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INDIAN CHILD WELFARE ACT OUTLINE
MINIMUM FEDERAL STANDARDS
STATE COURT PROCEEDINGS
April 2002

A. Initial Determinations

1. Is the child an Indian? 25 U.S.C. §1903(4)¹
 - a. The child must be unmarried and under 18.
 - b. The child must 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. [Enrollment not necessarily required for membership. *In re Junious M.* (1983) 144 Cal.App.3d 786,796.]
 - c. The juvenile court and county welfare department have an affirmative duty to inquire whether a child is or may be an Indian child. (Cal. Rules of Court, rule 1439(d) [The California Rules of Court have the force of law. *In re Richard S.* 54 Cal.3d 857,863.]; Manual of Policies and Procedures, California Department of Social Services, §31-515.1.11.111.)) The determination of whether a child is Indian is not a racial one, but rather a question of political status. (*Morton v. Mancari* (1974) 417 U.S. 535.) Tribal membership is an exclusively tribal question. (*Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49.) A tribe's determination that a child is an Indian child is conclusive. (*In re Junious M.*, *supra*, 144 Cal.App.3d at p. 788; Guidelines for State Courts: Indian Child Custody Proceedings (44 Fed.Reg. 67584, 67586 (Nov. 26, 1979.))
 - d. One of the primary purposes of giving notice to the tribe is to enable the tribe to determine whether the child is an Indian child. Where the agency failed to provide notice, the fact the child is not enrolled until late in a proceeding, does not preclude application of the Act to the entire proceeding. Further, a letter from a former chairman, not accompanied by a tribal resolution and predating the birth of the child does not satisfy the affirmative duty to inquire regarding a particular child, nor does it constitute tribal participation or an express indication of no tribal

1§1903 (3) & (4) define the terms "Indian" and "Indian child", respectively. However, it should be noted that §1934 contains a second and broader definition of Indian which is applicable to §1932 & §1933 of the Act. Finally, §1912(a) creates what is essentially a third definition. One need only have "reason to know" an Indian child is involved to activate the notice requirements of §1912 (a). California Rules of Court, rule 1439(e) further specifies that the Act shall be applied to the entire proceeding if the court has reason to know the child may be an Indian child, however, only notice and further inquiry is required where the child may only possess Indian ancestry.

interest in the proceeding. (*In re Desiree F.* (2000) 83 Cal.App.4th 460; 99 Cal.Rptr.2d 688.) But see, *In re William G.* (2001) 89 Cal.App.4th 423, 107 Cal.Rptr.2d 436. [Failure to apply the Act in the absence of reason to know the child is Indian is not a violation of the Act where the court proceeds to apply the Act to the proceeding once Indian heritage is known.]

- e. Even if the tribe does not respond to notice, California Rules of Court, rule 439(c)(3) and (e) specify that the Act shall be applied to the entire proceeding if the court has reason to know the child may be an Indian child, however, only notice and further inquiry is required where the child may only possess Indian ancestry. (Cal. Rules of Court, rule 1439(e).)
- f. The Bureau of Indian Affairs (BIA) of the Department of the Interior has promulgated federal guidelines for state court ICWA proceedings. (44 Fed.Reg. 67584 - 67595 (Nov. 26, 1979.)) These are entitled to judicial deference. (*In re Junious M.*, *supra*, 144 Cal. App.3d at p. 792, fn. 7; *In re Kahlen W.* (1991) 23 Cal.App.3d 1414, 1422, fn. 3.) Absent a contrary determination by the tribe, a determination by the BIA that a child is or is not an Indian is conclusive. (BIA Guidelines, *supra*, 44 Fed. at p. 67586; Cal. Rules of Court, rule 1439(e) and 1439(g)(4).) In the absence of a tribal or BIA determination, it is up to the juvenile court, not DSS or its social workers, to determine whether the Act applies under a given set of circumstances. (*In re Marinna J.* (2001) 90 Cal.App.4th 731.)
- g. The tribe must be a federally recognized Indian tribe, group or community. [Eligible for federal services provided to Indians]. (25 U.S.C. §1903(8).) *See* 65 Fed.Reg. 13298 (Mar. 13, 2000)]; *In re Wanomi P.* (1989) 216 Cal.App.3d 156; *In re John V.* (1992) 5 Cal.App.4th 1201.)

2. Is this child custody proceeding covered by the ICWA? 25 U.S.C. §1903(1)

- a. The Act covers:
 - 1.) Foster care placements, which is defined in the ICWA to mean any temporary placement where the child need not be returned upon demand, and includes placement in a foster home or institution or the home of a guardian or conservator. All California guardianship proceedings meet this definition and are covered by the Act. (E.g., Welf. & Inst. §§300 *et seq.*, §601, §636 [re: “602 placements”], §727 and §728; Prob. §1500 *et seq.*, §2112.)
 - 2.) Termination of parental rights. (E.g., Fam.C. §7802 *et seq.*; Fam.C. §§7660-7664, §8605; Welf. & Inst. §366.26, §727.31, §727.4.)
 - 3.) Pre-adoptive placement in a home or institution after termination of parental rights but before or in lieu of adoptive placement.
 - 4.) Adoptive placement. (Fam. C. §§8500 *et seq.*; Welf & Inst. §366.26, §727.31.)
- b. ICWA coverage exceptions:

