a conflict between the provisions of federal and state law. *In re Brandon M.* (1997) 54 CA4th 1387. [ICWA does not preempt California's de facto parent doctrine.]

IV. Applicable Law

A. Overview of the Indian Child Welfare Act

The Indian Child Welfare Act (ICWA) significantly impacts litigation and proceedings involving the custody of Indian children. In most situations, the Act limits the placement of Indian children to a specified preference order. The ICWA also mandates extensive notice procedures. Child custody proceedings and other actions pursuant to state law can be invalidated for failure to follow the ICWA's procedural requirements.

This sub-section provides the reader with a context for understanding the ICWA.

L JUDICIAL TIP: *The ICWA does not contain a definition of “custody” per se. However, by its terms, it does NOT apply to all cases involving custody. Significantly, **the Act does not apply to custody disputes between parents in divorce (dissolution) proceedings, nor to placements based on criminal acts.** Through its definition of “child custody proceeding”, the Act specifies to which types of custody cases it applies and to which types of custody cases it does not apply. **The focus is on whether the proceeding meets a definition set forth in the Act, and not upon what the proceeding is called.** 25 U.S.C. §1903(1). It is unsettled whether the ICWA applies to family law custody disputes between parents who were never married. To the extent such proceedings are like divorce cases, the Act probably does not apply. However, it has been held to apply to other types of proceedings, such as termination of parental rights, even when the action is between parents.*

1. Basic Principles of Indian Law

Described as “domestic, dependent nations,” tribes have a unique status in the federal system. *Cherokee Nation v. Georgia* (1831) 30 U.S. (5 Pet.) 1. Indian tribes are sovereign entities predating the U.S. Constitution. *Id.* Through the U.S. Constitution, Congress has the exclusive authority to regulate “commerce with Indian tribes.” U.S. Const., Art. I, Sec. 8, Cl. 3. In general, tribal sovereignty is limited by overriding federal authority only to the extent expressly authorized by Congress, or where inconsistent with the tribe’s legal status. *New Mexico v. Mescalero Apache Tribe* (1983) 462 U.S. 324; *United States v. Wheeler* (1978) 435 U.S. 313; *Montana v. United States* (1981) 450 U.S. 544. Consequently, states are preempted from exercising any authority over Indian tribes if it would clash with federal authority or policy. *Worcester v. Georgia* (1832) 31 U.S. (6 Pet.) 515; *Williams v. Lee* (1959) 358 U.S. 217; *New Mexico v. Mescalero Apache Tribe* (1983) 462 U.S. 324.

The federal government must exercise its plenary power over Indian tribes consistent with certain obligations to tribes. The relationship between the U.S. and tribes has been characterized as that of a guardian and ward, with the U.S. having trust responsibilities to tribes. Tribes and the U.S. have a “political” relationship between two nations, not a relationship based on any racial classification of Native Americans. Because of the unique relationship between tribes and the federal government, Congress can treat Native Americans differently from other racial or ethnic groups without running afoul of traditional equal protection rules. *Morton v. Mancari* (1974) 417 U.S. 535.

As an incident to sovereignty, tribes have the inherent authority to regulate domestic relations among their members. *See, e.g., Fisher v. District Court* (1976) 424 U.S. 382 (authority to grant on-reservation adoption); *No Fire v. United States* (1897) 164 U.S. 657 (authority to grant marriage license); *Conroy v. Conroy* (8th Cir. 1978) 575 F.2d 175 (authority to divide marital property). In many ways, the ICWA is simply the codification of the tribes’ legal rights as they existed before passage of the Act. At the same

time, the ICWA extends Congressional authority over Indian affairs by dictating federal standards for state custody proceedings involving Native American children and establishing tribal procedural rights in these state proceedings.

L JUDICIAL TIP: *The status of Tribes as quasi-sovereign nations and the status of Indian children as citizens of tribal nations, impact best interest analysis. Tribes have an interest in protecting tribal children. It is misguided to view the interest of the tribe as opposed to those of the child, and to view the application of the Act as only in the tribe's interest. The two purposes of the Act - to promote "the 'best interests of Indian children' and the ... 'stability and security of Indian tribes and families' - are intertwined" with the underlying premise being that "it is in the best interest of an American Indian child that the role of the tribal community in the child's life be protected." (See §IV. A.4.) The Indian child has an interest in his or her tribe that Congress has sought to protect by the imposition of minimum federal standards, in order to assure that cultural bias and misunderstanding does not adversely impact an Indian child's relationship with his or her Indian family and tribe. It is too easy for a state court to justify the destruction of Indian families and tribes by casting its rulings in undefined terms of "best interest." What the Act attempts to do is to eliminate biased subjectivity by imposing minimum standards for state court proceedings. As a matter of federal law, if these standards are met, the best interests of Indian children will be advanced. If they are not, then the action is not in the best interest of the Indian child regardless of the belief of the state court judge to the contrary.*

2. Factual Orientation

a. Native Americans in California

California tribes are numerous and diverse, reflecting a rich past. The Bureau of Indian Affairs recognizes 107 California tribes. Some of these tribes are among the most sophisticated tribes in the United States. However, of the federally recognized tribes, a significant number also represent formerly terminated tribes that have been "unterminated" in recent years via litigation or legislation. Termination is the process by which Congress abolishes a tribe's government, distributes tribal assets and ends (terminates) the federal government's trust relationship with the tribe. Between 1954 and 1966, Congress terminated over one hundred tribes, most of them in Oregon and California. American Indian Policy Review Commission, *Final Report* p. 447-53 (Washington D.C.: Government Printing Office, 1977). A shift in federal policy, ended the termination era and ushered in a period of critical examination of the termination process. This resulted in a number of lawsuits. One example of an untermination lawsuit that has impacted a number of California tribes is the class action lawsuit *Tillie Hardwick v. United States of America*, U.S. District Court for the Northern District of California, No. C-79-1710-SW. This litigation, settled in the 1980's, resulted in the untermination of 17 California tribes that had been terminated. The litigation reestablished tribal status and confirmed reservation boundaries. (See, Advisory Council on California Indian Policy, Termination Report, Chapter 5, page 32, footnote 111.) However, since tribal existence had been interrupted for twenty to thirty years, it is not uncommon to encounter unterminated, but now recognized, tribes that are in early stages of organization. See Bench Guide §IV. C.1.b.ii. for a discussion of federal recognition.

Although the Bureau of Indian Affairs (BIA) recognizes 107 California tribes, there are many more tribes in the state. California is also home to approximately 40 unrecognized tribes and 10 tribes terminated in the 1950's and 1960's who are eligible for restoration. Today, over 80 Indian reservations, encompassing approximately 452,567 acres, dot the California landscape. Membership rolls range from under 25 people for smaller tribes to the Yurok Nation with over 3,000 members.

With a total of over 200,000 Native American persons, California has one of the highest Indian populations in the nation, second only to the state of Oklahoma. This total includes between 45,000 and 80,000 Indians from federally recognized California tribes and 80,000 California natives whose tribes are not acknowledged by the federal government. (See, Advisory Council on California Indian Policy, Final Reports and Recommendations to the Congress of the United States pursuant, Chapter 1, page 6.) The state's Indian population also includes a substantial number of Native people from out-of-state tribes who have relocated.

b. Indian Programs and Services

Because California is a Public Law 280 state (28 U.S.C. §1360, commonly referred to as P.L. 280, makes state laws of general application applicable to reservation Indians), Indians are eligible for state programs and services. In addition, tribes and the federal government share the responsibility of delivering social services to Indians in California. Many tribes, the U.S. Department of the Interior Bureau of Indian Affairs (“BIA”), and the U.S. Department of Housing and Urban Development (“HUD”), all have Indian housing programs. Health services, including drug and alcohol rehabilitation, are handled mostly by the U.S. Department of Health and Human Services, Indian Health Service (“IHS”). In California, tribes and non-profit groups directly administer most IHS programs. Both the BIA and a number of tribes run job, education and educational support programs. Indian programs and services are not centralized, so all potential sources of assistance must be investigated to maximize services for each client. A useful approach is to contact the Tribe, the BIA, and IHS in this order of preference. The BIA Sacramento Area Office maintains a current list of Tribal directory information for tribes in California, and maintains a current list of tribes that operate BIA funded child and family service programs. The IHS maintains a current list of tribal health care and mental health care providers.

3. Tribal Roles and Options in ICWA Proceedings

From a Tribal perspective, the Indian Child Welfare Act, 25 U.S.C. §1901, *et seq.*, (ICWA) may simplistically be divided into two categories, legal and social/cultural.

a. Legal Aspects:

- C JURISDICTION. One legal aspect involves jurisdiction, allowing tribes in some circumstances to assert exclusive control over child custody matters through tribal courts, and to accept case transfers in others. 25 U.S.C. §§1911(a) and (b).
- C REASSUMPTION. Tribes that may not have previously operated judicial systems are provided an opportunity to **reassume** jurisdiction. 25 U.S.C. §1918. This process is optional and is *not* required before a tribe may exercise concurrent jurisdiction over Indian child custody cases.
- FULL FAITH AND CREDIT. The Act requires Full faith and credit be given to the public acts, records, and judicial proceedings of Indian tribes applicable to Indian child custody proceedings. 25 U.S.C. §1911(d).
- C INTERVENTION. Tribes are authorized to intervene as parties in state custody cases, at any point in a state court Indian child custody proceeding.
- C MINIMUM FEDERAL STANDARDS. The Act sets forth minimum federal requirements

for Indian child custody proceedings in state courts. These are federal requirements that must be followed whenever a state court decides child custody cases covered by the ICWA. These standards must be followed whether or not a tribe becomes involved in a state court Indian child custody case. 25 U.S.C. §§1912, 1913, 1915, 1916, 1917, 1920, 1921, and 1922.

- C AGREEMENTS. The Act authorizes agreements between states and tribes. 25 U.S.C. §1919.

- b. *Social/Cultural Components*

- C TRIBAL PROGRAMS. The primary social/cultural component of the Act, Title II, authorizes grants for establishment and operation of Indian Child and family service programs.

- C TRIBAL LAW AND CULTURE ACKNOWLEDGED IN FEDERAL STANDARDS. The minimum federal standards for state proceedings require that states defer to Indian social and cultural standards in placement and treatment assessments. 25 U.S.C. §§1912 and 1915. As well, tribes have opportunities to influence or alter the standards that must be applied by state courts. For example, the definition section of the ICWA, defines a number of terms as “as defined by tribal law or custom,” and in the absence thereof, as set forth in the Act. 25 U.S.C. §1903.

4. ICWA Policy and Legislative History

The ICWA implements the federal government’s trust responsibility to tribes by protecting and preserving the bond between Indian children and their tribe and culture. Congress passed the ICWA to address the misuse of state child protection power to remove Indian children and place them with non-Indian families. By maintaining the connection between Indian children and their tribes, the ICWA protects the best interests of Indian children and promotes the stability and security of Indian tribes and families. Numerous courts have ruled that the ICWA is constitutional. *See*, Bench Guide §IV.A.4.b.

- a. *The Problem Leading to Passage of the ICWA*

Congressional hearings in the mid-1970’s revealed a pattern of wholesale public and private removal of Indian children from their homes, undermining Indian families, and threatening tribal survival and Indian culture. Indian Child Welfare Program, Hearings Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93rd Cong., 2d Sess. 3 (1974) (statement of William Byler). At the national level:

- C Indian children were placed in foster care or for adoption at **three times the rate of non-Indian children.**
- C Approximately **25-35 percent of all Indian children were removed** from their homes and placed in foster homes, adoptive homes, or institutions.

H.R. Report No. 1386, 95th Cong., 2d Sess. (1978).

In California:

- C public agencies placed over **eight times as many Indian children** than non-Indian children in adoptive homes.
- C **Over 90 percent** of California Indian children subject to adoption were placed in non-Indian homes.
- C **One of every 124 Indian children** in California was in a foster home, compared to a rate of one in 337 for non-Indian children.

Congress determined that Indian children who had been placed for adoption into non-Indian homes **frequently suffered serious adjustment problems during adolescence.** Indian Child Welfare Program, Hearings Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93rd Cong., 2d Sess. 75-83 (1974). Indian children had to cope with the overwhelming problems of adjusting to a social and cultural environment much different than their own. They were not accepted in non-Indian communities, and they were torn away from their Indian families and tribes.

In 1978, Congress concluded “that the Indian child welfare crisis is of massive proportions and that Indian families face vastly greater risks of involuntary separation than are typical for our society as a whole.” H.R. Report No. 1386, 95th Cong., 2d Sess. (1978). **This resulted from states failing to recognize the essential tribal relations of Indian people and the different cultural standards regarding extended family which prevail in Indian communities.** 25 U.S.C. §1901(5); H.R. Report No. 1386, 95th Cong., 2d Sess. 10-12 (1978). Congress passed the ICWA to remedy these “abusive child welfare practices.” *Mississippi Choctaw v. Holyfield* (1989) 490 U.S. 30, 32.

b. The “Best Interest” Test

The ICWA revolutionized the “best interest” test in the context of Indian children. Although, the ICWA leaves in place the best interests of the child standard for child custody proceedings, the Act shifts the focus of the standard where an Indian child is involved. Under the federal standard, the best interests of Indian children are served by protecting “the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.” H.R. Report No. 1386, 95th Cong., 2d Sess. 23 (1978). Federal policy protects the best interests of Indian children by preserving Indian families and the connection between tribes and their children.

Most states use the “best interests of the child” standard in child custody proceedings. Generally, the best interests of a child is deemed to be a stable placement with an adult who becomes the psychological parent. *See, e.g., J. Goldstein, et al., Beyond the Best Interests of the Child* (1979) p. 53. In passing the ICWA, Congress was concerned that states were applying the best interest standard to the detriment of Indian children and found the vagueness of the standard especially problematic. Using the best interest standard, state officials made subjective value decisions about Indian families without taking into account cultural differences in child rearing or the essential tribal relations of Native American people. H.R. Report No. 1386, 95th Cong., 2d Sess. 19 (1978). To rectify this situation, Congress included in the ICWA a federal statutory best interest standard for Indian children.

In the ICWA, Congress declared that it is the official policy of the federal government “to protect the best interests of Indian children.” 25 U.S.C. §1902. This policy is carried out by following four important objectives of the Act:

- C Jurisdictional provisions and intervention rights designed to enhance tribal control and involvement in Indian child custody cases;
- C the adoption of minimum federal standards for the removal of Indian children from their families;
- C the placement of Indian children in Indian homes; and
- C the support of tribal child and family service programs.

Congress concluded that proper implementation of the ICWA would serve the best interests of the Native American child. H.R. Report No. 1386, 95th Cong., 2d Sess. 19 (1978).

Congressional findings set forth in the Act include that “the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the *essential tribal relations* of Indian people and the *cultural and social standards* prevailing in Indian communities and families.” (emphasis added.) 25 U.S.C. §1901(5). This finding sets forth two important but distinct considerations that underlie the provisions of the Act.

Cultural considerations, and concern for tribal heritage are relevant to a proper application of the Indian Child Welfare Act. Assessment, treatment and placement standards require adherence to cultural dictates. See, 25 U.S.C. §§1912, 1915. However, the Act is not simply an effort to strengthen Indian culture.

The Act acknowledges a *special relationship* between tribes and the federal government and seeks to protect *essential tribal relations*. The nature of these relationships, both between tribes and the federal government and between tribes and their members, is premised on more than mere cultural considerations. Indians as members of tribes are not simply separate racial or cultural groups, but also separate **political** groups. See, *Morton v. Mancari* (1974) 417 U.S. 535. The Act is very much concerned with these legal/political relationships. Indian tribes stand in a government to government relationship with the United States. See, *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe* (1991) 111 S.Ct. 905. An Indian child is a “citizen” of a tribe and entitled to the incidents of that status as determined both by the laws of the federal government and the tribe. The Indian child has an interest in his or her tribe that Congress has sought to protect by the imposition of minimum federal standards, in order to assure that cultural bias and misunderstanding does not adversely impact an Indian child’s relationship with his or her Indian family and tribe. A state court may not justify the destruction of Indian families and tribes by casting its rulings in undefined terms of “best interest.” What the Act attempts to do is to eliminate biased subjectivity by imposing minimum standards for state court proceedings. As a matter of federal law, if these standards are met, the best interests of Indian children will be advanced. If they are not, then the action is not in the best interest of the Indian child regardless of the belief of a state court judge to the contrary.

This approach was adopted by California in 1999, with passage of Assembly Bill 65. The bill, codified in Fam. Code §7810 and Welf. & Inst. Code §§305.5 and 360.6, directs the courts to strive to promote the stability and security of Indian tribes and families and to comply with ICWA in all Indian child custody proceedings as specified by the Act. It further expressly states it is “in the interest of an Indian child that the child’s membership in the child’s Indian tribe and connection to the tribal community be encouraged and protected.”

c. *Constitutionality*

The ICWA has survived numerous constitutional challenges by parties claiming that the Act constitutes disparate treatment based on race. *See, e.g., In re Marcus S.* (Me. 1994) 638 A.2d 1158; *In re D.L.L. and C.L.L.* (S.D. 1980) 291 N.W.2d 278; *In re Appeal of Pima County Juvenile Action* (Ariz.App. 1981) 635 P.2d 187, *cert. den.*, 455 U.S. 1007 (1982); *Matter of Miller* (Mich.App. 1990) 451 N.W.2d 576; *State ex rel. CSD v. Graves* (Ore.App. 1993) 848 P.2d 133. The constitutionality of federal statutes affecting Indians is reviewed under a rational basis standard. *Morton v. Mancari* (1974) 417 U.S. 535, 555. If the statute's objectives can be rationally connected to the fulfillment of the federal government's unique obligation to Indians, the statute is constitutional. Only one statute affecting Indians (The Indian Land Consolidation Act, 25 U.S.C. §2201 *et seq.*) has ever been ruled unconstitutional under this standard. In upholding the constitutionality of the ICWA, courts have referred to the Commerce Clause as a justification for congressional action in protecting the welfare of Indian children.

Recently, the California Court of Appeal for the Second District held that the ICWA does not violate the Constitution to the extent it is based upon social, cultural or political relationships between Indian children and their tribes. However, the court went on to hold that recognition of an "existing Indian family doctrine" was necessary under the facts of the case before it in order to preserve the constitutionality of the ICWA. *In re Bridget R.* (1996) 41 Cal.App.4th 1483. Subsequently, the Fourth and Sixth Districts followed suit. *In re Alexandria Y.* (1996) 45 Cal.App.4th 1483; *In re Crystal R.* (1997) 59 Cal.App.4th 703. The exception requires a showing of significant social, cultural, or political affiliation with Indian life.

First, it is important to note that panels from the First, Third and Fifth Districts have rejected the doctrine as an impermissible judicially created exception to federal law. *In re Junious M.* (1983) 144 Cal.App.3d 786; *In re Crystal K.* (1990) 226 Cal.App.3d 655; *Adoption of Lindsay C.* (1991) 229 Cal.App.3d 404.

Second, the opinions of the appellate courts applying the existing Indian family exception, characterize the interests and issues involved in a manner that demonstrates a profound misunderstanding of the rights of Indian tribes and of Indian children as citizens of those tribes. Many advocates point out that the best interests of Indian children as Indian children are not advanced by this line of reasoning. Citizenship is a bilateral political relationship. *Fisher v. District Court* (1976) 424 U.S. 382; *United States v. Antelope* (1977) 430 U.S. 641, 645-6. The Indian child has an interest in his or her tribe that Congress has sought to protect by the imposition of minimum federal standards. Hence, these standards apply whether or not a tribe intervenes or seeks a transfer of jurisdiction. In addition, interests asserted by a tribe are not interests that compete with what is best for the child, but rather interests calculated to protect the rights of the child as an Indian. This relationship is precisely the type of "essential tribal relations" that congress has cited as too often misunderstood by states.

Interestingly, the existing Indian family exception authorizes a determination of ICWA applicability based on social or cultural factors. This, opponents believe, is unconstitutional. The California legislature weighed in on the issue with passage of Assembly Bill 65, effective September, 1999. Codified in Fam. Code §7810 and Welf. & Inst. Code §§305.5 and 360.6, the bill directs the courts to strive to promote the stability and security of Indian tribes and families and to comply with ICWA in all Indian child custody proceedings as specified by the Act. It responds to the existing Indian family doctrine by finding and declaring that it is in an Indian child's interest that the child's relationship to his or her tribe be encouraged and protected, and that a tribe's determination that the child meets the definition of Indian set forth in the ICWA "shall constitute a significant political affiliation with the tribe and shall require the application of

the federal Indian Child Welfare Act to the proceeding.

5. General Overview of the ICWA — A Multifaceted Statute

The ICWA acknowledges a *special relationship* between tribes and the federal government and seeks to protect *essential tribal relations*. The nature of these relationships, both between tribes and the federal government and between tribes and their members, are premised on more than mere cultural considerations. Indians as members of tribes are not simply separate racial or cultural groups, but also separate **political** groups. See, *Morton v. Mancari* (1974) 417 U.S. 535. The Act is very much concerned with both cultural considerations and with these legal/political relationships.

The Indian Child Welfare Act is a multi-faceted and powerful statute that includes provisions addressing all of the following:

- C Tribal Rights and Opportunities
- C Indian Social and Cultural Considerations
- C Minimum Federal Standards for State Court Proceedings

The ICWA is a powerful statute for tribes. (See section A.3. above, Tribal Roles and Options in ICWA Proceedings.) The Act includes jurisdictional provisions, full faith and credit requirements, authorization for agreements between tribes and states, and a tribal right to intervene at any stage of a state court child custody proceeding involving an Indian child. In addition, the Act authorizes tribal acts to alter the standards that must be applied in state proceedings.

Cultural considerations, and concern for tribal heritage are relevant to a proper application of the Indian Child Welfare Act. Title II of the Act authorizes grants for establishment and operation of Indian Child and family service programs. The minimum federal standards for state proceedings require that states defer to Indian social and cultural standards in placement and treatment assessments. 25 U.S.C. §§1912, 1915. Finally, a number of the definitions set forth in the act are “as defined by tribal law or custom,” or in the absence thereof, as set forth in the Act. 25 U.S.C. §1903.

Finally, the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §1901, *et seq.*, imposes minimum federal standards for state court Indian child custody proceedings that include procedural and substantive requirements. The minimum federal standards apply when two basic requirements are met: 1) an Indian child is involved, and 2) the proceeding is one covered by the Act. In general, the ICWA covers both voluntary and involuntary proceedings regarding foster care placement, termination of parental rights, and adoption of an Indian child. Custody decisions incident to divorce and juvenile delinquency proceedings are not generally covered by the Act. 25 U.S.C. §1903(1). One of the more complex pieces of federal legislation ever passed, the ICWA significantly impacts child custody litigation and procedures involving Indian children.

L JUDICIAL TIP: *The ICWA does not contain a definition of “custody” per se. However, by its terms, it does NOT apply to custody disputes between parents in divorce proceedings, nor to placements based on criminal acts. In determining whether the Act applies to a particular proceeding, the focus is on whether the proceeding meets a definition set forth in the Act, and not upon what the proceeding is called. 25 U.S.C. §1903(1).*

Under the ICWA, Indian tribes and parents are guaranteed procedural safeguards in custody proceedings involving Indian children. The child's tribe has a right to assert jurisdiction over the proceeding or to intervene in a state court proceeding. 25 U.S.C. §§1911(b), (c). With only limited exceptions, a tribe has exclusive jurisdiction over any proceeding involving an Indian child residing or domiciled on the reservation. 25 U.S.C. §1911(a). In addition, both the child's tribe and biological parents must be notified of pending custody proceedings. 25 U.S.C. §1912(a). Indigent parents also have the right to appointed counsel for certain proceedings. 25 U.S.C. §1912(b).

The Act also mandates substantive requirements designed to protect the best interests of Indian children. To begin, the ICWA requires a high standard of proof for removal of an Indian child from her or his biological parents or Indian custodian, or for the termination of parental rights. 25 U.S.C. §§1912(e), (f). Before removing Indian children from their homes, states must first attempt to prevent the break-up of Indian families through rehabilitation and reunification services. 25 U.S.C. §1912(d). If removed from their homes, Indian children must be placed according to the following placement preference order: with a member of the child's extended family, with other members of the child's tribe, or with other Indian families. 25 U.S.C. §1915. To be valid, parental consent for placement or termination of parental rights must follow strict requirements. 25 U.S.C. §1913. State court proceedings that do not comply with the ICWA may be invalidated. 25 U.S.C. §1914.

B. Proceedings Covered by the Act

1. General application of Act

A two-prong test is used to initially review any case for ICWA applicability:

- 1) is the proceeding a "child custody proceeding" 25 U.S.C. §1903(1), and
- 2) is the child involved an Indian child. 25 U.S.C. §1903(4).

This section will discuss the first prong of the test. For an in-depth review of the second prong please see section C.1, Indian child, below.

25 U.S.C. §1903(1) defines child custody proceedings as those involving foster care placements, termination of parental rights, preadoptive placements and adoptive placements. Also see, Cal. Rule of Court, rule 1439(a)(8). Each of these proceedings will be discussed in turn.

L JUDICIAL TIP: *The ICWA does not contain a definition of "custody" per se. However, by its terms, it does NOT apply to all cases involving custody. Significantly, **the Act does not apply to custody disputes between parents in divorce proceedings, nor to placements based on criminal acts committed by the child.** Through its definition of "child custody proceeding", the Act specifies to which types of custody cases it applies and to which types of custody cases it does not apply. The focus is on whether the proceeding meets a definition set forth in the Act, and not upon what the proceeding is called or whether it is a private action or an action brought by a public agency. 25 U.S.C. §1903(1). Hence, the Act clearly does not apply to custody disputes between parents in dissolution proceedings. It is unsettled whether the ICWA applies to family law custody disputes between parents who were never married. To the extent such proceedings are like divorce cases, the Act probably does not apply. However, it has been held to apply to other types of proceedings, such as termination of parental rights, even when the action is between parents. Similarly, not all California delinquency cases involve removals based on criminal acts. 1999 changes to*

California law make it clear that some removals in delinquency cases are “placements” which meet the requirements for federal foster care funding, in that they are made for the child’s welfare after reasonable efforts have been made to prevent the need for removal of the child from his or her home. (See, e.g., *Welf. & Inst* §636.) As well, California law now allows the granting of guardianships and termination of parental rights in delinquency proceedings, proceeding to which the Act applies.

Voluntary and involuntary proceedings are covered by the act, although different sections of the Act may apply to each. Involuntary proceedings, especially, involve a larger number of the Act’s provisions because there is greater risk of culturally inappropriate removal and placement in such proceedings. H.R. Rep. No. 1386, 95th Cong. 2d Sess. 10, 1978 U.S. Code Cong. & Admin. News 7530.

2. Proceedings Covered by the ICWA

a. Foster Care Placements

According to 25 U.S.C. §1903(1)(i) foster care placements refer to any action removing an Indian child from his/her parents or Indian custodian for temporary placement in a foster home or in a situation or home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where the parental rights have not been terminated. Inherent in this proceeding is that there is some restriction on the parent or Indian custodian that keeps the child from being returned to the parent or custodian on demand. Some provisions of the Act apply only to voluntary foster care placements (e.g., §1913 consents), others apply only to involuntary foster care placements (e.g., §1912 standards), and some apply to both (e.g., §1915 placement preferences). While some provisions of Act apply only to involuntary proceedings, it should not be over looked that a parent or custodian in a voluntary foster placement situation may withdraw consent, and if the child is not returned, then the proceeding becomes involuntary and all relevant provisions of the Act must be complied with. This situation should be distinguished from that in which a child is involuntarily removed from the Indian custodian and returned to the parents. 25 U.S.C. §1916(b). Such a situation does not trigger the Act’s provisions. American Bar Association; The Indian Child Welfare Act Handbook, p.20.

b. Termination of Parental Rights

25 U.S.C. §1903(1)(ii) includes in this category any action that results in the termination of the parent-child relationship. Both voluntary and involuntary proceedings are included, and in fact, the legislative history demonstrates that the Act governs any proceeding in which there is even a potential for termination of parental rights. 25 U.S.C. §§1912(f), 1913(a) and 1913(c).

In addition, the following termination of parental right situations have been found to come within the Act:

- C Family Code §§7800-7808 governing Freedom from Parental Custody and Control chapter. *In re Crystal K* (1990) 226 Cal.App.3d 655 (the Act was found to apply in a proceeding brought by an Indian child’s mother (after divorce) to have the child declared free of the father’s parental custody and control so that child could be adopted by mother’s second husband).
- C Family Code §§8606-8622 governing adoption of an unmarried minor.

c. *Preadoptive and Adoptive Placements*

i. *Preadoptive Placement*

25 U.S.C. §1903(1)(iii) defines preadoptive placement as the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of an adoptive placement. California law does not authorize placement that meets this definition.

ii. *Adoptive Placement*

25 U.S.C. §1903(1)(iv) defines adoptive placement as the permanent placement of an Indian child for adoption, including any action that may result in a final decree of adoption. In adoptive placements, placement preferences must be followed in the absence of good cause to the contrary. 25 U.S.C. §1915(a). Also see, *Guidelines for State Courts, Indian Child Custody Proceedings*, 44 Fed.Reg. 67588 (Nov. 26, 1979) B.3. commentary, & section G., Standards for custodial placement, *infra*.

Both independent and agency adoptions are covered by ICWA. *Mississippi Band Of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30 (where the Act was found to apply to two twin babies whose Indian reservation domiciled parents had originally consented to adoption of twins by non-Indians).

L JUDICIAL TIP: *In a private adoption proceeding in California, either a consent meeting ICWA requirements will have been given, or parental rights will have been terminated in a civil action where ICWA standards were met. Hence, issues for the court to consider when granting a private adoption would include compliance with placement preference requirements and assuring that required information is forwarded to the BIA. In all cases, because it may impact benefits a child is entitled to, court's should urge completion of tribal enrollment prior to granting an adoption. In a hearing under Welfare and Institutions Code §366.26, the rules of court suggest that the court should make all required ICWA evidentiary findings at the 366.26 hearing. However, a recent California appellant case held that the required finding under §1912(f) regarding services should generally be made at the final review hearing at which a §366.26 hearing is scheduled. Under designated circumstances or if the finding was not made at the final review hearing and the court intends to terminate parental rights, the §1912(f) finding must be made at the §366.26 hearing. (In re Matthew Z. (2000) 80 Cal.App. 4th 545.)*

d. *Applicability to Juvenile Delinquency Proceedings.*

The Act expressly excepts from its definition of child custody proceedings **placements based on an act which, if committed by an adult, would be deemed a crime.** Hence, proceedings under Welfare and Institutions code §602 (delinquency cases) are not subject to the Act when placement is based on a criminal act. However, not all California delinquency cases involve removals based on criminal acts and may be subject to the ICWA.

In this regard, while the ICWA does not contain a definition of “custody” per se, under its definition of “child custody proceeding”, the Act specifies the types of custody cases to which it applies and to which types of custody cases it does not apply. The *focus is not on what a proceeding is called, or whether it is a private action or an action brought by a public agency, but on whether the proceeding meets a definition set forth in the Act.* 25 U.S.C. §1903(1). Accordingly, a state’s characterization of a proceeding as “criminal” is not necessarily determinative. See, *California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202, 107 S.Ct. 1083. [U.S. Supreme Court ruled California’s criminal statutes governing conduct of bingo did not apply to Indian reservations under Public Law 280, granting the state criminal jurisdiction over

reservations, because the state’s statute was, in effect, regulatory rather than criminal in nature.]

Recent changes to California law make it clear that some delinquency proceedings are subject to the Act. As well, to the extent the policy underlying juvenile law in California remains treatment and rehabilitation of the child, the policy underlying the ICWA strongly supports tribal involvement in 602 proceedings. Accordingly, many tribes actively pursue permissive involvement in 602 cases and make an effort to provide services and locate appropriate placements.

California juvenile delinquency proceedings may be covered by the ICWA in a variety of circumstances.

i. Tribe’s Right to be Present at §602 Proceedings.

The California Rules of Court are adopted by the California Judicial Council pursuant to its constitutional and statutory authority to adopt rules for court administration, practice, and procedure. Division Ia of the California Rules of Court contain Juvenile Court Rules. The rules are designed to implement the purposes of the juvenile court law by promoting uniformity in practice and procedure and by providing guidance to judges, referees, attorneys, and others participating in the juvenile court. (Cal. Const., art VI, §6; §265; Cal. Rules of Court, rule 1400(b).) **The rules apply to every action and proceeding to which the juvenile court law applies.** (Cal. Rules of Court, rule 1400(a).)¹

Chapter 3 of the Juvenile Court Rules set forth rules governing the general conduct of juvenile court proceedings. Rule 1410(b) provides, in pertinent part, as follows:

“The following persons are **entitled to be present**:

...

(2) All parents, de facto parents, Indian custodians, and guardians of the child . . .

(3) Counsel representing the child or the or the parent, de facto parent, guardian or adult relative, Indian custodian or the tribe of an Indian child;

...

(7) A representative of the Indian child’s tribe; . . .” (Emphasis added.)

Thus, as a matter of California law, Indian tribes have a right to be present at *every* juvenile proceeding involving Indian children, including §602 proceedings.

Rule 1410 is a reasonable measure to promote court administration and practice and to further the purposes of both the juvenile court law and the ICWA, in that, as discussed below, the Act applies to some §602 proceedings. By allowing tribes to be present for all §602 proceedings involving Indian children, tribes can monitor cases to assure proper application of and compliance with the Act.

¹ The Judicial Council adopted the following introductory statement to the California Rules of Court in 1992: INTRODUCTORY STATEMENT: The Judicial Council is established under article VI, section 6, of the Constitution of California, and is given various powers and responsibilities to improve the administration of justice. . . . Unless otherwise indicated, each rule in these California Rules of Court was adopted by the Judicial Council under its constitutional authority to “adopt rules for court administration, practice and procedure, not inconsistent with statute,” or under express authority granted by the Legislature. Throughout the rules, “shall” is mandatory, “may” is permissive, and “should” indicates a nonbinding recommendation unless the context or subject matter requires otherwise. **All of the California Rules of Court have the force of law.** . . . (emphasis added.)

ii. *Mandatory Application of the ICWA in §602 proceedings.*

1. Placement Cases. (Title IV-E Federal Funded Foster Care Reimbursement cases).

Recent changes to California law make it clear that some delinquency proceedings involve “placements” which meet the requirements for federal foster care funding, in that they are made for the child’s welfare after reasonable efforts have been made to prevent the need for removal of the child from his or her home. (See, e.g., Welf. & Inst. §§636, 727 *et seq.*) *Such placements would include foster care placements made to relatives, foster care or licensed group homes and treatment facilities pursuant to Welf. & Inst §11402.* In order to qualify for foster care funding, the placement must be based not on the criminal conduct, but the welfare of the child, following reasonable efforts to avoid the need for placement. In effect, the findings required to qualify the placement for federal foster care funding, also bring the proceeding within the federal definition of child custody proceeding covered by the Indian Child Welfare Act in that they require the court to specify the placement is being made for other than criminal conduct by the minor. The fact that in such cases, a finding is also made that the child has committed a crime would not exclude the case from ICWA coverage. Section 602 placements which are in fact based on commission of a crime are treated differently than placements made for the minor’s benefit. Such placements are not eligible for or funded by Title IV-E.

2. Guardianship and Termination of Parental Rights Proceedings.

Pursuant to Welfare and Institutions Code section 728, effective 1998, juvenile courts have authority to terminate or modify guardianships of the person of a child previously established under the Probate Code, or appoint a guardian, co-guardian or successor guardian of the person of the child, if the child is the subject of a petition filed under Welf. & Inst. Code §§300, 601, or 602. All proceedings to modify or terminate a guardianship granted under this section must be held in the juvenile court, even if the wardship or dependency proceedings has otherwise been terminated.

Guardianship proceedings clearly fall within the definition of foster care set forth in the Act. **Foster care placements** refer to “any action removing an Indian child from its parents or Indian custodian for temporary placement in a foster home or institution or home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where the parental rights have not been terminated.” (25 U.S.C. §1903(1)(i).) If a guardianship is pursued in the juvenile court relative to an Indian child who is a ward of the juvenile court, the ICWA applies to the §602 proceeding in which the guardianship activity occurs.

As well, 1999 amendments to California law, authorize the termination of parental rights for wards of the juvenile court who are placed in out-of-home care pursuant to Welf. & Inst. Code §727.3 (involving IV-E funded foster placement). (Welf. & Inst. Code §727.31.) The ICWA covers “any action resulting in the termination of the parent-child relationship. (25 U.S.C. §1903(1)(ii).)

Given the Act’s express exclusion of placements based on crimes, it is unlikely that all delinquency proceedings are brought within the Act’s scope simply because any such proceeding could lead to guardianship or termination of parental rights. However, at such time as any delinquency case moves to guardianship or termination of parental rights, it would at that point be subject to the Act.

iii. *Permissive tribal participation in §602 proceedings.*

To the extent the policy underlying juvenile law in California remains treatment and rehabilitation of the child, as discussed in section i., above, the policy underlying the ICWA strongly supports tribal involvement in §602 proceedings. Accordingly, many tribes actively pursue involvement in §602 cases on a permissive basis and make an effort to provide services and locate appropriate placements. Such involvement can be formalized through an agreement authorized by 25 U.S.C. §1919.

Tribal participation in §602 proceedings is consistent with both Federal policy as stated in the ICWA and State policy governing juvenile delinquency proceedings. While application of the ICWA may impose additional requirements, it can also enhance the court's ability to effectively respond to the needs of the child involved. Examples include the following:

- **Accessing Additional Services.** Special services and benefits may be available to an Indian child. If the Indian status of the child is verified via tribal or Bureau of Indian Affairs documentation, some of these services may be available to a ward of the court. In particular, the Indian Health Services, an agency of the Department of Health and Human Service, maintains many programs throughout California that offer medical and therapeutic services. As well, many tribes operate Indian Child Welfare Programs under Title II of the ICWA. These programs may serve both members and nonmember Indians. Finally, Indian tribes may be interested in providing services to a member child that may otherwise not be available.
- **Expanded Placement and Funding Options.** The court has an obligation to secure the safety and welfare of children in its care. As such, children must be placed in homes that meet the requirements of applicable law. The ICWA authorizes placement in the home of extended family, as defined by the child's tribe or, in the absence a tribal definition, as defined in the Act. A broad tribal definition of extended family may authorize placement in homes not otherwise authorized by state law. In addition, the Act authorizes placement in homes "licensed, approved, or specified by the Indian child's tribe" or in an "institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs." If the court confirms tribal approval of a home or institution, the Act requires that the placement receive preference in placement "absence good cause to the contrary." Tribes can, via tribal resolution, qualify a home for placement that would not otherwise be available to receive placement. Courts can greatly expand placement options for Indian children by working with the child's tribe.

Counties may claim state and federal AFDC-FC on behalf of an eligible Indian child in foster care placement made pursuant to the ICWA. These placements may include a state licensed or approved facility and any home of a relative or nonrelative located on or off the reservation which is licensed, approved or specified by the Indian child's tribe. Calif. Welf.& Inst. code §11401; SDSS All County Letter No. 95-07, February 9, 1995.

Hence, a child's tribe can, through tribal resolution, both qualify a home for placement and funding, even if the home would not otherwise be available to receive placement.

3. **Proceedings Excluded From the ICWA**

a. *Statutory Exclusions*

i. *Divorce Proceedings*

As long as child custody in a divorce proceeding is granted to one of the two divorcing parents, the Act will not cover the proceedings. 25 U.S.C. §1903(1). Also see, *Guidelines* B.3.b. The ICWA does not contain a definition of “divorce” per se. However, the Act clearly does not apply to a dissolution proceeding where two parents vie for custody. The Act expressly excludes a case where the following two elements are present: (1) two parents, and (2) divorce (dissolution) action. However, attention must be paid to what is occurring in a proceeding. The fact two parents are involved or (as opposed to “and”) that the matter is a family law action, does not necessarily eliminate the proceeding from the Act’s coverage. For example, an action by one parent to terminate parental rights of other parent is covered by the Act. *In re Crystal K.* (1990) 226 Cal.App.3d 655; *Adoption of Lindsay C.* (1991) 229 Cal.App.3d 404.

It is unsettled whether the ICWA applies to family law custody disputes between parents who were never married. To the extent such proceedings are like divorce cases, the Act probably does not apply. However, it is important to remember that the Act defines parents as the Indian biological parents, non-Indian biological parents or Indian adoptive parents. 25 U.S.C. §1903(9). Thus, a non-Indian adoptive parent or non-Indian step-parent is not a parent under the Act, and a dissolution resulting in the possible awarding of custody to a non-Indian step or adoptive parent triggers the application of the Act.

Logically, if any other party, other than a defined parent, is awarded custody in a divorce or dissolution proceeding, the Act applies. *Declaration of Commissioner of Indian Affairs - In the Matter of Adoption of L.A.C. and F.T.C.* 8 Indian L.Rep 5021.

As well, there is an argument that the Act does apply to a custody dispute between parents where the essential element of a prior marriage is absent. Relying upon the decision of the Commissioner of Indian Affairs in *Appeal of William Stanek*, 8 Indian L.Rep. 5021 (April 1981), the Bureau of Indian Affairs has paid claims for appointed counsel in family law proceedings involving disputes between parents who were never married. To request reimbursement, counsel must submit a certification form the court that the part was indigent and that appointed counsel is not otherwise available as a matter of state law. A sample “ORDER AND CERTIFICATION RE APPOINTMENT OF COUNSEL” is provided in Section VIII, form L. Please note, under the Act, the state court is obligated to appoint counsel any child custody proceeding subject to the Act, whether or not reimbursement is available from the Bureau of Indian Affairs. The BIA often does not have funds available, nevertheless, when they do, they have paid.

ii. *Crimes and Educational Placements*

By its terms, a proceeding involving a placement based upon an act, which if committed by an adult would be deemed a crime is not covered under the ICWA. 25 U.S.C. §1903(1). Hence, proceedings under Welfare and Institutions code §602 (delinquency cases) are **not** subject to the Act. However, as discussed at length in subsection B.2.d, above, not all California delinquency cases involve removals based on criminal acts and so may be subject to the ICWA.

Placements made based on offenses that an adult could not commit, but which reflect on the inability of parents to control the child, such as truancy and curfew violations, are covered under ICWA. *Guidelines* B.3. and commentary. Hence, Welfare and Institutions Code §601 placements are covered.

Lastly, the Act excludes any placement situation where the parent or Indian custodian is not deprived of the right to regain custody of the Indian child. *Guidelines* B.3. commentary. The most common such situation is a parent placing the child in a school or religious education placement.

iii. *Emergency Removal Proceedings*

The state may make an emergency removal of an Indian child who is a resident or is domiciled on a reservation but who is temporarily located off the reservation. 25 U.S.C. §1922. However such removal must be necessary to prevent imminent physical damage or harm to the child. 25 U.S.C. §1922, Cal. Rules of Court, rule 1439(c)(A).

In addition, if the child resides on or is domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, the placement must be terminated as soon as the imminent physical damage to the child no longer exists. *Guidelines* B.7(c). Alternatively, if a child is not returned, a proceeding must be initiated in compliance with requirements of the ICWA. The Guidelines at B.7(b) specify the contents of the affidavit to be filed along with the petition seeking continued emergency physical custody.

Emergency custody for more than 90 days is not allowed unless it is shown by clear and convincing evidence and testimony of an expert witness that returning the child to the custody of the parents or Indian custodian would likely cause serious emotional or physical damage. *Guideline* B.7(d).

Section 1922 and the Rule of Court both refer to an Indian child “who is a resident or is domiciled on a reservation but who is temporarily located off the reservation.” There is no similar provision allowing emergency custody of an Indian child who is not resident or domiciled on a reservation. However, it should be noted that the language in §1922 addresses what would otherwise be a jurisdictional impediment to a state court making an emergency custody order. No such impediment exists as to an off-reservation Indian child. Hence, a state court may remove such a child on an emergency basis relying on its inherent judicial authority, and look to the standards set forth in §1922 and accompanying authority when making emergency orders involving an off-reservation Indian child. *In re Desiree F.* (2000) 83 Cal. App.4th 460, 476.

4. Judicial Interpretations - Existing Indian Family Doctrine (Split)

Three California appellate districts (the First, Third, and Fifth) have been in the forefront in advancing the proposition that judicially created exceptions to the Indian Child Welfare Act should not be permitted. See, *In re Alicia S.* (1998) 65 Cal.App.4th 79; *In re Crystal K.* (1990) 226 Cal.App.3d 655; *In re Junious M.* (1983) 144 Cal.App.3d 786; *Adoption of Lindsay C.* (1991) 229 Cal.App.3d 404. Additionally, and consistent with these cases, in 1997 amendments to the California Rules of Court, rule 1439, the California Judicial Council acted in the dependency setting to reject what has come to be known as the existing Indian family doctrine, discussed at length below.

However, the second, fourth, and sixth California Appellate Districts have declined to apply the ICWA unless the Indian child or at least one parent has a significant social, cultural or political affiliation with Indian life, based on a factual determination for the trial court. *In re Alexandria Y.* (1996) 45 Cal.App.4th 1483; *In re Bridget R.* (1996) 41 Cal.App.4th 1483; *In re Crystal R.* (1997) 59 Cal.App.4th 703. *In re Derek W.* (1999) 86 Cal.Rptr.2d 742.

The Second District, in *In re Bridget R.* (1996) 41 Cal.App.4th 1483, reversed a trial court’s order in a private adoption proceeding that Indian children twins be returned to their parents. The father lived off the reservation but was a tribal member. The father and mother both signed relinquishments for an agency adoption and initially concealed the father’s Native American heritage. The birth parents then brought proceedings to invalidate relinquishments due to noncompliance with the Act. Citing the children’s interest in a permanent placement, the appellate court found that the Act’s application violated the Fifth, Tenth

and Fourteenth Amendments of the U.S. Constitution, but found that restricting the Act's scope to Indian parents who had significant connections with tribal culture at the time of placement could preserve the Act's constitutionality.

In re Alexandria Y. concerned a termination of parental rights in a dependency action. The court there agreed with *In re Bridget R.*'s holding that recognition of the existing Indian family doctrine is necessary to avoid constitutional flaws in the ICWA. However, it extended the *Bridget R.* holding that the doctrine cannot come into play unless the child and both parents lack a significant relationship with Indian life. Whether there is an existing family is dependent on the unique facts of each situation and is a factual determination for the court to make.

In re Crystal R. dealt with a dependency action in which the Indian father, an enrolled member of an Alaska Native Tribe, had been incarcerated most of the child's life and had no contact with the child. The Fourth District found that the father had never been a part of the child's life and remanded the matter to the juvenile court for a factual determination to establish whether the child was part of an existing Indian family so as to justify the application of the Act.

Lastly, *In re Derek W.*, decided shortly before the effective date of California legislation rejecting the existing Indian family doctrine, the Second District denied a writ where an alleged Indian father first mentioned possible Indian heritage at the termination hearing, some ten years after the case had first been initiated.

It must be noted that both the United States and California Supreme Courts have denied review of cases both accepting and rejecting the existing Indian family doctrine. Cases applying the existing Indian family doctrine assert that it is constitutionally mandated. However, the doctrine requires courts to make factual inquiries into, and allows courts to base application of the Act on, factors other than political status (tribal membership). The constitutionality of this approach is questionable.

L JUDICIAL TIP: *The ICWA is designed to protect the best interest of the Indian child. See Bench Guide section IVA.4. What the Act attempts to do is eliminate biased subjectivity by imposing minimum standards for state court proceedings. As a matter of federal law, if these standards are met, the best interests of Indian children will be advanced. If they are not, then the action is not in the best interest of the Indian child, no matter how much a state court judge may believe otherwise.*

The result sought in each case following the existing Indian family doctrine could have been reached under the Act. (See, discussion of In re Alicia S., below.) Good cause standards established by the Act could have been relied upon to support the placement in the first instance, or (where a procedural flaw requires invalidation of a proceeding) as part of a new action prosecuted in compliance with the requirements of the ICWA.

As indicated above, other California courts have rejected this reasoning. Intra-family, private child custody actions and actions involving children who may not be part of an existing Indian family have been found to be covered under the Act. In *In re Junious M.* (1983) 144 Cal.App.3d 786, the trial court refused to apply the ICWA in a proceeding to terminate parental rights under former Civil Code §232, based in part on its determination that the minor "had developed no identification as an Indian." *In re Junious M.* (1983) 144 Cal.App.3d 786, 796. In reversing this order, the Court of Appeal noted "[t]he language of the Act contains no such exception to its applicability, and we do not deem it appropriate to create one judicially." *Id.*

In re Crystal K. (1990) 226 Cal.App. 3d 655, involved a private step-parent adoption. The non-Indian mother was initially awarded custody of the child in a divorce action five years earlier. The Alaska native father had little contact with the child. The mother and step-father petitioned to terminate the father's parental rights. The court held that the Act applies. "Limiting the Act's applicability solely to situations where nonfamily entities physically remove Indian children from actual Indian dwellings deprecates the very links—parental, tribal and cultural—the Act is designed to preserve."

Adoption of Lindsay C. (1991) 229 Cal.App.3d 404, also involved a private step-parent adoption. There the Act was held to apply to an action to terminate the parental rights of an Indian father who had little contact with his three-year-old daughter. The court applied the Act and held that application of the ICWA's notice requirements "is in keeping with the tenor of *Holyfield* which stresses consideration of not only the wishes of the parents, but the well-being and interests of the child and the tribe." 229 Cal.App.3d 404 at 416.

The most recent statement rejecting the existing Indian family doctrine comes from the 5th District Court of Appeals. In *In re Alicia S.* (1998) 65 Cal.App.4th 79, the court expressly rejected the existing Indian family doctrine and reversed a trial court decision terminating the Indian mother's parental rights. Although both parents and the children were enrolled members of Indian tribes, the trial court found that neither parent had any significant relationship with the Indian community and so refused to apply the ICWA to the proceedings.

In rejecting the doctrine, the *Alicia S.* court noted as follows:

"When Statutory language is clear and unambiguous there is no need for construction and courts should not indulge in it. . . Congress has clearly defined the nature of the relationship an Indian child must have with a tribe in order to trigger application of the Act. There is no threshold requirement in the Act that the child must have been born into or be living with an **existing Indian family**, or must have some particular type of relationship with the tribe or his or her Indian heritage. 'No amount of probing into what Congress 'intended' can alter what Congress said, in plain English . . .' [citations omitted.]

Moreover, we believe the existing Indian family doctrine conflicts with the ICWA's policy of protecting and preserving the interests of Indian tribes in their children. And it undermines the ICWA's purpose to establish uniform federal standards governing the removal of Indian children from their families." 65 Cal.App.4th at 128.

Citing *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 34-35, the court concluded:

"[T]he existing Indian family doctrine frustrates the policies underlying the ICWA by returning Indian child custody proceedings to a time before its enactment when "Indian children [were] removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing." 490 U.S. at 129.

While acknowledging a concern for a dependent child's interests in permanence and stability, the *In re Alicia S.* court noted that "this concern can and should be accommodated by the ICWA without resort to the existing Indian family doctrine's strained interpretation of the Act." Citing the Act's good cause stan-

dard for deviating from placement preferences, **the court noted that the courts adopting the existing Indian family doctrine could have reached the same result under the Act, without having to rely on a judicially-created exception to the ICWA.** *In re Alicia S.* (1998) 65 Cal.App.4th 79.

L JUDICIAL TIP: *Where Courts of Appeal have rendered conflicting decisions, “[a]s a practical matter, a superior court ordinarily will follow an appellate opinion emanating from its own district even though it is not bound to do so. Superior courts in other appellate districts may pick and choose between conflicting lines of authority. This dilemma will endure until the Supreme Court resolves the conflict, or the Legislature clears up the uncertainty by legislation.”* *McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315, footnote 4.

a. The Legislative Response.

The California legislature rejected the existing Indian family doctrine in Assembly Bill 65. Adopted as an urgency measure, and effective as of September 1999, the bill is codified in Fam. Code § 7810 and Welf. & Inst. Code §§305.5 and 360.6. It directs the courts to strive to promote the stability and security of Indian tribes and families and to comply with ICWA in all Indian child custody proceedings, as specified, and requires that the Act be applied if the tribe determines that an unmarried person, who is under the age of 18 years, is a member of the tribe or is eligible for membership and is a biological child of a member of a tribe. Such a determination “shall constitute a significant political affiliation with the tribe and shall require the application of the federal Indian Child Welfare Act.”

C. Interested Parties

1. Indian Child

a. Multiple definitions of “Indian”

As stated in the previous section, the second prong of the ICWA coverage test is that the child in the proceedings must be an Indian child. 25 U.S.C. §1903(4). The Act defines an Indian child in the definition section of the Act as **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. 25 U.S.C. §1903(4).** Yet, as will be explained, the definition of Indian child remains one of the most difficult and least understood concepts within the Act. This is because the singular definition set forth in §1903(4) is not the only definition in the Act. Two other definitions of Indian exist within the ICWA. Each broader in scope than the §1903(4) definition. As well, tribes have an opportunity to impact the definition of Indian child via their particular and varying rules governing “membership.”

Of the additional definitions, one applies only to title II of the Act, governing grants and funds for on and off-reservation services. 25 U.S.C. §§1932 and 1933. Those sections specify that the Secretary of the Interior is authorized to make grants to Indian Tribes and organizations to establish Indian child and family service programs. Section 1934, in turn, specifies that for the purposes of §§1932 and 1933, the term Indian is defined in 25 U.S.C. §1603(c). Section 1603(c) sets forth the broader Indian Health Care Improvement Act definition of Indian. It defines Indian as any person who is a member of an Indian tribe, except that for health related services, the term means **any individual who (1) irrespective of whether he or she lives on or near a reservation, is a member of a tribe, band, or other organized group of Indians, including those tribes, bands, or groups terminated since 1940 and those recognized now or in the future by the state in which they reside, or who is a descendant, in the first or second degree, of any such member; or (2) is an Eskimo or Aleut or other Alaska Native; or (3) is considered by the**

Secretary of the Interior to be an Indian for any purpose; or (4) is determined to be an Indian under regulations promulgated by the Secretary. (25 U.S.C. §1603(c).²) It should further be noted that an Indian tribe is defined as any Indian tribe, band, nation or other organized group or community, including any Alaska Native village or group or regional or village corporation, which is eligible for the special programs and services provided by the United States to Indians because of their status as Indians. 25 U.S.C. §1603(d). As will be discussed in Bench Guide §IV.C.1.b., an Indian tribe need not be recognized for its members to receive services from the United States. Thus, it appears that for purposes of funding services to Indian children, the definition of Indian is both broad and complex.

