

V. 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.¹²⁵ In fact, 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.

⇒ **PRACTICE TIP:** *While California tribes do not yet have primary jurisdiction over custody proceedings, it is important to bear in mind that an Indian child has an interest in his or her tribe that Congress has specifically 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 court child custody proceeding, the state court must first determine whether it has jurisdiction over the child. In the context of the ICWA, 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 under 25 U.S.C. section 1918 because the tribe is subject to state jurisdiction under 28 U.S.C. section 1360 (commonly known as P.L. 280).¹²⁶ For the most part, the child's jurisdictional status is determined by his or her residence or domicile.

A. Exclusive versus Non-Exclusive

Unless otherwise vested in the state under 25 U.S.C. section 1918, an Indian tribe has exclusive jurisdiction over child 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.¹²⁷ In such cases where the tribe has exclusive jurisdiction, the state court has no jurisdiction to hear custody proceedings involving the Indian child and must transfer the proceeding to tribal court.¹²⁸ Moreover, individual Indians who are exclusively within the tribe's jurisdiction cannot waive that jurisdiction and may not initiate in state court a child custody proceeding involving Indian children.¹²⁹

¹²⁵ *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989).

¹²⁶ See Public Law 83-280 of the 83rd Congress, August 15, 1953.

¹²⁷ 25 U.S.C. § 1911(a).

¹²⁸ See WELF. & INST. CODE § 305.5(a); CAL. RULES OF COURT, RULE 5.483(a).

¹²⁹ *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

There are two noted exceptions to exclusive tribal jurisdiction afforded under 25 U.S.C. section 1911(a). First, under 25 U.S.C. section 1922, in an emergency removal situation, a state can exercise jurisdiction over a child temporarily located off the reservation in order to prevent imminent physical damage or harm to the child. State courts may only use this authority for temporary emergency removals, and the state must ensure that the placement is terminated as soon as it is no longer necessary to prevent imminent harm to the child.¹³⁰ Further, the state “shall expeditiously initiate an Indian child custody proceeding. . . , transfer the child to the jurisdiction of the Indian child’s tribe, or restore the child to the parent or Indian custodian, as may be appropriate.”¹³¹ The second exception is that states can validly exercise concurrent 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.¹³² This exception is discussed in more detail below.

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.¹³³ However, the state shall transfer the proceeding to the jurisdiction of the child’s tribe, upon the petition by either parent, the Indian custodian, or the child’s tribe, unless the court finds that good cause exists not to transfer jurisdiction.¹³⁴ This has been deemed referral jurisdiction or concurrent but presumptively tribal jurisdiction.¹³⁵ If the tribal court declines to accept transfer of the proceeding, the state court retains jurisdiction.¹³⁶

1. Public Law 280

As briefly noted above, tribes located in a P.L. 280 state have been divested of their exclusive jurisdiction under 25 U.S.C. § 1918.¹³⁷ Under P.L. 280, Congress delegated to the states civil jurisdiction over private causes of actions involving Indians in “Indian country.”¹³⁸ In these states, even if a child is domiciled or resides on the reservation, the state may acquire valid initial jurisdiction.¹³⁹

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 pursuant to 25 U.S.C. section 1918.¹⁴⁰ Where a tribe has reassumed jurisdiction, and an Indian child residing or domiciled within that tribe’s reservation is removed

¹³⁰ 25 U.S.C. § 1922; WELF. & INST. CODE § 305.5(f).

¹³¹ 25 U.S.C. § 1922; *see* WELF. & INST. CODE § 305.5(f).

¹³² 25 U.S.C. § 1911(a).

¹³³ 25 U.S.C. § 1911(a), (b).

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

¹³⁵ *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989); *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 561 (9th Cir. 1991); *In the Matter of C.R.H.*, 29 P.3d 849 (Alaska 2001); *In re M.A.*, 137 Cal. App. 4th 567 (2006).

¹³⁶ 25 U.S.C. § 1911(b); WELF. & INST. CODE § 305.5(c)(1)(C).

¹³⁷ *See* Public Law 83-280 of the 83rd Congress, August 15, 1953.

¹³⁸ 28 U.S.C. § 1360; *see* 18 U.S.C. § 1151 for definition of “Indian country.”

