

III. Procedure

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III. Procedure

A. Checklist: Determination of Indian Status and Child's Tribe.

L JUDICIAL TIP: *Indian status determination can be one of the most complex issues in an ICWA case. This is because there are many different definitions of "Indian" that apply in varying circumstances. IT IS IMPORTANT TO BE AWARE THAT DIFFERENT DEFINITIONS MAY APPLY IN DIFFERENT CIRCUMSTANCES. For example, §§1903(3) & (4) of the ICWA define the terms "Indian" and "Indian child", respectively. These are the definitions reflected in this checklist. However, it should be noted that §1934 contains a second and broader definition of Indian which is applicable to §§1932 & 1933 (involving Indian Child and Family Programs) of the ICWA. Finally, §1912(a) (involving minimum standards for state proceedings) 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) of the Act.*

- (1) " The child is unmarried and under 18.
 - (2) The court knows or has reason to know the child is
 - (a) " a member or eligible for membership in an Indian tribe.
- or -
- (b) " eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe.
 - " the parents are unmarried but the paternity of the Indian father has been
" established or " acknowledged. 25 U.S.C. §1903(9).

L JUDICIAL TIP: *The tribe must be a federally recognized Indian tribe, group or community. [Eligible for federal services provided to Indians by the Secretary of the Interior. 25 U.S.C. §1903(8). See 65 Fed. Reg. 13298 (March 13, 2000) [a periodic publication of the list of "recognized tribes."]]*

L JUDICIAL TIP: *The ICWA refers to "membership" in a tribe. 25 U.S.C. §§1903(3), (4), & (5). "Enrollment" is a common means of establishing membership in a tribe, but it is not the only means. A person may be a member of a tribe without being enrolled. In re Junious M. (1983) 144 CA3d 786,796. Membership criteria may be established by tribal constitutions and elaborated upon in tribal ordinances and may be unique to that tribe. The BIA may be able to establish whether a person is enrolled, but may not otherwise be able to establish a person's membership in a tribe.*

- (c) " Both parents, the child, and any agency representative have been asked if the child is American Indian or has American Indian ancestors. Cal. Rules of Court, rule 1439(d).
- (d) " Available information has been reviewed for any indication of Indian heritage. Indicators include, but not limited to self-identification by the child or parent(s); information provided by any party or Indian or public or private agency; and, the residence or domicile of the child or his parents in an area know to be a predominately Indian community. *Guidelines for State Courts: Indian Child Custody*

(3) Indian status determination. (Apply the ICWA if any box is checked.)

" Confirmed by child's tribe(s): _____
_____.

" Confirmed by Bureau of Indian Affairs. (Identity or location of tribe unknown.)

" No confirmation but facts sufficient to provide the court "reason to know that an Indian child is involved. 25 U.S.C.§1912; Cal. Rules of Court, rule 1439(e).

" No confirmation, possible Indian heritage only, and no facts sufficient to provide the court reason to know the child is a member or eligible for membership in an Indian tribe. (Cal. Rules of Court, rule 1439(e).

(4) Determination of child's tribe.

" The following Indian Tribe(s) has/have confirmed the child is a member or eligible for membership (**Each of these tribes must DIRECTLY receive notice of this Indian child custody proceeding**): _____

" While confirmation has not been obtained, there is reason to believe the child may be a member or eligible for membership in the following tribe(s). (**Each of these tribes must DIRECTLY receive notice of this Indian child custody proceeding**):

" Inquiry has been made regarding all of the facts set forth below. Checked marks indicate affirmative responses recorded as to the above listed tribes:

" (Optional) Whether the parent, Indian custodian or other interested party has reviewed the federal register listing of recognized tribes to assist in identifying the child's tribe.

" Whether the parent, Indian custodian or other interested party has indicated that the child is a member of or eligible for membership in an Indian tribe that is listed on the federal register listing of recognized tribes.

Name of tribe(s): _____

" Whether there is any documentary or other basis indicating that the child is a member of or eligible for membership in an Indian tribe that is listed on the federal register listing of recognized tribes. Name of tribe(s):

“ Whether the child is identified as descended from an historical tribe that corresponds to the name or a portion of the name of a federally recognized tribe, as listed in the Federal Register list of recognized tribes. Name of tribe(s):

L JUDICIAL TIP: *Because a child may be a member or eligible for membership in more than one tribe and each such tribe is entitled to direct notice if their identity and location is known, the recommended practice is to create a record to support decisions on what, if any, tribe(s) receive notice. The above inquiries are suggestions to use in eliciting a factual record.*

“ (Optional) Circumstances require a determination of one tribe as the “Indian child’s tribe” as defined by the ICWA. The Tribe with the most significant contacts is:_____

L JUDICIAL TIP: *A child may be a member of more than one tribe. Even if a child is not enrolled, it is not uncommon for a child to be eligible for membership in more than one tribe. Nothing prevents more than one tribe from participating as a party to a proceeding. Participation of multiple tribes may provide increased service resources for the child. However, if a tribe seeks transfer of the case to its tribal court or if a tribe seeks to assert rights to alter standards established by the Act, as authorized by the Act, then it may be necessary to determine which tribe meets the definition set forth in the Act, i.e., the tribe with the most significant contacts. 25 U.S.C. §1903(5).*

B. Checklist: State or Tribal Jurisdiction.

L JUDICIAL TIP: *Tribes function as governments whose powers are shaped by a unique relationship to the federal government. To a significant extent, general jurisdictional principles applicable to interactions between governments apply to interactions with tribal governments. However, these principles are impacted by special federal laws relating to Indians and tribes. The ICWA establishes jurisdictional requirements that provide for exclusive, concurrent or referral tribal jurisdiction in varying circumstances. If an Indian child resides or is domiciled on a reservation with exclusive jurisdiction over child custody matters, or if the child is already a ward of a tribal court, state courts lack jurisdiction and the case must be dismissed. 25 U.S.C. §1911(a). When the child has been taken into custody in an emergency, the case may be transferred to tribal court in lieu of dismissal. 25 U.S.C. §1922. 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. Absent good cause to the contrary, transfer to tribal court shall occur, subject to veto by the parents or decline of the transfer by the tribal court. 25 U.S.C. §1911(b).*

