

XIII. Family Law Proceedings

The ICWA applies to state child custody proceedings involving an Indian child (including family law adoptions and other family law cases) that will result in a non-parent receiving custody. In order to promote the stability and security of Indian tribes and families, the Act provides minimum standards, both procedural and substantive, that govern the removal of Indian children from their families.⁴²⁵

The California legislature has declared its commitment to encouraging and protecting Indian children's connections to their tribes and tribal communities.⁴²⁶ With the passage of SB 678 in 2006, the application of the ICWA to adoption and guardianship proceedings is now clear.⁴²⁷ “[C]learly delineate[d] expectations regarding the child welfare system’s approach to working with Indian children, their parents and their tribes.”⁴²⁸ The provisions of SB 678 specific to family law were codified throughout the California Family Code, including the addition of Part 3 (“Indian Children”) to Division 1. This particular section of the Benchguide provides a comprehensive look at the ICWA’s application to family law cases in California. It incorporates all SB 678 amendments as well as relevant case law and current Rules of Court.

A. Adoption Proceedings

The ICWA applies to all family law cases involving an Indian child where the outcome will be a final adoption decree: both agency adoptions and independent adoptions (including stepparent and relative adoptions), whether voluntary or involuntary.⁴²⁹

1. Voluntary Adoption Proceedings

In addition to concerns about involuntary removals of Indian children, Congress was aware that Indian children could be deprived of their cultural heritage through voluntary placements.⁴³⁰ Thus, the ICWA covers both voluntary and involuntary proceedings. Tribes have many of the same rights during voluntary proceedings as during involuntary proceedings, including the right to notice and the right to intervene.⁴³¹ In addition, guaranteeing informed consent, there are strict consent requirements for voluntary foster care placements and adoptions.⁴³²

In California, parental rights may be voluntarily terminated in two ways: agency adoptions and independent adoptions. If a child is delivered to an adoption agency for placement, parental rights are terminated on the filing of the relinquishment form with the

⁴²⁵ 25 U.S.C. §§ 1901-1902; *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32-37 (1989); *In re Alicia S.*, 65 Cal. App. 4th 79, 81 (1998).

⁴²⁶ FAM. CODE § 175.

⁴²⁷ Sen. Bill No. 678 (2005-2006 Reg. Sess.); Stats.2006, ch. 838, §§ 1-57.

⁴²⁸ Ducheny, Denise M., Senate Daily Journal for the 2005-2006 Regular Session, pp. 5606–5607 (August 31, 2006).

⁴²⁹ FAM. CODE §§ 175, 8620, 8700.

⁴³⁰ S. Rep. No. 95-597, 95th Cong., 1st Sess. (1977).

⁴³¹ FAM. CODE § 8620.

⁴³² 25 U.S.C. § 1913; FAM. CODE § 8606.5.

California Department of Social Services (“the Department”).⁴³³ A parent may also consent to an independent adoption, in which case parental rights are terminated by decree of adoption.⁴³⁴

a. Notice and Inquiry in Voluntary Proceedings

The enactment of SB 678 codified the requirements for inquiry and notice in voluntary child custody proceedings.⁴³⁵ These inquiry and notice requirements clarified existing practices in many counties. Without notice, a tribe would not be able to exercise its right to intervene or to assert jurisdiction and transfer jurisdiction.⁴³⁶ Thus, even prior to the enactment of SB 678, courts consistently required that tribes receive notice of state voluntary proceedings.⁴³⁷

In voluntary adoption proceedings, the duty to inquire about Indian ancestry and to provide notice is borne by the Department, the licensed adoption agency, or the adoption service provider, as applicable. In all cases where a parent is seeking to relinquish the custody of their child, both the child and the child’s parent or custodian must be asked if the child is or may be eligible for membership in an Indian tribe. This inquiry must be documented and provided to the court for review. If there is reason to believe that the child is of Indian descent, notice must be provided to all Indian tribes in which the child may be eligible for membership.⁴³⁸ Among other requirements, the notice must describe the nature of the proceedings and must advise the tribe of its right to intervene.⁴³⁹