¹³⁹ 25 U.S.C. § 1911(a).

¹⁴⁰ *See Doe v. Mann*, 415 F.3d 1038, 1064 (9th Cir. 2005) (“[T]he explicit references to Public Law 280 in ICWA. . . demonstrate that Congress intended Public Law 280 states to have jurisdiction over Indian child dependency proceedings unless tribes availed themselves of Section 1918 in order to obtain exclusive jurisdiction”).

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.¹⁴¹

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

- **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.¹⁴²
- **REFERRAL.** According to the Ninth Circuit, Section 1911(b) of the ICWA creates referral jurisdiction which is concurrent but presumptively tribal.¹⁴³ Under Section 1911(b), a state court with valid initial jurisdiction over a child custody proceeding involving an Indian child shall transfer the case to the tribal court if petitioned by either parent, the Indian custodian, or the tribe.¹⁴⁴
- **EXCLUSIVE.** Tribes with exclusive jurisdiction are the only entities with authority over child custody matters involving tribal children.¹⁴⁵

Additionally, under 25 U.S.C. section 1919 and Welfare and Institutions Code section 10553.1, Indian tribes are authorized to enter into agreements with states 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.

Because the extent of tribal jurisdiction varies widely from tribe to tribe, state courts must make an individualized jurisdictional determination 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.¹⁴⁶ In addition, several California tribes have either reassumed jurisdiction (*e.g.*, the Washoe Tribe of Nevada and California, located primarily in Nevada, has reassumed exclusive jurisdiction over its territory in Alpine County, California), 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.

¹⁴¹ WELF. & INST. CODE § 305.5(a); *see* CAL. RULES OF COURT, RULE 5.483(a).

¹⁴² *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 561 (9th Cir. 1991); 25 U.S.C. § 1918; 25 C.F.R. §§ 13.1-13.16.

¹⁴³ *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 561 (9th Cir. 1991).

¹⁴⁴ *See* WELF. & INST. CODE § 305.5(b).

¹⁴⁵ *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 561-562 (9th Cir. 1991).

¹⁴⁶ 25 U.S.C. §§ 1911(a) and 1922.

B. 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 shall decline jurisdiction over the petition and shall 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.¹⁴⁷ These provisions usually arise where adoptive parents refuse to return a child to a parent who has validly revoked consent after the adoption.

⇒ **PRACTICE TIP:** *Section 1922 of the Act authorizes emergency removal of an Indian child in certain circumstances. Both 25 U.S.C. section 1922 and Welfare and Institutions Code section 305.5(f) 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 an Indian child who is not a resident of or domiciled on a reservation. However, the language in Section 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 Section 1922 and accompanying authority when making emergency orders involving an off-reservation Indian child.*¹⁴⁸

If the court has reason to believe that the child has been improperly removed or detained, the BIA Guidelines direct the court to stay the proceeding until it can make a determination on the issue.¹⁴⁹ 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.¹⁵⁰ The tribe, Indian child, parent or Indian custodian has standing to seek invalidation of a foster care placement (as defined by the Act) or termination of parental rights involving a child improperly removed from the custody of a parent or Indian custodian.¹⁵¹

C. Domicile and Residence

Under the ICWA, the tribe's exclusive jurisdiction over Indian children is determined by the domicile or residence of the child.¹⁵² 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.¹⁵³ In *Mississippi Choctaw*, the Court indicated that a minor's domicile is determined by that of his or her parents, or his or her mother where the parents are not married.¹⁵⁴

¹⁴⁷ 25 U.S.C. § 1920; WELF. & INST. CODE § 305.5(e).

¹⁴⁸ See, e.g., *In re Desiree F.*, 83 Cal. App.4th 460, 476 (2000).

¹⁴⁹ BIA Guidelines § B.8.

¹⁵⁰ *Id.*; but see *In re Bridget R.*, 41 Cal. App. 4th 1483, 1517 (1996) (the statutory lack of jurisdiction does not foreclose a custody hearing to protect the child's constitutional due process rights).

¹⁵¹ 25 U.S.C. § 1914.

¹⁵² 25 U.S.C. § 1911(a).