L JUDICIAL TIP: *Because of the broad definition applicable to Indian child and family programs funded under the Act, a tribal program may provide services to Indians and Indian children that are **not** members of their tribe. Consequently, an Indian or tribal representative may be present in court on an Indian case as a service provider, versus as a representative of an Indian child's tribe. The status of tribal or Indian program representatives should not simply be assumed. Clarify the capacity and authority of all participants in a proceeding. See, California Rules of Court, rule 1412(i). (See, Bench Guide §VIII. I, Form: Designation of Tribal Representative.)*

The third definition of Indian is alluded to but not explicitly set forth in 25 U.S.C. §1912(a). The section states that where **the court “knows or has reason to know” that an Indian child is involved in the proceedings**, the notice requirements of the Act are triggered. *Matter of Baby Boy Doe* (Idaho 1993) 849 P.2d 925 (the Idaho court stated that the Act does not require a tribe to determine the child's eligibility before state courts can apply the Act). For an in-depth discussion of notice, please see, §IV. E.1. Involuntary Child Custody Proceedings, Notice.

All of these definitions are potentially complicated by the rules and processes of the child's Tribe. Some tribes have sophisticated systems with specific membership criteria and presumption, as well as computerized enrollment data. Others do not have a formal enrollment process and make membership determinations based on other factors. Of course, the determination of whether a child is Indian is not a racial one, but rather a question of political status. *Morton v. Mancari* (1974) 417 U.S. 535. Tribal membership is an exclusively tribal question. *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49. And, a tribe's determination that a child is an Indian child is conclusive. *In re Junious M.* (1983) 144 Cal.App.3d 786; *Guidelines for State Courts: Indian Child Custody Proceedings*, 44 Fed.Reg. 67584, 67586 (Nov. 26, 1979.) The role of tribes in membership determinations requires that tribes be consulted and the final answer in an Indian status (definition) determination may vary depending upon the law of the particular tribe.

² The issue of defining Indians in California is even more complex. 25 U.S.C. §1679(b) modifies the §1603(c) definition. The Indian Health Care Improvement Act contains a special eligibility definition for California Indians which includes 1) Any member of a federally recognized Indian tribe; 2) Any descendant of an Indian who was residing in California on June 1, 1852, but only if such descendant - (A) is living in California, (B) is a member of the Indian community served by a local program of the Service, and (C) is regarded as an Indian by the community in which such descendant lives; 3) Any Indian in California who holds trust interests in public domain, national forest, or Indian reservation allotments in California; and 4) Any Indian in California who is listed on the plans for distribution of the assets of California rancherias and reservations under the Act of August 18, 1958 (72 Stat. 619), and any descendant of such an Indian.

Because Indian status determinations are complex, in juvenile cases, the California Rules of Court distinguish between children who may simply be of Indian descent, and Indian children, that is, children that may meet the definition of Indian set forth in the Act. When a child is simply of Indian descent, all that is required is notice to the Bureau of Indian Affairs and further inquiry. However, whenever the court has reason to believe a child may be *Indian*, that is, *a member or eligible for membership in an Indian tribe*, the rule specifies that the court should proceed in accordance with the Act. For cases that may involve Indian children, the rule essentially creates a presumption, thereby providing a basis for treating the case as an Indian case, in the absence of a definitive response from tribes or the Bureau of Indian Affairs. In this manner, if the minimum standards are complied with, then California Rules of Court, rule 1439(e.) Cf. *In re Levi U.* (2000) 78 Cal.App.4th 191.)

b. Membership and Federal Recognition

i. Membership

As mentioned, the membership requirements under §1903(4) specify the child must be a member of an Indian tribe or eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe. One common mistake in interpreting the membership language is confusing enrollment with membership. **An individual does not need to be enrolled in a tribe to be a member.** *In re Junious M.* (1983) 144 Cal.App.3d 786, 788 (where the Appellate Court reversed the trial court's decision that a child was not an Indian child because neither the child nor his Indian mother were enrolled members of the tribe). *In re Bridget R.* (1996) 41 Cal.App.4th 1483 (where the court discussed membership rules for the Dry Creek Rancheria of Pomo Indians and noted that for that Rancheria's membership purposes, a lineal descendant of a historic tribal member was also a member even though the person was not on the enrollment list established by the Tribe's 1973 Articles of Association).

Membership can be verified by either the tribe or the Area Office of the Bureau of Indian Affairs. *Guidelines*, B.1. However, the tribe's determination is always conclusive while the BIA's determination is conclusive only absent a contrary determination by the tribe. *Guidelines*, B.1(b)(I).

If a child is eligible for membership in more than one tribe, the child's tribe for purposes of the Act will be the tribe with which the child has the most significant contacts. 25 U.S.C. §1903(5). The Guidelines also suggest factors that a court may wish to consider when determining which tribe has the most significant contacts. Among these factors are:

- C length of residence on or near the reservation of each tribe and frequency of contacts with each tribe;
- C the child's participation in activities of each tribe;
- C the child's fluency in the language of each tribe;
- C whether there has been a previous adjudication with respect to the child by a court of one of the tribes;
- C residence on or near one of the tribes' reservation by the child's relatives;
- C tribal membership of custodial parent or Indian custodian;
- C interest asserted by a tribe; and
- C the child's self identification.

Guidelines, B.2.

ii. *Federal Recognition*

There are more than 550 federally recognized Tribes in the United States, including 223 village groups in Alaska. Over 100 of the recognized tribes located in California. “Federally recognized” means that these tribes and groups have a special, legal relationship with the U.S. government. This relationship is referred to as a government-to-government relationship. See, 25 C.F.R. §83.2. Indians must be members, i.e., “citizens” of a tribal government in order to be subject to many of the special laws governing Indians and tribes, including a number of the protections of the Indian Child Welfare Act. See, *In re Wanomi P.* (1989) 216 Cal.App.3d 156; *In re John V.* (1992) 5 Cal.App.4th 1201. The concept of recognition as “eligible for services provided to Indian because of their unique status as Indians” appears in the definition of Indian tribe that is set forth in the ICWA. This same definition has appeared in statutes since the early part of this century. Under many of these statutes, Indians in California received services, with their Indian status and eligibility regularly certified by the Bureau of Indian Affairs.

In the early 1980’s the Bureau of Indian Affairs adopted regulations that require periodic publication of a list of recognized tribes in the Federal Register. The list must be published once every three years, with the most current list generally available through the BIA. The most recent list of federally recognized tribes is published in 65 Fed. Reg. 13298 (March 13, 2000).

The regulations also establish a procedure for “unrecognized tribes” to petition for recognition. 25 C.F.R. Part 83. A Tribe can gain recognition (have their status as a tribe acknowledged or restored) by successfully petitioning under the regulations, or in some cases by securing status clarification from the Bureau through other means, through litigation or through legislation.

Through a unique history and course of dealings, tribes listed in the Federal Register, particularly in California, often do not correspond to aboriginal or historical tribal groupings.

First, it should be noted that, Indians of California have been recognized by the federal government for many purposes via course of dealing and special statute. See, e.g., 25 U.S.C. §651 *et seq.* (Indians of California); 25 U.S.C. §1679(b) (Indian Health Care Improvement Act, special California Indian eligibility definition.) Unique to California, a federal agency service delivery system has developed that allows certification of Indian status and eligibility for Indian services.³

³ A short explanation is required detailing the reasons why there appear to be a large number of non-federally recognized tribes in California as well as a large number of aboriginal California Indians unaffiliated with a federally recognized tribe. Tribal existence and identity have never depended on federal recognition or acknowledgment; tribal existence predates the United States. During the Indian treaty-making period of the 1880’s the United States treated all tribes as sovereigns and all tribes were “recognized” through course of dealings and treaties with the federal government. Advisory Council on California Indian Policy, *Final Reports and Recommendations to the Congress of the United States* pursuant to P.L. 102-416. (1997) Recognition report at 8. Once the treaty-making era ended Congress continued to pass laws applying to tribes “recognized by the political department of the government.” *United States v. 43 Gallons of Whiskey* (1876) 93 U.S. 188, 195. These tribes included California Indian tribes. However, the government did not have one definition for recognized tribes until 1978 when the Department of the Interior created the Branch of Acknowledgment and Research to process tribal petitions for official recognition. (1979) 44 Fed.Reg. 7235. Thus, a number of tribes, including California tribes, are still in the process of applying for official (Part 83) recognition, and the Department’s recognition scheme is still developing.

Second, it should be noted that many California Indians and tribes are not listed on the 25 C.F.R. Part 83 published list of federally recognized tribes. This is because tribes selected for inclusion on the list corresponded to groups occupying lands held in trust by the federal government. All Indian groups not occupying such lands were not listed. Hence, in the 1980's, when the Bureau first started publishing the Part 83 list, significant numbers of Indians and tribes in California were suddenly deemed "unrecognized." An anomaly developed in California where one family or a small group of Indians residing on trust land was deemed a federally recognized, quasi-sovereign tribe, while another large aboriginal tribal group was suddenly deemed unrecognized. The "unrecognized" Indians may have been receiving federal services, and in some cases reside on Indian lands held in trust by the United States for their benefit.

Response to the unique circumstance of California Indians and tribes is ongoing, with special legislation and litigation continuously addressing the problem. As a consequence, many California Indians may not be affiliated with a tribe listed in the federal register, but may be treated as Indians for some purposes. See, e.g., Indian Health Care Improvement Act, 25 U.S.C. §1679(b), special California Indian eligibility definition. The circumstances of Indians in California has rendered Indian status determinations one of the most controversial and complex areas of ICWA implementation.

2. Parent

A parent means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions carried out under tribal law or custom. 25 U.S.C. §1903(9). However, an unwed father whose paternity has not been acknowledged or established is not a parent under the Act. 25 U.S.C. §1903(9). Conversely, "acknowledgment" is sufficient to establish paternity for purposes of applicability of the ICWA. While California has not yet grappled with a situation where the unwed Indian father seeks to establish paternity in order to bring the case within the Act, another state has. See, *Matter of Appeal in Maricopa County* (Ariz. 1983) 667 P.2d 228 (a court in Arizona found that an affidavit by the unwed father was sufficient to establish paternity and bring the case within the Act). As well, in *Matter of Baby Boy Doe*, Idaho (1993) 849 P.2d 925, 123 Idaho 464, certiorari denied 114 S.Ct. 173, 510 U.S. 860, 126 L.Ed.2d 133, the court held that evidence including a father's membership application to a tribe on the child's behalf and the filing of paternity affidavit with the state and tribe was sufficient to support the trial court's finding that the father, an Indian, was one of the "Indian child's" natural parents; thus, the trial court's decision that Indian Child Welfare Act (ICWA) did not apply to parental rights termination and adoption proceedings was not harmless error.

3. Indian Custodian and Extended Family

a. Indian Custodian

An Indian custodian is defined by the Act as any Indian person who has legal custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody and control has been transferred by the parent of such child. 25 U.S.C. §1903(6). These custodians have many of the same rights as parents under the Act. These rights include: under

- C section 1911(b) and (c) - the right to request a transfer of proceedings and the right to intervene in state court;
- C section 1912(a) and (b) - the right to notice and appointment of counsel where the proceedings involve foster care or termination of parental rights;
- C section 1912(c) - the right to access information;

- C section 1912(d) and (f) - the right to require an active efforts showing and heightened evidentiary standards established by the Act, including expert testimony;
- C section 1913 - the right to give consent to voluntary adoptive placements and the right to withdraw consent to foster placement.

L JUDICIAL TIP: *The Act does not require a writing to create an Indian custodial placement. Nevertheless, a Designation of Indian Custodian form is provided in section V.F. Reliance on Indian custodial status and a writing to evidence the Indian custodial status (either a form executed by a parent or a document such as a resolution, evidencing a tribal act) can be a useful tool for achieving an appropriate outcome for a child. This approach has been used with success to essentially “back a child out of a case” and allow dismissal where an appropriate placement exists or is available but otherwise applicable rules make accomplishing the placement difficult. Examples include early placement with an Indian relative where absence of parties prevents stipulation, and simplifying inter-state placement of children where a tribe has an Indian custodial placement available on their reservation.*

L JUDICIAL TIP: *In the dependency setting, as a result of California case law and Rules of Court, a prior Indian custodians may invoke Rule of Court 1412(e) where, upon a sufficient showing, the court may recognize the child’s present or previous custodians as de facto parents.*

b. *Extended Family*

An extended family may fall under one of two definitions. The extended family may either be defined (1) by the law or custom of the Indian child’s tribe or (2) in the absence of such law or custom, as a person who has reached the age of eighteen and who is the Indian child’s grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent. 25 U.S.C. §1903(2). The ICWA includes a legal definition for extended family and accords extended family certain rights, because Congress realized that states have in the past failed to recognize that in Indian communities, people other than the nuclear family can share the child care responsibilities. Through the interplay of state and federal law, extended family members are also given certain rights to social service funding. See All County Letter No. 95-07 and Welfare & Institution Code §11401(e) (the AFDC-FC program is available to fund extended families, where Indian children have been placed with them). Also see, §B.3.b., Judicial Interpretations - Existing Indian Family Doctrine, *supra*.

It should be noted that in dependency cases, California’s de facto parent doctrine is not preempted by the Act. The de facto doctrine, a creature of California dependency law, expands the definition of extended family for placement preference purposes to include de facto parents. *In re Brandon M.* (1997) 54 Cal.App.4th 1387 (the de facto doctrine does not conflict with the Act’s placement preferences where the de facto parent, a former stepfather, is also an extended family member). But see, *In re Cynthia C.* (1997) 58 Cal.App.4th 1479 (in dependency actions, de facto status does not create a right to placement of the child.)

Evidence of a tribe’s law or custom may be presented by expert witnesses. These witnesses may include tribal elders, or other tribal members knowledgeable about tribal child care and family organization customs. *Guidelines D.4.(b)(i)*. *In re Krystle D.* (1994) 30 Cal.App.4th 1778 (burden was on the tribe to present evidence of tribal law & custom regarding who could be considered to be extended family members). Also see, §IV.E.6.c., Expert Witness Requirements.

4. Tribe

The ICWA redefines the parties who have a right to participate in Indian child custody proceedings subject to the Act. Under the Act, tribes have a right to intervene and participate in child custody proceedings regarding tribal children. 25 U.S.C. §1911(c). The ICWA acknowledges that tribes have an interest in their children “which is distinct from but on a parity with the interests of the parents.” *Matter of Adoption of Holloway* (Utah 1986) 732 P.2d 962, 969, quoted with approval in *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30.

This relationship between Indian tribes and their children finds no parallel in other ethnic groups in the United States because of the unique legal status of tribes. The purpose behind giving tribes more say in the fate of their children is to promote tribal self-government. In other words, determining who will have the care and custody of its children is a fundamentally important way to preserve tribal identity and culture. Thus, the fate of Indian children is a matter of tribal sovereignty.

The ICWA gives tribes several procedural rights. Tribes have a right to participate in state child custody proceedings involving their children. Also, tribal courts are designated the preferred forum for determining custody and adoption matters involving Indian children. The court cannot ignore the tribe’s interests in an Indian child involved in a custody proceeding, even if those interests conflict with the parents’ interests or desires. Indeed, the tribe’s interests may even outweigh and supersede the parents’ interests. *See Matter of Adoption of a Child of Indian Heritage* (N.J. 1988) 543 A.2d 925. Ultimately, a proceeding may be invalidated if the court ignores a tribe’s interests in its children.

It is worth repeating that under the Act an Indian Tribe, for purposes of intervention, is any Indian tribe, band, nation or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in 43 U.S.C. §1602(c) (which defines Alaska Native village). Note that such a definition does not include Canadian, Mexican or other foreign Indian tribes. *In re Junious M.* (1983) 144 Cal.App.3d 786.

The Act defines “Indian Child’s tribe” as “(a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts.” 25 U.S.C. §1903(5). If an Indian child is a member or eligible for membership in more than one tribe, the Guidelines for State Courts suggest it may be appropriate to allow all tribes the child is affiliated with to intervene in the proceeding. Nevertheless in some circumstances the court may need to determine which tribe has the “more significant contacts.” *See* 44 Fed.Reg. 67587-7(B2); 25 U.S.C. §1903(5).⁴

⁴ Commentary to section B.2 of the BIA Guidelines for State Courts includes the following discussion: We have received several recommendations that ‘Indian child’s tribe’ status be accorded to all tribes in which a child is eligible for membership. The fact that Congress, in the definition of ‘Indian child’s tribe,’ provided a criterion for determining which is the Indian child’s tribe, is a clear indication of legislative intent that there be only one such tribe for each child. For purposes of transfer of jurisdiction, there obviously can be only one tribe to adjudicate the case. . . . A right of intervention could be accorded a tribe with which a child has less significant contacts without undermining the right of the other tribe. A state court can, if it wishes and state law permits, permit intervention by more than one tribe. It could also give a second tribe preference in placement after attempts to place a child with a member of the first tribe or in a home or institution designated by the first tribe has proved unsuccessful. So long as the special rights of the Indian child’s tribe are respected, giving special status to the tribe with the less significant contacts is not prohibited by the Act and may, in many instances, be a good way to comply with the spirit of the Act.

In making a determination of significant contacts, section B.2 (e) of the BIA *Guidelines for State Courts* provides that “if the child is a member of only one tribe, that tribe shall be designated the Indian child’s tribe even though the child is eligible for membership in another tribe.” 44 Fed.Reg. 67584 (Nov. 26, 1979). The commentary to B.2. notes “The Act itself and the legislative history make it clear that tribal rights are to be based on the existence of a political relationship between the family and the tribe. For that reason, the guidelines make actual tribal membership of the child conclusive on this issue.”

D. Jurisdiction Under the ICWA

Separate from federal requirements imposed on state court proceedings, the ICWA is a powerful jurisdictional statute. The U.S. Supreme Court has held that the jurisdictional provisions of the ICWA are at the very heart of the law. *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 36. Indeed the ICWA has been deemed one of the most complex jurisdictional statutes ever enacted. The overall scheme of the ICWA is that the tribe has primary jurisdiction over custody proceedings, while state court jurisdiction over such matters is narrowly prescribed.

L JUDICIAL TIP: *While California tribes do not yet have primary jurisdiction over custody proceedings, it is important to bear in mind that the Indian child has an interest in his or her tribe that Congress has sought to protect. Hence, the provisions of the act apply whether or not a tribe intervenes or seeks a transfer of jurisdiction. Interests asserted by a tribe are not interests that compete with what is best for the child, but rather interests calculated to protect the rights of the child as an Indian. The provisions of the ICWA do not demonstrate that a tribe’s “interest” in child custody proceedings diminishes as the family’s connections to the tribe becomes more attenuated. However, the tribe’s governmental authority to exert control over Indian child custody cases is impacted by standard rules of jurisdictional analysis applicable to any government. Rather than reflect an acknowledgment by Congress that tribal interests diminish, the Act reflects an attempt to bolster the ability of tribes to impact cases involving tribal children, even when those cases are heard in distant forums.*

When an Indian child is involved in a state child custody proceeding, the state court must first determine whether it has jurisdiction over the child. In the ICWA context, the question of jurisdiction involves two factors: 1) the jurisdictional status of the tribe; and 2) the jurisdictional status of the child. Tribes in many states retain exclusive jurisdiction over child custody proceedings involving Indian children. However, some tribes, including California tribes, were divested of this authority when the federal government delegated to certain states partial civil jurisdiction over Indian reservations located within those states. 28 U.S.C. §1360; 25 U.S.C. §1911(b). For the most part, the child’s jurisdictional status is determined by her or his residence or domicile.

1. Exclusive Versus Non-Exclusive Jurisdiction

With a few exceptions, a tribe has exclusive jurisdiction over custody proceedings involving an Indian child who resides or is domiciled on the reservation, or who is a ward of the tribal court, regardless of domicile. 25 U.S.C. §1911(a). In such cases, the state court has no jurisdiction to hear custody proceedings involving the Indian child and must transfer the proceeding to tribal court. *Guidelines*, B.4(a). Individual Indians who are within a tribe’s exclusive jurisdiction cannot waive that jurisdiction and may not initiate in state court a child custody proceeding involving Indian children. *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30.

There are two exceptions to the exclusive jurisdiction rule. A state can exercise jurisdiction over a child temporarily located off the reservation to prevent imminent physical damage or harm to the child. 25

U.S.C. §1922. State courts may only use this authority for temporary emergency removals for up to 90 days, if supported by expert testimony that removal is necessary to protect the minor. *Guideline*, B.7. Another exception is that states can validly exercise jurisdiction over Indian children residing or domiciled on a reservation where the federal government has delegated civil jurisdiction to the state in which the tribe is located. 25 U.S.C. §1911(a). This exception is discussed in more detail below.

Non-exclusive jurisdiction, where both the tribe and state have authority over a given matter, arises in several ways. If the child is not domiciled or residing on the reservation, the Indian tribe does not have exclusive jurisdiction. In this case, the state may exercise initial jurisdiction over the proceeding. 25 U.S.C. §1911(a), (b). However, the state must transfer the proceeding to the tribe upon petition by either parent, the Indian custodian, or the child's tribe, unless good cause exists not to transfer jurisdiction. 25 U.S.C. §1911(b). This has been deemed referral jurisdiction or concurrent but presumptively tribal jurisdiction. *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30; *Native Village of Venetie I.R.A. Council v. Alaska* (9th Cir. 1991) 944 F.2d 548, 561. If the tribal court declines to accept transfer of the proceeding, the state court retains jurisdiction. 25 U.S.C. §1911(b).

Non-exclusive jurisdiction can also arise where a tribe's authority over civil matters has been partially divested by the federal government. Although tribes generally retain exclusive jurisdiction over their internal affairs, in some states, Congress delegated to the states partial civil jurisdiction over Indian reservations within the states. 28 U.S.C. §1360. These states are commonly called "P.L. 280 states", and the tribes affected by the statute are called "P.L. 280 tribes". In these states, even if a child is domiciled or resides on the reservation, the state may acquire valid initial jurisdiction. 25 U.S.C. §1911(a). California is one of these states. 25 U.S.C. §1360(a). Tribes from California and other P.L. 280 states may not exercise exclusive jurisdiction over an Indian child custody proceeding under the ICWA, unless they have reassumed jurisdiction under the Act. Where a tribe has reassumed jurisdiction, and an Indian child residing or domiciled within that tribe's reservation is removed by state authorities, California law requires notice to the tribe no later than the next business day, and transfer of the proceedings to tribal court within 24 hours of receipt of a written notice from the tribe that the child is Indian. *Welf. & Inst. Code* §305.5.

Although divested of exclusive jurisdiction, P.L. 280 tribes do retain some authority over child custody matters. The Ninth Circuit Court of Appeals has distinguished between three types of tribal jurisdiction over child custody proceedings in P.L. 280 states:

- C CONCURRENT. In California, both the tribe and state have authority over child custody matters. Under the ICWA, P.L. 280 tribes must get approval from the Secretary of the Interior to reassume referral or exclusive jurisdiction. *Native Village of Venetie*, 944 F.2d at 561; 25 U.S.C. §1918; 25 C.F.R. §§13.1-13.6.
- C REFERRAL. According to the Ninth Circuit, Section 1911(b) of the ICWA creates referral jurisdiction which is concurrent but presumptively tribal. 944 F.2d at 561. Under Section 1911(b), a state court with valid initial jurisdiction over a child custody proceeding involving an Indian child must transfer the case to the tribal court if petitioned by either parent, the Indian custodian, or the tribe.
- C EXCLUSIVE. Tribes with exclusive jurisdiction are the only entities with authority over child custody matters involving Tribal children.

Native Village of Venetie I.R.A. Council v. Alaska (9th Cir. 1991) 944 F.2d 548, 561-562. Tribes retain sovereign power to exercise dominion over their members' domestic relations, and states must give full faith and credit to child custody determination made by P.L. 280 tribes. 944 F.2d at 562. Thus, if a tribe has valid initial jurisdiction over a child custody proceeding, states must respect the tribal court's determination.

The full faith and credit provision of the ICWA does not require a state court to apply a tribe's law in violation of the state's own legitimate policy nor does it empower a tribe to control the outcome of the state court proceeding. While the constitution requires each state to give effect to official acts of other states, precedence differentiates the credit owed to laws and to judgments. An obligation is exacting as to judgments, provided there is jurisdiction over the parties and subject matter. The same rule does not necessarily apply to statutory law. The full faith and credit clause does not compel a state either to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate, or to apply another state's statutory law in violation of its own legitimate public policy. (*In re Laura F.* (2000) 83 Cal.App.4th 583.) [Tribal resolution opposing adoption was a public act or record entitled to judicial notice, but not a judgment entitled to full faith and credit.]

Because the extent of tribal jurisdiction varies widely from tribe to tribe, state courts must make an individualized jurisdictional determinations for each custody proceeding involving an Indian child. California houses a significant population of Indians from non-California tribes. If the state court determines that the Indian child resides or is domiciled on a reservation on which the tribe has exclusive jurisdiction, or if the child is a ward of a tribal court, the state court has no jurisdiction to hear the case in non-emergency situations. In addition, several California tribes have either reassumed jurisdiction (e.g. the Washoe Tribe of Nevada reassumed exclusive jurisdiction over its territory in Alpine County), or exercise concurrent jurisdiction such that a child may be a ward of a tribal court (e.g. the Hoopa Valley Tribe in Humboldt County), and state courts may be required to transfer child custody proceedings to these tribal courts.

2. Improper Removal of an Indian Child

Where a petitioner in an Indian child custody proceeding has improperly removed the child from the custody of a parent or Indian custodian, or has improperly retained custody after a visit or other temporary relinquishment of custody, the court must decline jurisdiction over the petition. As well, the court must immediately return the child to the parent or Indian guardian, unless the child would be subject to substantial and immediate danger or threat of danger. 25 U.S.C. §1920. This provision usually arises where adoptive parents refuse to return a child to a parent who has validly revoked consent after the adoption.

L JUDICIAL TIP: *Section 1922 of the Act authorizes emergency removal of an Indian child in certain circumstances. Both §1922 and the California Rules of Court, rule 1439 refer to emergency removal of an Indian child "who is a resident or is domiciled on a reservation but who is temporarily located off the reservation." There is no similar provision allowing emergency custody of Indian child who is not resident or domiciled on a reservation. However, the language in §1922 addresses what would otherwise be a jurisdictional impediment to a state court making an emergency custody order. No such impediment exists as to an off-reservation Indian child. Hence, a state court may remove such a child on an emergency basis relying on its inherent judicial authority, and look to the standards set forth in §1922 and accompanying authority when making emergency orders involving an off-reservation Indian child. In re Desiree F. (2000) 83 Cal. App.4th 460, 476.*

If the court has reason to believe that the child has been improperly removed or retained, the *Guide-*

lines direct the court to stay the proceeding until it can make a determination on the issue. *Guidelines*, B.8. Since a finding of improper removal would affect the state court's jurisdiction over the matter, the court should decide the issue before moving to the merits. *Guidelines*, B.8; but see *In re Bridget R.* (1996) 41 Cal.App.4th 1483, 1517 (the statutory lack of jurisdiction does not foreclose a custody hearing to protect the child's constitutional due process rights). The tribe, Indian child, parent or Indian custodian has standing to seek invalidation of a foster care placement or termination of parental rights involving a child improperly removed from the custody of a parent or Indian custodian. 25 U.S.C. §1914.

3. Domicile and Residence

Under the ICWA, the tribes' exclusive jurisdiction over Indian children is determined by the domicile or residence of the child. 25 U.S.C. §1911(a). Although the ICWA does not define residence or domicile, the U.S. Supreme Court has ruled that the determination of domicile is a matter of federal law. *Mississippi Choctaw Band of Indians v. Holyfield* (1989) 490 U.S. 30. In *Mississippi Choctaw*, the Court indicated that a minor's domicile is determined by that of its parents, or its mother where the parents are not married. 490 U.S. at 48. Furthermore, the Court concluded that any interpretation of state law on domicile that conflicts with an assertion of tribal jurisdiction over its children undermines the ICWA's operative scheme. Therefore, the ICWA preempts any such inconsistent construction of state law. 490 U.S. at 51-52. The ICWA also prevents parents from circumventing tribal jurisdiction by placing children off the reservation shortly after birth. 490 U.S. at 51. Applying these rules, the Court concluded that the Mississippi Choctaw Tribe had exclusive jurisdiction over newborn twins who had never been on the reservation but whose parents were tribal members domiciled on the reservation. This was so even though the parents had gone to great lengths to give birth off the reservation so they could place their babies with a non-Indian couple. 490 U.S. at 52.

The ICWA broadly defines reservation to mean "Indian country". 25 U.S.C. §1903(10). Indian country includes (a) all land within the limits of any Indian reservation, including fee-owned land, (b) all dependent Indian communities, and (c) all Indian allotments, including rights-of-way running through them. 25 U.S.C. §1903(10); 18 U.S.C. §1151. A discussion of the complex body of law defining Indian country is beyond the scope of this Bench Guide.

4. Transfer of Jurisdiction

As discussed above, a state court may have valid initial jurisdiction over an Indian child custody proceeding involving a child who is not domiciled or residing on a reservation. 25 U.S.C. §1911. However, the ICWA expresses a preference for tribal jurisdiction in matters concerning the custody of the tribe's children. *Guidelines*, A.1. Thus, upon petition by the tribe, either parent or the Indian custodian, the state court must transfer the proceeding to the tribal court unless either parent objects or there is good cause not to transfer. 25 U.S.C. §1911(b). For discussion, see *In re Larissa G.* (1996) 43 Cal.App.4th 505. Of course, the tribal court may decline to exercise jurisdiction. 25 U.S.C. §1911(b). The ICWA's sections on transfer of jurisdiction apply to both involuntary and voluntary proceedings. *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 36.

A petition to transfer jurisdiction may be submitted at any time during the proceeding. However, the petition may be denied for good cause if not timely made. *Guidelines*, C.E.(b)(I); *In re Robert T.* (1988) 200 Cal.App.3d 657 (where good cause was defined in a case which denied the tribal court's requests to transfer jurisdiction from state court due to the tribe's failure to ask for transfer before the permanency planning hearing despite the tribe having notice of the dependency for over one year). Including the granting of time extensions, child custody proceedings are usually commenced thirty days after the child's

parents, Indian custodian or tribe are notified of the pending action. 25 U.S.C. §1912(a). If the parties are not notified of an Indian child custody proceeding until it has already progressed to a late stage, the transfer petition should be granted if made immediately after receipt of notice. *Guidelines*, C.1. California Court Rules do not set forth time limits for submitting transfer petitions. See, Cal. Rules of Court, rule 1439(c)(2).

After a transfer petition is received, the state should hold a hearing to determine whether to grant the petition. Note that there is no need for adversary proceedings on a transfer petition if either parent or the tribal court opposes it, since both parties have the power to veto transfers of jurisdiction. *Guidelines*, C.2.; *In re Larissa G.* (1996) 43 Cal.App.4th 505, 515. The state court must hold a hearing if the court believes or another party asserts that good cause exists not to transfer the proceeding to tribal court. The BIA Guidelines suggest that parties asserting good cause to deny the transfer should state the reasons in writing and make this document available to all parties prior to the hearing. The burden of establishing good cause, by clear and convincing evidence, is on the party opposing the transfer, since the ICWA defers to tribal authority in Indian child custody decisions. *Guidelines*, C.3.(d).

The Act does not define good cause to deny transfer petitions. To provide states guidance, the BIA developed a noninclusive list of five reasons that may constitute good cause to deny a transfer petition:

- (1) the tribe does not have a tribal court which can handle the transferred case, *Guidelines*, C.3.(a); 25 U.S.C. §1903(12) (the ICWA broadly defines tribal courts to include almost any entity with delegated authority over child custody proceedings);
- (2) the proceeding was at an advanced stage when the transfer petition was filed, *Guidelines*, C.3.(b)(i);
- (3) the child is at least twelve years old and objects to the transfer, *Guidelines*, C.3.(b)(ii);
- (4) presenting the necessary evidence in tribal court will cause the parties undue hardship, *Guidelines*, C.3.(b)(iii); and
- (5) the parents are not available, the child is at least five years old, and the child has had little or no contact with the tribe or its members, *Guidelines*, C.3.(b)(iv).

In addition, state courts may not consider socioeconomic conditions or the perceived adequacy of tribal or BIA social services or judicial systems in determining whether good cause exists. *Guidelines*, C.3.(c).

In 1988, a California appellate court held that transfer may be denied if it is not in the child's best interests. *In re Robert T.* (1988) 200 Cal.App.3d 657, 667. In this case, the transfer petition was filed sixteen months after the dependency was declared and the child had bonded with his foster family. 200 Cal.App.3d 657 at 667. Subsequently, the U.S. Supreme Court ruled that bonding of an Indian child to non-Indian custodians is not sufficient reason to avoid application of the ICWA and does not outweigh the tribe's interests in making the custodial decision. *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 53. Similarly, in 2000, a California appellate court held that failure to give the tribe proper notice requires invalidation of a juvenile dependency proceeding, even though parental rights had been terminated. The court ruled that on remand, if the tribe elects not to assume jurisdiction, the juvenile court must comply with ICWA and factors flowing from a placement made in flagrant violation of the ICWA, including but not limited to bonding with a foster family and the trauma which may occur in terminating that placement, may not be considered in determining whether good cause exists to deviate from the place-

ment preferences. (*In re Desiree F.* (2000) 83 Cal.App.4th 460.)

If the state court transfers the proceeding, it should forward its court file and all available information to the tribal court. *Guidelines*, C.4.(d). If the case is not transferred, the child's tribe and Indian custodian have the right to intervene at any point in the proceedings. 25 U.S.C. §1911(c).

L JUDICIAL TIP: *As discussed below, the Guidelines suggest written communication between the state and tribal court systems to confirm whether the tribal court will accept transfer. This obviously should occur prior to the state court forwarding the case file. As well, there is no standard procedure for accomplishing transfer. Discussions may be in order to determine how costs associated with the transfer will be apportioned and how physical custody of the child will be transferred. Finally, depending on the facts of the case, particularly if there is a need for a transition period, concurrent jurisdiction may be appropriate to allow the child access to necessary financial resources. A sample transfer order is included in section VIII, form J.*

5. Decline of Jurisdiction by Tribal Court

A tribal court may decline to accept a requested transfer of jurisdiction over an Indian child custody proceeding from a state court. 25 U.S.C. §1911(b). If a state court receives a transfer petition, it must give the tribal court written notice stating how much time the tribal court has to respond, providing a minimum of twenty days from receipt of the notice. The tribal court may provide the state court written or oral notice of its decision. *Guidelines*, C.4.(b). Since tribal courts must take affirmative action to decline a transfer of jurisdiction, state courts should not presume that a tribal court has declined jurisdiction merely because the tribal court has not responded. *Guidelines*, C.4. Commentary. Tribal courts will accept oral arguments or written pleadings the parties may wish to make on whether the tribal court should accept or decline the transfer of jurisdiction. *Guidelines*, C.4.(c).

6. Full Faith and Credit

The federal government and states must give full faith and credit to the "public acts, records, and judicial proceedings" of any tribe applicable to Indian child custody proceedings. While tribes must give full faith and credit to other tribes in such cases, there is no requirement that tribes give the same deference to state decisions. 25 U.S.C. §1911(d). To be entitled to full faith and credit, a state court must find that the public act, record or judicial order is related to an Indian child custody proceeding. In addition, state courts are permitted to look beyond a tribal order to examine the jurisdictional basis for the tribal court's entry of the order. *See e.g., Application of Defender* (S.D. 1989) 435 N.W.2d 717 (state court may evaluate whether tribe had personal jurisdiction over mother before granting comity to tribal court custody order); *Matter of Welfare of R.I.* (Minn.App. 1987) 402 N.W.2d 173 (state court not required to defer to tribal court order where tribal court had no jurisdiction to make child ward of court). Of course, a state court may also require that the proper evidentiary foundation be laid for admitting a document or court order into evidence. *See, e.g., Quinn v. Walters* (Ore. 1994) 881 P.2d 795. Most tribal records are admissible under the public records or business records exception to the hearsay rule.

The full faith and credit provision of the ICWA does not require a state court to apply a tribe's law in violation of the state's own legitimate policy nor does it empower a tribe to control the outcome of the state court proceeding. While the constitution requires each state to give effect to official acts of other states, precedence differentiates the credit owed to laws and to judgments. A obligation is exacting as to judgments, provided there is jurisdiction over the parties and subject matter. The same rule does not

necessarily apply to statutory law. The full faith and credit clause does not compel a state either to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate, or to apply another state's statutory law in violation of its own legitimate public policy. (*In re Laura F.* (2000) 83 Cal.App.4th 583.) [Tribal resolution opposing adoption was a public act or record entitled to judicial notice, but not a judgment entitled to full faith and credit.]

E. Involuntary Child Custody Proceedings

1. Notice

Notice is a crucial component of the congressional goal of preserving tribes and Indian families. Notice ensures that tribes will be afforded the chance to assert their procedural rights under the ICWA. The ICWA also requires notice to parents and Indian custodians to help protect their procedural rights. Proceedings which take place without proper notice may violate the ICWA, and any action taken therein is subject to invalidation. 25 U.S.C. §1914.

a. When Required

In any involuntary proceeding, where the court “knows or has reason to know” that an Indian child is involved, notice must be sent to the parents or Indian custodian and the tribe. 25 U.S.C. §1912(a). The party seeking the foster care placement of, or the termination of parental rights to, the Indian child is responsible for sending the notice. *Id.* The notice requirements arise even where the child's Indian status is not certain. *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1422. Actual or constructive knowledge of the child's Indian status is enough to trigger the notice provisions. H.R. Rep. No. 1386, 95th Cong., 2d Sess. 21.

State courts have an affirmative duty to inquire about a child's Indian status. *Guidelines*, B.5; California Rules of Court, rule 1439(d); *In re Desiree F.* (2000) 83 Cal.App.4th 460, 470. Whenever a state court has reason to believe that an Indian child may be involved, the court must seek verification of the child's membership status from the child's tribe or the BIA. *Guidelines*, B.1.(a); *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1425 (the burden to prove the child's Indian status is not on the parents, and their silence does not waive the court's affirmative duty to inquire); *In re Junious M.* (1983) 144 Cal.App.3d 786 (tribes have sole authority to determine a child's tribal membership status). The BIA Guidelines establish a noninclusive list of circumstances giving a court reason to believe that a child may be Indian:

- (1) any party to the case, tribe, Indian organization or public or private agency informs the court the child is Indian;
- (2) any public or state-licensed agency involved in child protective services or family support discovers information suggesting the child is Indian;
- (3) the child gives the court reason to believe he or she is Indian;
- (4) the residence or domicile of the child, the parents, or the Indian custodian is known or shown to be a predominantly Indian community; and
- (5) an officer of the court has knowledge that the child may be Indian. *Guidelines*, B.1.(c).

If after the child custody proceeding is under way, the court discovers that the ICWA applies, notice must be provided at that time. *In re Kahlen W.* (1991) 233 Cal.App.3d 1414; *Guidelines*, C.1. Commentary. These notice requirements do not apply to emergency removal actions carried out under §1922 of the Act. *D.E.H. v. State* (Alaska 1985) 704 P.2d 774.

California Rules of Court require that notice of each hearing must be sent whenever there is reason to believe the child may be Indian, until such time as it is determined the child is not Indian. Cal. Rules of Court, rule 1439(f)(5). Also, one California court has held that tribes are entitled to notice in private adoption cases. *Adoption of Lindsay C.* (1991) 229 Cal.App.3d 404.

Because Indian status determinations are complex, in juvenile cases, the California Rules of Court distinguish between children who may simply be of Indian descent, and Indian children, that is, children that may meet the definition of Indian set forth in the Act. When a child is simply of Indian descent, all that is required is notice to the Bureau of Indian Affairs and further inquiry. However, whenever the court has reason to believe a child may be *Indian*, that is, *a member or eligible for membership in an Indian tribe*, the rule specifies that the court should proceed in accordance with the Act. For cases that may involve Indian children, the rule essentially creates a presumption, thereby providing a basis for treating the case as an Indian case, in the absence of a definitive response from tribes or the Bureau of Indian Affairs. In this manner, if the minimum standards are complied with, then the case will not be subject to invalidation when it is later confirmed that the child is Indian. (See, California Rules of Court, rule 1439(e).)

The requirement for inquiry is further limited by the facts of the case. When there is only a suggestion of Indian ancestry and the BIA fails to respond to notice, unless the juvenile court has some further basis on which to predicate the belief a child is an Indian under the Act, the court is not required to make further inquiry. (*In re Levi U.* (2000) 78 Cal.App.4th 191.) As well, without discussing the rule, and expressly noting that “nothing in this opinion should be construed to prevent or discourage the giving, in an abundance of caution, of notice to the BIA and Indian tribes in circumstances similar to that present in this appeal,” a recent California appellate decision held that a parent’s unspecified expression of belief that the parent has Indian heritage is insufficient to provide reason to know the child is Indian and to trigger the notice provision of the Act. (*In re Adam N.* (2000) 84 Cal.App.4th 846. [Parent’s stated belief of some Blackfoot Indian heritage not sufficient where grandparent indicated the connection was 8 generations ago and neither she nor her children are eligible for enrollment.])

b. Who Must Be Notified

Notice of a pending Indian child custody proceeding must be sent to the parent or Indian custodian and the child’s tribe. 25 U.S.C. §1912(a). As between parents and Indian custodians, parents must be notified where termination of parental rights is a possible outcome, and the BIA recommends that both parties receive notice in all cases. *Guidelines*, B.5. Commentary. California requires that notice to the tribe must be sent to the chairperson, unless the tribe designates another agent. Cal. Rules of Court, rule 1439(f)(2).

If the child is eligible for membership in more than one tribe, notice must be sent to each tribe. *Guidelines*, B.2.(b). Each tribe has a right to assert a claim to the child, and the state court may select the tribe that has “the more significant contacts” with the child. 25 U.S.C. §1903(5)(b).

If the parents, Indian custodian or tribe cannot be determined or located, the notice must be sent to the Secretary of the Interior. 25 U.S.C. §1912(a). Under these circumstances, the Act requires the BIA be involved because it has better access to resources to discover this information. The Secretary has 15 days

after receipt to provide the notice to the parents or custodian and the tribe. *Guidelines*, B.1. Commentary; *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1422. Addresses for the various BIA offices where notice may be sent are listed in 25 C.F.R. §23.12.

L JUDICIAL TIP: *The Act require service directly on the parent, Indian custodian or tribe when their identity and location is known. Substitute service on the BIA is required only when the identity or location of the parent, Indian custodian or tribe is not known. The regulations, however, require that a copy of all notice(s) be sent to the BIA in all cases subject to the Act. Hence, service of a copy of notices on the BIA is both required by federal regulations and an appropriate step to take to eliminate the potential for problems resulting from inadvertent failure to serve any additional unidentified tribes the child may be eligible for membership in.*

c. Form of Notice

Under the ICWA, notice must be sent by registered mail with return receipt requested. 25 U.S.C. §1912(a). California rules require that notice be sent registered mail or certified mail with return receipt requested. Cal. Rules of Court, rule 1439(f)(1). Personal service may be served in lieu of service by registered mail. *Guidelines*, B.5.(e). Service by any other means is subject to invalidation. (See Bench Guide VIII.A. for a sample Notice form.) **The notice requirement is not satisfied unless there is strict adherence to the federal statute.** (*In re Desiree F.* (2000) 83 Cal.App.4th 460.)

Notice to parents or Indian custodian and the tribe must be written in clear and understandable language and include the following:

- (1) the name of the child;
- (2) the child's tribal affiliation;
- (3) a copy of the petition, complaint or other document initiating the proceeding;
- (4) the petitioner's name and the name and address of the petitioner's attorney;
- (5) a statement of the right of the parents, Indian custodian or tribe to intervene in the proceeding;
- (6) a statement that counsel will be appointed for parents or Indian custodians who are indigent;
- (7) a statement of the right of the parents, Indian custodian or tribe to get, on request, an additional twenty days to prepare for the proceeding;
- (8) the location and address of the court;
- (9) a statement of the right of the parent, Indian custodian or tribe to petition the court to transfer the proceeding to tribal court;
- (10) the potential legal consequences of an adjudication on future custodial rights of the parents or Indian custodians; and

- (11) a statement that tribal officials should keep confidential the information in the notice. *Guidelines*, B.5.

If the notice does not comply with this form, the trial court may lack jurisdiction over the child, and the proceeding may be invalidated. *Matter of N.A.H.* (S.D. 1988) 418 N.W.2d 311.

Notice must be sent directly to parents, Indian custodians and the child's tribe, when their identity and location are known, with copies to the BIA. Where the parents, Indian custodian or tribe cannot be determined or located, notice must be sent to the appropriate BIA office by registered mail with return receipt requested. 25 C.F.R. §23.11(a). The notice must include the following information, if known:

- (1) the child's name, birth date and birthplace;
- (2) the child's tribal affiliation;
- (3) the names of the child's parents or Indian custodians, including birth date, birthplace and mother's maiden name;
- (4) a copy of the document initiating the proceeding. 25 C.F.R. §23.11(c); *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1422-23.

On receiving the notice, the BIA must make diligent efforts to locate and notify the parents or Indian custodian and tribe. The BIA has 15 days to provide notice to the parents or Indian custodian and tribe or to notify the court that it needs additional time. 25 U.S.C. §1912(a); 25 C.F.R. §23.11(e).

d. Effect of Notice on Pending Proceeding

No foster care placement or termination of parental rights proceeding shall be held until at least 10 days after receipt of notice by the parent or Indian custodian and the tribe of Secretary of the Interior. 25 U.S.C. §1912(a). State courts have no jurisdiction to proceed with dependency proceedings involving a possible Indian child until a period of at least 10 days after the receipt of such notice by the tribe. (*In re Desiree F.* (2000) 83 Cal.App.4th 460.) If requested, the parent, Indian custodian or tribe must be granted up to 20 additional days to prepare. 25 U.S.C. §1912(a). The ICWA sets minimum time limits, and the court may grant more time to prepare where state law permits. *Guidelines*, B.6.; 25 U.S.C. §1921.

Violation of any of the notice provisions of the Act may be cause for invalidation of the proceeding. 25 U.S.C. §1914; *In re Junious M.* (1983) 144 Cal.App.3d 786, 791. Although there is authority indicating that technical compliance with the ICWA's notice provisions is not required if there is substantial compliance (e.g., certified instead of registered mail), in all cases, actual notice of the proceedings and the right to intervene is required. Mere awareness of the proceedings is insufficient. *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421-22. A recent California case held that the notice requirement is not satisfied unless there is strict adherence to the federal statute. (*In re Desiree F.* (2000) 83 Cal.App.4th 460.)

Failure to send notice to the tribe requires remand. However, the tribe waives any defects in the manner of giving notice by exercising its right to intervene and fully participating in the proceeding. *In re Krystle D.* (1994) 30 Cal.App.4th 1778, 1796-98. The ICWA protects the tribe's rights independent of other parties, and a parent or Indian custodian cannot waive the tribe's rights. *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1424-25.

2. Right of Tribe to Intervene

The ICWA revolutionized the conception of interested parties in Indian child custody proceedings by giving the child's tribe and Indian custodian the absolute right to intervene **at any point** in a foster care placement or termination of parental rights proceeding. 25 U.S.C. §1911(c); *In re Desiree F.* (2000) 83 Cal.App.4th 460. [Tribe may intervene at any point, including after parental rights have been terminated in a dependency proceeding.] Parents have an independent constitutional right to be a party in a child custody proceeding. See, *Stanley v. Illinois* (1972) 405 U.S. 645, 657-58. The initiation of a voluntary or involuntary foster care placement or termination of parental rights proceeding triggers the right to intervene. This right extends to adoptive placement proceedings which are final dispositions of involuntary foster care placements or termination proceedings. See, *Matter of M.E.M.* (Mont. 1986) 725 P.2d 212. The right to intervene may be invoked at any time in an ICWA proceeding, even on appeal.

There are no federal guidelines on the procedure for intervention, but California courts have accepted a tribe's request to intervene in a variety of formats. See, e.g., *In re Alexandria Y.* (1996) 45 Cal.App.4th 1483, 1485 (letter expressing intent to intervene); *In re Crystal K.* (1990) 226 Cal.App.3d 655, 658 (notice of intervention.) California Rules of Court include as persons present at Indian child custody proceedings a representative of the child's tribe and allow for the presence of a non-intervening tribal representative. Cal. Rules of Court, rules 1410(6) & (7). An Oregon court has held that the ICWA preempts state statutes requiring groups and associations to be represented by an attorney when applied to a tribe's attempt to intervene in a child custody proceeding. *State ex rel. Juvenile Dept. of Lane County v. Shuey* (Ore.App. 1993) 850 P.2d 378.

3. Appointment of Counsel

The ICWA gives an indigent parent or Indian custodian the right to court-appointed counsel in any involuntary removal, placement or termination proceeding. 25 U.S.C. §1912(b); *In re Crystal K.* (1990) 226 Cal.App.3d 655, 658 (counsel appointed for Indian father in non-Indian mother's proceeding to terminate father's parental rights). At its discretion, the court may also appoint counsel for a minor child involved in a custody proceeding on a finding that it is in the child's best interests. 25 U.S.C. §1912(b); see also, Cal. Fam. Code §7861 (appointment of counsel for minor in proceeding for freedom from parental control and custody); Welf. & Inst. Code §317(c) (appointment of counsel for minor in dependency proceeding); *In re Alexandria Y.* (1996) 45 Cal.App.4th 1483, 1485 (reporting, without discussion, that counsel was appointed for tribe). If state law does not authorize appointed counsel in a proceeding, the Act authorizes the BIA to pay reasonable fees and expenses. 25 U.S.C. §1912(b). A sample "ORDER AND CERTIFICATION RE APPOINTMENT OF COUNSEL" is provided in §VIII, form L. Please note, under the Act, even though state law may not provide for appointed counsel, the state court is obligated to appoint counsel in any child custody proceeding subject to the Act, whether or not reimbursement is available from the Bureau of Indian Affairs. The BIA often does not have funds available, nevertheless, when they do, they have paid.

4. Extension of Time

No foster care placement or termination of parental rights proceeding shall be held until at least 10 days after receipt of notice by the parent or Indian custodian and the tribe or Secretary of the Interior. 25 U.S.C. §1912(a). If requested, the parent, Indian custodian or tribe must be granted up to 20 additional days to prepare. 25 U.S.C. §1912(a).

Generally, tribes request the extension as a matter of course to prepare for the proceeding. California has a speedy trial requirement for a civil action to declare a child free from parental control, as well as

a provision governing continuances in juvenile cases which requires that a written motion for a continuance of the hearing be filed within two court days of the hearing date. Cal. Fam. Code §§7668, 7871; Cal. Welf.& Inst. Code §352(a). However, the ICWA generally prevails over state law to the extent that there is any conflict.

5. Access to Court Documents and Records

Every party to a foster placement or termination of parental rights proceeding in a state court has the right to examine all reports or other documents filed with the court on which any decision regarding the action may be based. 25 U.S.C. §1912(c). Social services caseworkers usually file a report with the court before a hearing, summarizing their case narratives, notes, activities and any recommendations to the court on how to proceed. As well, Court Appointed Special Advocates may file reports. Parents, Indian custodians and tribes may find such reports useful in preparing for custody proceedings. In addition, access to a caseworker's actual notes may be critical in cross-examining a worker on potential cultural bias or inappropriate conclusions concerning Indian people or the requirements of the Act. Although this raw data is not technically "filed with the court," courts have routinely ordered production of all relevant information when the issue has arisen.

6. Evidentiary Requirements

a. *Standard of Proof*

The ICWA establishes a federal standard for the burden of proof that must be met to order a foster care placement or a termination of parental rights. 25 U.S.C. §1912(e) & (f). There is a different standard for each proceeding.

To order a foster care placement, the court must make a determination, supported by clear and convincing evidence and supported by testimony of an expert witness, that the continued custody of the child by the parent or Indian custodian is likely to result in "serious emotional or physical damage to the child." 25 U.S.C. §1912(e). Meeting the removal standards for Welfare and Institutions Code §361 will not support an order for out-of-home placement of an Indian child, absent a finding that continued custody is likely to cause serious emotional or physical harm. Cal. Rules of Court, rule 1439(i)(3).

In order to terminate parental rights to an Indian child, the court must determine, supported by evidence beyond a reasonable doubt and supported by expert witness testimony, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C. §1912(f); Cal. Rules of Court, rule 1439(m)(1). This standard applies to either parent of an Indian child, whether the parent is Indian or non-Indian. *In re Riva M.* (1991) 235 Cal.App.3d 403, 411, n. 6.

The burden of proof must be met by producing evidence that shows the existence of particular conditions in the home that are likely to result in serious emotional or physical harm to a particular child. In other words, there must be a causal relationship between the existing conditions and the damage that is likely to result. *Guidelines*, D.3. Two questions are involved in meeting the burden of proof:

- (1) whether the parent's conduct is likely to result in serious emotional or physical harm to the child; and
- (2) if so, whether the parents can be persuaded to modify their conduct. *Guidelines*, D.4. Commentary.

Federal guidelines strongly suggest that the removal of Indian children from their families must not be based on socio-economic conditions. Cognizant of the rationale and historical basis for the ICWA, the guidelines explain that evidence of community or family poverty, crowded or inadequate housing, alcohol abuse or non-conforming social behavior is not sufficient to support a foster care placement or termination of parental rights. *Guidelines*, D.3.(c).

The ICWA does not define the phrase “continued custody.” However, a California court held that it means more than actual physical custody and that the burden of proof must be met even if the parent has no physical custody of the child and only occasional contact with the child. *In re Crystal K.* (1990) 226 Cal.App.3d 655, 667-668. In addition, the psychological bond of an Indian child to prospective adoptive parents is not to be used as evidence to support a finding of emotional damage to the Indian child if returned to the parent. *Matter of Adoption of Holloway* (Utah 1986) 732 P.2d 962, cited with approval in *Mississippi Choctaw v. Holyfield*.

The ICWA does not address how the federal burden of proof interacts with state standards of proof to release a minor from parental custody and control. However, given the Act’s goals of protecting the rights of Indian parents and tribes, it is likely that the ICWA burden of proof to terminate parental rights must be made in addition to, not in lieu of, state standards. For example, California law requires that an order terminating parental rights must be supported by clear and convincing evidence. Cal. Fam. Code §7800, et seq. California lists several specific grounds for terminating parental rights, including abandonment, cruelty or neglect, or an alcohol or drug-related disability. Cal. Fam. Code §§7822, 7823, 7824. In a Family Code Section 7800 proceeding involving an Indian child, the petitioner would have to prove: (1) the facts establishing grounds for termination under California law by clear and convincing evidence, and (2) serious emotional or physical damage under the ICWA’s standard.