⇒ **PRACTICE TIP:** *The Court of Appeal in In re R.S.⁴⁴⁰ seemingly held that the ICWA’s inquiry and notice requirements do not apply to voluntary relinquishment cases. This holding is highly questionable, however, where it fails to address the inquiry and notice requirements of Family Code section 8620, which apply to voluntary relinquishment cases under a plain reading of the statute. In addition, the court failed to appreciate that a tribe which is not noticed has no ability to exercise its right to intervene, which is guaranteed by Family Code sections 170 and 177(a) and Welfare and Institutions Code section 224, and which creates a risk of invalidation pursuant to the ICWA.*

Notice is often cited as the most critical component of the ICWA. For this reason, and because failure to properly notice is reversible error, California law provides for civil penalties of up to \$20,000 where a person, other than a birth parent of the child, in one of a number of ways attempts to avoid notice requirements of the ICWA.⁴⁴¹

⁴³³ FAM. CODE § 8700(e).

⁴³⁴ FAM. CODE § 8617.

⁴³⁵ FAM. CODE §§ 180 and 8620.

⁴³⁶ 25 U.S.C. § 1911(a)-(c).

⁴³⁷ *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989); *In re Junious M.*, 144 Cal. App. 3d 786 (1983) (tribe’s right to intervene is meaningless if the tribe has no notice of the pending action); *Adoption of Lindsay C.*, 229 Cal. App. 3d 404 (1991); *In re Crystal K.*, 226 Cal. App. 3d 655 (1990), *cert. denied*, 502 U.S. 862 (1991).

⁴³⁸ FAM. CODE §§ 177, 180, 8620; CAL. RULES OF COURT, RULE 5.481(b).

⁴³⁹ See § VI of this Benchguide for additional notice requirements

⁴⁴⁰ 179 Cal. App. 4th 1137 (2009), 101 Cal. Rptr. 3d 910.

⁴⁴¹ FAM. CODE § 8620(g-h).

b. Consent Requirements

Both the Act and California law establish procedures and substantive requirements that must be followed to validate a voluntary foster placement, termination of parental rights, or adoption of an Indian child.⁴⁴² The consent provisions apply to both Indian and non-Indian parents, as well as to Indian custodians.⁴⁴³ These consent provisions are designed to ensure that voluntary placements of Indian children are not coerced and are fully informed.⁴⁴⁴

Four conditions are needed to establish valid consent in voluntary proceedings:

- (1) The consent must be in writing;
- (2) The consent must be recorded before a court of competent jurisdiction;
- (3) The presiding judge must certify that the terms and consequences of the consent were fully explained in detail; and,
- (4) The presiding judge must certify that the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language the person understood.⁴⁴⁵

⇒ **PRACTICE TIP:** *There is an apparent inconsistency between where the ICWA at 25 U.S.C. section 1913 says a voluntary termination of parental rights is valid and when California Family Code 8700 says a voluntary termination of parental rights is final. The ICWA is clear in requiring written consent to be reviewed and certified by a judge in a court of competent jurisdiction in order to be valid. However, Family Code section 8700 provides that a voluntary relinquishment is final when filed with the department (absent certain exceptions).*

The consent document must contain the name and birth date of the Indian child, the name of the child's tribe, any tribal identification number, and the name and address of the consenting parent or Indian custodian.⁴⁴⁶ For foster placements, the consent document must contain the name and address of the person who arranged the placement or the name and address of the foster parents, if known at the time of consent.⁴⁴⁷ For adoptive placements, the name and address of the person or entity arranging for the placement must be included in the consent document.⁴⁴⁸

The Act also regulates execution of the consent. Where an Indian child resides or is domiciled on a reservation, the tribal court is the only court with competent jurisdiction to record the consent unless the tribe has been divested by federal law of exclusive jurisdiction over child custody matters.⁴⁴⁹ (See Section V of this Benchguide for a discussion of tribal jurisdiction.)

⁴⁴² 25 U.S.C. § 1913; FAM. CODE § 8606.5.

⁴⁴³ 25 U.S.C. §§ 1903(9) and 1913(a).

