

XI. Delinquency Proceedings

Although the language of the ICWA expressly excludes from its definition of child custody proceedings placements based on an act which, if committed by an adult, would be deemed a crime, in some circumstances the ICWA may or does still apply.³⁵⁸ Most proceedings under Welfare and Institutions Code section 600 *et seq.* (i.e., delinquency cases) are not subject to the Act when the minor is adjudicated, has a disposition, or is removed from his or her home based on an act that would be criminal if it were committed by an adult. However, not all California delinquency cases involve removal and placement based on the “criminal acts” of the minor, and therefore some delinquency cases are subject to the ICWA. Moreover, SB 678, which codified the ICWA in California statutes in 2006, added and expanded the class of applicable cases to include Section 600 delinquency cases.³⁵⁹

In considering whether the Act applies to a case, 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 rather on whether the proceeding meets one of the definitions set forth in the Act.³⁶⁰ Accordingly, a state’s characterization of a proceeding as “criminal” is not necessarily determinative.³⁶¹

In 2005 the Judicial Council attempted to comply with the ICWA in part, based on the state’s Title IV-E audit which found California non-compliant. Title IV-E funds are derived from the Adoption and Safe Families Act (ASFA) and come with certain restrictions attached. California was one of a handful of states that used Title IV-E funds to pay for juvenile justice placements.³⁶² A 1998 federal government report estimated that California used \$1.8 million of IV-E funds for juvenile justice placements.³⁶³ By 1999 the amount of IV-E funds used for delinquent minors in foster care had risen to \$300 million.³⁶⁴

The source of funds used for delinquent placements is relevant because in 1999-2000 California attempted to comply with the federal IV-E restrictions by enacting Assembly Bill 575. The Social Security Act prohibits states from using foster care funds for placements in facilities operated primarily for detention. Therefore, where IV-E funds are used to pay for foster care, the placement should not be based on punishing conduct that would be a crime if committed by an adult, but instead should be designed to further the child’s best interest.³⁶⁵

Any ambiguity that may have remained after the Judicial Council’s Rules of Court amendments in 2005 was removed when SB 678 specifically applied the ICWA to some

³⁵⁸ 25 U.S.C. § 1903(1)(iv), WELF. & INST. CODE § 224.3(a).

³⁵⁹ See WELF. & INST. CODE § 224.3(a).

³⁶⁰ 25 U.S.C. § 1903(1).

³⁶¹ See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (the U.S. Supreme Court ruled California’s criminal statutes governing conduct of bingo did not apply to Indian reservations under Public Law 280, because the state’s statute was, in effect, regulatory rather than criminal in nature).

³⁶² UNITED STATES GENERAL ACCOUNTING OFFICE REPORT OF CONGRESSIONAL REQUESTORS, *FOSTER CARE: HHS SHOULD ENSURE THAT JUVENILE JUSTICE PLACEMENTS ARE REVIEWED*, 5 (June 2000).

³⁶³ *Id.*

³⁶⁴ Assembly Committee Bill Analysis, Assembly Committee on Social Services (April 21, 1999).

³⁶⁵ See WELF. & INST. CODE § 202(e), *citing* WELF. & INST. CODE § 727.3.

delinquency placements.³⁶⁶ Until SB 678's passage, the only case directly addressing the applicability of the ICWA to delinquencies was *In re Enrique O.*³⁶⁷ *Enrique O.* found that the Judicial Council's rule governing the applicability of the ICWA to Section 600 cases (then California Rules of Court, rule 1439) was inconsistent with federal law. At that time, the bulk of the ICWA's provisions were applied to the juvenile courts not through statute, but through the Rules of Court, and on that basis such rules have the force of law only to the extent that they do not conflict with legislation.³⁶⁸ But the *Enrique O.* ruling did not entirely answer the question, because it left the door open to applying the ICWA for foster care placements based on probation violations, status offenses, or violation of other court orders that were not in and of themselves criminal. What *Enrique O.* declined to find was that, since a foster care placement is always a consideration, especially when a minor is detained from their parents, whether the ICWA should apply to such cases.

