

IV. General Application of the Act

A. Proceedings Covered by the Act

Indian child custody proceedings to which the ICWA and supplementary California laws apply include 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.⁸³ An important detail sometimes overlooked is that the determination of whether the ICWA applies to a particular proceeding is solely the responsibility of the court, and not of any state or county department or agency involved with the case.⁸⁴

B. Proceedings Not Covered by the Act

1. Divorce Proceedings

The ICWA expressly does not apply to “an award, in a divorce proceeding, of custody to one of the parents.”⁸⁵ The ICWA does not define “divorce,” however, and attention must be paid to what is occurring in a proceeding. The fact that two parents are involved or 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 the other parent is clearly covered by the Act.⁸⁶

2. Educational Placements

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 upon demand.⁸⁷ The most common situation is a parent placing the child in a school or religious education program.

C. Interested Parties

1. Indian Child

The ICWA applies only to proceedings which involve an “Indian child.”⁸⁸ The Act defines an Indian child as any unmarried person who is under eighteen and is either: (a) a

⁸³ 25 U.S.C. §§ 1903(1); FAM. CODE §§ 170(c), 177, 180, 3041(e), and 8620; PROB. CODE § 1459.5; WELF. & INST. CODE § 224 *et seq.*; CAL. RULES OF COURT, RULE 5.480; *see* § XI of this Benchguide (“Delinquency Proceedings”).

⁸⁴ FAM. CODE § 177(a); PROB. CODE § 1459.5(b); WELF. & INST. CODE § 224.3(e)(3); CAL. RULES OF COURT, RULE 5.482(d).

⁸⁵ 25 U.S.C. § 1903(1); *see* BIA Guidelines § B.3(b).

⁸⁶ *In re Crystal K.*, 226 Cal. App. 3d 655 (1990), *cert. denied*, 502 U.S. 862 (1991); *Adoption of Lindsay C.*, 229 Cal. App. 3d 404 (1991); *In re Suzanna L.*, 104 Cal. App. 4th 223 (2002).

⁸⁷ *See* BIA Guidelines § B.3 Commentary.

⁸⁸ 25 U.S.C. § 1903(4).

member of an Indian tribe, or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.⁸⁹

Determining whether a child is an Indian child may potentially be complicated by the rules and processes of the child's tribe. Some tribes have sophisticated enrollment systems with specific membership criteria and presumptions. Others do not have formal enrollment processes and make membership determinations based on their own factors. Of course, the determination of whether a child is Indian is not a racial question, but rather a question of political status.⁹⁰ Tribal membership is an exclusively tribal question.⁹¹ A tribe's determination that a child is an Indian child is conclusive.⁹² The role of tribes in membership determinations absolutely requires that tribes be consulted, and the final answer in an Indian status determination may vary depending upon the law of the tribe(s) involved.

a. Multiple Definitions of "Indian"

The ICWA defines an "Indian" as any member of an "Indian tribe," which is in turn defined as "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 [of the Interior] because of their status as Indians."⁹³ A similar definition applies to Alaskan Natives.⁹⁴

However, the above is not the only definition of "Indian" in the ICWA. The other applies only to Title II of the Act, governing grants and funds for on- and off-reservation child and family service programs.⁹⁵ Section 1934 specifies that for the purposes of Sections 1932 and 1933, the term Indian is defined in 25 U.S.C. section 1603(c). Section 1603(c) sets forth the broader Indian Health Care Improvement Act definition, which, for health-related services, is any person 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.⁹⁶

⁸⁹ 25 U.S.C. § 1903(4); *see* WELF. & INST. CODE § 224.1(a).

⁹⁰ *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974).

⁹¹ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978); *United States v. Bruce*, 394 F.3d 1215, 1225 (2005) ("[O]ne of an Indian tribe's most basic powers is the authority to determine its own membership").

⁹² *In re Junious M.*, 144 Cal. App. 3d 786, 793 (1983); *see* WELF. & INST. CODE §§ 224(c) and 224.3(e)(1); *see also* BIA Guidelines § B.1(b)(i).

⁹³ 25 U.S.C. § 1903(3), (8).

⁹⁴ *Id.*; *see* 43 U.S.C. §§ 1602 and 1606.

⁹⁵ 25 U.S.C. §§ 1932 and 1933.

⁹⁶ 25 U.S.C. § 1603(c).

