



ICWA Advocate Guide for California Courts

by

California Indian Legal Services



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by

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Use and Disclaimers

This publication is designed to assist ICWA advocates and tribal representatives who appear in state court.

Not all California tribes have the resources to hire attorneys for every dependency case. In the alternative, tribes regularly rely on tribal social workers, referred to in this Guide as ICWA advocates. As a general rule, most other parties in dependency cases are represented by appointed or assigned legal counsel, including the social services agency, the parents or Indian custodian, and the child.

The ICWA advocate represents the interests of the tribe, which may or may not align with other parties. Advocates may have knowledge specific to the ICWA, but might find that their knowledge of the complex state child welfare system (known as juvenile dependency law) may be limited. The advocate might also find themselves having to render these services with little to no legal training and/or courtroom advocacy experience – whether formal or informal.

The Guide is intended to serve as a reference tool for tribal advocates in their participation in dependency proceedings. The Guide is not intended to be legal advice, and is not intended to be a comprehensive discussion covering all legal issues or authority. Moreover, any tips provided in this Guide are only that – suggested tips.

When referring to the Guide, it is critical that the reader keep in mind that each case, situation, and legal circumstance is unique. Each issue can also involve a number of complex issues which can cross over to a number of other legal areas.

The legal analysis of authorities cited in this publication is current through the date of publication. As the law is always subject to change, you must continue to monitor developments in the law and practice.

For a more detailed and up-to-date analysis and application of these rules, further research and/or consulting with an attorney may be appropriate.

Credits

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I. INTRODUCTION

“Dependency” or “juvenile dependency” is the area of law involving children who are or may be at risk of abuse or neglect. Many view the Indian Child Welfare Act (ICWA) as a body of law operating separate and apart from dependency law. In reality, the ICWA is simply one aspect of dependency, and is best understood as a part of the dependency system.

This Advocate Guide is intended as an overview of the ICWA as it intersects with California’s dependency system, including advocacy and practice pointers. As a guide, its purpose is to identify dependency and ICWA issues that an advocate might encounter, and explain how best to deal with those issues. This Guide is not a substitute for retaining legal counsel and is not designed to supplant licensed representatives.

It is worth emphasizing that the ICWA applies whether or not a tribe formally intervenes in a case. ICWA issues can and should be raised by parents’ or child’s legal counsel, as well as by the court itself. In some instances, however, social services agencies and courts do not apply the ICWA as rigorously where a tribe is not participating, or only monitors a case without formally intervening.

Where a parent fails to tell the court of Indian heritage, some courts treat that as a waiver or forfeiture of the ICWA, but a parent cannot waive the ICWA on behalf of an Indian tribe. In other words, a tribe’s rights under the ICWA are separate and distinct from the parents’ and Indian child’s rights, and may even conflict.

A. History of the ICWA

Congress passed the ICWA in 1978 to counteract frequent misuse of state dependency proceedings which resulted in widespread removal of Indian children from their families. Prior to its passage, there were no specific protections for Indian children and no uniformity between states, particularly when it came to non-Indian placements.

The ICWA fulfills an important aspect of the federal government’s trust responsibility to tribes by protecting and preserving the bond between Indian children and their tribe.

In 2006, California’s Legislature codified much of the ICWA into state law with Senate Bill 678 – what is now commonly called Cal-ICWA. Bear in mind that the ICWA establishes minimum standards, and states are free to adopt more stringent laws for Indian children. California did exactly that with certain aspects of SB 678, and again in 2010 with the addition of a new permanency option for Indian children called Tribal Customary Adoption (TCA).

Opponents have challenged the ICWA as being unconstitutional, but none of those challenges have been successful. There are two primary types of cases affected by the ICWA, one being dependency cases involving children who are involuntarily removed from their parents or guardians for abuse or neglect, and the other being voluntary adoptions. Most of the

opposition to the ICWA—which applies equally to involuntary removal cases and adoptions—has been raised by adoption groups.¹

Part of the resistance to implementing the ICWA is due to perceived complexities in having a second set of rules that apply to Indian children. Some social services agencies believe they have unnecessary and detailed hoops to jump through in supervising Indian children’s placements and reunification plans. However, it is precisely because of state and county failures to recognize the different cultural standards of Indian tribes and the relations of Indian people that Congress concluded Indian children were exposed to a higher risk of involuntary separation than non-Indian children.

B. Nuts and Bolts

1. Findings and Orders

A “finding” is when the judge decides the existence or non-existence of some fact. For the non-attorney, it is important to know that many findings are of a continuing nature, and the judge is required to make certain findings at every hearing. This is significant because findings must be supported by information in the court’s “record,” most of which is presented in the social worker report. Findings are usually listed separately at the end of the report, and are, in truth, suggested findings.

Many judges will read their findings aloud in open court. The process is long, and seemingly dull, and it is easy for parents or advocates not to pay attention—particularly if the advocate does not have a copy of the proposed findings and orders to read along. So advocates should familiarize themselves beforehand with the findings and orders involved for each hearing.

Advocates should be mindful of the distinction between “findings” and “orders.” Findings are conclusions made by the judge about facts or the law that support an order. Some findings are required to make an order, and if missing or incomplete, the order may be deficient.

⇒ **PRACTICE POINTER:** *For further information and to access the findings and orders that the court must make, see <http://www.courts.ca.gov/forms.htm?filter=JV>. See form titles JV-410 through JV-457.*

Before the judge makes any findings or orders, the tribal advocate should make known any factual information, findings, orders or any other conclusion that the tribe disagrees with. If

¹ The U.S. Supreme Court’s 2013 *Baby Girl Veronica* case reinforced the dichotomy between voluntary and involuntary adoptions, but applied a broad standard to a narrow circumstance of events. The undercurrent of *Baby Girl* was that opponents of the ICWA wanted to write something into the ICWA that was never part of the law—that only practicing Indian families can be considered as “real Indians.” In other words, the opponents, and to some extent the Supreme Court, advanced a notion that Indian families must exist before they can be broken apart, and if a child is not part of an intact Indian family then the ICWA shouldn’t apply. This logic was especially troublesome in *Baby Girl* where the child was unborn at the time a voluntary adoption was initiated by the non-Indian mother, and the Court found that a child can’t be removed from a home that she didn’t live in (and therefore that the ICWA did not apply). (*Adoptive Couple v. Baby Girl* (2013), 133 S.Ct. 2552).

no objections are made, the court will usually adopt what has been submitted by the social worker. This is a key spot for the advocate to act.

For example, one finding that is not always made is whether a child is an Indian child. An advocate should review any proposed findings and orders requested by the social services agency to be certain that the court is making a finding that there is an Indian child, and that the ICWA applies. Once that is done, all the requirements which flow from the ICWA will then apply.

2. What is a Record?

A “record” is all of the court papers, filings and statements submitted to a trial court, as well as the testimony of witnesses and arguments or statements of parties made in open court. Think of the record as the court’s file, plus everything anyone said in the presence of the judge.

Why is the record important? Many cases do not get appealed. However, when there is an appeal, there is a formal division of tasks between the lower court and the appeals court. Lower courts, or trial courts, are where facts are established (evidence and testimony taken and submitted), while an appeals court can only review questions of law. An appeals court does not receive new evidence or testimony, and when it reviews the law, it is based only on the record of the trial court.

For that reason, it is important for advocates to make sure a record includes any information that a tribe wants considered, and also to object on the record to improper evidence or statements submitted by another party. Failure to object can be construed as an acceptance, which means any un-objected statement or document or report becomes part of the record.

3. The Main Hearings in Dependency Cases

Dependency cases in California have five distinct phases, and a tribe can participate at any stage:

- (1) Detention;
- (2) Jurisdiction;
- (3) Disposition;
- (4) Review; and
- (5) Reunification or Permanency Planning.