- 1.) The ICWA does not cover an award of custody to one parent as part of a divorce proceeding. (25 U.S.C. §1903(1).) However, action by one parent to terminate parental rights of other parent is covered by the Act. (*In re Crystal K.* (1990) 226 Cal.App.3d 655 (review denied Mar. 14, 1991); *In re Adoption of Lindsay C.* (1991) 229 Cal.App.3d 404.) Custody dispute between unmarried parents may be covered. (*Appeal of William Stanek*, 8 Indian L.Rep.5021 (April 1981)(decision of the Commissioner of Indian Affairs.))

- 2.) A placement based on an act which would be a crime if committed by an adult.
 - i.) Juvenile delinquency matters are not generally covered. (i.e., Welf. & Inst. §§602 *et. seq.*) Status offenses, such as truancy are covered. (i.e., Welf. & Inst. §§601 *et. seq.*)
 - a.) California Rules of Court, rule 1410(b), entitles parents, Indian custodians, the child’s tribe (and counsel) to be present in all juvenile proceedings, including §602 proceedings.
 - ii.) §602 proceedings are covered in certain circumstances:
 - a.) When a *placement* in a §602 case is made for the child’s welfare after reasonable efforts have been made to prevent the need for removal of the child from his or her home, as required to qualify for federal IV-E funds, i.e, federal welfare aid to fund the cost of the child’s placement. Such placements would include those made to relatives, foster care or licensed group homes and treatment facilities. (Welf. & Inst. §§636, 727 *et seq.*)
 - b.) When the juvenile court grants, or modifies a guardianship pursuant to Welf. & Inst.Code §728, or pursues termination of parental rights pursuant to Welf. & Inst. Code §727.31.

- c. Existing Indian family exception. A split in authority developed regarding the judicially created “existing Indian family doctrine.”
 - 1.) The judicial split. Other than as expressly excepted, intra-family, private child custody actions and actions involving children who may not be part of an existing Indian family are covered. (*See In re Junious M.*, supra; 144 Cal.App.3d 786; *In re Crystal K.*, supra, 226 Cal.App.3d 655; *Adoption of Lindsay C.*, supra, 229 Cal.App.3d 404; *In re Alicia S.* (1998) 65 Cal.App.4th 79, 76 Cal.Rptr.2d 121; Cal.Rules of Court, rule 1439.) -Vrs- Under the existing Indian family doctrine, three California courts refused to apply the ICWA unless the Indian child or at least one parent has a significant social, cultural or political relationship with Indian life. This is a factual determination for the trial court. (*In re Alexandria Y.* (1996) 45 Cal.App.4th 1483, 53 Cal.Rptr.2d 679; *In re Bridget R.* (1996) 41 Cal.App.4th 1483, 49 Cal.Rptr.2d 507; *In re Crystal R.* (1997) 59 Cal.App.4th 703., 69 Cal.Rptr.2d 414.; *In re Derek W.* (1999) 86 Cal. Rptr.2d 742; *In re Santos Y.* (2001) 92 Cal.App.4th 1274.)

- 2.) Legislative action. **The California legislature rejected the existing Indian family doctrine in AB 65.** The bill, effective September 1, 1999, and codified at Fam. Code §7810 and Welf. & Inst. Code §§305.5 and 360.6, directs the courts to strive to promote the stability and security of Indian tribes and families and to comply with ICWA in all Indian child custody proceedings, as specified, and requires that the Act be applied if the tribe determines that an unmarried person, who is under the age of 18 years, is a member of the tribe or is eligible for membership and is a biological child of a member of a tribe.

Judicial Reaction: In *In re Santos Y.*, filed October 19, 2001, the Second Appellate District rejected §360.6 as a dispositive rejection of the existing Indian Family Doctrine, at least as applied to the particular facts of that case. To the extent *Santos Y* is not read narrowly, it resurrects the pre-existing split among the districts.