L JUDICIAL TIP: *Public Law 280 (P.L. 280), codified at 18 U.S.C. §1162 and 28 U.S.C. §1316, conferred criminal and some civil jurisdiction over reservation Indians to designated states, including California. The civil section of P.L. 280 made state laws of general application applicable to reservation Indians. The U.S. Supreme Court has ruled that the statute did nothing more than authorize reservation Indians to resolve their disputes in state courts should they choose to. Bryan v. Itasca County (1976) 426 U.S. 373. Under P.L. 280, tribes retain concurrent jurisdiction. Native Village of Venetie IRA Council v. Alaska (9th Cir. 1990) 918 F.2d 797. While tribes in California have legal authority to exercise jurisdiction over child custody cases, as a result of P.L. 280 and the accompanying absence of financial resources, most tribes in California have not maintained tribal court systems and do not opt to exercise concurrent jurisdiction. Only a few California tribes have formal court systems. Presently, most transfer proceedings involve tribes from other states. However, increasing numbers of tribes in California are actively working on tribal court development. Since nothing requires a formal court system to support an assertion of tribal jurisdiction, tribes will occasionally seek transfer based on judicial acts of the tribal governing body.*

(1) “ State jurisdiction declined. The petitioner 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. Pursuant to ICWA, the court must decline jurisdiction over such petition. 25 U.S.C. §1920.

“ The court shall immediately return the child to his or her parents or Indian custodian.

- or -

“ Returning the child to the parent or Indian custodian would subject the child to substantial and immediate danger or the threat of such danger such that the court should “ transfer jurisdiction to the tribe (exclusive jurisdiction), or “ initiate a state ICWA proceeding.

(2) “ Transfer of Jurisdiction.

“ The child must be transferred to the jurisdiction of the tribal court because the Indian child is:

“ a ward of a tribal court, or

“ resides or is domiciled on a reservation where the tribe exercises exclusive Indian child custody jurisdiction.

“ The parent, Indian custodian or Indian child’s tribe has petitioned for transfer of the proceeding to the jurisdiction of the tribe.

“ The petition should be granted, subject to the tribe’s right to decline the transfer.

- or-

“ The petition should be denied because:

“ a parent objects to the transfer, or

“ the court finds good cause to deny the petition.

L JUDICIAL TIP: *Factors in determining good cause to deny a transfer petition are set out in the Guidelines for State Courts. 44 Fed. Reg. 67590-91; See also, Benchguide §IV D.*

L JUDICIAL TIP: *There is no one or standard procedure for transfer of a case to a tribal court. Indian tribes are not parties to the Interstate Compact for the Placement of Children. Tribes vary widely in their practices and resources. The tribe involved must be contacted to determine that tribe’s procedure and to coordinate how costs involved in the transfer will be apportioned. A sample transfer order is included in section VIII.*

(3) “ State court jurisdiction is proper in this case.

(4) “ Tribal Participation in state proceeding.

Tribes exercises its option of participating in State court proceeding as:

“ Intervening party to case. 25 U.S.C. §1911(c).; or

“ Permissive participation by tribal representative pursuant to leave of court.Cal. Rules of Court, rule 1412(i).

(5) “ Full faith and credit given to the public acts, records, and judicial proceedings of Indian tribes applicable to Indian child custody proceedings. 25 U.S.C. §1911(d).

C. Checklist: Child Custody Proceedings Subject to the ICWA

L JUDICIAL TIP: *The ICWA does not contain a definition of “custody” per se. However, by its terms, it does NOT apply to all cases involving custody. Significantly, the Act does not apply to custody disputes between parents in divorce (dissolution) proceedings, nor to placements based on criminal acts. Through its definition of “child custody proceeding”, the Act specifies to which types of custody cases it applies and to which types of custody cases it does not apply. The focus is on whether the proceeding meets a definition set forth in the Act, and not upon what the proceeding is called. 25 U.S.C. §1903(1). It is unsettled whether the ICWA applies to family law custody disputes between parents who were never married. To the extent such proceedings are like divorce cases, the Act probably does not apply. However, it has been held to apply to other types of proceedings, such as termination of parental rights, even when the action is between parents.*

(1) Child Custody Proceedings covered by the Act:

- “ **Foster care placements**, defined in the ICWA to mean *any* action removing an Indian child from a parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator to which the child need not be returned upon demand, but where parental rights have not been terminated. [E.g., Welf. & Inst. §300 (dependency); Welf. & Inst. §601 (truants and status offenders); Prob. §1500 et. seq. (probate guardianships); some Welf & Inst. §602 cases (delinquency placements funded by federal foster care monies; Welf & Inst. §§636, 727(a), 727.31, 728.)]
- “ **Termination of parental rights**, defined in the ICWA to mean *any* action resulting in the termination of the parent-child relationship. E.g., Fam.C. §7802 et. seq.; Fam.C §§7660-7664, §8605; Welf. & Inst. §366.26, 727.31.
- “ **Pre-adoptive placement**, defined in the ICWA to mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement.
- “ **Adoptive placement**, defined in the ICWA to mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption. E.g., Fam. C. §8500 et. seq; Welf. & Inst. §366.26, 727.31.

(2) ICWA coverage exceptions:

- “ An award of custody to one parent as part of a divorce proceeding. 25 U.S.C. §1903(1).

L JUDICIAL TIP: *The Act clearly does NOT apply to a dissolution proceeding where two parents vie for custody. The Act expressly excludes a case where the following two elements are present: (1) two parents, and (2) divorce (dissolution) action. However, attention must be paid to what is occurring in a proceeding. The fact two parents are involved or (as opposed to “and”) that the matter is a family law action, does not necessarily eliminate the proceeding from the Act’s coverage. For example, an action by one parent to terminate parental rights of other parent is covered by the Act. In Re Crystal K. (1990) 226 CA3d 655 (review denied Mar. 14, 1991); In re Adoption of Lindsay C. (1991) 229 CA3d 404.*

“ A placement based on an act by a child which would be a crime if committed by an adult. E.g., Welf. & Inst. §602 *et. seq.* (Delinquency).