The hearings for each of the above are each discussed in detail in this Guide (see Section 7, Hearings).

Once a tribe has identified a child as being an “Indian child” and it intervenes in the court case, the most important hearing will typically be Disposition. The reason for Disposition’s

significance is because this is the hearing where the court determines whether the child is declared a “dependent of the court,” thereby allowing the court to limit a parent’s control and custody of the child. It is the social services agency’s responsibility to return a child home, unless the social services agency can demonstrate to the court (in legalese, can meet its “burden of proof”) that there are grounds to support continued removal. But in practice, a court may be hesitant to dismiss a case, and instead devise a supervised plan for reunifying a family. Those case plans are approved at Disposition, and it is this proceeding where a tribal advocate should be especially prepared to emphasize ICWA issues. The heightened requirements of the ICWA can be leveraged most effectively at the Dispositional hearing (although the ICWA applies to all hearings in a case, not just to Disposition, and ICWA issues can and should be raised at all stages if present).

4. Laws, Rules, and Guidance

It is important that an advocate understand the different sources of law, of the rules of court, and of guidance. Some basic sources are defined below:

- a. Federal legislation or statutes: Passed by Congress and apply to all of the 50 states.
- b. State legislation or statutes: Passed by the California Legislature and apply to all state court proceedings.
- c. Case law: The courts’ interpretations and applications of legislation, rules, and prior judicial decisions, and even guidance. They apply to all courts within the issuing court’s “district”² and can be instructive or persuasive in other districts.
- d. California Rules of Court: Rules adopted by the California Judicial Council to clarify or fill in gaps in legislation, and which apply to all state courts in California. Rules of Court cannot contradict or override state legislation.
- e. Local Rules of Court: Special rules that counties make which apply only to the courts within that county. Local rules cannot contradict or override state legislation or the state Rules of Court.
- f. All County Letters: Advisory opinions to social services agencies which do not have the force of law, but which can be binding on a social worker or the social services agency because it is their own legal interpretation.
- g. BIA Guidelines: Advisory guidelines adopted by the Bureau of Indian Affairs (BIA) to interpret the ICWA. They are not legally binding, but are entitled to “great weight.” This means that a court should take them into consideration where they apply to the facts of a particular case, but that the court is not strictly required to follow them.

² A “district” is the territory where an appellate court will hear cases originating from. For example, the First District Court of Appeal hears cases from Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Napa, San Francisco, San Mateo, Solano, and Sonoma counties. The California Supreme Court hears cases from any county in the state. The U.S. Supreme Court hears cases from anywhere in the country.

- The BIA Guidelines were first issued in 1979. California courts adopted certain Guidelines as if they were binding – in other words, converted them into case law.
- The BIA Guidelines were revised in 2015. They can be found on the BIA’s website at: www.bia.gov/cs/groups/public/documents/text/idc1-029637.pdf
- The 1979 Guidelines should still be enforceable in the interim for those portions approved by case law.

5. Form of Citations and Abbreviations

The vast majority of statutes applicable to dependency cases are in California’s Welfare and Institutions Code. Other codes which apply in certain situations include the Family Code, Probate Code, Evidence Code, and Code of Civil Procedure. These codes can be found online at <http://www.leginfo.ca.gov/calaw.html> or <http://leginfo.legislature.ca.gov/faces/codes.xhtml>.

Applicable codes, Rules of Court, and guidance are abbreviated in this Guide³ as follows:

- United States Code – “U.S.C.” (for example, a citation to 25 U.S.C. § 1901 means to Section 1901 of Title 25 of the U.S. Code).
- Welfare and Institutions Code – “Welf. & Inst. Code”
- Evidence Code – “Evid. Code”
- Code of Civil Procedure – “Code of Civ. Proc.”
- California Rules of Court – “Cal. Rules of Court, rule”
- Code of Federal Regulations – “C.F.R.”
- Bureau of Indian Affairs Guidelines for State Courts and Agencies in Indian child Custody Proceedings, 80 Fed. Reg. 10146 (Feb. 25, 2015) – “BIA Guidelines”

³ Throughout this Guide and in court decisions the reader will notice the symbol “§,” which is simply shorthand for “section.”

II. CHILD WELFARE AND THE ICWA

A. Child Welfare Generally

Parents have a constitutional right to the care, custody, and control of their children. However, these rights are subject to limitation. States have the power to intervene in the family for reasons specified under the law. In California dependency law (and delinquency law, mentioned in parts of this Guide), these reasons are listed in the Welfare and Institutions Code §§ 300-399, which cover the bulk of dependency cases (sometimes shorthanded as “300” cases), and §§ 600-796, which cover delinquency cases (shorthanded as “600,” “601,” or “602” cases).

The state court with the power to declare a child a dependent or ward of the court is commonly called the “juvenile court.” The specific court with that power over a specific child would be the court in the county:

- In which the child resides;
- In which the child is found; or
- In which the acts take place or the circumstances exist that are alleged to bring the child within the provisions of Welfare and Institutions Code §§ 300 or 601 or 602.⁴

B. Indian Child Welfare Act

In enacting the ICWA,⁵ Congress recognized a “special relationship” between the federal government and Indian tribes and members, acknowledged a federal responsibility to the same, and declared that:

- There is no more vital resource to Indian tribes than their children, and the federal government has an interest in protecting Indian children who are members of or are eligible for membership in an Indian tribe.
- A high percentage of Indian families were being broken up by the unwarranted removal of children who were then being placed in non-Indian homes and institutions.
- To remedy the situation, Congress put limits on states’ conduct when exercising jurisdiction over Indian children because the states had failed to “recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.”
- One of the primary limitations was to require that, whenever possible, Indian children should be placed in homes “which will reflect the unique values of Indian culture.”⁶

⁴ Cal. Rules of Court, rule 5.510; Welf. & Inst. Code § 327, 651; See Welf. & Inst. Code § 17.1 for definition of “resides”.

⁵ 25 U.S.C. §§ 1901-1925.

1. When Does the ICWA Apply?

a. “Child Custody Proceeding”

The ICWA applies whenever an Indian child is the subject of a state “child custody proceeding.”

A “child custody proceeding” is a defined term. Definitions in the law have specific meanings that are intended to apply exactly the same every time a defined term appears. That means not all cases involving children are “child custody proceedings.” For example, a custody case between parents is not considered to be a “child custody proceeding” under the ICWA.

What is a “child custody proceeding” under the ICWA? The focus is not on what a proceeding is called, or whether it is a private action or an action brought by a social services agency, but on whether the proceeding meets a definition set forth in the ICWA.⁷ The ICWA covers 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. The ICWA also covers any proceeding resulting in adoption or termination of parental rights. This would generally include juvenile, family court and probate guardianship actions.

Specifically, the ICWA provides that a “child custody proceeding” includes:

- (i) “foster care placement” which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;
- (ii) “termination of parental rights” which shall mean any action resulting in the termination of the parent-child relationship;
- (iii) “preadoptive placement” which shall 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; and
- (iv) “adoptive placement” which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.⁸

The BIA Guidelines define “child custody proceeding” in nearly identical terms.⁹

⁶ 25 U.S.C. §§ 1901-1902.

⁷ 25 U.S.C. § 1903(1).

⁸ 25 U.S.C. § 1903(1).

⁹ BIA Guidelines § A.2.

The ICWA also applies to proceedings involving status offenses or juvenile delinquency proceedings if any part of those proceedings results in the need for placement of the child in a foster care, preadoptive or adoptive placement, or termination of parental rights.¹⁰

California Rules of Court provide that:

“The chapter addresses the Indian Child Welfare Act (25 United States Code section 1901 et seq.) as codified in various sections of the California Family, Probate, and Welfare and Institutions Codes, applies to most proceedings involving Indian children that may result in an involuntary foster care placement; guardianship or conservatorship placement; custody placement under Family Code section 3041; declaration freeing a child from the custody and control of one or both parents; termination of parental rights; or adoptive placement.”