¹⁵³ *Mississippi Choctaw Band of Indians v. Holyfield*, 490 U.S. 30 (1989).

¹⁵⁴ *Id.* at 48; see WELF. & INST. CODE § 305.5(d) (Indian child's domicile or residence determined by that of parent, guardian, or Indian custodian with whom child maintained primary place of abode at start of proceedings).

Furthermore, the Court concluded that any interpretation of state law on domicile that conflicts with an assertion of tribal jurisdiction over tribal children undermines the ICWA's operative scheme. Therefore, the ICWA preempts any such inconsistent construction of state law.¹⁵⁵ The ICWA also prevents parents from circumventing tribal jurisdiction by placing children off the reservation shortly after birth.¹⁵⁶ 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 finding was made even though the parents had gone to great lengths to give birth off the reservation so that they could place their children with a non-Indian couple.¹⁵⁷

The ICWA broadly defines "reservation" to mean "Indian country."¹⁵⁸ 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 those allotments.¹⁵⁹ A discussion of the complex body of law further defining Indian country is beyond the scope of this Benchguide.

D. 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.¹⁶⁰ However, the ICWA expresses a preference for tribal jurisdiction in matters concerning custody of the tribe's children.¹⁶¹ Thus, upon petition by the tribe, either parent or the Indian custodian, the state court shall transfer the proceeding to the tribal court unless either parent objects or there is good cause not to transfer.¹⁶² Of course, the tribal court may decline to exercise jurisdiction, and the state would then be required to maintain jurisdiction.¹⁶³ The ICWA's sections on transfer of jurisdiction apply to both involuntary and voluntary proceedings.¹⁶⁴

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.¹⁶⁵ 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.¹⁶⁶ If the parties are not notified of an Indian child custody proceeding until it has already progressed to a late

¹⁵⁵ *Mississippi Choctaw Band of Indians v. Holyfield*, 490 U.S. 30, 51-52 (1989).

¹⁵⁶ *Id.* at 51.

¹⁵⁷ *Id.* at 52.

¹⁵⁸ 25 U.S.C. § 1903(10).

¹⁵⁹ 25 U.S.C. § 1903(10); 18 U.S.C. § 1151.

¹⁶⁰ 25 U.S.C. § 1911.

¹⁶¹ BIA Guidelines § A.1.

¹⁶² 25 U.S.C. § 1911(b); WELF. & INST. CODE § 305.5(b); CAL. RULES OF COURT, RULE 5.483(b); see *In re Larissa G.*, 43 Cal. App. 4th 505 (1996) (discussing transfer to tribal court).

¹⁶³ 25 U.S.C. § 1911(b); WELF. & INST. CODE § 305.5(c)(1)(C); CAL. RULES OF COURT, RULE 5.483(d)(a)(C).

¹⁶⁴ *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989).

¹⁶⁵ WELF. & INST. CODE § 305.5(c)(2)(B); CAL. RULES OF COURT, RULE 5.482(e); *In re Robert T.*, 200 Cal. App. 3d 657 (1988) (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).

¹⁶⁶ 25 U.S.C. § 1912(a); see CAL. RULES OF COURT, RULE 5.482(a).

stage, the transfer petition should be granted if made immediately after receipt of notice.¹⁶⁷ California Rules of Court do not set forth time limits for submitting transfer petitions.¹⁶⁸

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 have the power to veto transfers of jurisdiction.¹⁶⁹ 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.¹⁷⁰ The California Rules of Court state that “[i]f the court believes, or any party asserts, that good cause to deny the request exists, the reasons for that belief or assertion must be stated in writing, in advance of the hearing, and made available to all parties who are requesting the transfer, and the petitioner must have the opportunity to provide information or evidence in rebuttal of the belief or assertion.”¹⁷¹ 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.¹⁷²

The Act does not define good cause to deny transfer petitions. However, California has enacted Welfare and Institutions Code section 305.5, which lists reasons that may constitute good cause to deny a transfer petition:

- (1) If a petition to transfer proceedings as described in subdivision (b) is filed, the court shall find good cause to deny the petition if one or more of the following circumstances are shown to exist:
 - (A) One or both the parents object to the transfer.
 - (B) The child’s tribe does not have a “tribal court” as defined in the Act.
 - (C) The tribal court of the child’s tribe declines the transfer
- (2) Good cause not to transfer the proceeding may exist if:
 - (A) The evidence necessary to decide the case cannot be presented in tribal court without undue hardship to the parties or the witnesses, and the tribal court is unable to mitigate the hardship by making arrangements to receive and consider the evidence or testimony by use of remote communication, by hearing the evidence or testimony at a location convenient to the parties or witnesses, or by use of other means permitted in the tribal court’s rules of evidence or discovery.
 - (B) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition within a reasonable time after receiving notice of the proceeding, provided the notice complied with Section 224.2. It shall not, in and of itself, be considered an unreasonable delay for a party to wait until

¹⁶⁷ WELF. & INST. CODE § 305.5(c)(2)(B).

¹⁶⁸ See CAL. RULES OF COURT, RULE 5.483.

¹⁶⁹ WELF. & INST. CODE § 305.5(c)(1)(A) or (C); *In re Larissa G.*, 43 Cal. App. 4th 505, 515 (1996).

¹⁷⁰ CAL. RULES OF COURT, RULE 5.483(d)(3).

¹⁷¹ CAL. RULES OF COURT, RULE 5.483(f)(2).

¹⁷² WELF. & INST. CODE § 305.5(c)(4); see CAL. RULES OF COURT, RULE 5.483(f)(1).

reunification efforts have failed and reunification services have been terminated before filing a petition to transfer.

- (C) The Indian child is over 12 years of age and objects to the transfer.
 - (D) The parents of the child over 5 years of age are not available and the child has little or no contact with the child's tribe or members of the child's tribe.
- (3) Socioeconomic conditions and the perceived adequacy of tribal social services or judicial systems may not be considered in a determination that good cause exists.
 - (4) The burden of establishing good cause to the contrary shall be on the party opposing transfer. If the court believes, or any party asserts, that good cause to the contrary exists, the reasons for that belief or assertion shall be stated in writing and made available to all parties who are petitioning for the transfer, and the petitioner shall have the opportunity to provide information or evidence in rebuttal of the belief or assertion.
 - (5) Nothing in this section or Section 1911 or 1918 of Title 25 of the United States Code shall be construed as requiring a tribe to petition the Secretary of the Interior to reassume exclusive jurisdiction pursuant to Section 1918 of Title 25 of the United States Code prior to exercising jurisdiction over a proceeding transferred under subdivision (b).¹⁷³

In 1988, a California appellate court held that transfer may be denied if not in the child's best interests.¹⁷⁴ In that case, the transfer petition was filed 16 months after dependency was declared and the child had bonded with his foster family.¹⁷⁵ 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.¹⁷⁶ 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 the ICWA, and factors flowing from a placement made "in flagrant violation of the ICWA, including but not limited to bonding with [the child's] current foster family and the trauma which may occur in terminating that placement, shall not be considered in determining whether good cause exists to deviate from the placement preferences" of the ICWA.¹⁷⁷

If the state court transfers the proceeding, it should make an order transferring the physical custody of the child to a designated tribal court representative.¹⁷⁸ Moreover, once the

¹⁷³ WELF. & INST. CODE § 305.5(c)(1)-(5); see CAL. RULES OF COURT, RULE 5.483(d).

¹⁷⁴ *In re Robert T.*, 200 Cal. App. 3d 657, 667 (1988).

¹⁷⁵ *Id.*

¹⁷⁶ *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 53 (1989).

¹⁷⁷ *In re Desiree F.*, 83 Cal. App. 4th 460, 475-76 (2000).

¹⁷⁸ CAL. RULES OF COURT, RULE 5.483(h).