The burden of proof requirement is neither jurisdictional or constitutionally compelled and may be waived expressly or by conduct. Under California rules, a stipulation by the parent, Indian custodian or tribe, or failure to object at trial court, may waive the requirement of producing evidence of the likelihood of serious damage. However, the court must be satisfied that the party has been fully advised of the ICWA’s requirements and has knowingly, intelligently and voluntarily waived them. Cal. Rules of Court, rule 1439(i)(2) and (m)(2); *see also*, *In re Riva M.* (1991) 235 Cal.App.3d 403.

b. Requirement of Active Remedial Efforts

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law must demonstrate that “active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family” and that such efforts have failed. 25 U.S.C. §1912(d). The phrase “breakup of the Indian family” means a situation in which the family is unable or unwilling to raise the child in a manner which will not endanger the child’s emotional or physical health. *Guidelines*, D.2. Commentary. Attempts must be made to preserve the parent-child relationship, regardless of whether the parents are married, even where the parents are divorced. *In re Crystal K.* (1990) 226 Cal.App.3d 655. According to federal guidelines, the remedial efforts should take place before the commencement of the proceeding. This means that such services should be provided before notice is sent to the tribe or other parties.

These remedial and rehabilitative programs must take into account the prevailing social and cultural conditions and way of life of the child’s tribe. *Guidelines*, D.2.; Cal. Rules of Court, rule 1439(1). All available resources should be used, including the extended family, the tribe, Indian social service agencies, Indian care givers, and medicine people. *Guidelines*, D.2. Commentary; Cal. Rules of Court, rule 1439(1).

Active efforts must be shown before parental rights may be terminated. The phrase active efforts, requires that *timely* and *affirmative* steps be taken to remedy problems which might lead to severance of the parent-child relationship. The state may rely upon *recent* but unsuccessful reunification efforts with the same parent but a different child where “substantial but unsuccessful efforts have *just* been made to address a parent’s thoroughly entrenched drug problem . . . and the parent has shown no desire to change. . . .” The law does not require the performance of idle acts. (emphasis added.) (*In re Letitia V. v. Superior Court* (2000) 81 Cal.App.4th 1009.)

A finding of active efforts must be supported by clear and convincing evidence. *In re Michael G.* (1998) 63 Cal.App.4th 700.

In a California dependency case, the court must make the ICWA section 1912(f) finding before it terminates parental rights. One court has held that the finding should generally be made at the final review hearing at which a section 366.26 hearing is scheduled. If it is, a court need not readdress the issue at the section 366.26 hearing, unless the parent presents evidence of changed circumstances or shows the finding was stale because the period between the referral hearing and the section 366.26 hearing was substantially longer than the 120-day statutory period. However, if the finding was not made at the final review hearing and the court intends to terminate parental rights, the section 1912(f) finding must be made at the section 366.26 hearing. (*In re Matthew Z.* (2000) 80 Cal.App.4th 545.)

c. Expert Witness Requirement

The burden of proof for foster care placement and termination of parental rights includes an expert witness requirement. The petitioner must present testimony of one or more qualified expert witnesses demonstrating that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child. 25 U.S.C. §1912(e) & (f). California has adopted a rule of court, which includes provisions regarding expert witness requirements. Cal. Rules of Court, rules 1439(i) & (m).

L JUDICIAL TIP: *California Evidence Code section 801 allows experts to offer testimony in the form of an opinion when the opinion is “related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” There are many issues that may arise in an Indian child custody proceeding where the testimony of an expert may be appropriate. Because the Act involves tribal law and Indian standards, not subjects within the common experience of most state court judges, any issue involving such matters, for example, placement assessments under §1915, may benefit from expert testimony. However, there are mandatory findings that must be made where expert testimony is particularly appropriate or required. These include the services requirements of section 1912(d) of the Act (culturally relevant services), and the explicit expert witness requirement of section 1912(e) and (f).*

The expert witness must be qualified to speak specifically to the issue of whether continued custody will place the child at risk. *Guidelines*, D.4.(a). Any of the following persons are likely to qualify as expert witnesses:

- (1) a member of the child’s tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child rearing practices;
- (2) a lay expert witness with substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and child rearing practices within the child’s tribe; and

- (3) a professional person with substantial education and experience in the area of his or her specialty. *Guidelines*, D.4.(b).

California rules add an additional category of expert, preferring before a professional person, a professional person with substantial education and experience working with Indian families and familiar with Indian social and cultural standards, particularly those of the child's tribe. Cal. Rules of Court, rule 1439(a)(10)(C).

The court or any party may seek assistance from the child's tribe or the BIA in locating such a witness. *Guidelines*, D.4.(c).

Courts have struggled with the expert requirement. One California court has found that expert witnesses need not possess special knowledge of Indian ways of life. *In re Krystle D.* (1994) 30 Cal.App.4th 1778, 1801-1803. While this position is consistent with the standards established in the Guidelines and in the California Rules of Court, it is the least favored approach. As well, decisions from other states suggest that if cultural bias issues exist, the expert witness must have knowledge regarding the placement of Indian children. The failure of the court to inquire about this special knowledge may result in a reversal of the proceeding. See e.g., *In re Interest of C.W.* (Neb. 1992) 479 N.W.2d 105; *Matter of D.S.* (Ind. 1991) 577 N.E.2d 572; *Matter of N.L.* (Okla. 1988) 754 P.2d 863.

Even where an exception may be made to the requirement that experts possess knowledge of Indian culture without running afoul of the intent and requirements of the Act, extreme care is needed in applying any such exception. The focus of the inquiry must be on actual harm; the Act is designed to avoid more nebulous and conclusory opinions.

Relying on *State ex rel Juvenile Dept. v. Tucker* (Ore.App. 1985) 710 P.2d 793, an argument is sometimes made that the general rule is that an expert witness within the meaning of that term in 25 U.S.C. §1912(e) and (f) must possess special knowledge of social and cultural aspects of Indian life. However, an exception should be made where no specialized knowledge of social and cultural aspects of Indian life is necessary when cultural bias is clearly not implicated.

Tucker involved a mentally ill mother where there was no dispute about the condition or its severity. 710 P.2d at 799. Analogizing to *Tucker*, arguments are advanced that problems such as personality disorder, poor judgment, neglectful living circumstances, poor understanding and awareness, a high child abuse potential, and limited parenting skills, are personality and functioning problems and have nothing to do with cultural heritage. Similarly, lack of motivation regarding services and negative perception about them are identified as problems unrelated to cultural bias.

It cannot be said that subjective conclusions such as personality disorder, poor judgment, neglectful living circumstances, lack of motivation, etc., have nothing to do with cultural heritage. Indeed, these conclusions are largely driven by cultural heritage, both that of the evaluator and of the client.⁵ Unfamiliarity with culture and community standards very often results in misdiagnosis and tragic loss of Indian children to their Indian family and tribe.⁶

In *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, the United States Supreme Court quoting from testimony offered in support of the Indian Child Welfare Act, noted the following:

One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and child rearing.

Many of the individuals who decide the fact of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child. (*Id.*, at 38.)

In commentary to sections D.3 and D.4, the Bureau of Indian Affairs Guidelines for State Courts, cited by the third district Court of Appeal in *In re Crystal K.* (1990) 226 Cal.App.3d 655, 667, note the following:

The legislative history of the Act makes it pervasively clear that Congress attributes many unwarranted removals of Indian children to cultural bias on the part of the courts and social workers making the decisions. In many cases children were removed merely because the family did not conform to the decision-maker's stereotype of what a proper family should be-without any testing of the implicit assumption that only a family that conformed to the stereotype could successfully raise children. Subsection (c) makes it clear that mere non-conformance with such stereotypes or the existence of other behavior or conditions that are considered bad does not justify a placement or termination under the standards imposed by Congress...

...knowledge of tribal culture and child rearing practices will frequently be very valuable to the court. Determining the likelihood of future harm frequently involves predicting future behavior - which is influenced to a large degree by culture. Specific behavior patterns will often need to be placed in the context of the total culture to determine whether they are likely to cause serious emotional harm.

⁵ (See, McGoldrick, *Ethnicity and Family Therapy* (6th ed. 1986) p. 6.) ["Problems (whether physical or mental) can be neither diagnosed nor treated without understanding the frame of reference of the person seeking help as well as that of the helper."]

See also, Sue, *Counseling the Culturally Different* (1981). [(Relative to appellant's noted disinterest in insight and unreceptiveness to counseling referrals) "Racial or ethnic factors may act as impediments to counseling . . . Misunderstandings that arise from cultural variations in communication may lead to alienation and/or inability to develop trust and rapport. . . This may result in early termination of therapy." Minorities, including Native Americans, have been documented to terminate counseling after only one session at a rate of 50% as compared to a 30% rate for Anglos. *Id.*, at pp.27, 28.)

"Counselors who believe that having clients obtain insight into their personality dynamics and who value verbal, emotional, and behavioral expressiveness as goals in counseling are transmitting their own cultural values. This generic characteristic of counseling is not only antagonistic to lower-class values, but also to different cultural ones." *Id.*, at p. 38.]

⁶ Studies of American Indian children during diagnostic interviews have identified behaviors that may negatively affect assessment outcome: nonassertive, nonspontaneous, and soft-spoken verbal interaction; limited eye contact; discomfort and decreased performance on timed tasks; reluctance to offer self-disclosure; and selective performance of only those skills that contribute to the betterment of the group. (Gibbs, *Children of Color, Psychological Interventions with Minority Youth* (1st ed. 1989.) p.125.)

As with the standard of proof, the expert witness requirement is not constitutionally compelled and may be waived expressly or by failure to object at the trial court level. *In re Riva M.* (1991) 235 Cal.App.3d 403. In juvenile cases, stipulations or failure to object constitute a waiver only if the court is satisfied that the party has been fully advised of the requirements of the Act, and has knowingly, intelligently and voluntarily waived them. Cal. Rules of Court, rule 1439(I)(2) and rule 1439(j)(2).

F. Voluntary Custody Proceedings

In addition to addressing concerns about involuntary removals of Indian children, Congress was also aware that Indian children could be deprived of their cultural heritage through voluntary placements. Sen. Rep. No. 597, 95th Cong., 1st Sess. (1977). Thus, the ICWA covers voluntary proceedings, as well as involuntary proceedings. Tribes have many of the same rights regarding voluntary proceedings as for involuntary proceedings, including notice and intervention. In addition, to guarantee informed consent, there are strict consent requirements for voluntary foster care placements and adoptions.

1. Scope

By definition, these provisions do not apply to a nonmarital father who has not acknowledged or established paternity. 25 U.S.C. §1903(9). Conversely, “acknowledgment” is sufficient to establish paternity for purposes of applicability of the ICWA. See, §IV.C.2, above.

For purposes of the ICWA, a voluntary proceeding is one in which a parent or Indian custodian has voluntarily consented to termination of parental rights or a foster care placement. 25 U.S.C. §1913(a); *In re Bridget R.* (1996) 41 Cal.App.4th 1483 (held that a voluntary relinquishment for adoption falls within the ICWA’s rules on voluntary proceeding). In California, parental rights may be voluntarily terminated in two ways — agency adoptions and independent adoptions. If a child is delivered to an adoption agency for placement, parental rights are terminated by operation of law on the filing of the relinquishment form with the State Department of Social Services. Cal. Fam. Code §8700(b). A parent may also consent to an independent or stepparent adoption, in which case parental rights are terminated by operation of law by the decree of adoption. Cal. Fam. Code §8617. The ICWA’s rules on voluntary proceedings cover both consensual agency and independent or stepparent adoptions.

Under the ICWA, to qualify as voluntary, a foster care placement must meet two conditions. First, the parent or Indian custodian must consent to the placement. 25 U.S.C. §1913(a). Second, the parent or custodian must be automatically entitled to return of the child upon withdrawing consent. 25 U.S.C. §1913(b). Any voluntary consent to a placement where the parent or Indian custodian is not entitled to return of the child upon demand is not considered voluntary under the ICWA. 25 U.S.C. §1903(1)(i). For example, a juvenile dependency matter in which a parent stipulates to jurisdiction and out-of-home placement would not be a voluntary proceeding for purposes of the ICWA.

2. Notice

By its express terms, the ICWA only requires notice in state involuntary proceedings for foster care placement or termination of parental rights. 25 U.S.C. §1912(a). However, as a practical matter, without notice, a tribe would not be able to exercise its right to intervene or to assert its exclusive or transfer jurisdiction. 25 U.S.C. §1911(a)-(c). Thus, courts in other states have consistently required that tribes receive notice of state voluntary proceedings. The U.S. Supreme Court confirmed that tribes must be

notified of voluntary adoption proceedings. *Mississippi Band of Choctaw Indians v. Holyfield*, (1989) 490 U.S. 30; *see also*, *Matter of Adoption of Holloway* (Utah 1986) 732 P.2d 962; *Matter of J.R.S.* (Alaska 1984) 690 P.2d 10; *In re Junious M.* (1983) 144 Cal.App.3d 786 (tribe's right to intervene is meaningless if the tribe has no notice of the pending action); *Adoption of Lindsay C.* (1991) 229 Cal.App.3d 404; *In re Crystal K* (1990) 226 Cal.App.3d 655.

In an independent adoption, inquiry should be made as to whether relevant Department of Social Service forms have been completed. The Department has an American Indian Child form (AD 4311). If it is completed and submitted by the adoption service provider the Department will contact the Bureau of Indian Affairs and determine which tribes to notify. If the Indian ancestry is through an alleged natural father, a paternity statement must accompany the AD 4311. See Department of Social Services All County Letter of March 13, 1996, p. 4.

3. Intervention in Voluntary Proceedings

L JUDICIAL TIP: *The ICWA contains standards that differ, depending on whether a proceeding is voluntary or involuntary. The Act defines child custody proceeding without distinguishing between voluntary and involuntary proceedings, however, a "voluntary" proceedings involves a consent to placement, and a requirement that the child shall be returned if consent is withdrawn. 25 U.S.C. §1913. Hence, since a parent would never be entitled to return of the child upon withdrawal of any consent to placement in a dependency action, all dependency actions are involuntary proceedings. As a general matter, California law does not distinguish proceedings as "voluntary" or "involuntary". A proceeding, such as a probate guardianship or independent adoption, is one or the other depending only on if it is contested or involves a consent. The ICWA applies in either event, however, how and which provisions apply may vary, depending on whether the case is contested or involves a consent.*

For the purposes of the mandatory right of intervention, the ICWA does not distinguish between involuntary and voluntary proceedings. The Indian custodian and the tribe have the right to intervene at any point in any involuntary state proceeding for the foster care placement of, or termination of parental rights to, an Indian child. 25 U.S.C. §1911(c); *Guidelines*, B.1 and B.5. Although not directly addressed, the U.S. Supreme Court implied in *Mississippi Band of Choctaw Indians* that a tribe has the right to intervene in state voluntary proceedings for foster care placement or termination of parental rights. 490 U.S. at 37-39, 53.

In California, the right of tribes and Indian custodians to intervene in voluntary adoption proceedings is somewhat unclear. The reason is that voluntary adoptions do not involve a separate proceeding to terminate parental rights, they are terminated by operation of law. Cal. Fam. Code §§8617 and 8700(h); *In re Bridget R.* (1996) 41 Cal.App.4th 1483 (tribe was allowed to intervene in proceeding filed by Indian parents seeking to invalidate their relinquishments). One California court ruled that the ICWA does not expressly grant the tribe the right to intervene in voluntary adoption proceedings with no distinct proceeding to terminate parental rights, although the tribe did have the right to intervene under California law. *In re Baby Girl A.* (1991) 230 Cal.App.3d 1611, 1621.

Assuming that the tribe does have the right to intervene, its role in voluntary adoption proceedings is relatively limited. The tribe does not have veto power over a parent's consent to the adoption of an Indian child. However, the tribe may assert the ICWA's placement preference requirements. 25 U.S.C. §1915. For a detailed discussion of the placement requirements, see section G, below. In addition, the tribe may raise violations of the Act's consent requirements and may assert any other state law grounds for denying the adoption. 25 U.S.C. §1913; *Adoption of Thevenin* (1961) 189 Cal.App.2d 245, 250.

4. Consent Requirements

The ICWA establishes procedures and substantive requirements that must be followed to validate a voluntary foster placement, termination of parental rights, or adoption of an Indian child. 25 U.S.C. §1913. The consent provisions apply to both Indian and non-Indian parents, as well as Indian custodians. 25 U.S.C. §§1903(9) and 1913(a). These consent provisions are designed to ensure that voluntary placements of Indian children are uncoerced and fully informed. *Matter of Adoption of a Child of Indian Heritage* (N.J. 1988) 543 A.2d 925.

There are four conditions needed to establish valid consent in voluntary proceedings:

- (1) The consent must be in writing;
- (2) The consent must be recorded before a court of competent jurisdiction;
- (3) The presiding judge must certify that the terms and consequences of the consent were fully explained in detail; and
- (4) The presiding judge must also certify that the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language the person understood. 25 U.S.C. §1913.

The consent document must contain the name and birth date of the Indian child, the name of the child's tribe, any tribal identification number, and the name and address of the consenting parent or Indian custodian. *Guidelines*, E.2.(a). For foster placements, the consent document must contain the name and address of the person who arranged the placement or the name and address of the foster parents, if known at the time of consent. *Guidelines*, E.2.(b). For adoptive placements, the name and address of the person or entity arranging for the placement must be included in the consent document. *Guidelines*, E.2.(c).

The Act also regulates execution of the consent. Where an Indian child resides or is domiciled on a reservation, the tribal court is the only court with competent jurisdiction to record the consent, unless the tribe has been divested by federal law of exclusive jurisdiction over child custody matters. 25 U.S.C. §1911(a); *Mississippi Band of Choctaw Indians* (1989) 490 U.S. 30, 51 n.26. (For a discussion of tribal jurisdiction, see section D, above.) Otherwise, any tribal, state or federal court with competent jurisdiction may record the consent. The consent must be executed in open court, absent a request for confidentiality or anonymity. *Guidelines*, E.1. & Commentary. Finally, any consent given before, or within ten days of, the child's birth is invalid. 25 U.S.C. §1913(a).

The State of California also has adopted rules on voluntary relinquishments of Indian children. See 22 Cal. Code Reg. §§35095.2, (independent adoptions) 35131, 35148 (agency adoptions); see also Cal. Fam. Code §8619; 22 Cal. Code Reg. §35353 et seq. (Additional requirements applicable to all adoptions of Indian children). Written relinquishments and consents must be on forms developed by the State Department of Social Services. See Cal. Fam. Code §§8801.3(b), (c)(5), 8814(a) (consent); 22 Cal. Code Reg. §35143 (relinquishment).

5. Withdrawal of Consent

In any voluntary proceeding for termination of parental rights or adoptive placement, the parent or Indian custodian may withdraw consent at any time before the entry of a final decree of termination of adoption. 25 U.S.C. §1913(c). If consent is withdrawn, the child must be returned to the parent or Indian

custodian as soon as practicable. *Guidelines*, E.4. The parent may file the withdrawal in the court where the consent was originally recorded, and the court clerk must notify the party who arranged for the adoptive placement. *Guidelines*, E.4.

After the final decree of adoption is entered in a state court, the parent may withdraw consent only on the grounds that the consent was obtained through fraud or duress and may petition the court to vacate the decree. 25 U.S.C. §1913(d). The court must vacate the decree and return the child to the parent if the court finds that the consent was indeed given under fraud or duress. 25 U.S.C. §1913(d). No adoption orders may be vacated under the ICWA after two years, unless otherwise permitted under state law. 25 U.S.C. §1913(d). Under California law, an action to vacate an adoption decree based on fraud may be brought within five years after entry of the decree. Cal. Fam. Code §9102(b).

If the adoption is vacated or set aside for any reason, a parent or Indian custodian may petition for return of the child. The court must grant the petition unless it would not be in the best interests of the child under the ICWA's strict standard of proof. 25 U.S.C. §§1916(b), 1912.

For voluntary foster care placements, the parent or Indian custodian may withdraw consent at any time. 25 U.S.C. §1913(b). The withdrawal of consent may be given in the same court where consent was filed. *Guidelines*, E.3. Upon withdrawal of consent, the child must be returned to the parent or Indian custodian as soon as practicable. 25 U.S.C. §1913(b); *Guidelines*, E.3. Contrary to ICWA's explicit provisions, a California court held that invalidation of relinquishment of an Indian child does not automatically entitle Indian parents to return of the child. *In re Bridget R.* (1996) 41 Cal.App.4th 1483, 1515-1521. The court reasoned that a child has a constitutional right to a secure home, which displaces the ICWA's statutory provisions. Thus, the Indian child need not be returned to its parents if the child's caretakers establish by clear and convincing evidence that it would be detrimental to the child and that granting custody to the caretakers would be in the child's best interests. 41 Cal.App.4th at 1515-1521. But see, *In re Desiree F.* (2000) 83 Cal.App.4th 460. [The court invalidated a dependency proceeding for violations of the ICWA, and specified that factors flowing from a placement made in flagrant violation of the ICWA, including but not limited to bonding with a foster family and the trauma which may occur in terminating that placement, may not be considered in determining whether good cause exists to deviate from the placement preferences.]

L JUDICIAL TIP: *The ICWA is designed to protect the best interest of the Indian child. See section 4(b) above. What the Act attempts to do is to eliminate biased subjectivity by imposing minimum standards for state court proceedings. As a matter of federal law, if these standards are met, the best interests of Indian children will be advanced. If they are not, then the action is not in the best interest of the Indian child, regardless of the belief of the state court judge to the contrary. The better course of action is to apply the Act and rely upon good cause standards established by the Act to support the non-preferential placement in the first instance, or (where a procedural flaw requires reversal) as part of a new action prosecuted in compliance with the requirements of the Act.*

G. Standards for Custodial Placement

1. Community Standards

The Act sets forth placement preferences and standards that must be followed in adoptive, foster care or preadoptive placements, absent good cause to the contrary. 25 U.S.C. §1915(d). The preferences and standards recognized are the prevailing social and cultural standard of the Indian community in which the parent or extended family resides or with which the parent or extended family maintains social and

cultural ties. 25 U.S.C. §1915(d); *In re Junious M.* (1983) 144 Cal.App.3d 786 (the court held that to prevent an Indian child who had never lived within an Indian community from developing his Indian identity would run contrary to the major premise of the Act. Just because a child has never lived within an Indian community is not good cause to avoid the placement preferences). Assembly Bill 65, adopted as an urgency measure, and effective as of September 1999, is codified in Fam. Code §7810 and Welf. & Inst. Code §360.6. It directs the courts to strive to promote the stability and security of Indian tribes and families and to fully comply with ICWA in all Indian child custody proceedings, as specified. It expressly requires that the Act be applied to such proceedings if the tribe determines that an unmarried person, who is under the age of 18 years, is a member of the tribe or is eligible for membership and is a biological child of a member of a tribe. Such a determination “shall constitute a significant political affiliation with the tribe and shall require the application of the federal Indian Child Welfare Act.”

The significance of Indian community standards cannot be overemphasized. In enacting this provision Congress realized that even where an Indian child’s bond to the parents or custodian is severed, state courts must make every effort to recognize and preserve the tie between the Indian child and the child’s tribe in order to protect the future and sustainability of the tribe itself. *Mississippi Band of Choctaw Indians* (1989) 490 U.S. 30 (where the Supreme Court stated that the Act’s placement preferences are the most important substantive requirement of the Act placed on state courts). Also see, Cal. Rule of Court, rule 1439(l) which specifies that the court must consider the prevailing social and cultural conditions for the tribe before finding that the breakup of the Indian family must be made.

2. Adoptive Standards

The Act established that the following preferences shall be given in placing Indian children for adoptions, unless good cause exists:

- C a. with a member of the child’s extended family; or
- C b. with other members of the Indian child’s tribe; or
- C c. with other Indian families.

25 U.S.C. §1915(a); For discussion of the definition of extended family and Indian tribe, see §C.3. -Interested Parties, Indian custodian and extended family and §C.4. Tribe, but note that extended family refers to non-Indian as well as Indian relatives. 25 U.S.C. §1903(2).

The tribe may establish a different preference order, by resolution. 25 U.S.C. §1915(c).

3. Foster Care Placements

The following preferences must be given, absent good cause to the contrary, in foster care or preadoptive placements:

- a. with a member of the child’s extended family; 25 U.S.C. §1915(b)(i). Also see §C.3. for discussion of extended family definition;
- b. with a foster home licensed, approved or specified by the Indian child’s tribe; 25 U.S.C. §1915(b)(ii);
- c. with an Indian foster home licensed or approved by an authorized non-Indian licensing

authority; 25 U.S.C. §1915(b)(iii) or;

d. with an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs. 25 U.S.C. §1915(b)(iv)

The child must be placed in the least restrictive setting which most approximates a family and in which the child's special needs, if any, may be met. 25 U.S.C. §1915(b). In addition, the child must be placed within a reasonable proximity to the child's home. 25 U.S.C. §1915(b).

The tribe may establish a different preference order, by resolution, which **shall** be followed if it is the least restrictive setting. 25 U.S.C. §1915(c).

Counties may claim both state and federal welfare aid (AFDC-FC) on behalf of eligible Indian children in foster care placements made under the Act. Welfare & Institutions Code §11401. The placements which can be counted include state licensed or approved facilities and homes of relatives or nonrelatives located both on or off the reservation so long as the placement is licensed, approved or specified by the Indian child's tribe. All County Letter No. 95-07.

4. Modification of Placement Preference Order (Good Cause)

In either foster care or adoptive placement a tribe, by resolution, may establish a different order than that stated in the Act so long as the placement order is the least restrictive setting appropriate to the needs of the child. 25 U.S.C. §1915(c). However, the Act's placement preferences are not affected by federal legislation prohibiting delay or discrimination in foster care and adoption placements on the basis of race, color, or national origin of the child or foster or adoptive parent. P.L. 104-188.

The Act allows the Indian child's or parent's personal preference to be considered 25 U.S.C. §1915(c). In doing so, the court should also consider the parents' desire for anonymity. 25 U.S.C. §1915(c). *In re Baby Girl A.* (1991) 230 Cal.App.3d 1611 (the trial court must consider the request of the parents to avoid the placement preference and balance this request against the interests of the tribe in a voluntary adoption proceeding).

As mentioned, the placement preferences must be followed in the absence of good cause to the contrary. 25 U.S.C. §1915(a) & (b). The Guidelines set out factors to consider when making a determination of good cause to depart from the placement preference order. These circumstances include:

- C The request of the biological parents or the child when the child is of sufficient age;
- C The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness;
- C The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.

Guidelines, F.3(a)(I)-(iii); See also, Cal. Rules of Court, rule 1439(k)(4); but note *In re Junious M.* (1983) 144 Cal.App.3d 786 (it is not good cause to avoid the placement preference where the good cause argued is that the minor had never lived in an Indian community); *In re Desiree F.* (2000) 83 Cal.App.4th 460. (Factors flowing from a placement made in flagrant violation of the ICWA, including but not limited to bonding with a foster family and the trauma which may occur in terminating that placement, may not be considered in determining whether good cause exists to deviate from the placement preferences.)

The Act limits an agency's discretion in selecting a permanent placement for an Indian child. Thus,

the California Department of Social Services must search diligently for a placement that falls within the preferences of the Act and may reject a preferred placement only on a showing of good cause. Where a prospective adoptive parent has suffered a criminal conviction that brings the person within Welf. & Inst. Code §361.4, or where the adoptive household includes such a person, good cause may exist to reject a placement preferred by the Act. However, the agency must either ask for a waiver of the disqualification or adequately support its reasons for not doing so if failure to request a waiver results in a placement that contravenes the Act's preferences. In turn, where a waiver is requested, the Director of the Department of Social Services may not unreasonably deny such exemption. Failure to follow applicable regulations could be evidence of a lack of good cause. (*In re Julian B.* (2000) 82 Cal.App.4th 1337, modified by 83 Cal.App. 4th 935a.)

Before the good cause can be shown, the party arguing that the child can be placed with a particular person under a preference category must show that the person with whom the child is to be placed can meet the child's needs. *In re Krystal D.* (1994) 30 Cal.App.4th 1778 (the court found no evidence that the persons within the preference categories could meet the Indian child's needs); *In re Matter of the Custody of S.E.G.* (Minn. 1984) 521 N.W.2d 357 (the child's need to be adopted is not good cause to avoid the placement preferences of the Act. The court found that the child had a need for stability but that adoption was not necessarily the only means to establish stability).

5. Record of Placement

A record of each placement of an Indian child made by a state court must be maintained by the state which evidences the efforts to comply with the order of preference specified in the Act. 25 U.S.C. §1915(e); see *Mississippi Band of Choctaw Indians* (1989) 490 U.S. 30, 40 n. 13 (court notes that state failed to maintain records under 25 U.S.C. §1915(e)). These records shall be made available at any time upon the request of the Secretary of the Interior or by the child's tribe. 25 U.S.C. §1915(e). The Guidelines for State Courts suggest that the records should be kept at a single location in the state and that the state should make them available within seven days of a request by the Secretary or the Tribe. The records should contain, at a minimum, the petition or complaint, all substantive orders entered in the proceeding, and the complete record of the placement determination. See *Guidelines*, G.4. The California State Department of Social Services maintains some placement records in California. Also see, §H.3, Release of Adoption Information, *infra*.

6. Change of Placement

Whenever an Indian child is removed from a foster home for further placement, such placement must adhere to the Act. 25 U.S.C. §1916(b). The following variations should be noted:

- C If the Indian child is being removed from a non-Indian home or a home that is not an Indian custodian home, the new placement must meet placement preferences, however, the removal standard will not apply;
- C If the Indian child is removed from a parent or and Indian custodian, the standards for involuntary removal under the Act must be met;
- C If the Indian child is being returned to the custody of the parent or Indian custodian from whose custody the child was first removed, the Act will not apply.

H. Post - Trial Issues

1. Invalidation of State Court Proceedings

a. Coverage.

A child custody proceeding in state court can be invalidated if it is shown that any provision of §§1911 (tribal jurisdiction), 1912 (involuntary custody proceedings), or 1913 (voluntary custody proceedings) were violated. Also see, §D. Jurisdiction under the ICWA; §E. Involuntary Child Custody Proceedings, and §F. Procedures for Voluntary Custody Proceedings. However, at least one California court has found that the Act must first be determined to apply and override state law where the application of state law could do major damage to “clear and substantial federal interests.” *In re Bridget R.* (1996) 41 Cal.App.4th 1483. Also see §B.3.b. Judicial Interpretations and §C.4. Interested parties - Tribe.

A petition for invalidation of a juvenile court proceeding must be brought in juvenile court. Cal. Rules of Court, rule 1439(1)(l); *Slone v. Inyo Co. Juvenile Court* (1991) 230 Cal.App.3d 263, (a Superior Court has no jurisdiction under §1914 to set aside orders of its own juvenile court department).

b. Form of invalidation action.

The petition may take any form. A common procedural form is the filing of a petition to invalidate, or a petition for a writ of habeas corpus proceeding, although motions for reconsideration or motions for relief from judgment have also been used in other state. *Application of Angus* (Ore. 1982) 655 P.2d 208, *cert. den.*, 464 U.S. 830 (use of habeas corpus because of a violation of the Act results in the minor being illegally detained). In the California dependency setting, a Cal. Welf. & Inst. Code §388 petition or a petition to invalidate, may be filed in the juvenile court case.

c. Standing.

The petition may be brought by the Indian child, the parent(s), or the custodian from whom the custody of the minor was last removed, or the child’s tribe. 25 U.S.C. §1914.

2. Appeal

As a general matter, federal substantive laws applicable to state proceedings must be applied consistent with state procedural requirements. To avoid procedural barriers from frustrating proper application of the Indian Child Welfare Act, clarity regarding the interplay of ICWA and state law is essential. Particularly in the context of dependency cases, the Act must be applied in the context of California’s comprehensive statutory scheme. It is important to know which issues may arise at which hearings in order both to adhere to the Act and to properly advise parties of their rights, including their right to appeal.

Under Welfare and Institutions Code §395, every judgment in a dependency proceeding is appealable (other than the hearing terminating reunification services and referring the case for a selection and implementation hearing - which requires a writ). Notice of appeal must be filed within 60 days after the making of an appealable order. An appeal from the most recent order entered in a dependency matter may not challenge prior orders for which the statutory time for filing an appeal has passed. *In re Elizabeth M.* (1991) 232 Cal.App.3d 443, 563; *See also, In re Pedro N.* (1995) 35 Cal.App.4th 183. (A parent who appears in a proceeding and has knowledge of ICWA applicability is foreclosed on appeal from raising ICWA notice issues by failure to challenge timely the juvenile court’s action.)

3. Subsequent Proceedings

As noted earlier, ICWA became effective on May 7, 1979. Although the Act does not, as a rule, apply to custody proceedings begun or completed before that date, there are several important exceptions. According to 25 U.S.C. §1925 the sections to which the Act can apply in subsequent proceedings are: section 1911(a) (where the tribal court has exclusive jurisdiction over an Indian child residing or domiciled on the reservation or where the child is a ward of the court); section 1918 (where a court may reassume jurisdiction over a minor's custody proceedings; and section 1919 (where state - tribe agreements over child custody and jurisdiction are in place).

However, besides the above exceptions, adult adoptees whose adoption was completed before May 7, 1979, may invoke the Act to obtain release of their adoption information. See *Guidelines*, G.2(b). Also see, §H.3. Release of Adoption Information, below.

4. Release of Adoption Information

a. *Information from Secretary of Interior.*

State courts have been required to send copies of the final adoption decree or the order for adoptive placement of any Indian child to the Secretary of the Interior along with (1) the name and tribal affiliation of the child; (2) the names and address of the adoption parents, (3) the name and addresses of the biological parents and (4) the name of any agency having files or information relating to the adoptive placement. 25 U.S.C. §1951(a).

Any adopted Indian individual over age 18, any adoptive or foster parent(s) of an Indian child and any Indian tribe will then be able to request the Secretary to provide such information necessary to enroll the Indian child with the tribe. 25 U.S.C. §1951(b); *Guideline* G.2(a) & (c). Such a process does not violate the confidentiality of the adoption records. *Guideline* G.2(c). In addition, where the biological parents submitted an affidavit requesting confidentiality to the tribal court, and where the affidavit was sent to the Secretary of the Interior, the Secretary will sustain the confidentiality and that information will not even be available to a Freedom of Information Request. 25 U.S.C. §1951(a). Also see, Cal. Rule of Court, rule 1439(n)(1). The BIA can certify that an individual Indian child meets requirements for tribal membership based on the BIA's information. *Guidelines*, G.2 and commentary.

b. *Information from state court*

An Indian child age 18 and older can also petition the court that entered a final decree of adoption to release selected information such as tribal affiliation of the biological parents. 25 U.S.C. §1917. Also see, 22 Cal.Code Reg. §35385, for procedures of transmission of information to adoptee of Indian heritage.

L JUDICIAL TIP: *Application for adoptive information may be made by petitioning to open adoption records and secure a certified copy of an original birth record under §1917 of the ICWA, under California Family Code §9200, and under California Health and Safety Code §10275.*

c. *Information from California - State Department of Social Services*

The Department requires parents or custodians relinquishing an Indian child for adoption to provide enough information to the Department so that a certificate of degree of Indian blood can be given by the BIA. Cal. Fam. Code §8619. An adoption agency is also under a duty to provide the same information

and documentation to the Department. 22 Cal. Code Reg. §35387. This information becomes a part of the adoptee's file and may be released to the adoptee once the adoptee reaches age 18. Cal. Fam. Code §8619 and 22 Cal. Code Reg. §35385(a).

I. Impact of ASFA upon Indian Children and Families in State Systems.⁷

1. Overview of the Adoption and Safe Families Act (ASFA)

On November 19, 1997, the Adoption and Safe Families Act of 1997 (ASFA), P.L. 105-89, was signed into law. ASFA is an amendment to Title IV-B and Title IV-E of the Social Security Act. (42 U.S.C. §620 et seq. and 42 U.S.C. §670 et seq., respectively.) Title IV-B provides for two child welfare grant programs (referred to as Title IV-B Subparts 1 and 2) for states and tribes. The Title IV-E Foster Care and Adoption Assistance program provides federal money for foster care and adoption assistance on an entitlement basis. Title IV-E also provides funding for independent living services for adolescents who are transitioning out of foster care. Title IV-B and Title IV-E are the basis for many of the basic federal statutory requirements of the child welfare systems, including the following pre-ASFA requirements:

- case plans providing for children in foster care to be placed in the least restrictive setting which is in close proximity to the home of the child's parents;
- case review systems providing for court or administrative reviews of each child at least once every six months and dispositional court hearings within the first 18 months; and
- reasonable efforts to prevent removal of children from their families and to facilitate the return of children who have been removed.

Congress amended Title IV-B and Title IV-E of the Social Security Act by enacting ASFA. The most significant aspects of ASFA are as follows:

- The health and safety of children must be the paramount concern in all decisions regarding provision of services, placement and permanency decisions. (42 U.S.C. §622(b)(10)(B) as amended by section 102(1) of ASFA; 42 U.S.C. §629b(a)(9) as added by section 305(c) of ASFA; 42 U.S.C. §671(a)(15) as amended by section 102(2) of ASFA; 42 U.S.C. §675(5)(E) as amended by section 101 of ASFA.) States are required and encouraged to establish or utilize various mechanisms to achieve this goal, including criminal background checks of prospective foster and adoptive parents. (42 U.S.C. §671(a)(20) as added by section 101 of ASFA.)
- Reasonable efforts to reunify a family are not required where a parent has a pattern of abusive behavior with the child in question, criminal behavior with another child of the parent or the parental rights of a parent to a sibling of the child in question have been previously terminated involuntarily. (42 U.S.C. §671(a)(15) as amended by section 101 of ASFA.)
- Incentive payments intended to increase the number of foster children placed for adoption are made available. (42 U.S.C. §673b as added by section 201 of ASFA.)
- Expedited permanent placements for children are sought by:

⁷The information in this section is excerpted from Simmons and Trope, *P.L. 105-89 Adoption and Safe Families Act of 1997, Issues for Tribes and States Serving Indian Children*. National Resource Center for Organizational Improvement, Edmund S. Muskie School of Public Service, University of Southern Maine, 1999.

- a. mandating petitions for termination of parental rights once a child has been in foster care for a period of 15 out of 22 months (subject to certain exceptions); encouraging the use of concurrent planning - namely, planning for an out-of-home permanent placement, such as adoption, at the same time that efforts are being made to reunify the child with his/her family; (42 U.S.C. §675(5)(E) as amended by section 203 of ASFA and 42 U.S.C. §671(a)(15)(F) as added by section 101 of ASFA.)
- b. requiring a permanency hearing within 12 months after the initial foster care placement; (42 U.S.C. §675(5)(C) as amended by section 302 of ASFA.)
- c. removing state and county jurisdictional barriers which delay interstate and intercounty adoptive placements; (42 U.S.C. §622(b)(12) as added by section 202 of ASFA; 42 U.S.C. §671(a)(23) as added by P.L. 105-200.)
- d. extending the reasonable efforts and case plan documentation requirements to also include efforts to find a permanent placement for a child; (42 U.S.C. §671(a)(15) and 42 U.S.C. §675(1)(E) as amended by section 101 of ASFA.) and
- e. expanding the use of Title IV-B, Subpart 2 funding for “Adoption Promotion and Support Services” and “Time-Limited Family Reunification Services.” (42 U.S.C. §629b(a)(4) as amended by section 305(b) of ASFA; 42 U.S.C. §§629a(a)(7) and (8) as added by section 305(b) of ASFA.)

2. Impact of ASFA upon Indian Children and Families in State Systems

ASFA and the Indian Child Welfare Act (ICWA):

ASFA Does Not Modify ICWA

For a number of reasons, ASFA should not be viewed as affecting the application of the Indian Child Welfare Act in the case of Indian children involved in state child custody proceedings.⁸

- a. The Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-272) was the first reform of federal child welfare law. It created Title IV-E and revised Title IV-B. P.L. 96-272 made no specific reference to ICWA and, in spite of its later date of enactment, has never been interpreted as modifying the provisions of ICWA. Likewise, there is no provision in ASFA that indicates an intent to modify ICWA. Thus, given that Title IV-B and Title IV-E of the Social Security Act have not been interpreted as modifying or affecting the application of ICWA, ASFA should not be interpreted as modifying ICWA.

⁸ Accord, Appendix F, All County Information Notice No. I-46-98, “The Impact on the Indian Child Welfare Act of Assembly Bill 1544; The Adoption and Safe Families Act of 1997; and the Small Business Job Protection Act of 1996, Section 1808 ‘Removal of Barriers to Interethnic Adoption.’” “These new federal and state standards do not change the responsibility of states to meet the standards established under ICWA for eligible Indian children under California care and custody, nor does it impact eligible Indian children in the custody of a tribal court in which the tribe has a state/tribal agreement pursuant to AB 1525.”

- b. In 1994, an amendment to Title IV-B was passed requiring, for the first time, that state Title IV-B plans “contain a description, developed after consultation with tribal organizations . . . in the State, of the specific measures taken by the State to comply with the Indian Child Welfare Act.” (P.L. 103-432, section 204, was codified at 42 U.S.C. §622(11).) This section was not changed by ASFA.
- c. Standard rules of statutory construction provide further support for the proposition that no part of ASFA should be interpreted as modifying ICWA. First, ASFA deals with all children who become involved with the foster care or adoption system, whereas ICWA is a specific enactment dealing with one subsection of children - Indian children involved in child custody proceedings. ICWA is based upon extensive hearings which demonstrated that the specific needs of Indian children are normally best served by maintaining their relationships with their tribes and extended families. (See *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32037, 49-50 (1988).) It is a standard rule of statutory construction that specific legislative enactments take precedence over general statutory enactments. (See, e.g., *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974). [“Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.”]) Moreover, as part of its trust relationship with Native people, Congress routinely enacts Indian-specific legislation which is specifically targeted toward the particular and special needs of Native Americans. (See, in general, Title 25 of the United States Code.) Such Indian-specific statutes are to be liberally interpreted for the benefit of the people on whose behalf they were enacted. (See, e.g., *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832,838 (1982).)

Key areas where ICWA standards must be met by states include:

- notice to tribes of state child custody proceedings, (25 U.S.C. §1912(a))
- standards for the placement of Indian children in foster homes and termination of parental rights; (25 U.S.C. §1912(e) and (f))
- active efforts to provide rehabilitative services to the birth family or Indian custodian; (25 U.S.C. §1912(d))
- transfer of jurisdiction to tribal courts and full faith and credit for tribal judgments; (25 U.S.C. §1912(b) and (d))
- preferred placements of Indian children with their extended family or other Indian families; (25 U.S.C. §1915) and
- tribal right to intervene in state child custody proceedings. (25 U.S.C. §1911(c).)

V. Practical Solutions, Using the Act Creatively

A. Accessing Additional Services

Special services and benefits are often available to an Indian child. If the Indian status of the child is verified via tribal or Bureau of Indian Affairs documentation, some of these services may be available without tribal response. In particular, the Indian Health Services, an agency of the Department of Health and Human Service, maintains many programs throughout California that offer medical and therapeutic services. As well, many tribes operate Indian Child Welfare Programs under Title II of the ICWA. These programs may serve Indians that are not members of the tribe that operates the program. The Area Office of the Bureau of Indian Affairs and the Area Office of the Indian Health Service are both located in Sacramento, California and may be contacted for a list of programs. See Bench guide §VI, Resource Directory.

Indian tribes often operate an array of programs available to children who are enrolled in the tribe. The child's tribe should be contacted to identify any relevant tribal programs that may serve the child or family involved in a child custody proceeding.

B. Expanded Placement Options

The court has an obligation to secure the safety and welfare of children in its care. As such, children must be placed in homes that meet the requirements of applicable law. The ICWA authorizes placement in the home of extended family, as defined by the child's tribe or, in the absence a tribal definition, as defined in the Act. A broad tribal definition of extended family may authorize placement in homes not otherwise authorized by state law. In addition, the Act authorizes placement in homes "licensed, approved, or specified by the Indian child's tribe" or in an "institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs." If the court confirms tribal approval of a home or institution, the Act requires that the placement receive preference in placement "absence good cause to the contrary." Tribes can, via tribal resolution, qualify a home for placement that would not otherwise be available to receive placement. Courts can greatly expand placement options for Indian children by working with the child's tribe. See Benchguide § IV.G.

C. Working with Tribes to Secure Placement Funding

Counties may claim state and federal AFDC-FC on behalf of an eligible Indian child in foster care placement made pursuant to the ICWA. These placements may include a state licensed or approved facility and any home of a relative or nonrelative located on or off the reservation which is licensed, approved or specified by the Indian child's tribe. Cal.W&I §11401; SDSS All County Letter No. 95-07, February 9, 1995. Hence, a child's tribe can, through tribal resolution, both qualify a home for placement and funding, even if the home would not otherwise be available to receive placement. Courts can greatly expand placement options for Indian children by working with the child's tribe. See Benchguide section IV.G; section VIII. H, Sample Tribal Resolution Designating Placement Preference.

D. Concurrent Jurisdiction and creative approaches to achieving solutions

Where tribal jurisdiction over Indian child custody cases is not exclusive, the state and tribe possess concurrent jurisdiction. This allows either or, as appropriate, both systems to exercise jurisdiction over a

child custody case. See Benchguide section IV. D. This jurisdictional arrangement may be relied upon to facilitate a desired resolution of a case. An example includes a situation where a tribe seeks transfer of a case, but the child may not be fit to travel for a limited but unspecified period. Where the state and tribe agree the case will transfer but wish to delay moving the child, the case could be transferred and the child remain in the existing placement under a tribal court order. However, this arrangement creates problems for the placements eligibility to continue to receive foster care payments from the state. As an alternative, a concurrent jurisdiction arrangement may be utilized. In this situation, the placement would continue under both a state and tribal court order. Because the placement continues to be pursuant to a state court order, the placement would remain eligible for foster care payments from the state. When the child is ready to travel, the state case may be dismissed.

E. Using Indian Custodians to Address a Child's Needs

An Indian custodian is defined by the Act as any Indian person who has legal custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody and control has been transferred by the parent of such child. 25 U.S.C. §1903(6). Indian custodians are entitled to all the protections afforded by the Act to parents. When a dependency is initiated, the court must determine if the case involves an Indian custodian. If so, the Indian custodian is entitled to continued custody and to all of the protections of the Act. If the Indian custodian can adequately provide for the needs of the child, a dependency is unnecessary, regardless of the circumstances of the parent.

Tribes may act to define Indian custodian in a manner that facilitates resolution of a case. For example, an action was initiated on Indian children in Florida. The authorities in Florida, the tribe and the mother all agreed the family would be best served by a return to the reservation in California, where the tribe could provide services to the family. However, the tribe did not operate a court system and was not in a position to accept transfer of the case. To accomplish the desired outcome, the tribe provided the court with a resolution specifying that, as a matter of tribal law, a designated tribal representative qualified as the Indian custodian of the children and had the right to custody of the children under ICWA. The representative traveled to Florida and delivered the resolution to the court, which then released the children to their Indian custodian and dismissed the case. The representative then returned to California with the Indian mother and children.

F. Addressing Paternity issues

Tribal determinations as to membership are conclusive. Additionally, tribes have jurisdiction over areas of traditional tribal control, such as determinations of paternity when tribal members are involved. Such determinations are entitled to full faith and credit. A problem often arises when a tribe has not asserted jurisdiction over an issue and does not respond to inquiries regarding membership. While tribal determinations, and in the absence thereof BIA determinations, are conclusive for state court purposes, if an answer is not forthcoming from the tribe or BIA, may the state court entertain issues as necessary to determine if a child is an Indian for purposes of the ICWA? First, it is not necessary to “determine” paternity in order to determine if the Act applies. An Indian father need only *acknowledge* a child in order to meet the definition of parent under the Act. California Rules of Court, rule 1439(e) requires the court to proceed with the dependency, applying the requirements of the Act as if the child is an Indian child, whenever the court has reason to believe the child may be an Indian child. The ICWA defines “parent” to include unwed fathers where paternity has been acknowledged or established. Hence, acknowledgment would be sufficient to render an Indian father a parent for ICWA purposes.

Where a tribe does not exercise its jurisdiction over domestic relations, the state court, under Public Law 280, does have concurrent jurisdiction over civil causes of actions and may hear and decide paternity cases involving Indians in California.

G. Indian Status Determinations - Reason to Know Versus Reason to Suspect.

Courts often struggle with Indian status determinations. As discussed in Bench guide §IV.C., these determinations can be complex. The Act requires compliance with ICWA notice requirements whenever the court has reason to know the child is an Indian. In dependency cases, the California Rules of Court, rule 1439, require that the Act be fully applied to a dependency proceeding when the court has reason to believe the child may be Indian. When this standard is met, the Act must be followed unless and until the Bureau of Indian Affairs and each tribe the child may be affiliated with has confirmed the child is not Indian. This allows the court to proceed with the case in the event no answer, or a delayed answer, is received from the BIA and tribe(s). This approach eliminates the likelihood that a case subject to the Act may be invalidated because the Act was not applied. However, this approach does *not* require that every child be treated as an Indian simply because there is an allegation that the child may have Indian ancestry. Indian child as defined in the Act requires membership or eligibility for membership in an Indian tribe. The fact a child may have a distant Indian ancestor, in and of itself, is not sufficient to meet this standard or give the court reason to know the child is Indian.

VI. Resource Directory: Essential Contacts for Indian Tribes and Indian Programs

(Because programs and addresses change rapidly, the following directory provides information on agencies and established programs that can assist courts and practitioners in accessing information on Indians and Tribes.)

A. Federal Agencies

1. United States Department of the Interior, Bureau of Indian Affairs.

The Bureau of Indian Affairs (BIA) is the principal bureau, within the federal government, responsible for the administration of federal programs for federally recognized Indian tribes, and for promoting Indian self-determination. The BIA's mission is to enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect and improve the trust assets of American Indians, Indian tribes and Alaska Natives. The BIA, among other things, maintains current directory information on tribes, administers grants for the operation of tribal Indian Child Welfare Programs and must be notified in ICWA cases.

(The Bureau Area Office that services the geographical area a tribe is located in can provide current tribal directory information for all tribes in that area.)

Aberdeen Area Office

(Nebraska, North Dakota and South Dakota)
Bureau of Indian Affairs
115 4th Avenue, S.E.
Aberdeen, South Dakota 57401-4384
(605) 226-7343 FAX (605) 226-7446

Albuquerque Area Office

(Colorado and New Mexico)
Bureau of Indian Affairs
615 First St., N.W.
P.O. Box 26567
Albuquerque, New Mexico 87125-6567
(505)346-7590 FAX (505) 346-7517

Anadarko Area Office

(Kansas and West Oklahoma)
Bureau of Indian Affairs
WCD Office Complex
P.O. Box 368
Anadarko, Oklahoma 73005
(405) 247-6673 FAX (405) 247-2242

Billings Area Office

(Montana and Wyoming)
Bureau of Indian Affairs
316 North 26th Street
Billings, Montana 59101
(406) 247-7943 FAX (406) 247-7976

Eastern Area Office

(New York, Maine, Louisiana, Florida, Connecticut
Alabama, North Carolina & Mississippi)
Bureau of Indian Affairs
3701 N. Fairfax Drive
Mail Stop 260-VASQ.
Arlington, VA 22203
(703) 235-2571 FAX (703) 235-8610

Juneau Area Office

(Alaska)
Bureau of Indian Affairs
P.O. Box 255200
Juneau, Alaska 99802-5520
(907) 586-7177 FAX (907) 586-7169

Minneapolis Area Office

(Minnesota, Iowa, Mich, & Wisc.)
Bureau of Indian Affairs
1 Federal Drive, Room 550
Minneapolis, MN 55111-4007
(612) 713-4400 FAX (612) 713-4401

Navajo Area Office

(Navajo Res., Ariz., Utah, & New Mexico)
Bureau of Indian Affairs
P.O. Box 1060
Gallup, New Mexico 87305
(505) 863-8314 FAX (505) 863-8324

Muskogee Area Office

(East Oklahoma)
Bureau of Indian Affairs
101 North 5th Street
Muskogee, Oklahoma 74401-6206
(918) 687-2296 FAX (918) 687-2571

Phoenix Area Office

(AZ, Nevada, UT, California and Idaho)
Bureau of Indian Affairs
One North First Street
P.O. Box 10
Phoenix, Arizona 85001
(602) 379-6600 FAX (602) 379-4413

Portland Area Office

(Oregon, Washington, and Idaho)
Bureau of Indian Affairs
911 N.E. 11th Avenue
Portland, Oregon 97232
(503) 231-6702 FAX (503) 231-2201

Sacramento Area Office

(California)
Bureau of Indian Affairs
2800 Cottage Way
Sacramento, California 95825
(916) 978-6000 FAX (916) 978-6099

2. United States Department of Health and Human Services, Indian Health Service.

The Indian Health Service (IHS) is responsible for providing federal health services to American Indians and Alaska Natives. The IHS mission is to raise the physical, mental, social, and spiritual health of American Indians and Alaska Natives to the highest level and to assure that comprehensive, culturally acceptable personal and public health services are available and accessible to American Indian and Alaska Native people. The IHS is also involved in preventive measures involving environmental/sanitation, educational, and outreach activities. IHS services are provided directly and also through tribally contracted and operated health programs, many of which contain mental health facilities.

Indian Health Service Headquarters

Room 6-35
Parklawn Building
5600 Fishers Lane
Rockville, Maryland 20857
(301) 443-3593 FAX (301) 443-0507

(The IHS Area Office that services the geographical area a tribe is located in can provide information on the health services available in that area.)