L JUDICIAL TIP: The Act clearly does NOT apply to a placement based on an a criminal act. However, not all California delinquency cases involve removals based on criminal acts. 1999 changes to California law make it clear that some removals are “placements” which meet the requirements for federal foster care funding, in that they are 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. (See, e.g., Welf. & Inst §636.) In effect, the findings required to qualify the placement for federal foster care funding, also bring the proceeding within the federal definition of child custody proceeding covered by the Indian Child Welfare Act. As well, California law now allows guardianships and termination of parental rights in delinquency proceedings. Guardianship and termination of parental rights are proceedings covered by the act. Given the Act’s express exclusion of placements based on crimes, it is unlikely that all delinquency proceedings are brought within the Act’s scope simply because any such proceeding could, for example, lead to guardianship. However, at such time as any delinquency case moves to guardianship, it would at that point be subject to the Act.

D. Checklist: Minimum Federal Standards for Involuntary Proceedings.

L JUDICIAL TIP: *The ICWA applies to both involuntary and voluntary “child custody proceedings,” as that term is defined in the Act. (Remember, by its terms, the Act exempts from its coverage custody disputes between parents in divorce proceedings. See Checklist C.) Some of the provisions of the Act apply to both types of child custody proceedings (e.g., the placement preference requirements of 25 U.S.C. §1915.) Some provisions, by their terms, apply only to involuntary proceedings, and others to only voluntary proceedings. This checklist discusses standards applicable to involuntary proceedings.*

(1) Notice 25 U.S.C. §1912(a).

“ Notice of the *proceeding* **and** of the *right to intervene* has been provided directly to the “ parent “ child’s tribe(s) “ Indian custodian “ Bureau of Indian Affairs by **registered/certified mail, return receipt requested.**

“ The identity or location of the “ parent “ child’s tribe(s) “ Indian custodian is unknown. Substitute notice was served by registered/certified mail, return receipt requested, on the Bureau of Indian Affairs with notice that pursuant to the Act, the Bureau has 15 days to locate the party on whose behalf they were served.

L JUDICIAL TIP: *Federal Regulations specify extensive and specific information to be included in notices, if available. Consult 25 C.F.R. §23.11(d). The Bureau of Indian Affairs periodically publishes a list of designated agents for service of process in the Federal Register. (The latest listing is at 64 Fed Reg 11490 (March 9, 1999).)*

“ Tribal notice directed to “ tribal Chairman -OR- “ agent for service of process designated “ in the Federal Register “ by resolution or official communication from an authorized tribal official.

“ Registered/certified mail receipts have been filed with the court confirming receipt of notice by the “ parent “ child’s tribe “ Indian custodian “ Bureau of Indian Affairs **at least ten days prior to the hearing date** for which notice was provided.

“ The “ parent, “ Indian custodian or “ child’s tribe has requested a continuance to allow preparation for this proceeding. Hearing in this matter is continued to_____. (Date must allow at least an additional 20 days.)

(2) Information Access 25 U.S.C. §1912(c).

Full access to all reports or other documents filed with the court upon which any decision with respect to such action may be based has been given to:

“ Tribe(s)

“ Parent(s)

“ Indian custodian

L JUDICIAL TIP: *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). As well, 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(1)(2).*

(3) Appointed Counsel 25 U.S.C. §1912(b).

" The " Parent(s) " Indian custodian have been advised of their right to appointed counsel, if they are indigent.

" Good cause exists for discretionary appointment of counsel for the minor(s).

" Counsel appearances noted as follows:

" Child(ren): _____

' Counsel _____ " Apptd. " Retained

' Parent(s): _____

' Counsel _____ " Apptd. " Retained

" Indian Custodian(s): _____

" Counsel _____ " Apptd. " Retained

L JUDICIAL TIP: *An "Indian custodian" means any Indian person who has legal custody 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. Like parents, Indian custodians are entitled to the protections established by the Act. As well, an Indian person who has adopted an Indian child under state law, or tribal law or custom is considered a parent for purposes of the ICWA. 25 U.S.C. §§1903(6) & (9). Various provisions of the Act require accommodation of tribal action and, hence, tribal action may impact a state proceeding, whether or not a tribe has intervened as a party.*

L JUDICIAL TIP: *The child's tribe(s) may intervene as a party and may be represented by counsel. The Act does not provide for appointed counsel for indigent tribes. Cal. Rules of Court, rule 1410 and 1412 authorize a tribal representative to be present at juvenile hearings and, in cases subject to the Act, to participate either as a party or in other capacities, with counsel or via non-attorney representatives.*

" The parent(s) or Indian custodian is entitled to appointed counsel under ICWA but state law does not authorize appointment of counsel in this type of proceeding. (E.g. probate guardianship.)

" Indian party entitled to appointed counsel: _____

' Counsel appointed and Court certification provided that the Indian client is indigent and that state law makes no provision for appointment of counsel in the proceeding.

L JUDICIAL TIP: *In involuntary cases where state law does not provide for appointment of counsel as required by the ICWA, such as private guardianship actions, the ICWA authorizes the Bureau of Indian Affairs to compensate counsel. A process is set forth in 25 C.F.R. §23.13. It should be noted that a basis for denying a compensation claim is unavailability of funds and the Bureau may not adequately budget to make these payments*

" Child's Tribe

" Intervened as party

" Tribal Official/Representative _____

" Counsel _____

" No formal intervention (California Rules of Court, rule 1412.)

" Tribal Official/Contact _____

" Indian program representative _____

" Authorizing resolution or letter from child's tribe designating official capacity of any tribal representative(s) attached.

L JUDICIAL TIP: *Tribal representatives or individual Indians may be present in various and/or multiple capacities. They may or may not be familiar with state law and legal principles, such as legal capacity and standing. An Indian person in the court room may be present in any of a number of different capacities, such as a family member, a witness, the duly authorized representative of an intervening tribe, or as a tribal social service provider. Clarifying the role and capacity of Indian people present in the court room is encouraged. To assist with this function, a questionnaire is included in §VIII.*

(4) Active Efforts 25 U.S.C. §1912(d).