SB 678 presumably removed the doughnut-hole ambiguity that parts of the ICWA had been applied to courts by rule only, not by statute. However, the cases that followed make clear that there is anything but a consensus in the appellate districts on when or whether to apply the Act to delinquent minors who are in, or at risk to be placed in, foster care. Following SB 678's passage, *In re Alejandro A.* essentially affirmed *Enrique O.*'s adult criminal act exclusion, but it did so based on a lack of evidence in that record that the child in question was an Indian child.³⁶⁹ The court also declined to address whether the particular program where the minor was sent constituted a foster program. *Alejandro A.* did not offer any specific criteria to analyze which group homes or programs approximate foster care because of an inadequate record. Ultimately the answer may rest on whether IV-E funds are used.

The court in *R.R. v. Superior Court* struck down a standing order in Sacramento County that the ICWA did not apply in delinquency cases, did not impose a duty of inquiry as to whether the minor is an Indian child, and did not require notice to minor's tribe.³⁷⁰ Unlike *Enrique O.*, the minor in *R.R.* committed a probation violation by not complying with the terms of his youth center "contract." The *R.R.* court declined to address whether the "act" that qualifies for the criminal act exception is the probation violation, or the underlying legal violation that caused the minor to be put on probation in the first place. Instead, the court noted that a minor is at risk to of entering foster care even when there exist unresolved conditions in the minor's family that may necessitate entry into foster care.³⁷¹ Moreover, *R.R.* affirmed the legislature's ability to exceed the minimum federal standards of the ICWA and refuted the notion that the higher state standards were preempted by the less protective federal law. So long as state law is consistent with the force and purpose of federal law, and not in direct conflict, then preemption does not occur.³⁷² *R.R.* acknowledges not only the tribe's right to receive notice of the proceedings, but also to intervene in a delinquency case, transfer it to tribal court (or tribal jurisdiction if it has no court), and participate in the proceedings, which would include obtaining discovery.

³⁶⁶ WELF. & INST. CODE § 224.3(a); CAL. RULES OF COURT, RULE 5.480.

³⁶⁷ *In re Enrique O.*, 137 Cal. App. 4th 728 (2006).

³⁶⁸ *Id.* at 735, citing *In re Richard S.*, 54 Cal.3d 857, 863 (1991).

³⁶⁹ *In re Alejandro A.*, 160 Cal. App. 4th 1343 (2008).

³⁷⁰ *R.R. v. Superior Court*, 180 Cal. App. 4th 185 (2009).

³⁷¹ *Id.*

³⁷² *Id.*, citing *In re Brandon M.*, 54 Cal. App. 4th, 1387, 1393 (1997).

By contrast, the subsequent Riverside County case of *In re W.B., Jr.*, took issue with *R.R. v. Superior Court* and directly contradicted the holding that the ICWA applies to delinquencies.³⁷³ The court in *W.B.* acknowledged that the newly enacted Welfare and Institutions Code section 224.3 imposed an affirmative duty to inquire whether a minor for whom a Section 300 or Section 601/602 petition is filed is an Indian child and at risk of entering foster care, but interpreted such application to limited circumstances – such as dual status cases under Section 241.1 or cases where the act would not be criminal if committed by an adult, such as underage drinking.³⁷⁴ *W.B.* declined to impose an expanded application because the court found it was pre-empted by state law. The court reasoned that the definition of 25 U.S.C. section 1903(l) was in conflict with Welfare and Institutions Code section 224.3 because of the criminal act exception as applied to all delinquency proceedings.³⁷⁵ Despite the fact that *W.B.* could have been decided on narrower grounds (namely, that the placement at issue was not a foster care placement, but was a public or private institute), the court’s ruling cannot be reconciled with *R.R.* and invites some higher level of review.

A. Mandatory Application of the ICWA in Section 602 Proceedings

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

Some delinquency proceedings result in a minor being committed to a locked or secure facility such as California Division of Juvenile Justice (previously called California Youth Authority) or Juvenile Hall. However, other delinquency dispositions result in a minor being sent to a less restrictive “placement.” These placements are made for the child’s welfare where the court has found the child is a risk of entering foster care after reasonable efforts have been made to prevent the need for removal of the child from his or her home.³⁷⁶ Such placements would include foster care placements made with relatives, foster care with strangers, licensed group homes, shelter care homes and treatment facilities pursuant to Welfare and Institutions Code section 11402.

In order to qualify for IV-E foster care funding, the placement must be based not on the criminal conduct of the minor, but on the best interests and welfare of the child. This finding in effect means that a child is being placed in foster care similar to a Section 300 dependency placement case. The findings that the court must make to effectuate placement of the child in a foster care case are identical to those of a Section 300 case, which is why they bring the proceeding within the definition of a child custody proceeding covered by the ICWA.

