

III. Overview of the Indian Child Welfare Act

A. ICWA Policy and Legislative History

Congress passed the ICWA to counteract frequent misuse of state child protection powers with regard to Indian children, which had resulted in widespread removal of such children from their Indian families and subsequent placement with non-Indian families.³⁴ The ICWA helps to fulfill an important aspect of the federal government's trust responsibility to tribes by protecting and preserving the bond between Indian children and their tribes.³⁵ In doing so, the ICWA ultimately serves both the best interests of Indian children and the stability and security of Indian tribes and families.³⁶ Numerous courts have ruled that the ICWA is constitutional.³⁷

1. The Problem Leading to the 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 the survival Indian tribes and tribal cultures.³⁸ At the national level:

- Indian children were placed in foster care or for adoption at three times the rate of non-Indian children; and,
- Approximately 25-35% of all Indian children were removed from their homes and placed in foster homes, adoptive homes, or institutions.³⁹

In California:

- Public agencies placed more than eight times as many Indian children in adoptive homes as they did non-Indian children;
- Over 90% of California Indian children subject to adoption were placed in non-Indian homes; and,
- 1 of every 124 Indian children in California was in a foster home, compared to a rate of 1 in 337 for non-Indian children.⁴⁰

Congress determined that Indian children who had been placed for adoption into non-Indian homes frequently suffered serious adjustment problems during adolescence, including the lack of acceptance into non-Indian society and the difficulties in adjusting to cultural

³⁴ 25 U.S.C. § 1901.

³⁵ *Id.*

³⁶ 25 U.S.C. § 1902.

³⁷ See § III(C) of this Benchguide (“Constitutionality and the Existing Indian Family Exception”).

³⁸ *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).

³⁹ H.R. Rep. No. 1386, 95th Cong., 2d Sess. (1978).

⁴⁰ *Child Welfare Services Reports for California*, data retrieved from the UC Berkeley Center for Social Services Research Web site at http://cssr.berkeley.edu/ucb_childwelfare/. Data source: CWS/CMS 2004 Quarter 2 extract.

environments much different than their own.⁴¹ Due in large part to states' failures to recognize the different cultural standards of Indian tribes and the tribal relations of Indian people, Congress concluded that the Indian child welfare crisis was of massive proportions and that Indian families face vastly greater risks of involuntary separation than are typical for our society as a whole.⁴²

2. California's Implementation of Federal Law at State Level: the ICWA via Senate Bill 678

a. Policy and Purpose in Applying the ICWA through State Statute

Prior to the adoption of Senate Bill 678 in 2006, many California tribes struggled to convince courts, county social workers, and attorneys that the ICWA was not just a rote procedural hurdle, but rather that courts should embrace the spirit and purpose of the ICWA. Despite the enactment of the Act in 1978, in the years leading up to SB 678, there had arisen a widespread perception of institutional resistance and a belief that the Act's application had often been inconsistent and perfunctory. For example, essential requirements such as proving the detriment of returning a child to his or her Indian family, a requirement that can be satisfied only with expert testimony, were frequently met with boilerplate declarations ratifying state agencies' actions. Some attempts to transfer cases to tribal court were resisted by counties due to a perception that tribal forums were inferior.

When state courts considered permanent plans for tribal children, adoption was prioritized, rather than guardianship, in spite of the effect which the termination of parental rights commonly has on a child's tribal membership and identity. (That particular policy bias has been mitigated to some extent since the enactment of AB 1325 in 2009 recognizing "customary adoptions" as a permanent plan.)⁴³ Prior to passage of SB 678, if the parents did not comply with or complete a reunification plan, the range of options narrowed and was weighted toward termination of the parent-child relationship – a concept that is both offensive to and not recognized by many Indian tribes.

Procedurally, in order to avoid termination of parental rights, a recognized exception had to exist. Such exceptions included consideration of a sibling bond, for example, but did not include any consideration of the effect that terminating parental rights would have on the child's relationship to his or her tribal community and culture. Once adoption was identified as the

⁴¹ *Indian Child Welfare Program: Hearings Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs*, 93rd Cong., 2d Sess. 7531 (1974).