" Timely remedial services and rehabilitative programs designed to prevent breakup of the Indian family — including resources of the extended family, the tribe, Indian social service agencies, and individual Indian care givers — have been provided to parents, Indian custodian and child. 44 Fed. Reg. 67592; Cal. Rules of Court, rule 1439(l).

" The services and programs have proved unsuccessful. (The efforts must have proved unsuccessful before removal can be ordered.)

" The court considered the prevailing social and cultural conditions of the Indian child's tribe or community. That tribe or community is the _____.

L JUDICIAL TIP: *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). 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). These requirements are meant to assure that both evaluation of a problem and development of treatment plan are culturally appropriate and not tainted by cultural bias.*

" The parties stipulate to waive services requirements and 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)(4).

L JUDICIAL TIP: *At least one California case has held that a parent may waive the ICWA right to receive services. The ICWA Rule of Court allows a knowing and intelligent waiver. As well, Welf.&Inst. Code §361.5(13) now requires that, as a matter of state law, “[t]he court shall not accept the waiver of services unless it states on the record its finding that the parent or guardian has knowingly and intelligently waived the right to services.” Section 1921 of the ICWA requires that the parent or Indian custodian be afforded the highest level of protection provided by either the Act or state law. The court should exercise caution with waivers. If a tribe has not received proper notice or intervened as a party, the tribe cannot join in a waiver. Since the tribe has an independent interest in securing compliance with the requirements of the ICWA and may intervene at any point in a proceeding, a Tribe may intervene late in a proceeding and petition to invalidate when the Act has not been fully complied with. See, *In re Desiree F.* (2000) 83 CA4th 460, 471. [“There is nothing in either the ICWA or the case law interpreting it which enables anyone to waive the tribe’s right to notice and right to intervene in child custody matters.”]*

(5) Evidentiary Requirements 25 U.S.C. §§1912(e) & (f).

L JUDICIAL TIP: *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). No termination of parental rights may be ordered in the absence of “evidence beyond a reasonable doubt, including expert testimony that continued custody is likely to result in serious emotional or physical damage to the child.” 25 U.S.C. §1912(f).*

“ **Foster Care, including Guardianship.** The court finds by clear and convincing evidence that continued custody of the child by the parent or Indian custodian is likely to cause the Indian child serious emotional or physical damage.

“ **Termination of Parent Rights.** The court finds by proof beyond a reasonable doubt that continued custody of the child by the parent or Indian custodian is likely to cause the Indian child serious emotional or physical damage.

L JUDICIAL TIP: *The Act does not define the term custody per se. However, it is clear that the term involves more than physical custody. At least one California appellate court and the Cal. Rules of Court, rule 1439(a)(5) define “custody” to mean legal or physical custody or both as provided by state law or tribal law or custom.*

“ The expert is qualified under the Act as follows:

“ a member of a tribe with knowledge of Indian family organization and Indian child rearing practices.

“ a lay expert with substantial experience in Indian child and family services and extensive knowledge of the social and cultural standards and child-rearing practices of Indian tribes.

“ a professional person with substantial education and experience in Indian child and family services and in the social and cultural standards of Indian tribes. Cal. Rules of Court, rule 1439(a)(10)(C).

“ a professional person having substantial education and experience in the area of his or her specialty.

L JUDICIAL TIP: A “qualified expert” is meant to apply to expertise beyond the normal social worker qualifications and should not be the referring social worker. *H.R. Rep. No. 1386 at 22; Manual of Policies and Procedures, California Department of Social Services §31-515.14.141.*

L JUDICIAL TIP: “By imposing these standards, Congress has changed the rules of law of many states with respect to the placement of Indian children. A child may not be removed simply because there is someone else willing to raise the child who is likely to do a better job or that it would be “in the best interests of the child” for him or her to live with someone else. Neither can a placement or termination of parental rights be ordered simply based on a determination that the parents or custodians are “unfit parents.” . . . “[M]ere 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. See, *Guidelines for State Courts*, 44 Fed. Reg. 67582-3 (D3).

“ The parties stipulate to waive service requirements and the court finds that the party entering the waiver 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) & (m)(2); Calif. Welf. & Inst Code §361.5(13).

L JUDICIAL TIP: *At least one California case has found that a parent may waive the ICWA right to receive services. The ICWA Rule of Court allows a knowing and intelligent waiver. As well, Welf. & Inst. Code §361.5(13) now requires that, as a matter of state law, “[t]he court shall not accept the waiver of services unless it states on the record its finding that the parent or guardian has knowingly and intelligently waived the right to services.” Section 1921 of the ICWA requires that the parent or Indian custodian be afforded the highest level of protection provided by either the Act or state law. The court should exercise caution with waivers. If a tribe has not received proper notice or intervened as a party, the tribe cannot join in a waiver. Since the tribe has an independent interest in securing compliance with the requirements of the ICWA and may intervene at any point in a proceeding, a Tribe may intervene late in a proceeding and petition to invalidate when the Act has not been fully complied with. See, *In re Desiree F.* (2000) 83 CA4th 460, 471. [“There is nothing in either the ICWA or the case law interpreting it which enables anyone to waive the tribe’s right to notice and right to intervene in child custody matters.”]*

E. Checklist: Voluntary Proceedings

L JUDICIAL TIP: *Bureau of Indian Affairs Guidelines for State Courts specify extensive and specific information to be included in a consent. Consult 44 Fed. Reg. 67593; See Benchguide §VIII.D., form - Consent to Placement.) The criteria below reflect the requirements expressly mandated by the 25 U.S.C. §1913.*

Voluntary Consent Placements

- " A voluntary consent to " foster care placement or " termination of parental rights has been executed in writing and recorded in the presence of a judge of a court of competent jurisdiction. 25 U.S.C. §1913.
- " The consent is accompanied by the judge's certificate stating that the terms and consequences of the consent were:
 - " fully explained to the parent or Indian custodian.
 - " that the parent or Indian custodian fully understood the consent.
 - " that the consent was fully understood in English or that it was interpreted into a language that the parent or Indian custodian understood.
- " The consent was not given prior to, or within 10 days after, birth of the Indian child. (Any consent given within this period is invalid.)
- " The consent and the judge's certificate have been filed with the court.
- " Withdrawal of Consent has been submitted.
 - " The child shall be returned to the parent or Indian custodian.
 - " The court is without further jurisdiction in this matter and the case is dismissed.
 - " Returning the child to his parent or custodian would subject the child to substantial and immediate danger or threat of such danger
 - " The child shall remain placed in the current placement pending a proceeding conducted in accordance with the provisions of the ICWA governing involuntary proceedings.