⁴⁴⁴ *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988).

⁴⁴⁵ 25 U.S.C. § 1913; FAM. CODE § 8606.5.

⁴⁴⁶ BIA Guidelines, § E.2(a).

⁴⁴⁷ BIA Guidelines, § E.2(b).

⁴⁴⁸ BIA Guidelines, § E.2(c).

⁴⁴⁹ 25 U.S.C. § 1911(a); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 51 n.26 (1989).

Otherwise, any tribal, state or federal court with competent jurisdiction may record the consent. The consent must be executed in open court, absent a request for confidentiality or anonymity.⁴⁵⁰ Finally, any consent given before or within ten days of the child's birth is invalid.⁴⁵¹

c. Withdrawal of Consent

In any voluntary adoption proceeding, the parent or Indian custodian may withdraw consent at any time before the entry of a final decree of adoption.⁴⁵² If consent is withdrawn, the child must be returned to the parent or Indian custodian as soon as practicable.⁴⁵³ The parent must file the withdrawal in the court where the consent was originally recorded, and the court clerk must notify the party who arranged for the adoptive placement.⁴⁵⁴

After the final decree of adoption is entered, the parent may withdraw consent only on the grounds that the consent was obtained through fraud or duress and may petition the court to vacate the decree.⁴⁵⁵ The court must vacate the decree and return the child to the parent if the court finds that the consent was indeed given under fraud or duress.⁴⁵⁶ Under the ICWA, adoption orders that have been effective for at least two years may not be vacated unless otherwise permitted under state law.⁴⁵⁷ However, under California law, an action to vacate an adoption decree based on fraud may be brought within three years after entry of the decree.⁴⁵⁸

If an adoption is vacated or set aside for any reason, a parent or Indian custodian may petition for return of the child. The court must grant the petition unless it would not be in the best interests of the child under the ICWA's strict standard of proof.⁴⁵⁹

d. Certificate Degree of Indian Blood

In a voluntary adoption proceeding involving an Indian child, the Department must ensure that birth parents of Indian ancestry who seek to relinquish the child for adoption provide sufficient information to the Department or the adoption agency so that a Certificate Degree of Indian Blood (CDIB) can be obtained from the BIA.⁴⁶⁰ An adoption agency must provide the same information and documentation to the Department at the Department's request.⁴⁶¹ This information becomes a part of the adoptee's file and may be released to the adoptee once the adoptee reaches the age of 18.⁴⁶²

⁴⁵⁰ BIA Guidelines § E.1 and Commentary.

⁴⁵¹ 25 U.S.C. § 1913(a); FAM. CODE § 8606.5.

⁴⁵² 25 U.S.C. § 1913(c); FAM. CODE § 8606.5(b).

⁴⁵³ BIA Guidelines § E.4.

⁴⁵⁴ *Id.*

⁴⁵⁵ 25 U.S.C. § 1913(d); FAM. CODE § 8606.5(c).

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.*

⁴⁵⁸ FAM. CODE § 9102(b).

⁴⁵⁹ 25 U.S.C. §§ 1912, 1916(b).

⁴⁶⁰ FAM. CODE § 8619.

⁴⁶¹ 22 C.C.R. § 35387.

⁴⁶² FAM. CODE § 8619; 22 C.C.R. § 35385(a).

2. Involuntary Adoption Proceedings

Involuntary adoption proceedings involving an Indian child under the Family Code require the court to make both of the two findings listed below prior to declaring any Indian child free from the custody and control of a parent (and thus eligible for adoption).

- (1) The court must find by clear and convincing evidence that active efforts were made in accordance with Welfare and Institutions Code section 361.7, Family Code section 7892.5 and California Rules of Court, rule 5.485.
- (2) The court must make a determination supported by evidence beyond a reasonable doubt, including testimony of one or more “qualified expert witnesses” as defined in Welfare and Institutions Code section 224.6⁴⁶³ and Family Code section 177(a), that the continued custody of the Indian child by the parent is likely to result in serious emotional or physical damage to the child.⁴⁶⁴

3. Postadoptive Contact Agreements

The Family Code provides for postadoptive contact agreements by recognizing that “some adoptive children may benefit from either direct or indirect contact with birth relatives, including the birth parent or parents or an Indian tribe, after being adopted.”⁴⁶⁵ In cases involving Indian children, postadoptive contact agreements can include provisions for visitation, future contact, and the sharing of information about the child, not only with birth relatives and birth parents, but also with the child’s Indian tribe.