Typically the delinquency court will make a finding that the child is entering foster care or is “at risk of entering foster care.”³⁷⁷ The application of the ICWA by California Rules of Court, rule 5.480 is broad – it applies to all child custody proceedings under Section 300 and “to all proceedings under Section 601 and Section 602 *et seq.* where the child is at risk of entering

³⁷³ *In re W.B., Jr.*, 182 Cal. App. 4th 126 (2010).

³⁷⁴ *Id.* at 131-132.

³⁷⁵ *Id.*

³⁷⁶ *See, e.g.*, WELF. & INST. CODE §§ 636 and 727 *et seq.*; CAL. RULES OF COURT, RULE 5.480.

³⁷⁷ CAL. RULES OF COURT, RULE 5.480(1).

foster care or is in foster care, including detention hearings, jurisdiction hearings, disposition hearings, review hearings, and hearings under section 366.26.”

Again, the finding that the court makes is that the placement is being made for something 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, does not in and of itself exclude the case from the ICWA’s coverage. However, some courts disagree.³⁷⁸

⇒ **PRACTICE TIP:** *While the use of Title IV-E funds to pay for a child’s placement is not what triggers the application of the ICWA, the findings required to qualify the placement for federal foster care funding are the same findings that require application of the ICWA. 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 ineligible for Title IV-E funding.*

EXAMPLE: Dell is 13 years old and a member of a recognized California tribe. Dell unlawfully takes a motor vehicle (a violation of Penal Code section 488). The juvenile court either accepts an admission by Dell or it adjudges that Dell is a Section 602 ward based on his theft of the vehicle. At the dispositional hearing the court finds that: (1) Dell is not going home; (2) Dell is an Indian child; and (3) Dell is committed to the Division of Juvenile Justice for three years. The ICWA does not apply at this point because even though Dell is removed from his home he is not going to a “foster care placement.” What if Dell is not committed to a “locked facility,” but instead goes to a group home that is funded by Title IV-E? Yes, the ICWA then applies.

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 Welfare and Institutions Code sections 300, 601, or 602. All proceedings to modify or terminate a guardianship granted under this Section 728 were previously held in the juvenile court, even if the wardship or dependency proceedings had otherwise been terminated.

Guardianship proceedings clearly fall within the definition of foster care placements 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.”³⁷⁹ For Section 600 dispositional matters guardianship is a subset of foster care. 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 Section 602 proceeding in which the guardianship activity occurs.

³⁷⁸ See *In re W.B., Jr.*, 182 Cal. App. 4th 126 (2010), and *In re Alejandro A.*, 160 Cal. App. 4th 1343 (2008).

³⁷⁹ 25 U.S.C. § 1903(1) (emphasis added).

Similarly, the 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 Welfare and Institutions Code section 727.3 (involving IV-E funded foster placement).³⁸⁰ The ICWA covers “any action resulting in the termination of the parent-child relationship.”³⁸¹ When any delinquency case moves to guardianship or termination of parental rights, it would then be subject to the Act and all its procedural safeguards and placement preferences.

3. Minimum Federal Standards as Applied to Section 602 Proceedings

Once the juvenile court applies the ICWA to a delinquency case, the minimum federal standards as discussed in the prior chapters apply to the case.³⁸² For example, California Rules of Court require probation departments in delinquency cases to fulfill many of the same requirements as county welfare departments must in dependency cases.³⁸³

Some minimum federal standards or requirements of the ICWA are difficult to apply in the delinquency context, and are seemingly incongruous – for example, the mandatory waiting periods prior to proceeding with a court hearing after notice. The ICWA requires that “[n]o foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent, Indian custodian and the tribe or Secretary.”³⁸⁴ However, there is a conflicting time constraint on the juvenile court in a wardship proceeding to provide a child with a speedy adjudication of his or her case. For example, if a minor is detained at the time the petition is filed, the clerk must calendar the petition to be heard, and the hearing must be commenced within 15 judicial days from the date of the detention order.³⁸⁵

The conflict between the federal statutory right of the tribe to have notice in advance of the proceedings and the ward’s right to have speedy adjudication cannot always be harmonized, and where this occurs it is probable that a court will give greater deference to the individual’s constitutional right. This is an area which the appellate courts may need to address on a case-by-case basis, recognizing that the difficulty in applying all of the ICWA’s rules on the front end of a case does not allow a court to disregard the Act in subsequent hearings. However, there is case law finding that the rights afforded under the ICWA are statutory rights and not constitutionally-based rights, and thus it may be argued that the right to speedy adjudication, especially when a child is detained, is a constitutionally-based right which supersedes the statutory rights provided under the ICWA.