L JUDICIAL TIP: *The Guidelines for State Courts indicate a notarized statement of intent to withdraw consent should be filed with the court; the clerk of the court should notify the party through whom placement was arranged; and that party shall arrange return of the child. 44 Fed. Reg. 67594. In California, it may be appropriate to set a hearing to enter withdrawal of consent, obtain an order for return of the child and to dismiss the action. 25 U.S.C. §1920 provides that the court shall decline jurisdiction and order return of the child whenever a child has been improperly removed or improperly retained after a*

temporary relinquishment of custody, “unless returning the child to his parent or custodian would subject the child to substantial and immediate danger or threat of such danger.” Hence, to maintain custody when consent has been withdrawn, the petitioner must first meet the substantial and immediate danger or threat of danger test. Thereafter, following the emergency provisions of §1922 of the Act, the petitioner must proceed with an involuntary action in accordance with the requirements of the ICWA.

F. Checklist: Placement Preferences

L JUDICIAL TIP: *Every time an Indian child is removed from a parent or Indian custodian, and every time a child is moved from one placement to another, the relevant provisions of the ICWA must be followed. 25 U.S.C. §1915(b). In every placement, diligent efforts must be made to place the child in a first preference home. Only if that is not possible can a child be placed in a home in the next preference category. Standards of the American Indian community are to be applied in accepting or rejecting a particular placement. 25 U.S.C. §1915(d).*

Placement Preference 25 U.S.C. §1916.

- " The Tribe has been contacted to determine if it has established an order of preference by resolution. The Tribe " has " has not established its own placement preferences.

- " The Tribe has been sent written notice prior to initial placement and prior to any change in placement. 25 U.S.C. §§1912 & 1916(b).

- " The placement meets the placement preference requirements of the Indian Child Welfare Act.
 - " As specified by the child's Tribe.
- or-**
- " Foster or Preadoptive Placement Preferences (The placement must be in reasonable proximity to the child's home, and the least restrictive setting which most approximates a family.)
 - " A member of the child's extended family (includes both Indian and non-Indian extended family, unless specified otherwise by the child's tribe.)
 - " A foster home licensed or approved by the Indian child's tribe
 - " An Indian foster home licensed or approved by non-Indian licensing authority
 - " A children's institution approved by the tribe or operated by an Indian organization which has a program suitable to meet the child's needs

- " Adoptive Placement
 - " A member of the child's extended family
 - " Other members of the child's tribe
 - " Other Indian families.

- " The placement does not meet the placement preference requirements of the Act and good cause exists for modifying the preference order.
 - " A diligent search, including inquiry to tribe, extended family, and Indian service agencies, has failed to locate a suitable Indian home. [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).]

- " As appropriate, the request of a biological parent or the child (if sufficient age), has been considered, including the request of a parent for anonymity.
- " Extraordinary physical or emotional needs of the child, as established by qualified experts.
- " If the tribe has designated a placement preference by resolution, the placement is not the least restrictive setting which most approximates a family and in which the child's special needs, if any, are met. 25 U.S.C. §1915(c).
- " If the child is not yet in an Indian home, a diligent search for an Indian home is on-going. 44 Fed. Reg. 67595.
- " The prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties were used to evaluate placements. 25 U.S.C. §1915(d).
- " A record of efforts to comply with placement preferences has been filed with the court and shall be made available to the child's tribe of the Secretary of Interior upon request. 25 U.S.C. §1915(e).
- " Placement qualifies for state and federal AFDC-FC payments for the eligible Indian child.

L JUDICIAL TIP: *Placement options are broader for Indian children. Because the Act mandates placements that might not otherwise be authorized by state law or be eligible to receive foster care payments, tribes (whether or not they intervene as parties) can act to qualify a home for both placement and payment. Under state law, placements made "pursuant to the Act" are eligible to receive placement and payment. 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. Welf. &Inst. §11401; SDSS All County Letter No. 95-07, February 9, 1995. **The court may want to request a Tribal Council resolution approving or specifying a placement as a means to verify the necessary official tribal action.***

G. Checklist: ICWA Issues at Juvenile Dependency Hearings

The juvenile dependency system in California is set forth in a comprehensive statutory scheme designed around definite hearing phases. Each phase is required by statute to address specified issues and requirements. Various ICWA issues are relevant at the different hearings. This checklist identifies ICWA issues that commonly arise at the various hearings.

(1) Initial Appearance of Tribal Representative. A Tribe may intervene *at any point* in the proceeding. When a tribal representative first appears, regardless of whether it is a detention hearing or a selection and implementation hearing, the issues listed below should be considered and clarified.

- " Child's Indian Status. See Checklist A.
- " Identification of Child's Tribe(s). See Checklist A.
- " Tribal Jurisdiction. See Checklist B.
- " Capacity of Tribal Representative. Cal. Rules of Court, rule 1412(i).
" Tribal Intervention " Permissive Participation
- " Continuance. 25 U.S.C. §1912(a).
- " Information Access. 25 U.S.C. §1912(c).
- " Invalidation Motion or Petition. 25 U.S.C. §1914.

(2) Detention/Initial Appearance. If a child is detained pending court proceedings, an initial "detention hearing" is held to consider whether the child must continue to be detained out of the home pending further court proceedings. The court is required to order the release of the child from custody unless it makes one of the specific findings set forth in applicable provisions of the Welfare and Institutions Code.