3. Is state jurisdiction proper in this case?

- a. If the child resides or is domiciled on an Indian reservation, the tribe has exclusive jurisdiction over the proceeding. (25 U.S.C. §1911(a).) In all other cases, jurisdiction is concurrent, but presumptively tribal. (*Mississippi Choctaw Indian Band v. Holyfield* (1989) 490 U.S. 30, 104 L.Ed.2d 29, 38-39. [Federal common law definition of “domicile.”])
- 1.) The tribe must have exclusive jurisdiction, so P.L. 280 tribes, such as California tribes, may not be covered by §1911(a). P.L. 280 tribes may reassume exclusive or referral jurisdiction under the Act. [P.L.280 is codified at 28 U.S.C. §1360.] California law imposes time frames on transfer to a tribe what has reassumed exclusive jurisdiction. (Welf. & Inst. Code §305.5.)
- 2.) P.L. 280 tribes, such as tribes in California, possess concurrent civil jurisdiction with the state. (*Native Village of Venetie I.R.A Council v. State of Alaska* (9th Cir. 1991) 944 F.2d 548; *In re Laura F.* (2000) 83 Cal.App.4th 583; 99 Cal.Rptr.2d 859.)
- 3.) A state court shall exercise temporary jurisdiction over a child who resides or is domiciled on a reservation, but is temporarily off the reservation, if there is an immediate threat of serious physical damage or harm to the child. Such removal must terminate when the danger passes, the child must be returned to the reservation, or an ICWA proceeding must be completed within 90 days. 25 U.S.C. §1922, 44 Fed.Reg. 67589-90 (B.7).
- b. If the child is not domiciled or residing on a reservation, the state court shall transfer jurisdiction to the tribal court in the absence of good cause to the contrary. (25 U.S.C. §1911(b); Cal.Rules of Court, rule 1439(c).) See, *In re Robert T.* (1988) 200 Cal. App. 3d. 657 [confine reading to timeliness of requests and forum non conveniens holdings, i.e., which forum provides the better opportunity to produce valuable evidence.]

- 1.) The tribe, parent or Indian custodian must petition the court to transfer.
 - 2.) Either parent may object to the transfer of jurisdiction. Parental objection vetos the transfer. (*In re Larissa G.* (1996) 43 Cal.App.4th 505, 51 Cal.Rptr.2d 16.)
 - 3.) The tribal court may decline the transfer of jurisdiction.
- c. State courts have no jurisdiction to proceed with dependency proceedings involving a possible Indian child until a period of at least 10 days after the receipt of such notice by the tribe. Section 1922 of the Act authorizes emergency removal of Indian children, even those not domiciled on a reservation. (*In re Desiree F.* (2000) 83 Cal.App.4th 460; 99 Cal.Rptr.2d 688)

B. Child Custody Proceedings in State Court

1. The Indian custodian and Indian child's tribe have a right to intervene at any point in an Indian child custody proceeding. (25 U.S.C. §1911(c).)
 - a. A parent whose rights are subject to limitation or termination is a party.
 - b. An Indian custodian is any Indian person who has:
 - 1.) legal custody of an Indian child under tribal law or custom, or under state law. (*In re Charloe* (Ore. 1982) 640 P.2d 608; Cal. Rules of Court, rule 1439(a)(3)(A).)
 - 2.) temporary physical care, custody and control which has been transferred by the parent of such child. 25 U.S.C. §1903(6); Cal. Rules of Court, rule 1439(3)(b).)
 - c. A parent includes the biological parents of an Indian child or any Indian person who has lawfully adopted such a child, including adoption under tribal law or custom. It does not include an unwed father where paternity has not been determined or acknowledged. (Cal. Rules of Court, rule 1439(a)(4).)
 - d. An Indian tribe may appear on its own behalf. (Cal. Rules of Court, rule 1410(b)(7) and rule 1412(i); *State Ex Rel. Juvenile Dept. of Lane County v. Shuey* (Ore. 1993) 850 P.2d 378. [State statutes requiring groups to be represented by attorney preempted when applied to Indian tribe's attempt to intervene under ICWA.])
2. The parent, Indian custodian and Indian child's tribe are entitled to notice of the pending proceedings and of their right to intervene whenever the court has reason to believe the child may be an Indian child. (25 U.S.C. §1912(a); 25 C.F.R. §23.11; Cal. Rules of Court, rule 1439(f); Manual of Policies and Procedures California Department of Social Services §31-515.1.12; *In re Junious M.*, supra, 144 Cal. App. 3d 786; *In re Adoption of Lindsay C.*, supra, 229 Cal.App.3d 404; *In re Kahlen W.*, supra, 233 Cal.App.3d 1414.) Substantial compliance is not adequate. **The notice requirement is not satisfied unless there is strict adherence to the federal statute.** (*In re Desiree F.* (2000) 83 Cal.App.4th

460, 99 Cal.Rptr.2d 688; *In re Jonathan D.* (2001) 92 Cal.App.4th 105, 111 Cal.Rptr.2d 628.)