⁴² See H.R. Rep. No. 1386, 95th Cong., 2d Sess. (1978).

⁴³ A.B. 1325, which allows "tribal customary adoption" for Indian children in foster care, will go into effect on July 1, 2010. This landmark legislation will allow traditional forms of adoption practiced by tribes to be recognized by California courts as an addition to the permanency options available. It is highly significant in that it does not require termination of parental rights. Under existing state law, once reunification services have been exhausted, social services agencies give preference to terminating the parent-child relationship unless one of a handful of exceptions applies. Tribal customary adoption will create a more culturally-appropriate option by providing for a permanent home without compelling a termination of parental rights. This legislation harmonizes state law and tribal custom where a tribe has identified that a tribal customary adoption is in a child's best interest. A tribal customary adoption order will have the same force and effect as an order of adoption. While the 2010 update of the Benchguide will not include discussion of tribal customary adoption, by 2011 it is hoped that there will be regulations in place or cases on which to base a discussion.

permanent plan, there was no provision for an enforceable post-adoption agreement allowing the child a way to maintain contact with extended family and the tribal community.

SB 678 was intended to harmonize federal legislation and intent in California. Before the provisions of SB 678 took effect, the Act had generally been applied through the California Rules of Court, case law, and the BIA Guidelines, but it had not been codified on a state level. There had been an effort made in 1999 to overturn California case law which recognized the “existing Indian family doctrine,” an issue that SB 678 was forced to readdress.⁴⁴ SB 678 became one of the most far-reaching state laws in the country, one that could impact every tribe in the nation. Its potential impact is of such breadth because California has the largest population of non-Californian Indians in the United States, and because it applies to any Indian child who falls under the jurisdiction of the dependency, delinquency, family and probate courts.

b. The Legislation

Even before SB 678, the ICWA was not limited solely to dependency cases in California. Instead, it applied to child custody proceedings including dependency, delinquency, probate guardianships and family law matters. SB 678’s comprehensive scope affirmed this.

In California, the state’s dependency cases were filed in juvenile court if jurisdiction was found, and compelled social services agencies to offer a variety of services to maintain an intact family, or reunify ones where the child or children had been removed. However, in spite of the ICWA’s requirements for active efforts towards rehabilitation and reunification,⁴⁵ no such mechanism existed for guardianships, delinquent wards at risk of entering foster care, or other family law matters to which the Act applied.

In evaluating social services agencies’ delivery of services and parents’ case plan compliance, California courts hold a sequence of review hearings that necessitate the court making, or declining to make, required findings about the parents’ and agency’s progress. These firewalls are designed to guarantee compliance with state policy and the law’s preference for returning children to their families whenever possible and safe. But for Indian children, the ICWA imposes additional requirements.

The ICWA requires that before an Indian child is removed from an Indian parent or Indian custodian, active efforts must be made to prevent the breakup of the Indian family and must be found unsuccessful. Prior to SB 678, the ICWA’s application was apparently not made sufficiently clear in the Family and Probate Codes, which led to inconsistent and incomplete authority and rulings. The ICWA does apply in those contexts and SB 678 makes that fact unambiguous. SB 678 also required that the federal standards and intent of the Act be recognized and applied. It incorporated many, but not all, of the BIA Guidelines that had previously been advisory. The final legislation was the culmination of efforts by State Senator Denise Ducheny (its sponsor), California Indian Legal Services, and a host of others.

⁴⁴ A.B. 65 (Ca. 1999); *see* § III(C) of this Benchguide (“Constitutionality and the Existing Indian Family Exception”).

⁴⁵ 25 U.S.C. § 1912(d); *see* § VIII(A)(2) of this Benchguide (“What Constitutes Active Efforts”).

c. Key Provisions

A number of the ICWA's and SB 678's key provisions are briefly summarized below. More detailed coverage of each of these provisions appears *infra*.