- " Issues to be determined at the first hearing held in the case (these issues may arise whether or not the child's tribe appears):
 - " Child's Indian Status. See Checklist A.
 - " Identification of Child's Tribe(s). See Checklist A.
 - " Tribal Jurisdiction. See Checklist B.
 - " Capacity of any Tribal Representative. Cal. Rules of Court, rule 1412(i).
" Tribal Intervention " Permissive Participation
 - " Indian Custodian. 25 U.S.C. §1903(6).
- " Notice. 25 U.S.C. §1912(a); Cal. Rules of Court, rule 1439(f)(5).
- " Appointment of Counsel. 25 U.S.C. §1912(b).
- " Information Access. 25 U.S.C. §1912(c).
- " Placement. 25 U.S.C. §1915.

L JUDICIAL TIP: *The ICWA applies in a dependency action involving an Indian child. The child's Indian status triggers the Act, whether or not a child's tribe responds to notice or otherwise opts to become involved in the proceeding. Hence, it is important to identify Indian children at the earliest opportunity. This may be at the detention hearing or at the jurisdiction hearing where a child has not been detained. As well, it is important to identify the child's tribe as early as possible to minimize possible violation of the Act. The tribe has rights independent of other parties, has standing to intervene at any point in the proceeding, and may petition to invalidate the proceeding for certain violations of the Act.*

L JUDICIAL TIP: *Section 1922 of the Act authorizes emergency removal of an "Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation." While this could perhaps be read as a limitation on the exercise of emergency removal authority, the better view is to read it as a grant of limited jurisdiction to state courts in situations where a tribe might otherwise possess exclusive jurisdiction. Nothing in the Act impairs a state's reliance on inherent judicial authority to act in an emergency situation to detain a child as necessary to prevent imminent physical damage or harm to the child. Consistent with this approach, a recent appellate court decision directs application of section 1922 to emergency removal of Indian children not residing or domiciled on a reservation. (Desiree F. (2000) 83 CA4th 460.)*

(3) Jurisdiction. The purpose of the jurisdictional hearing is to determine whether or not sufficient grounds exist for the court to declare the child a dependent of the court.

" Issues to be determined at the first hearing (if not previously addressed at a detention hearing):

" Child's Indian Status. See Checklist A.

" Identification of Child's Tribe(s). See Checklist A.

" Tribal Jurisdiction. See Checklist B.

" Capacity of Tribal Representative. Cal. Rules of Court, rule 1412(i).

" Tribal Intervention " Permissive Participation

" Indian Custodian. 25 U.S.C. §1903(6).

" Notice. 25 U.S.C. §1912(a); Calif. Rules of Court, rule 1439(f)(5).

" Appointment of Counsel. 25 U.S.C. §1912(b).

" Information Access. 25 U.S.C. §1912(c).

" Knowing and Intelligent Waiver. Calif. Rules of Court, rule 1439(i)(2) & (j)(2); Welf. & Inst. §361.5(13).

" Placement Preferences. 25 U.S.C. §1915. [If child is detained, confirm or address availability of ICWA placement.]

(4) Disposition. If the child is found to be a person described in Welf. & Inst. §300, a disposition hearing must be held to hear evidence on the question of the proper disposition to be made in the case. The object of the hearing is to determine what plan should be made for the child and the family. Considerations for the court may include whether the child can remain at, or be returned to the home, and what services should be ordered to maintain the child at home. If the court determines that the child must be removed from the home, then, absent exceptional circum-

stances, the court is required to order reunification services.

“ Notice. 25 U.S.C. §1912(a); Calif. Rules of Court, rule 1439(f)(5).

“ Active Efforts Services Requirements. 25 U.S.C. §1912(d).

“ Evidentiary Standards, including expert testimony. 25 U.S.C. §1912(e).

“ Foster care/guardianship - clear and convincing testimony that continued custody is likely to result in serious emotional or physical damage to the child.

“ Right to Counsel. 25 U.S.C. §1912(b).

“ Placement Preferences. 25 U.S.C. §1915.

“ Knowing and Intelligent Waiver. Calif. Rules of Court, rule 1439(i)(2) & (j)(2); Welf. & Inst. §361.5(13).

L JUDICIAL TIP: *California law has expanded the circumstances when services may be denied to parents, including when previous reunification efforts involving the same parent have failed. (Calif. Welf. & Inst. Code §361.5.) The only California case to consider the interplay between California law and ICWA requirements has specified that 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 active efforts showing must be made.** 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 the parent’s entrenched problem and the parent has shown no desire to change. The law does not require the performance of idle acts. (In re Letitia V. v. Superior Court (2000) 81 CA4th 1009.)*

L JUDICIAL TIP: *California Evidence Code section 801 allows experts to offer testimony in the form of an opinion when the opinion is “related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” There are many issues that may arise in an Indian child custody proceeding where the testimony of an expert may be appropriate. Because the Act involves tribal law and Indian standards, not subjects within the common experience of most state court judges, any issue involving such matters, for example placement assessments under §1915, may benefit from expert testimony. However, there are mandatory findings that must be made where expert testimony is particularly appropriate or required. These include the services requirements of section 1912(d) of the Act (culturally relevant services), and the expert witness requirement of section 1912(e) and (f).*

(5) Periodic Review. The status of every child adjudged to be a dependent of the juvenile court must be reviewed periodically in accordance with statutory time frames, generally every six months.

“ Notice. 25 U.S.C. §1912(a); Calif. Rules of Court, rule 1439(f)(5).

“ Information Access. 25 U.S.C. §1912(c).

“ Active Efforts Services Requirements. 25 U.S.C. §1912(d).

“ Right to Counsel. 25 U.S.C. §1912(b).