- a. The court must only “know or have reason to know” that an Indian child is involved before it is required to send out notice. (*See* 44 Fed.Reg. 67586(B1); Cal. Rules of Court, rule 1439(d)(2) [what constitutes reason to know.]) Indian status of child need not be certain before notice required. (*In re Kahlen W., supra.*) A previous determination that the child’s siblings were not Indian children under the Act is not dispositive of the child’s Indian status. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 99 Cal.Rptr.2d 688; *In re Jonathan D.* (2001) 92 Cal.App.4th 105, 111 Cal.Rptr.2d 628.)
- b. If the court has reason to know only that the child may be of Indian ancestry, notice is all that is required, absent status confirmation from a tribe or the Bureau of Indian Affairs. (Cal. Rules of Court, rule 1439(e).) When there is only a suggestion of Indian ancestry and the BIA fails to respond to notice, unless the juvenile court has some further basis on which to predicate the belief a child is an Indian under the Act, the court is not required to make further inquiry. (*In re Levi U.* (2000) 78 Cal.App.4th 191.)] However, when a party proffers the name of a tribe, there is a duty to notify the tribe. (*In re Marinna J.* (2001) 90 Cal.App.4th 731.) [Where parent identifies Cherokee ancestry, each Cherokee Tribe must be noticed.]
- c. If the identity and location of the parent, Indian custodian and tribe are known, notice must be sent directly, with a copy to the Secretary. (25 C.F.R. §23.11(a).)
- d. Notice must be sent by registered mail with return receipt requested. (25 U.S.C. §1912(a).) The Notice must contain specified information required to determine Indian status, as well as advisement of rights. (25 C.F.R. §23.11(d).) Notice to the tribe is to tribal chairman unless the tribe has designated another agent for service. (25 C.F.R. §23.12; Cal. Rules of Court, rule 1439(f)(2).)
- e. State law imposes pleading requirements and further specifies the form of notice. (Cal. Rules of Court, rule 1439(f); Manual of Policies and Procedures California Department of Social Services §31-515.1.12.121.) When there is reason to believe a child is an Indian, ICWA notice must be sent for every hearing unless and until it is determined the child is not an Indian. (Cal. Rules of Court, rule 1439(f)(5).) Once the tribe (or parent) is a party, there is no necessity to repeat the formal ICWA notice to that party. (*In re Krystle D.* (1994) 30 Cal.App.4th 1778.)
- f. If an Indian child is eligible for membership in more than one tribe, the court may need to determine which tribe has the more significant contacts. (*See* 44 Fed.Reg. 67587-7(B2); 25 U.S.C. §1903(5).) The court shall keep a record of its determination on this issue.
 - 1.) It is the tribe’s prerogative to determine whether a child is eligible for membership.
 - 2.) Notice must be sent to all tribes in which the child may be eligible for membership. (*In re Desiree F.* (2000) 83 Cal.App.4th 460; 99 Cal.Rptr.2d 688)

- g. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, notice must be sent to the Secretary of the Interior. (25 U.S.C. §1912(a); *In re Kahlen W.*, *supra*.)
 - 1.) 25 C.F.R §23.11 specifies which office should receive notice.
 - 2.) The Secretary has 15 days to provide the required notice to the parent, Indian custodian, or tribe. and must inform the court if unable to verify the child’s status or locate parties. (25 C.F.R. §23.11(f).)
 - h. State courts have no jurisdiction to proceed with the custody proceeding until at least 10 days after receipt of notice by those entitled to it. (*In re Jonathan D.* (2001) 92 Cal.App.4th 105, 111 Cal.Rptr.2d 628.)
 - i. The parent, Indian custodian or tribe will be granted up to a 20-day delay to prepare for the proceeding upon request to the court. (25 U.S.C. §1912(a).)
3. If the court determines indigence, the parent or Indian custodian have a right to court-appointed counsel. (25 U.S.C. §1912(b).)
 - a. The court may, in its discretion, appoint counsel for a child on finding that it would be in the “best interests” of the child as defined by the Act.
 - b. When appointment of counsel is not authorized under state law, a procedure exists for requesting payment of fees by the Bureau of Indian Affairs. (25 C.F.R. §23.13.)
 4. All parties to an Indian child custody proceeding and their attorneys have the right to examine all reports or other documents filed with the court on which any decision to order foster placement or termination of parental rights may be based. (25 U.S.C. §1912(c). Cal. Rules of Court, rule 1439(h)(2).) A non-party representative designated by the child’s tribe may be permitted access to court documents and participate in the proceedings. (Cal. Rules of Court, rule 1412(l)(2).)
 5. The court must be satisfied that active rehabilitative efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. (25 U.S.C. §1912(d); *In re Crystal K.*, *supra*, 226 Cal.App.3d at p. 666; *In re Pima County Juvenile Action* (Ariz.Ct.App. 1981) 635 P.2d 187.)
 - a. The ICWA contemplates an effort beyond the passive service normally provided by states, and imposes an additional federal requirement in this regard. (H.R. Rep. No. 1386, 95th Cong. 2d Sess. 22 (1978).)
 - b. The rehabilitative effort should take into account the prevailing social and cultural conditions and way of life of the child’s tribe. (44 Fed.Reg. 67582(D2).) Efforts shall include attempts to utilize the available resources of extended family members, the tribe, Indian social service agencies, and individual Indian care givers. (Cal. Rules of Court, rule 1439(k)(2); rule 1439(l)(4).)
 - c. The efforts must have proved unsuccessful before removal can be recommended.