1) Applicability

The ICWA and SB 678 apply to foster care placements, guardianships, and conservatorships, if in any of these types of proceedings (whether voluntary or involuntary, temporary or long-term) the parent or Indian custodian does not retain the right to have the child returned upon demand; custody awards to non-parents where parents object; terminations of parental rights; preadoptive and adoptive placements (including voluntary relinquishments); and, certain delinquency proceedings.⁴⁶

2) Notice

One of the most crucial aspects of the ICWA, and yet also one of the most common areas of noncompliance, is the mandatory provision of notice whenever “it is known or there is reason to know that an Indian child is involved” in a proceeding.⁴⁷ Lack of proper notice may result in a parent, Indian custodian, or Indian tribe being prejudicially denied the opportunity to exercise legal rights under the Act or to do so in a timely manner.

Notice must be sent to the child's parents or legal guardian, Indian custodian (if any), and to all federally-recognized tribes of which the child is or may be a member (or in some circumstances, the BIA). Notice must provide certain details in order to allow the tribe(s) to confirm membership or eligibility for membership and to advise the parties of their rights. For the purposes of providing proper notice, any party who knowingly and willfully misrepresents or conceals a fact regarding whether a child is an Indian child is subject to sanctions by the court.

3) Duty to Inquire

SB 678 imposes an affirmative and continuing duty to inquire whether a child is or may be an Indian child.⁴⁸ This duty applies to all of the following: the courts, court-connected investigators, county welfare departments, probation departments, licensed adoption agencies, adoption service providers, investigators, petitioners, appointed guardians or conservators, and appointed fiduciaries. The continuing nature of this duty means, for example, that a duty to provide notice will be triggered even in the midst of a case if information comes to light that was not previously available suggesting that the child is or may be Indian.

⁴⁶ See § IV of this Benchguide (“General Application of the Act”).

⁴⁷ See § VI of this Benchguide (“Notice”).

⁴⁸ See § VI(A) of this Benchguide (“When Notice is Required”).

4) Active Efforts

SB 678 incorporates into California law the ICWA's requirement of demonstrating that "active efforts" have been made to provide remedial services and rehabilitative programs aimed at preventing the breakup of the Indian family, and those active efforts were unsuccessful.⁴⁹

Active efforts are not necessarily coextensive with the "reasonable efforts" standard applied to non-Indian children. In fact, the deliberate use of the phrase "active efforts" (rather than "reasonable efforts") in the sections added or amended by SB 678, the requirement that active efforts both account for tribal social/cultural values and utilize tribal and Indian resources, and the higher standards of proof adopted by the Legislature to justify the removal and placement of an Indian child arguably overturn prior case law holding that "active efforts under ICWA and reasonable reunification efforts are essentially undifferentiable."⁵⁰

5) Qualified Expert Witness

The ICWA requires the testimony of a "qualified expert witness" in support of any finding that a parent's or Indian custodian's continued custody of a child would be likely to result in serious physical or emotional harm.⁵¹ SB 678 addressed this subject in two significant ways – one, by providing examples of certain persons likely to qualify as expert witnesses and probable characteristics thereof, and two, by prohibiting the use of an employee of the person or party seeking a foster care placement (as defined by the Act and California law) or termination of parental rights.⁵²

A further limitation on the testimony of the qualified expert witness applies to the use of a declaration or affidavit in lieu of actual testimony. Over the course of time, social services agencies and attorneys, when confronted with the expert witness requirement, would instead submit a written declaration to support the necessary findings. Despite the fact that the ICWA specified the need for expert testimony, the practice became widespread. The changes made by SB 678 now require, in order to prove a case by declaration, a stipulation in writing by the parties and the court's satisfaction that the stipulation was knowingly, intelligently and voluntarily entered into.⁵³

6) Transfer of Case

An Indian child's tribe can petition the court to transfer a child custody proceeding involving a child who is not domiciled or residing on a reservation to tribal court at any time.⁵⁴ The only specific limitations are where a parent objects to the transfer or the court finds good cause to deny the transfer. The good cause standard for a court to disallow a transfer was not defined in the ICWA. SB 678 defined a good cause standard and specifically provided that

⁴⁹ See § VIII of this Benchguide ("Evidentiary Requirements").