state court transfers the proceeding, it does not retain concurrent jurisdiction over the case.¹⁷⁹ In *In re M.M.*, the Humboldt County Juvenile Court transferred a dependency proceeding to the Karuk Tribal Court.¹⁸⁰ At the hearing, minor’s counsel did not request a stay of the transfer order. The court ordered the clerk to complete the transfer and the Karuk Tribal Court accepted jurisdiction.¹⁸¹ Subsequently, minor’s counsel filed a notice of appeal from the juvenile court’s transfer order. The Court of Appeal determined “that the transfer of Minor’s case to the courts of a wholly separate sovereign has deprived the California courts of jurisdiction over this case.”¹⁸² The court relied on the only published case that directly addresses how an ICWA transfer order affects the jurisdiction of the transferor court, *Comanche Indian Tribe of Oklahoma v. Hovis*,¹⁸³ “[T]he district court held that the state court lost jurisdiction over the case after it transferred the matter and transmitted the case file to the tribal court.”¹⁸⁴ Additionally, the court relied on the analogy of “the removal of actions from state court to federal court under title 28 U.S.C. section 1446.”¹⁸⁵ “As a consequence, when an action is removed from state court to federal court, the state court loses jurisdiction to proceed further with the matter.”¹⁸⁶ Therefore, the court dismissed the appeal for lack of jurisdiction.¹⁸⁷

If the case is not transferred, the child’s tribe and Indian custodian retain the right to intervene at any point in the proceedings.¹⁸⁸

⇒ **PRACTICE TIP:** *California Rules of Court, rule 5.843(h) lays out the procedure for the court to follow after transferring the case to tribal court. The court must utilize Form ICWA-050 (Notice of Petition and Petition to Transfer Case Involving Indian Child to Tribal Jurisdiction) and Form ICWA-060 (Order on Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction).*

E. Declination of Jurisdiction by Tribal Court

A tribal court may decline to accept a transfer of jurisdiction over an Indian child custody proceeding from a state court.¹⁸⁹ 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.¹⁹⁰ The tribal court may provide the state court written or oral notice of its decision.¹⁹¹ 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.¹⁹² The BIA Guidelines further

¹⁷⁹ See *In re M.M.*, 154 Cal. App. 4th 897 (2007).

¹⁸⁰ *Id.* at 901.

¹⁸¹ *Id.* at 905.

¹⁸² *Id.* at 906.

¹⁸³ 847 F.Supp. 871 (W.D.Okla. 1994), *reversed on other grounds* 53 F.3d 298 (10th Cir. 1995).

¹⁸⁴ *In re M.M.*, 154 Cal. App. 4th 897, 912 (2007) quoting *Hovis* at 847 F.Supp. 871, 886-87.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 917.

¹⁸⁸ 25 U.S.C. § 1911(c).

¹⁸⁹ 25 U.S.C. § 1911(b); WELF. & INST. CODE § 305.5(c)(1)(C); CAL. RULES OF COURT, RULE 5.483(d)(1)(C).

¹⁹⁰ BIA Guidelines § C.4(b).

¹⁹¹ *Id.*; CAL. RULES OF COURT, RULE 5.483(c).

¹⁹² BIA Guidelines § C.4 Commentary.

recommend that tribal courts accept oral arguments or written pleadings that the parties may wish to make on whether the tribal court should accept or decline the transfer of jurisdiction.¹⁹³

F. Full Faith and Credit

The federal government and states must give full faith and credit to a tribe's "public acts, records, and judicial proceedings" applicable to Indian child custody proceedings.¹⁹⁴ 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.¹⁹⁵ 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.¹⁹⁶ Of course, a state court may also require that the proper evidentiary foundation be laid for admitting a document or court order into evidence.¹⁹⁷ 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. 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.¹⁹⁸

¹⁹³ *Id.* at § C.4(c).

¹⁹⁴ 25 U.S.C. § 1911(d); WELF. & INST. CODE § 224.5.

¹⁹⁵ *Id.*

¹⁹⁶ *See, e.g., Application of DeFender*, 435 N.W.2d 717 (S.D. 1989) (state court may evaluate whether tribe had personal jurisdiction over mother before granting comity to tribal court custody order); *In re Welfare of R.I.*, 402 N.W.2d 173 (Minn.Ct.App. 1987) (state court not required to defer to tribal court order where tribal court had no jurisdiction to make child ward of court).

¹⁹⁷ *See, e.g., Quinn v. Walters*, 881 P.2d 795 (OR. 1994).

¹⁹⁸ *In re Laura F.*, 83 Cal. App. 4th 583(2000); *cert. denied*, 532 U.S. 979 (2001) (tribal resolution opposing adoption was a public act or record entitled to judicial notice, but not a judgment entitled to full faith and credit).