- d. Stipulation or failure to object constitutes a waiver only if the court is satisfied that the party has been fully advised of the requirements of the Act, and has knowingly, intelligently and voluntarily waived them. (Cal. Rules of Court, rule 1439(I)(2) and rule 1439(j)(2).)
 - e. The active efforts requirement must be supported by clear and convincing evidence. (*In re Michael G.* (1998) 63 Cal.App.4th 700, 74 Cal.Rptr.3d 642.)
 - f. The phrase active efforts, requires that *timely* and *affirmative* steps be taken to remedy problems which might lead to severance of the parent-child relationship. The state may rely upon *recent* but unsuccessful reunification efforts with the same parent but a different child where “substantial but unsuccessful efforts have *just* been made to address a parent’s thoroughly entrenched drug problem . . . and the parent has shown no desire to change. . . .” The law does not require the performance of idle acts. (emphasis added.) (*In re Letitia V. v. Superior Court* (2000) 81 Cal.App.4th 1009, 97 Cal.Rptr.2d 303.)
 - g. The Act requires that active efforts be made to provide services, not that services be provided regardless of when a parent becomes available to receive those services. Where a parent chooses to make himself unavailable, the active efforts requirement may be met by a showing of repeated attempts to contact appellant and to notify him of the proceedings. (*In re William G.* (2001) 89 Cal.App.4th 423, 107 Cal.Rptr.2d 436.)
 - h. In a California dependency case, the court must make the ICWA section 1912(f) finding before it terminates parental rights. One court has held that the finding should generally be made at the final review hearing at which a section 366.26 hearing is scheduled. If it is, a court need not readdress the issue at the section 366.26 hearing, unless the parent presents evidence of changed circumstances or shows the finding was stale because the period between the referral hearing and the section 366.26 hearing was substantially longer than the 120-day statutory period. However, if the finding was not made at the final review hearing and the court intends to terminate parental rights, the section 1912(f) finding must be made at the section 366.26 hearing. (*In re Matthew Z.* (2000) 80 Cal.App.4th 545; 95 Cal.Rptr.2d 343.)
6. No foster placement may be ordered in the absence of “clear and convincing evidence,” including testimony of qualified expert witnesses, that continued custody is likely to result in serious emotional or physical damage. (25 U.S.C. §1912(e).) Under the ICWA, no termination of parental rights may be ordered in the absence of “evidence beyond a reasonable doubt,” including expert testimony that continued custody likely to result in serious emotional or physical damage to the child. (25 U.S.C. §1912(f).) The ICWA controls contradictory state law. (25 U.S.C. §1921.)
- a. Custody means something more than actual physical custody. Term refers to legal and/or physical custody provided under state law or tribal law or custom. (*See In re Crystal K., supra.*; Cal. Rules of Court, rule 1439(a)(5).)
 - b. The testimony of qualified expert witnesses is required to support the court’s

determination.

- 1.) A “qualified expert” is meant to apply to expertise beyond the normal social worker qualifications. (H.R. Rep. No. 1386 at 22; *In re Pima County Juvenile Action* (1981) 635 P.2d 187.)
 - 2.) Persons likely to meet the requirements of a qualified expert include:
 - i.) Tribal members knowledgeable in family organization and child rearing;
 - ii.) lay experts with experience in Indian child and family services and a knowledge of the social and cultural standards of the child’s tribe;
or
 - iii.) a professional person. (44 Fed.Reg. 67583, 67593(D4).)
 - 3.) California rules add an additional category of expert, preferring before a professional person, a professional person with substantial education and experience working with Indian families and familiar with Indian social and cultural standards, particularly those of the child’s tribe. (Cal. Rules of Court, rule 1439(a)(10)(C).)
 - 4.) California DSS regulations have similar standards; the expert cannot be the referring social worker. (Manual of Policies and Procedures, California Department of Social Services §31-515.14.141.)
 - 5.) Experts should speak specifically to the issue of whether the parent’s or Indian custodian’s conduct is likely to cause serious emotional or physical damage to the child. (*See* BIA Guidelines for State Courts.)
- c. Stipulation or failure to object may waive 1912(d) and (e) showing. (*In re Riva M.* (1991) 235 App.3d 403.) Stipulations or failure to object constitute a waiver only if the court is satisfied that the party has been fully advised of the requirements of the Act, and has knowingly, intelligently and voluntarily waived them. (Cal. Rules of Court, rule 1439(I)(2) and rule 1439(j)(2).)
 - d. The Act does not preclude presentation of otherwise expert opinion evidence because the witness did not have an expertise in Indian matters. (*In re Krystle D.* (1994) 30 Cal.App.4th 1778.)
 - e. The standards for removal in the ICWA are meant to change the state’s rule of law in regard to the placement of Indian children. The child may not be removed only because there is someone who can do a better job or because it would be in the best interests of a child to live with someone else, or that the parents are generally “unfit.” Mere non-conformance with non-Indian family and child rearing stereotypes, or the existence of other behavior or conditions that are considered inappropriate, does not justify removal. (44 Fed.Reg.67582-3(D3).)
7. Foster and adoptive placement preferences must follow a specified order in the absence of good cause to the contrary. (25 U.S.C. §1915(a),(b).)