The court may order the parties to engage in family mediation services in an effort to reach a postadoptive contact agreement in adoption cases involving an Indian child if a birth parent, birth relative, or Indian tribe so petitions the court.⁴⁶⁶

⇒ **PRACTICE TIP:** *Where the parties fail to negotiate in good faith, the court has the authority to modify or issue new orders, including initiation of guardianship proceedings instead of adoption or authorizing a different adoptive placement for the child.*⁴⁶⁷

4. Information Required to be Sent to the BIA

In all cases involving an Indian child where the outcome is an adoption decree, the court must provide to the BIA the information listed below within 30 days of the decree:⁴⁶⁸

⁴⁶³ NOTE: Family Code section 7892.5 mistakenly cites to Welfare and Institutions Code section 224.5 in its text, but the description of “qualified expert witness” is actually at Welfare and Institutions Code section 224.6.

⁴⁶⁴ FAM. CODE §§ 177, 7892.5; CAL. RULES OF COURT, RULE 5.485.

⁴⁶⁵ FAM. CODE §§ 8616.5(a), 8620(f).

⁴⁶⁶ FAM. CODE § 8616.5(k)(1).

⁴⁶⁷ Fam. Code § 8616.5(k)(2).

⁴⁶⁸ FAM. CODE § 9208; CAL. RULES OF COURT, RULE 5.487; *see In re Antoinette S.*, 104 Cal. App. 4th 1401, 1406 (2002) (notice to Secretary is accomplished by notice to BIA).

- (1) A copy of the adoption decree;
- (2) The name and tribal affiliation of the child;
- (3) The names and addresses of the biological parents;
- (4) The names and addresses of the adoptive parents; and
- (5) The identity of any agency maintaining files and records regarding the adoptive placement.

This list is intended to gather evidence sufficient to allow the tribe and/or the individual to begin to determine eligibility for tribal membership. In cases where a biological parent has requested by affidavit confidentiality of his or her identity, the court must provide the affidavit to the BIA, which in turn must ensure the confidentiality of the information.⁴⁶⁹

B. Custody Cases Where Actual Custody is with a Non-Parent (Family Code Section 3041)

The ICWA applies to proceedings that could award custody of an Indian child to a nonparent (or Indian custodian), such as placements under Section 3041 of the Family Code.⁴⁷⁰ The party seeking custody in these proceedings must complete Form ICWA-010(A) (*Indian Child Inquiry Attachment*) and attach it to the petition.⁴⁷¹ If there is reason to know that an Indian child is the subject of the proceeding, notice must be provided. (See Section VI of this Benchguide for detailed information on notice requirements under the ICWA.) Under Family Code section 3041, where it is determined that the proceeding involves an Indian child, whether or not the tribe chooses to intervene, the court shall:

- (1) Apply the evidentiary standards provided in the ICWA at 25 U.S.C. Section 1912 and Welfare and Institutions Code sections 224.6 and 361.7; and,
- (2) Apply the placement preferences and standards set out in Welfare and Institutions Code section 361.31.

C. Custody Disputes between Parents

The ICWA specifically excludes custody awards to a parent in a “divorce proceeding.”⁴⁷² Therefore, the impact of the ICWA is limited in custody proceedings unless custody is to be awarded to a nonparent, or one parent is seeking to terminate the other parent’s rights.

⁴⁶⁹ *Id.*

⁴⁷⁰ FAM. CODE § 3041; CAL. RULES OF COURT, RULE 5.480.

⁴⁷¹ FAM. CODE § 177(a); CAL. RULES OF COURT, RULE 5.481.

⁴⁷² 25 U.S.C. § 1903.