- " Placement Preferences. 25 U.S.C. §1915.
- (6) Twelve or Eighteen Month Review. At the twelve month review, sometimes extended to the eighteen month review, (and in designated circumstances at the disposition hearing) if the court does not return the child, the court must terminate reunification efforts and set the matter for a hearing pursuant to §366.26 for the selection and implementation of a permanent plan for the child.
- " Notice. 25 U.S.C. §1912(a); Calif. Rules of Court, rule 1439(f)(5).
 - " Information Access. 25 U.S.C. §1912(c).
 - " Active Efforts Services Requirements. 25 U.S.C. §1912(d).
 - " Right to Counsel. 25 U.S.C. §1912(b).
 - " Placement Preferences. 25 U.S.C. §1915.
 - " Knowing and Intelligent Waiver. Calif. Rules of Court, rule 1439(i)(2) & (j)(2); Welf. & Inst. §361.5(13).
- (7) Selection and Implementation Hearing, §366.26. The §366.26 hearing is held to consider what permanent plan is in the child's best interest - adoption, guardianship or long term foster care. The juvenile court may terminate parental rights and order the child placed for adoption, appoint a guardian of the person, or order the child remain in long term foster care.
- " Notice. 25 U.S.C. §1912(a); Calif. Rules of Court, rule 1439(f)(5).
 - " Right to Counsel. 25 U.S.C. §1912(b).
 - " Information Access. 25 U.S.C. §1912(c).
 - " Active Efforts Services Requirements. 25 U.S.C. §1912(d); Calif. Rules of Court, rule 1439(m)(4).
 - " Evidentiary Standards, including qualified ICWA expert. 25 U.S.C. §§1912(e) or (f).
 - " Foster care /guardianship - clear and convincing testimony that continued custody is likely to result in serious emotional or physical damage to the child.
 - " Termination of parental rights - proof beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child.
 - " Placement Preferences. 25 U.S.C. §1915.
 - " Knowing and Intelligent Waiver. Calif. Rules of Court, rule 1439(m)(2) & (m)(4).
- (8) Petition to Change, Modify or Set Aside Order, §388. Any parent or other person having an interest in a child who is a dependent child of the juvenile court or the child may, upon grounds

of change of circumstance or new evidence, petition the court for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court.

- " Indian Status. See Checklist A.
- " Placement Preferences. 25 U.S.C. §1915.
- " Invalidation Motion or Petition. 25 U.S.C. §1914. [The ICWA provides a separate and independent statutory basis for a petition to invalidate. However, a §388 petition provides a familiar option for seeking invalidation.]
- " Other Issues as Warranted by the Facts of the Case.

L JUDICIAL TIP: *To avoid procedural barriers from frustrating proper application of the Indian Child Welfare Act, clarity regarding the interplay of ICWA and state law is essential. The Act must be applied in the context of California's comprehensive statutory scheme. It is important to know which issues may arise at which hearings in order both to adhere to the Act and to properly advise parties of their rights, including their right to appeal.*

Under Welfare and Institutions Code §395, every judgment in a dependency proceeding is appealable (other than the hearing terminating reunification services and referring the case for a selection and implementation hearing - which requires a writ). Notice of appeal must be filed within 60 days after the making of an appealable order. An appeal from the most recent order entered in a dependency matter may not challenge prior orders for which the statutory time for filing an appeal has passed. *In re Elizabeth M.* (1991) 232 CA3d 443, 563.

H. Checklist: Post-Proceeding Actions

(1) Petition to Invalidate. 25 U.S.C. §1914.

“Had the mandate of the ICWA been followed in 1986, of course, much potential anguish might have been avoided, and in any case the law cannot be applied so as automatically to ‘reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation.’” *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 109 S.Ct. 1597, 161, 490 U.S. 30, 104 L.Ed.2d 29, quoting Supreme Court of Utah.

- “ Invalidation petition brought before a court of competent jurisdiction. (Superior court without jurisdiction to entertain petition while dependency matter is before juvenile court. *Slope v. Inyo County Juvenile Court* (1991) 230 CA3d 263.)
- “ Petitioner is the “ Indian child, “ parent, “ Indian custodian from whose custody the child was removed, “ the Indian child’s tribe.
- “ Basis for invalidation. (The invalidation is mandatory on a showing that any of the following rights was violated.)

25 U.S.C. §1911:

- “ Tribe has exclusive jurisdiction. 25 U.S.C. §1911(a).
- “ Trial court failed to grant a petition to transfer jurisdiction to tribal court when neither parent objected and there was not “good cause” to deny transfer. 25 U.S.C. §1911(b)
- “ Child, Indian custodian or the tribe was denied right to intervene at any point in the proceedings. 25 U.S.C. §1911(c)
- “ Court failed to give full faith and credit to public acts, records or judicial proceedings of a tribe. 25 U.S.C. §1911(d)

25 U.S.C. §1912:

- “ Court failed to give proper notice to parent, Indian custodian, tribe, or BIA, including information on right to intervene. 25 U.S.C. §1912(a).
- “ Proceedings took place too soon after notice. 25 U.S.C. §1912(a).
- “ Indigent parent or Indian custodian not provided court appointed counsel. 25 U.S.C. §1912(b).
- “ Child not provided court appointed attorney and appointment was in best interests of child. 25 U.S.C. §1912(b).
- “ Any party denied right to examine all reports or other documents filed with the court. 25 U.S.C. §1912(c).

- " Party seeking placement failed to show (1) that it made active efforts to provide remedial services and rehabilitative programs designed to prevent family breakup and (2) that those efforts have proven unsuccessful. 25 U.S.C. §1912(d).
- " Lack of qualified expert testimony that continued custody by parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C. §§1912(e) & (f).
- " Incorrect burden of proof applied. 25 U.S.C. §§1912(e) & (f).