- a. Standards to be applied in placing an Indian child shall be the prevailing social and cultural standards of the Indian community where the parent or extended family member resides, or with which they maintain social and cultural contacts. (25 U.S.C. §1915(d).)
- b. In an adoptive placement, preference must be given to a placement with:
 - 1.) a member of the child's extended family;
 - 2.) other members of the child's tribe; or
 - 3.) other Indian families.
- c. In foster or pre-adoptive placement, preference must be given to a placement with:
 - 1.) a member of the child's extended family;
 - 2.) a foster home licensed or approved by the Indian child's tribe;
 - 3.) an Indian foster home licensed or approved by CWS; or
 - 4.) a children's institution approved by the tribe or operated by an Indian organization.
 - 5.) The home shall be in reasonable proximity to his or her home, and the child shall be placed in the least restrictive setting which most approximates a family.
- d. An Indian child may be placed in a non-Indian home only if the court makes a finding that a "diligent" search has failed to find an Indian home. (44 Fed.Reg. 67584(F3); Cal. Rules of Court, rule 1439(j)(3).)
- e. **The tribe may establish a different preference order**, by resolution, which **shall** be followed if it is the least restrictive setting. (25 U.S.C. §1915(c).)
- f. Counties may claim state and federal AFDC-FC 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 nonrelative located on or off the reservation which is licensed, approved or specified by the Indian child's tribe. (Cal.W&I §11401; SDSS All County Letter No. 95-07, February 9, 1995.)
- g. Where appropriate, the preference of the Indian child or parent shall be considered, including a parent's desire for anonymity. (Cal. Rules of Court, rule 1439(k)(4).)
- h. Good cause to modify the preference orders may include a diligent but unsuccessful search for appropriate homes, the requests of the parents, and extraordinary needs of the child as established by a qualified expert witness. (44 Fed.Reg. 67584(F3); *In re Baby Girl A.* (1991) 230 Cal.App.3d 1611; *But see Adoption of Lindsay C., supra.*)
- i. The Act limits an agency's discretion in selecting a permanent placement for an Indian child. Thus, the agency must search diligently for a placement that falls within the preferences of the Act and may reject a preferred placement only on a showing of good cause. Where a prospective adoptive parent has suffered a criminal conviction that brings the person within Welf. & Inst. Code §361.4, or

where the adoptive household includes such a person, good cause may exist to reject a placement preferred by the Act. However, the agency must either ask for a waiver of the disqualification or adequately support its reasons for not doing so if failure to request a waiver results in a placement that contravenes the Act's preferences. In turn, where a waiver is requested, the Director of the Department of Social Services may not unreasonably deny such exemption. Failure to follow applicable regulations could be evidence of a lack of good cause. (*In re Julian B.* (2000) 82 Cal.App.4th 1337; 99 Cal.Rptr.2d 241.)

- j. Factors flowing from a placement made in flagrant violation of the ICWA, including but not limited to bonding with a foster family and the trauma which may occur in terminating that placement, may not be considered in determining whether good cause exists to deviate from the placement preferences. (*In re Desiree F.* (2000) 83 Cal.App.4th 460; 99 Cal.Rptr.2d 688.)
- k. California's de facto parent doctrine is not preempted by the Indian Child Welfare Act. The doctrine expands the definition of extended family for placement preference purposes to include de facto parents. *In re Brandon M.* (1997) 63 Cal.Rptr.2d 671.
- l. A record of each placement of an Indian child under state law shall be maintained by the state, evidencing the efforts to comply with the preference order. The Secretary of the Interior or the child's tribe may request such records at anytime. (25 U.S.C. §1915(e); Calif-SDSS-Manual 31-520.3.)

C. Voluntary Consent Placements

- 1. A voluntary consent to foster care placement or termination of parental rights must be executed in writing and recorded in the presence of a judge of a court of competent jurisdiction. (25 U.S.C. §1913(a); Calif-SDSS-Manual 31-520.2.23.)
- 2. The presiding judge must accompany the consent with a certificate stating that the terms and consequences of the consent were fully explained.
 - a. The certificate must state that the parent or Indian custodian fully understood their consent.
 - b. The court shall also certify that the consent was fully understood in English or that it was interpreted into a language that the parent or Indian custodian understood.
- 3. Consent given prior to, or within 10 days after, birth of the Indian child shall not be valid.
- 4. Consent to foster placement under state law may be withdrawn at any time and the child shall be returned to the parent or Indian custodian. (25 U.S.C. §1913(b). [State regs. establish 3 to 7 day time frame.]
- 5. Consent to adoption may be withdrawn at any time for any reason prior to the entry of final decree of adoption and the child shall be returned to the parent. An adoption can be overturned within 2 years after entry of the decree if fraud or duress can be proven. (25 U.S.C. §1913(c),(d); *In re Pima County Juvenile Action* (Ariz. 1981) 635 P.2d 187.) A hearing may be required prior to return of custody.

6. Indian Child Welfare Act (ICWA) did not give Indian tribe automatic right to intervene in ancillary proceeding intended to assist in completing voluntary adoptive placement; however, ICWA did not preclude intervention. Indian tribe was entitled to intervene, under state law, in ancillary proceeding intended to assist in completing voluntary adoptive placement of child of tribe member. (*In re Baby Girl A.* (1991) 230 Cal.App.3d 1611, 282 Cal.Rptr.105.)
7. Failure to comply with terms of ICWA in securing parent's consent to adoption constitutes professional malpractice. (*Doe v. Hughes, Thorsness, Gantz, et al.* (Alaska 1992) 838 P.2d 804. [Malpractice found even though child ultimately determined not to be Indian at conclusion of protracted litigation.]

