

## **V. Practical Solutions, Using the Act Creatively**

### **A. Accessing Additional Services**

Special services and benefits are often available to an Indian child. If the Indian status of the child is verified via tribal or Bureau of Indian Affairs documentation, some of these services may be available without tribal response. In particular, the Indian Health Services, an agency of the Department of Health and Human Service, maintains many programs throughout California that offer medical and therapeutic services. As well, many tribes operate Indian Child Welfare Programs under Title II of the ICWA. These programs may serve Indians that are not members of the tribe that operates the program. The Area Office of the Bureau of Indian Affairs and the Area Office of the Indian Health Service are both located in Sacramento, California and may be contacted for a list of programs. See Bench guide §VI, Resource Directory.

Indian tribes often operate an array of programs available to children who are enrolled in the tribe. The child's tribe should be contacted to identify any relevant tribal programs that may serve the child or family involved in a child custody proceeding.

### **B. Expanded Placement Options**

The court has an obligation to secure the safety and welfare of children in its care. As such, children 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 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." If the court confirms tribal approval of a home or institution, the Act requires that the placement receive preference in placement "absence good cause to the contrary." Tribes can, via tribal resolution, qualify a home for placement that would not otherwise be available to receive placement. Courts can greatly expand placement options for Indian children by working with the child's tribe. See Benchguide § IV.G.

### **C. Working with Tribes to Secure Placement Funding**

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. 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 available to receive placement. Courts can greatly expand placement options for Indian children by working with the child's tribe. See Benchguide section IV.G; section VIII. H, Sample Tribal Resolution Designating Placement Preference.

### **D. Concurrent Jurisdiction and creative approaches to achieving solutions**

Where tribal jurisdiction over Indian child custody cases is not exclusive, the state and tribe possess concurrent jurisdiction. This allows either or, as appropriate, both systems to exercise jurisdiction over a

child custody case. See Benchguide section IV. D. This jurisdictional arrangement may be relied upon to facilitate a desired resolution of a case. An example includes a situation where a tribe seeks transfer of a case, but the child may not be fit to travel for a limited but unspecified period. Where the state and tribe agree the case will transfer but wish to delay moving the child, the case could be transferred and the child remain in the existing placement under a tribal court order. However, this arrangement creates problems for the placements eligibility to continue to receive foster care payments from the state. As an alternative, a concurrent jurisdiction arrangement may be utilized. In this situation, the placement would continue under both a state and tribal court order. Because the placement continues to be pursuant to a state court order, the placement would remain eligible for foster care payments from the state. When the child is ready to travel, the state case may be dismissed.

### **E. Using Indian Custodians to Address a Child's Needs**

An Indian custodian is defined by the Act as any Indian person who has legal custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody and control has been transferred by the parent of such child. 25 U.S.C. §1903(6). Indian custodians are entitled to all the protections afforded by the Act to parents. When a dependency is initiated, the court must determine if the case involves an Indian custodian. If so, the Indian custodian is entitled to continued custody and to all of the protections of the Act. If the Indian custodian can adequately provide for the needs of the child, a dependency is unnecessary, regardless of the circumstances of the parent.

Tribes may act to define Indian custodian in a manner that facilitates resolution of a case. For example, an action was initiated on Indian children in Florida. The authorities in Florida, the tribe and the mother all agreed the family would be best served by a return to the reservation in California, where the tribe could provide services to the family. However, the tribe did not operate a court system and was not in a position to accept transfer of the case. To accomplish the desired outcome, the tribe provided the court with a resolution specifying that, as a matter of tribal law, a designated tribal representative qualified as the Indian custodian of the children and had the right to custody of the children under ICWA. The representative traveled to Florida and delivered the resolution to the court, which then released the children to their Indian custodian and dismissed the case. The representative then returned to California with the Indian mother and children.

### **F. Addressing Paternity issues**

Tribal determinations as to membership are conclusive. Additionally, tribes have jurisdiction over areas of traditional tribal control, such as determinations of paternity when tribal members are involved. Such determinations are entitled to full faith and credit. A problem often arises when a tribe has not asserted jurisdiction over an issue and does not respond to inquiries regarding membership. While tribal determinations, and in the absence thereof BIA determinations, are conclusive for state court purposes, if an answer is not forthcoming from the tribe or BIA, may the state court entertain issues as necessary to determine if a child is an Indian for purposes of the ICWA? First, it is not necessary to “determine” paternity in order to determine if the Act applies. An Indian father need only *acknowledge* a child in order to meet the definition of parent under the Act. California Rules of Court, rule 1439(e) requires the court to proceed with the dependency, applying the requirements of the Act as if the child is an Indian child, whenever the court has reason to believe the child may be an Indian child. The ICWA defines “parent” to include unwed fathers where paternity has been acknowledged or established. Hence, acknowledgment would be sufficient to render an Indian father a parent for ICWA purposes.

Where a tribe does not exercise its jurisdiction over domestic relations, the state court, under Public Law 280, does have concurrent jurisdiction over civil causes of actions and may hear and decide paternity cases involving Indians in California.

### **G. Indian Status Determinations - Reason to Know Versus Reason to Suspect.**

Courts often struggle with Indian status determinations. As discussed in Bench guide §IV.C., these determinations can be complex. The Act requires compliance with ICWA notice requirements whenever the court has reason to know the child is an Indian. In dependency cases, the California Rules of Court, rule 1439, require that the Act be fully applied to a dependency proceeding when the court has reason to believe the child may be Indian. When this standard is met, the Act must be followed unless and until the Bureau of Indian Affairs and each tribe the child may be affiliated with has confirmed the child is not Indian. This allows the court to proceed with the case in the event no answer, or a delayed answer, is received from the BIA and tribe(s). This approach eliminates the likelihood that a case subject to the Act may be invalidated because the Act was not applied. However, this approach does *not* require that every child be treated as an Indian simply because there is an allegation that the child may have Indian ancestry. Indian child as defined in the Act requires membership or eligibility for membership in an Indian tribe. The fact a child may have a distant Indian ancestor, in and of itself, is not sufficient to meet this standard or give the court reason to know the child is Indian.