As such, the Rules of Court apply to:

“(1) Proceedings under Welfare and Institutions Code section 300 et seq.;

(2) Proceedings under Welfare and Institutions Code sections 601 and 602 et seq., whenever the child is either in foster care or at risk of entering foster care. In these proceedings, inquiry is required in accordance with [California Rules of Court] rule 5.481(a). The other requirements of this chapter contained in [California Rules of Court] rules 5.481 through 5.487 apply only if:

(A) The court's jurisdiction is based on conduct that would not be criminal if the child were 18 years of age or over;

(B) The court has found that placement outside the home of the parent or legal guardian is based entirely on harmful conditions within the child's home. Without a specific finding, it is presumed that placement outside the home is based at least in part on the child's criminal conduct, and this chapter shall not apply; or

(C) The court is setting a hearing to terminate parental rights of the child's parents.

(3) Proceedings under Family Code section 3041;

(4) Proceedings under the Family Code resulting in adoption or termination of parental rights; and

(5) Proceedings listed in Probate Code section 1459.5 and [California Rules of Court] rule 7.1015.”¹¹

¹⁰ BIA Guidelines § A.3(a).

¹¹ Cal. Rules of Court, rule 5.480.

b. “Indian Child”

An “Indian child” is defined as:

“Any unmarried person who is under age eighteen and is either: (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.”¹²

⇒ **PRACTICE POINTER:** *Agencies and courts often focus on the issues of “enrollment” and “membership” when making this determination. The juvenile court may not rely on the child’s and/or parent’s lack of formal enrollment in a tribe to conclude the “membership” requirement of the ICWA is not met.¹³ Unless the tribe confirms in writing that enrollment is a prerequisite for membership under tribal law or custom, information that the child is not enrolled or eligible for enrollment in the tribe is not determinative of the child’s membership status.¹⁴ The tribe has the definitive word on whether a child is or is not a member. Its determination is conclusive on the state court.¹⁵ The state court may not substitute its own determination regarding a child’s membership or eligibility for membership in a tribe or tribes.¹⁶*

¹² 25 U.S.C. § 1903(4); Welf. & Inst. Code § 224.1; Cal. Rules of Court, rule 5.502(19). It is important to keep in mind that laws all have their own definitions applicable to the subject a particular law addresses. You cannot assume that one definition applies to all federal or state law. For example, the term “Indian” is defined differently in several federal laws.

¹³ 25 U.S.C. § 1903(4).

¹⁴ Welf. & Inst. Code § 224.3(e)(1).

¹⁵ Welf. & Inst. Code § 224.3(e)(1).

¹⁶ BIA Guidelines § B.3(d).

III. PRE-REMOVAL

A. Emergency Removal of an Indian Child

The ICWA allows for emergency removal from a child's parent or Indian custodian or the emergency placement of a child in a foster home or institution, under applicable state law.¹⁷ "Emergency removal" is needed in order to prevent imminent physical damage or harm to the child.¹⁸

Where the Indian child is a ward of a tribal court or resides or is domiciled within a reservation of an Indian tribe that has exclusive jurisdiction over child welfare proceedings:

- The state or local authority must provide notice of the removal to the tribe no later than the next working day following the removal and shall provide all relevant documentation to the tribe regarding the removal and the child's identity.
- If the tribe determines that the child is an Indian child, the state or local authority must transfer the child custody proceeding to the tribe within 24 hours after receipt of written notice from the tribe of that determination.¹⁹

In the case of an Indian child who is not domiciled or residing within a reservation of an Indian tribe or who resides or is domiciled within a reservation of an Indian tribe that does not have exclusive jurisdiction over child custody proceedings:²⁰

- The court must transfer the proceeding to the jurisdiction of the child's tribe upon petition of either parent, the Indian custodian, if any, or the child's tribe, unless the court finds good cause not to transfer.
- The court will dismiss the proceeding or terminate jurisdiction only after receiving proof that the tribal court has accepted the transfer of jurisdiction.
- At the time that the court dismisses the proceeding or terminates jurisdiction, the court must also make an order transferring the physical custody of the child to the tribal court.²¹

B. Active Efforts to Prevent the Need for Detention

The requirement to engage in "active efforts"²² begins from the moment the possibility arises that a social services agency case or investigation may result in the need for the Indian child to be placed outside the custody of either parent or Indian custodian in order to prevent removal.²³

¹⁷ 25 U.S.C. § 1922.

¹⁸ 25 U.S.C. § 1922.

¹⁹ Welf. & Inst. Code § 305.5(a).

²⁰ This is the case in California due to Public Law 280.

²¹ Welf. & Inst. Code § 305.5(b).

²² See also Section VII(C)(6)(f)(v), Hearings, Disposition Hearing, Active Efforts.

²³ BIA Guidelines § B.1(a).

The social services agency must engage in active efforts to prevent removal of the child during the time it is investigating whether the child is a member of the tribe, is eligible for membership in the tribe, or whether a biological parent of the child is or is not a member of a tribe.²⁴

The Welfare and Institutions Code similarly states that before a social worker takes the child into custody, the social worker must consider whether the child can remain safely in his or her residence.

The consideration of whether the child can remain safely at home includes, but is not limited to, the following factors:

- Whether there are any reasonable services available to the social worker which, if provided to the child's parent, guardian, caretaker, or to the child, would eliminate the need to remove the child.
- Whether a referral to public assistance would eliminate the need to take temporary custody of the child. (If those services are available they must be utilized.)
- Whether a non-offending caretaker can provide for and protect the child from abuse and neglect and whether the alleged perpetrator voluntarily agrees to withdraw from the residence, does withdraw, and is likely to remain withdrawn.²⁵

²⁴ BIA Guidelines § B.1(b).

²⁵ Welf. & Inst. Code § 306(b).

IV. NOTICE AND INQUIRY

A. Background and Purpose

Notice and inquiry provisions are critical components of serving the Congressional and state legislature's goal of preserving tribes and Indian families.²⁶

Notice ensures that tribes will be afforded the chance to assert their rights under the ICWA. Notice also allows tribes to intervene as early as possible in a child custody proceeding and provides an opportunity for the tribe to bring resources to assist in preventing a breakup of the family.²⁷

Failure to give proper notice to a tribe with which the child may be affiliated forecloses participation by the tribe and it subjects the proceeding to invalidation.²⁸

As such, the ICWA provides that:

“In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention.”²⁹

Similarly, Cal-ICWA provides that:

“If the court, a social worker, or probation officer knows or has reason to know that an Indian child is involved, any notice sent in an Indian child custody proceeding under this code shall be sent to the child's parents or legal guardian, Indian custodian, if any, and the child's tribe.”³⁰

There is an “affirmative and continuing duty” to inquire whether a child for whom a petition under Section 300, 601, or 602 is to be, or has been, filed is or may be an Indian child if the child is at risk of entering foster care or is in foster care.³¹

B. Inquiry

At the start of any child custody proceeding, it must be asked whether there is “reason to believe” the child who is the subject of the proceeding is an Indian child.³²

²⁶ 25 U.S.C. § 1901, 1902; Welf. & Inst. Code § 224.

²⁷ BIA Guidelines § A.3(c).

²⁸ 25 U.S.C. § 1914; Welf. & Inst. Code § 224(e).

²⁹ 25 U.S.C. § 1912; See, 25 C.F.R. § 23.11.

³⁰ Welf. & Inst. Code § 224.2(a).

