

IX. Placement

A. Tribal Social and Cultural Standards

The ICWA sets forth certain placement preferences for all actions within its definition of “foster care placement” (foster care placements, guardianships, conservatorships, and placements in an “institution,” when the parent or Indian custodian cannot have the child returned upon demand), preadoptive placements, and adoptive placements, which must be followed by state courts in Indian child custody proceedings, absent good cause to the contrary.³⁰⁴ The U.S. Supreme Court has characterized these placement preferences as “[t]he most important substantive requirement imposed on state courts.”³⁰⁵

The ICWA expressly declares that, when it becomes necessary to remove an Indian child from his or her home, the child’s subsequent placement “will reflect the unique values of Indian culture.”³⁰⁶ Thus, courts must apply tribal social and cultural standards when determining an Indian child’s placement.³⁰⁷ The importance of unique Indian social and cultural standards cannot be overemphasized – the historical lack of understanding of such standards by state courts and agencies, and the resulting effects on the populations of Indian tribes and the self-identification of Indian children, is precisely why the ICWA was enacted, as “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.”³⁰⁸ A tribe might rely on its social and cultural standards, for example, in defining who qualifies as a child’s “extended family member,” or in approving a particular foster home, or in establishing an order of placement preference different than as set forth in the ICWA.³⁰⁹

California has also recognized the significance of culturally-appropriate placement to both Indian children and tribes, and has declared that the policy of the state shall be to place an Indian child, “whenever possible, in a placement that reflects the unique values of the child’s tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the child’s tribe and tribal community.”³¹⁰ Furthermore, the California Legislature has expressly 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.”³¹¹

³⁰⁴ 25 U.S.C. §§ 1903(1), 1915(a), (b).

³⁰⁵ *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989).

³⁰⁶ 25 U.S.C. §1902.

³⁰⁷ 25 U.S.C. §1915(d).

³⁰⁸ 25 U.S.C. §1901; *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32-37 (1989).

³⁰⁹ 25 U.S.C. §§ 1903(2), 1915(b)(ii), (c).

³¹⁰ 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).

³¹¹ FAM. CODE § 175(a)(2); PROB. CODE § 1459(a)(2); WELF. & INST. CODE § 224(a)(2); *see* CAL. RULES OF COURT, RULE 5.485(b) (court may find that termination of parental rights is not in child’s best interest where there would be interference with connection to tribal community or tribal rights, or where tribe identifies alternative permanent plan) (*see also* § VIII(A) herein, discussing possible impacts on child’s connection to tribe/tribal rights).

B. Placement Preferences

Seeking better compliance with the ICWA's placement preferences, SB 678 codified those preferences into state law and created specific Rules of Court to address placement in Indian child custody proceedings.³¹² Any services available from the child's tribe must be utilized in effecting placement.³¹³

There are two different orders of placement preference. Placement preferences for adoptive placements are as follows, in descending order of priority:

- (1) A child's extended family member.
- (2) A member of the child's tribe.
- (3) Another Indian family.³¹⁴

The placement preferences for preadoptive and similar placements (foster care, guardianship, etc.) are listed below in descending order of priority. Note that such placements must also take into account the placement's approximation to a family, the child's special needs (if any), the restrictiveness of the setting, and the proximity to the child's home:

- (1) A child's extended family member.
- (2) A foster home licensed, approved, or specified by the child's tribe.
- (3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority.
- (4) An institution approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.³¹⁵

The above preferences apply not only to the initial placement of an Indian child after removal, but also when a child is removed from a foster care home or institution, guardianship, or adoptive placement for subsequent further placement.³¹⁶ As mentioned previously, the Indian child's tribe may by resolution establish a different order of preference than those set forth above, which must be followed so long as it is the least restrictive setting appropriate to the child's particular needs.³¹⁷ Finally, note that in cases where no preferred placement is available, "active efforts" must then be made, and documented, to ensure that the child's placement is "with a family committed to enabling the child to have visitation with "extended family members," ... and participation in the cultural and ceremonial events of the child's tribe."³¹⁸

³¹² FAM. CODE §§ 177(a), 3041, and 8710; PROB. CODE § 1459.5(b); WELF. & INST. CODE § 361.31; CAL. RULES OF COURT, RULES 5.482(g), 5.484(b).

³¹³ WELF. & INST. CODE § 361.31(g); CAL. RULES OF COURT, RULE 5.482(g).

³¹⁴ 25 U.S.C. § 1915(a); WELF. & INST. CODE § 361.31(c).

³¹⁵ 25 U.S.C. § 1915(b); WELF. & INST. CODE § 361.31(b).

³¹⁶ FAM. CODE § 175(b); PROB. CODE § 1459(b); WELF. & INST. CODE § 224(b).

³¹⁷ 25 U.S.C. § 1915(c); WELF. & INST. CODE § 361.31(d); CAL. RULES OF COURT, RULE 5.484(b)(4).

³¹⁸ WELF. & INST. CODE § 361.31(i); CAL. RULES OF COURT, RULE 5.484(b)(6).

C. Good Cause for Deviation from Order of Preference

Certain circumstances may create “good cause” for the court to order a deviation from the above placement preferences.³¹⁹ The burden of proving that good cause for deviation exists is on the party requesting the court for a deviation.³²⁰ A good cause finding may be based on:

- (A) The requests of the parent or Indian custodian;
- (B) The requests of the Indian child, when of sufficient age;
- (C) The extraordinary physical or emotional needs of the Indian child as established by a qualified expert witness; or
- (D) The unavailability of suitable families based on a documented diligent effort to identify families meeting the preference criteria.³²¹

The finding that good cause for deviation from the placement preferences exists is a decision that must be made by the court, not by a local or state agency, in consideration of all of the Indian child’s interests as well as those of the child’s tribe.³²² Emotional bonding between a child and his or her placement which occurs as a result of a local or state agency’s failure to comply with the ICWA does not constitute good cause for deviating from the ICWA’s placement preferences, although considerable trauma to the child may occur as a result.³²³ Again, where no preferred placement is available, “active efforts” must be made and documented to place the child with someone who is committed to enabling the child to have visitation with extended family members and to participate in tribal cultural and ceremonial events.³²⁴

Given the U.S. Supreme Court’s recognition of the importance of the placement preferences, the findings by both Congress and the California Legislature of an Indian child’s own interest in establishing and maintaining a relationship with his or her tribe, and the potential impacts of the child’s loss of tribal membership rights, it is recommended that courts give careful consideration to those factors, and to the underlying reasons for the placement preferences themselves, when weighing the possibility of a good cause deviation. It must be remembered that a profound lack of understanding of Indian culture, and the effects which placement of Indian children with non-Indian families had on both Indian children and their tribes, is precisely what moved Congress to pass the ICWA in the first place.

³¹⁹ 25 U.S.C. § 1915(a), (b); WELF. & INST. CODE § 361.31(h); CAL. RULES OF COURT, RULE 5.484(b).

³²⁰ WELF. & INST. CODE § 361.31(j); CAL. RULES OF COURT, RULE 5.484(b)(3).

³²¹ CAL. RULES OF COURT, RULE 5.484(b)(2).

³²² WELF. & INST. CODE § 361.31(h); CAL. RULES OF COURT, RULE 5.484(b)(1)-(3).

³²³ *In re Desiree F.*, 83 Cal. App. 4th 460, 476 (2000); see *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 53-54 (1989).

³²⁴ WELF. & INST. CODE § 361.31(i); CAL. RULES OF COURT, RULE 5.484(b)(6).