Aberdeen Area Indian Health Service
(N. Dakota, S. Dakota, Indiana, and Nebraska)
115 4th Avenue, Southeast
Aberdeen, South Dakota 57401
(605) 226-7531 FAX (605) 226-7321

Alaska Area Indian Health Service
(Alaska)
4141 Ambassador Drive
Anchorage, Alaska 99508-5928
(907) 729-3686 FAX (907)729-3689

Albuquerque Area Indian Health Service
(New Mexico, Colorado and Texas)
5300 Homestead Road, N.E.
Albuquerque, New Mexico 87110
(505) 248-4102 FAX (505) 248-4115

Bemidji Area Indian Health Service
(Minnesota, Michigan & Wisconsin)
522 Minnesota Ave. NW, Room 119
Bemidji, Minnesota 56601
(218) 759-3412 FAX (218)759-3511

Billings Area Indian Health Service
(Montana and Wyoming)
2900 4th Avenue, North
Billings, Montana 59101
(406) 247-7107 FAX (406) 247-7230

Calif. Area Indian Health Service
(California)
1825 Bell Street, Suite 200
Sacramento, California 95825-1097
(916) 566-7023 FAX (916)566-7065

Nashville Indian Health Service
(Eastern United States)
711 Stewarts Ferry Pike
Nashville, Tennessee 37214-2634
(615) 736-2400 FAX (616) 736-2391

Navajo Area Indian Health Service
(Nebraska, Arizona, New
Mexico & Utah)
P.O. Box 9020
Window Rock, Arizona 86515-9020
(520) 871-5811 FAX (520) 871-5896

Oklahoma Indian Health Service
(Oklahoma, Kansas and Texas)
Five Corporate Plaza
3625 NW 56th Street
Oklahoma City, Oklahoma 73112
(405) 951-3768 FAX (405) 951-3780

Phoenix Indian Health Service
(Arizona, Nevada and Utah)
Two Renaissance Square
40 North Central Avenue
Phoenix, Arizona 85004
(602) 364-5039 FAX (602) 364-5042

Portland Indian Health Service
(Idaho, Oregon and Washington)
1220 S.W. Third Avenue, Room 476
Portland, Oregon 97204-2892
(503) 326-2020 FAX (503) 326-7280

Tucson Indian Health Service
(Arizona)
7900 South "J" Stock Road
Tucson, Arizona 85746-7012
(520) 295-2405 FAX (520) 295-2602

B. INDIAN ORGANIZATIONS

1. California Indian Legal Services

California Indian Legal Services (CILS) is a statewide non-profit corporation organized to provide legal representation to low income Native Americans for legal problems unique to Native American people.

Office

Counties Served

Oakland Office

510 16th Street, 4th Floor
Oakland, California 94612
(510) 835-0284; (800) 829-0284
FAX (510) 835-8045

Alameda, Amador, Butte, Calaveras, Colusa, Contra
Costa, El Dorado, Fresno, Glenn, Kings, Lake,
Madera, Marin, Mariposa, Mendocino, Merced,
Monterey, Napa, Nevada, Placer, Sacramento,
San Benito, San Francisco, San Joaquin, San Luis Obispo,
San Mateo, Santa Clara, Santa Cruz, Sierra, Solano,
Sonoma, Stanislaus, Sutter, Tulare, Yolo, Yuba

Bishop Office

787 North Mail Street, Suite D
Bishop, California 93514
(760) 873-3581; (800) 736-3582
FAX (760) 873-8788

Alpine, Inyo, Kern, Mono, Tuolumne

Escondido Office

609 S. Escondido Blvd.
Escondido, California 92025
(619) 746-8941; (800) 743-8941
FAX (619) 746-1815

Imperial, Los Angeles, Orange, Riverside, San
Bernadino, San Diego, Santa Barbara, Ventura

Eureka Office

324 F Street, Suite A
Eureka, California 95501
(707) 443-8397; (800) 347-2402
FAX (707) 443-8913

Del Norte, Humboldt, Lassen, Northern Mendocino,
Modoc, Plumas, Shasta, Siskiyou, Tehama, Trinity

C. WEB SITES

1. California Indian Legal Services Homepage

Location: <http://www.calindian.org/>

(Information on CILS statewide programs, offices, etc.. Links to other Indian sites.)

2. Bureau of Indian Affairs Homepage

Location: <http://www.doi.gov/bureau-indian-affairs.html>

(Information on BIA programs, offices, etc.. Tribal Directory information. Links to other Indian sites.) Notable in this site are two important, common references:

a. List of Federally Recognized Tribes

Location: <http://www.doi.gov/bia/tribes/entry.html>

b. List of Designated Agents for Service of Process

Location: <http://www.doi.gov/bia/desigag.html>

3. Indian Health Services Homepage

Location: <http://www.ihs.gov/>

(Information on IHS programs, offices, etc.. Telephone directory for all IHS Area Offices and

Service Units throughout the United States. Tribal Program Directory information. Links to other Indian sites.)

4. Native American Rights Fund

Location: <http://www.narf.org/>

(A National Indian Legal Rights Organization. Site has information on the National Indian Law Library, a tribal directory, articles and general information.)

5. Native American Legal Resources on the Internet

Location: <http://www.hanksville.org/NAresources/>

(Links to wide variety of Native American Programs and resources.)

6. National Indian Child Welfare Association

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

(A site devoted entirely to ICWA issues and defending the policy behind the Act. Site has general ICWA information, a library of ICWA resources, and proposed ICWA amendments.)

7. Indigenous Nations Child & Family Agency

Location: <http://www.civicbank.com/indigenous.html>

(Serves North-Central California with ICWA services, foster care, and child abuse prevention.)

8. Tribal Court Clearinghouse

Location: <http://www.tribal-institute.org/>

(A resource on tribal justice systems including tribal constitutions, law review articles, message forum and list of links.)

VII. Additional References

Craig J. Dorsay, *The Indian Child Welfare Act and Laws Affecting Indian Juveniles Manual*, Indian Law Support Center (1984)

Craig J. Dorsay *et al.*, *1992 Update to the Indian Child Welfare Act and Laws Affecting Indian Juveniles Manual*, Indian Law Support Center (1992)

B.J. Jones, *The Indian Child Welfare Act Handbook: A Legal Guide to the Custody and Adoption of Native American Children*, American Bar Association (1995)

5 Matthew Benders, *California Family Law Practice and Procedure, Indian Child Welfare Act 176* (2d ed 1998)

P.L. 105-89 *Adoption and Safe Families Act of 1997: Issues for Tribes & States serving Indian Children*, The National Indian Child Welfare Association (1999)

A. Sample Forms: Notice of Indian Child Custody Proceeding

1. Notice of Involuntary Child Custody Proceeding Involving an Indian Child
2. Request for Confirmation of Child's Status as Indian

L JUDICIAL TIP: *The Department of Social Services' Notice can be used in private proceedings if a cover sheet is attached explaining that the official form is being used for convenience only.*

L JUDICIAL TIP: *The Code of Federal Regulations specifies additional information that should be included in the notice, if available:*

- !** *The names and addresses (current and former) of the child's maternal and paternal grandparents, and great grandparents, including maiden, married and former names or aliases; birthdates; places of birth and death; tribal enrollment numbers, and/or other identifying information. (25 C.F.R. §23.11 (d) (3)).*
- !** *A statement of the potential legal consequences of the proceedings on the future custodian and parental rights of the Indian parents or Indian custodians. (25 C.F.R. §23.11 (e) (6)).*
- !** *A statement that all parties notified should keep confidential the information contained in the notice concerning the particular proceedings. The tribe should not release the information any more than is necessary to exercise their rights under the Indian Child Welfare Act. (25 C.F.R. §23.11 (e) (7)).*

REQUEST FOR CONFIRMATION OF CHILD'S STATUS AS INDIAN

- Attach copy of birth certificate.
- Attach copy of court petition when applicable
- Complete entire form:
 - If item is not known, mark "UNK".
 - If item is not applicable, mark "N/A".
 - If Indian Ancestry is traced through only one birth parent, section of form regarding the history of the other birth parent should be marked "N/A"

SEND REQUEST TO:

DATE OF REQUEST
CASE NUMBER
ANONYMITY REQUESTED BY CHILD'S PARENTS <input type="checkbox"/> YES <input type="checkbox"/> NO

CHILD'S NAME	SEX	BIRTHDATE (MM/DD/YY)	BIRTHPLACE (CITY & STATE)
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CHILD'S FAMILY HISTORY

BIRTH MOTHER (INCLUDE MAIDEN NAME AND/OR ALL NAMES KNOWN BY)	BIRTHDATE	BIRTHPLACE (CITY, STATE, AND/OR RESERVATION)
TRIBAL AFFILIATION AND LOCATION (TRIBE, BAND, AND RESERVATION) <u>2/</u>	ENROLLED IN TRIBE? (YES, NO, UNK)	ENROLLMENT NO. OR HOME AGENCY

MATERNAL GRANDMOTHER (INCLUDE MAIDEN NAME AND/OR ALL NAMES KNOWN BY)	BIRTHDATE	BIRTHPLACE (CITY, STATE, AND/OR RESERVATION)
TRIBAL AFFILIATION AND LOCATION (TRIBE, BAND, AND RESERVATION) <u>2/</u>	ENROLLED IN TRIBE? (YES, NO, UNK)	ENROLLMENT NO. OR HOME AGENCY

MATERNAL GRANDFATHER (INCLUDE ALL NAMES KNOWN BY)	BIRTHDATE	BIRTHPLACE (CITY, STATE, AND/OR RESERVATION)
TRIBAL AFFILIATION AND LOCATION (TRIBE, BAND, AND RESERVATION) <u>2/</u>	ENROLLED IN TRIBE? (YES, NO, UNK)	ENROLLMENT NO. OR HOME AGENCY

BIRTH FATHER (INCLUDE ALL NAMES KNOWN BY)	BIRTHDATE	BIRTHPLACE (CITY, STATE, AND/OR RESERVATION)
TRIBAL AFFILIATION AND LOCATION (TRIBE, BAND, AND RESERVATION) <u>2/</u>	ENROLLED IN TRIBE? (YES, NO, UNK)	ENROLLMENT NO. OR HOME AGENCY

PATERNAL GRANDMOTHER (INCLUDE MAIDEN NAME AND/OR ALL NAMES KNOWN BY)	BIRTHDATE	BIRTHPLACE (CITY, STATE, AND/OR RESERVATION)
TRIBAL AFFILIATION AND LOCATION (TRIBE, BAND, AND RESERVATION) <u>2/</u>	ENROLLED IN TRIBE? (YES, NO, UNK)	ENROLLMENT NO. OR HOME AGENCY

REQUEST FOR CONFIRMATION OF CHILD'S STATUS AS INDIAN

CHILD'S NAME	CASE NUMBER
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PATERNAL GRANDFATHER (INCLUDE ALL NAMES KNOWN BY)	BIRTHDATE	BIRTHPLACE (CITY, STATE, AND/OR RESERVATION)
TRIBAL AFFILIATION AND LOCATION (TRIBE, BAND, AND RESERVATION) <u>2/</u>	ENROLLED IN TRIBE? (YES, NO, UNK)	ENROLLMENT NO. OR HOME AGENCY

MATERNAL GREAT GRANDPARENTS	BIRTHDATE	BIRTHPLACE (CITY, STATE, AND/OR RESERVATION)
TRIBAL AFFILIATION AND LOCATION (TRIBE, BAND, AND RESERVATION) <u>2/</u>	ENROLLED IN TRIBE? (YES, NO, UNK)	ENROLLMENT NO. OR HOME AGENCY

PATERNAL GREAT GRANDPARENTS	BIRTHDATE	BIRTHPLACE (CITY, STATE, AND/OR RESERVATION)
TRIBAL AFFILIATION AND LOCATION (TRIBE, BAND, AND RESERVATION) <u>2/</u>	ENROLLED IN TRIBE? (YES, NO, UNK)	ENROLLMENT NO. OR HOME AGENCY

IS BIRTH FATHER NAMED ON BIRTH CERTIFICATE? <input type="checkbox"/> YES <input type="checkbox"/> NO	IF NOT, HAS BIRTH FATHER ACKNOWLEDGED PATERNITY? <input type="checkbox"/> YES <input type="checkbox"/> NO	IF NOT, WAS BIRTH FATHER'S PATERNITY ESTABLISHED? <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> UNK
---	--	--

REMARKS: 4/

SEND CONFIRMATION TO:		
AGENCY NAME	WORKER NAME	TELEPHONE NUMBER

AGENCY ADDRESS	<u>1/</u> , <u>2/</u> , <u>3/</u> , <u>4/</u> : SEE FOLLOWING PAGES FOR EXPLANATION
----------------	--

REQUEST FOR CONFIRMATION OF CHILD'S STATUS AS INDIAN

CHILD'S NAME	CASE NUMBER
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TO AID IN THE PROCESSING OF THIS FORM, ANSWER **EVERY** QUESTION.

1. Anonymity Requested

To ensure that a parent's relationship with his/her tribe is not jeopardized, every precaution will be taken, if the parent(s) requests it, to preserve anonymity when making inquiries as to the child's Indian status.

2. Tribal Affiliation and Location (Check appropriate box (A or B) and answer questions which follow. If not applicable, proceed to C.)

- A. 1906 Final Roll -OR- B. Roll of 1924

If a client alleges to be of Cherokee, Choctaw, Chickasaw, Creek or Seminole ancestry from Oklahoma (the 5 civilized tribes), the name of a relative must be provided who might have been enrolled in the final roll prepared in 1906 by the Dawes Commission (referred to as the "1906 Final Roll"). To assist in determining descendency, answer the following questions:

If a client alleges to be of Cherokee ancestry, but from another state such as North Carolina, Georgia, Mississippi, or another Southeastern area state, the client may be descended from the Eastern Band of Cherokees, to prove descendency from that tribe, one must be related to a person listed on the Roll of 1924 for the Eastern Band of Cherokees. To establish descendency, answer the following questions:

1. Do you know the name of any Indian relative that was alive in 1906 or 1924 and might have been listed on either the "1906 Final Roll or the Roll of 1924?

Yes No Unknown If yes, name and relationship _____
 1906 Final Roll Roll of 1924

2. Do you know where this relative was born, or at least the state of his/her birth?

Yes No Not Applicable If yes, place of birth _____

3. Can you furnish documents such as certificate of birth, death, marriage, or baptism that will prove your relationship to this person?

Yes No Not Applicable If yes, attach documents:

C. The following questions may be helpful in tracing the ancestry of any person alleging Indian descent

1. Is your family a part of an Indian Band? Yes No

If yes which band _____

2. Have you or any members of your family ever received services from the bureau of Indian Affairs? Yes No

If yes, complete items below:

Name/ Relationship	Type(s) of Services	Date(s) Services Received	Location Where Services Received

3. Have you or any members of your family ever:

(a) attended an Indian school? Yes No

If yes, complete items below:

Name/ Relationship	Name of School(s)	Date(s) Attended	Location of School(s)

REQUEST FOR CONFIRMATION OF CHILD'S STATUS AS INDIAN

CHILD'S NAME	CASE NUMBER
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(b) Received medical treatment at an Indian health clinic or public health service hospital? Yes No

If yes, complete items below :

Name/ Relationship	Type(s) of Treatment	Date(s) Treatments Received	Location Where Treatment(s) Received

(c) Lived in federal trust land, a reservation, or a rancheria? Yes No

If yes, complete items below:

Name/ Relationship	Specify Name and Address of Location(s)	Date(s)

3. Has Birth Father's Paternity Been Established?

If the birth father is the only parent of Indian descent and is **not** the legal father and/or is **not** named on the birth certificate, a written paternity statement must be submitted with the referral to compute the child's Indian blood degree.

4. Remarks

Use this space to note any additional information which may be of assistance in establishing the child's Indian ancestry.
(e.g. extended family members)

NOTICE OF INVOLUNTARY CHILD CUSTODY PROCEEDING INVOLVING AN INDIAN CHILD

CERTIFIED MAIL -- RETURN RECEIPT REQUESTED

NOTICE TO:

- The child's parent(s)
- The child's tribe
- The child's custodian(s)
- The Bureau of Indian Affairs

The Indian Welfare Act¹ requires that you be notified of the upcoming custody hearing concerning the child named below. Information on the hearing is also contained in this form. We have attached a copy of the dependency petition which was filed for the child with the county juvenile court.²

Your rights to participate in the proceedings are explained on the last page of this form.

THIS NOTICE CONCERNS:

INDIAN CHILD'S NAME	BIRTHDATE	CHILD'S BIRTHPLACE (CITY, STATE AND/OR RESERVATION)
TRIBE OR BAND OF WHICH CHILD IS A REPORTED MEMBER OR IS ELIGIBLE FOR MEMBERSHIP		
MOTHER'S NAME (INCLUDE MAIDEN NAME AND ALL NAMES KNOWN BY)		NAME TYPE
MOTHER'S TRIBAL AFFILIATION (BAND, TRIBE &/OR RESERVATION NAME)		
MOTHER'S BIRTHPLACE (CITY, STATE &/OR RESERVATION)	MOTHER'S BIRTHDATE	
FATHER'S NAME (INCLUDE ALL NAMES KNOWN BY)		NAME TYPE
FATHER'S TRIBAL AFFILIATION (BAND, TRIBE &/OR RESERVATION NAME)		
FATHER'S BIRTHPLACE (CITY, STATE &/OR RESERVATION)	FATHER'S BIRTHDATE	

THIS IS TO ADVISE YOU THAT THE CHILD NAMED ABOVE HAS BEEN TEMPORARILY PLACED IN THE CUSTODY OF THE COUNTY WELFARE DEPARTMENT OR INDIAN CUSTODIAN(S) NAMED BELOW:

NAME OF COUNTY WELFARE DEPARTMENT WITH CUSTODY

COUNTY OF

NAME OF CHILD'S INDIAN CUSTODIAN(S)

NAME OF CUSTODIAN'S TRIBE

CHILD'S NAME	CHILD I.D. #
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DEPENDENCY HEARING INFORMATION:

DATE OF HEARING	TIME OF HEARING	DATE DEPENDENCY PETITION FILED
JUVENILE COURT HOLDING HEARING		HEARING JUDGE NAME
COURT ADDRESS		
COURT ROOM NUMBER	SUPERIOR COURT DEPARTMENT NUMBER	COURT TELEPHONE NUMBER

¹ 25 United States Code 1901 et. seq., specifically subsections 1911 and 1912.

² This petition was filed under Section 300 of the California Welfare and Institutions Code.

IF YOU HAVE ANY QUESTIONS REGARDING THIS HEARING OR YOUR RIGHTS, CONTACT:

CASEWORKER NAME	TELEPHONE NUMBER
CASEWORKER'S SIGNATURE	DATE
COUNTY WELFARE DEPARTMENT ADDRESS	

Under the Indian Child Welfare Act your rights in this matter are as follows:

1. The natural (biological) parents, the Indian custodians and the child's tribe have the right to intervene in the proceedings
2. If the parent(s) or Indian custodian(s) are unable to afford a lawyer, a lawyer will be appointed to represent them.
3. The parent(s), the Indian custodian(s), and the child's tribe have the right, upon request, to have up to 20 additional days to prepare for the hearing.
4. The location, mailing address and telephone number of the court shall be made known to all parties. (*See the first page of this form.*)
5. The parent(s), the Indian custodian(s) or the child's tribe have the right to petition the court for a transfer of the proceedings to the child's tribal court. They also have the right to refuse to permit the case to be transferred.
6. A statement of the potential legal consequences of the hearing on the future rights of the parent(s) or Indian custodian(s) shall be provided to all those involved.

1 B. Sample Form: Order Granting Intervention

2 (Name of Tribal Representative)

3 (Address of Representative)

4 (Telephone Number of Representative)

5 Representative of Indian Child's Tribe.

6

7

8

IN THE SUPERIOR COURT OF CALIFORNIA

9

COUNTY OF _____

10

In the matter of:

)

No.

11

)

NOTICE OF TRIBAL
INTERVENTION;
ORDER

12

)

13

NOTICE OF INTERVENTION

14

YOU AND EACH OF YOU will please take notice:

15

1. The above-named child(ren) is/are Indian children subject to the Indian Child Welfare Act,
16 25 U.S.C. section 1901 et seq., in that the child(ren) is/are member(s) of the
17 _____ Tribe, or is/are eligible for membership in the _____ Tribe and is/are
the child(ren) of a member of an Indian tribe.

18

2. The _____ Tribe, is a federally recognized Indian Tribe. (See, 65 Fed.
19 Reg. 13298.)

20

3. The Indian Child Welfare Act, 25 U.S.C. section 1911 (c) grants the _____
Tribe, as the children's tribe, the unconditional right to intervene at any point in this proceeding.

21

4. The _____ Indian Tribe does hereby appear in the above-entitled cause
22 and requests that each of the parties to this proceeding and their counsel of record provide the
23 undersigned with copies of all documents hereafter filed with the court in the above proceeding, and
with notice of all further hearings.

24

5. The papers and pleadings are to be sent or delivered to the _____ Indian
25 Tribe at the address listed below.

26

REQUEST FOR CONTINUANCE

27

[] The _____ Indian Tribe requests an additional 20 days to prepare for the

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proceedings as provided for in 25 U.S.C. section 1912, Indian Child Welfare Act, and applicable state laws.

Dated: _____

Tribal Name

Tribal Address Street

City State Zip Code

Telephone Number

IT IS SO ORDERED

Dated: _____

Judge of the Juvenile Court

INDIAN CHILD: STANDARD ORDER FORM

Additional Persons present:

G Indian Custodian _____ **G** Attorney for Tribe _____**G** Others: _____**FINDINGS RE: INDIAN STATUS OF CHILD:**

1. **G** The child is Indian as determined by the _____ Tribe and confirmed in the documents dated _____ and filed on this date.
2. **G** The Indian child is **G** a ward of a tribal court or **G** resides or is domiciled on a reservation on which the tribe exercises exclusive Indian child custody and the child shall be transferred to the jurisdiction of the tribal court at (*reservation name, county, state*): _____
3. **G** The petition of the **G** parent **G** Indian custodian **G** child's tribe for transfer of the proceedings to the jurisdiction of the Tribe is **G** granted, subject to the right of the Tribe to decline transfer; **G** denied based on: **G** the objection of a parent to the transfer **G** the Court's finding of good cause for denial.
4. **G** The court has reason to believe the child is Indian:
 - a. **G** Indicated Tribe(s): _____
 - b. **G** The tribe with the most significant contacts is: _____
 - c. **G** Identity or location of the tribe is unknown.
 - d. **G** Whereabouts of Indian parent or Indian custodian is unknown.
5. **G** The court has reason to believe the child may be of Indian descent, but does not have reason to believe the child is a member or eligible for membership in an Indian tribe.
6. **G** The child is not Indian as confirmed by all tribes identified and by the Bureau of Indian Affairs in documents filed on this date.

FINDINGS AND ORDERS RE NOTICE:

7. **G** Notice of the proceedings and of the right to intervene has been provided by registered/certified mail, return receipt requested, to: (a) **G** mother (b) **G** presumed/legal father (c) **G** alleged/biological father (d) **G** Indian custodian (e) **G** Bureau of Indian Affairs (f) child's tribe(s) directed to: **G** Tribal Chairman or **G** agent designated for service.
8. **G** Return receipts have been filed with the Court at least 10 days prior to this hearing.
9. **G** The Court has reason to believe the child may be an Indian child, the County Welfare Department shall provide notice by registered or certified mail, return receipt requested, of all dependency hearings regarding this child to all tribes listed in section (*select one*) 4 (a) or (b) above or to the Bureau of Indian Affairs if 4 (c) or (d) applies.
-OR-
G The court has reason to believe the child may be of Indian descent, but does not have reason to believe the child is a member or eligible for membership in an Indian tribe. Notice of the proceedings to the Bureau of Indian Affairs and further inquiry regarding the possible Indian status of the child are the only requirements. (California Rules of Court, rule 1439 (e).)

FINDINGS AND ORDERS RE REMOVAL OF THE CHILD FROM PARENT OR INDIAN CUSTODIAN:

10. **G** The Court considered: **G** the social study report **G** documents submitted on behalf of _____.
G the testimony of (name)_____, a qualified expert witness, who is ;
G a tribal member with knowledge of the Indian family organization and child rearing;
G a lay person with substantial experience in services to Indian children and families and extensive knowledge of the social and cultural standards and child rearing practices of Indian tribes;
G a professional with substantial education and experience in the area of the witness' specialty.
11. **G** The **G** mother **G** presumed/legal father **G** alleged/biological father **G** Indian custodian **G** Indian Tribe knowingly, intelligently and voluntarily waived production of evidence to show the likelihood of serious damage to the child if continued in the custody of the parent or Indian custodian.
12. **G** The court finds by clear and convincing evidence that continued custody of the child with the parent or Indian custodian is likely to cause the child to suffer serious emotional or physical damage.
- a. **G** Active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family:
G have been made, but were unsuccessful
G have not been made.
- b. **G** Attempts to utilize the available resources of extended family members, the tribe, Indian social service agencies and individual Indian care givers:
G were included.
G were not included.
- c. **G** The court considered the prevailing social and cultural conditions of the Indian child's tribe.

FINDINGS AND ORDERS RE PLACEMENT OF THE INDIAN CHILD.

13. **G** A diligent search for a suitable Indian home was conducted in the statutory preference order.
14. **G** The child's tribe has, by resolution, established a different preference order for placement, and a diligent search was conducted on the preference order.
15. **G** A suitable Indian home has been identified, and the child shall be placed with (name, relationship to child or Indian status, address): _____
16. **G** The court has modified the preference order for good cause:
17. **G** A record of efforts to comply with the applicable preference order shall be filed with the court and made available on request to the child's tribe or Secretary of the Interior.

FINDINGS AND ORDERS RE TERMINATION OF PARENTAL RIGHTS:

18. **G** The **G** mother **G** presumed /legal father **G** alleged/ biological father **G** Indian custodian has relinquished parental rights or consented to the adoption of the child:
G in writing, and recorded the writing before this court or another judicial officer of competent jurisdiction;
and
G the court explained and was satisfied that the parent or Indian custodian fully understood the terms and consequences of the relinquishment or consent.

19. **G** The court finds:

G Beyond a reasonable doubt that continued custody by the parent or Indian custodian **G** is **G** is not likely to result in serious emotional or physical damage to the child as supported by the testimony of a qualified expert witness as described in section 9 above; and,

G Active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family have been provided as described in section 11 above. -OR-

The **G** mother **G** presumed/legal father **G** alleged/biological father **G** Indian custodian **G** Indian Tribe knowingly, intelligently and voluntarily waived production of evidence to show **G** active efforts to provide remedial services or **G** the likelihood of serious damage to the child if continued in the custody of the parent or Indian custodian.

D. Sample Form: Consent to Placement and Certification

IN THE SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

In The Matter of _____,)
)
) Consent To Foster Care Placement
) And Certification
And Concerning _____,)
Natural Parent.)

Pursuant to the Indian Child Welfare Act of 1978, 25 U.S.C. § 1913, I do hereby consent to the foster care placement of my child, _____, D.O.B.: _____, and request his/her placement with _____ for a foster care placement.

Before this Court I do state:

1. That I am an enrolled member of the _____ Tribe of the State of _____, with an enrollment number of _____.
2. That my child, _____, is a member of or eligible for membership with the _____ Tribe of the State of _____, with an enrollment number of _____.
3. That I desire to place my child in foster care and prefer that he/she be placed with _____, (name), my _____, (relationship if any), pursuant to the placement preferences of the Indian Child Welfare Act of 1978, 25 U.S.C. § 1915 (a) and (c).
4. That I fully understand the consequences of my actions and no threats or promises have been made to me to get me to sign this consent.
5. That I have the right to withdraw my consent to foster care placement at any time and regain the custody of my child, at which time _____ will be returned to my custody.
6. That I do not intend to waive any of my rights under Indian Child Welfare Act by signing this consent.
7. That this consent was not signed prior to, or within ten days after the birth of _____.
8. That I prefer that this consent be signed in closed court because I wish to remain anonymous. I do not wish that my Tribe be notified of this proceeding, although I acknowledge that should the Tribe become aware of this proceeding it may be entitled to participate.
9. I acknowledge that at the time of the execution of this consent I am not domiciled on or residing upon any Indian reservation.

Verification

Executed the _____ day of _____, 200____, in open (closed) court before a judge of the _____ Juvenile Court for the State of _____.

Natural Parent or Indian Custodian

Certification

Pursuant to the Indian Child Welfare Act of 1978, 25 U.S.C. § 1913 (a), I, the Honorable _____, Judge of the _____ Juvenile Court for the State of California, do certify that this consent was executed in writing and recorded before me in open court (or closed court upon the request of the parent), that the terms and consequences were explained in detail to _____, and that the parent fully understood the consequences and understood English or that it was interpreted into a language he/she understood.

Certified this _____ day of _____, 200____.

Judge of the Juvenile Court

E.1. Sample Forms: Adoption - All Purpose Adoption Forms

Petition for Adoption	Adopt-200
Petitioner Consent and Agreement to Adoption	Adopt-210
Order of Adoption	Adopt-215
Attachment To Petition for Adoption	
- Adoption of an Indian Child	Adopt-220
Consent to Termination of Parental Rights and Certification	
-Adoption of an Indian Child	Adopt-225

ATTORNEY OR PARTY WITHOUT ATTORNEY (<i>Name, state bar number, and address</i>): TELEPHONE NO.: _____ FAX NO.: _____ ATTORNEY FOR (<i>Name</i>): _____	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
IN THE MATTER OF THE ADOPTION PETITION OF: <i>(Names of adopting parents or parent)</i>	
PETITION FOR ADOPTION	ADOPTION CASE NUMBER: _____

1. Type of adoption: Stepparent Independent Intercountry
 Agency (*name*): _____
2. Petitioner(s) (*specify name of each petitioner*):
- seek(s) to adopt the following child:
- a. Male Female
- b. Date of birth: _____
- c. Age: _____
- d. Place of birth (*if known*): _____
- e. Dependent child of (*specify county*): _____ ; case no. (*specify*): _____
- I/We have been provided with written information on the Adoption Assistance Program and on the availability of mental health services through the Medi-Cal program or other programs.
3. Petitioner(s) is/are the grandparent aunt uncle first cousin sibling
 other relative (*specify*): _____ of the child.
 A **Kinship Adoption Agreement** (form ADOPT-310) is attached will be submitted
 will not be submitted.
4. Petitioner(s) has/have been named in the will of a deceased mother father as an intended adoptive parent and the child has no other parent.
5. Address of each petitioner (*specify*): _____
6. Child's address (*if different*): _____
7. For independent adoption
- a. A copy of the *Adoptive Placement Agreement* is attached. (*Required in most independent adoptions; see Fam. Code, § 8802.*)
- b. Petitioner(s) will file promptly with the department or delegated county adoption agency information required by the department in the investigation of the proposed adoption.
- c. The consent of the birth mother presumed father is not necessary because (*specify Fam. Code, § 8606 subdivision*): _____
8. a. Parental rights of the birth mother presumed father biological father unknown father
 have been terminated. (*Attach copy of order if available.*)
- b. A petition to terminate the parental rights of the birth mother presumed father biological father
 will be filed.

(Continued on reverse)

IN THE MATTER OF THE ADOPTION PETITION OF <i>(Names of adopting parents or parent):</i>	CASE NUMBER:
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- 9. The birth mother presumed father biological father has relinquished the child to an agency for adoption.
- 10. The birth mother presumed father biological father has consented to the adoption. *(Attach signed consent, if available.)*
- 11. The birth mother presumed father biological father is deceased.
- 12. The child has been determined to be an Indian child, and an *Attachment to Petition for Adoption—Adoption of an Indian Child* (form ADOPT-220) is attached.
- 13. The child is the subject of a guardianship established on *(date):*
in *(specify county):* _____ ; case no. *(specify):* _____
 A copy of the letters of guardianship is attached.
- 14. The child is a proper subject for adoption, the home of each petitioner is suitable for the child, and each petitioner will support and care properly for the child. The welfare of the child will be served and the child's best interest promoted by this adoption, and each petitioner will treat the child in all respects as his or her own lawful child. Each petitioner is at least 10 years older than the child, and each petitioner consents to the adoption of the child by the other.
- 15. The child is 12 years of age or older and consents to the adoption.
- 16. **Petitioner(s) request(s) the court to grant the petition for adoption and to declare that each petitioner and the child shall sustain toward one another the legal relation of parent and child, with all the rights and duties of the relationship, and that the child shall be known as *(state child's full adoptive name):***

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

(TYPE OR PRINT NAME)

▶

(SIGNATURE OF PETITIONER)

Date: _____

(TYPE OR PRINT NAME)

▶

(SIGNATURE OF PETITIONER(S))

Date: _____

(TYPE OR PRINT NAME)

▶

(SIGNATURE OF ATTORNEY FOR PETITIONER(S))

ATTORNEY OR PARTY WITHOUT ATTORNEY <i>(Name, state bar number, and address):</i> TELEPHONE NO.: _____ FAX NO.: _____ ATTORNEY FOR <i>(Name):</i> _____	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
IN THE MATTER OF THE ADOPTION PETITION OF: <i>(Names of adopting parents or parent)</i>	
PETITIONER CONSENT AND AGREEMENT TO ADOPTION (Petitioners and Child 12 or Older)	ADOPTION CASE NUMBER:

1. a. I, the undersigned petitioner, hereby agree with the State of California and with the child named in the adoption petition that the child shall be adopted and treated in all respects as my lawful child and shall enjoy all the rights of a natural child of mine, including the right of inheritance.
- b. I, the undersigned petitioner, also consent to the adoption by the other petitioner. *(Do not check this box if you are the only petitioner.)*

 (TYPE OR PRINT NAME)

 (SIGNATURE OF PETITIONER)

2. a. I, the undersigned petitioner, hereby agree with the State of California and with the child named in the adoption petition that the child shall be adopted and treated in all respects as my lawful child and shall enjoy all the rights of a natural child of mine, including the right of inheritance.
- b. I, the undersigned petitioner, also consent to the adoption by the other petitioner.

 (TYPE OR PRINT NAME)

 (SIGNATURE OF PETITIONER)

3. a. I, the child, am 12 years of age or older, and I consent to the adoption by each petitioner.
- b. I request that my name before this adoption be included on the order of adoption.
- c. I request that I be able to contact my sister(s) or brother(s) after my adoption is finalized.

 (TYPE OR PRINT NAME)

 (SIGNATURE OF CHILD)

Executed on *(date)*:
 In the presence of

 JUDICIAL OFFICER

ATTORNEY OR PARTY WITHOUT ATTORNEY (<i>Name, state bar number, and address</i>): TELEPHONE NO.: _____ FAX NO.: _____ ATTORNEY FOR (<i>Name</i>): _____	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
IN THE MATTER OF THE ADOPTION PETITION OF: <i>(Names of adopting parents or parent)</i>	
ORDER OF ADOPTION	ADOPTION CASE NUMBER: _____

1. a. Date of hearing: _____ Dept.: _____ Div.: _____ Room: _____
 b. Judicial officer: _____
 c. Present: (1) Petitioner(s) (2) Attorney for petitioner(s)
 (3) Child (4) Attorney for child
 (5) Other (*specify*): _____
 d. Date and place of child's birth (*specify*): _____
2. The court has read and considered the assessment and other documents and evidence.
 3. The court has examined each petitioner, and each petitioner has executed an agreement in writing that the child will be treated in all respects as the lawful child of petitioner.
 4. The court has examined the child, who is 12 years of age or older, and the child has consented to the adoption, and requested that his or her name before the adoption (*specify name*): _____ appear here.

THE COURT FINDS AND ORDERS THAT

5. The child is a proper subject for adoption, the home of petitioner is suitable for the child, and the interests of the child will be promoted by this adoption.
 6. The petition for adoption is granted.
 7. **The child is now the lawful child of petitioner, and petitioner shall sustain toward the child and the child toward petitioner the legal relation of parent and child.**
 8. The name of the child shall be (*specify*): _____
 9. The child is an Indian child.
 a. The clerk shall transmit a copy of this order, the adoption petition, and the *Attachment to Petition for Adoption—Adoption of an Indian Child* (form ADOPT-220) to the Bureau of Indian Affairs.
 b. The court finds
 (1) the adoptive placement meets the placement preference requirements of the Indian Child Welfare Act, **or**
 (2) good cause exists for modifying the preference order.
 10. The *Kinship Adoption Agreement* is approved as submitted as amended.
 11. The child shall be permitted to contact his or her birth siblings.
 12. Name of parent retaining parental rights (*i.e., stepparent and unmarried couple adoptions*): _____

Date: _____

 JUDICIAL OFFICER

(Certificate of mailing on reverse)

IN THE MATTER OF THE ADOPTION PETITION OF <i>(Names of adopting parents or parent):</i> _____	CASE NUMBER:
--	--------------

NOTE: If the child is an Indian child, the Clerk's Certificate of Mailing below must be completed.

CLERK'S CERTIFICATE OF MAILING

I certify that I am not a party to this cause and that an endorsed copy of the foregoing order, the adoption petition, and the *Attachment to Petition for Adoption—Adoption of an Indian Child* (form ADOPT-220) were mailed as follows:

The copies were enclosed in an envelope with postage fully prepaid. The envelope was sealed, marked "Confidential," and addressed to: **Chief, Division of Social Services, Bureau of Indian Affairs, 1849 C Street, N.W., Mail Stop 310-SIB, Washington, DC 20240** and deposited with the United States Postal Service at *(place)*:
on *(date)*:

Date: _____ Clerk, by _____, Deputy

CASE NAME: 	CASE NUMBER:
--------------------	----------------------

**ATTACHMENT TO PETITION FOR ADOPTION—
ADOPTION OF AN INDIAN CHILD**

Section 1951 of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq. and 25 C.F.R. § 23.71) requires that any state court entering a final decree or adoptive order for any Indian child shall within 30 days provide the Secretary of the Interior a copy of the decree or order, together with any information necessary to show the following:

1. Indian child's name:

2. Indian child's birth date:

3. Indian child's tribal affiliation:
and enrollment number (*if known*):

4. Names and addresses of the biological parents:

5. If known, names of Indian grandparents:

6. Names and addresses of the adoptive parents:

7. Identity of any agency having relevant information relating to the adoptive placement:

8. Others, including persons through which eligibility for the California Roll is traceable (*specify name and relationship to child*):

9. The biological parents have by affidavit requested that their identity remain confidential. A copy of each affidavit is attached.

10. Termination or Voluntary Relinquishment of Parental Rights (*must complete a. or b., below*):
 - a. Parental rights have been terminated on (*specify date*):
 - b. Parental rights have not been terminated; a *Voluntary Consent and Certification for Adoption of an Indian Child* (form ADOPT-225)
 - was filed on (*specify date*):
 - is attached to the *Petition for Adoption*.

NOTE: Pursuant to 25 U.S.C. § 1913, any consent by the Indian parent shall not be valid unless executed in writing and recorded before a judge and accompanied by the judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent.

ATTORNEY OR PARTY WITHOUT ATTORNEY <i>(Name, state bar number, and address):</i> TELEPHONE NO.: _____ FAX NO.: _____ ATTORNEY FOR <i>(Name):</i> _____	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CHILD'S NAME:	
CONSENT TO TERMINATION OF PARENTAL RIGHTS AND CERTIFICATION—ADOPTION OF AN INDIAN CHILD	ADOPTION CASE NUMBER:

Pursuant to the Indian Child Welfare Act of 1978 (25 U.S.C. § 1913), I do hereby consent to the termination of parental rights for my child *(name)*: _____ born on *(date)*: _____ and request his/her placement for adoption with *(specify name(s))*: _____

BEFORE THIS COURT I DO STATE THE FOLLOWING:

1. I am a member of the *(specify)*: _____ Tribe of the state of *(specify)*: _____
 Enrollment number *(specify, if available)*: _____
2. My child *(name)*: _____ is a member of or is eligible for membership with the *(specify)*: _____
 Tribe of the state of *(specify)*: _____
 Enrollment number *(specify, if available)*: _____
3. I desire to terminate my parental rights to said child or consent to adoption and prefer that, pursuant to the placement preferences of the Indian Child Welfare Act of 1978 (25 U.S.C. § 1915), he/she be placed with *(name)*: _____
 who is my *(specify relationship, if any)*: _____
4. I fully understand the consequences of my actions, and no threats or promises have been made to me to get me to sign this consent.
5. I understand that at any time before the entry of an order terminating parental rights or an order of adoption, I have the right to withdraw my consent and my child will be returned to me.
6. I wish to be notified if the final decree of adoption is set aside or vacated, so that I may exercise my right to petition the court for a return of custody and custody shall be returned if the court finds that it is in the child's best interest to be returned to me.
7. I do not intend to waive any of my rights under the Indian Child Welfare Act by signing this consent.
8. This consent was not signed prior to or within 10 days after the birth of my child *(name)*: _____
9. a. I understand that it is not required that the tribe be notified of this proceeding.
 b. I wish that the tribe be notified of this proceeding.
 c. I wish that the tribe not be notified of this proceeding.
 d. I acknowledge that should the tribe become aware of this proceeding it may be entitled to participate.
10. I acknowledge that at the time of the execution of this consent, I am not domiciled on or residing upon any Indian reservation.

Date: _____

_____ (TYPE OR PRINT NAME)	_____ (SIGNATURE)
-------------------------------	----------------------

CERTIFICATION

Pursuant to the Indian Child Welfare Act of 1978 (25 U.S.C. § 1913(a)), I, the Honorable *(name)*: _____, Judge of the *(specify county)*: _____ Superior or Consolidated Court for the State of California, do hereby certify that this consent was executed in writing and recorded before me in open court (or closed court upon request of the parent), that the terms and consequences were explained in detail to *(name of parent)*: _____, that the parent fully understood the consequences, and that the parent understood English or that the proceedings were interpreted into a language that he/she understood.

Certified this *(date)*: _____ day of *(month)*: _____, *(year)*: _____

 JUDGE

Sample form: E. 2. Record of ICWA Placement

Unit No. _____

SUPERIOR COURT OF
COUNTY OF _____

RECORD OF ICWA PLACEMENT

JUVENILE COURT

In the Matter of

Action No. _____ PFN No. _____

Date of Hearing _____ Department _____

Hearing: Adoptive _____ Foster Care / Pre-adoptive _____

Judge / Temporary Judge _____

Referee / Commissioner _____

Deputy Clerk _____

Reporter _____ Waived

Court Officer _____ Bailiff _____

Present:

Tribe

Indian Custodian

Tribal Representative

Others

GOOD CAUSE APPEARING, THE COURT HEREBY MAKES THE FOLLOWING FINDINGS AND ORDERS:

For purposes of foster care, pre-adoptive or adoptive placement, good cause does not exist to allow non compliance with the order of preference established by the ICWA.

For purposes of foster care, pre-adoptive or adoptive placement, good cause does exist to allow non compliance with the order of preference established by the ICWA.

The biological Indian parent(s) requests that the court not follow the preference.

The minor Indian child of sufficient age requests that the court not follow the preference.

Extraordinary physical or emotional needs of the Indian child were established by testimony of a qualified expert witness:

Contact with local and nationally known Indian programs with available placement resources:

Other contacts or efforts:

Other good cause grounds:

THE COURT ORDERS:

The Indian child is to be placed, in accordance with the preference guidelines of the Act, with:

The Indian child is to be placed, not in accordance with the preference guidelines of the Act,
with:

DATE: _____

CLERK

REFEREE / COMMISSIONER OF THE JUVENILE COURT

JUDGE / PRO TEM JUDGE OF THE JUVENILE COURT

**DESIGNATION OF INDIAN CUSTODIAN
(25 U.S.C. 1901 et seq.)**

I, _____, am the parent of

(Name of Parent)

_____,

(Names of Children)

_____ ,

(Dates of Birth)

who is/are a member of, or eligible for membership in, the following federally-recognized Indian tribe: _____ .

(Name of Tribe)

I hereby transfer the care and custody of my child(ren) to _____
(Name of Indian Custodian)

_____, and, pursuant to the Indian Child Welfare Act, 25 U.S.C. 1901 et seq. ("ICWA"), designate him/her as my child(ren)'s Indian custodian.

I understand that the designated Indian custodian is an Indian person and that, based upon the Indian community standards of my child(ren)'s tribe and other applicable standards, he/she has the ability to provide my child(ren) with the physical and emotional care necessary for my child(ren)'s proper upbringing.

I do hereby authorize the designated Indian custodian to consent to any medical treatment and hospital care of my child(ren) which is deemed advisable. It is understood that this authorization is given in advance of any specific diagnosis, treatment, or hospital care being required, but it is given to provide authority and power on the part of the designated Indian custodian to give specific consent to medical care and treatment.

This placement is revocable pursuant to the terms of the ICWA. By making this placement, I do not waive my rights under the ICWA to notice in any future state court proceeding involving the custody of my child(ren).

(Signature of Parent)

(Date)

I accept this designation as the Indian custodian of the child(ren) named above.

(Signature of Indian Custodian)

(Date)

h. Termination of Parental Rights.

The right to require proof beyond a reasonable doubt, including the testimony of qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

“

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF PARENT, INDIAN CUSTODIAN,
OR TRIBAL REPRESENTATIVE)

Certification

Pursuant to the California Rules of Court, rules 1439(i)(4) and 1439(j)(2), the Honorable _____, _____ of the _____ Juvenile Court for the State of _____, does certify that this waiver was knowingly and voluntarily executed in writing and recorded before me in court, that the terms and consequences were explained in detail to _____, and that the party fully understood the consequences, and that party understood English or that it was interpreted into a language he/she understood.

Certified this _____ day of _____, 20__.

Judge of the Juvenile Court

L JUDICIAL TIP: *At least one California case has found that a parent may waive the right to receive services. The Rules of Court allow a knowing and intelligent waiver. A waiver of ICWA rights executed by one party does not waive the rights of other parties or potential parties to the proceeding. For the rights granted under ICWA to be waived entirely, the parents, the Indian custodian (if any), and the tribe must sign a waiver, or the required evidentiary showing should be made. The court should exercise caution with waivers. If a tribe has not received proper notice or intervened as a party, the tribe cannot join in a waiver. Since the tribe has an independent interest in securing compliance with the requirements of the ICWA and may intervene at any point in a proceeding, a Tribe may intervene late in a proceeding and petition to invalidate when the Act has not been fully complied with.*

H. Sample Form: Tribal Resolution- Tribal Placement Preferences

[TRIBAL RESOLUTION]

[Resolution No. _____]

[Date Approved: _____]

SUBJECT: PLACEMENT OF [child's name] _____,
COUNTY JUVENILE COURT, CASE NO. _____.

WHEREAS, the _____ TRIBE is a federally recognized Indian tribe eligible for the services provided to Indians by the Secretary of the Interior because of the Tribe's status; and,

WHEREAS, the minor child [child's name] _____ is a member or eligible for membership in the _____ TRIBE and is the natural child of a member of the said TRIBE; and,

WHEREAS, the Indian Child Welfare Act imposes specific and stringent minimum federal standards applicable to state court child custody proceedings; and

WHEREAS, when an Indian child must be removed from his or her home, the Act imposes placement preferences that must be complied with; and

WHEREAS, the Indian Child Welfare Act authorizes the Tribe to alter placement preferences mandated by the Act and to designate and approve certain placements; and

WHEREAS, the Tribe pursuant to the Indian Child Welfare Act, section 1915, subdivision (c), desires, by resolution, to establish the placement preference for [name of child] _____, and

THEREFORE BE IT RESOLVED that under the authority of the Indian Child Welfare Act, section 1915, subdivision (c), the _____ TRIBE hereby establishes that the first order of placement preference of [name of child] _____ should be with _____, and

BE IT FURTHER RESOLVED that the _____ TRIBE hereby approved the home of _____ and designates the home as a placement that meets the Tribe's prevailing social and cultural standards and protects the best interests of this Indian child.

C-E-R-T-I-F-I-C-A-T-I-O-N

This is to certify that Resolution # _____ was approved at a regularly scheduled meeting of the _____ Tribal Council on _____, 20____, at which a quorum was present and that this Resolution was adopted by a vote of _____ For, _____ Opposed, _____ Abstentions. This Resolution has not been rescinded or amended in any way.

DATED THIS ____ DAY OF _____, 20____.

Chairperson
_____ Tribal Council

Attest: _____
Recording Secretary
_____ Tribal Council

I. Sample Forms: Designation of Tribal Representative
1. **Intervention Authorization and Designation of Tribal Representative**

**RESOLUTION OF THE
_____ TRIBAL COUNCIL**

RESOLUTION NO:

DATE APPROVED:

SUBJECT: IN THE MATTER OF _____,
_____ COUNTY JUVENILE COURT NO. _____
INTERVENTION AUTHORIZATION

WHEREAS: the _____ Tribe is a federally recognized Indian tribe eligible for all rights and privileges afforded to recognized Tribes; and,

WHEREAS: the _____ Tribal Council is the governing body of the _____ Tribe under the Authority of the Constitution of the _____ Tribe; and,

WHEREAS: the minor child _____, date of birth _____, is an enrolled member of the _____ Tribe or eligible for membership and the natural child of _____, who is an enrolled member of the _____ Tribe; and,

WHEREAS: the _____ Tribe has determined it is necessary and appropriate to intervene in the child custody case involving _____, pursuant to the authority of 25 U.S.C. section 1911, subdivision (c); and,

WHEREAS: pursuant to applicable tribal, federal and state law an Indian Tribe may appear on its own behalf to protect its compelling interest in state court Indian child custody proceedings.¹

NOW THEREFORE BE IT RESOLVED: that the _____ Tribe hereby authorizes intervention as a party in the following state child custody proceeding:

IN THE MATTER OF _____, A MINOR
_____ County Juvenile Court No. _____.

BE IT FURTHER RESOLVED: that the Tribal Chairperson of the _____ Tribe, or, as his/her designee, the Coordinator of the Tribal Indian Child Welfare Program, _____, is hereby delegated authority to appear as and on behalf of the _____ Tribe to fully participate as a party to the above referenced proceeding.

¹See, Cal. Rules of Court, rule 1410 (b) (7) [Representative of the Indian child's tribe entitled to be present at juvenile court proceedings.]; State Ex Rel. Juvenile Dept. of Lane County v. Shuey (Ore. 1993) 850 P.2d 378. [State statutes requiring groups to be represented by attorney preempted when applied to Indian tribe's attempt to intervene under ICWA.]

C-E-R-T-I-F-I-C-A-T-I-O-N

This is to certify that Resolution #_____ was approved at a regularly scheduled meeting of the _____ Tribal Council on _____, 20____, at which a quorum was present and that this Resolution was adopted by a vote of ____ For, ____ Opposed, ____ Abstentions. This Resolution has not been rescinded or amended in any way.

DATED THIS ____ DAY OF _____, 20____,

Chairperson
_____ Tribal Council

Attest: _____
Recording Secretary
_____ Tribal Council

Tribe's representative designated herein, notice of all proceedings should continue to be directed to the Tribe's elected tribal official as follows:

Chairperson: _____

Address: _____

The Tribe expressly requests that it receive notice of all hearings in this matter.

Dated: _____

By _____

INDIAN TRIBE

IT IS SO ORDERED.

Dated: _____

Judge of the Juvenile Court

EXHIBIT A

**RESOLUTION OF THE
_____ TRIBAL COUNCIL**

RESOLUTION NO:
DATE APPROVED:

SUBJECT: IN THE MATTER OF _____,
_____ COUNTY JUVENILE COURT NO. _____
TRIBAL REPRESENTATIVE DESIGNATION

WHEREAS: the _____ Tribe is a federally recognized Indian tribe eligible for all rights and privileges afforded to recognized Tribes; and,

WHEREAS: the _____ Tribal Council is the governing body of the _____ Tribe under the Authority of the Constitution of the _____ Tribe; and,

WHEREAS: the minor child _____, date of birth _____, is a member of the _____ Tribe or eligible for membership and the natural child of _____, who is a member of the _____ Tribe; and,

WHEREAS: _____ is an Indian child subject to the provisions of the Indian Child Welfare Act, 25 U.S.C. Section 1901 *et seq.* the _____ Tribe has determined there is an Indian child custody proceeding involving the said minor child and that the Tribe has a right to have a representative of the Tribe present at that hearing even in situations where the Tribe does not formally intervene as a party (see, 25 U.S.C. section 1911, subdivision (c), California Rules of Court, rule 1410(b).); and,

WHEREAS: the Indian Child Welfare Act imposes specific and stringent minimum federal standards applicable to state court child custody proceedings and in situations where the court adheres to the law, the Tribe has determined that there is not a need for it to exercise its right under Section 1911(c) to intervene as a party in the proceeding; and,

WHEREAS: in all cases involving _____ children the Tribe is interested in monitoring the proceeding, providing input and cooperating with the court and social service agencies to work for a resolution which is in the best interest of the Indian child.

NOW THEREFORE BE IT RESOLVED: that pursuant to California Rules of Court, rule 1412(i)(2), the _____ Tribe hereby authorizes _____, Coordinator of the Tribe's Indian Child Welfare Program, to serve as the tribe's representative for the following purposes:

1. To be present at the hearing(s);
2. To address the court;
3. To receive notice of hearings;
4. To examine all court documents relating to the dependency case; and,
5. To submit written reports and recommendations to the court.

BE IT FURTHER RESOLVED: that as the Tribe has not formally intervened as a party, in addition to notice provided to _____, notice of all proceedings should continue to be directed to the Tribe's elected tribal official, Chairperson _____. Any and all official correspondence to the _____ Tribe in this case, including legally sufficient notice, must be so directed. The Tribe expressly requests that it receive notice of all hearings, including future hearings, in the event there is a need for the Tribe to re-evaluate its position regarding this proceeding.

C-E-R-T-I-F-I-C-A-T-I-O-N

This is to certify that Resolution #_____ was approved at a regularly scheduled meeting of the _____ Tribal Council on _____, 20____, at which a quorum was present and that this Resolution was adopted by a vote of ____ For, ____ Opposed, ____ Abstentions. This Resolution has not been rescinded or amended in any way.

DATED THIS ____ DAY OF _____, 20____,

Chairperson
_____ Tribal Council

Attest: _____
Recording Secretary
_____ Tribal Council

J. Sample Form: Transfer Order

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address): ATTORNEY FOR (Name):	TELEPHONE NO:	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:		
CHILD'S NAME:		HEARING DATE AND TIME:
ORDER - TRANSFER TO TRIBAL COURT		CASE NUMBER:

Child's name:	
Date of birth:	Age:
Mother's name (if known):	
Father's name (if known):	

1. a. Date of hearing: _____ Dept: _____ Room _____
 b. Judicial officer: _____
 c. Parties and attorneys present: _____

THE COURT FINDS AND ORDERS THAT:

2. " Notice has been given as required by law.
3. " The minor child involved in this proceeding is an "Indian child" as defined by the Indian Child Welfare Act of 1978, 25 U.S.C. §1903 (4), in that the child is under eighteen years of age, and the child is a member of the _____ Tribe or eligible for membership in the _____ Tribe and the child of _____ who is a member of the _____ Tribe.
4. " The _____ Tribe is an "Indian tribe" as defined by the Indian Child Welfare Act of 1978, 25 U.S.C. §1903 (8), and this fact is entitled to judicial notice by virtue of publication in the Federal Register, 65 Fed. Reg. 13298 (March 13, 2000).
5. " The _____ Tribe is the "Indian child's Tribe" as defined by the Indian Child Welfare Act of 1978, 25 U.S.C. §1903 (5), in that the child is a member of or eligible for membership in the said Tribe and has the most significant contact with the said Tribe.
6. " This is a child custody proceeding as defined by the Indian Child Welfare Act of 1978, 25 U.S.C. §1903 (1).
7. " The Indian child is " a ward of a tribal court or " resides or is domiciled on a reservation on which the Tribe exercises exclusive Indian child custody and the child must be transferred to the jurisdiction of the Tribal Court.
- or-**
- " The " parent " Indian custodian " child's Tribe petitioned for transfer of the proceedings to the jurisdiction of the Tribe and good cause does not exist to deny transfer of this proceeding.
8. " This case is ordered transferred to the jurisdiction of the _____ Tribal Court, the Court with exclusive jurisdiction over the child pursuant to 25 U.S.C. §1911 (a), at (*reservation name, county, state*): _____.
- or-**
- " Subject to declination by the Tribal Court, the petition for transfer is granted and this case is ordered transferred to the jurisdiction of the _____ Tribal Court at (*reservation name, county, state*): _____.