³¹ Welf. & Inst. Code § 224.2(b).

³² BIA Guidelines §§ A.3(c), B.2(a), (b)(1).

Once it is known or there is reason to know that an Indian child is or may be involved, that person or entity is required to make further inquiry as soon as practicable.³³

1. What is “Reason to Believe”?

The BIA Guidelines provide:

“an agency or court has reason to believe that a child involved in a child custody proceeding is an Indian child if:

- (1) Any party to the proceeding, Indian tribe, Indian organization or public or private agency informs the agency or court that the child is an Indian child;
- (2) Any agency involved in child protection services or family support has discovered information suggesting that the child is an Indian child;
- (3) The child who is the subject of the proceeding gives the agency or court reason to believe he or she is an Indian child;
- (4) The domicile or residence of the child, parents, or the Indian custodian is known by the agency or court to be, or is shown to be, on an Indian reservation or in a predominantly Indian community; or
- (5) An employee of the agency or officer of the court involved in the proceeding has knowledge that the child may be an Indian child.”³⁴

The Welfare and Institutions Code states that a child may be known to be an Indian child if: “(1) ... one or more of the child’s biological parents, grandparents, or great-grandparents are or were a member of a tribe.”³⁵

Similarly, the California Rules of Court provide the following:

“(A) The child or a person having an interest in the child, including an Indian tribe, an Indian organization, an officer of the court, a public or private agency, or a member of the child’s extended family, informs or otherwise provides information suggesting that the child is an Indian child to the court, the county welfare agency, the probation department, the licensed adoption agency or adoption service provider, the investigator, the petitioner, or any appointed guardian or conservator;

(B) The residence or domicile of the child, the child’s parents, or an Indian custodian is or was in a predominantly Indian community; or

³³ Cal. Rules of Court, rule 5.481(a)(4).

³⁴ BIA Guidelines § B.2(c).

³⁵ See, Welf & Inst. Code § 224.3(b).

(C) The child or the child's family has received services or benefits from a tribe or services that are available to Indians from tribes or the federal government, such as the U.S. Department of Health and Human Services, Indian Health Service, or Tribal Temporary Assistance to Needy Families benefits.”³⁶

2. How is Inquiry Made?

California Rules of Court provide that inquiry is made by:

“(A) Interviewing the parents, Indian custodian, and "extended family members" as defined in 25 United States Code sections 1901 and 1903(2), to gather the information listed in Welfare and Institutions Code section 224.2(a)(5), Family Code section 180(b)(5), or Probate Code section 1460.2(b)(5), which is required to complete the Notice of Child Custody Proceeding for Indian Child (form ICWA-030);

(B) Contacting the Bureau of Indian Affairs and the California Department of Social Services for assistance in identifying the names and contact information of the tribes in which the child may be a member or eligible for membership; and

(C) Contacting the tribes and any other person that reasonably can be expected to have information regarding the child's membership status or eligibility.”³⁷

The BIA Guidelines also recommend that the court ask each party to the case to certify on the record whether they have discovered or know of any information that suggests or indicates the child is an Indian child.³⁸

At the first court appearance by a parent, Indian custodian, or guardian, the court must order that they complete a Parental Notification of Indian Status (ICWA-020) form.³⁹

If no one appears at the first hearing, or is unavailable, the court must order the social services agency to use reasonable diligence to find a parent, Indian custodian, or guardian in order to have Parental Notification of Indian Status (ICWA-020) completed.⁴⁰

It is from that information that the court must render the required notice using the Notice of Child Custody Proceeding for Indian Child (ICWA-030) form.

The duty to inquire about a child’s Indian status is affirmative and continuing.⁴¹

³⁶ Welf. & Inst. Code § 224.3(b); Cal. Rules of Court, rule 5.481(a)(5)(A)-(C).

³⁷ Cal. Rules of Court, rule 5.481(a)(4).

³⁸ BIA Guidelines § B.2(b)(1).

³⁹ Cal. Rules of Court, rule 5.481(a)(2).

⁴⁰ Cal. Rules of Court, rule 5.481(a)(2)-(3).

⁴¹ BIA Guidelines § B.2(b)(1); Welf. & Inst. Code § 224.3(a); Cal. Rules of Court, rule 5.481(a).

C. Notice

Under both state and federal law, notice must be sent regarding the child custody proceeding.⁴²

⇒ **PRACTICE POINTER:** *A common mistake is to conflate the issues of: (a) whether the ICWA applies and (b) whether notice is required. Oftentimes it cannot be determined whether the ICWA applies until notice is sent and a response from the tribe is received. Notice is required wherever the ICWA might apply, not only where it is known to apply.*

1. Content Requirements for the Notice

The Welfare and Institutions Code provides that notice must include the following:

- “(A) The name, birthdate, and birthplace of the Indian child, if known.
- (B) The name of the Indian tribe in which the child is a member or may be eligible for membership, if known.
- (C) All names known of the Indian child’s biological parents, grandparents, and great-grandparents, or Indian custodians, including maiden, married and former names or aliases, as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, and any other identifying information, if known.
- (D) A copy of the petition by which the proceeding was initiated.
- (E) A copy of the child’s birth certificate, if available.
- (F) The location, mailing address, and telephone number of the court and all parties notified pursuant to this section.
- (G) A statement of the following:
 - (i) The absolute right of the child’s parents, Indian custodians, and tribe to intervene in the proceeding.
 - (ii) The right of the child’s parents, Indian custodians, and tribe to petition the court to transfer the proceeding to the tribal court of the Indian child’s tribe, absent objection by either parent and subject to declination by the tribal court.
 - (iii) The right of the child’s parents, Indian custodians, and tribe to, upon request, be granted up to an additional 20 days from the receipt of the notice to prepare for the proceeding.

⁴² 25 U.S.C. § 1912; See, 25 C.F.R. § 23.11; BIA Guidelines § B.6(a); Welf. & Inst. Code § 224.2.

(iv) The potential legal consequences of the proceedings on the future custodial and parental rights of the child’s parents or Indian custodians.

(v) That if the parents or Indian custodians are unable to afford counsel, counsel will be appointed to represent the parents or Indian custodians pursuant to Section 1912 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.).

(vi) That the information contained in the notice, petition, pleading, and other court documents is confidential, so any person or entity notified shall maintain the confidentiality of the information contained in the notice concerning the particular proceeding and not reveal it to anyone who does not need the information in order to exercise the tribe’s rights under the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.).”⁴³

What is important to remember is that notice is intended to elicit information to confirm whether the child is an Indian child. Each of these provisions is significant in that the information enables the tribe to determine whether the child is an Indian child.

Per the BIA Guidelines, the court may require the social services agency to provide:

“(i) Genograms or ancestry charts for both parents, including all names known (maiden, married and former names or aliases); current and former addresses of the child's parents, maternal and paternal grandparents and great grandparents or Indian custodians; birthdates; places of birth and death; tribal affiliation including all known Indian ancestry for individuals listed on the charts, and/or other identifying information; and/or

(ii) The addresses for the domicile and residence of the child, his or her parents, or the Indian custodian and whether either parent or Indian custodian is domiciled on or a resident of an Indian reservation or in a predominantly Indian community.”⁴⁴

The BIA Guidelines also provide that the notice must be in a “clear, understandable language.” Translation and explanation might be necessary.⁴⁵

⇒ **PRACTICE POINTER:** *As a practical matter, the notice must be fully and accurately filled out. Many of the challenges relating to ICWA notice relate to deficiencies, including misspellings and/or incomplete names, incomplete identifying information, and/or notice sent for some but not all siblings.*

⁴³ Welf. & Inst. Code § 224.2(a)(5).

⁴⁴ BIA Guidelines § B.2(b)(1).

⁴⁵ BIA Guidelines § B.6.