D. Post-Proceeding Action

1. Any Indian child, parent, Indian custodian from whose custody such child was removed, and the Indian child's tribe, may petition any court of competent jurisdiction to invalidate a foster placement or termination of parental rights upon a showing that such action violated any provisions of 25 U.S.C. §§1911, 1912, 1913. The invalidation is mandatory on a showing that rights were violated. (25 U.S.C. §1914.)
 - a. Superior court without jurisdiction to entertain petition while dependency matter is before juvenile court. (*Slone v. Inyo County Juvenile Court* (1991) 230 Cal.App.3d 263.)
 - b. Proceeding will not be invalidated on the basis of failure of notice where the Tribe makes a general appearance and actually participates in the proceeding. (*In re Krystle D.* (1994) 30 Cal.App.4th 1778.)
 - c. A parent who appears in a proceeding and has knowledge of ICWA applicability is foreclosed on appeal from raising ICWA notice issues by failure to challenge timely the juvenile court's action. (*In re Pedro N.* (1995) 35 Cal.App.4th 183; *Contra, In re Marinna J.* (2001) 90 Cal.App.4th 731.) Where the notice requirements of the Act were violated and the parents did not raise that claim in a timely fashion, the waiver doctrine cannot be invoked to bar consideration of the notice error on appeal. [Parental inaction could not excuse the failure of the juvenile court to ensure that notice was provided to the Indian tribe named in the proceeding.]
 - d. First applying the ICWA to a dependency case at the selection and implementation hearing would require the setting aside of all prior orders in the case, or all such orders to which a party petitioning for invalidation objects, and full compliance with notice, services and expert witness requirements. (*In re Derek W.* (1999) 86 Cal. Rptr.2d 742; *In re Desiree F., supra.*)
2. If a final decree of adoption is vacated or set aside, or the adoptive parents voluntarily consent to the termination of their parental rights, a biological parent or prior Indian custodian may petition for a return of custody. (25 U.S.C. §1916(a).)
 - a. The court shall grant such petition unless there is a showing that such return of custody is not in the best interests of the child.

- b. Such showing must take place in a proceeding subject to 25 U.S.C. §1912.
3. Whenever an Indian child is removed from a foster home or institution for further foster, pre-adoptive or adoptive placement, such placement shall be in accordance with the provisions of the ICWA. (25 U.S.C. §1916(b).)
 - a. If the child is removed from the home of an Indian custodian or parent, the standards of evidence must be met in the removal process.
 - b. If the Indian child is removed from a home not subject to ICWA protections, the subsequent placement must be in accordance with the preference provisions of the ICWA.
 - c. ICWA provisions need not be followed if the child is being returned to the parent or Indian custodian from whose custody the child was originally removed.
4. The ICWA does not apply to child custody proceedings initiated prior to May 7, 1979, but it does apply to “subsequent proceedings in the same matter” or subsequent proceedings affecting the custody or placement of the same child. (25 U.S.C. §1923.) [E.g., provisions authorizing access to birth information apply in petitions to open records in adoptions entered prior to 1979.]
5. Where a petitioner in an Indian child custody proceeding (e.g. guardianship) before a state court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition. (25 U.S.C. §1920.)
 - a. The court shall immediately return the child to his or her parents or Indian custodian.
 - b. If returning the child to the parent or Indian custodian would subject the child to a substantial and immediate danger or the threat of such danger the court may transfer jurisdiction to the tribe (exclusive jurisdiction), or initiate a state ICWA proceeding.

E. Miscellaneous

1. The U.S., all territories, every state and every Indian tribe shall give full faith and credit to the “public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings.” (25 U.S.C. §1911(d).)
 - a. Provision provides federal cause of action. (*See, Native Village of Venetie I.R.A Council v. State of Alaska, supra.*)
 - b. 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. A 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. (*In re Laura F.* (2000) 83 Cal.App.4th 583; 99 Cal.Rptr.2d 859.) [Tribal resolution opposing adoption was a public act or record entitled to judicial notice, but not a judgment entitled to full faith and credit.]

2. In any case where state or federal law applicable to child custody proceedings under state or federal law provides a higher standard of protection to the rights of a parent or Indian custodian than the ICWA, the state or federal court shall apply the higher state or federal standard. (25 U.S.C. §1921.)
3. The ICWA does not preempt state law unless there is an express preemption clause, implied preemption ("occupation of the field"), or a conflict between the provisions of federal and state law. *In re Brandon M.* (1997) 63 Cal.Rptr.2d 671. [ICWA does not preempt California's de facto parent doctrine.]
4. State courts entering adoption decrees shall provide the Secretary with a copy of the decree and additional information necessary to establish the child's tribal affiliation. (25 U.S.C. §1951(a); 25 C.F.R. §23.71; Fam.C. §8619.) [See SDSS All County Letter No. 89-26, Procedures for Certifying Indian Blood for children in adoption planning.] Said information may be disclosed for enrollment purposes or, where anonymity has been requested, the Secretary certifies eligibility.
5. Upon application by an Indian who has reached 18 years of age and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation of the person's biological parents and provide such other information necessary to protect any rights deriving from the person's tribal relationship. (25 U.S.C. §1917.)
6. State/tribal agreements authorized. (25 U.S.C. §1919.)
 - a. Tribes may contract with the Director of the State Department of Social Services relative to tribal operation of Indian child welfare systems. (California Welfare and Institutions Code §10553.1 [Director's delegation agreement with Indian Tribe.]; Section 11401(e) [AFDC-FC for Indian placements]; Manual of Policies and Procedures, California Department of Social Services, §45-101; §45-202, §45-203. [Implementing §11401(e)].)