CHILD'S NAME:	Case Number:
---------------	--------------

- 9. " The clerk is directed to send by certified mail, return receipt requested an endorsed filed copy of this order to the designated Tribal Court with:
 - " notice that the case shall be transferred as required by the Indian Child Welfare Act of 1978, 25 U.S.C. §1911 (a), §1922.
 - or-**
 - " notice that a petition for transfer has been granted. Upon receipt of a tribal order accepting transfer of the case and assuming jurisdiction over the child, the state case shall be dismissed and, at the Tribe's request, the Superior Court's file (or a copy thereof) shall be forwarded to the Tribal Court. Failure to submit a tribal order within 30 days shall be deemed a declination of jurisdiction.
- 10. " This matter is calendared for _____, 20____, to review the status of the transfer and either confirm the transfer and dismiss the proceeding or to resume the proceeding in accordance with California law.
- 11. " Other:

Date:

JUDICIAL OFFICER

CLERK'S CERTIFICATE OF MAILING

I certify that I am not a party to this cause and that an endorsed filed copy of the foregoing order and notice as set forth below, was mailed by certified mail, return receipt requested, to the _____ Tribal Court at the following address:

NOTICE TO TRIBAL COURT

- " **The Superior Court of _____ County, California, Juvenile Division, has determined that the minor child, _____, is properly subject to the exclusive jurisdiction of your Court. Accordingly, as required by the Indian Child Welfare Act of 1978, 25 U.S.C. §1911 (a), §1922, the case shall be transferred to tribal court. Please take note that within 30 days, the file shall be forwarded to your court and the state proceeding dismissed.**
- or-**
- " **The Superior Court of _____ County, California, Juvenile Division, has granted a petition to transfer the Indian child custody proceeding involving the minor child, _____, to your Court. Upon receipt of a tribal order accepting transfer of the case and assuming jurisdiction over the child, the state case shall be dismissed and, at the Tribe's request, the Superior Court's file (or a copy thereof) shall be forwarded to the Tribal Court. Failure to submit a tribal order within 30 days shall be deemed a declination of jurisdiction.**

Date:

CLERK

K. Sample Form: Tribal Participation in State Indian Child Custody Proceedings

Questionnaire - Tribal Participation in State Proceedings

This Questionnaire is provided to assist the Court and parties in clarifying the role of Indian or tribal persons present in court in connection with an Indian child custody proceeding. Clarification is necessary because:

- Juvenile cases are confidential proceedings, not generally open to the public.
 - Tribal representatives may participate in state cases in several different capacities or roles.
 - The capacity or role of an Indian or tribal person present in court may impact that person's rights and responsibilities in the proceeding.
 - To protect the interests of all parties to the case, including the child's tribe, it is important that the role of any Indian or tribal person present in court be clear.
-

Please provide the information requested below and check all boxes that apply to you.

Child's name: _____ Court Case No. _____

Your name: _____ Agency or Tribe: _____
Your phone: _____ Phone: _____
Your address: _____ Address: _____
Your Title: _____

Why are you present in court? (Check all that apply.)

- " I am a parent or Indian custodian of this child.
- " I am a potential witness in this case.
- " I am a friend or relative of the child or another party to the case.
- " I am an employee of an " Indian " non-Indian agency that provides support or services to Indian children or families.
- " I am an employee or official of the child's tribe.
- " By " tribal resolution " letter " other writing, the _____ Tribe, the child's tribe, has delegated to me authority to represent the tribe's interests in this case as follows:
 - " Intervene on the tribe's behalf as a party.

[NOTE: Intervention as a party means the tribal representative has the right to fully participate in the case, with or without an attorney retained by the Tribe. As a party, the tribal representative is responsible for fully participating to advance and protect the tribe's rights. Failure to do so may compromise tribal rights.]

- " No formal intervention/Non party participation (California Rules of Court, rule 1412.)

[NOTE: Tribes have the option of seeking the court's authorization for a tribal representative to participate in the case without formally intervening as a party. (Similar to the role of a CASA volunteer.) This accommodates the practice of many tribes of relying on service providers or lay-advocates to monitor cases and work with the court to best meet the child's needs as an Indian child. Under this option, the representative has only the authority granted by the court.]

- " Authorizing resolution or letter or other writing from child's tribe designating official capacity and role of tribal representative(s) attached.

APPENDICES

LAW OFFICES OF
CALIFORNIA INDIAN LEGAL SERVICES

787 North Main St., Suite D
Bishop, CA 93514
(760) 873-3581

609 S. Escondido Blvd.
Escondido, CA 92025
(760) 746-8941

324 F Street, Suite A
Eureka, CA 95501
(707) 443-8397

510 16th St., Fourth Floor
Oakland, CA 94612
(510) 835-0284

INDIAN CHILD WELFARE ACT OUTLINE
MINIMUM FEDERAL STANDARDS
STATE COURT PROCEEDINGS
April 2002

A. Initial Determinations

1. Is the child an Indian? 25 U.S.C. §1903(4)¹
 - a. The child must be unmarried and under 18.
 - b. The child must be 1) a member of an Indian tribe or 2) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe. [Enrollment not necessarily required for membership. *In re Junious M.* (1983) 144 Cal.App.3d 786,796.]
 - c. The juvenile court and county welfare department have an affirmative duty to inquire whether a child is or may be an Indian child. (Cal. Rules of Court, rule 1439(d) [The California Rules of Court have the force of law. *In re Richard S.* 54 Cal.3d 857,863.]; Manual of Policies and Procedures, California Department of Social Services, §31-515.1.11.111.)) The determination of whether a child is Indian is not a racial one, but rather a question of political status. (*Morton v. Mancari* (1974) 417 U.S. 535.) Tribal membership is an exclusively tribal question. (*Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49.) A tribe's determination that a child is an Indian child is conclusive. (*In re Junious M.*, *supra*, 144 Cal.App.3d at p. 788; Guidelines for State Courts: Indian Child Custody Proceedings (44 Fed.Reg. 67584, 67586 (Nov. 26, 1979.))
 - d. One of the primary purposes of giving notice to the tribe is to enable the tribe to determine whether the child is an Indian child. Where the agency failed to provide notice, the fact the child is not enrolled until late in a proceeding, does not preclude application of the Act to the entire proceeding. Further, a letter from a former chairman, not accompanied by a tribal resolution and predating the birth of the child does not satisfy the affirmative duty to inquire regarding a particular child, nor does it constitute tribal participation or an express indication of no tribal

1§1903 (3) & (4) define the terms "Indian" and "Indian child", respectively. However, it should be noted that §1934 contains a second and broader definition of Indian which is applicable to §1932 & §1933 of the Act. Finally, §1912(a) creates what is essentially a third definition. One need only have "reason to know" an Indian child is involved to activate the notice requirements of §1912 (a). California Rules of Court, rule 1439(e) further specifies that the Act shall be applied to the entire proceeding if the court has reason to know the child may be an Indian child, however, only notice and further inquiry is required where the child may only possess Indian ancestry.

interest in the proceeding. (*In re Desiree F.* (2000) 83 Cal.App.4th 460; 99 Cal.Rptr.2d 688.) But see, *In re William G.* (2001) 89 Cal.App.4th 423, 107 Cal.Rptr.2d 436. [Failure to apply the Act in the absence of reason to know the child is Indian is not a violation of the Act where the court proceeds to apply the Act to the proceeding once Indian heritage is known.]

- e. Even if the tribe does not respond to notice, California Rules of Court, rule 439(c)(3) and (e) specify that the Act shall be applied to the entire proceeding if the court has reason to know the child may be an Indian child, however, only notice and further inquiry is required where the child may only possess Indian ancestry. (Cal. Rules of Court, rule 1439(e).)
- f. The Bureau of Indian Affairs (BIA) of the Department of the Interior has promulgated federal guidelines for state court ICWA proceedings. (44 Fed.Reg. 67584 - 67595 (Nov. 26, 1979.)) These are entitled to judicial deference. (*In re Junious M.*, *supra*, 144 Cal. App.3d at p. 792, fn. 7; *In re Kahlen W.* (1991) 23 Cal.App.3d 1414, 1422, fn. 3.) Absent a contrary determination by the tribe, a determination by the BIA that a child is or is not an Indian is conclusive. (BIA Guidelines, *supra*, 44 Fed. at p. 67586; Cal. Rules of Court, rule 1439(e) and 1439(g)(4).) In the absence of a tribal or BIA determination, it is up to the juvenile court, not DSS or its social workers, to determine whether the Act applies under a given set of circumstances. (*In re Marinna J.* (2001) 90 Cal.App.4th 731.)
- g. The tribe must be a federally recognized Indian tribe, group or community. [Eligible for federal services provided to Indians]. (25 U.S.C. §1903(8).) *See* 65 Fed.Reg. 13298 (Mar. 13, 2000)]; *In re Wanomi P.* (1989) 216 Cal.App.3d 156; *In re John V.* (1992) 5 Cal.App.4th 1201.)

2. Is this child custody proceeding covered by the ICWA? 25 U.S.C. §1903(1)

- a. The Act covers:
 - 1.) Foster care placements, which is defined in the ICWA to mean any temporary placement where the child need not be returned upon demand, and includes placement in a foster home or institution or the home of a guardian or conservator. All California guardianship proceedings meet this definition and are covered by the Act. (E.g., Welf. & Inst. §§300 *et seq.*, §601, §636 [re: “602 placements”], §727 and §728; Prob. §1500 *et seq.*, §2112.)
 - 2.) Termination of parental rights. (E.g., Fam.C. §7802 *et seq.*; Fam.C. §§7660-7664, §8605; Welf. & Inst. §366.26, §727.31, §727.4.)
 - 3.) Pre-adoptive placement in a home or institution after termination of parental rights but before or in lieu of adoptive placement.
 - 4.) Adoptive placement. (Fam. C. §§8500 *et seq.*; Welf & Inst. §366.26, §727.31.)
- b. ICWA coverage exceptions:

- 1.) The ICWA does not cover an award of custody to one parent as part of a divorce proceeding. (25 U.S.C. §1903(1).) However, action by one parent to terminate parental rights of other parent is covered by the Act. (*In re Crystal K.* (1990) 226 Cal.App.3d 655 (review denied Mar. 14, 1991); *In re Adoption of Lindsay C.* (1991) 229 Cal.App.3d 404.) Custody dispute between unmarried parents may be covered. (*Appeal of William Stanek*, 8 Indian L.Rep.5021 (April 1981)(decision of the Commissioner of Indian Affairs.))

- 2.) A placement based on an act which would be a crime if committed by an adult.
 - i.) Juvenile delinquency matters are not generally covered. (i.e., Welf. & Inst. §§602 *et. seq.*) Status offenses, such as truancy are covered. (i.e., Welf. & Inst. §§601 *et. seq.*)
 - a.) California Rules of Court, rule 1410(b), entitles parents, Indian custodians, the child’s tribe (and counsel) to be present in all juvenile proceedings, including §602 proceedings.
 - ii.) §602 proceedings are covered in certain circumstances:
 - a.) When a *placement* in a §602 case is made for the child’s welfare after reasonable efforts have been made to prevent the need for removal of the child from his or her home, as required to qualify for federal IV-E funds, i.e, federal welfare aid to fund the cost of the child’s placement. Such placements would include those made to relatives, foster care or licensed group homes and treatment facilities. (Welf. & Inst. §§636, 727 *et seq.*)
 - b.) When the juvenile court grants, or modifies a guardianship pursuant to Welf. & Inst.Code §728, or pursues termination of parental rights pursuant to Welf. & Inst. Code §727.31.

- c. Existing Indian family exception. A split in authority developed regarding the judicially created “existing Indian family doctrine.”
 - 1.) The judicial split. Other than as expressly excepted, intra-family, private child custody actions and actions involving children who may not be part of an existing Indian family are covered. (*See In re Junious M.*, supra; 144 Cal.App.3d 786; *In re Crystal K.*, supra, 226 Cal.App.3d 655; *Adoption of Lindsay C.*, supra, 229 Cal.App.3d 404; *In re Alicia S.* (1998) 65 Cal.App.4th 79, 76 Cal.Rptr.2d 121; Cal.Rules of Court, rule 1439.) -Vrs- Under the existing Indian family doctrine, three California courts refused to apply the ICWA unless the Indian child or at least one parent has a significant social, cultural or political relationship with Indian life. This is a factual determination for the trial court. (*In re Alexandria Y.* (1996) 45 Cal.App.4th 1483, 53 Cal.Rptr.2d 679; *In re Bridget R.* (1996) 41 Cal.App.4th 1483, 49 Cal.Rptr.2d 507; *In re Crystal R.* (1997) 59 Cal.App.4th 703., 69 Cal.Rptr.2d 414.; *In re Derek W.* (1999) 86 Cal. Rptr.2d 742; *In re Santos Y.* (2001) 92 Cal.App.4th 1274.)

- 2.) Legislative action. **The California legislature rejected the existing Indian family doctrine in AB 65.** The bill, effective September 1, 1999, and codified at Fam. Code §7810 and Welf. & Inst. Code §§305.5 and 360.6, directs the courts to strive to promote the stability and security of Indian tribes and families and to comply with ICWA in all Indian child custody proceedings, as specified, and requires that the Act be applied if the tribe determines that an unmarried person, who is under the age of 18 years, is a member of the tribe or is eligible for membership and is a biological child of a member of a tribe.

Judicial Reaction: In *In re Santos Y.*, filed October 19, 2001, the Second Appellate District rejected §360.6 as a dispositive rejection of the existing Indian Family Doctrine, at least as applied to the particular facts of that case. To the extent *Santos Y* is not read narrowly, it resurrects the pre-existing split among the districts.

3. Is state jurisdiction proper in this case?

- a. If the child resides or is domiciled on an Indian reservation, the tribe has exclusive jurisdiction over the proceeding. (25 U.S.C. §1911(a).) In all other cases, jurisdiction is concurrent, but presumptively tribal. (*Mississippi Choctaw Indian Band v. Holyfield* (1989) 490 U.S. 30, 104 L.Ed.2d 29, 38-39. [Federal common law definition of “domicile.”])
- 1.) The tribe must have exclusive jurisdiction, so P.L. 280 tribes, such as California tribes, may not be covered by §1911(a). P.L. 280 tribes may reassume exclusive or referral jurisdiction under the Act. [P.L.280 is codified at 28 U.S.C. §1360.] California law imposes time frames on transfer to a tribe what has reassumed exclusive jurisdiction. (Welf. & Inst. Code §305.5.)
- 2.) P.L. 280 tribes, such as tribes in California, possess concurrent civil jurisdiction with the state. (*Native Village of Venetie I.R.A Council v. State of Alaska* (9th Cir. 1991) 944 F.2d 548; *In re Laura F.* (2000) 83 Cal.App.4th 583; 99 Cal.Rptr.2d 859.)
- 3.) A state court shall exercise temporary jurisdiction over a child who resides or is domiciled on a reservation, but is temporarily off the reservation, if there is an immediate threat of serious physical damage or harm to the child. Such removal must terminate when the danger passes, the child must be returned to the reservation, or an ICWA proceeding must be completed within 90 days. 25 U.S.C. §1922, 44 Fed.Reg. 67589-90 (B.7).
- b. If the child is not domiciled or residing on a reservation, the state court shall transfer jurisdiction to the tribal court in the absence of good cause to the contrary. (25 U.S.C. §1911(b); Cal.Rules of Court, rule 1439(c).) See, *In re Robert T.* (1988) 200 Cal. App. 3d. 657 [confine reading to timeliness of requests and forum non conveniens holdings, i.e., which forum provides the better opportunity to produce valuable evidence.]

- 1.) The tribe, parent or Indian custodian must petition the court to transfer.
 - 2.) Either parent may object to the transfer of jurisdiction. Parental objection vetos the transfer. (*In re Larissa G.* (1996) 43 Cal.App.4th 505, 51 Cal.Rptr.2d 16.)
 - 3.) The tribal court may decline the transfer of jurisdiction.
- c. State courts have no jurisdiction to proceed with dependency proceedings involving a possible Indian child until a period of at least 10 days after the receipt of such notice by the tribe. Section 1922 of the Act authorizes emergency removal of Indian children, even those not domiciled on a reservation. (*In re Desiree F.* (2000) 83 Cal.App.4th 460; 99 Cal.Rptr.2d 688)

B. Child Custody Proceedings in State Court

1. The Indian custodian and Indian child's tribe have a right to intervene at any point in an Indian child custody proceeding. (25 U.S.C. §1911(c).)
 - a. A parent whose rights are subject to limitation or termination is a party.
 - b. An Indian custodian is any Indian person who has:
 - 1.) legal custody of an Indian child under tribal law or custom, or under state law. (*In re Charloe* (Ore. 1982) 640 P.2d 608; Cal. Rules of Court, rule 1439(a)(3)(A).)
 - 2.) temporary physical care, custody and control which has been transferred by the parent of such child. 25 U.S.C. §1903(6); Cal. Rules of Court, rule 1439(3)(b).)
 - c. A parent includes the biological parents of an Indian child or any Indian person who has lawfully adopted such a child, including adoption under tribal law or custom. It does not include an unwed father where paternity has not been determined or acknowledged. (Cal. Rules of Court, rule 1439(a)(4).)
 - d. An Indian tribe may appear on its own behalf. (Cal. Rules of Court, rule 1410(b)(7) and rule 1412(i); *State Ex Rel. Juvenile Dept. of Lane County v. Shuey* (Ore. 1993) 850 P.2d 378. [State statutes requiring groups to be represented by attorney preempted when applied to Indian tribe's attempt to intervene under ICWA.])
2. The parent, Indian custodian and Indian child's tribe are entitled to notice of the pending proceedings and of their right to intervene whenever the court has reason to believe the child may be an Indian child. (25 U.S.C. §1912(a); 25 C.F.R. §23.11; Cal. Rules of Court, rule 1439(f); Manual of Policies and Procedures California Department of Social Services §31-515.1.12; *In re Junious M.*, supra, 144 Cal. App. 3d 786; *In re Adoption of Lindsay C.*, supra, 229 Cal.App.3d 404; *In re Kahlen W.*, supra, 233 Cal.App.3d 1414.) Substantial compliance is not adequate. **The notice requirement is not satisfied unless there is strict adherence to the federal statute.** (*In re Desiree F.* (2000) 83 Cal.App.4th

460, 99 Cal.Rptr.2d 688; *In re Jonathan D.* (2001) 92 Cal.App.4th 105, 111 Cal.Rptr.2d 628.)

- a. The court must only “know or have reason to know” that an Indian child is involved before it is required to send out notice. (*See* 44 Fed.Reg. 67586(B1); Cal. Rules of Court, rule 1439(d)(2) [what constitutes reason to know.]) Indian status of child need not be certain before notice required. (*In re Kahlen W., supra.*) A previous determination that the child’s siblings were not Indian children under the Act is not dispositive of the child’s Indian status. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 99 Cal.Rptr.2d 688; *In re Jonathan D.* (2001) 92 Cal.App.4th 105, 111 Cal.Rptr.2d 628.)
- b. If the court has reason to know only that the child may be of Indian ancestry, notice is all that is required, absent status confirmation from a tribe or the Bureau of Indian Affairs. (Cal. Rules of Court, rule 1439(e).) When there is only a suggestion of Indian ancestry and the BIA fails to respond to notice, unless the juvenile court has some further basis on which to predicate the belief a child is an Indian under the Act, the court is not required to make further inquiry. (*In re Levi U.* (2000) 78 Cal.App.4th 191.)] However, when a party proffers the name of a tribe, there is a duty to notify the tribe. (*In re Marinna J.* (2001) 90 Cal.App.4th 731.) [Where parent identifies Cherokee ancestry, each Cherokee Tribe must be noticed.]
- c. If the identity and location of the parent, Indian custodian and tribe are known, notice must be sent directly, with a copy to the Secretary. (25 C.F.R. §23.11(a).)
- d. Notice must be sent by registered mail with return receipt requested. (25 U.S.C. §1912(a).) The Notice must contain specified information required to determine Indian status, as well as advisement of rights. (25 C.F.R. §23.11(d).) Notice to the tribe is to tribal chairman unless the tribe has designated another agent for service. (25 C.F.R. §23.12; Cal. Rules of Court, rule 1439(f)(2).)
- e. State law imposes pleading requirements and further specifies the form of notice. (Cal. Rules of Court, rule 1439(f); Manual of Policies and Procedures California Department of Social Services §31-515.1.12.121.) When there is reason to believe a child is an Indian, ICWA notice must be sent for every hearing unless and until it is determined the child is not an Indian. (Cal. Rules of Court, rule 1439(f)(5).) Once the tribe (or parent) is a party, there is no necessity to repeat the formal ICWA notice to that party. (*In re Krystle D.* (1994) 30 Cal.App.4th 1778.)
- f. If an Indian child is eligible for membership in more than one tribe, the court may need to determine which tribe has the more significant contacts. (*See* 44 Fed.Reg. 67587-7(B2); 25 U.S.C. §1903(5).) The court shall keep a record of its determination on this issue.
 - 1.) It is the tribe’s prerogative to determine whether a child is eligible for membership.
 - 2.) Notice must be sent to all tribes in which the child may be eligible for membership. (*In re Desiree F.* (2000) 83 Cal.App.4th 460; 99 Cal.Rptr.2d 688)

- g. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, notice must be sent to the Secretary of the Interior. (25 U.S.C. §1912(a); *In re Kahlen W.*, *supra*.)
 - 1.) 25 C.F.R §23.11 specifies which office should receive notice.
 - 2.) The Secretary has 15 days to provide the required notice to the parent, Indian custodian, or tribe. and must inform the court if unable to verify the child's status or locate parties. (25 C.F.R. §23.11(f).)
 - h. State courts have no jurisdiction to proceed with the custody proceeding until at least 10 days after receipt of notice by those entitled to it. (*In re Jonathan D.* (2001) 92 Cal.App.4th 105, 111 Cal.Rptr.2d 628.)
 - i. The parent, Indian custodian or tribe will be granted up to a 20-day delay to prepare for the proceeding upon request to the court. (25 U.S.C. §1912(a).)
3. If the court determines indigence, the parent or Indian custodian have a right to court-appointed counsel. (25 U.S.C. §1912(b).)
 - a. The court may, in its discretion, appoint counsel for a child on finding that it would be in the "best interests" of the child as defined by the Act.
 - b. When appointment of counsel is not authorized under state law, a procedure exists for requesting payment of fees by the Bureau of Indian Affairs. (25 C.F.R. §23.13.)
 4. All parties to an Indian child custody proceeding and their attorneys have the right to examine all reports or other documents filed with the court on which any decision to order foster placement or termination of parental rights may be based. (25 U.S.C. §1912(c). Cal. Rules of Court, rule 1439(h)(2).) A non-party representative designated by the child's tribe may be permitted access to court documents and participate in the proceedings. (Cal. Rules of Court, rule 1412(l)(2).)
 5. The court must be satisfied that active rehabilitative efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. (25 U.S.C. §1912(d); *In re Crystal K.*, *supra*, 226 Cal.App.3d at p. 666; *In re Pima County Juvenile Action* (Ariz.Ct.App. 1981) 635 P.2d 187.)
 - a. The ICWA contemplates an effort beyond the passive service normally provided by states, and imposes an additional federal requirement in this regard. (H.R. Rep. No. 1386, 95th Cong. 2d Sess. 22 (1978).)
 - b. The rehabilitative effort should take into account the prevailing social and cultural conditions and way of life of the child's tribe. (44 Fed.Reg. 67582(D2).) Efforts shall include attempts to utilize the available resources of extended family members, the tribe, Indian social service agencies, and individual Indian care givers. (Cal. Rules of Court, rule 1439(k)(2); rule 1439(l)(4).)
 - c. The efforts must have proved unsuccessful before removal can be recommended.

- d. Stipulation or failure to object constitutes a waiver only if the court is satisfied that the party has been fully advised of the requirements of the Act, and has knowingly, intelligently and voluntarily waived them. (Cal. Rules of Court, rule 1439(I)(2) and rule 1439(j)(2).)
 - e. The active efforts requirement must be supported by clear and convincing evidence. (*In re Michael G.* (1998) 63 Cal.App.4th 700, 74 Cal.Rptr.3d 642.)
 - f. The phrase active efforts, requires that *timely* and *affirmative* steps be taken to remedy problems which might lead to severance of the parent-child relationship. The state may rely upon *recent* but unsuccessful reunification efforts with the same parent but a different child where “substantial but unsuccessful efforts have *just* been made to address a parent’s thoroughly entrenched drug problem . . . and the parent has shown no desire to change. . . .” The law does not require the performance of idle acts. (emphasis added.) (*In re Letitia V. v. Superior Court* (2000) 81 Cal.App.4th 1009, 97 Cal.Rptr.2d 303.)
 - g. The Act requires that active efforts be made to provide services, not that services be provided regardless of when a parent becomes available to receive those services. Where a parent chooses to make himself unavailable, the active efforts requirement may be met by a showing of repeated attempts to contact appellant and to notify him of the proceedings. (*In re William G.* (2001) 89 Cal.App.4th 423, 107 Cal.Rptr.2d 436.)
 - h. In a California dependency case, the court must make the ICWA section 1912(f) finding before it terminates parental rights. One court has held that the finding should generally be made at the final review hearing at which a section 366.26 hearing is scheduled. If it is, a court need not readdress the issue at the section 366.26 hearing, unless the parent presents evidence of changed circumstances or shows the finding was stale because the period between the referral hearing and the section 366.26 hearing was substantially longer than the 120-day statutory period. However, if the finding was not made at the final review hearing and the court intends to terminate parental rights, the section 1912(f) finding must be made at the section 366.26 hearing. (*In re Matthew Z.* (2000) 80 Cal.App.4th 545; 95 Cal.Rptr.2d 343.)
6. No foster placement may be ordered in the absence of “clear and convincing evidence,” including testimony of qualified expert witnesses, that continued custody is likely to result in serious emotional or physical damage. (25 U.S.C. §1912(e).) Under the ICWA, no termination of parental rights may be ordered in the absence of “evidence beyond a reasonable doubt,” including expert testimony that continued custody likely to result in serious emotional or physical damage to the child. (25 U.S.C. §1912(f).) The ICWA controls contradictory state law. (25 U.S.C. §1921.)
- a. Custody means something more than actual physical custody. Term refers to legal and/or physical custody provided under state law or tribal law or custom. (*See In re Crystal K., supra.*; Cal. Rules of Court, rule 1439(a)(5).)
 - b. The testimony of qualified expert witnesses is required to support the court’s

determination.

- 1.) A “qualified expert” is meant to apply to expertise beyond the normal social worker qualifications. (H.R. Rep. No. 1386 at 22; *In re Pima County Juvenile Action* (1981) 635 P.2d 187.)
 - 2.) Persons likely to meet the requirements of a qualified expert include:
 - i.) Tribal members knowledgeable in family organization and child rearing;
 - ii.) lay experts with experience in Indian child and family services and a knowledge of the social and cultural standards of the child’s tribe;
or
 - iii.) a professional person. (44 Fed.Reg. 67583, 67593(D4).)
 - 3.) California rules add an additional category of expert, preferring before a professional person, a professional person with substantial education and experience working with Indian families and familiar with Indian social and cultural standards, particularly those of the child’s tribe. (Cal. Rules of Court, rule 1439(a)(10)(C).)
 - 4.) California DSS regulations have similar standards; the expert cannot be the referring social worker. (Manual of Policies and Procedures, California Department of Social Services §31-515.14.141.)
 - 5.) Experts should speak specifically to the issue of whether the parent’s or Indian custodian’s conduct is likely to cause serious emotional or physical damage to the child. (*See* BIA Guidelines for State Courts.)
- c. Stipulation or failure to object may waive 1912(d) and (e) showing. (*In re Riva M.* (1991) 235 App.3d 403.) Stipulations or failure to object constitute a waiver only if the court is satisfied that the party has been fully advised of the requirements of the Act, and has knowingly, intelligently and voluntarily waived them. (Cal. Rules of Court, rule 1439(I)(2) and rule 1439(j)(2).)
 - d. The Act does not preclude presentation of otherwise expert opinion evidence because the witness did not have an expertise in Indian matters. (*In re Krystle D.* (1994) 30 Cal.App.4th 1778.)
 - e. The standards for removal in the ICWA are meant to change the state’s rule of law in regard to the placement of Indian children. The child may not be removed only because there is someone who can do a better job or because it would be in the best interests of a child to live with someone else, or that the parents are generally “unfit.” Mere non-conformance with non-Indian family and child rearing stereotypes, or the existence of other behavior or conditions that are considered inappropriate, does not justify removal. (44 Fed.Reg.67582-3(D3).)
7. Foster and adoptive placement preferences must follow a specified order in the absence of good cause to the contrary. (25 U.S.C. §1915(a),(b).)

- a. Standards to be applied in placing an Indian child shall be the prevailing social and cultural standards of the Indian community where the parent or extended family member resides, or with which they maintain social and cultural contacts. (25 U.S.C. §1915(d).)
- b. In an adoptive placement, preference must be given to a placement with:
 - 1.) a member of the child's extended family;
 - 2.) other members of the child's tribe; or
 - 3.) other Indian families.
- c. In foster or pre-adoptive placement, preference must be given to a placement with:
 - 1.) a member of the child's extended family;
 - 2.) a foster home licensed or approved by the Indian child's tribe;
 - 3.) an Indian foster home licensed or approved by CWS; or
 - 4.) a children's institution approved by the tribe or operated by an Indian organization.
 - 5.) The home shall be in reasonable proximity to his or her home, and the child shall be placed in the least restrictive setting which most approximates a family.
- d. An Indian child may be placed in a non-Indian home only if the court makes a finding that a "diligent" search has failed to find an Indian home. (44 Fed.Reg. 67584(F3); Cal. Rules of Court, rule 1439(j)(3).)
- e. **The tribe may establish a different preference order**, by resolution, which **shall** be followed if it is the least restrictive setting. (25 U.S.C. §1915(c).)
- f. Counties may claim state and federal AFDC-FC on behalf of an eligible Indian child in foster care placement made pursuant to the ICWA. These placements may include a state licensed or approved facility and any home of a relative or nonrelative located on or off the reservation which is licensed, approved or specified by the Indian child's tribe. (Cal.W&I §11401; SDSS All County Letter No. 95-07, February 9, 1995.)
- g. Where appropriate, the preference of the Indian child or parent shall be considered, including a parent's desire for anonymity. (Cal. Rules of Court, rule 1439(k)(4).)
- h. Good cause to modify the preference orders may include a diligent but unsuccessful search for appropriate homes, the requests of the parents, and extraordinary needs of the child as established by a qualified expert witness. (44 Fed.Reg. 67584(F3); *In re Baby Girl A.* (1991) 230 Cal.App.3d 1611; *But see Adoption of Lindsay C., supra.*)
- i. The Act limits an agency's discretion in selecting a permanent placement for an Indian child. Thus, the agency must search diligently for a placement that falls within the preferences of the Act and may reject a preferred placement only on a showing of good cause. Where a prospective adoptive parent has suffered a criminal conviction that brings the person within Welf. & Inst. Code §361.4, or

where the adoptive household includes such a person, good cause may exist to reject a placement preferred by the Act. However, the agency must either ask for a waiver of the disqualification or adequately support its reasons for not doing so if failure to request a waiver results in a placement that contravenes the Act's preferences. In turn, where a waiver is requested, the Director of the Department of Social Services may not unreasonably deny such exemption. Failure to follow applicable regulations could be evidence of a lack of good cause. (*In re Julian B.* (2000) 82 Cal.App.4th 1337; 99 Cal.Rptr.2d 241.)

- j. Factors flowing from a placement made in flagrant violation of the ICWA, including but not limited to bonding with a foster family and the trauma which may occur in terminating that placement, may not be considered in determining whether good cause exists to deviate from the placement preferences. (*In re Desiree F.* (2000) 83 Cal.App.4th 460; 99 Cal.Rptr.2d 688.)
- k. California's de facto parent doctrine is not preempted by the Indian Child Welfare Act. The doctrine expands the definition of extended family for placement preference purposes to include de facto parents. *In re Brandon M.* (1997) 63 Cal.Rptr.2d 671.
- l. A record of each placement of an Indian child under state law shall be maintained by the state, evidencing the efforts to comply with the preference order. The Secretary of the Interior or the child's tribe may request such records at anytime. (25 U.S.C. §1915(e); Calif-SDSS-Manual 31-520.3.)

C. Voluntary Consent Placements

- 1. A voluntary consent to foster care placement or termination of parental rights must be executed in writing and recorded in the presence of a judge of a court of competent jurisdiction. (25 U.S.C. §1913(a); Calif-SDSS-Manual 31-520.2.23.)
- 2. The presiding judge must accompany the consent with a certificate stating that the terms and consequences of the consent were fully explained.
 - a. The certificate must state that the parent or Indian custodian fully understood their consent.
 - b. The court shall also certify that the consent was fully understood in English or that it was interpreted into a language that the parent or Indian custodian understood.
- 3. Consent given prior to, or within 10 days after, birth of the Indian child shall not be valid.
- 4. Consent to foster placement under state law may be withdrawn at any time and the child shall be returned to the parent or Indian custodian. (25 U.S.C. §1913(b). [State regs. establish 3 to 7 day time frame.]
- 5. Consent to adoption may be withdrawn at any time for any reason prior to the entry of final decree of adoption and the child shall be returned to the parent. An adoption can be overturned within 2 years after entry of the decree if fraud or duress can be proven. (25 U.S.C. §1913(c),(d); *In re Pima County Juvenile Action* (Ariz. 1981) 635 P.2d 187.) A hearing may be required prior to return of custody.

6. Indian Child Welfare Act (ICWA) did not give Indian tribe automatic right to intervene in ancillary proceeding intended to assist in completing voluntary adoptive placement; however, ICWA did not preclude intervention. Indian tribe was entitled to intervene, under state law, in ancillary proceeding intended to assist in completing voluntary adoptive placement of child of tribe member. (*In re Baby Girl A.* (1991) 230 Cal.App.3d 1611, 282 Cal.Rptr.105.)
7. Failure to comply with terms of ICWA in securing parent's consent to adoption constitutes professional malpractice. (*Doe v. Hughes, Thorsness, Gantz, et al.* (Alaska 1992) 838 P.2d 804. [Malpractice found even though child ultimately determined not to be Indian at conclusion of protracted litigation.]

D. Post-Proceeding Action

1. Any Indian child, parent, Indian custodian from whose custody such child was removed, and the Indian child's tribe, may petition any court of competent jurisdiction to invalidate a foster placement or termination of parental rights upon a showing that such action violated any provisions of 25 U.S.C. §§1911, 1912, 1913. The invalidation is mandatory on a showing that rights were violated. (25 U.S.C. §1914.)
 - a. Superior court without jurisdiction to entertain petition while dependency matter is before juvenile court. (*Slone v. Inyo County Juvenile Court* (1991) 230 Cal.App.3d 263.)
 - b. Proceeding will not be invalidated on the basis of failure of notice where the Tribe makes a general appearance and actually participates in the proceeding. (*In re Krystle D.* (1994) 30 Cal.App.4th 1778.)
 - c. A parent who appears in a proceeding and has knowledge of ICWA applicability is foreclosed on appeal from raising ICWA notice issues by failure to challenge timely the juvenile court's action. (*In re Pedro N.* (1995) 35 Cal.App.4th 183; *Contra, In re Marinna J.* (2001) 90 Cal.App.4th 731.) Where the notice requirements of the Act were violated and the parents did not raise that claim in a timely fashion, the waiver doctrine cannot be invoked to bar consideration of the notice error on appeal. [Parental inaction could not excuse the failure of the juvenile court to ensure that notice was provided to the Indian tribe named in the proceeding.]
 - d. First applying the ICWA to a dependency case at the selection and implementation hearing would require the setting aside of all prior orders in the case, or all such orders to which a party petitioning for invalidation objects, and full compliance with notice, services and expert witness requirements. (*In re Derek W.* (1999) 86 Cal. Rptr.2d 742; *In re Desiree F., supra.*)
2. If a final decree of adoption is vacated or set aside, or the adoptive parents voluntarily consent to the termination of their parental rights, a biological parent or prior Indian custodian may petition for a return of custody. (25 U.S.C. §1916(a).)
 - a. The court shall grant such petition unless there is a showing that such return of custody is not in the best interests of the child.

- b. Such showing must take place in a proceeding subject to 25 U.S.C. §1912.
3. Whenever an Indian child is removed from a foster home or institution for further foster, pre-adoptive or adoptive placement, such placement shall be in accordance with the provisions of the ICWA. (25 U.S.C. §1916(b).)
 - a. If the child is removed from the home of an Indian custodian or parent, the standards of evidence must be met in the removal process.
 - b. If the Indian child is removed from a home not subject to ICWA protections, the subsequent placement must be in accordance with the preference provisions of the ICWA.
 - c. ICWA provisions need not be followed if the child is being returned to the parent or Indian custodian from whose custody the child was originally removed.
4. The ICWA does not apply to child custody proceedings initiated prior to May 7, 1979, but it does apply to “subsequent proceedings in the same matter” or subsequent proceedings affecting the custody or placement of the same child. (25 U.S.C. §1923.) [E.g., provisions authorizing access to birth information apply in petitions to open records in adoptions entered prior to 1979.]
5. Where a petitioner in an Indian child custody proceeding (e.g. guardianship) before a state court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition. (25 U.S.C. §1920.)
 - a. The court shall immediately return the child to his or her parents or Indian custodian.
 - b. If returning the child to the parent or Indian custodian would subject the child to a substantial and immediate danger or the threat of such danger the court may transfer jurisdiction to the tribe (exclusive jurisdiction), or initiate a state ICWA proceeding.

E. Miscellaneous

1. The U.S., all territories, every state and every Indian tribe shall give full faith and credit to the “public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings.” (25 U.S.C. §1911(d).)
 - a. Provision provides federal cause of action. (*See, Native Village of Venetie I.R.A Council v. State of Alaska, supra.*)
 - b. The full faith and credit provision of the ICWA does not require a state court to apply a tribe’s law in violation of the state’s own legitimate policy nor does it empower a tribe to control the outcome of the state court proceeding. While the Constitution requires each state to give effect to official acts of other states, precedence differentiates the credit owed to laws and to judgments. A obligation

is exacting as to judgments, provided there is jurisdiction over the parties and subject matter. The same rule does not necessarily apply to statutory law. The full faith and credit clause does not compel a state either to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate, or to apply another state's statutory law in violation of its own legitimate public policy. (*In re Laura F.* (2000) 83 Cal.App.4th 583; 99 Cal.Rptr.2d 859.) [Tribal resolution opposing adoption was a public act or record entitled to judicial notice, but not a judgment entitled to full faith and credit.]

2. In any case where state or federal law applicable to child custody proceedings under state or federal law provides a higher standard of protection to the rights of a parent or Indian custodian than the ICWA, the state or federal court shall apply the higher state or federal standard. (25 U.S.C. §1921.)
3. The ICWA does not preempt state law unless there is an express preemption clause, implied preemption ("occupation of the field"), or a conflict between the provisions of federal and state law. *In re Brandon M.* (1997) 63 Cal.Rptr.2d 671. [ICWA does not preempt California's de facto parent doctrine.]
4. State courts entering adoption decrees shall provide the Secretary with a copy of the decree and additional information necessary to establish the child's tribal affiliation. (25 U.S.C. §1951(a); 25 C.F.R. §23.71; Fam.C. §8619.) [See SDSS All County Letter No. 89-26, Procedures for Certifying Indian Blood for children in adoption planning.] Said information may be disclosed for enrollment purposes or, where anonymity has been requested, the Secretary certifies eligibility.
5. Upon application by an Indian who has reached 18 years of age and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation of the person's biological parents and provide such other information necessary to protect any rights deriving from the person's tribal relationship. (25 U.S.C. §1917.)
6. State/tribal agreements authorized. (25 U.S.C. §1919.)
 - a. Tribes may contract with the Director of the State Department of Social Services relative to tribal operation of Indian child welfare systems. (California Welfare and Institutions Code §10553.1 [Director's delegation agreement with Indian Tribe.]; Section 11401(e) [AFDC-FC for Indian placements]; Manual of Policies and Procedures, California Department of Social Services, §45-101; §45-202, §45-203. [Implementing §11401(e)].)

ICWA CASES AND OTHER AUTHORITY CITED IN OUTLINE

Cases:

Adoption of Lindsay C. (1991) 229 Cal.App.3d 404, 280 Cal.Rptr. 194 [Outline page (“p.”) 3, 5, 10.]
Doe v. Hughes, Thorness, Gantz, et al. (Alaska 1992) 838 P.2d 804 [p. 12.]
In re Alexandria Y. (1996) 45 Cal.App.4th 1483, 53 Cal.Rptr.2d 679 [p.3.]
In re Alicia S. (1998) 65 Cal.App.4th 79, 76 Cal.Rptr.2d 121 [p. 3.]
In re Baby Girl A. (1991) 230 Cal.App.3d 1611, 282 Cal.Rptr. 105 [p. 10, 12.]
In re Brandon M. (1997) 54 Cal.App.4th 1387, 63 Cal.Rptr.2d 671 [p. 11, 14.]
In re Bridget R. (1996) 41 Cal.App.4th 1483, 49 Cal.Rptr.2d 507 [p. 3.]
In re Charloe (Ore. 1982) 640 P.2d 608 [p. 5.]
In re Crystal K. (1990) 226 Cal.App.3d 655, 276 Cal.Rptr. 619 [p. 3, 7, 8.]
In re Crystal R. (1997) 59 Cal.App.4th 703, 69 Cal.Rptr.2d 414. [p. 3.]
In re Derek W. (1999) 73 Cal.App.4th 828, 86 Cal. Rptr.2d 742. [p. 3, 12.]
In re Desiree F. (2000) 83 Cal.App.4th 460, 99 Cal.Rptr.2d 688 [p. 2, 5, 6, 11, 12.]
In re John V. (1992) 5 Cal.App.4th 1201, 7 Cal.Rptr. 629 [p. 2.]
In re Jonathan D. (2001) 92 Cal.App.4th 105, 111 Cal.Rptr.2d 628. [p. 6, 7.]
In re Julian B. (2000) 82 Cal.App.4th 1337, modified by 83 Cal.App.4th 935A, 99 Cal.Rptr.2d 241 [p.11]
In re Junious M. (1983) 144 Cal.App.3d 786, 193 Cal.Rptr. 40 [p. 1, 2, 3, 5.]
In re Kahlen W. (1991) 233 Cal.App.3d 1414, 285 Cal.Rptr. 507 [p. 2, 5, 6, 7.]
In re Krystle D. (1994) 30 Cal.App.4th 1778, 37 Cal.Rptr.2d 132 [p. 6, 9, 12.]
In re Larissa G. (1996) 43 Cal.App.4th 505, 51 Cal.Rptr.2d 16 [p. 5.]
In re Laura F. (2000) 83 Cal.App.4th 583, 99 Cal.Rptr.2d 859 [p. 4, 14.]
In re Letitia V. v. Superior Court (2000) 81 Cal.App.4th 1009, 97 Cal.Rptr.2d 303 [p. 8.]
In re Levi U. (2000) 78 Cal.App.4th 191, 92 Cal.Rptr.2d 648 [p. 6.]
In re Marinna J. (2001) 90 Cal.App.4th 731, 109 Cal.Rptr.2d 267 [p. 2, 6, 12.]
In re Matthew Z. (2000) 80 Cal.App.4th 545, 95 Cal.Rptr.2d 343 [p. 8.]
In re Michael G. (1998) 63 Cal.App.4th 700, 74 Cal.Rptr.3d 642 [p. 8.]
In re Pedro N. (1995) 35 Cal.App.4th 183, 41 Cal.Rptr.2d 507 [p. 12.]
In re Pima County Juvenile Action (Ariz. 1981) 635 P.2d 187 [p. 7, 9, 11.]
In re Richard S. 54 Cal.3d 857, 2 Cal.Rptr.2d 2 [p. 1.]
In re Riva M. (1991) 235 Cal.App.3d 403, 286 Cal.Rptr. 592 [p. 9.]
In re Robert T. (1988) 200 Cal.App.3d 657, 246 Cal.Rptr. 168 [p. 4.]
In re Santos Y. (2001) 92 Cal.App.4th 1274, 112 Cal.Rptr.2d 692, review denied (Feb. 13, 2002) [p. 3, 4.]
In re Wanoni P. (1989) 216 Cal.App.3d 156, 264 Cal.Rptr. 623 [p. 2.]
In re William G., Jr. (2001) 89 Cal.App.4th 423, 107 Cal.Rptr.2d 436 [p. 2, 8.]
Mississippi Choctaw Indian Band v. Holyfield (1989) 490 U.S. 30, L.Ed.2d 29 [p. 4.]
Morton v. Mancari (1974) 417 U.S. 535 [p. 1.]
Native Village of Venetie I.R.A. Council v. State of Alaska (9th Cir. 1991) 944 F.2d 548 [p. 4, 13.]
Santa Clara Pueblo v. Martinez (1978) 436 U.S. 49 [p. 1.]
Slone v. Inyo County (1991) 230 Cal.App.3d 263, 282 Cal.Rptr. 126 [p. 12.]
State Ex Rel. Juvenile Dept. of Lane County v. Shuey (Ore.1993) 850 P.2d 378 [p. 5.]

Cases (de-published or partially unpublished on ICWA issue):

In re Adam N. (2000) 101 Cal.Rptr.2d 181
In re Bettye K. (1991) 285 Cal.Rptr. 633
In re Carlos G. (1999) 88 Cal.Rptr.2d 623
In re Jacqueline L. (1995) 39 Cal.Rptr.2d 178
In re Santos Y. (2001) 110 Cal.Rptr.2d 1
In re Se.T. (2002) 115 Cal.Rptr.2d 335

Statutes and Other Authority (Specific to Indians):

Indian Child Welfare Act of 1978, 25 U.S.C. §§1901 et seq.
Indian Child Welfare Act Regulation, 25 C.F.R. Part 23.
Indian Child Welfare Act, Legislative History, H.R. Rep. 95-1386, 95th Cong.2d Sess. 22, 1978 U.S. Code Cong. & Admin. News 7530.
Bureau of Indian Affairs Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed.Reg. 67584 (Nov. 26, 1979)
California Family Code
Section 7810 [Calif. declaration of policy, existing Indian family doctrine abrogated.]
California Welfare and Institutions Code
Section 305.5 [Transfer to Tribe after reassumption of exclusive jurisdiction.]
Section 360.6 [Calif. declaration of policy, existing Indian family doctrine abrogated.]
Section 11401(e) [AFDC-FC for Indian placements.]
Section 10553.1 [Director’s delegation agreement with Indian Tribe.]
Cal. Rules of Court
Rule 1410 - Persons present.
Rule 1412 (I) - Tribal representatives.
Rule 1439 - Indian Child Welfare Act.
Manual of Policies and Procedures, California Department of Social Services, §31-515 et seq - Indian Child Welfare Act.
Manual of Policies and Procedures, California Department of Social Services, §45-101; §45-202, §45-203. [Implementing section 11401(e).]
SDSS All County Letter No. 89-26, Procedures for Certifying Indian Blood for Children in Adoption Planning.
SDSS All County Letter No. 95-07, AFDC-FC Program Eligible Facility Requirements.
Appeal of William Stanek, 8 Indian L.Rep.5021 (April 1981)(decision of the Commissioner of Indian Affairs.) [p. 3.]

APPENDIX - B

INDIAN CHILD WELFARE ACT

**UNITED STATES CODE
TITLE 25. INDIANS
CHAPTER 21--INDIAN CHILD WELFARE ACT**

§ 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds-

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.
(Pub.L. 95-608, § 2, Nov. 8, 1978, 92 Stat. 3069.)

§ 1902. Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.
(Pub.L. 95-608, § 3, Nov. 8, 1978, 92 Stat. 3069.)

§ 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term--

(1) "child custody proceeding" shall mean and include--

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43;

(4) "Indian child" means 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;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) “Indian tribe” means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43;

(9) “parent” means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) “reservation” means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) “Secretary” means the Secretary of the Interior; and

(12) “tribal court” means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings. (Pub.L. 95-608, § 4, Nov. 8, 1978, 92 Stat. 3069.)

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child’s tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child’s tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child’s tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity. (Pub.L. 95-608, Title I, § 101, Nov. 8, 1978, 92 Stat. 3071.)

§ 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation

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, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(Pub.L. 95-608, Title I, § 102, Nov. 8, 1978, 92 Stat. 3071.)

§ 1913. Parental rights, voluntary termination

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent 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.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

(Pub.L. 95-608, Title I, § 103, Nov. 8, 1978, 92 Stat. 3072.)

§ 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

(Pub.L. 95-608, Title I, § 104, Nov. 8, 1978, 92 Stat. 3072.)

§ 1915. Placement of Indian children

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with--

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: Provided, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

(Pub.L. 95-608, Title I, § 105, Nov. 8, 1978, 92 Stat. 3073.)

§ 1916. Return of custody

(a) Petition; best interests of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

(b) Removal from foster care home; placement procedure

Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

(Pub.L. 95-608, Title I, § 106, Nov. 8, 1978, 92 Stat. 3073.)

§ 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

(Pub.L. 95-608, Title I, § 107, Nov. 8, 1978, 92 Stat. 3073.)

§ 1918. Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassertion of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassertion of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multiracial occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

(c) Approval of petition; publication in Federal Register; notice; reassertion period; correction of causes for disapproval

If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may

be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Pending actions or proceedings unaffected

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title.

(Pub.L. 95-608, Title I, § 108, Nov. 8, 1978, 92 Stat. 3074).

§ 1919. Agreements between States and Indian tribes

(a) Subject coverage

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Revocation; notice; actions or proceedings unaffected

Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

(Pub.L. 95-608, Title I, § 109, Nov. 8, 1978, 92 Stat. 3074.)

§ 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception

Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

(Pub.L. 95-608, Title I, § 110, Nov. 8, 1978, 92 Stat. 3075.)

§ 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

(Pub.L. 95-608, Title I, § 111, Nov. 8, 1978, 92 Stat. 3075.)

§ 1922. Emergency removal or placement of child; termination appropriate action

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

(Pub.L. 95-608, Title I, § 112, Nov. 8, 1978, 92 Stat. 3075).

§ 1923. Effective date

None of the provisions of this subchapter, except sections 1911(a), 1918, and 1919 of this title, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after November 8, 1978, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

(Pub.L. 95-608, Title I, § 113, Nov. 8, 1978, 92 Stat. 3075.)

§ 1931. Grants for on or near reservation programs and child welfare codes

(a) Statement of purpose; scope of programs

The Secretary is authorized to make grants to Indian tribes and organizations in the establishment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be a last resort. Such child and family service programs may include, but are not limited to--

- (1) a system for licensing or otherwise regulating Indian foster and adoptive homes;
- (2) the operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children;
- (3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care;
- (4) home improvement programs;
- (5) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;
- (6) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;

(7) a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs; and

(8) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.

(b) Non-Federal matching funds for related Social Security or other Federal financial assistance programs; assistance for such programs unaffected; State licensing or approval for qualification for assistance under federally assisted program

Funds appropriated for use by the Secretary in accordance with this section may be utilized as non-Federal matching share in connection with funds provided under Titles IV-B and XX of the Social Security Act [42 U.S.C.A. §§ 620 et seq., 1397 et seq.] or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized to be appropriated for use under this chapter. The provision or possibility of assistance under this chapter shall not be a basis for the denial or reduction of any assistance otherwise authorized under Titles IV-B and XX of the Social Security Act or any other federally assisted program. For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State. (Pub.L. 95-608, Title II, § 201, Nov. 8, 1978, 92 Stat. 3075.)

§ 1932. Grants for off-reservation programs for additional services

The Secretary is also authorized to make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs which may include, but are not limited to--

(1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate State standards of support for maintenance and medical needs;

(2) the operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; and

(4) guidance, legal representation, and advice to Indian families involved in child custody proceedings. (Pub.L. 95-608, Title II, § 202, Nov. 8, 1978, 92 Stat. 3076.)

§ 1933. Funds for on and off reservation programs

(a) Appropriated funds for similar programs of Department of Health and Human Services; appropriation in advance for payments

In the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements with the Secretary of Health and Human Services, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health and Human Services: Provided, That authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

(b) Appropriation authorization under section 13 of this title

Funds for the purposes of this chapter may be appropriated pursuant to the provisions of section 13 of this title. (Pub.L. 95-608, Title II, § 203, Nov. 8, 1978, 92 Stat. 3076; Pub.L. 96-88, Title V, § 509(b), Oct. 17, 1979, 93 Stat. 695.)

§ 1934. "Indian" defined for certain purposes

For the purposes of sections 1932 and 1933 of this title, the term "Indian" shall include persons defined in section 1603(c) of this title. (Pub.L. 95-608, Title II, § 204, Nov. 8, 1978, 92 Stat. 3077.)

§ 1951. Information availability to and disclosure by Secretary

(a) Copy of final decree or order; other information; anonymity affidavit; exemption from Freedom of Information Act

Any State court entering a final decree or order in any Indian child adoptive placement after November 8, 1978, shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show--

(1) the name and tribal affiliation of the child;

(2) the names and addresses of the biological parents;

(3) the names and addresses of the adoptive parents; and

(4) the identity of any agency having files or information relating to such adoptive placement.

Where the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained and such information shall not be subject to the Freedom of Information Act (5 U.S.C. 552), as amended.

(b) Disclosure of information for enrollment of Indian child in tribe or for determination of member rights or benefits; certification of entitlement to enrollment

Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe. (Pub.L. 95-608, Title III, § 301, Nov. 8, 1978, 92 Stat. 3077.)