2. Who Should Receive Notice?

The ICWA requires that notice must be sent to the parent or any Indian custodian and the child's tribe.⁴⁶

Notice must be to all tribes in which the child may be a member or eligible for membership until the court makes a determination as to which tribe will be designated as the "Indian child's tribe."⁴⁷

If more than one tribe claims the child as a member (or the child is not a member but is eligible for membership in more than one tribe), the court may select the tribe that has the "more significant contacts" with the child.⁴⁸

In making this determination, the judge must do the following:

"(1) If the Indian child is or becomes a member of only one tribe, that tribe shall be designated as the Indian child's tribe, even though the child is eligible for membership in another tribe.

(2) If an Indian child is or becomes a member of more than one tribe, or is not a member of any tribe but is eligible for membership in more than one tribe, the tribe with which the child has the more significant contacts shall be designated as the Indian child's tribe. In determining which tribe the child has the more significant contacts with, the court shall consider, among other things, the following factors:

(A) The length of residence on or near the reservation of each tribe and frequency of contact with each tribe.

(B) The child's participation in activities of each tribe.

(C) The child's fluency in the language of each tribe.

(D) Whether there has been a previous adjudication with respect to the child by a court of one of the tribes.

(E) Residence on or near one of the tribes' reservations by the child parents, Indian custodian or extended family members.

(F) Tribal membership of custodial parent or Indian custodian.

⁴⁶ 25 U.S.C. § 1912(a).

⁴⁷ BIA Guidelines § A.3(d); Welf. & Inst. Code § 224.2(a)(3), (b); Cal. Rules of Court, rule 5.482(d)(2); Cal. Rules of Court, rule 5.481(b)(1).

⁴⁸ 25 U.S.C. § 1903(5)(b); Welf. & Inst. Code § 224.1(e)(2).

(G) Interest asserted by each tribe in response to the notice specified in [Welfare and Institutions Code] § 224.2.

(H) The child’s self-identification.”⁴⁹

The court is required to state its determination, and the reasons for it, in writing.⁵⁰

Once the child is or becomes a member of only one tribe, that tribe must be designated as the Indian child’s tribe, even though the child is eligible for membership in another tribe.⁵¹

The notice is supposed to be sent to the chairperson, unless the tribe designates another agent.⁵²

The tribe can designate “by resolution, or by such other form as the tribe's constitution or current practice requires, an agent for service of notice other than the tribal chairman and send a copy of the designation to the Secretary or his/her designee. The Secretary or his/her designee shall update and publish as necessary the names and addresses of the designated agents in the Federal Register. A current listing of such agents shall be available through the area offices.”⁵³

3. Service on the Bureau of Indian Affairs

A copy of all notice(s) must always be sent to the BIA in all cases subject to the ICWA.⁵⁴ This provision however, is separate and distinct from the requirements for rendering substituted service.

Substituted service on the BIA occurs if the identity or location of the Indian parents, Indian custodians or tribes in which the Indian child is a member or eligible for membership cannot be ascertained, but there is reason to believe the child is an Indian child; notice of the child custody proceeding must be sent to the appropriate BIA Regional Director and Secretary of the Interior.⁵⁵

After receiving notice of the state court dependency petition, the BIA has 15 days to notify the parents or custodian and the tribe of the pending action and to send a copy of the notice to the state court.⁵⁶

If the BIA cannot ascertain whether the child is an Indian child or cannot locate the child’s Indian parents or custodian within the initial 15-day period, it must notify the court “prior

⁴⁹ Welf. & Inst. Code § 224.1(e)(2).

⁵⁰ Welf. & Inst. Code § 224.1(d).

⁵¹ Welf. & Inst. Code § 224.1(e)(1).

⁵² Welf. & Inst. Code § 224.2(a)(2); Cal. Rules of Court, rule 5.481(b)(4).

⁵³ 25 C.F.R. § 23.12.

⁵⁴ 25 C.F.R. § 23.11(a).

⁵⁵ 25 U.S.C. § 1912(a); BIA Guidelines § B.6(e); 25 C.F.R. § 23.11(a); Welf. & Inst. Code § 224.2(a)(4); Cal. Rules of Court, rule 5.481(b).

⁵⁶ 25 C.F.R. § 23.11(f).

to the initiation of the proceedings” and state how much additional time it will need to complete the search.⁵⁷

4. Documentation of Compliance

The BIA Guidelines provide that the original or a copy of each notice sent and any return receipts or other proof of service should be filed with the court.⁵⁸

Whereas, state law requires that proof of notice sent to the child’s parent or legal guardian, Indian custodian, and the child’s tribe, including copies of notices sent, all return receipts, and responses received, must be filed with the juvenile court.⁵⁹

5. Duty is Continuing and Ongoing

Even after custody proceedings have started, if the court later discovers that the child may be an Indian child, notice must be provided.⁶⁰ This means that the duty remains even if notice had already previously been rendered.⁶¹

⁵⁷ 25 C.F.R. § 23.11(f).

⁵⁸ BIA Guidelines § B.6(g).

⁵⁹ Welf. & Inst. Code § 224.2(c); Cal. Rules of Court, rule 5.482(b).

⁶⁰ See Welf. & Inst. Code § 224.3(d), (f); Cal. Rules of Court, rule 5.481(b).

⁶¹ Welf. & Inst. Code § 224.3(f).

V. PRELIMINARY CONSIDERATIONS

A. Intervention

Both state and federal law afford the child's tribe and Indian custodian with an absolute right to intervene in a proceeding.⁶²

1. How to Intervene

This right can be invoked at any time, even if for the first time on appeal.⁶³ The tribe may appear by counsel or by a tribally designated representative. Intervention can be done orally or in writing.⁶⁴

The tribe and/or Indian custodian may, but is not required to, file with the court the Notice of Designation of Tribal Representative and Notice of Intervention in a Court Proceeding Involving an Indian Child (form ICWA-040) to give notice of their intent to intervene.⁶⁵

Also allowed is some form of written authentication stating the representative's name and the verification that the representative is authorized to appear pursuant to an official act of the tribe (tribal resolution or other document evidencing an official act of the tribe).⁶⁶

2. Effect of Intervention

As an intervening party, the tribe is entitled to all rights afforded to any party in a proceeding, including the right to sit at the counsel table, the right to examine witnesses, and the right to be given copies of documents.⁶⁷

⇒ **PRACTICE POINTER:** *Advocates and tribes must be aware that, should the tribe intervene and be represented by an advocate rather than an attorney, the tribe will nonetheless be held to the same standards regarding objections, waiver of rights, etc. as other (represented) parties.*

3. The Tribe May Participate Even Without Intervening

If the tribe of the Indian child does not intervene as a party, the court may permit the Indian Child's tribe to:

- Be present at the hearing;
- Address the court;

⁶² 25 U.S.C. § 1911(c); Welf. & Inst. Code § 224.4.

⁶³ 25 U.S.C. § 1911(c); Welf. & Inst. Code § 224.4; Cal. Rules of Court, rule 5.482(e).; See, *In re Desiree F.* (2000) 83 Cal.App.4th 460, 472 (the tribe may intervene at any point, including after parental rights have been terminated).

⁶⁴ Cal. Rules of Court, rule 5.534(i).

⁶⁵ Cal. Rules of Court, rule 5.482(e).

⁶⁶ Cal. Rules of Court, rule 5.534(i).

⁶⁷ See Code of Civ. Proc. § 387; see also Cal. Rules of Court, rule 5.482(e) and Judicial Council form ICWA-040.