⁵⁰ WELF. & INST. CODE § 361.7; *In re Michael G.*, 63 Cal. App. 4th 700, 714 (1998).

⁵¹ See § VIII(A)(1) of this Benchguide ("Selection of an Expert Witness").

⁵² WELF. & INST. CODE § 224.6.

⁵³ WELF. & INST. CODE § 224.6(e).

⁵⁴ See § V of this Benchguide ("Jurisdiction under the ICWA").

“[s]ocioeconomic conditions and the perceived adequacy of tribal social services or judicial systems may not be considered in a determination that good cause exists.”⁵⁵ Many tribal courts operate informally on tribal custom and tradition, which the ICWA itself recognizes.⁵⁶

In California, a reunification plan might last as long as 18 months. SB 678 specifically provides that it is not an unreasonable delay in filing a petition for a transfer to tribal court to wait until reunification efforts have failed and services have been terminated.⁵⁷ Simply put, good cause to deny a transfer does not exist solely by virtue of the fact that a tribe chooses to afford a parent time to comply with court-ordered services before seeking a transfer. SB 678 also provides that the burden of establishing good cause to deny a transfer to tribal court rests on the party objecting to the transfer.⁵⁸

Normally, when a child is to be placed out of state, the Interstate Compact on Placement of Children (ICPC) applies.⁵⁹ SB 678 added Family Code section 7907.3 to clarify that the ICPC does not apply to “any placement, sending, or bringing of an Indian child into another state pursuant to a transfer of jurisdiction to a tribal court under Section 1911 of the [ICWA].”

7) Appointment of Counsel

SB 678 provides for the court to appoint counsel where a parent, guardian, Indian custodian or child desires an attorney, but is unable to afford one.⁶⁰ The new provisions will not have an impact in dependency or delinquency matters, but are significant in their application to guardianships, conservatorships, and family law petitions to declare an Indian child free from the custody and control of a parent.⁶¹

Absent the additional protections of SB 678, a parent could find themselves defending a guardianship petition without any due process protections. The probate guardianship procedure was never intended to bypass juvenile courts, or to leave parents without court-appointed representation. To the extent a guardianship, conservatorship, or petition to declare a child free from parental control is an action to remove a child from the biological parent, due process requires the court to afford the parent certain procedural and substantive safeguards, including a right to court-appointed counsel. The interest of parents in making decisions about the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests.⁶² Although the funding mechanism refers to Section 1912 of the ICWA and Part 23.13 of the Code of Federal Regulations, which involve petitioning the BIA for reimbursement, to deny a parent or Indian custodian the opportunity to protect that liberty interest without legal counsel until funding is resolved invites a petition for invalidation.⁶³

⁵⁵ WELF. & INST. CODE § 305.5(c).

⁵⁶ 25 U.S.C. § 1903(12).

⁵⁷ WELF. & INST. CODE § 305.5(c)(2)(B).

⁵⁸ WELF. & INST. CODE § 305.5(c)(4).

⁵⁹ FAM. CODE § 7901.

⁶⁰ WELF. & INST. CODE § 317.

⁶¹ FAM. CODE § 180(b)(5)(G); PROB. CODE §§ 1460.2(b)(5)(G) and 1474.

⁶² *Kyle O. v. Donald R.*, 85 Cal. App. 4th 848, 861 (2000), citing *Troxel v. Granville*, 530 U.S. 57, 64-65 (2000).

⁶³ 25 U.S.C. § 1914.