§ 1952. Rules and regulations

Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter. (Pub.L. 95-608, Title III, § 302, Nov. 8, 1978, 92 Stat. 3077.)

§ 1961. Locally convenient day schools

(a) Sense of Congress

It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families.

(b) Report to Congress; contents, etc.

The Secretary is authorized and directed to prepare, in consultation with appropriate agencies in the Department of Health and Human Services, a report on the feasibility of providing Indian children with schools located near their homes, and to submit such report to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives within two years from November 8, 1978. In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades. (Pub.L. 95-608, Title IV, § 401, Nov. 8, 1978, 92 Stat. 3078; Pub.L. 96-88, Title V, § 509(b), Oct. 17, 1979, 93 Stat. 695.)

§ 1962. Omitted

§ 1963. Severability

If any provision of this chapter or the applicability thereof is held invalid, the remaining provisions of this chapter shall not be affected thereby. (Pub.L. 95-608, Title IV, § 403, Nov. 8, 1978, 92 Stat. 3078.)

APPENDIX - C

DEPARTMENT OF INTERIOR GUIDE- LINES FOR STATE COURTS

Department of the Interior
Bureau of Indian Affairs
Guidelines for State Courts; Indian
Child Custody Proceedings

(Published at 44 Fed.Reg. 67,584 (1979))

This notice is published in exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 DM 8.

There was published in the Federal Register. Vol. 44, No. 79/ Monday, April 23, 1979 a notice entitled Recommended Guidelines for State Courts—Indian Child Custody Proceedings. This notice pertained directly to implementation of the Indian Child Welfare Act of 1978, Pub.L. 95—608, 92 Stat. 3069, 25 U.S.C. 1901 et seq. A subsequent Federal Register notice which invited public comment concerning the above was published on June 5, 1979. As a result of comments received, the recommended guidelines were revised and are provided below in final form.

Introduction

Although the rulemaking procedures of the Administrative Procedures Act have been followed in developing these guidelines, they are not published as regulations because they are not intended to have binding legislative effect. Many of these guidelines represent the interpretation of the Interior Department of certain provisions of the Act. Other guidelines provide procedures which, if followed, will help assure that rights guaranteed by the Act are protected when state courts decide Indian child custody matters. To the extent that the Department's interpretations of the Act are correct, contrary interpretations by the courts would be violations of the Act. If procedures different from those recommended in these guidelines are adopted by a state, their adequacy to protect rights guaranteed by the Act will have to be judged on their merits.

Where Congress expressly delegates to the Secretary the primary responsibility for interpreting a statutory term, regulations interpreting that term have legislative effect. Courts are not free to set aside those regulations simply because they would have interpreted that statute in a different manner. Where, however, primary responsibility for interpreting a statutory term rests with the courts, administrative interpretations of statutory terms are given important but not controlling significance. *Batterton v. Francis*. 432 U.S. 416, 424—425 (1977).

In other words, when the Department writes rules needed to carry out responsibilities Congress has explicitly [sic] imposed on the Department, those rules are binding. A violation of those rules is a violation of the law. When, however, the Department writes rules or guidelines advising some other agency how it should carry out responsibilities explicitly assigned to it by Congress, those rules or guidelines are not, by themselves, binding. Courts will take what this Department has to say into account in such instances, but they are free to act contrary to what the Department has said if they are convinced that the Department's guidelines are not required by the statute itself.

Portions of the Indian Child Welfare Act do expressly delegate to the Secretary of the Interior responsibility for interpreting statu-

tory language. For example, under 25 U.S.C. 1918, the Secretary is directed to determine whether a plan for reassumption of jurisdiction is "feasible" as that term is used in the statute. This and other areas where primary responsibility for implementing portions of the Act rest with this Department, are covered in regulations promulgated on July 31, 1979, at 44 FR 45092.

Primary responsibility for interpreting other language used in the Act, however, rests with the courts that decide Indian child custody cases. For example, the legislative history of the Act states explicitly that the use of the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child. S.Rep. No. 95—597, 95th Cong., 1st Sess. 17 (1977). The Department's interpretation of statutory language of this type is published in these guidelines.

Some commenters asserted that Congressional delegation to this Department of authority to promulgate regulations with binding legislative effect with respect to all provisions of the Act is found at 25 U.S.C. 1952, which states, "Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter." Promulgation of regulations with legislative effect with respect to most of the responsibilities of state or tribal courts under the Act, however, is not necessary to carry out the Act. State and tribal courts are fully capable of carrying out the responsibilities imposed on them by Congress without being under the direct supervision of this Department.

Nothing in the legislative history indicates that Congress intended this Department to exercise supervisory control over state or tribal courts or to legislate for them with respect to Indian child custody matters. For Congress to assign to an administrative agency such supervisory control over courts would be an extraordinary step.

Nothing in the language or legislative history of 25 U.S.C 1952 compels the conclusion that Congress intended to vest this Department with such extraordinary power. Both the language and the legislative history indicate that the purpose of that section was simply to assure that the Department moved promptly to promulgate regulations to carry out the responsibilities Congress had assigned it under the Act. Assignment of supervisory authority over the courts to an administrative agency is a measure so at odds with concepts of both federalism and separation of powers that it should not be imputed to Congress in the absence of an express declaration of Congressional intent to that effect.

Some commenters also recommended that the guidelines be published as regulations and that the decision of whether the law permits such regulations to be binding be left to the court that approach has not been adopted because the Department has an obligation not to assert authority that it concludes it does not have.

Each section of the revised guidelines is accompanied by com-

mentary explaining why the Department believes states should adopt that section and to provide some guidance where the guidelines themselves may need to be interpreted in the light of specific circumstances.

The original guidelines used the word "should" instead of "shall" in most provisions. The term "should" was used to communicate the fact that the guidelines were the Department's interpretations of the Act and were not intended to have binding legislative effect. Many commenters, however, interpreted the use of "should" as an attempt by this Department to make statutory requirements themselves optional. That was not the intent. If a state adopts those guidelines, they should be stated in mandatory terms. For that reason the word "shall" has replaced "should" in the revised guidelines. The status of these guidelines as interpretative rather than legislative in nature is adequately set out in the introduction.

In some instances a state may wish to establish rules that provide even greater protection for rights guaranteed by the Act than those suggested by these guidelines. These guidelines are not intended to discourage such action. Care should be taken, however, that the provision of additional protections to some parties to a child custody proceeding does not deprive other parties of rights guaranteed to them by the Act.

In some instances the guidelines do little more than restate the statutory language. This is done in order to make the guidelines more complete so that they can be followed without the need to refer to the statute in every instance. Omission of any statutory language, of course, does not in any way affect the applicability of the statute.

A number of commenters recommended that special definitions of residence and domicile be included in the guidelines. Such definitions were not included because these terms are well defined under existing state law. There is no indication that these state law definitions tend to undermine in any way the purposes of the Act. Recommending special definitions for the purpose of this Act alone would simply provide unnecessary complications in the law.

A number of commenters recommended that the guidelines include recommendations for tribal-state agreements under 25 U.S.C. 1919. A number of other commenters, however, criticized the one provision in the original guidelines addressing that subject as tending to impose on such agreements restrictions that Congress did not intend should be imposed. Because of the wide variation in the situations and attitudes of states and tribes, it is difficult to deal with that issue in the context of guidelines. The Department is currently developing materials to aid states and tribes with such agreements. The Department hopes to have those materials available later this year. For these reasons, the provision in the original guidelines concerning tribal-state agreements has been deleted from the guidelines.

The Department has also received many requests for assistance from tribal courts in carrying out the new responsibilities resulting from the passage of this Act. The Department intends to provide additional guidance and assistance in that area also in the future. Providing guidance to state courts was given a higher priority because the Act imposes many more procedures on state courts than it does on tribal courts.

Many commenters have urged the Department to discuss the effect of the Act on the financial responsibilities of states and tribes to provide services to Indian children. Many such services are funded in large part by the Department of Health, Education, and Welfare. The policies and regulations of that Department will have a significant impact on the issue of financial responsibility. Officials of Inte-

rior and HEW will be discussing this issue with each other. It is anticipated that more detailed guidance on questions of financial responsibility will be provided as a result of those consultations.

One commenter recommended that the Department establish a monitoring procedure to exercise its right under 25 U.S.C. 1915(e) to review state court placement records. HEW currently reviews state placement records on a systematic basis as part of its responsibilities with respect to statutes it administers. Interior Department officials are discussing with HEW officials the establishment of a procedure for collecting data to review compliance with the Indian Child Welfare Act.

Inquiries concerning these recommended guidelines may be directed to the nearest of the following regional and field offices of the Solicitor for the Interior Department:

Office of the Regional Solicitor, Department of the Interior, 510 L Street, Suite 408, Anchorage, Alaska 99501, (907) 265-5301.

Office of the Regional Solicitor, Department of the Interior, Richard B. Russell Federal Building, 75 Spring St. SW., Suite 1328, Atlanta, Georgia 30303, (404) 221-4447.

Office of the Regional Solicitor, Department of the Interior, c/o U.S. Fish & Wildlife Service, Suite 306, 1 Gateway Center, Newton Corner, Massachusetts 02158, (617) 829-9258.

Office of the Field Solicitor, Department of the Interior, 686 Federal Building, Fort Snelling, Twin Cities, Minnesota 55111 (612) 725-3540.

Office of the Regional Solicitor, Department of the Interior, P.O. Box 25007, Denver Federal Center, Denver, Colorado 80225, (303) 234-3175.

Office of the Field Solicitor, Department of the Interior, P.O. Box 549, Aberdeen, South Dakota 57401, (605) 225-7254.

Office of the Field Solicitor, Department of the Interior, P.O. Box 1538, Billings, Montana 59103. (406) 245- 6711.

Office of the Regional Solicitor, Department of the Interior, Room E-2753, 2800 Cottage Way, Sacramento, California 95825, (916) 484-4331.

Office of the Field Solicitor, Department of the Interior, Valley Bank Center, Suite 280, 201 North Central Avenue, Phoenix, Arizona 85072, (602) 261-4758.

Office of the Field Solicitor, Department of the Interior, 3610 Central Avenue, Suite 104, Riverside, California 92506, (714) 737-1560.

Office of the Field Solicitor, Department of the Interior, Window Rock, Arizona 86515, (602) 871-5151.

Office of the Regional Solicitor, Department of the Interior, Room 3068, Page Belcher Federal Building, Tulsa, Oklahoma 74103, (918) 581-7501.

Office of the Field Solicitor, Department of the Interior, Room 7102, Federal Building & Courthouse, 500 Gold Avenue S.W., Albuquerque, New Mexico 87101, (505) 766-2547.

Office of the Field Solicitor, Department of the Interior, P.O. Box 397, W.C.D. Office Building, Route 1, Anadarko, Oklahoma 72005, (405) 247-6673.

Office of the Field Solicitor, Department of the Interior, P.O. Box 1508, Room 319, Federal Building, 5th and Broadway, Muskogee, Oklahoma 74401. (918) 683- 3111.

Office of the Field Solicitor, Department of the Interior, c/O Osage Agency, Grandview Avenue, Pawhuska, Oklahoma 74058, (918) 287-2431.

Office of the Regional Solicitor, Department of the Interior, Suite 6201, Federal Building, 125 South State Street Salt Lake City, Utah 84138, (801) 524-5677.

Office of the Regional Solicitor, Department of the Interior, Lloyd 500 Building, Suite 607, 500 N.E.

Multnomah Street, Portland, Oregon 97232, (503)
231-2125.

Guidelines for State Courts

A. Policy

B. Pre-trial requirements

1. Determination that child is an Indian
2. Determination of Indian child's tribe
3. Determination that placement is covered by the Act
4. Determination of jurisdiction
5. Notice requirements
6. Time limits and extensions
7. Emergency removal of an Indian child
8. Improper removal from Custody

C. Requests for transfer to tribal court

1. Petitions under 25 U.S.C. § 1911(b) for transfer of proceeding
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1. Adoptive placements
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G. Post-trial rights

1. Petition to vacate adoption
2. Adult adoptee rights
3. Notice of change in child's status
4. Maintenance of records

A. Policy

(1) Congress through the Indian Child Welfare Act has expressed its clear preference for keeping Indian children with their families, deferring to tribal judgment on matters concerning the custody of tribal children, and placing Indian children who must be removed from their homes within their own families or Indian tribes. Proceedings in state courts involving the custody of Indian children shall follow strict procedures and meet stringent requirements to justify any result in an individual case contrary to these preferences. The Indian Child Welfare Act, the federal regulations implementing the Act, the recommended guidelines and any state statute, regulation or rules promulgated to implement the Act shall be liberally construed in favor of a result that is consistent with these preferences. Any ambiguities in any of such statutes, regulations, rules or guidelines shall be resolved in favor of the result that is most consistent with these preferences.

(2) In any child custody proceeding where applicable state or

other federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Indian Child Welfare Act, the state court shall apply the state or other federal law, provided that application of that law does not infringe any right accorded by the Indian Child Welfare Act to an Indian tribe or child.

A. Commentary

The purpose of this section is to apply to the Indian Child Welfare Act the canon of construction that remedial statutes are to be liberally construed to achieve their purpose. The three major purposes are derived from a reading to the Act itself. In order to fully implement the Congressional intent the rule shall be applied to all implementing rules and state legislation as well.

Subsection A.(2) applies to canon of statutory construction that specific language shall be given precedence over general language. Congress has given certain specific rights to tribes and Indian children. For example, the tribe has a right to intervene in involuntary custody proceedings. The child has a right to learn of tribal affiliation upon becoming 18 years old. Congress did not intend 25 U.S.C. 1921 to have the effect of eliminating those rights where a court concludes they are in derogation of a parental right provided under a state statute. Congress intended for this section to apply primarily in those instances where a state provides greater protection for a right accorded to parents under the Act. Examples of this include State laws which, impose a higher burden of proof than the Act for removing a child from a home, give the parents more time to prepare after receiving notice, require more effective notice, impose stricter emergency removal procedure requirements on those removing a child, give parents greater access to documents, or contain additional safeguard to assure the voluntariness of consent.

B. Pretrial requirement

B.1. Determination That Child Is an Indian

(a) When a state court has reason to believe a child involved in a child custody proceeding is an Indian, the court shall, seek verification of the child's status from either the Bureau of Indian Affairs or the child's tribe. In a voluntary placement proceeding where a consenting parent evidences a desire for anonymity, the court shall make its inquiry in a manner that will not cause the parent's identity [sic] to become publicly known.

(b)(i) The determination by a tribe that a child is or is not a member of that tribe, is or is not eligible for membership in that tribe, or that the biological parent is or is not a member of that tribe is conclusive.

(ii) Absent a contrary determination by the tribe that is alleged to be the Indian child's tribe, a determination by the Bureau of Indian Affairs that a child is or is not an Indian child is conclusive.

(c) Circumstances under which a state court has reason to believe a child involved in a child custody proceeding is an Indian include but are not limited to the following:

(i) Any party to the case, Indian tribe, Indian organization or public or private agency informs the court that the child is an Indian child.

(ii) Any public or state-licensed agency involved in child protection services or family support has discovered information which

suggests that the child is an Indian child.

(iii) The child who is the subject of the proceeding gives the court reason to believe he or she is an Indian child.

(iv) The residence or the domicile of the child, his or her biological parents, or the Indian custodian is known by the court to be or is shown to be a predominantly Indian community.

(v) An officer of the court involved in the proceeding has knowledge that the child may be an Indian child.

B.1. Commentary

This guideline makes clear that the best source of information on whether a particular child is Indian is the tribe itself. It is the tribe's prerogative to determine membership criteria and to decide who meets those criteria. Cohen, *Handbook of Federal Indian Law* 133 (1942). Because of the Bureau of Indian Affairs' long experience in determining who is an Indian for a variety of purposes, its determinations are also entitled to great deference. See, e.g. *United States v. Sandoval*, 231 U.S.28, 27 [sic] (1913).

Although tribal verification is preferred, a court may want to seek verification from the BIA in those voluntary placement cases where the parent has requested anonymity and the tribe does not have a system for keeping child custody matters confidential.

Under the Act confidentially [sic] is given a much higher priority in voluntary proceedings than in involuntary ones. The Act mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones. Cf. 25 U.S.C. § 1912 with 25 U.S.C. § 1913. For voluntary placements, however, the Act specifically directs state courts to respect parental requests for confidentiality. 25 U.S.C. § 1915(c) The most common voluntary placement involves a newborn infant. Confidentiality has traditionally been a high priority in such placements. The Act reflects that traditional approach by requiring deference to requests for anonymity in voluntary placements but not in involuntary ones. This guideline specifically provides that anonymity not be compromised in seeking verification of Indian status. If anonymity were compromised at that point, the statutory requirement that requests for anonymity be respected in applying the preferences would be meaningless.

Enrollment is not always required in order to be a member of a tribe. Some tribes do not have written rolls.

Others have rolls that list only persons that were members as of a certain date. Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative. *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir.1979).

The guidelines also list several circumstances which shall trigger an inquiry by the court and petitioners to determine whether a child is an Indian for purposes of this Act. This listing is not intended to be complete, but it does list the most common circumstances giving rise to a reasonable belief that a child may be an Indian.

B.2. Determination of Indian Child's Tribe

(a) Where an Indian child is a member of more than one tribe or is eligible for membership in more than one tribe but is not a member of any of them, the court is called upon to determine with which tribe the child has more significant contacts.

(b) The court shall send the notice specified in recommended guideline B.4. to each such tribe. The notice shall specify the other tribe or tribes that are being considered as the child's tribe and invite each tribe's views on which tribe shall be so designated.

(c) In determining which tribe shall be designated the Indian child's tribe, the court shall consider, among other things, the following factors:

- (i) length of residence on or near the reservation of each tribe and frequency of contacts with each tribe;
- (ii) child's participation in activities of each tribe;
- (iii) child's fluency in the language of each tribe;
- (iv) whether there has been a previous adjudication with respect to the child by a court of one of the tribes;
- (v) residence on or near one of the tribes' reservation by the child's relatives;
- (vi) Tribal membership of custodial parent or Indian custodian;
- (vii) interest asserted by each tribe in response to the notice specified in subsection 3.2.(b) of these guidelines; and
- (viii) the child's self identification.

(d) The court's determination together with the reasons for it shall be act out in a written document and made a part of the record of the proceeding. A copy of that document shall be sent to each party to the proceeding and to each person or governmental agency that received notice of the proceeding.

(e) If the child is a member of only one tribe, that tribe shall be designated the Indian child's tribe even though the child is eligible for membership in another tribe. If a child becomes a member of one tribe during or after the proceeding, that tribe shall be designated as the Indian child's tribe with respect to all subsequent actions related to the proceeding. If the child becomes a member of a tribe other than the one designated by the court as the Indian child's tribe, actions taken based on the court's determination prior to the child's becoming a tribal member continue to be valid.

B.2. Commentary

This guideline requires the court to notify all tribes that are potentially the Indian child's tribe so that each tribe may assert its claim to that status and the court may have the benefit of the views of each tribe. Notification of all the tribes is also necessary so the court can consider the comparative interest of each tribe in the child's welfare in making its decision. That factor has long been regarded an important consideration in making child custody decisions.

The significant factors listed in this section are based on recommendations by tribal officials involved in child welfare matters. The Act itself and the legislative history make it clear that tribal rights are to be based on the existence of a political relationship between the family and the tribe. For that reason, the guidelines make actual tribal membership of the child conclusive on this issue.

The guidelines do provide, however, that previous decisions of a court made on its own determination of the Indian child's tribe are not invalidated simply because the child becomes a member of a different tribe. This provision is included because of the importance of stability and continuity to a child who has been placed outside the home by a court, if a child becomes a member before a placement is made or before a change of placement becomes necessary for other reasons, however, then that membership decision can be taken into account without harm to the child's need for stable relationships.

We have received several recommendations that "Indian child's

tribe" status be accorded to all tribes in which a child is eligible for membership. The fact that Congress, in the definition of "Indian child's tribe," provided a criterion for determining which is the Indian child's tribe, is a clear indication of legislative intent that there be only one such tribe for each child. For purposes of transfer of jurisdiction, there obviously can be only one tribe to adjudicate the case. To give more than one tribe "Indian child's tribe" status for purposes of the placement preferences would dilute the preference accorded by Congress to the tribe with which the child has the more significant contacts.

A right of intervention could be accorded a tribe with which a child has less significant contacts without undermining the right of the other tribe. A state court can, if it wishes and state law permits, permit intervention by more than one tribe. It could also give a second tribe preference in placement after attempts to place a child with a member of the first tribe or in a home or institution designated by the first tribe had proved unsuccessful. So long as the special rights of the Indian child's tribe are respected, giving special status to the tribe with the less significant contacts is not prohibited by the Act and may, in many instances, be a good way to comply with the spirit of the Act.

Determinations of the Indian child's tribe for purposes of this Act shall not serve as any precedent for other situations. The standards in this statute and these guidelines are designed with child custody matters in mind. A different determination may be entirely appropriate in other legal contexts.

B.3. Determination That Placement Is Covered by the Act

(a) Although most juvenile delinquency proceedings are not covered by the Act, the Act does apply to status offenses, such as truancy and incorrigibility, which can only be committed by children, and to any juvenile delinquency proceeding that results in the termination of a parental relationship.

(b) Child custody disputes arising in the context of divorce or separation proceedings or similar domestic relations proceedings are not covered by the Act so long as custody is awarded to one of the parents.

(c) Voluntary placements which do not operate to prohibit the child's parent or Indian custodian from regaining custody of the child at any time are not not [sic] covered by the Act. Where such placements are made pursuant to a written agreement, that agreement shall state explicitly the right of the parent or custodian to regain custody of the child upon demand.

B.3. Commentary

The purpose of this section is to deal with some of the questions the Department has been receiving concerning the coverage of the Act.

The entire legislative history makes it clear that the Act is directed primarily at attempts to place someone other than the parent or Indian custodian in charge of raising an Indian child—whether on a permanent or temporary basis. Although there is some overlap, juvenile delinquency proceedings are primarily designed for other purposes. Where the child is taken out of the home for committing a crime it is usually to protect society from further offenses by the child and to punish the child in order to persuade that child and others not to commit other offenses.

Placements based on status offenses (actions that are not a crime when committed by an adult), however, are usually premised on the conclusion that the present custodian of the child is not providing adequate care or supervision. To the extent that a status offense poses any immediate danger to society, it is usually also punishable as an offense which would be a crime if committed by an adult. For that reason status offenses are treated the same as dependency proceedings and are covered by the Act and these guidelines, while other juvenile delinquency placements are excluded.

While the Act excludes placement based on an act which would be a crime if committed by an adult, it does cover terminations of parental rights even where they are based on an act which would be a crime if committed by an adult. Such terminations are not intended as punishment and do not prevent the child from committing further offenses. They are based on the conclusion that someone other than the present custodian of the child should be raising the child. Congress has concluded that courts shall make such judgments only on the basis of evidence that serious physical or emotional harm to the child is likely to result unless the child is removed.

The Act excludes from coverage an award of custody to one of the parents "in a divorce proceeding." If construed narrowly, this provision would leave custody awards resulting from proceedings between husband and wife for separate maintenance, but not for dissolution of the marriage bond within the coverage of the Act. Such a narrow interpretation would not be in accord with the intent of Congress. The legislative history indicates that the exemption for divorce proceedings, in part, was included in response to the views of this Department that the protections provided by this Act are not needed in proceedings between parents. In terms of the purposes of this Act, there is no reason to treat separate maintenance or similar domestic relations proceedings differently from divorce proceedings. For that reason the statutory term "divorce proceeding" is construed to include other domestic relations proceedings between spouses.

The Act also excludes from its coverage any placements that do not deprive the parents or Indian custodians of the right to regain custody of the child upon demand. Without this exception a court appearance would be required every time an Indian child left home to go to school. Court appearances would also be required for many informal caretaking arrangements that Indian parents and custodians sometimes make for their children. This statutory exemption is restated here in the hope that it will reduce the instances in which Indian parents are unnecessarily inconvenienced by being required to give consent in court to such informal arrangements.

Some private groups and some states enter into formal written agreements with parents for temporary custody (See e.g. Alaska Statutes § 47.10.230). The guidelines recommend that the parties to such agreements explicitly provide for return of the child upon demand if they do not wish the Act to apply to such placements. Inclusion of such a provision is advisable because courts frequently assume that when an agreement is reduced to writing, the parties have only those rights specifically written into the agreement.

B.4. Determination of Jurisdiction

(a) In any Indian child custody proceeding in state court, the court shall determine the residence and domicile of the child. Except as provided in Section 3.7. of these guidelines, if either the residence or domicile is on a reservation where the tribe exercises exclusive jurisdiction over child custody proceedings, the proceedings in state court shall be dismissed.

(b) If the Indian child has previously resided or been domi-

ciled on the reservation, the state court shall contact the tribal court to determine whether the child is a ward of the tribal court. Except as provided in Section B.7. of these guidelines, if the child is a ward of a tribal court, the state court proceedings shall be dismissed.

B.4. Commentary

The purpose of this section is to remind the state court of the need to determine whether it has jurisdiction under the Act. The action is dismissed as soon as it is determined that the court lacks jurisdiction except in emergency situations. The procedures for emergency situations are set out in Section B.7.

B.5. Notice Requirements

(a) In any involuntary child custody proceeding, the state court shall make inquiries to determine if the child involved is a member of an Indian tribe or if a parent of the child is a member of an Indian tribe and the child is eligible for membership in an Indian tribe.

(b) In any involuntary Indian child custody proceeding, notice of the proceeding shall be sent to the parents and Indian custodians, if any, and to any tribes that may be the Indian child's tribe by registered mail with return receipt requested. The notice shall be written in clear and understandable language and include the following information:

(i) The name of the Indian child.

(ii) His or her tribal affiliation.

(iii) A copy of the petition, complaint or other document by which the proceeding was initiated.

(iv) The name of the petitioner and the name and address of the petitioner's attorney.

(v) A statement of the right of the biological parents or Indian custodians and the Indian child's tribe to intervene in the proceeding

(vi) A statement that if the parents or Indian custodians are unable to afford counsel, counsel will be appointed to represent them.

(vii) A statement of the right of the natural parents or Indian custodians and the Indian child's tribe to have, on request, twenty days (or such additional time as may be permitted under state law) to prepare for the proceedings.

(viii) The location, mailing address and telephone number of the court.

(ix) A statement of the right of the parents or Indian custodians or the Indian child's tribe to petition the court to transfer the proceeding to the Indian child's tribal court.

(x) The potential legal consequences of an adjudication on future custodial rights of the parents or Indian custodians.

(xi) A statement in the notice to the tribe that since child custody proceedings are usually conducted on a confidential basis, tribal officials should keep confidential the information contained in the notice concerning the particular proceeding and not reveal it to anyone who does not need the information in order to exercise the tribe's right under the Act.

(c) The tribe, parents or Indian custodians receiving notice from the petitioner of the pendency of a child custody proceeding has [sic] the right, upon request, to be granted twenty days (or such additional time as may be permitted under state law) from the date upon which the notice was received to prepare for the proceeding.

(d) The original or a copy of each notice sent pursuant to this section shall be filed with the court together with any return receipts or other proof of service.

(e) Notice may be personally [sic] served on any person entitled to receive notice in lieu of mail service.

(f) If a parent or Indian custodian appears in court without an attorney, the court shall inform him or her of the right to appointed counsel, the right to request that the proceeding be transferred to tribal court or 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 proceedings.

(g) If the court or a petitioning party has reason to believe that a parent or Indian custodian is not likely to understand the contents of the notice because of lack of adequate comprehension of written English, a copy of the notice shall be sent to the Bureau of Indian Affairs agency nearest to the residence of that person requesting that Bureau of Indian Affairs personnel arrange to have the notice explained to that person in the language that he or she best understands.

B.5. Commentary

This section recommends that state courts routinely inquire of participants in child custody proceedings whether the child is an Indian. If anyone asserts that the child is an Indian or that there is reason to believe the child may be an Indian, then the court shall contact the tribe or the Bureau of Indian Affairs for verification. Refer to sections B.1 and B.2 of these guidelines.

This section specifies the information to be contained in the notice. This information is necessary so the persons who receive notice will be able to exercise their rights in a timely manner. Subparagraph (xi) provides that tribes shall be requested to assist in maintaining the confidentiality of the proceeding. Confidentiality may be difficult to maintain—especially where small tribes are involved and the likelihood that the family involved is well known by tribal officials is great. Although Congress was concerned with confidentiality, it concluded that the interest of tribes in the welfare of their children justified taking some risks with confidentiality—especially in involuntary proceedings. It is reasonable, however, to ask tribal officials to maintain as much confidentiality as possible consistent with the exercise of tribal rights under the Act.

The time limits are minimum ones required by the Act. In many instances, more time may be available under state court procedures or because of the circumstances of the particular case. In such instances, the notice shall state that additional time is available.

The Act requires notice to the parent or Indian custodian. At a minimum, parents must be notified if termination of parental rights is a potential outcome since it is their relationship to the child that is at stake.

Similarly, the Indian custodians must be notified of any action that could lead to the custodians' losing custody of the child. Even where only custody is an issue, noncustodial parents clearly have a legitimate interest in the matter. Although notice to both parents and

Indian custodians may not be required in all instances by the Act or the Fourteenth Amendment to the U.S. Constitution, providing notice to both is in keeping with the spirit of the Act. For that reason, these guidelines recommend notice be sent to both.

Subsection (d) requires filing the notice with the court so there will be a complete record of efforts to comply with the Act.

Subsection (e) authorizes personal services since it is superior to mail services and provides greater protection or rights as authorized by 25 U.S.C. 1921. Since serving the notice does not involve any assertion of jurisdiction over the person served, personal notice may be served without regard to state or reservation boundaries.

Subsections (f) and (g) provide procedures to increase the likelihood that rights are understood by parents and Indian custodians.

B.6. Time Limits and Extensions

(a) A tribe, parent or Indian custodian entitled to notice of the pendency of a child custody proceeding has a right, upon request, to be granted an additional twenty days from the date upon which notice was received to prepare for participation in the proceeding.

(b) The proceeding may not begin until all of the following dates have passed:

(i) ten days after the parent or Indian custodian (or Secretary where the parent or Indian custodian is unknown to the petitioner) has received notice;

(ii) ten days after the Indian child's tribe (or the Secretary if the Indian child's tribe is unknown to the petitioner) has received notice;

(iii) thirty days after the parent or Indian custodian has received notice if the parent or Indian custodian has requested an additional twenty days to prepare for the proceeding; and

(iv) Thirty days after the Indian child's tribe has received notice if the Indian child's tribe has requested an additional twenty days to prepare for the proceeding.

(c) The time limits listed in this section are the minimum time periods required by the Act. The court may grant more time [sic] where state law permits.

B.6. Commentary

This section attempts to clarify the waiting periods required by the Act after notice has been received of an involuntary Indian child custody proceeding. Two independent rights are involved—the right of the parents or Indian custodians and the right of the Indian child's tribe. The proceeding may not begin until the waiting periods to which both are entitled have passed.

This section also makes clear that additional extensions of time may be granted beyond the minimum required by the Act.

B.7. Emergency Removal of an Indian Child

(a) Whenever an Indian child is removed from the physical custody of the child's parents or Indian custodians pursuant to the emergency removal or custody provisions of state law, the agency responsible for the removal action shall immediately cause an inquiry to be

made as to the residence and domicile of the child.

(b) When a court order authorizing continued emergency physical custody is sought, the petition for that order shall be accompanied by an affidavit containing the following information:

(i) The name, age and last known address of the Indian child.

(ii) The name and address of the child's parents and Indian custodians, if any. If such persons are unknown, a detailed explanation of what efforts have been made to locate them shall be included.

(iii) Facts necessary to determine the residence and the domicile of the Indian child and whether either the residence or domicile is on an Indian reservation. If either the residence or domicile is believed to be on an Indian reservation, the name of the reservation shall be stated.

(iv) The tribal affiliation of the child and of the parents and/or Indian custodians.

(v) A specific and detailed account of the circumstances that lead the agency responsible for the emergency removal of the child to take that action.

(vi) 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 transfer the child to the tribe's jurisdiction.

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

(c) If the Indian child is not restored to the parents or Indian custodians or jurisdiction is not transferred to the tribe, the agency responsible for the child's removal must promptly commence a state court proceeding for foster care placement. If the child resides or is domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, such placement must terminate as soon as the imminent physical damage & harm to the child which resulted in the emergency removal no longer exists or as soon as the tribe exercises jurisdiction over the case—whichever is earlier.

(d) Absent extraordinary circumstances, temporary emergency custody shall not be continued for more than 90 days without a determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert witness, that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

B.7. Commentary

Since jurisdiction under the Act is based on domicile and residence rather than simple physical presence, there may be instances in which action must be taken with respect to a child who is physically located off a reservation but is subject to exclusive tribal jurisdiction. In such instances the tribe will usually not be able to take swift action to exercise its jurisdiction. For that reason Congress authorized states to take temporary emergency action.

Since emergency action must be taken without the careful advance deliberation normally required, procedures must be established to assure that the emergency actions are quickly subjected to review. This section provides procedures for prompt review of such emergency actions. It presumes the state already has such review proce-

dures and only prescribes additional procedures that shall be followed in cases involving Indian children.

The legislative history clearly states that placements under such emergency procedures are to be as short as possible. If the emergency ends, the placement shall end. State action shall also end as soon as the tribe is ready to take over the case.

Subsection (d) refers primarily to the period between when the petition is filed and when the trial court renders its decision. The Act requires that, except for emergencies, Indian children are not to be removed from their parents unless a court finds clear and convincing evidence that the child would be in serious danger unless removed from the home. Unless there is some kind of time limit on the length of an "emergency removal" (that is, any removal not made pursuant to a finding by the court that there is clear and convincing evidence that continued parental custody would make serious physical or emotional harm likely), the safeguards of the Act could be evaded by use of long-term emergency removals.

Subsection (d) recommends what is, in effect, a speedy trial requirement. The court shall be required to comply with the requirements of the Act and reach a decision within 90 days unless there are "extraordinary circumstances" that make additional delay unavoidable.

B.8. Improper Removal From Custody

(a) If, in the course of any Indian child custody proceeding, the court has reason to believe that the child who is the subject of the proceeding may have been improperly removed from the custody of his or her parent or Indian custodian or that the child has been improperly retained after a visit or other temporary relinquishment of custody, and that the petitioner is responsible for such removal or retention, the court shall immediately stay the proceedings until a determination can be made on the question of improper removal or retention.

(b) If the court finds that the petitioner is responsible for an improper removal or retention, the child shall be immediately returned to his or her parents or Indian custodian.

B.8. Commentary

This section is designed to implement 25 U.S.C. § 1920. Since a finding of improper removal goes to the jurisdiction of the court to hear the case at all, this section provides that the court will decide the issue as soon as it arises before proceeding further on the merits.

C. Requests for Transfer to Tribal Court

C.1. Petitions under 25 U.S.C. § 1911(b) for transfer of proceeding

Either parent, the Indian custodian or the Indian child's tribe may, orally or in writing, request the court to transfer the Indian child custody proceeding to the tribal court of the child's tribe. The request shall be made promptly after receiving notice of the proceeding. If the request is made orally it shall be reduced to writing by the court and made a part of the record.

C.1. Commentary

Reference is made to 25 U.S.C. 1911(b) in the title of this section in order to clarify that this section deals only with transfers where

the child is not domiciled or residing on an Indian reservation.

So that transfers can occur as quickly and simply as possible, requests can be made orally.

This section specifies that requests are to be made promptly after receiving notice of the proceeding. This is a modification of the timeliness requirement that appears in the earlier version of the guidelines. Although the statute permits proceedings to be commenced even before actual notice is received by parties entitled to notice, those parties do not lose their right to request a transfer simply because neither the petitioner nor the Secretary was able to locate them earlier.

Permitting late transfer requests by persons and tribes who were notified late may cause some disruption. It will also, however, provide an incentive to the petitioners to make a diligent effort to give notice promptly in order to avoid such disruptions.

The Department received a number of comments objecting to any timeliness requirement at all. Commenters pointed out that the statute does not explicitly require transfer requests to be timely. Some commenters argued that imposing such a requirement violated tribal and parental rights to intervene at any point in the proceedings under 25 U.S.C. § 1911(c) of the Act.

While the Act permits intervention at any point in the proceeding, it does not explicitly authorize transfer requests at any time. Late interventions do not have nearly the disruptive effect on the proceeding that last minute transfers do. A case that is almost completed does not need to be retried when intervention is permitted. The problems resulting from late intervention are primarily those of the intervenor, who has lost the opportunity to influence the portion of the proceedings that was completed prior to intervention.

Although the Act does not explicitly require transfer petitions to be timely, it does authorize the court to refuse to transfer a case for good cause. When a party who could have petitioned earlier waits until the case is almost complete to ask that it be transferred to another court and retried, good cause exists to deny the request.

Timeliness is a proven weapon of the courts against disruption caused by negligence or obstructionist tactics on the part of counsel. If a transfer petition must be honored at any point before judgment, a party could wait to see how the trial is going in state court and then obtain another trial if it appears the other side will win. Delaying a transfer request could be used as a tactic to wear down the other side by requiring the case to be tried twice. The Act was not intended to authorize such tactics and the "good cause" provision is ample authority for the court to prevent them.

C.2. Criteria and Procedures for Ruling on 25 U.S.C. §1911(b) Transfer Petitions

(a) Upon receipt of a petition to transfer by a parent, Indian custodian or the Indian child's tribe, the court must transfer unless either parent objects to such transfer, the tribal court declines jurisdiction, or the court determines that good cause to the contrary exists for denying the transfer.

(b) If the court believes or any party asserts that good cause to the contrary exists, the reasons for such belief or assertion shall be stated in writing and made available to the parties who are petitioning for transfer. The petitioners shall have the opportunity to provide the court with their views on whether or not good cause to deny transfer exists.

C.2. Commentary

Subsection (a) simply states the rule provided in 25 U.S.C. § 1911(b).

Since the Act gives the parents and the tribal court of the Indian child's tribe an absolute veto over transfers, there is no need for any adversary proceedings if the parents or the tribal court opposes transfer. Where it is proposed to deny transfer on the grounds of "good cause," however, all parties need an opportunity to present their views to the court.

C.3. Determination of Good Cause to the Contrary

(a) Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.

(b) Good cause not to transfer the proceeding may exist if any of the following circumstances exists:

(i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.

(ii) The Indian child is over twelve years of age and objects to the transfer.

(iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.

(iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

(c) Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

(d) The burden of establishing good cause to the contrary shall be on the party opposing the transfer.

C.3. Commentary

All five criteria that were listed in the earlier version of the guidelines were highly controversial. Comments on the first two criteria were almost unanimously negative. The first criterion was whether the parents were still living. The second was whether an Indian custodian or guardian for the child had been appointed. These criteria were criticized as irrelevant and arbitrary. It was argued that children who are orphans or have no appointed Indian custodian or guardian (sic) are no more nor less in need of the Act's protections than [sic] other children. It was also pointed out that these criteria are contrary to the decision in *Wisconsin Potawatomies of the Hannahville Indian Community v. Houston*, 397 F.Supp. 719 (W.D.Mich 1973), which was explicitly endorsed by the committee that drafted that Act. The court in that case found that tribal jurisdiction existed even though [sic] the children involved were orphans for whom no guardian had been appointed.

Although there was some support for the third and fourth criteria, the preponderance of the comment concerning them was critical. The third criteria was whether the child had little or no contact with his or her Indian tribe for a significant period of time. The fourth was whether the child had ever resided on the reservation for a significant

period of time. These criteria were criticized, in part, because they would virtually exclude from transfers infants who were born off the reservation. Many argued that the tribe has a legitimate interest in the welfare of members who have not had significant previous contact with the tribe or the reservation. Some also argued that these criteria invited the state courts to be making the kind of cultural decisions that the Act contemplated should be made by tribes. Some argued that the use of vague words in these criteria accorded state courts too much discretion.

The fifth criteria was whether a child over the age of twelve objected to the transfer. Comment on this criteria was much more evenly divided and many of the critics were ambivalent. They worried that young teenagers could be too easily influenced by the judge or by social workers. They also argued that fear of the unknown [sic] would cause [sic] many teenagers to make an ill-considered decision against transfer.

The first four criteria in the earlier version were all directed toward the question of whether the child's connections with the reservation were so tenuous that transfer back to the tribe is not advised. The circumstances under which it may be proper for the state court to take such considerations into account are set out in the revised subsection (iv).

It is recommended that in most cases state court judges not be called upon to determine [sic] whether or not a child's contacts with a reservation are so limited that a case should not be transferred. This may be a valid consideration since the shock of changing cultures may, in some cases, be harmful to the child. This determination, however, can be made by the parent, who has a veto over transfer to tribal court.

This reasoning does not apply, however, where there is no parent available to make that decision. The guidelines recommend that state courts be authorized to make such determinations only in those cases where there is no parent available to make it.

State court authority to make such decisions is limited to those cases where the child is over five years of age. Most children younger than five years can be expected to adjust more readily to a change in cultural environment.

The fifth criterion has been retained. It is true that teenagers may make some unwise decisions, but it is also true that their judgment has developed to the extent that their views ought to be taken into account in making decisions about their lives.

The existence of a tribal court is made an absolute requirement for transfer of a case. Clearly, the absence of a tribal court is good cause not to ask the tribe to try the case.

Consideration of whether or not the case can be properly tried in tribal court without hardship to the parties or witnesses was included on the strength of the section-by-section analysis in the House Report on the Act, which stated with respect to the j 1911(b), "The subsection is intended to permit a State court to apply to apply [sic] a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected." Where a child is in fact living in a dangerous situation, he or she should not be forced to remain there simply because the witnesses cannot afford to travel long distances to court.

Application of this criterion will tend to limit transfers to cases involving Indian children who do not live very far from the reserva-

tion. This problem may be alleviated in some instances by having the court come to the witnesses. The Department is aware of one case under that Act where transfer was conditioned on having the tribal court meet in the city where the family lived. Some cities have [sic] substantial populations of members of tribes from distant reservations. In such situations some tribes may wish to appoint members who live in those cities as tribal judges.

The timeliness of the petition for transfer, discussed at length in the commentary to section C.1. is listed as a factor to be considered. Inclusion of this criterion is designed to encourage the prompt exercise of the right to petition for transfer in order to avoid unnecessary delays. Long periods of uncertainty concerning the future are generally regarded as harmful to the well-being of children. For that reason, it is especially important to avoid unnecessary delays in child custody proceedings.

Almost all commenters favored retention of the paragraph stating that reservation socio-economic conditions and the perceived adequacy of tribal institutions are not to be taken into account in making good cause determinations. Some commenters did suggest, however, that a case not be transferred if it is clear that a particular disposition of the case that could only be made by the state court held especially great promise of benefiting the child.

Such considerations are important but they have not been listed because the Department believes such judgments are best made by tribal courts. Parties who believe that state court adjudication would be better for such reasons can present their reasons to the tribal court and urge it to decline jurisdiction. The Department is aware of one case under the Act where this approach is being used and believes it is more in keeping with the confidence Congress has expressed in tribal courts.

Since Congress has established a policy of preferring tribal control over custody decisions affecting tribal members, the burden of proving that an exception to that policy ought to be made in a particular case rests on the party urging that an exception be made. This rule is reflected in subsection (d).

C.4. Tribal Court Declination of Transfer.

(a) A. tribal court to which transfer is requested may decline to accept such transfer.

(b) Upon receipt of a transfer petition the state court shall notify the tribal court in writing of the proposed transfer. The notice shall state how long the tribal court has to make its decision. The tribal court shall have at least twenty days from the receipt of notice of a proposed transfer to decide whether to decline the transfer. The tribal court may inform the state court of its decision to decline either orally or in writing.

(c) Parties shall file with the tribal court any arguments they wish to make either for or against tribal declination of transfer. Such arguments shall be made orally in open court or in written pleadings that are served on all other parties.

(d) If the case is transferred the state court shall provide the tribal court with all available information on the case

C.4. Commentary

The previous version of this section provided that the state court should presume the tribal court has declined to accept jurisdiction unless it hears otherwise. The comments on this issue were divided.

This section has been revised to require the tribal court to decline the transfer affirmatively if it does not wish to take the case. This approach is in keeping with the apparent intent of Congress. The language in the Act providing that transfers are "subject to declination by the tribal court" indicates that affirmative action by the tribal court is required to decline a transfer.

The recommended time limit for a decision has been extended from ten to twenty days. The additional time is needed for the court to become apprised of factors it may want to consider in determining whether or not to decline the transfer.

A new paragraph has been added recommending that the parties assist the tribal court in making its decision on declination by giving the tribal court their views on the matter.

Transfers ought to be arranged as simply as possible consistent with due process. Transfer procedures are a good subject for tribal-state agreements under 25 U.S.C. § 1919.

D. Adjudication of Involuntary Placements, Adoptions, or Terminations or Terminations of Parental Right

D.1. Access to Reports

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child has the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based. No decision of the court shall be based on any report or other document not filed with the court.

D.1. Commentary

The first sentence merely restates the statutory language verbatim. The second sentence makes explicit the implicit assumption of Congress—that the court will limit its considerations to those documents and reports that have been filed with the court.

D.2. Efforts to Alleviate Need To Remove Child From Parents or Indian Custodians

Any party petitioning a state court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court that prior to the commencement of the proceeding active efforts have been made to alleviate the need to remove the Indian child from his or her parents or Indian custodians. These efforts shall take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. They shall also involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian care givers.

D.2. Commentary

This section elaborates on the meaning of "breakup of the Indian family" as used in the Act. "Family breakup" is sometimes used as a synonym for divorce. In the context of this statute, however, it is clear that Congress meant a situation in which the family is unable or unwilling to raise the child in a manner that is not likely to endanger the child's emotional or physical health.

This section also recommends that the petitioner take into account the culture of the Indian child's tribe and use the resources of the child's extended family and tribe in attempting to help the family function successfully as a home for the child. The term "individual

Indian care givers" refers to medicine men and other individual tribal members who may have developed special skills that can be used to help the child's family succeed.

One commenter recommended that detailed procedures and criteria be established in order to determine whether family support efforts had been adequate. Establishing such procedures and requirements would involve the court in second-guessing the professional judgment of social service agencies. The Act does not contemplate [sic] such a role for the courts and they generally lack the expertise to make such judgments.

D.3. Standards of Evidence

(a) The court may not issue an order effecting a foster care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one of [sic] more qualified expert witnesses, demonstrating that the child's continued custody with the child's parents or Indian custodian is likely to result in serious emotional or physical damage to the child.

(b) The court may not order a termination of parental rights unless the court's order is supported by evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(c) Evidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or non-conforming social behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child. To be clear and convincing, the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding. The evidence must show the causal relationship between the conditions that exist and the damage that is likely to result

D.3. Commentary

The first two paragraphs are essentially restatement of the statutory language. By imposing these standards, Congress has changed the rules of law of many states with respect to the placement of Indian children. A child may not be removed simply because there is someone else willing to raise the child who is likely to do a better job or that it would be "in the best interests of the child" for him or her to live with someone else. Neither can a placement or termination of parental rights be ordered simply based on a determination that the parents or custodians are "unfit parents." It must be shown that it is [sic] dangerous for the child to remain with his or her present custodians. Evidence of that must be "clear and convincing" for placements and "beyond a reasonable doubt" for terminations.

The legislative history of the Act makes it pervasively clear that Congress attributes many unwarranted removals of Indian children to cultural bias on the part of the courts and social workers making the decisions. In many cases children were removed merely because the family did not conform to the decision-maker's stereotype of what a proper family should be—without any testing of the implicit assumption that only a family that conformed to that stereotype could successfully raise children. Subsection (c) makes it clear that mere nonconformance with such stereotypes or the existence of other behavior or conditions that are considered bad does not justify a placement or termination under the standards imposed by Congress. The focus must be on whether the particular conditions are likely to cause serious damage.

D.4. Qualified Expert Witnesses

(a) Removal of an Indian child from his or her family must be based on competent testimony from one or more experts qualified to speak specifically to the issue of whether continued custody by the parents or Indian custodians is likely to result in serious physical or emotional damage to the child.

(b) Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:

(i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.

(ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.

(iii) A professional person having substantial education and experience in the area of his or her specialty.

(c) The court or any party may request the assistance of the Indian child's tribe or the Bureau of Indian Affairs agency serving the Indian child's tribe in locating persons qualified to serve as expert witnesses.

D.4. Commentary

The first subsection is intended to point out that the issue on which qualified expert testimony is required is the question of whether or not serious damage to the child is likely to occur if the child is not removed. Basically two questions are involved. First, is it likely that the conduct of the parents will result in serious physical or emotional harm to the child? Second, if such conduct will likely cause such harm, can the parents be persuaded to modify their conduct?

The party presenting an expert witness must demonstrate that the witness is qualified by reason of educational background and prior experience to make judgments on those questions that are substantially more reliable than judgments that would be made by nonexperts.

The second subsection makes clear that knowledge of tribal culture and childrearing practices will frequently be very valuable to the court. Determining the likelihood of future harm frequently involves predicting future behavior—which is influenced to a large degree by culture. Specific behavior patterns will often need to be placed in the context of the total culture to determine whether they are likely to cause serious emotional harm.

Indian tribes and Bureau of Indian Affairs personnel frequently know persons who are knowledgeable concerning the customs and cultures of the tribes they serve. Their assistance is available in helping to locate such witnesses.

E. Voluntary Proceedings

E.1. Execution of Consent

To be valid, consent to a voluntary termination of parental rights or adoption must be executed in writing and recorded before a judge or magistrate of a court of competent jurisdiction. A certificate of the

court must accompany any consent and must certify that the terms and consequences of the consent were explained in detail and in the language of the parent or Indian custodian, if English is not the primary language, and were fully understood by the parent or Indian custodian. Execution of consent need not be in open court where confidentiality is requested or indicated.

E.1. Commentary

This section provides that consent may be executed before either a judge or magistrate. The addition of magistrates was made in response to a suggestion from Alaska where magistrates are found in most small communities but "judges" are more widely scattered. The term "judge" as used in the statute is not a term of art and can certainly be construed to include judicial officers who are called magistrates in some states. The statement that consent need not be in open court where confidentiality is desired or indicated was taken directly from the House Report on the Act. A recommendation that the guideline list the consequences of consent that must be described to the parent or custodian has not been adopted because the consequences can vary widely depending on the nature of the proceeding, state law and the particular facts of individual cases.

E.2. Content of Consent Document

(a) The consent document shall contain the name and birthdate of the Indian child, the name of the Indian child's tribe, any identifying number or other indication of the child's membership in the tribe, if any, and the name and address of the consenting parent or Indian custodian.

(b) A consent to foster care placement shall contain, in addition to the information specified in (a), the name and address of the person or entity by or through whom the placement was arranged, if any, or the name and address of the prospective foster parents, if known at the time.

(c) A consent to termination of parental rights or adoption shall contain, in addition to the information specified in (a), the name and address of the person or entity by or through whom any preadoptive or adoptive placement has been or is to be arranged.

E.2. Commentary

This section specifies the basic information about the placement or termination to which the parent or Indian custodian is consenting to assure that consent is knowing and also to document what took place.

E.3. Withdrawal of Consent to Placement

Where a parent or Indian custodian has consented to a foster care placement under state law, such consent may be withdrawn at any time by filing, in the court where consent was executed and filed, an instrument executed by the parent or Indian custodian. When a parent or Indian custodian withdraws consent to foster care placement, the child shall as soon as is practicable be returned to that parent or Indian custodian.

E.3. Commentary

This section specifies that withdrawal of consent shall be filed in the same court where the consent document itself was executed.

E.4. Withdrawal of Consent to Adoption

A consent to termination of parental rights or adoption may be withdrawn by the parent at any time prior to entry of a final decree of voluntary termination or adoption by filing in the court where the consent is filed an instrument executed under oath by the parent stipulating his or her intention to withdraw such consent. The clerk of the court where the withdrawal of consent is filed shall promptly notify the party by or through whom any preadoptive or adoptive placement has been arranged of such filing and that party shall insure the return of the child to the parent as soon as practicable.

E.4. Commentary

This provision recommends that the clerk of the court be responsible for notifying the family with whom the child has been placed that consent has been withdrawn. The court's involvement frequently may be necessary since the biological parents are often not told who the adoptive parents are.

F. Dispositions

F.1. Adoptive Placements

(a) In any adoptive placement of an Indian child under state law preference must be given (in the order listed below) absent good cause to the contrary, to placement of the child with:

- (i) A member of the child's extended family;
- (ii) Other members of the Indian child's tribe; or
- (iii) Other Indian families, including families of single parents.

(b) The Indian child's tribe may establish a different order of preference by resolution. That order of preference must be followed so long as placement is the least restrictive setting appropriate to the child's needs.

(c) Unless a consenting parent evidences a desire for anonymity, the court or agency shall notify the child's extended family and the Indian child's tribe that their members will be given preference in the adoption decision.

F.1. Commentary

This section makes clear that preference shall be given in the order listed in the Act. The Act clearly recognizes the role of the child's extended family in helping to raise children. The extended family should be looked to first when it becomes necessary to remove the child from the custody of his or her parents. Because of differences in cultures among tribes, placement within the same tribe is preferable.

This section also provides that single parent families shall be considered for placements. The legislative history of the Act makes it clear that Congress intended custody decisions to be made based on a consideration of the present or potential custodian's ability to provide the necessary care, supervision and support for the child rather than on preconceived notions of proper family composition.

The third subsection recommends that the court or agent make an active effort to find out if there are families entitled to preference who would be willing to adopt the child. This provision recognizes, however, that the consenting parent's request for anonymity takes precedence over efforts to find a home consistent with the Act's priorities.

F.2. Foster Care or Preadoptive Placements

In any foster care or preadoptive placement of an Indian child:

(a) The child must be placed in the least restrictive setting which

- (i) most approximates a family;
- (ii) in which his or her special needs may be met; and
- (iii) which is in reasonable proximity to his or her home.

(b) Preference must be given in the following order, absent good cause to the contrary, to placement with:

- (i) A member of the Indian child's extended family;
- (ii) A foster home, licensed, approved or specified by the Indian child's tribe, whether on or off the reservation;
- (iii) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- (iv) An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

(c) The Indian child's tribe may establish a different order of preference by resolution, and that order of preference shall be followed so long as the criteria enumerated in subsection (a) are met.

F.2. Commentary

This guideline simply restates the provisions of the Act.

F.3. Good Cause To Modify Preferences

(a) For purposes of foster care, presadoptive or adoptive placement, a determination of good cause not to follow the order of preference set out above shall be based on one or more of the following considerations:

(i) The request of the biological parents or the child when the child is of sufficient age.

(ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.

(iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.