- Request and receive notice of hearings;
- Examine all court documents relating to the case;
- Present information to the court that is relevant to the proceeding;
- Submit written reports and recommendations to the court; and
- Perform other duties and responsibilities as requested or approved by the court.⁶⁸

⇒ **PRACTICE POINTER:** *Monitoring cases is not recommended. The court does not appear to treat tribes differently if they intervene instead of monitor a case, but a monitor may not have the same breadth of rights as a tribe intervening with counsel, or even intervening with a lay advocate.*

One significant disadvantage in appearing through non-attorneys is that the privileges of confidentiality and attorney work-product are not available to non-attorneys, so statements made to or from the advocate are not confidential, nor are the documents or statements written by an advocate. This means an advocate could be called to testify about something a tribal member/official said in confidence. If a tribe intends to proceed with non-licensed representatives, it may be wise to consult with an attorney beforehand to be certain what activities the lay advocate can participate in, and what potential risks should be communicated to the tribal client, beforehand.

4. Methods for Participating

The BIA Guidelines provide that the court should allow, if it possesses the capability, alternative methods of participation in state court proceedings by family members and tribes, such as participation by telephone, videoconferencing, or other methods.⁶⁹

⇒ **PRACTICE POINTER:** *It is important that you familiarize yourself with the court's capabilities. It may take time to arrange alternate methods for participation. If you know that one is needed, make sure to prepare in advance.*

B. Tribe and Indian Custodian's Right to a Continuance

Except for the detention hearing, no proceeding shall be held until at least 10 days after receipt of notice by the parent, Indian custodian, the tribe, or the BIA. Upon request of the parent, Indian custodian, or the tribe, the court must grant up to 20 additional days to prepare for that proceeding.⁷⁰

This is a legal right of tribes and Indian custodians. Still, as a practical matter, tribes often face opposition from the court, social services agency, and other parties when trying to exercise this right. In opposition to a request for a continuance, an advocate might hear that the juvenile dependency system is based on the need for expediency and avoiding delay of permanence for

⁶⁸ 25 U.S.C. §§ 1911, 1931-1934; Welf. & Inst. Code § 306.6; Cal. Rules of Court, rule 5.534(i).

⁶⁹ BIA Guidelines § B.7(d).

⁷⁰ Welf. & Inst. Code § 224.2 (d); See also, BIA Guidelines § B.7.

the child. The court or the parties might also try to assert that all continuances are governed by Welfare and Institutions Code § 352, which permits a continuance, but the delay must be shown not to be contrary to the child's best interest.⁷¹ The court or the parties might also assert that the court is bound by strict timelines for completing hearings.⁷²

Should you face opposition, remind the court and the parties that the ICWA specifically provides for such continuances. Additionally, where state and federal law provide different standards, the state court must use the standard that provides more protection for the parent, guardian, and/or tribe.⁷³

C. Transfer of Proceedings to Tribal Court

Under Welfare and Institutions Code § 305.5 and California Rules of Court, rule 5.483, proceedings can be transferred to tribal court.

It should be noted that the ICWA provides an expansive definition of a tribal court, which includes a court established under the code or custom of an Indian tribe or any other administrative body of a tribe which is vested with authority over child custody proceedings.⁷⁴

The scope of that definition includes a Tribal Council, or in the case of some California tribes, consortium courts. It is not limited to the traditional state definition of a "court." So long as the tribe has designated some adjudicatory body to preside over such cases, a transfer is appropriate.

The presumption is that upon petition by the tribe, either parent, or the Indian custodian, the state court shall transfer the proceeding to the tribal court unless either parent objects or there is good cause not to transfer.⁷⁵

1. If the Tribe Has Exclusive Jurisdiction, Transfer is Mandatory

If the tribal court has "exclusive jurisdiction," transfer of the case is required. This means that the state court must order transfer of a case to the tribal court of the child's tribe if:

- The Indian child is a ward of the tribal court;
- or
- The Indian child is domiciled or resides within a reservation of an Indian tribe that has exclusive jurisdiction over Indian child custody proceedings under 25 U.S.C. §§ 1911 & 1918.⁷⁶

⁷¹ Cal. Rules of Court, rule 5.550.

⁷² For example, if the child has been removed from parental custody, the court must not grant continuances that would cause the dispositional hearing to be completed more than six months after the detention hearing. (Welf. & Inst. Code § 352(b).)

⁷³ 25 U.S.C. § 1921.

⁷⁴ 25 U.S.C. § 1903(12).

⁷⁵ 25 U.S.C. § 1911(b); Welf. & Inst. Code § 305.5(b); Cal. Rules of Court, rule 5.483(b).

2. If the Tribe Does Not Have Exclusive Jurisdiction, Transfer is Presumed

If the parent, the Indian custodian, or the child's tribe requests the case be transferred to the tribal court the court must order transfer absent good cause not to transfer.⁷⁷

3. Purpose/Background

While a state court may have valid initial jurisdiction over an Indian child custody proceeding, the ICWA expresses a preference for tribal jurisdiction in matters concerning custody of the tribe's children.⁷⁸

4. When?

A petition to transfer jurisdiction may be submitted at any time during the proceeding. However, under current state law, the petition may be denied for good cause if not timely made.⁷⁹ It should, however, be noted that the BIA Guidelines remove the timing of a transfer petition from the list of good cause exceptions to deny the transfer.⁸⁰

5. Hearing on Objection

When a party objects to a transfer to tribal court, the court must hold an evidentiary hearing on the transfer and make its findings on the record.⁸¹

6. What is "Good Cause" to Deny the Request to Transfer?

a. Mandatory Denial

The existence of one or more of the following circumstances constitutes mandatory good cause to deny a request to transfer:

- One or both of the child's parents objects to the transfer in open court or in an admissible writing for the record;
- The child's tribe does not have a "tribal court" or any other administrative body; or
- The tribal court of the child's tribe declines the transfer.⁸²

⁷⁶ Cal. Rules of Court, rule 5.483(a).

⁷⁷ Cal. Rules of Court, rule 5.483(b).

⁷⁸ *In re M.M.* (2007) 154 Cal.App.4th 897, 907; *In re Jack C., III* (2011) 192 Cal.App.4th 967, 982.

⁷⁹ Welf. & Inst. Code § 305.5(c); Cal. Rules of Court, rule 5.483(d); *In re Robert T.* (1988) 200 Cal.App.3d 657 (good cause found to deny request to transfer jurisdiction from state court due to 16-month delay between permanency planning hearing and tribe's first expression of intent to intervene; note that this was a pre-SB 678 case, and tribe argued that waiting to see results of reunification was appropriate).

⁸⁰ BIA Guidelines § C.3.

⁸¹ Cal. Rules of Court, rule 5.483(d)(3).

⁸² Cal. Rules of Court, rule 5.483(d)(1); Welf. & Inst. Code § 305.5.

b. Discretionary Denial

The ICWA does not define good cause to deny transfer petitions. However, state law lists reasons that may constitute good cause to deny a transfer petition.

One or more of the following circumstances may constitute discretionary good cause to deny a request to transfer:

- Hardship caused by transferring the case to tribal court.

In other words, if the court can find that the evidence necessary to decide the case cannot be presented in the tribal court without undue hardship to the parties or the witnesses and the tribal court is unable to mitigate the hardship.

The court will look at whether it can:

- make arrangements to receive and consider the evidence or testimony by use of remote communication, or
 - hear the evidence or testimony at a location convenient to the parties or witnesses, or
 - use other means permitted in the tribal court's rules of evidence or discovery
- Unreasonable delay in requesting transfer.

The court will consider whether the proceeding was at an advanced stage when the request to transfer was received,

and

the petitioner did not make the request within a reasonable time after receiving notice of the proceeding.