25 U.S.C. §1913:

- " Invalid voluntary consent to placement. 25 U.S.C. §1913(a).
 - " Consent given prior to or within 10 days of birth
 - " Consent not in writing
 - " Consent not recorded in court, and not accompanied by judge's certificate
- " Parent or Indian custodian not allowed to withdraw consent to foster care placement. 25 U.S.C. §1913(b).
- " Child not returned to parent or Indian custodian after consent to placement withdrawn. 25 U.S.C. §1913(b).
- " Parent not allowed to withdraw consent to termination of parental rights or adoptive placement prior to entry of decree. 25 U.S.C. §1913(c).
- " Child not returned to parent if consent to termination of parental rights or adoptive placement withdrawn within ten days or prior to entry of decree, whichever occurs later. 25 U.S.C. §1913(c).
- " Adoption decree not vacated if parent withdraws consent due to fraud or duress within two years of date adoption was granted. 25 U.S.C. §1913(d)
- " Child not returned to parent after finding that consent to adoption was obtained through fraud or duress. 25 U.S.C. §1913(d).
- " Upon application by an Indian who has reached 18 years of age and who was the subject of an adoptive placement, the court that entered the final decree shall inform that individual of the tribal affiliation of his or her biological parents and provide other information necessary to protect any rights deriving from the tribal relationship. 25 U.S.C. §1917.

L JUDICIAL TIP: *Application for adoptive information may be made by petitioning to open adoption records and securing a certified copy of an original birth record under §1917 of the ICWA, and under Family Code §9200, and under California Health and Safety Code §10275.*

I. Checklist: Adoptions

- " Jurisdiction:
 - " Inquiry had been made to determine if child is ward of tribal court. 25 U.S.C. §1911.
 - " Inquiry has been made to determine if child resides or is domiciled on a reservation with jurisdiction over child custody matters. 25 U.S.C. §1911.

L JUDICIAL TIP: *If parents are domiciled on a reservation the child is also domiciled there, even if born off the reservation, and even if the child never resided on the reservation. Mississippi Band of Choctaw Indians v. Holyfield (1989) 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d.*

- " Tribe has been properly notified
 - " Tribe received full notice of all proceedings for termination of parental rights. 25 U.S.C. §1912; See Checklist D.
 - " Tribe received notice of adoptive action as required for compliance with placement preference provisions of the Act. 44 Fed. Reg. 67594.
 - " If adoption requires termination of parental rights of a parent or Indian custodian, minimum federal standards have been complied with. See Checklist D.
 - " If adoption is voluntarily initiated by birth parents, Voluntary Placement Checklist has been followed
 - " Adoptive placement preference:
 - " The Tribe has been contacted to determine if it has established an order of preference by resolution. The Tribe " has " has not established its own placement preferences.
 - " The placement meets the placement preference requirements of the Indian Child Welfare Act.
 - " As specified by the child's Tribe
- or-**
- " As set forth in the ICWA:
 - " a member of the child's extended family
 - " other members of the child's tribe
 - " other Indian families.

- “ The placement does not meet the placement preference requirements of the Act and good cause exists for modifying the preference order.
 - “ A diligent search, including inquiry to tribe, extended family, and Indian service agencies, has failed to locate a suitable Indian home. [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).]
 - “ As appropriate, the request of a biological parent or the child (if sufficient age), has been considered, including the request of a parent for anonymity.
 - “ Extraordinary physical or emotional needs of the child, as established by qualified experts.
- “ If the tribe has designated a placement preference by resolution, the placement is not the least restrictive setting which most approximates a family and in which the child’s special needs, if any, are met. 25 U.S.C. §1915(c).
- “ The prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties were used to evaluate placements. 25 U.S.C. §1915(d).
- “ A record of efforts to comply with placement preferences has been filed with the court and shall be made available to the child’s tribe of the Secretary of Interior upon request. 25 U.S.C. §1915(e).
- “ Copy of adoption decree to be sent to BIA, along with (25 U.S.C. §1951(a).):
 - “ Name and tribal affiliation of child
 - “ Names and addresses of biological parents
 - “ Names and addresses of adoptive parents
 - “ Identity of any agency having files or information relating to the adoptive placement
 - “ Affidavit of biological parent(s) who request confidentiality
- “ Parties have been advised:
 - “ If adoption is set aside or adoptive parents voluntarily terminate parental rights, biological parent or prior Indian custodian shall be informed and shall be granted custody if he or she petitions for custody unless party opposing return of child meets minimum federal standards for involuntary proceedings. 25 U.S.C. §1916; 44 Fed. Reg. 67595.

“ Any adult who was adopted as a child shall be informed of tribal affiliation of biological parents and any other information necessary to protect that person’s rights flowing from tribal membership. 25 U.S.C. §1917; 44 Fed. Reg. 67595.

L JUDICIAL TIP: *Sections 1951(a) and 1917 of the ICWA both govern information access for purposes of securing tribal enrollment. Enrollment is often required to trigger eligibility for tribal benefits ranging from health services to tribal per capita payments. It is in the Indian child’s interest to complete the tribal enrollment process as early as possible. Courts should urge or require completion of the enrollment process prior to granting the adoption.*

J. Checklist: Statutory Construction

- " State or federal law that provides higher standard of protection to rights of parent or Indian custodian must be applied. 25 U.S.C. §1921. [E.g., At least one California court has held that a parent may waive their ICWA right to services by stipulation or by failing to object. Cal. Welf.& Inst. Code §361.5(13) allows a waiver of services but requires an express *finding* that any waiver is *knowing and voluntary*. This higher standard would apply to the right to services provided by ICWA.]

- " ICWA, BIA Guidelines for State Courts, federal regulations implementing the ICWA, and all state statutes, regulations and rules implementing the ICWA shall be liberally construed in favor of result consistent with the following preferences, 44 Fed. Reg. 67586:
 - " Indian children should be kept with their families;
 - " State courts should defer to tribal judgment on matters concerning the custody of tribal children; and
 - " Indian children who must be removed from their homes should be placed within their own families or tribes.

- " Statutes passed to benefit Indians must be liberally construed to effectuate their purposes; doubtful expressions are to be resolved in favor of Indians. *Bryan v. Itasca County*, (1976) 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710.

- " State law definitions of terms cannot be used to frustrate the policies of the ICWA. *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 109 S.Ct.1597, 104 L.Ed.2d 29.

- " Remedial statutes should be broadly construed to effectuate their purpose. *Tcherepnin v. Knight* (1967) 389 U.S. 332, 88 S.Ct. 548, 19 L.Ed.2d 564.

- " 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) 54 CA4th 1387. [ICWA does not preempt California's de facto parent doctrine.]