(b) The burden of establishing the existence of good cause not to follow the order of preferences established in subsection (b) shall be on the party urging that the preferences not be followed.

F.3. Commentary

The Act indicates that the court is to give preference to confidentiality requests by parents in making placements. Paragraph (i) is intended to permit parents to ask that the order of preference not be followed because it would prejudice confidentiality or for other reasons. The wishes of an older child are important in making an effective placement.

In a few cases a child may need highly specialized treatment services that are unavailable in the community where the families who meet the preference criteria live. Paragraph (ii) recommends that such considerations be considered as good cause to the contrary.

Paragraph (iii) recommends that a diligent attempt to find a suitable family meeting the preference criteria be made before consider-

ation of a non-preference placement be considered. A diligent attempt to find a suitable family includes at a minimum, contact with the child's tribal social service program, a search of all county or state listings of available Indian homes and contact with nationally known Indian programs with available placement resources.

Since Congress has established a clear preference for placements within the tribal culture, it is recommended in subsection (b) that the party urging an exception be made be required to bear the burden of proving and [sic] exception is necessary.

G. Post-Trial Rights

G.1. Petition To Vacate Adoption

(a) Within two years after a final decree of adaption of any Indian child by a state court, or within any longer period of time permitted by the law of the state, a parent who executed a consent to termination of paternal rights or adoption of that child may petition the court in which the final adoption decree was entered to vacate the decree and revoke the consent on the grounds that such consent was obtained by fraud or duress.

(b) Upon the filing of such petition, the court shall give notice to all parties to the adoption proceedings and shall proceed to hold a hearing on the petition. Where the court finds that the parent's consent was obtained through fraud or duress, it must vacate the decree of adoption and order the consent revoked, and order the child returned to the parent.

G.1. Commentary

This section recommends that the petition to vacate an adoption be brought in the same court in which the decree was entered, since that court clearly has jurisdiction, and witnesses on the issue of fraud or duress are most likely to be within its jurisdiction.

G.2. Adult Adoptee Rights

(a) Upon application by an Indian individual who has reached age 18 who was the subject of an adoptive placement, the court which entered the final decree must inform such individual of the tribal affiliations, if any of the individual's biological parents and provide such other information necessary to protect any rights flowing from the individual's tribal relationship.

(b) The section applies regardless of whether or not the original adoption was subject to the provisions of the Act.

(c) Where state law prohibits revelation of the identity of the biological parent, assistance of the Bureau of Indian Affairs shall be sought where necessary to help an adoptee who is eligible for membership in a tribe establish that right without breaching the confidentiality of the record.

G.2. Commentary

Subsection (b) makes clear that adoptions completed prior to May 7, 1979, are covered by this provision. The Act states that most portions of Title I do not "affect a proceeding under State law" initiated or completed prior to May 7, 1979. Providing information to an adult adoptee, however, cannot be said to affect the proceeding by which the adoption was ordered.

The legislative history of the Act makes it clear that this Act was not intended to supersede the decision of state legislatures on

whether adult adoptees may be told the names of their biological parents. The intent is simply to assure the protection of rights deriving from tribal membership. Where a state law prohibits disclosure of the identity of the biological parents, tribal rights can be protected by asking the BIA to check confidentially whether the adult adoptee meets the requirements for membership in an Indian tribe. If the adoptee does meet those requirements, the BIA can certify that fact to the appropriate tribe.

G.3. Notice of Change in Child's Status

(a) Whenever a final decree of adoption of an Indian child has been vacated or set aside, or the adoptive parent has voluntarily consented to the termination of his or her parental rights to the child, or whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive placement, or adoptive placement, notice by the court or an agency authorized by the court shall be given to the child's biological parents or prior Indian custodians. Such notice shall inform the recipient of his or her right to petition for return of custody of the child.

(b) A parent or Indian custodian may waive his or her right to such notice by executing a written waiver of notice filed with the court. Such waiver may be revoked at any time by filing with the court a written notice of revocation, but such revocation would not affect any proceeding which occurred before the filing of the notice of revocation.

G.3. Commentary

This section provides guidelines to aid courts in applying the provisions of Section 106 of the Act. Section 106 gives legal standing to a biological parent or prior Indian custodian to petition for return of a child in cases of failed adoptions or changes in placement in situations where there has been a termination of parental rights. Section 106(b) provides the [sic] whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive placement, or adoptive placement, such placement is to be in accordance with the provisions of the Act—which requires notice to the biological parents.

The Act is silent on the question of whether a parent or Indian custodian can waive the right to further notice. Obviously, there will be cases in which the biological parents will prefer not to receive notice once their parental rights have been relinquished or terminated. This section provides for such waivers but, because the Act establishes an absolute right to participate in any future proceedings and to petition the court for return of the child, the waiver is revocable.

G.4. Maintenance of Records

The state shall establish a single location where all records of every foster care, preadoptive placement and adoptive placement of Indian children by courts of that state will be available within seven days of a request by an Indian child's tribe or the Secretary. The records shall contain, at a minimum, the petition or complaint, all substantive orders entered in the proceeding, and the complete record of the placement determination.

G.4. Commentary

This section of the guidelines provides a procedure for implementing the provisions of 25 U.S.C. § 1915(e). This section has been modified from the previous version which required that all records be maintained in a single location within the state. As revised this

section provides only that the records be retrievable by a single office that would make them available to the requester within seven days of a request. For some states (especially Alaska) centralization of the records themselves would create major administrative burdens. So long as the records can be promptly made available at a single location, the intent of this section that the records be readily available will be satisfied.

Forrest J. Gerard,

Assistant Secretary, Indian Affairs

November 16, 1979.

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APPENDIX - D

**CODE OF
FEDERAL
REGULATIONS**

CODE OF FEDERAL REGULATIONS
TITLE 25—INDIANS
CHAPTER I—BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR
SUBCHAPTER D—HUMAN SERVICES
PART 23—INDIAN CHILD WELFARE ACT
SUBPART A—PURPOSE, DEFINITIONS, AND POLICY
(Current through August 1, 2000; 65 FR 47238)

§ 23.1 Purpose. The purpose of the regulations in this part is to govern the provision of funding for, and the administration of Indian child and family service programs as authorized by the Indian Child Welfare Act of 1978 (Pub.L. 95-608, 92 Stat. 3069, 25 U.S.C. 2, 9, 1901-1952).

§ 23.2 Definitions. Act means the Indian Child Welfare Act (ICWA), Pub.L. 95-608, 92 Stat. 3069, 25 U.S.C. 1901 et seq. Assistant Secretary means the Assistant Secretary—
Indian Affairs, the Department of the Interior.
Bureau of Indian Affairs (BIA) means the Bureau of Indian Affairs, the Department of the Interior. Child Custody Proceeding includes:

- (1) Foster care placement, which shall mean any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;
- (2) Termination of parental rights, which shall mean any action resulting in the termination of the parent-child relationship;
- (3) Preadoptive placement, which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement;
- (4) Adoptive placement, which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption; and
- (5) Other tribal placements made in accordance with the placement preferences of the Act, including the temporary or permanent placement of an Indian child in accordance with tribal children's codes and local tribal custom or tradition;
- (6) The above terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime in the jurisdiction where the act occurred or upon an award, in a divorce proceeding, of custody to one of the parents.

Consortium means an association or partnership of two or more eligible applicants who enter into an agreement to administer a grant program and to provide services under the grant to Indian residents in a specific geographical area when it is administratively feasible to provide an adequate level of services within the area.

Extended family member shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of 18 and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

Grant means a written agreement between the BIA and the governing body of an Indian tribe or Indian organization wherein the BIA

provides funds to the grantee to plan, conduct or administer specific programs, services, or activities and where the administrative and programmatic provisions are specifically delineated.

Grantee means the tribal governing body of an Indian tribe or Board of Directors of an Indian organization responsible for grant administration.

Grants Officer means an officially designated officer who administers ICWA grants awarded by the Bureau of Indian Affairs, the Department of the Interior.

Indian means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 7 of the Alaska Native Claims Settlement Act, 43 U.S.C. 1606.

Indian child means any unmarried person who is under age 18 and is either a member of an Indian tribe, or is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. Indian child's tribe means the Indian tribe in which an Indian child is a member or is eligible for membership or, in the case of an Indian child who is a member of or is eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts, to be determined in accordance with the BIA's "Guidelines for State Courts—Indian Child Custody Proceedings."

Indian custodian means any Indian person who has legal custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody and control has been transferred by the parent of such child.

Indian organization, solely for purposes of eligibility for grants under subpart D of this part, means any legally established group, association, partnership, corporation, or other legal entity which is owned or controlled by Indians, or a majority (51 percent or more) of whose members are Indians.

Indian preference means preference and opportunities for employment and training provided to Indians in the administration of grants in accordance with section 7 (b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450).

Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians federally recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 3 (c) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1602 (c).

Off-reservation ICWA program means an ICWA program administered in accordance with 25 U.S.C. 1932 by an off-reservation Indian organization.

Parent means the biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. The term does not include the unwed father where paternity has not been acknowledged or established.

Reservation means Indian country as defined in 18 U.S.C. 1151 and any lands not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or

individual subject to a restriction by the United States against alienation.

Secretary means the Secretary of the Interior.

Service areas solely for newly recognized or restored Indian tribes without established reservations means those service areas congressionally established by Federal law to be the equivalent of a reservation for the purpose of determining the eligibility of a newly recognized or restored Indian tribe and its members for all Federal services and benefits.

State court means any agent or agency of a state, including the District of Columbia or any territory or possession of the United States, or any political subdivision empowered by law to terminate parental rights or to make foster care placements, preadoptive placements, or adoptive placements.

Subgrant means a secondary grant that undertakes part of the obligations of the primary grant, and assumes the legal and financial responsibility for the funds awarded and for the performance of the grant-supported activity.

Technical assistance means the provision of oral, written, or other relevant information and assistance to prospective grant applicants in the development of their grant proposals. Technical assistance may include a preliminary review of an application to assist the applicant in identifying the strengths and weaknesses of the proposal, ongoing program planning, design and evaluation, and such other program-specific assistance as is necessary for ongoing grant administration and management.

Title II means Title II of Public Law 95-608, the Indian Child Welfare Act of 1978, which authorizes the Secretary to make grants to Indian tribes and off-reservation Indian organizations for the establishment and operation of Indian child and family service programs.

Tribal Court means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

Tribal government means the federally recognized governing body of an Indian tribe.

Value means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

§ 23.3 Policy. In enacting the Indian Child Welfare Act of 1978, Pub.L. 95-608, the Congress has declared that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and Indian families by the establishment of minimum Federal standards to prevent the arbitrary removal of Indian children from their families and tribes and to ensure that measures which prevent the breakup of Indian families are followed in child custody proceedings (25 U.S.C. 1902). Indian child and family service programs receiving Title II funds and operated by federally recognized Indian tribes and off-reservation Indian organizations shall reflect the unique values of Indian culture and promote the stability and security of Indian children, Indian families and Indian communities. It is the policy of the Bureau of Indian Affairs to emphasize and facilitate the comprehensive design, development and implementation of Indian child and family service

programs in coordination with other Federal, state, local, and tribal programs which strengthen and preserve Indian families and Indian tribes.

§ 23.4 Information collection. (a) The information collection requirements contained in § 23.13 of this part have been approved by the Office of Management and Budget (OMB) under 44 U.S.C. 3501 et seq., and assigned clearance number 1076-0111.

(1) This information will be used to determine eligibility for payment of legal fees for indigent Indian parents and Indian custodians, involved in involuntary Indian child custody proceedings in state courts, who are not eligible for legal services through other mechanisms. Response to this request is required to obtain a benefit.

(2) Public reporting for this information collection is estimated to average 10 hours per response, including the time for reviewing instructions, gathering and maintaining data, and completing and reviewing the information collection. Direct comments regarding the burden estimate or any aspect of this information collection should be mailed or hand-delivered to the Bureau of Indian Affairs, Information Collection Clearance Officer, Room 336-SIB, 1849 C street, NW., Washington, DC 20240; and the Office of Information and Regulatory Affairs Paperwork Reduction Project—1076-0111, Office of Management and Budget, Washington, DC 20503.

(b) The information collection requirements contained in §§ 23.21; 23.31; 23.46; 23.47, and 23.71 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq. and assigned clearance number 1076- 0131. The information collection requirements under §§ 23.21 and 23.31 are collected in the form of ICWA grant applications from Indian tribes and off-reservation Indian organizations. A response to this request is required to obtain grant funds. The information collection requirements under 23.46 are collected in compliance with applicable OMB circulars on financial management, internal and external controls and other fiscal assurances in accordance with existing Federal grant administration and reporting requirements. The grantee information collection requirements under § 23.47 are collected in the form of quarterly and annual program performance narrative reports and statistical data as required by the grant award document. Pursuant to 25 U.S.C. 1951, the information collection requirement under §§ 23.71 is collected from state courts entering final adoption decrees for any Indian child and is provided to and maintained by the Secretary.

(1) Public reporting for the information collection at §§ 23.21 and 23.31 is estimated to average 32 hours per response, including the time for reviewing the grant application instructions, gathering the necessary information and data, and completing the grant application. Public reporting for the information collection at §§ 23.46 and 23.47 is estimated to average a combined total of 16 annual hours per grantee, including the time for gathering the necessary information and data, and completing the required forms and reports. Public reporting for the information collection at § 23.71 is estimated

to average 4 hours per response, including the time for obtaining and preparing the final adoption decree for transmittal to the Secretary.

(2) Direct comments regarding any of these burden estimates or any aspect of these information collection requirements should be mailed or hand-delivered to the Bureau of Indian Affairs, Information Collection Clearance Officer, room 336-SIB, 1849 C Street, NW., Washington, DC, 20240; and the Office of Information and Regulatory Affairs Paperwork Reduction Project—1076-0131, Office of Management and Budget, Washington, DC 20503

SUBPART B—NOTICE OF INVOLUNTARY CHILD CUSTODY PROCEEDINGS AND PAYMENT FOR APPOINTED COUNSEL IN STATE COURTS

§ 23.11 Notice. (a) In any involuntary proceeding in a state court where the court knows or has reason to know that an Indian child is involved, and where the identity and location of the child's Indian parents or custodians or tribe is known, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall directly notify the Indian parents, Indian custodians, and the child's tribe by certified mail with return receipt requested, of the pending proceedings and of their right of intervention. Notice shall include requisite information identified at paragraphs (d)(1) through (4) and (e)(1) through (6) of this section, consistent with the confidentiality requirement in paragraph (e)(7) of this section. Copies of these notices shall be sent to the Secretary and the appropriate Area Director listed in paragraphs (c)(1) through (12) of this section.

(b) If the identity or location of the Indian parents, Indian custodians or the child's tribe cannot be determined, notice of the pendency of any involuntary child custody proceeding involving an Indian child in a state court shall be sent by certified mail with return receipt requested to the appropriate Area Director listed in paragraphs (c)(1) through (12) of this section. In order to establish tribal identity, it is necessary to provide as much information as is known on the Indian child's direct lineal ancestors including, but not limited to, the information delineated at paragraph (d)(1) through (4) of this section.

(c)(1) For proceedings in Alabama, Connecticut, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia or any territory or possession of the United States, notices shall be sent to the following address: Eastern Area Director, Bureau of Indian Affairs, 3701 N. Fairfax Drive, Suite 260, Arlington, Virginia 22201.

(2) For proceedings in Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio, or Wisconsin, notices shall be sent to the following address: Minneapolis Area Director, Bureau of Indian Affairs, 331 Second Avenue South, Minneapolis, Minnesota 55401-2241.

(3) For proceedings in Nebraska, North Dakota, or South Dakota, notices shall be sent to the following address: Aberdeen Area Director, Bureau of Indian Affairs, 115 Fourth Avenue, SE, Aberdeen, South Dakota 57401.

(4) For proceedings in Kansas, Texas (except for notices to the

Ysleta del Sur Pueblo of El Paso County, Texas), and the western Oklahoma counties of Alfalfa, Beaver, Beckman, Blaine, Caddo, Canadian, Cimarron, Cleveland, Comanche, Cotton, Custer, Dewey, Ellis, Garfield, Grant, Greer, Harmon, Harper, Jackson, Kay, Kingfisher, Kiowa, Lincoln, Logan, Major, Noble, Oklahoma, Pawnee, Payne, Pottawatomie, Roger Mills, Texas, Tillman, Washita, Woods and Woodward, notices shall be sent to the following address: Anadarko Area Director, Bureau of Indian Affairs, P.O. Box 368, Anadarko, Oklahoma 73005. Notices to the Ysleta del Sur Pueblo of El Paso County, Texas shall be sent to the Albuquerque Area Director at the address listed in paragraph (c)(6) of this section.

(5) For proceedings in Wyoming or Montana (except for notices to the Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana), notices shall be sent to the following address: Billings Area Director, Bureau of Indian Affairs, 316 N. 26th Street, Billings, Montana 59101. Notices to the Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana, shall be sent to the Portland Area Director at the address listed in paragraph (c)(11) of this section.

(6) For proceedings in the Texas counties of El Paso and Hudspeth and proceedings in Colorado or New Mexico (exclusive of notices to the Navajo Tribe from the New Mexico counties listed in paragraph (c)(9) of this section), notices shall be sent to the following address: Albuquerque Area Director, Bureau of Indian Affairs, 615 First Street, P.O. Box 26567, Albuquerque, New Mexico 87125. Notices to the Navajo Tribe shall be sent to the Navajo Area Director at the address listed in paragraph (c)(9) of this section.

(7) For proceedings in Alaska (except for notices to the Metlakatla Indian Community, Alaska), notices shall be sent to the following address: Juneau Area Director, Bureau of Indian Affairs, 709 West 9th Street, Juneau, Alaska 99802-1219. Notices to the Metlakatla Indian Community of the Annette Islands Reserve, Alaska, shall be sent to the Portland Area Director at the address listed in paragraph (c)(11) of this section.

(8) For proceedings in Arkansas, Missouri, and the eastern Oklahoma counties of Adair, Atoka, Bryan, Carter, Cherokee, Craig, Creek, Choctaw, Coal, Delaware, Garvin, Grady, Haskell, Hughes, Jefferson, Johnson, Latimer, LeFlore, Love, Mayes, McCurtain, McClain, McIntosh, Murray, Muskogee, Nowata, Okfuskee, Okmulgee, Osage, Ottawa, Pittsburg, Pontotoc, Pushmataha, Marshall, Rogers, Seminole, Sequoyah, Wagoner, Washington, Stephens, and Tulsa, notices shall be sent to the following address: Muskogee Area Director, Bureau of Indian Affairs, 101 North Fifth Street, Muskogee, Oklahoma 74401.

(9) For proceedings in the Arizona counties of Apache, Coconino (except for notices to the Hopi and San Juan Paiute Tribes) and Navajo (except for notices to the Hopi Tribe); the New Mexico counties of McKinley (except for notices to the Zuni Tribe), San Juan, and Socorro; and the Utah county of San Juan, notices shall be sent to the following address: Navajo Area Director, Bureau of Indian Affairs, P.O. Box 1060, Gallup, New Mexico 87301. Notices to the Hopi and San Juan Paiute Tribes shall be sent to the Phoenix Area Director at the address listed in

paragraph (c)(10) of this section. Notices to the Zuni Tribe shall be sent to the Albuquerque Area Director at the address listed in paragraph (c)(6) of this section.

(10) For proceedings in Arizona (exclusive of notices to the Navajo Tribe from those counties listed in paragraph (c)(9) of this section), Nevada or Utah (exclusive of San Juan county), notices shall be sent to the following address: Phoenix Area Director, Bureau of Indian Affairs, 1 North First Street, P.O. Box 10, Phoenix, Arizona 85001.

(11) For proceedings in Idaho, Oregon or Washington, notices shall be sent to the following address: Portland Area Director, Bureau of Indian Affairs, 911 NE 11th Avenue, Portland, Oregon 97232. All notices to the Confederated Salish & Kootenai Tribes of the Flathead Reservation, located in the Montana counties of Flathead, Lake, Missoula, and Sanders, shall also be sent to the Portland Area Director.

(12) For proceedings in California or Hawaii, notices shall be sent to the following address: Sacramento Area Director, Bureau of Indian Affairs, Federal Office Building, 2800 Cottage Way, Sacramento, California 95825.

(d) Notice to the appropriate Area Director pursuant to paragraph (b) of this section may be sent by certified mail with return receipt requested or by personal service and shall include the following information, if known:

(1) Name of the Indian child, the child's birthdate and birthplace.

(2) Name of Indian tribe(s) in which the child is enrolled or may be eligible for enrollment.

(3) All names known, and current and former addresses of the Indian child's biological mother, biological father, maternal and paternal grandparents and great grandparents or Indian custodians, including maiden, married and former names or aliases; birthdates; places of birth and death; tribal enrollment numbers, and/or other identifying information.

(4) A copy of the petition, complaint or other document by which the proceeding was initiated.

(e) In addition, notice provided to the appropriate Area Director pursuant to paragraph (b) of this section shall include the following:

(1) A statement of the absolute right of the biological Indian parents, the child's Indian custodians and the child's tribe to intervene in the proceedings.

(2) A statement that if the Indian parent(s) or Indian custodian(s) is (are) unable to afford counsel, and where a state court determines indigency, counsel will be appointed to represent the Indian parent or Indian custodian where authorized by state law.

(3) A statement of the right of the Indian parents, Indian custodians and child's tribe to be granted, upon request, up to 20 additional days to prepare for the proceedings.

(4) The location, mailing address, and telephone number of the court and all parties notified pursuant to this section.

(5) A statement of the right of the Indian parents, Indian custodians and the child's tribe to petition the court for transfer of the proceeding to the child's tribal court pursuant to 25 U.S.C. 1911, absent objection by either parent: Provided, that such transfer shall be subject to declination by the tribal court of said tribe.

(6) A statement of the potential legal consequences of the proceedings on the future custodial and parental rights of the Indian parents or Indian custodians.

(7) A statement that, since child custody proceedings are conducted on a confidential basis, all parties notified shall keep confidential the information contained in the notice concerning the particular proceeding. The notices shall not be handled by anyone not needing the information contained in the notices in order to exercise the tribe's rights under the Act.

(f) Upon receipt of the notice, the Secretary or his/her designee shall make reasonable documented efforts to locate and notify the child's tribe and the child's Indian parents or Indian custodians. The Secretary or his/her designee shall have 15 days, after receipt of the notice from the persons initiating the proceedings, to notify the child's tribe and Indian parents or Indian custodians and send a copy of the notice to the court. If within the 15-day time period the Secretary or his/her designee is unable to verify that the child meets the criteria of an Indian child as defined in 25 U.S.C. 1903, or is unable to locate the Indian parents or Indian custodians, the Secretary or his/her designee shall so inform the court prior to initiation of the proceedings and state how much more time, if any, will be needed to complete the search. The Secretary or his/her designee shall complete all research efforts, even if those efforts cannot be completed before the child custody proceeding begins.

(g) Upon request from a party to an Indian child custody proceeding, the Secretary or his/her designee shall make a reasonable attempt to identify and locate the child's tribe, Indian parents or Indian custodians to assist the party seeking the information.

§ 23.12 Designated tribal agent for service of notice.

Any Indian tribe entitled to notice pursuant to 25 U.S.C. 1912 may designate by resolution, or by such other form as the tribe's constitution or current practice requires, an agent for service of notice other than the tribal chairman and send a copy of the designation to the Secretary or his/her designee. The Secretary or his/her designee shall update and publish as necessary the names and addresses of the designated agents in the Federal Register. A current listing of such agents shall be available through the area offices.

§ 23.13 Payment for appointed counsel in involuntary Indian child custody proceedings in state courts.

(a) When a state court appoints counsel for an indigent Indian party in an involuntary Indian child custody proceeding for which the appointment of counsel is not authorized under state law, the court shall send written notice of the appointment to the

BIA Area Director designated for that state in § 23.11. The notice shall include the following:

- (1) Name, address, and telephone number of attorney who has been appointed.
- (2) Name and address of client for whom counsel is appointed.
- (3) Relationship of client to child.
- (4) Name of Indian child's tribe.
- (5) Copy of the petition or complaint.
- (6) Certification by the court that state law makes no provision for appointment of counsel in such proceedings.
- (7) Certification by the court that the Indian client is indigent.

(b) The Area Director shall certify that the client is eligible to have his or her appointed counsel compensated by the BIA unless:

- (1) The litigation does not involve a child custody proceeding as defined in 25 U.S.C. 1903 (1);
- (2) The child who is the subject of the litigation is not an Indian child as defined in 25 U.S.C. 1903 (4);
- (3) The client is neither the Indian child who is the subject of the litigation, the Indian child's parent as defined in 25 U.S.C. 1903 (9), nor the child's Indian custodian as defined in 25 U.S.C. 1903 (6);
- (4) State law provides for appointment of counsel in such proceedings;
- (5) The notice to the Area Director of appointment of counsel is incomplete; or
- (6) Funds are not available for the particular fiscal year.

(c) No later than 10 days after receipt of the notice of appointment of counsel, the Area Director shall notify the court, the client, and the attorney in writing whether the client has been certified as eligible to have his or her attorney fees and expenses paid by the BIA. If certification is denied, the notice shall include written reasons for that decision, together with a statement that complies with 25 CFR 2.7 and that informs the applicant that the decision may be appealed to the Assistant Secretary. The Assistant Secretary shall consider appeals under this subsection in accordance with 25 CFR 2.20 (c) through (e). Appeal procedures shall be as set out in part 2 of this chapter.

(d) When determining attorney fees and expenses, the court shall:

- (1) Determine the amount of payment due appointed counsel by the same procedures and criteria it uses in determining the fees and expenses to be paid appointed counsel in state juvenile delinquency proceedings; and
- (2) Submit approved vouchers to the Area Director who certified eligibility for BIA payment, together with the court's certification that the amount requested is reasonable under the state standards

considering the work actually performed in light of criteria that apply in determining fees and expenses for appointed counsel in state juvenile delinquency proceedings.

(e) The Area Director shall authorize the payment of attorney fees and expenses in the amount requested in the voucher approved by the court unless:

- (1) The amount of payment due the state-appointed counsel is inconsistent with the fees and expenses specified in § 23.13 (d)(1); or
- (2) The client has not been certified previously as eligible under paragraph (c) of this section; or
- (3) The voucher is submitted later than 90 days after completion of the legal action involving a client certified as eligible for payment of legal fees under paragraph (b) of this section.

(f) No later than 15 days after receipt of a payment voucher, the Area Director shall send written notice to the court, the client, and the attorney stating the amount of payment, if any, that has been authorized. If the payment has been denied, or the amount authorized is less than the amount requested in the voucher approved by the court, the notice shall include a written statement of the reasons for the decision together with a statement that complies with 25 CFR 2.7 and that informs the client that the decision may be appealed to the Interior Board of Indian Appeals in accordance with 25 CFR 2.4 (e); 43 CFR 4.310 through 4.318 and 43 CFR 4.330 through 4.340.

(g) Failure of the Area Director to meet the deadline specified in paragraphs (c) and (f) of this section may be treated as a denial for purposes of appeal under paragraph (f) of this section.

(h) Payment for appointed counsel does not extend to Indian tribes involved in state court child custody proceedings or to Indian families involved in Indian child custody proceedings in tribal courts.

§ 23.21 Noncompetitive tribal government grants.

(a) Grant application information and technical assistance. Information on grant application procedures and related information may be obtained from the appropriate Agency Superintendent or Area Director. Pre-award and ongoing technical assistance to tribal governments shall be provided in accordance with § 23.42 of this part.

(b) Eligibility requirements for tribal governments. The tribal government(s) of any Indian tribe or consortium of tribes may submit a properly documented application for a grant to the appropriate Agency Superintendent or Area Director. A tribe may neither submit more than one application for a grant nor be the beneficiary of more than one grant under this subpart.

(1) Through the publication of a Federal Register announcement at the outset of the implementation of the noncompetitive grant award process during which tribal applications will be solicited, the Assistant Secretary will notify eligible tribal applicants under

this subpart of the amount of core funds available for their ICWA program. The funding levels will be based on the service area population to be served. Upon the receipt of this notice from the Agency Superintendent or appropriate Area Director, tribal applicants shall submit a completed ICWA application no later than 60 days after the receipt of this notice.

(2) A grant to be awarded under this subpart shall be limited to the tribal governing body(ies) of the tribe(s) to be served by the grant.

(3) For purposes of eligibility for newly recognized or restored Indian tribes without established reservations, such tribes shall be deemed eligible to apply for grants under this subpart to provide ICWA services within those service areas legislatively identified for such tribes.

(4) A grantee under this subpart may make a subgrant to another Indian tribe or an Indian organization subject to the provisions of § 23.45.

(c) Revision or amendment of grants. A grantee under this subpart may submit a written request and justification for a post-award grant modification covering material changes to the terms and conditions of the grant, subject to the approval of the grants officer. The request shall include a narrative description of any significant additions, deletions, or changes to the approved program activities or budget in the form of a grant amendment proposal.

(d) Continued annual funding of an ICWA grant under this subpart shall be contingent upon the fulfillment of the requirements delineated at § 23.23(c).

(e) Monitoring and program reporting requirements for grantees under this subpart are delineated at § 23.44 and 23.47.

§ 23.22 Purpose of tribal government grants. (a) Grants awarded under this subpart are for the establishment and operation of tribally designed Indian child and family service programs. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and to ensure that the permanent removal of an Indian child from the custody of his or her Indian parent or Indian custodian shall be a last resort. Such child and family service programs may include, but need not be limited to:

(1) A system for licensing or otherwise regulating Indian foster and adoptive homes, such as establishing tribal standards for approval of on-reservation foster or adoptive homes;

(2) The operation and maintenance of facilities for counseling and treatment of Indian families and for the temporary custody of Indian children with the goal of strengthening Indian families and preventing parent-child separations;

(3) Family assistance, including homemaker and home counselors, protective day care and afterschool care, recreational activities, respite care, and employment support services with the goal of strengthening Indian families and contributing to family stability;

(4) Home improvement programs with the primary emphasis on preventing the removal of children due to unsafe home environments by making homes safer, but not to make extensive structural home improvements;

(5) The employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters, but not to establish tribal court systems;

(6) Education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;

(7) A subsidy program under which Indian adoptive children not eligible for state or BIA subsidy programs may be provided support comparable to that for which they could be eligible as foster children, taking into account the appropriate state standards of support for maintenance and medical needs;

(8) Guidance, legal representation and advice to Indian families involved in tribal, state, or Federal child custody proceedings; and

(9) Other programs designed to meet the intent and purposes of the Act.

(b) Grants may be provided to tribes in the preparation and implementation of child welfare codes within their jurisdiction or pursuant to a tribal-state agreement.

(c) Grantees under this subpart may enhance their capabilities by utilizing ICWA funds as non-Federal matching shares in connection with funds provided under titles IV-B, IV-E and XX of the Social Security Act or other Federal programs which contribute to and promote the intent and purposes of the Act through the provision of comprehensive child and family services in coordination with other tribal, Federal, state, and local resources available for the same purpose.

(d) Program income resulting from the operation of programs under this subpart, such as day care operations, may be retained and used for purposes similar to those for which the grant was awarded.

§ 23.23 Tribal government application contents.

(a) The appropriate Area Director shall, subject to the tribe's fulfillment of the mandatory application requirements and the availability of appropriated funds, make a grant to the tribal governing body of a tribe or consortium of tribes eligible to apply for a grant under this subpart.

(b) The following mandatory tribal application requirements must be submitted to the appropriate Agency Superintendent or Area Director in accordance with the timeframe established in § 23.21 (b) of this subpart:

(1) A current tribal resolution requesting a grant by the Indian tribe(s) to be served by the grant. If an applicant is applying for a grant benefiting more than one tribe (consortium), an authorizing resolution from each tribal government to be served

must be included. The request must be in the form of a current tribal resolution by the tribal governing body and shall include the following information:

(i) The official name of tribe(s) applying for the grant and who will directly benefit from or receive services from the grant;

(ii) The Beginning and ending dates of the grant;

(iii) A provision stating that the resolution will remain in effect for the duration of the program or until the resolution expires or is rescinded; and

(iv) The signature of the authorized representative of the tribal government and the date thereof.

(2) A completed Application for Federal Assistance form, SF-424.

(3) A narrative needs assessment of the social problems or issues affecting the resident Indian population to be served; the geographic area(s) to be served; and estimated number of resident Indian families and/or persons to receive benefits or services from the program.

(4) A comprehensive developmental multi-year plan in narrative form describing what specific services and/or activities will be provided each program year and addressing the above-identified social problems or issues. At a minimum, the plan must include:

(i) The program goals and objectives, stated in measurable terms, to be achieved through the grant;

(ii) A narrative description of how Indian families and communities will benefit from the program; and

(iii) The methodology, including culturally defined approaches, and procedures by which the tribe(s) will accomplish the identified goals and objectives.

(5) An internal monitoring system to measure progress and accomplishments, and to assure that the quality and quantity of actual performance conforms to the requirements of the grant.

(6) A staffing plan that is consistent with the implementation of the above- described program plan of operation and the procedures necessary for the successful delivery of services.

(i) The plan must include proposed key personnel; their qualifications, training or experience relevant to the services to be provided; responsibilities; Indian preference criteria for employment; and position descriptions.

(ii) In accordance with 25 U.S.C. 3201 et seq. (Pub.L. 101-630), title IV, the Indian Child Protection and Family Violence Prevention Act, grantees shall conduct character and background investigations of those personnel identified in that statute. Grantees must initiate character and background investigations of said personnel prior to their actual employment, and complete the investigations in a timely manner.

(7) A program budget and budget narrative justification submitted on an annual basis for the amount of the award and supported by the

proposed plan, appropriate program services and activities for the applicable grant year.

(8) Identification of any consultants and/or subgrantees the applicant proposes to employ; a description of the consultant and/or subgrantee services to be rendered; the qualifications and experience in performing the identified services; and the basis for the cost and amount to be paid for such services.

(9) A certification by a licensed accountant that the bookkeeping and accounting procedures which the tribe(s) uses or intends to use meet existing Federal standards for grant management and administration specified at § 23.46.

(10) A system for managing property and recordkeeping which complies with subpart D of 43 CFR part 2 implementing the Privacy Act (5 U.S.C. 552a) and with existing Federal requirements for grants at 25 CFR 276.5 and 276.11, including the maintenance and safeguarding of direct service case records on families and/or individuals served by the grant.

(11) A listing of equipment, facilities, and buildings necessary to carry out the grant program. Liability insurance coverage for buildings and their contents is recommended for grantees under this subpart.

(12) Pursuant to the Drug-Free Workplace Act of 1988, tribal programs shall comply with the mandatory Drug-Free Workplace Certification, a regulatory requirement for Federal grant recipients.

(c) Continued annual funding of an ICWA program under this subpart shall be contingent upon the existing grant program receiving a satisfactory program evaluation from the area social services office for the previous year of operation. A copy of this evaluation must be submitted together with an annual budget and budget narrative justification in accordance with paragraph (b)(7) of this section. Minimum standards for receiving a satisfactory evaluation shall include:

(1) The timely submission of all fiscal and programmatic reports;

(2) A narrative program report indicating work accomplished in accordance with the applicant's approved multi-year plan and, if applicable, a description of any modification in programs or activities to be funded in the next fiscal year; and

(3) The implementation of mutually determined corrective action measures, if applicable.

SUBPART D—GRANTS TO OFF-RESERVATION INDIAN ORGANIZATIONS FOR TITLE II INDIAN CHILD AND FAMILY SERVICE PROGRAMS

§ 23.31 Competitive off-reservation grant process. (a) Grant application procedures and related information may be obtained from the Area Director designated at § 23.11 for processing ICWA notices for the state in which the applicant is located. Pre-award and ongoing technical assistance of off-reservation

Indian organization grantees shall be provided in accordance with § 23.42.

(b) Prior to the beginning of or during the applicable year(s) in which grants for off-reservation programs will be awarded competitively, the Assistant Secretary—Indian Affairs shall publish in the Federal Register an announcement of the grant application process for the year(s), including program priorities or special considerations (if any), applicant eligibility criteria, the required application contents, the amount of available funding and evaluation criteria for off-reservation programs.

(c) Based on the announcement described in paragraph (b) of this section, an off-reservation applicant shall prepare a multi-year developmental application in accordance with § 23.33 of this subpart. To be considered in the area competitive review and scoring process, a complete application must be received by the deadline announced in the Federal Register by the Area Director designated at § 23.11 for processing ICWA notices for the state in which the applicant is located.

(d) Eligibility requirements for off-reservation Indian organizations. The Secretary or his/her designee shall, contingent upon the availability of funds, make a multi-year grant under this subpart for an off-reservation program when officially requested by a resolution of the board of directors of the Indian organization applicant, upon the applicant's fulfillment of the mandatory application requirements and upon the applicant's successful competition pursuant to § 23.33 of this subpart.

(e) A grant under this subpart for an off-reservation Indian organization shall be limited to the board of directors of the Indian organization which will administer the grant.

(f) Continued annual funding of a multi-year grant award to an off-reservation ICWA program under this subpart shall be contingent upon the grantee's fulfillment of the requirements delineated at § 23.33 (e).

(g) Monitoring and program reporting requirements for grants awarded to off-reservation Indian organizations under this subpart are delineated at § 23.44 and 23.47. § 23.32 Purpose of off-reservation grants. The Secretary or his/her designee is authorized to make grants to off-reservation Indian organizations to establish and operate off-reservation Indian child and family service programs for the purpose of stabilizing Indian families and tribes, preventing the breakup of Indian families and, in particular, to ensure that the permanent removal of an Indian child from the custody of his/her Indian parent or Indian custodian shall be a last resort. Child and family service programs may include, but are not limited to:

(a) A system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate state standards of support for maintenance and medical needs;

(b) The operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children with the goal of strengthening and stabilizing

Indian families;

(c) Family assistance (including homemaker and home counselors), protective day care and afterschool care, employment support services, recreational activities, and respite care with the goal of strengthening Indian families and contributing toward family stability; and

(d) Guidance, legal representation and advice to Indian families involved in state child custody proceedings.

§ 23.33 Competitive off-reservation application contents and application selection criteria.

(a) An application for a competitive multi-year grant under this subpart shall be submitted to the appropriate Area Director prior to or on the announced deadline date published in the Federal Register. The Area Director shall certify the application contents pursuant to § 23.34 and forward the application within five working days to the area review committee, composed of members designated by the Area Director, for competitive review and action. Modifications and/or information received after the close of the application period, as announced in the Federal Register, shall not be reviewed or considered by the area review committee in the competitive process.

(b) Mandatory application requirements for Indian organization applicants shall include:

(1) An official request for an ICWA grant program from the organization's board of directors covering the duration of the proposed program;

(2) A completed Application for Federal Assistance form, SF 424;

(3) Written assurances that the organization meets the definition of Indian organization at § 23.2;

(4) A copy of the organization's current Articles of Incorporation for the applicable grant years;

(5) Proof of the organization's nonprofit status;

(6) A copy of the organization's IRS tax exemption certificate and IRS employer identification number;

(7) Proof of liability insurance for the applicable grant years; and

(8) Current written assurances that the requirements of Circular A-128 for fiscal management, accounting, and recordkeeping are met.

(9) Pursuant to the Drug-Free Workplace Act of 1988, all grantees under this subpart shall comply with the mandatory Drug-Free Workplace Certification, a regulatory requirement for Federal grant recipients.

(c) Competitive application selection criteria. The Area Director

or his/her designated representative shall select those proposals which will in his/her judgment best promote the purposes of the Act. Selection shall be made through the area review committee process in which each application will be scored individually and ranked according to score, taking into consideration the mandatory requirements as specified above and the following selection criteria:

- (1) The degree to which the application reflects an understanding of the social problems or issues affecting the resident Indian client population which the applicant proposes to serve;
- (2) Whether the applicant presents a narrative needs assessment, quantitative data and demographics of the client Indian population to be served;
- (3) Estimates of the number of Indian people to receive benefits or services from the program based on available data;
- (4) Program goals and objectives to be achieved through the grant;
- (5) A comprehensive developmental multi-year narrative plan describing what specific services and/or activities will be provided each program year and addressing the above-identified social problems or issues. At a minimum, the plan must include a narrative description of the program; the program goals and objectives, stated in measurable terms, to be achieved through the grant; and the methodology, including culturally defined approaches, and procedures by which the grantee will accomplish the identified goals and objectives;
- (6) An internal monitoring system the grantee will use to measure progress and accomplishments, and to ensure that the quality and quantity of actual performance conforms to the requirements of the grant;
- (7) Documentation of the relative accessibility which the Indian population to be served under a specific proposal already has to existing child and family service programs emphasizing the prevention of Indian family breakups, such as mandatory state services. Factors to be considered in determining accessibility include:
 - (i) Cultural barriers;
 - (ii) Discrimination against Indians;
 - (iii) Inability of potential Indian clientele to pay for services;
 - (iv) Technical barriers created by existing public or private programs;
 - (v) Availability of transportation to existing programs;
 - (vi) Distance between the Indian community to be served under the proposal and the nearest existing programs;
 - (vii) Quality of services provided to Indian clientele; and
 - (viii) Relevance of services provided to specific needs of the Indian clientele.

(8) If the proposed program duplicates existing Federal, state, or local child and family service programs emphasizing the prevention of Indian family breakups, proper and current documented evidence that repeated attempts to obtain services have been unsuccessful;

(9) Evidence of substantial support from the Indian community or communities to be served, including but not limited to:

(i) Tribal support evidenced by a tribal resolution or cooperative service agreements between the administrative bodies of the affected tribe(s) and the applicant for the duration of the grant period, or

(ii) Letters of support from social services organizations familiar with the applicant's past work experience;

(10) A staffing plan that is consistent with the implementation of the above- described program plan of operation and the procedures necessary for the successful delivery of services. The plan must include proposed key personnel, their qualifications, training or experience relevant to the services to be provided, responsibilities, Indian preference criteria for employment and position descriptions. In accordance with 25 U.S.C. 3201 et seq. (Pub.L. 101-630), Title IV, the Indian Child Protection and Family Violence Prevention Act, grantees shall conduct character and background investigations of those personnel identified in that statute prior to their actual employment;

(11) The reasonableness and relevance of the estimated overall costs of the proposed program or services and their overall relation to the organization's funding base, activities, and mission;

(12) The degree to which the detailed annual budget and justification for the requested funds are consistent with, and clearly supported by, the proposed plan and by appropriate program services and activities for the applicable grant year;

(13) The applicant's identification of any consultants and/or subgrantees it proposes to employ; description of the services to be rendered; the qualifications and experience of said personnel, reflecting the requirements for performing the identified services; and the basis for the cost and the amount to be paid for such services;

(14) Certification by a licensed accountant that the bookkeeping and accounting procedures that the applicant uses or intends to use meet existing Federal standards for grant administration and management specified at § 23.46;

(15) The compliance of property management and recordkeeping systems with subpart D of 43 CFR part 2 (the Privacy Act, 5 U.S.C. 552a), and with existing Federal requirements for grants at 25 CFR 276.5 and 276.11, including the maintenance and safeguarding of direct service case records on families and/or individuals served by the grant;

(16) A description of the proposed facilities, equipment, and buildings necessary to carry out the grant activities; and

(17) Proof of liability insurance coverage for the applicable grant year(s).

(d) Two or more applications receiving the same competitive score will be prioritized in accordance with announcements made in the Federal Register pursuant to § 23.31 (b) for the applicable year(s).

(e) Continued annual funding of a multi-year grant award to an off-reservation ICWA program under this subpart shall be contingent upon the availability of appropriated funds and upon the existing grant program receiving a satisfactory program evaluation from the area social services office for the previous year of operation. A copy of this evaluation shall be submitted together with an annual budget and budget narrative justification in accordance with paragraph (c) (10) of this section. Minimum standards for receiving a satisfactory evaluation shall include the timely submission of all fiscal and programmatic reports; a narrative program report indicating work accomplished in accordance with the initial approved multi-year plan; and the implementation of mutually determined corrective action measures, if applicable.

§ 23.34 Review and decision on off-reservation applications by Area Director. (a) Area office certification. Upon receipt of an application for a grant by an off-reservation Indian organization at the area office, the Area Director shall:

(1) Complete and sign the area office certification form. In completing the area certification form, the Area Director shall assess and certify whether applications contain and meet all the application requirements specified at § 23.33. Area Directors shall be responsible for the completion of the area office certification forms for all applications submitted by off-reservation Indian organizations.

(2) Acknowledge receipt of the application to the applicant and advise the applicant of the disposition of the application within 10 days of receipt; and

(3) Transmit all applications within five working days of receipt to the area review committee for competitive review and subsequent approval or disapproval of the applications.

(b) Area office competitive review and decision for off-reservation applications. Upon receipt of an application for an off-reservation grant under this part requiring the approval of the Area Director, the Area Director shall:

(1) Establish and convene an area review committee, chaired by a person qualified by knowledge, training and experience in the delivery of Indian child and family services.

(2) Review the area office certification form required in paragraph (a) of this section.

(3) Review the application in accordance with the competitive review procedures prescribed in § 23.33. An application shall not receive approval for funding under the area competitive review and scoring process unless a review of the application determines that it:

(i) Contains all the information required in § 23.33 which must be received by the close of the application period. Modifications of the grant application received after the close of the application period shall not be considered in the competitive review process.

(ii) Receives at least the established minimum score in an area competitive review, using the application selection criteria and scoring process set out in § 23.33. The minimum score shall be established by the Central Office prior to each application period and announced in the Federal Register for the applicable grants year(s).

(4) Approve or disapprove the application and promptly notify the applicant in writing of the approval or disapproval of the application. If the application is disapproved, the Area Director shall include in the written notice the specific reasons therefore.

(c) The actual funding amounts for the initial grant year shall be subject to appropriations available nationwide and the continued funding of an approved off-reservation grant application under subpart D of this part shall be subject to available funds received by the respective area office for the applicable grant year. Initial funding decisions and subsequent decisions with respect to funding level amounts for all approved grant applications under this part shall be made by the Area Director.

§ 23.35 Deadline for Central Office action. Within 30 days of the receipt of grant reporting forms from the Area Directors identifying approved and disapproved applications pursuant to subpart D of this part and recommended funding levels for approved applications, the Secretary or his/her designee shall process the Area Directors' funding requests.

§ 23.41 Uniform grant administration provisions, requirements and applicability. The general and uniform grant administration provisions and requirements specified at 25 CFR part 276 and under this subpart are applicable to all grants awarded to tribal governments and off-reservation Indian organizations under this part, except to the extent inconsistent with an applicable Federal statute, regulation or OMB circular.

§ 23.42 Technical assistance. (a) Pre-award and ongoing technical assistance may be requested by an Indian tribe or off-reservation Indian organization from the appropriate agency or area office to which the tribe or organization will be submitting an application for funds under subparts C and D of this part. A request for pre-award technical assistance by an off-reservation Indian organization must be received by the Area Director designated at § 23.11 for the state in which the applicant is located no later than 10 days prior to the application deadline to assure sufficient time for area response.

(b) Pre-award and ongoing technical assistance may be provided by the appropriate BIA agency or area office for purposes of program planning and design, assistance in establishing internal program monitoring and evaluation criteria for ongoing grant administration and management, and for other appropriate assistance requested.

(c) The area social services staff shall provide technical assistance to grantees upon receipt of an authorized request from the grantee or when review of the grantee's quarterly performance reports shows that:

(1) An ICWA program is yielding results that are or will be detrimental to the welfare of the intended Indian beneficiaries of the program;

(2) A program has substantially failed to implement its goals and objectives;

(3) There are serious irregularities in the fiscal management of the grant; or

(4) The grantee is otherwise deficient in its program performance.

(5) Upon receiving an authorized request from the grantee, the area social services staff and/or grants officer shall provide the necessary technical assistance to arrive at mutually determined corrective action measures and their actual implementation, if necessary, and the timeframes within which said corrective actions will be implemented.

SUBPART E—GENERAL AND UNIFORM GRANT ADMINISTRATION PROVISIONS AND REQUIREMENTS

§ 23.43 Authority for grant approval and execution. (a) Tribal government programs. The appropriate Agency Superintendent or Area Director may approve a grant application and its subsequent execution under subpart C when the intent, purpose and scope of the application pertains solely to reservations located within the service area jurisdiction of the agency or area office.

(b) Off-reservation programs. The appropriate Area Director may approve a grant application and its subsequent execution under subpart D when the intent, purpose and scope of the grant proposal pertains to off-reservation Indian service populations or programs.

§ 23.44 Grant administration and monitoring.

All grantees under this part shall be responsible for managing day-to-day program operations to ensure that program performance goals are being achieved and to ensure compliance with the provisions of the grant award document and other applicable Federal requirements. Unless delegated to the Agency Superintendent, appropriate area office personnel designated by the Area Director shall be responsible for all grant program and fiscal monitoring responsibilities

§ 23.45 Subgrants. A tribal government grantee may make a subgrant under subpart C of this part, provided that such subgrants are for the purpose for which the grant was made and that the grantee retains administrative and financial responsibility over the activity and the funds.

§ 23.46 Financial management, internal and external controls and other assurances. Grantee financial management systems shall comply with the following standards for accurate, current and complete disclosure of financial activities.

(a) OMB Circular A-87 (Cost principles for state and local governments and federally recognized Indian tribal governments).

(b) OMB Circular A-102 (Common rule 43 CFR part 12).

(c) OMB Circular A-128 (Single Audit Act).

(d) OMB Circular A-110 or 122 (Cost principles for non-profit organizations and tribal organizations, where applicable).

(e) Internal control. Effective control and accountability must be maintained for all grants. Grantees must adequately safeguard any property and must ensure that it is used solely for authorized purposes.

(f) Budget control. Actual expenditures must be compared with budgeted amounts for the grant. Financial information must be related to program performance requirements.

(g) Source documentation. Accounting records must be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, grant documents, or other information required by the grantee's financial management system. The Secretary or his/her designee may review the adequacy of the financial management system of an Indian tribe(s) or off-reservation Indian organization applying for a grant under this part.

(h) Pursuant to 18 U.S.C. 641, whoever embezzles, steals, purloins, or knowingly converts to his or her use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or whoever receives, conceals, or retains the same with intent to convert it to his or her use or gain, knowing it to have been embezzled, stolen, purloined, or converted shall be fined not more than \$10,000 or imprisoned not more than 10 years, or both; but if the value of such property does not exceed the sum of \$100, he or she shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

§ 23.47 Reports and availability of information to Indians.

(a) Any tribal government or off-reservation Indian organization receiving a grant under this part shall make general programmatic information and reports concerning that grant available to the Indian people it serves or represents. Access to this information may be requested in writing and shall be made available within 10 days of receipt of the request. Except as required by title IV of Pub.L. 101-630, the Indian Child Protection and Family Violence Prevention Act, grantees shall hold confidential all information obtained from persons receiving services from the program, and shall not release such information without the individual's written consent. Information may be disclosed in a manner which does not identify or lead to the identification of particular individuals.

(b) Grantees shall submit Standard Form 269 or 269A on a quarterly and an annual basis to report their status of funds by the dates specified in the grant award document.

(c) Grantees shall furnish and submit the following written

quarterly and annual program reports by the dates specified in the award document:

(1) Quarterly and annual statistical and narrative program performance reports which shall include, but need not be limited to, the following:

(i) A summary of actual accomplishments and significant activities as related to program objectives established for the grant period;

(ii) The grantee's evaluation of program performance using the internal monitoring system submitted in their application;

(iii) Reports on all significant ICWA direct service grant activities including but not limited to the following information:

(A) Significant title II activities;

(B) Data reflecting numbers of individuals referred for out-of-home placements, number of individuals benefiting from title II services and types of services provided, and

(C) Information and referral activities.

(iv) Child abuse and neglect statistical reports and related information as required by 25 U.S.C. 2434, Pub.L. 99-570, the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986;

(v) A summary of problems encountered or reasons for not meeting established objectives;

(vi) Any deliverable or product required in the grant; and

(vii) Additional pertinent information when appropriate.

(2) The BIA may negotiate for the provision of other grant-related reports not previously identified.

(d) Events may occur between scheduled performance reporting dates which have significant impact on the grant-supported activity. In such cases, the grantee must inform the awarding agency as soon as problems, delays, adverse conditions, or serious incidents giving rise to liability become known and which will materially impair its ability to meet the objectives of the grant.

§ 23.48 Matching shares and agreements. (a) Grant funds provided to Indian tribes under subpart C of this part may be used as non-Federal matching shares in connection with funds provided under titles IV-B, IV-E and XX of the Social Security Act or such other Federal programs which contribute to and promote the purposes of the Act as specified in §§ 23.3 and 23.22 (25 U.S.C. 1931).

(b) Pursuant to 25 U.S.C. 1933, in furtherance of the establishment, operation, and funding of programs funded under subparts C and D of this part, the Secretary may enter into agreements with the Secretary of Health and Human Services. The latter Secretary is authorized by the Act to use funds appropriated for the Department of Health and Human Services for programs similar to those funded under subparts C and D of this part (25 U.S.C. 1931 and 1932), provided that authority to make payment pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

§ 23.49 Fair and uniform provision of services.

(a) Grants awarded under this part shall include provisions assuring compliance with the Indian Civil Rights Act; prohibiting discriminatory distinctions among eligible Indian beneficiaries; and assuring the fair and uniform provision by the grantees of the services and assistance they provide to eligible Indian beneficiaries under such grants. Such procedures must include criteria by which eligible Indian beneficiaries will receive services, recordkeeping mechanisms adequate to verify the fairness and uniformity of services in cases of formal complaints, and an explanation of what rights will be afforded an individual pending the resolution of a complaint.

(b) Indian beneficiaries of the services to be rendered under a grant shall be afforded access to administrative or judicial bodies empowered to adjudicate complaints, claims, or grievances brought by such Indian beneficiaries against the grantee arising out of the performance of the grant.

§ 23.50 Service eligibility. (a) Tribal government Indian child and family service programs. Any person meeting the definition of Indian, Indian child, Indian custodian, or Indian parent of any unmarried person under the age of 18 as defined in § 23.2 is eligible for services provided under 25 U.S.C. 1931 of the Act. Tribal membership status shall be determined by tribal law, ordinance, or custom. The tribe may, under subpart C, extend services to nontribal family members related by marriage to tribal members, provided such services promote the intent and purposes of the Act. A tribe may also, within available resources, extend services under this part to individuals who are members of, or are eligible for membership in other Indian tribes, and who reside within the tribe's designated service area.