⇒ **PRACTICE POINTER:** *It is not by itself considered unreasonable delay to wait until reunification efforts have failed and reunification services have been terminated before filing a request to transfer.*

⇒ **PRACTICE POINTER:** *It must be emphasized that the rules expressly condition this denial only where notice was properly provided, since transfer cannot be requested timely if notice was not properly received.*

- The Indian child is over 12 years of age and objects to the transfer;

or

- The parents of a child over five years of age are not available and the child has had little or no contact with his or her tribe or members of the child's tribe.⁸³

Not Evidence of Good Cause

The court may not consider socioeconomic conditions or the perceived adequacy of tribal social services, tribal probation, or the tribal judicial systems in its determination that good cause exists to deny a request to transfer to tribal court.⁸⁴

Burden

The burden of establishing good cause is on the party opposing the transfer.⁸⁵ However, the ICWA does not set forth an express standard of proof by which good cause must be shown.⁸⁶

⇒ **PRACTICE POINTER:** *Since the jurisdictional scheme of the ICWA in California is “concurrent but presumptively tribal”⁸⁷ there is a strong argument that the appropriate standard of proof is at least clear and convincing evidence, rather than merely a preponderance of the evidence.*

The choice between state court and tribal court is not a choice between two equally-preferred venues. The ICWA favors tribal court jurisdiction.

A preponderance of the evidence may be enough to justify a permissive transfer from one county to another in a non-ICWA case,⁸⁸ but that same standard should not be held sufficient to overcome a specific statutory preference for tribal court jurisdiction.

⇒ **PRACTICE POINTER:** *Deciding whether to transfer a case to tribal court is a tactical and significant decision that should be made early in the process.*

7. What Will You See if Transfer is Granted?

Advisement

The court must advise the parties orally and in writing that any appeal to the order for transfer to a tribal court must be made before the transfer to tribal jurisdiction is finalized.⁸⁹ This

⁸³ Cal. Rules of Court, rule 5.483(d)(2).

⁸⁴ Cal. Rules of Court, rule 5.483(e).

⁸⁵ Welf. & Inst. Code § 305.5(c)(4); see Cal. Rules of Court, rule 5.483(f)(1).

⁸⁶ 25 U.S.C. § 1911(b).

⁸⁷ *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30; *In re M.A.* (2006) 137 Cal.App.4th 567; *In re M.M.* (2007) 154 Cal.App.4th 897, 907; *In re Jack C., III* (2011) 192 Cal.App.4th 967, 982.

⁸⁸ See, e.g., Welf. & Inst. Code § 375; *In re Jon N.* (1986) 179 Cal.App.3d 156, 158 (fn. 2). It should be noted that in such permissive transfer situations, the best interest of the child must be considered when determining which county is appropriate; *In re J.C.* (2002) 104 Cal.App.4th 984, 992. In an ICWA case, the best interest of an Indian child is protected by application of the ICWA, including the provisions for transfer to tribal court. (25 U.S.C. §§ 1901(5), 1902).

⁸⁹ Cal. Rules of Court, rule 5.483(h).

section exists to ensure that the objecting party does not inadvertently lose the right to appeal a transfer order.⁹⁰

Tribal Court Has to Accept for the Transfer to Finalize

If a state court receives a transfer petition, it should give the tribal court written notice stating how much time the tribal court has to respond, providing a minimum of 20 days from receipt of the notices.⁹¹ The state court must receive proof of acceptance by the tribal court before dismissing the proceeding or terminating jurisdiction.⁹²

A tribal court may decline to accept a transfer of jurisdiction.⁹³ However, since tribal courts must take affirmative action to decline a transfer of jurisdiction, state courts should not assume that a tribal court has declined jurisdiction merely because the tribal court has not responded.

The BIA Guidelines recommend that tribal courts hear any arguments from the parties on whether the tribal court should accept or decline the transfer of jurisdiction.⁹⁴

Order for the Transfer

If the state court transfers the proceeding, it should make an order transferring the physical custody of the child to a designated tribal court representative.⁹⁵ The court must issue its final order on the Order on Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction (form ICWA-060).

The order must include:

- All of the findings, orders, or modifications of orders that have been made in the case;
- The name and address of the tribe to which jurisdiction is being transferred;
- Directions for the social services agency to release the child's case file to the tribe having jurisdiction;
- Directions that all papers contained in the child's case file must be transferred to the tribal court; and
- Directions that a copy of the transfer order and the findings of fact must be maintained by the transferring court.⁹⁶

⁹⁰ Cal. Rules of Court, rule 5.483(h) – Advisory Comment.

⁹¹ BIA Guidelines § C.4(a).

⁹² Welf. & Inst. Code § 305.5(b).

⁹³ 25 U.S.C. § 1911(b); Welf. & Inst. Code § 305.5(c)(1)(C); Cal. Rules of Court, rule 5.483(d)(1)(C).

⁹⁴ See, BIA Guidelines § C.2(b).

⁹⁵ Cal. Rules of Court, rule 5.483(h).

⁹⁶ Cal. Rules of Court, rule 5.483(h).

VI. GOING TO COURT

A. Hearings Generally – Location

1. Where the Case is Held

The proper court will be the juvenile court in the county where:

- (1) The child resides;⁹⁷

or
- (2) The child is found;

or
- (3) The acts take place or the circumstances exist that are alleged to bring the child within the provisions of Welfare and Institutions Code §§ 300 (dependency), 601, or 602 (delinquency).⁹⁸

2. Transfer Between Counties

The court may not transfer the case unless it determines that the transfer will protect or further the child's best interest.⁹⁹

On receipt and filing of a certified copy of a transfer order, the receiving court must accept jurisdiction of the case. The receiving court may not reject the case. The clerk of the receiving court must immediately place the transferred case on the court calendar for a transfer-in hearing:

- Within 2 court days after the transfer-out order and documents are received if the child has been transported in custody and remains detained;

or
- Within 10 court days after the transfer-out order and documents are received if the child is not detained in custody. There can be no requests for additional time for the transfer-in hearing.
 - The clerk must immediately notice the child and the parent or guardian, orally or in writing, of the time and place of the transfer-in hearing.

⁹⁷ The word “resides” is defined as the residence of the parent with whom a child maintains his or her place of abode or the residence of any individual who has been appointed legal guardian or the individual who has been given the care or custody by a court of competent jurisdiction. (Welf. & Inst. Code § 17.1(a).)

⁹⁸ Cal. Rules of Court, rule 5.510; Welf. & Inst. Code §§ 327, 651.

⁹⁹ Cal. Rules of Court, rule 5.610(e).

- The hearing regarding the transfer-in of the case is then held.
- The receiving court must notify the transferring court on receipt and filing of the certified copies of the transfer order and complete case file.¹⁰⁰

3. Where Do I Go in the Courthouse?

The courtroom where the case will be located will differ considerably depending on what county and courthouse you are located at. Each courthouse has a different practice in how and where juvenile matters are held.

Importantly, you must remember that juvenile cases (both dependency and delinquency) are strictly confidential. Consequently, courts are limited on what identifying information they can post or publish. This means that although you might be used to finding the case information posted online or in the courthouse for other types of cases (eviction, divorce, etc.), you will not find such information publicly given for juvenile matters. For this reason, it is very important that you become familiar with the practices and customs of the courthouse where the case is.

For example, some common court practices are:

- Courthouse
 - Depending on the size of the jurisdiction and the population that it serves, juvenile dependency matters might be held at one or more courthouse locations.
 - Still, generally you can expect that the case will remain in the same courthouse throughout the proceedings.
- Judge
 - Depending on the size of the jurisdiction – e.g., the number of judges and cases – dependency cases may be assigned to one or more judges. However, the judge that is assigned the case is usually the judge or among the set of judges that handles all of the juvenile dependency cases. For that reason, one can expect that they are well-versed in dependency matters.
 - The case might also be heard by a referee.¹⁰¹

4. You Must Wait in the Hallway Until the Case is Called

Due to confidentiality requirements, courts do not allow persons into the courtroom unless it is their matter being heard. The very limited exception is that you might notice some judges will allow members of the panel of court-appointed attorneys to remain in the courtroom even on cases they are not involved in.