The issue of defining Indians in California is even more complex. The Indian Health Care Improvement Act contains a special eligibility definition for California Indians, again regarding health-related services, 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 who holds trust interests in public domain, national forest, or Indian reservation allotments in California.
- (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.⁹⁷

⇒ **PRACTICE 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, a representative may be present in court on an Indian child's case as a service provider, instead of as a representative of an Indian child's tribe. The status of such representatives should not simply be assumed. Clarify the capacity and authority of all participants in a proceeding.*⁹⁸

b. Membership and Federal Recognition

As previously mentioned, an “Indian child” must either 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. One common mistake in interpreting the membership language is equating membership with formal enrollment. An individual does not necessarily need to be formally enrolled in a tribe to be a member.⁹⁹ Additionally, if there is knowledge or reason to know that a child is Indian, there is an affirmative duty on the court to treat the child as an Indian child and to order active efforts be made to secure tribal membership for the child.¹⁰⁰

Membership may be verified by either the tribe or the BIA.¹⁰¹ The tribe's determination is always conclusive, while the BIA's determination is conclusive only absent a contrary determination by the tribe.¹⁰²

⁹⁷ 25 U.S.C. § 1679(b).

⁹⁸ See CAL. RULES OF COURT, RULE 5.534(i)(1).

⁹⁹ *In re Junious M.*, 144 Cal. App. 3d 786, 796 (1983) (appellate court reversed trial court's erroneous decision that the ICWA did not apply because neither the child nor his Indian mother were enrolled members of the tribe).

¹⁰⁰ CAL. RULES OF COURT, RULES 5.482(c) and 5.484(c).

¹⁰¹ BIA Guidelines § B.1.

¹⁰² WELF. & INST. CODE § 224(c); BIA Guidelines § B.1(b)(I).

2. Parent

“Parent” means any biological parent of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions carried out under tribal law or custom.¹⁰³ However, an unwed father whose paternity has not been acknowledged or established is not a parent under the Act.¹⁰⁴ Conversely, “acknowledgment” is sufficient to establish paternity for purposes of applicability of the ICWA.

Other states have grappled with a situation where an unwed Indian father seeks to establish paternity in order to bring the case within the Act.¹⁰⁵ In *In re Baby Boy Doe*,¹⁰⁶ 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 the ICWA did not apply to the parental rights termination and adoption proceedings was not harmless error.¹⁰⁷

3. Indian Custodian and Extended Family

a. Indian Custodian

An “Indian custodian” is defined 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 an Indian child.¹⁰⁸ Indian custodians have many of the same rights as parents under the Act.¹⁰⁹ However, recent California case law indicates some willingness by courts to curtail these rights for some custodians.¹¹⁰ Until recently, no California case had addressed the mechanics of establishing Indian custodian status. The court in *In re G.L.* not only recognized that an Indian custodian can be created with or without a written instrument, but also that the court need not consider the nature, frequency, and duration of contact between an Indian child and his or her Indian custodian.¹¹¹

The rights of an Indian custodian include:

- Section 1911(b) and (c) - the right to request a transfer of proceedings and the right to intervene in state court; *see also* Welfare & Institutions Code section 224.4 and California Rules of Court, rules 5.482(e) and 5.483(c);

¹⁰³ 25 U.S.C. § 1903(9); WELF. & INST. CODE § 224.1(b).

¹⁰⁴ 25 U.S.C. § 1903(9); WELF. & INST. CODE § 224.1(b); *In re Daniel M.*, 110 Cal. App. 4th 703, 708-709 (2003), *contra In re Jonathon S.*, 129 Cal. App. 4th 334, 340 (2005).

¹⁰⁵ *See In re Appeal in Maricopa County Juvenile Action No. A-25525*, 667 P.2d 228 (Ariz. 1983) (Arizona court found that an affidavit by the unwed father was sufficient to establish paternity and bring the case within the Act).

¹⁰⁶ 849 P.2d 925, 932 (Idaho 1993), *cert. denied*, 510 U.S. 860 (1993).

¹⁰⁷ *Id.*

¹⁰⁸ 25 U.S.C. § 1903(6); WELF. & INST. CODE § 224.1(a).

¹⁰⁹ *See generally* 25 U.S.C. § 1901 *et seq.*

¹¹⁰ *In re G.L.*, 177 Cal. App. 4th 683, 694 (2009) (court held failure to notify custodian grandmother of her right to intervene and to appointed counsel did not violate the ICWA).

¹¹¹ *Id.* at 693.

- Section 1912(a) and (b) - the right to notice and appointment of counsel where the proceedings involve foster care or termination of parental rights; *see also* Welfare & Institutions Code section 224.2(a) and California Rules of Court, rule 5.481(b); *contra In re G.L.*, 177 Cal. App. 4th 683, 694 (2009);
- Section 1912(c) - the right to access information;
- Section 1912(d) and (f) - the right to an active efforts showing and heightened evidentiary standards established by the Act, including expert testimony; and,
- Section 1913 - the right to give consent to voluntary adoptive placements and the right to withdraw consent to foster placement.