(b) Off-reservation Indian child and family service programs and agreements with the Secretary of Health and Human Services pursuant to 25 U.S.C. 1933. For purposes of eligibility for services provided under 25 U.S.C. 1932 and 1933 of the Act, any person meeting the definition of Indian, Indian child, Indian custodian, or Indian parent of any unmarried person under the age of 18 as defined in § 23.2, or the definition of Indian as defined in 25 U.S.C. 1603(c), shall be eligible for services. Tribal membership status shall be determined by tribal law, ordinance, or custom.

§ 23.51 Grant carry-over authority. Unless restricted by appropriation, and contingent upon satisfactory program evaluations from the appropriate area or agency office for an existing program, grantees are authorized to carry over unliquidated grant funds which remain at the end of a budget period. Such funds may be carried over for a maximum period of two years beyond the initial grant funding period and must be utilized only for the intent, purpose and scope of the original grant. These carry-over grant funds shall not be reprogrammed into other appropriation activities or subactivities. Funds carried over into another fiscal year will be added to the grantee's new fiscal year funding amount.

§ 23.52 Grant suspension. (a) When a grantee has materially failed to comply and remains out of compliance with the terms and conditions of the grant, the grants officer may, after reasonable notice to the grantee and the provision of requested technical assistance, suspend the grant. The notice preceding the suspension shall include the effective date of the suspension, the

corrective measures necessary for reinstatement of the grant and, if there is no immediate threat to safety, a reasonable timeframe for corrective action prior to actual suspension.

(b) No obligation incurred by the grantee during the period of suspension shall be allowable under the suspended grant, except that the grants officer may at his/her discretion allow necessary and proper costs which the grantee could not reasonably avoid during the period of suspension if such costs would otherwise be allowable under the applicable cost principles.

(c) Appropriate adjustments to the payments under the suspended grant will be made either by withholding the payments or by not allowing the grantee credit for disbursements which the grantee may make in liquidation of unauthorized obligations the grantee incurs during the period of suspension.

(d) Suspension shall remain in effect until the grantee has taken corrective action to the satisfaction of the grants officer, or given assurances satisfactory to the grants officer that corrective action will be taken, or until the grants officer cancels the grant.

§ 23.53 Cancellation.

(a) The grants officer may cancel any grant, in whole or in part, at any time before the date of completion whenever it is determined that the grantee has:

- (1) Materially failed to comply with the terms and conditions of the grant;
- (2) Violated the rights as specified in § 23.49 or endangered the health, safety, or welfare of any person; or
- (3) Been grossly negligent in, or has mismanaged the handling or use of funds provided under the grant.

(b) When it appears that cancellation of the grant will become necessary, the grants officer shall promptly notify the grantee in writing of this possibility. This written notice shall advise the grantee of the reason for the possible cancellation and the corrective action necessary to avoid cancellation. The grants officer shall also offer, and shall provide, if requested by the grantee, any technical assistance which may be required to effect the corrective action. The grantee shall have 60 days in which to effect this corrective action before the grants officer provides notice of intent to cancel the grant as provided for in paragraph (c) of this section.

(c) Upon deciding to cancel for cause, the grants officer shall promptly notify the grantee in writing of that decision, the reason for the cancellation, and the effective date. The Area Director or his/her designated official shall also provide a hearing for the grantee before cancellation. However, the grants officer may immediately cancel the grant, upon notice to the grantee, if the grants officer determines that continuance of the grant poses an immediate threat to safety. In this event, the Area Director or his/her designated official shall provide a hearing for the grantee within 10 days of the cancellation.

(d) The hearing referred to in paragraph (c) of this section shall be conducted as follows:

(1) The grantee affected shall be notified, in writing, at least 10 days before the hearing. The notice should give the date, time, place, and purpose of the hearing.

(2) A written record of the hearing shall be made. The record shall include written statements submitted at the hearing or within five days following the hearing.

SUBPART F—APPEALS

§ 23.61 Appeals from decision or action by Agency Superintendent, Area Director or Grants Officer. A grantee or prospective applicant may appeal any decision made or action taken by the Agency Superintendent, Area Director, or grants officer under subparts C or E of this part. Such an appeal shall be made to the Assistant Secretary who shall consider the appeal in accordance with 25 CFR 2.20 (c) through (e). Appeal procedures shall be as set out in part 2 of this chapter.

§ 23.62 Appeals from decision or action by Area Director under subpart D. A grantee or applicant may appeal any decision made or action taken by the Area Director under subpart D that is alleged to be in violation of the U.S. Constitution, Federal statutes, or the regulations of this part. These appeals shall be filed with the Interior Board of Indian Appeals in accordance with 25 CFR 2.4 (e); 43 CFR 4.310 through 4.318 and 43 CFR 4.330 through 4.340. However, an applicant may not appeal a score assigned to its application or the amount of grant funds awarded.

§ 23.63 Appeals from inaction of official. A person or persons whose interests are adversely affected, or whose ability to protect such interests is impeded by the failure of an official to act on a request to the official, may make the official's inaction the subject of an appeal under part 2 of this chapter.

SUBPART G—ADMINISTRATIVE PROVISIONS

§ 23.71 Recordkeeping and information availability. (a)(1) Any state court entering a final decree or adoptive order for any Indian child shall provide the Secretary or his/her designee within 30 days a copy of said decree or order, together with any information necessary to show:

(i) The Indian child's name, birthdate and tribal affiliation, pursuant to 25 U.S.C. 1951;

(ii) Names and addresses of the biological parents and the adoptive parents; and

(iii) Identity of any agency having relevant information relating to said adoptive placement.

(2) To assure and maintain confidentiality where the biological parent(s) have by affidavit requested that their identity remain confidential, a copy of such affidavit shall be provided to the Secretary or his/her designee. Information provided pursuant to 25 U.S.C. 1951(a) is not subject to the Freedom of Information Act (5 U.S.C. 552), as amended. The Secretary or his/her designee shall ensure that the confidentiality of such information

is maintained. The address for transmittal of information required by 25 U.S.C. 1951(a) is: Chief, Division of Social Services, Bureau of Indian Affairs, 1849 C Street, NW., Mail Stop 310-SIB, Washington, DC 20240. The envelope containing all such information should be marked "Confidential." This address shall be sent to the highest court of appeal, the Attorney General and the Governor of each state. In some states, a state agency has been designated to be repository for all state court adoption information. Where such a system is operative, that agency may assume reporting responsibilities for the purposes of the Act.

(b) The Division of Social Services, Bureau of Indian Affairs, is authorized to receive all information and to maintain a central file on all state Indian adoptions. This file shall be confidential and only designated persons shall have access to it. Upon the request of an adopted Indian individual over the age of 18, the adoptive or foster parents of an Indian child, or an Indian tribe, the Division of Social Services shall disclose such information as may be necessary for purposes of tribal enrollment or determining any rights or benefits associated with tribal membership, except the names of the biological parents where an affidavit of confidentiality has been filed, to those persons eligible under the Act to request such information.

The chief tribal enrollment officer of the BIA is authorized to disclose enrollment information relating to an adopted Indian child where the biological parents have by affidavit requested anonymity. In such cases, the chief tribal enrollment officer shall certify the child's tribe, and, where the information warrants, that the child's parentage and other circumstances entitle the child to enrollment consideration under the criteria established by the tribe.

SUBPART H—ASSISTANCE TO STATE COURTS

§ 23.81 Assistance in identifying witnesses. Upon the request of a party in an involuntary Indian child custody proceeding or of a court, the Secretary or his/her designee shall assist in identifying qualified expert witnesses. Such requests for assistance shall be sent to the Area Director designated in § 23.11(c). The BIA is not obligated to pay for the services of such expert witnesses

§ 23.82 Assistance in identifying language interpreters.

Upon the request of a party in an Indian child custody proceeding or of a court, the Secretary or his/her designee shall assist in identifying language interpreters. Such requests for assistance should be sent to the Area Director designated in § 23.11(c). The BIA is not obligated to pay for the services of such language interpreters.

§ 23.83 Assistance in locating biological parents of Indian child after termination of adoption. Upon the request of a child placement agency, the court or an Indian tribe, the Secretary or his/her designee shall assist in locating the biological parents or prior Indian custodians of an adopted Indian child whose adoption has been terminated pursuant to 25 U.S.C. 1914. Such requests for assistance should be sent to the Area Director designated in § 23.11(c).

APPENDIX - E

CALIFORNIA RULES OF COURT

**CALIFORNIA RULES OF COURT
TITLE FIVE. SPECIAL RULES FOR TRIAL COURTS
DIVISION IC. JUVENILE COURT RULES
CHAPTER 3. GENERAL CONDUCT OF JUVENILE COURT PROCEEDINGS**

(Effective as of January 1, 2001)

Rule 1410. Persons present

(a) [Separate session; restriction on persons present (§§ 345, 675)] All juvenile court proceedings shall be heard at a special or separate session of the court, and no other matter shall be heard at that session. No person on trial, awaiting trial, or accused of a crime, other than a parent, de facto parent, guardian, or relative of the child, shall be permitted to be present at the hearing, except while testifying as a witness.

(b) [Persons present (§§ 280, 332, 335, 347, 349, 353, 656, 658, 677, 679, 681, 700, 25 U.S.C. §§ 1911, 1931-1934)] The following persons are entitled to be present:

(1) The child;

(2) All parents, de facto parents, Indian custodians, and guardians of the child or, if no parent or guardian resides within the state or, if their places of residence are not known,

(A) any adult relatives residing within the county or, if none,

(B) any adult relatives residing nearest the court;

(3) Counsel representing the child or the parent, de facto parent, guardian or adult relative, Indian custodian or the tribe of an Indian child;

(4) The probation officer or social worker;

(5) The prosecuting attorney, as provided in subdivisions (c) and (d);

(6) Any court-appointed special advocate;

(7) A representative of the Indian child's tribe;

(8) The court clerk;

(9) The official court reporter, as provided in rule 1411;

(10) At the court's discretion, a bailiff.

(c) [Presence of prosecuting attorney--§§ 601-602 proceedings (§ 681)] In proceedings brought under section 602, the prosecuting attorney shall appear on behalf of the people of the State of California. In proceedings brought under section 601, the prosecuting attorney may appear to assist in ascertaining and presenting the evidence if:

(1) The child is represented by counsel; and

(2) The court consents to or requests the prosecuting attorney's presence, or the probation officer requests and the court consents to the prosecuting attorney's presence.

(d) [Presence of petitioner's attorney--§ 300 proceedings (§ 317)] In proceedings brought under section 300, the county counsel or district attorney shall appear and represent the petitioner if the parent or guardian is represented by counsel, and the juvenile court requests the attorney's presence.

(e) Others who may be admitted (§§ 346, 676, 676.5) Except as provided below, the public shall not be admitted to a juvenile court hearing. The court may admit those the court deems to have a direct and legitimate interest in the case, or in the work of the court.

(1) If requested by a parent or guardian in a hearing under section 300, and consented to or requested by the child, the court may permit others to be present.

(2) In a hearing under section 602:

(A) If requested by the child and a parent or guardian who is present, the court may admit others.

(B) Up to two family members of a prosecuting witness may attend to support the witness, as authorized by Penal Code section 868.5.

(C) Except as provided in section 676(b), members of the public shall be admitted to hearings concerning allegations of the offenses set forth in section 676(a).

(D) A victim of an offense alleged to have been committed by the child who is the subject of the petition, and up to two support persons chosen by the victim, are entitled to attend any hearing regarding the offense.

(E) Any persons, including the child, may move to exclude a victim or a support person and must demonstrate a substantial probability that overriding interests will be prejudiced by the presence of the individual sought to be excluded. Upon such motion, the court shall consider reasonable alternatives to the exclusion and shall make findings as required under section 676.5.

**CALIFORNIA RULES OF COURT
TITLE FIVE. SPECIAL RULES FOR TRIAL COURTS
DIVISION IC. JUVENILE COURT RULES
CHAPTER 3. GENERAL CONDUCT OF JUVENILE COURT PROCEEDINGS**

(Current through June 1, 2000)

Rule 1412. General provisions--proceedings

(a) [Control of proceedings (§§ 350, 680)] The court shall control all proceedings with a view to the expeditious and effective ascertainment of the jurisdictional facts and of all information relevant to the present condition and welfare of the child.

(b) [Conduct of proceedings (§§ 350, 680)] Unless there is a contested issue of fact or law, the proceedings shall be conducted in a nonadversarial atmosphere.

(c) [Testimony of child in chambers (§ 350)] In a hearing pursuant to section 300 et seq., a child may testify in chambers and outside the presence of the child's parent or guardian if the parent or guardian is represented by counsel who is present, and the court determines that any of the following circumstances exist:

(1) Testimony in chambers is necessary to ensure truthful testimony; or

(2) The child is likely to be intimidated by a formal courtroom setting; or

(3) The child is afraid to testify in front of the parent or guardian. In determining whether there is a basis for the child's in-chambers testimony, the court may consider the petitioner's report or other offers of proof. The parent or guardian may elect to have the court reporter read back the child's testimony.

(d) [Burden of proof (§§ 350, 701.1)] In any hearing under section 300 in which the county welfare agency has the burden of proof, after completion of the agency's case, and the presentation of evidence by the child, the court may, on motion of any party or on the court's own motion, order whatever action the law requires if the court, based on all the evidence then before it, finds that the burden of proof is not met.

In any hearing under section 601 or 602, after the completion of the petitioner's case, the court may, on the motion of any party, or on the court's own motion, order whatever action the law requires if the burden of proof is not met.

If the motion is denied, the child in a section 300 or section 601 or section 602 hearing, or the parent or guardian in a section 300 hearing, may offer evidence.

(e) [De facto parents] Upon a sufficient showing the court may recognize the child's present or previous custodians as de facto parents and grant standing to participate as parties in disposition hearings and any hearing thereafter at which the status of the dependent child is at issue. The de facto parent may:

(1) Be present at the hearing;

(2) Be represented by retained counsel or, at the discretion of the court, by appointed counsel;

(3) Present evidence.

(f) [Relatives] Upon a sufficient showing the court may permit relatives of the child to:

(1) Be present at the hearing;

(2) Address the court.

(g) [Right to counsel (§§ 317, 633, 634, 700)] At each hearing the court shall advise an unrepresented child, parent, or guardian of the right to be represented by counsel, and, if applicable, of the right to have counsel appointed, subject to a claim by the county for reimbursement as provided by law.

(h) [Appointment of counsel (§§ 317, 633, 634, 700)]

(1) In cases petitioned under section 300:

(A) The court shall appoint counsel for the child if it appears that the child would benefit from the appointment;

(B) The court shall appoint counsel for any parent or guardian unable to afford counsel if the child is placed in out_of_home care, or the recommendation of the petitioner is for out_of_home care, unless the court finds the parent or guardian has knowingly and intelligently waived the right to counsel. The court may also appoint counsel for the petitioner to represent the child unless the court deter-

mines that representation constitutes a conflict of interest. If the court finds a conflict exists, separate counsel shall be appointed for the child.

(2) In cases petitioned under section 601 or section 602:

(A) The court shall appoint counsel for any child who appears without counsel, unless the child knowingly and intelligently waives the right to counsel. If the court determines that the parent or guardian can afford counsel but has not retained counsel for the child, the court shall appoint counsel for the child and order the parent or guardian to reimburse the county;

(B) The court may appoint counsel for a parent or guardian who desires but cannot afford counsel;

(C) If the parent has retained counsel for the child and a conflict arises, the court shall take steps to ensure that the child's interests are protected.

(i) [Tribal representatives (25 U.S.C. §§ 1911, 1931-1934)] The tribe of an Indian child is entitled to intervene as a party at any stage of a dependency proceeding concerning the Indian child.

(1) The tribe may appear by counsel or by a representative of the tribe designated by the tribe to intervene on behalf of the tribe. When the tribe appears as a party by a representative of the tribe, the name of the representative and a statement of authorization for that individual or agency to appear as the tribe, shall be submitted to the court in the form of a tribal resolution or other document evidencing an official act of the tribe.

(2) If the tribe of the Indian child does not intervene as a party, the court may permit an individual affiliated with the tribe, or if requested by the tribe a representative of a program operated by another tribe or Indian organization to:

(A) be present at the hearing;

(B) address the court;

(C) receive notice of hearings;

(D) examine all court documents relating to the dependency case;

(E) submit written reports and recommendations to the court;

(F) perform other duties and responsibilities as requested or approved by the court.

(j) [Advice of hearing rights (§§ 301, 311, 341, 630, 702.5, 827)] The court shall advise the child, parent, and guardian in section 300 cases, and the child in section 601 or section 602 cases, of the following rights:

(1) Any right to assert the privilege against self-incrimination;

(2) The right to confront and cross-examine the persons who prepared reports or documents submitted to the court by the petitioner, and the witnesses called to testify at the hearing;

(3) The right to use the process of the court to bring in witnesses;

(4) The right to present evidence to the court.

The child, parent or guardian, and their attorneys have the right (i) to receive probation officer or social worker reports, and (ii) to inspect the documents used by the preparer of the report. Unless prohibited by court order, the child, parent or guardian, and their attorneys also have the right to receive all documents filed with the court.

(k) [Notice] At each hearing under section 300 et seq. the court shall determine whether notice has been given as required by law, and shall make an appropriate finding noted in the minutes.

(l) [Address of parent or guardian--notice (§ 316.1)] At the first appearance by a parent or guardian in proceedings under section 300 et seq., the court shall order the parent or guardian, or both, to provide a mailing address.

(1) The court shall advise the parent or guardian that the mailing address provided will be used by the court, the clerk, and the social services agency for the purposes of notice of hearings and the mailing of all documents related to the proceedings.

(2) The court shall advise the parent or guardian that until and unless the parent or guardian, or the attorney of record for the parent or guardian, submits written notification of a change of mailing address, the address provided will be used, and notice requirements will be satisfied by appropriate service at that address.

(3) Judicial Council form Notification of Mailing Address/Change of Mailing Address (JV-140) is the preferred method of informing the court and the social services agency of the mailing address of the parent or guardian and change of mailing address.

(A) The form shall be delivered to the parent or guardian, or both, with the petition.

(B) The form shall be available in the courtroom, in the office of the clerk, and in the offices of the social services agency.

(C) The form shall be printed and made available in both English and Spanish.

(m) [Periodic reports] The court may require the petitioner or any other agency to submit reports concerning a child subject to the jurisdiction of the court.

CALIFORNIA

**CALIFORNIA RULES OF COURT
TITLE FIVE. SPECIAL RULES FOR TRIAL COURTS
DIVISION IC. JUVENILE COURT RULES
CHAPTER 8. CASES PETITIONED UNDER SECTION 300
PART II. INDIAN CHILD WELFARE ACT**

(Effective as of January 1, 2001)

Rule 1439. Indian Child Welfare Act (25 U.S.C. § 1901 et seq.)

(a) [Definitions; 25 U.S.C. § 1903] As used in this rule, unless the context or subject matter otherwise requires:

(1) “Indian child” means an unmarried person under the age of 18 who:

(A) is 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.

(2) “Indian child’s tribe” means:

(A) the Indian tribe in which the child is a member or is eligible for membership; or

(B) in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has more significant contacts.

(3) “Indian custodian” means any Indian who has:

(A) legal custody of an Indian child under tribal law or custom, or under state law; or

(B) temporary physical care, custody, and control of an Indian child whose parent or parents have transferred custody to that person.

(4) “Parent of an Indian child” means the biological parent of an Indian child or any Indian person who has lawfully adopted a child, including adoptions under tribal law or custom. (This definition does not include a non-Indian adoptive parent, or an unwed alleged father where paternity has not been determined or acknowledged.)

(5) “Custody” means legal or physical custody or both as provided under state law or tribal law or custom.

(6) “Indian tribe” means any Indian tribe, band, nation, or other organized group or community of Indians eligible for services provided to Indians by the Secretary of the Interior because of their status as Indians, including any Alaskan Native Villages as defined by section 1602(c) of title 43 of the United States Code.

(7) “Extended family” means those persons defined by the law or custom of the Indian child’s tribe, or in the absence of such law or custom, an adult grandparent, aunt, uncle, brother, sister, sister-in-law, brother-in-law, niece, nephew, first or second cousin, or step-parent of the Indian child.

(8) “Child custody proceeding” means and includes a proceeding at which the court considers foster care placement, appointment of a guardian, termination of parental rights, preadoptive placement, or adoptive placement.

(9) “Foster care placement” means any temporary placement from which a child may not be removed by the parent or Indian custodian upon demand, including a shelter care home, foster home, institution, or the home of a guardian or conservator.

(10) “Qualified expert witness” means a person qualified to address the issue of whether continued custody by a parent or Indian custodian is likely to result in serious physical or emotional damage to the child. Persons most likely to be considered such an expert are:

(A) a member of a tribe with knowledge of Indian family organization and child rearing; or

(B) a lay expert with substantial experience in Indian child and family services and extensive knowledge of the social and cultural standards and child-rearing practices of Indian tribes, specifically the child’s tribe, if possible; or

(C) a professional person with substantial education and experience in Indian child and family services and in the social and cultural standards of Indian tribes, specifically the child’s tribe, if possible; or

(D) a professional person having substantial education and experience in the area of his or her specialty.

(11) “Act” means the Indian Child Welfare Act (25 U.S.C. §§ 1901-1963).

(12) “Tribal court” means a court with jurisdiction over child custody proceedings, identified as a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe that is vested with authority over child custody proceedings. If applicable, the tribal court has met the requirements for resumption of jurisdiction over child custody proceedings as approved by the Department of the Interior.

(b) [Applicability of rule; 25 U.S.C. §§ 1911, 1912] This rule applies to all proceedings under section 300 et seq., including detention hearings, jurisdiction hearings, disposition hearings, reviews, hearings under section 366.26, and subsequent hearings affecting the status of the Indian child.

(c) [Jurisdiction; 25 U.S.C. § 1911]

(1) If the Indian child resides or is domiciled on an Indian reservation that exercises exclusive jurisdiction under the Act over child custody proceedings, the petition under section 300 must be dismissed. At present, no California tribe is authorized under the Act to exercise exclusive jurisdiction.

(A) If the Indian child is temporarily off a reservation that exercises exclusive jurisdiction, the juvenile court shall exercise temporary jurisdiction if there is an immediate threat of serious physical harm to the child.

(B) Absent extraordinary circumstances, temporary emergency custody shall terminate within 90 days, unless the court determines by clear and convincing evidence, including the testimony of at least one qualified expert witness, that return of the child is likely to cause serious damage to the child.

(C) The child shall be returned immediately to the parent or Indian custodian when the emergency placement is no longer necessary to prevent serious harm to the child.

(2) If the Indian child is not domiciled or residing on a reservation that exercises exclusive jurisdiction, the tribe, parent, or Indian custodian may petition the court to transfer to the tribal jurisdiction, and the juvenile court shall transfer jurisdiction to tribal jurisdiction unless there is good cause not to do so.

(A) Either parent may object to the transfer.

(B) The tribe may decline the transfer of jurisdiction.

(3) If the tribe does not intervene or the tribal court does not request transfer to tribal jurisdiction, or if there is no response to the notice, the court should proceed to exercise its jurisdiction under section 300 et seq., in accordance with the procedures and standards of proof as required by the Act.

(d) [Inquiry] The court and the county welfare department have an affirmative duty to inquire whether a child for whom a petition under section 300 is to be, or has been, filed is or may be an Indian child.

(1) Section 1(l) or 1(m) of the Juvenile Dependency Petition (Version One) (JV-100) or section 1(i) or 1(j) of the Juvenile Dependency Petition (Version Two) (JV-110) must be checked if there is reason to know the child may be a member of or eligible for membership in a federally recognized Indian tribe or if there is reason to believe the child may be of Indian ancestry.

(2) The circumstances that may provide probable cause for the court to believe the child is an Indian child include, but are not limited to, the following:

(A) A party, including the child, an Indian tribe, an Indian organization, an officer of the court, or a public or private agency, informs the court or the welfare agency or provides information suggesting that the child is an Indian child;

(B) The residence of the child, the child’s parents, or an Indian custodian is in a predominantly Indian community.

(e) [Proceedings; 25 U.S.C. § 1912] If section 1(l) of the Juvenile Dependency Petition (Version One)(JV-100) or section 1(i) of the Juvenile Dependency Petition (Version Two) (JV-110) is checked, or if, upon inquiry, or based on other information, the court has reason to know the child may be an Indian child, the court shall proceed as if the child is an Indian child and shall proceed with all dependency hearings, observing the Welfare and Institutions Code timelines while complying with the Act and this rule. A determination by the identified tribe or the Bureau of Indian Affairs (BIA) that the child is not an Indian child shall be definitive. If section 1(m) of the Juvenile Dependency Petition (Version One) (JV-100) is checked and section 1(l) is not, or section 1(j) of the Juvenile Dependency Petition (Version Two) (JV-110) is checked and section 1(i) is not, notice of the proceedings to the Bureau of Indian Affairs and further inquiry regarding the possible Indian status of the child are the only requirements.

(f) [Notice; 25 U.S.C. § 1912] The parent and Indian custodian of an Indian child, and the Indian child’s tribe, must be notified of the pending petition and the right of the tribe to intervene in the proceedings. If at any time after the filing of the petition the court knows or has reason to know that the child is or may be an Indian child, the following notice procedures must be followed:

(1) Notice must be sent by registered or certified mail with return receipt requested, and additional notice by first class mail is recommended.

- (2) Notice to the tribe shall be to the tribal chairman unless the tribe has designated another agent for service.
- (3) Notice shall be sent to all tribes of which the child may be a member or eligible for membership.
- (4) If the identity or location of the parent or Indian custodian or the tribe cannot be determined, notice shall be sent to the specified office of the Secretary of the Interior, which has 15 days to provide notice as required.
- (5) Notice shall be sent whenever there is reason to believe the child may be an Indian child, and for every hearing thereafter unless and until it is determined that the child is not an Indian child.
- (g) [Determination of status; 25 U.S.C. § 1911 (Welf. & Inst. Code, § 360.6 (c)] Determination of tribal membership or eligibility for membership is made exclusively by the tribe.
- (1) A tribe's determination that the child is or is not a member of or eligible for membership in the tribe is conclusive.
- (2) Information that the child is not enrolled in the tribe is not determinative of status as an Indian child.
- (3) The tribe must be a federally recognized tribe, group, or community as defined by the Bureau of Indian Affairs (BIA) of the Department of the Interior as eligible for services provided to Indians by the Secretary of the Interior because of their status as Indians, including any Alaskan Native Villages as defined by section 1602(c) of title 43 of the United States Code.
- (4) Absent a contrary determination by the tribe, a determination by the BIA that a child is or is not an Indian is conclusive.
- (5) The Indian Child Welfare Act applies when a tribe determines that an unmarried minor is:
- (A) A member of an Indian tribe; or
- (B) Eligible for membership in an Indian tribe and a biological child of a member of an Indian tribe.
- (h) [Proceedings after notice; 25 U.S.C. § 1911] If it is determined that the Act applies, the juvenile court hearing shall not proceed until at least 10 days after those entitled to notice under the Act have received notice. If requested, the parent, Indian custodian, or tribe shall be granted a continuance of up to 20 days to prepare for the proceeding. The tribe may intervene at any point in the proceeding.
- (1) The indigent parent and indigent Indian custodian have a right to court-appointed counsel.
- (2) All parties, including the parent, Indian child, Indian custodian, and tribe, and their respective attorneys, have the right to examine all court documents related to the dependency case.
- (i) [Required procedures, findings and orders for foster care placement and guardianships; 25 U.S.C. § 1912] The court may not order foster care placement of an Indian child, or establish a guardianship of an Indian child unless the court finds by clear and convincing evidence that continued custody with the parent or Indian custodian is likely to cause the Indian child serious emotional or physical damage.
- (1) Testimony by a qualified expert witness is required.
- (2) Stipulation by the parent or Indian custodian or failure to object may waive the requirement of producing evidence of the likelihood of serious damage only if the court is satisfied that the party has been fully advised of the requirements of the Act, and has knowingly, intelligently, and voluntarily waived them.
- (3) Failure to meet non-Indian family and community child-rearing standards, or the existence of other behavior or conditions that meet the removal standards of section 361 will not support an order for placement absent the finding that continued custody with the parent or Indian custodian is likely to cause serious emotional or physical damage.
- (4) In addition to the findings required under section 361, in order to place an Indian child out of the custody of a parent or Indian custodian, the court must find that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, and that these efforts were unsuccessful. Stipulation by the parent or Indian custodian or failure to object may waive the requirement of this finding only if the court is satisfied that the party has been fully advised of the requirements of the Act, and has knowingly, intelligently, and voluntarily waived them.
- (A) The court shall consider all available information regarding the prevailing social and cultural conditions of the Indian child's tribe.
- (B) Efforts to provide services shall include attempts to utilize the available resources of extended family members, the tribe, Indian social service agencies, and individual Indian caregivers.
- (j) [Placement of an Indian child in a foster care placement; 25 U.S.C. § 1912] If it is determined that the Act applies, the court may

not order foster care placement of an Indian child unless the court finds by clear and convincing evidence that continued custody with the parent or Indian custodian is likely to cause the Indian child serious emotional or physical damage.

(1) Testimony by a qualified expert witness is required.

(2) Stipulation by the parent, Indian custodian, or tribe or failure to object may waive the requirement of producing evidence of the likelihood of serious damage only if the court is satisfied that the party has been fully advised of the requirements of the Act, and has knowingly, intelligently, and voluntarily waived them.

(3) If it is determined that the Act applies, failure to meet non-Indian family and child-rearing community standards, or the existence of other behavior or conditions that meet the removal standards of section 361 will not support an order for placement absent the finding that continued custody with the parent or Indian custodian is likely to cause serious emotional or physical damage.

(k) [Standards and preferences in placement of an Indian child; 25 U.S.C. § 1915] Foster and adoptive placements of Indian children must follow a specified order in the absence of good cause to the contrary. Placement standards shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family member resides, or with which the parent or extended family member maintains social and cultural contacts. The foster or pre-adoptive placement must be in the least restrictive setting, within reasonable proximity to the Indian child's home, and capable of meeting any special needs of the Indian child.

(1) In a foster or pre-adoptive placement, preference must be given in the following order:

(A) to a member of the Indian child's extended family;

(B) to a foster home licensed or approved by the Indian child's tribe;

(C) to a state- or county-licensed or certified Indian foster home;

(D) to a children's institution approved by the tribe or operated by an Indian organization and offering a program to meet the Indian child's needs;

(2) In an adoptive placement, preference must be given in the following order:

(A) to a member of the Indian child's extended family;

(B) to other members of the Indian child's tribe;

(C) to other Indian families.

(3) An Indian child may be placed in a non-Indian home only if the court finds that a diligent search has failed to locate a suitable Indian home.

(4) The court may modify the preference order only for good cause, which may include the following considerations:

(A) the requests of the parent or Indian custodian;

(B) the requests of the Indian child;

(C) the extraordinary physical or emotional needs of the Indian child as established by a qualified expert witness;

(D) the unavailability of suitable families based on a diligent effort to identify families meeting the preference criteria.

(5) The burden of establishing good cause for the court to alter the preference order shall be on the party requesting that a different order be considered.

(6) The tribe, by resolution, may establish a different preference order, which shall be followed if it provides for the least restrictive setting.

(7) The preferences and wishes of the Indian child and the parent shall be considered, and weight given to a consenting parent's request for anonymity.

(l) [Reasonable efforts; 25 U.S.C. § 1912] In addition to the findings required under section 361, in order to place an Indian child out of the custody of a parent or Indian custodian, or to issue orders under section 366.26, the court must find that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, and that these efforts were unsuccessful.

(1) The court shall consider all available information regarding the prevailing social and cultural conditions of the Indian child's tribe.

(2) Efforts to provide services shall include attempts to utilize the available resources of extended family members, the tribe, Indian social service agencies, and individual Indian caregivers.

(m) [Termination of parental rights; 25 U.S.C. § 1912] The court may not terminate parental rights to an Indian child unless there is proof beyond a reasonable doubt that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(1) The evidence must be supported by the testimony of a qualified expert witness.

(2) Stipulation by the parent or Indian custodian or failure to object may waive the requirement of producing evidence of the likelihood of serious damage only if the court is satisfied that the party has been fully advised of the requirements of the Act, and has knowingly, intelligently and voluntarily waived them.

(3) Consent to a voluntary termination of parental rights, relinquishment of parental rights, or consent to adoption shall be executed in writing and recorded before a judicial officer of competent jurisdiction. The court must certify that the terms and consequences of the consent were explained in detail, in the language of the parent or Indian custodian, and fully understood by the parent or Indian custodian. If confidentiality is requested or appropriate, the consent may be executed in chambers.

(4) In order to terminate parental rights to an Indian child the court must find that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, and that these efforts were unsuccessful. Stipulation by the parent or Indian custodian or failure to object may waive the requirement of this finding only if the court is satisfied that the party has been fully advised of the requirements of the Act, and has knowingly, intelligently and voluntarily waived them.

(n) [Petition to invalidate orders of removal or termination of parental rights; 25 U.S.C. § 1914] If it is determined that the Act applies, the Indian child, a parent, an Indian custodian, or the child's tribe may petition any court of competent jurisdiction to invalidate a foster placement or termination of parental rights.

(1) If the Indian child is a dependent child of the juvenile court or the subject of a pending petition, the juvenile court is the only court of competent jurisdiction with the authority to hear the petition to invalidate the foster placement or termination of parental rights.

(2) If a final decree of adoption is set aside, or if the adoptive parents voluntarily consent to the termination of their parental rights, a biological parent or prior Indian custodian may petition for a return of custody of the Indian child.

(A) The court shall grant the petition for return unless there is a showing that return is contrary to the best interests of the Indian child.

(B) The hearing on the petition to return shall be conducted in accordance with the Act and the relevant sections of this rule.

(o) [Post-hearing actions; 25 U.S.C. § 1916] Whenever an Indian child is removed from a foster home or institution for placement in a different foster home, institution, or pre-adoptive or adoptive home, the placement shall be in accordance with the Act and the relevant sections of this rule.

(p) [Recordkeeping; 25 U.S.C. § 1951]

(1) Upon granting a decree of adoption of an Indian child, the court shall provide the Secretary of the Interior with a copy of the decree and other information needed to show:

(A) the name and tribal affiliation of the Indian child;

(B) the names and addresses of the biological parents;

(C) the names and addresses of the adoptive parents; and

(D) the agency maintaining files and records regarding the adoptive placement.

(2) If a biological parent has executed an affidavit requesting that his or her identity remain confidential, the court shall provide the affidavit to the Secretary of the Interior, who shall ensure the confidentiality of the information.

APPENDIX - F

ALL COUNTY LETTER & ALL COUNTY INFORMATION NOTICE

1.
ALL COUNTY
LETTER 89-26

DEPARTMENT OF SOCIAL SERVICES
744 P Street, Sacramento, CA95814



March 24, 1989

ALL COUNTY LETTER NO. **89-26**

TO: ALL COUNTY WELFARE DIRECTORS
ALL PUBLIC AND PRIVATE ADOPTION AGENCIES
ALL SDSS ADOPTIONS DISTRICT OFFICES

SUBJECT: 1. REVISED INDIAN CHILD WELFARE ACT PROCEDURES
SUPERSEDES ACL No. 85-113, DATED NOVEMBER 8, 1985

2. INDIAN CHILD WELFARE ACT (ICWA) - TRIBAL
NOTIFICATION

The purpose of this letter is threefold:

First, it is to inform County Welfare Departments (CWDs) and adoption agencies of recent information from the Bureau of Indian Affairs (BIA) regarding the applicability of the Indian Child Welfare Act (ICWA) to children who are members of non-federally recognized tribes.

Second, it informs adoption agencies of changes in procedures necessary to request ICWA determinations for children who are in adoption planning. The latter changes were agreed upon between the BIA and the State Department of Social Services' (SDSS) Adoptions Branch and will necessitate revisions to current ICWA adoption procedures.

Third, in response to questions received by the Department, this letter provides clarification on when the federally recognized Indian tribe is to be notified of pending adoption proceedings which are subject to provisions of the ICWA.

1. REVISED INDIAN CHILD WELFARE ACT PROCEDURES

The major change which impacts both adoption agencies and CWDs which provide services to children who have possible Indian

heritage regards the applicability of the ICWA to children that are members of non-federally recognized Indian tribes. The BIA recently provided the Department with a new interpretation of "Indian Child" issued by the U.S. Department of Interior, Washington, D.C., which states that children who are members of non-federally recognized Indian tribes are not eligible for the protections of the ICWA. A listing of federally recognized tribes is contained in the Federal Register, Volume 51, No. 132, dated Thursday, July 10, 1986. Copies can be obtained by writing to the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402-9371. For tribes aboriginal to California which do not **appear on** this list, the BIA Agency Office **will determine whether the** tribe is federally recognized for purposes of the ICWA.

For CWDs, this means that Child Welfare Services/Indian Child Welfare Act regulations must be followed only when providing services to Indian children who belong to, claim membership in, or who are believed to be eligible for membership in, a federally recognized Indian tribe. When child welfare services (CWS) are provided to Indian children of non-federally recognized Indian tribes, all other CWS regulations are to be followed; the only change is that the specific ICWA-related regulations do not apply. Adoption agencies are still required by California Civil Code Section 224a to request a Certificate of Degree of Indian Blood (CDIB) for every child whose Indian heritage has been verified, regardless of whether or not the ICWA applies to the child.

Simply stated, an Indian child may not be subject to the requirements of the ICWA, yet still be eligible for a CRIB.

The second change is that effective immediately the Department's Adoptions Branch will decide if there is sufficient information on the AD 4311 with which to determine the ICWA's applicability or eligibility for a CRIB. This determination was previously made by the BIA Sacramento Area Office before they forwarded the information on to the tribe, BIA Agency Office or out-of-state Area Office. If there IS NOT sufficient information, the Department will return the form to the public/private adoption agency stating there is insufficient information to determine Indian heritage and that a CDIB is not being requested. If there IS sufficient information, the Department will forward the AD 4311 directly to the Indian tribe or appropriate BIA Agency Office if the designated tribe is federally recognized for determination of the applicability of the ICWA and a CDIB; and to the tribe, BIA Agency Office or out-of-state BIA Area Office for a CDIB only, if the tribe is non-federally recognized.

Listed below are the procedures that must be followed during adoption planning to implement these and other changes agreed upon with BIA. Instructions for County Welfare Departments/County Welfare Services' Programs are enumerated in Section A which have NOT changed. Instructions for adoption agencies are contained in Section B which have changed.

Section A: County Welfare Departments'
Procedures-Child Welfare Services

- I. The County Welfare Department sends to the BIA Sacramento Area Office:
 - A. Completed SOC 318 form (Request for Confirmation of Child's Status as Indian);

NOTE: The caseworker's name, telephone number (including area code) and complete agency address must be noted in the spaces provided on the SOC 318.

 - B. A photocopy or copy of the child's state-certified birth certificate; and
 - C. A signed and notarized paternity statement of the alleged natural father, if the father is The identified Indian parent.
- II. The BIA Sacramento Area Office:
 - A. Forwards the ICWA referral submitted by the County Welfare Department to the appropriate tribe, BIA agency office, or out-of-state BIA area office;
 - B. Instructs the receiving tribe, BIA agency office or out-of-state BIA area office to respond directly to the County Welfare Department;
 - C. Transmits a copy of the referral letter to the requesting County Welfare Department;
 - D. Does not retain a copy of the ICWA requests but retains only a copy of its referral letter forwarded to the tribe, BIA agency office, or out of-state BIA area office; and
 - E. Does not provide any further monitoring or liaison activity regarding the ICWA case.

- III. Upon receipt of the information forwarded from the BIA Sacramento Area Office, the tribe, BIA agency office, or out-of-state BIA area office:
- A. Reviews the referred information to determine whether the subject child comes within the provisions of the ICWA;
 - B. Requests additional information from the referring County Welfare Department if more information is required to make the IOWA determination; and
 - C. Provides written documentation to the County Welfare Department on the applicability of the ICWA to the designated child.
- IV. The County Welfare Department shall maintain written documentation in the child's case record.

Section B: Adoption Agencies' Procedures

Adoption agencies that provide relinquishment and independent adoptions services shall comply with the following procedures.

- I. Adoption agency sends the State Department of Social Services (SDSS) Adoptions Branch for ever child claiming Indian heritage:
- A. A completed form AD 4311, Information on American Indian Child (Adoption Program), with the caseworker's name, telephone number (including area code), and complete agency address indicated in the spaces provided on the form;
- NOTE: Attached is a list of suggested questions that the caseworker can ask which will assist in completing the AD 4311. These questions were received from the BIA Sacramento Area Office.
- B. A photocopy or copy of the child's birth certificate; and
 - C. A signed and notarized paternity statement of the alleged natural father, if the father is the identified Indian parent.
- II. SDSS Adoptions Branch:

- A. Will review the AD 4311 for completeness;
- B. Will determine whether there is sufficient information for an Indian determination;
- C. If there is NOT sufficient information, the SDSS Adoptions Branch will return the AD 4311 to the adoption agency.
- D. If there IS sufficient information, the SDSS Adoptions Branch will:
 - 1. For federally recognized tribes located outside of California:
 - a. Establish a tracking system on the child for subsequent ICWA verification activities;
 - b. Transmit the AD 4311 and other documents directly to the appropriate tribe, BIA agency office or out-of-state BIA area
 - c. Transmit a copy of the referral letter to the requesting adoption agency;
 - d. Instruct the receiving tribe, BIA agency office, or out-of-state BIA area office to respond directly to the adoption agency;
 - e. Retain a copy of the ICWA referral and supporting documents and a copy of its referral letter forwarded to the tribe, BIA agency office, or out-of-state BIA area office; and
 - f. Provide no further monitoring or liaison activity on the case.
 - 2. For non-federally recognized tribes located outside of California:
 - a. Establish a tracking system on the child for subsequent CDIB verification activities; and
 - b. Inform the adoption agency that the tribe indicated for the subject child is a non-federally recognized tribe and, **therefore**, the child is not subject to the provisions of the ICWA; however, the AD 4311 is being forwarded to the tribe or appropriate BIA agency for the issuance of a CDIB.
 - 3. For tribes aboriginal to California:

- a. Establish a tracking system on the child for subsequent ICWA and CDIB verification activities;
- b. Transmit the AD 4311 and other documents to the appropriate BIA agency office;
- c. Transmit a copy of the referral letter to the requesting adoption agency;
- d. Retain a copy of the ICWA/CDIB referral and a copy of its referral letter forwarded to the BIA agency office; and
- e. Provide no further monitoring or liaison activity on the case.

III. BIA Sacramento Area and other Offices for tribes aboriginal to California:

- A. Determine whether the subject child comes within the provisions of the ICWA;
- B. Acquire additional information if more information is required to make the ICWA/CDIB determination; and
- C. Issue a CDIB.

IV. Upon receipt of the AD 4311 and other documents, the tribe, BIA agency office, or out-of-state BIA agency office coordinates directly with the adoption agency to

- A. Determine whether the subject child comes within the provisions of the ICWA;
- B. Acquire additional information if more information is required to make the ICWA/CDIB determination; and
- C. Issue a CDIB.

V. Adoption agencies must:

- A. Communicate directly with the receiving tribe/agency, as necessary. Adoption agencies may not request the intervention/assistance from the BIA agency office after the ICWA request has been forwarded to the appropriate tribe/agency;
- B. Contact SDSS Adoptions Branch if the agency has not been contacted by the receiving tribe, BIA agency office or out-of-state BIA agency office for children whose tribe is aboriginal to California within 30 days after the date of the transmittal

letter to resolve any other major ICWA-related issues; and

- C. For relinquishment adoptions only, after receipt of the ICWA determination, the adoption agency shall send to SDSS Adoption Branch the AD 90, Supporting Information for Issuance of the Department of Social Services Waiver and Acknowledgement, and all copies of correspondence sent to or received from the tribe or BIA agency office.

Note: SDSS Adoptions Branch cannot issue its "Acknowledgement and Waiver" until a determination whether or not the child is subject to the provisions of the ICWA has been made.

2. TRIBAL NOTIFICATION

How parental rights are terminated in an adoption proceeding determines whether tribal notification is required pursuant to the ICWA. In any adoption proceeding where the parental rights of a parent are being involuntarily terminated by an adoption agency, the child's tribe has a right to be notified if the tribe is federally recognized for purposes of the ICWA.

Agency Adoptions Program:

Section 1911(b) of the ICWA (25 U.S.C., Section 1901-1923) (Indian Tribe -jurisdiction ...transfer...) requires that the court must transfer (in the absence of good cause or objection by either parent) termination of parental rights' proceedings to the jurisdiction of the child's tribe for those Indian children NOT domiciled or residing on the tribe's reservation upon petition of either parent, an Indian custodian or the tribe. The tribal court is permitted to decline the transfer of the jurisdiction.

Section 1911(c) (Indian Tribe Jurisdiction...State Court Proceedings; Intervention) permits both the child's Indian custodian and tribe to intervene in the termination of parental rights proceedings at any point.

Section 1912(a) (Pending Court Proceedings- Notice...) requires that the party (adoption agency) seeking the termination of parental rights to the Indian child must notify the parent or Indian custodian AND the child's tribe by registered mail of the pending proceedings and of their right to intervene.

Independent Adoptions Program:

Section 1911(b) see above. This section permits the biological parent of the Indian child to petition for the transfer of the proceedings to the tribal court. While this is unlikely to occur in an independent adoption, the parent does have this right under the ICWA and can petition the court for a transfer of jurisdiction.

Sections 1911(c) and 1912 (see above) do not apply to an independent adoption proceeding unless court action is taken to involuntarily terminate the parental rights of any parent. If a Civil Code (CC) Section 232 or 7017 action is taken on any parent, the adoption becomes an involuntary proceeding per the ICWA and the requirements of Sections 1911(b), 1911(c) and 1912(a) must be followed. Simply pat, notification to a federally recognized tribe pursuant to the ICWA is not required only when all parents sign a consent to the adoption on the appropriate form (AD 857; 858; 859; 850 or 861).

Nothing in this letter should be interpreted to exempt any agency from submitting an AD 4311 to the Department for the purpose of determining the child's Indian heritage, regardless of whether the tribe in question is federally recognized for purposes of the ICWA. An AD 4311 must be submitted whenever there is an indication that the child is of Indian heritage.

County Welfare Departments should refer all questions regarding CWS and ICWA procedures to the Adult and Family Services Operations Bureau at (916) 445-0623 or ATSS 485-0623. Public and private adoption agencies should refer all questions regarding these revised adoptions planning procedures to the Adoptions Policy Bureau at (916) 322-4228 or ATSS 492-4228.

LORAN D. SUTER
Deputy Director

Attachment

CC: CWDA

2.
ALL COUNTY
LETTER 95-07

DEPARTMENT OF SOCIAL SERVICES
744 P Street, Sacramento, CA95814



February 9, 1995

REASON FOR THIS TRANSMITTAL

ALL-COUNTY LETTER No. 95-07

- State Law change
- Federal Law or Regulation Change
- Court order or Settlement Agreement
- Clarification Requested by One or More Counties
- Initiated by CDSS

TO: ALL CITY WELFARE DIRECTORS

SUBJECT: AID TO FAMILIES WITH DEPENDENT CHILDREN-FOSTER CARE (AFDC-FC)
PROGRAM ELIGIBLE FACILITY REQUIREMENTS

REFERENCE: Welfare and Institution Code (WIC) section 11401(e) and Eligibility
and Assistance Standards (EAS) sections 45-202.5 and 45-203.4

The purpose of this All-County Letter is to inform the counties of a change in policy concerning AFDC-FC eligible facility requirements in the case of Indian children placed in out-of-home care pursuant to the Indian Child Welfare Act (ICWA).

Effective the date of this letter, counties may claim state and federal AFDC-FC on behalf of an eligible Indian child in a foster care placement made pursuant to the ICWA. These placements may include a state licensed or approved facility and any home of a relative or nonrelative located on or off the reservation which is licensed, approved or specified by the Indian child's tribe. The change in policy provides more placement options for Indian children, but does not make changes in any other areas of AFDC-FC program administration.

The change in policy is based on regulatory changes initiated by the California Department of Social Services (CDSS) in EAS sections 45-202.5 and 45-203.4 which provide that federal and state AFDC-FC respectively, may be claimed on behalf of an eligible Indian child placed in a home designated by the child's tribe. The CDSS will submit a Title IV-E State Plan amendment to the federal Department of Health and Human Services (DHSS), Administration for Children and Families, requesting formal approval to claim federal AFDC-FC for these placements. Additionally, the CDSS requested that the DHSS grant preliminary approval for the proposed amendment to the Title IV-E State Plan, and permission to implement the expanded funding options pending formal approval of both the regulatory changes and the State Plan amendment. The CDSS obtained written approval from the DHSS which granted both requests on December 14, 1994.

The policy and regulatory changes are supported by both federal and state statutes (ICWA 25 USC Section 1915 and WIC section 11401[e]). The ICWA was passed by Congress in 1978 to establish minimum federal standards for the removal

of Indian children from their homes. Specifically, the ICWA requires, in the absence of good cause to the contrary, that the preferred placement of an Indian child in foster care be the home of the Indian child's extended family or a foster home licensed, approved or specified by the Indian child's tribe. These ICWA provisions apply to all Indian children in foster care who are unmarried and less than 18 years of age and at a minimum have one parent who is a member of an Indian tribe recognized as *eligible* for the services provided to Indians by the Secretary of the Interior.

The CDSS encourages counties to work with tribes to establish mutually acceptable criteria for determining appropriate homes for the placement of Indian children. Please contact the Foster Care Policy Bureau at (916) 445-0813 if you have any questions regarding the implementation of this letter or any other issue related to AFDC-FC program administration.

Sincerely,

MARJORIE KELLY
Deputy Director
Children Services Division

3.
ALL COUNTY
INFORMATION
NOTICE I-46-98

DEPARTMENT OF SOCIAL SERVICES
744 P Street, Sacramento, CA 95814



August 12, 1998

ALL COUNTY INFORMATION NOTICE NO. I-46-98

TO: ALL COUNTY WELFARE DIRECTORS
ALL CALIFORNIA INDIAN TRIBES
ALL PUBLIC AND PRIVATE ADOPTION
AGENCIES
ALL CDSS ADOPTION DISTRICT OFFICES

REASON FOR THIS TRANSMITTAL

- State Law Change
 Federal Law or Regulation Change
 Court Order or Settlement
 Clarification Requested by One or
More Counties
 Initiated by CDSS

SUBJECT: THE IMPACT ON THE INDIAN CHILD WELFARE ACT OF:
ASSEMBLY BILL 1544; THE ADOPTION AND SAFE FAMILIES ACT OF 1997; AND THE
SMALL BUSINESS JOB PROTECTION ACT OF 1996, SECTION 1808 "REMOVAL OF
BARRIERS TO INTERETHNIC ADOPTION"

REFERENCE: ALL COUNTY INFORMATION NOTICES I-14-96 (dated March 11, 1996),
I-56-97 (dated September 10, 1997), I-16-98 (dated March 12, 1998)

The purpose of this All County Information Notice (ACIN) is to provide information concerning Assembly Bill (AB) 1544; the Adoption and Safe Families Act of 1997; and the Small Business Job Protection Act of 1996, Section 1808 "Removal of Barriers to Interethnic Adoption, and their interface with the Indian Child Welfare Act (ICWA)." These new federal and state standards do not change the responsibility of states to meet the standards established under ICWA for eligible Indian children under California care and custody, nor does it impact eligible Indian children in the custody of a tribal court in which the tribe has a state/tribal agreement pursuant to AB 1525 (Chapter 725, Statutes of 1995). Eligible Indian children as defined by ICWA are those who are either members of a federally recognized Indian tribe, or those who are eligible for membership in a federally recognized tribe. The standards established under ICWA would still override the provisions in each of these three laws for eligible Indian children.

Adoption and Safe Families Act of 1997 (Public Law 105-89)

The Adoption and Safe Families Act of 1997 establishes new federal standards in foster care and permanency planning. The "reasonable efforts" standard has been modified to apply to the development and achievement of permanency planning goals for children, and not just to efforts to reunify. Some of the other provisions of this law include the establishment of new case plan requirements for states, the provision of financial incentives for those states that increase the number of children in foster care that are adopted, the continuation of the Family Preservation and Support Services Program, and the development of new outcomes measures to gauge a state's progress on the protection of children. However, even with the creation of these new federal provisions, standards established under ICWA will still apply for eligible Indian children.

Assembly Bill (AB) 1544 (Chapter 793, Statutes of 1997)

Assembly Bill 1544 revises various sections of the Welfare and Institutions Code, Family Code, Health and Safety Code, and Evidence Code as these statutes pertain to the juvenile court dependency and adoption processes. Some of the major areas impacted by AB 1544 include concurrent services planning, the establishment of paternity, the definition of relative caregivers, kinship adoptions, sibling groups, and voluntary relinquishment. The purpose of the law is to achieve the ultimate goal of permanence for children with safe and nurturing families committed to them throughout their lives. As in the case of the Adoption and Safe Families Act of 1997, these statutory changes do not impact the standards established under ICWA for eligible Indian children regardless of whether the child is under California court jurisdiction or under the jurisdiction of a tribal court in which the tribe has entered into a state/tribal agreement pursuant to AB 1525.

Small Business Job Protection Act of 1996, Section 1808 "Removal of Barriers to Interethnic Adoption" (Public Law 104-188)

In 1996, the Small Business Job Protection Act of 1996 was signed into law. Section 1808 of the Act is entitled "Removal of Barriers to Interethnic Adoption." The interethnic placement provisions of the Act became effective January 1, 1997, and revised the federal Multi-ethnic Placement Act (MEPA) of 1994 relating to foster care and adoptive placement of children. The provisions were intended to eliminate delays in placement where they were in any way avoidable. Race, culture, or ethnicity may not be used as the basis for any denial of placement, nor may such factors be used as a reason to delay any foster or adoptive placement. However, as in the case of AB 1544 and the Adoption and Safe Families Act of 1997, the changes contained in Public Law 104-188 do not impact foster care placements or the consideration of permanent homes for eligible Indian children established by the provisions of ICWA.

The purpose in enacting all three of these pieces of legislation is to achieve timely legal permanence for children in out-of-home care. State and federal statute now authorize concurrent planning, e.g., working on an alternative permanency plan for children concurrently with efforts to reunify. However, the purpose of the legislation is not intended to override the provisions of ICWA.

If you have additional questions about the impact of AB 1544, Public Law 105-89, and Public Law 104-188 upon ICWA, please contact Teresa Contreras of the Foster Care Policy Bureau at (916) 445-0813, or by e-mail at tcontrer@dss.ca.gov.

Sincerely,

*Original Document Signed By
Marjorie Kelley on August 12, 1998*

MARJORIE KELLY
Deputy Director
Children and Family Services Division