8) Placement Preferences

The placement of Indian children is required to follow mandatory orders of preference for placements in child custody proceedings, absent good cause to the contrary, in order to ensure a culturally-appropriate placement whenever possible and to protect the interests of the child and tribe in establishing or maintaining a relationship.⁶⁴ A tribe may establish an alternate order of preference, so long as the placement is in the least restrictive setting appropriate to the particular needs of the child.⁶⁵

According to the U.S. Supreme Court, these placement preferences are “[t]he most important substantive requirement imposed on state courts” by the ICWA.⁶⁶ SB 678 declared that the state’s policy is to order whenever possible a culturally-appropriate placement which will best facilitate a connection between the child and his or her tribe.⁶⁷

9) Exceptions to Terminating Parental Rights

Perhaps the most significant changes made to California law by SB 678 are the two new exceptions to terminations of parental rights. The new exceptions are: (1) where termination would substantially interfere with the child’s connection to his or her tribal community or the child’s tribal membership rights; and, (2) where the child’s tribe identifies guardianship, long term foster care with a fit and willing relative, or another permanent plan.⁶⁸

Severing the legal relationship of a parent and child is not a concept that is culturally recognized by many Indian tribes. A child’s membership or eligibility for membership is typically predicated on proving the membership or eligibility of lineal ancestors. When the parent-child relationship is severed, an Indian child often loses his or her right to membership. This may result in a tremendous impact on the child – cultural (loss of access to the tribal community and cultural events), political (loss of voting rights/ability to participate in tribal government), and economic (loss of benefits conditioned upon tribal membership). The exceptions added by SB 678 are important because they allow alternative plans for Indian children and should reorient social service agencies away from the narrow view that adoption is always the best placement for a child.⁶⁹

B. Protecting Indian Children: the “Best Interest” Standard

The ICWA revolutionized the “best interest of the child” standard as applied to Indian children by shifting the standard when an Indian child is involved. Most states use the “best interest” standard in child custody proceedings. Generally, the best interest of a child is deemed to be a stable placement with an adult who becomes the psychological parent.⁷⁰ In passing the

⁶⁴ See § IX of this Benchguide (“Placement”).

⁶⁵ WELF. & INST. CODE § 361.31(c); FAM. CODE § 8710; PROB. CODE § 495.5.

⁶⁶ *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989).

⁶⁷ FAM. CODE § 175(a)(1); PROB. CODE § 1459(a)(1); WELF. & INST. CODE §§ 224(a)(1), 361.31(f); see FAM. CODE §§ 3041 and 8710 (referring to WELF. & INST. CODE § 361.31).

⁶⁸ WELF. & INST. CODE § 366.26(c)(1)(B)(vi).

⁶⁹ WELF. & INST. CODE § 366.26(b).

⁷⁰ See, e.g., J. Goldstein, et al., *Beyond the Best Interests of the Child* (1979).

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 standards or the essential tribal relations of Native American people.⁷¹

To solve this problem, Congress included in the ICWA a best interest standard specifically for Indian children, declaring that the best interest of an Indian child (not just the child's tribe) would be 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."⁷² This policy is carried out by following the four objectives:

- Jurisdictional provisions and intervention rights designed to enhance tribal control and involvement in Indian child custody cases;
- Adoption of minimum standards for removal of Indian children from their families;
- Culturally-appropriate placement of Indian children in Indian homes; and,
- Support of tribal child and family service programs.⁷³

Cultural considerations and concern for tribal heritage are relevant to proper application of the Act. Assessment, treatment and placement standards require adherence to cultural dictates.⁷⁴ However, the Act is not simply an effort to strengthen Indian culture. The Act acknowledges a special relationship between tribes and the federal government as well as between tribes and their members, which are founded on more than cultural considerations. Indians as members of tribes are not simply separate racial or cultural groups, but also separate political groups.⁷⁵ Indian tribes stand in a government-to-government relationship with the United States.⁷⁶ 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.

A state court may not justify the destruction of Indian families and tribes simply by casting its rulings in undefined terms of "best interest." As a matter of federal law, the ICWA's provisions must be met in order to truly guard the best interests of Indian children.