⇒ **PRACTICE TIP:** *The Act does not require a writing to create an Indian custodial placement. 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 interstate placement of children where a tribe has an Indian custodial placement available on their reservation.*

b. Extended Family

An “extended family member” may be defined either: (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.¹¹² Extended family members are afforded certain rights, as Congress realized that states had all too often failed to recognize that in Indian communities, people outside of the nuclear family commonly share in child care responsibilities. Through the interplay of state and federal law, extended family members are also given certain rights to social service funding.¹¹³

4. Tribe

The ICWA redefines the parties who have a right to participate in Indian child custody proceedings which are subject to the Act. 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.”¹¹⁴

¹¹² 25 U.S.C. § 1903(2); *see* WELF. & INST. CODE § 224.1(b).

¹¹³ *See* All County Letter No. 95-07 located in the Appendices of this Benchguide and WELF. & INST. CODE § 11401(e) (the Aid to Families with Dependent Children - Foster Care program is available to fund extended families, where Indian children have been placed with them).

¹¹⁴ *In re Adoption of Holloway*, 732 P.2d 962, 969 (Utah 1986); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 54 (1989); *see* WELF. & INST. CODE § 224.

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. One purpose behind giving tribes more influence in the fate of their children is to promote tribal self-determination. In other words, determining who will have the care and custody of tribal 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 a number of procedural rights. Tribes have an absolute right to intervene in state child custody proceedings involving their children.¹¹⁵ Also, tribal courts are designated as the preferred forum for determining custody and adoption matters involving Indian children.¹¹⁶ 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. Ultimately, a proceeding may be invalidated if the court ignores a tribe's interests in its children.

It is worth repeating that an Indian tribe under the Act 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. section 1602(c).¹¹⁷ Note that such a definition does not include Canadian, Mexican or other foreign indigenous tribes.¹¹⁸

a. Unrecognized Tribes in California

Under California law, even a non-federally-recognized tribe may participate in dependency proceedings involving a child who would otherwise be an "Indian child" under the act, but for the tribe's unrecognized status.¹¹⁹ It should be noted, however, that petitions by members of unrecognized tribes do not formally trigger the ICWA notice requirements.¹²⁰ The court may allow an unrecognized tribe to participate in the following ways, upon request of the tribe:

1. Be present at the hearing;
2. Address the court;
3. Request and receive notice of hearings;
4. Request to examine court documents relating to the proceeding;
5. Present information to the court that is relevant to the proceeding;
6. Submit written reports and recommendations to the court; and
7. Perform other duties and responsibilities as requested or approved by the court.¹²¹

¹¹⁵ 25 U.S.C. § 1911(c); *see* § VII of this Benchguide ("Intervention").

¹¹⁶ 25 U.S.C. § 1911; WELF. & INST. CODE § 305.5; CAL. RULES OF COURT, RULE 5.483.

¹¹⁷ 25 U.S.C. § 1903(8); *see* WELF. & INST. CODE § 224.1(a).

¹¹⁸ *Id.*

¹¹⁹ WELF. & INST. CODE § 306.6(a).

¹²⁰ *In re K.P.*, 175 Cal. App. 4th 1, 6 (2009) (when mother was a member of non-recognized tribe, the ICWA did not give rise to obligation to notice).

¹²¹ WELF. & INST. CODE § 306.6(b).

b. Eligibility for Multiple Memberships

The Act defines an “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.”¹²² Factors to consider in addressing the question of “more significant contacts” may include:

- Length of residence on or near the reservation of each tribe and frequency of contacts with each tribe;
- The child’s participation in activities of each tribe;
- The child’s fluency in the language of each tribe;
- Whether there has been a previous adjudication with respect to the child by a court of one of the tribes;
- Residence on or near one of the tribes’ reservation by the child’s relatives;
- Tribal membership of custodial parent or Indian custodian;
- Interest asserted by a tribe; and,
- The child’s self-identification.¹²³

If an Indian child is a member or eligible for membership in more than one tribe, the BIA Guidelines suggest it may be appropriate to allow all tribes which the child is affiliated with to intervene in the proceeding.¹²⁴

¹²² 25 U.S.C. § 1903(5).

¹²³ WELF. & INST. CODE § 224.1(d)(2)(A)-(H); *see* BIA Guidelines § B.2.

¹²⁴ Commentary to section B.2 of the BIA Guidelines 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. 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 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.