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In re Alexandria Y. (1996) 45 Cal.App.4th 1483, 53 Cal.Rptr.2d 679 [p.3.]
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In re Baby Girl A. (1991) 230 Cal.App.3d 1611, 282 Cal.Rptr. 105 [p. 10, 12.]
In re Brandon M. (1997) 54 Cal.App.4th 1387, 63 Cal.Rptr.2d 671 [p. 11, 14.]
In re Bridget R. (1996) 41 Cal.App.4th 1483, 49 Cal.Rptr.2d 507 [p. 3.]
In re Charloe (Ore. 1982) 640 P.2d 608 [p. 5.]
In re Crystal K. (1990) 226 Cal.App.3d 655, 276 Cal.Rptr. 619 [p. 3, 7, 8.]
In re Crystal R. (1997) 59 Cal.App.4th 703, 69 Cal.Rptr.2d 414. [p. 3.]
In re Derek W. (1999) 73 Cal.App.4th 828, 86 Cal. Rptr.2d 742. [p. 3, 12.]
In re Desiree F. (2000) 83 Cal.App.4th 460, 99 Cal.Rptr.2d 688 [p. 2, 5, 6, 11, 12.]
In re John V. (1992) 5 Cal.App.4th 1201, 7 Cal.Rptr. 629 [p. 2.]
In re Jonathan D. (2001) 92 Cal.App.4th 105, 111 Cal.Rptr.2d 628. [p. 6, 7.]
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In re Junious M. (1983) 144 Cal.App.3d 786, 193 Cal.Rptr. 40 [p. 1, 2, 3, 5.]
In re Kahlen W. (1991) 233 Cal.App.3d 1414, 285 Cal.Rptr. 507 [p. 2, 5, 6, 7.]
In re Krystle D. (1994) 30 Cal.App.4th 1778, 37 Cal.Rptr.2d 132 [p. 6, 9, 12.]
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In re Letitia V. v. Superior Court (2000) 81 Cal.App.4th 1009, 97 Cal.Rptr.2d 303 [p. 8.]
In re Levi U. (2000) 78 Cal.App.4th 191, 92 Cal.Rptr.2d 648 [p. 6.]
In re Marinna J. (2001) 90 Cal.App.4th 731, 109 Cal.Rptr.2d 267 [p. 2, 6, 12.]
In re Matthew Z. (2000) 80 Cal.App.4th 545, 95 Cal.Rptr.2d 343 [p. 8.]
In re Michael G. (1998) 63 Cal.App.4th 700, 74 Cal.Rptr.3d 642 [p. 8.]
In re Pedro N. (1995) 35 Cal.App.4th 183, 41 Cal.Rptr.2d 507 [p. 12.]
In re Pima County Juvenile Action (Ariz. 1981) 635 P.2d 187 [p. 7, 9, 11.]
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In re Riva M. (1991) 235 Cal.App.3d 403, 286 Cal.Rptr. 592 [p. 9.]
In re Robert T. (1988) 200 Cal.App.3d 657, 246 Cal.Rptr. 168 [p. 4.]
In re Santos Y. (2001) 92 Cal.App.4th 1274, 112 Cal.Rptr.2d 692, review denied (Feb. 13, 2002) [p. 3, 4.]
In re Wanoni P. (1989) 216 Cal.App.3d 156, 264 Cal.Rptr. 623 [p. 2.]
In re William G., Jr. (2001) 89 Cal.App.4th 423, 107 Cal.Rptr.2d 436 [p. 2, 8.]
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Morton v. Mancari (1974) 417 U.S. 535 [p. 1.]
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Bureau of Indian Affairs Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed.Reg. 67584 (Nov. 26, 1979)
California Family Code
Section 7810 [Calif. declaration of policy, existing Indian family doctrine abrogated.]
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Section 305.5 [Transfer to Tribe after reassumption of exclusive jurisdiction.]
Section 360.6 [Calif. declaration of policy, existing Indian family doctrine abrogated.]
Section 11401(e) [AFDC-FC for Indian placements.]
Section 10553.1 [Director’s delegation agreement with Indian Tribe.]
Cal. Rules of Court
Rule 1410 - Persons present.
Rule 1412 (I) - Tribal representatives.
Rule 1439 - Indian Child Welfare Act.
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Manual of Policies and Procedures, California Department of Social Services, §45-101; §45-202, §45-203. [Implementing section 11401(e).]
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Appeal of William Stanek, 8 Indian L.Rep.5021 (April 1981)(decision of the Commissioner of Indian Affairs.) [p. 3.]