California itself also has declared that an Indian child's own interests are served by protecting and encouraging "the child's membership in the child's Indian tribe and connection to the tribal community... regardless of whether the child is in the physical custody of an Indian parent or Indian custodian at the commencement of a child custody proceeding, the parental rights of the child's parents have been terminated, or where the child has resided or been domiciled."⁷⁷

⁷¹ H.R. Rep. No. 1386, 95th Cong., 2d Sess. 19 (1978); *see* 25 U.S.C. § 1901(5).

⁷² H.R. Rep. No. 1386, 95th Cong., 2d Sess. 23 (1978); *see* 25 U.S.C. §§ 1901-1902.

⁷³ 25 U.S.C. §§ 1901-18.

⁷⁴ *See* 25 U.S.C. §§ 1912, 1915.

⁷⁵ *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974).

⁷⁶ *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 489 U.S. 505, 509 (1991).

⁷⁷ FAM. CODE § 175(a)(2); PROB. CODE § 1459(a)(2); WELF. & INST. CODE § 224(a)(2); *see* CAL. RULES OF COURT,

C. Constitutionality and the Existing Indian Family Exception

The ICWA has survived numerous constitutional challenges by parties claiming that the Act constitutes disparate treatment based on race.⁷⁸ Prior to SB 678, there was a split in the California Courts of Appeal regarding a judicially-created exception to application of the ICWA known as the “existing Indian family doctrine,” which looked for an existing and significant social or cultural connection to an Indian tribe or community as a prerequisite necessary to render an application of the ICWA constitutional.⁷⁹

The doctrine received some favorable treatment in California courts even after the passage of Assembly Bill 65 in 1999, which was enacted with the specific intent of halting use of the existing Indian family doctrine and abrogating previous supportive holdings.⁸⁰ The Legislature returned to the issue again with SB 678 in an effort to more clearly require application of the ICWA according to the plain language of the federal law, providing that, as discussed above, an Indian child’s own interests are served by protecting and encouraging “the child's membership in the child's Indian tribe and connection to the tribal community... regardless of whether the child is in the physical custody of an Indian parent or Indian custodian at the commencement of a child custody proceeding, the parental rights of the child's parents have been terminated, or where the child has resided or been domiciled.”⁸¹

The only two cases addressing the existing Indian family doctrine since the passage of SB 678 have both rejected it.⁸² At this time, there should be no doubt that the application of the existing Indian family doctrine is no longer permissible in California.

⇒ **PRACTICE TIP:** *Because of the long history of a split in California courts regarding the application of the existing Indian family doctrine, there may still be some confusion by persons appearing before the court. Any argument referring to the doctrine can be easily extinguished by referring to SB 678.*

RULE 5.485(b).

⁷⁸ See, e.g., *In re Marcus S.*, 638 A.2d 1158 (Me. 1994); *In re Guardianship of D.L.L.*, 291 N.W.2d 278 (S.D. 1980); *In re Appeal Pima County Juvenile Action*, 635 P.2d 187 (Ariz. Ct. App. 1981), *cert. denied*, 455 U.S. 1007 (1982); *In re Miller*, 451 N.W.2d 576 (Mich. Ct. App. 1990); *State ex rel. Children Services Div. v. Graves*, 848 P.2d 133 (Or. Ct. App. 1993).

⁷⁹ See, e.g., *In re Bridget R.*, 41 Cal. App. 4th 1483, 1491-1492 (1996); *In re Alexandria Y.*, 45 Cal. App. 4th 1483, 1493-1494 (1996).

⁸⁰ *In re Vincent M.*, 150 Cal. App. 4th 1247, 1264 (2007) (discussing use of the doctrine in *In re Santos Y.*, 92 Cal. App. 4th 1274 (2001)).

⁸¹ FAM. CODE § 175(a)(2) (emphasis added); PROB. CODE § 1459(a)(2) (emphasis added); WELF. & INST. CODE § 224(a)(2) (emphasis added); see CAL. RULES OF COURT, RULE 5.485(b).

⁸² *In re Adoption of Hannah S.*, 142 Cal. App. 4th 988 (2006); *In re Vincent M.*, 150 Cal. App. 4th 1247 (2007).