There are other aspects of delinquency proceedings where application of the Act may conflict with the rights of an Indian child under both state and federal law. Where there is a conflict between the varying provisions of the ICWA and state law, the “higher standard of protection to the rights of the Indian parent or Indian custodian of an Indian child” shall apply.³⁸⁶

³⁸⁰ WELF. & INST. CODE § 727.31.

³⁸¹ 25 U.S.C. § 1903(1)(ii).

³⁸² 25 U.S.C. § 1902.

³⁸³ See CAL. RULES OF COURT, RULE 5.481.

³⁸⁴ 25 U.S.C. § 1912.

³⁸⁵ WELF. & INST. CODE § 657(a)(1); CAL. RULES OF COURT, RULE 5.774.

³⁸⁶ 25 U.S.C. § 1921.

4. Permissive Tribal Participation in Section 602 Proceedings

To the extent the policy underlying juvenile law in California remains treatment and rehabilitation of the child, tribal involvement in Section 602 proceedings is consistent with the purposes of the ICWA, even when there has not been a finding that the child is at risk of entering foster care. In such cases, many tribes actively pursue involvement in Section 602 cases on a permissive basis in an effort to provide services and locate appropriate placements, which can be formalized through an agreement authorized by 25 U.S.C. section 1919.

Tribal participation in Section 602 proceedings at all stages 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. Many state courts have embraced the idea of "wraparound services" (wraparound services were implemented in 1997 under SB 163, and allow California counties to use non-federal aid to families with dependent children-foster care funds to provide families and children with alternatives to group home care).³⁸⁷ 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 BIA 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 within California that offer medical and therapeutic services. 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. Both delinquent and dependent minors 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 of 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."³⁸⁸ If the court confirms tribal approval of a home or institution, the Act requires that the placement receive preference in placement absent good cause to the contrary. Tribes can, via tribal resolution, qualify a home for placement that would not otherwise be an eligible placement. Courts can augment placement options for Indian children by working with the child's tribe.

³⁸⁷ See *In re W.B.*, 182 Cal. App. 4th 126, 129 (2010).

³⁸⁸ 25 U.S.C. § 1915.

Counties may claim state and federal Aid to Families with Dependent Children – Foster Care funds 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 non-relative located on or off the reservation which is licensed, approved or specified by the Indian child's tribe.³⁸⁹ 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 eligible for placement.

5. Tribe's Right to be Present at Section 602 Proceedings

Even in those cases where the tribe does not or cannot appear in a Section 602 wardship proceeding, the policy underlying the ICWA strongly supports tribal involvement in Section 602 proceedings. This is true especially as the policy underlying juvenile law in California remains treatment and rehabilitation of the child. Accordingly, tribes should actively pursue permissive involvement in Section 602 cases and make efforts to provide services and locate appropriate placements.

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. The rules apply to every action and proceeding to which the juvenile court law applies.³⁹⁰ Chapter 3 of the Juvenile Court Rules set forth rules governing the general conduct of juvenile court proceedings. Rule of Court 5.530 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.)

As a matter of California law, Indian tribes have a right to be present at every juvenile proceeding involving Indian children, including Section 602 proceedings. California Rules of Court, rules 5.530 and 5.480 contain reasonable measures to promote court administration and practice and to further the purposes of both the juvenile court law and the ICWA. By allowing tribes to be present for all Section 602 proceedings involving Indian children, tribes can monitor cases to assure proper consideration of the Indian child's best interests.

⇒ **PRACTICE TIP:** *Section 601 “status offense” proceedings in practice do not result in placements and would not trigger a detention hearing. But the ICWA by its own terms still applies in a 601 proceeding. Section 601 cases involve truancy, runaways, and refusal to obey parents, where the minor's acts alone, do not constitute delinquent conduct. Further, in any proceeding where the child is not placed or detained at all (for example, is sent home with the parents on probation), the ICWA does not apply because there is no “placement.”*

³⁸⁹ WELF. & INST. CODE § 11401; SDSS All County Letter No. 95-07 (February 9, 1995) (*see* Appendices).

³⁹⁰ CAL. RULES OF COURT, RULE 5.480.