¹⁰⁰ See, Cal. Rules of Court, rule 5.612(a); Welf. & Inst. Code §§ 378, 753.

¹⁰¹ Note, the procedural requirements for referee orders can be located at Welf. & Inst. Code § 249.

⇒ **PRACTICE POINTER:** *This custom is based largely on the trust the court has for its court-appointed panel of attorneys to maintain confidentiality as officers of the court. However, despite this practice, technically the rule of confidentiality still applies. So in the event that the facts of the case call for compliance with the confidentiality restrictions, you can express concerns and a request that those allowed in the courtroom are only those parties and attorneys involved in your matter.*

Depending on the custom of that courthouse, the court may announce (“call”) the case in one of several ways:

- Some courts have a sheet where the cases are listed by the family’s initials and case number. Sometimes the case list sheet is with the bailiff; sometimes it is posted on the hall of the courthouse.
- Some courts will have participants check in with the courtroom bailiff to inform the court of your arrival. Sometimes there is a sign-in sheet where each party indicates their arrival outside the courtroom door.
- Usually, the courtroom bailiff will let the parties know when to enter the courtroom for that case.

⇒ **PRACTICE POINTER:** *Make sure to find out beforehand what is the practice of the courtroom that you will be appearing in. You should be able to get this information by calling the court clerk’s office. Unless the tribe has intervened into the case, the clerk will not want to provide you with case-specific information. But the clerk can give you information regarding the general practices of the court. When in doubt, feel free to approach one of the attorneys in the hallway of the courtroom. You will usually find the group of dependency attorneys sitting just outside the courtroom as they wait between matters.*

5. Where Do I Go in the Courtroom?

With few exceptions, courtrooms are usually divided into the following key sections:

a. “Audience”/Public Section

- This is generally the area when you enter the courtroom doors. There is a row of chairs.
- At the end of the row of chairs is usually a wall or divider separating it from the party table.
- Who sits in this section will depend on the custom of that courtroom. Each courtroom has its own habits. It is important to observe and learn the practices of your courtroom.

- Generally, you will find that this section might have family members, support persons, caretakers, and/or the child’s Court Appointed Special Advocate (CASA). When in doubt, this is usually a section where it is safe for you to assume that you could sit in.

b. Table Where the Parties Sit

- Immediately in front of the “audience” section is usually one or more tables.
- This is where the parties and their attorneys sit.
- Usually at least the parents and their attorneys sit at this table.
- Depending on the courtroom’s customs, the child(ren)’s attorney(s) will sit at that table or in the jury section.

c. Jury Box or Section

- Usually the social services agency’s social worker and their attorney (a.k.a. “county counsel”) will sit in this section.
- It depends on the courtroom’s customs, but sometimes you will find that the CASA and the ICWA advocates sit in this section.

d. Judge’s Bench and Staff Area

- Usually in front of the parties’ table is the judge’s bench.
- In the areas surrounding the judge, you will see:
 - Court clerk
 - This person assists the judge with all the administrative functions and court paperwork and hearing minutes.
 - Court reporter
 - This person is typing a record of all statements made during the court proceedings.
 - Bailiff
 - The bailiff’s primary duty is to keep the order and safety of the court.
 - This not only involves the calling of the case, but also to assist in delivering documents to the judge.

⇒ **PRACTICE POINTER:** *With rare and limited exception, you should never approach the judge directly, unless you are specifically requested to do so. In the event you need to hand something to the court, you should direct it to the bailiff who will either take it himself/herself or direct you to give it to the court clerk.*

B. What is Happening in the Courtroom?

Although it is called a “custody proceeding,” the judge is focused on the protection and care of the child. As part of its role to protect and care for the child, the judge will make orders regarding the custody and care of the child, including visitation and each parent’s custody. In fact, as long as the child is a “dependent” of the court, the juvenile court has the exclusive authority to make custody orders. This means that while the dependency case is pending, neither parent can go into the family court to ask for any order affecting the child’s custody – this includes visitation and/or restraining orders.¹⁰²

However, unlike in family court, the focus is not on resolving disputes between the parents. Rather, the orders will be based on the protection and best interests of the child. This means, for example, that the juvenile court judge will not hear any family law dispute (including child support and/or divorce matters). The court is also not bound by the same rules in family court, including the presumption of joint or equal custody of the child. Unless the judge has announced otherwise, you should assume that you are “on the record” when you are in the courtroom. To be “on the record” means that the court reporter is creating a record (i.e., a transcript) of everything that is said in the courtroom by everyone.

⇒ **PRACTICE POINTER:** *Depending on the custom of that courtroom, the case might already be put “on the record” by the time you are entering the courtroom. For that reason, you should refrain from any extra discussion outside the subject of the hearing. A transcript is being prepared of everything said in the courtroom. This means that anything you say, even if sitting in the audience section, is subject to being overheard. Be careful not to say anything that you would not want someone to read about later.*

1. Everyone Will Take Their Seat

⇒ **PRACTICE POINTER:** *Everything you do can be seen by the judge and will leave an impression. So refrain from cell phone use or any other distracting behavior.*

2. The Parties Will Announce Their Appearance

This depends on the custom of the courtroom, but generally, the parties will go around the room and announce their appearance for the record. When it gets to your turn, state your name, position, and tribe name clearly and loud enough for the court reporter to hear you.

¹⁰² Cal. Rules of Court, rule 5.530(a); See, Welf. & Inst. Code § 304; See also, Welf. & Inst. Code §§ 231.5, 302.

⇒ **PRACTICE POINTER:** *Unless the court reporter is familiar with you, it is helpful to have a business card or write out a note with this information. You can offer it to the bailiff to provide to the court reporter and court clerk. If you are unable to do so, it is helpful to spell out your name when you announce yourself.*

3. The Judge Usually Then Proceeds with the Issue for That Hearing

Each party (through their attorney) will take their turn telling the judge what they request and the reasons why. Depending on the issue and type of hearing, the parties might support their position with witnesses and/or documentary evidence. The parties might instead just present oral arguments. (See Section VII, Hearings, regarding the specific factual and legal issues involved at each hearing.)

⇒ **PRACTICE POINTER:** *The hearing can often seem like it is covering a lot of issues in a very quick period of time. It is important that you understand beforehand what issues the hearing will involve and whether the parties will be expected to present evidence. At each stage of a case, the judge must make a decision on a different legal question. To know what legal questions the judge must decide for the hearing you will attend, see Section VII, Hearings.*

C. Who is Allowed to Be in the Courtroom?

The public is not allowed.¹⁰³ The following persons are entitled to be present:

- The child or non-minor dependent;
- All parents (alleged and presumed), de facto parents, Indian custodians, and guardians of the child;
- Counsel representing the child or the parent, de facto parent, guardian, adult relative, or Indian custodian or the tribe of an Indian child;
- The probation officer or social worker;
- The prosecuting attorney;
- Any CASA volunteer;
- **In an ICWA case, a non-attorney representative of the Indian child's tribe;**
- Any known sibling of the child who is the subject of the hearing if that sibling either is the subject of a dependency proceeding or has been adjudged to be a dependent child of the juvenile court;
- The court clerk;

¹⁰³ Cal. Rules of Court, rule 5.530(e).

- The official court reporter;
 - At the court's discretion, a bailiff;
- and
- Any other person entitled to notice of the hearing under Welfare and Institutions Code §§ 290.1 and 290.2. This might include the district attorney or the probate department of the superior court that appointed the guardian (where the child is a ward of a guardian appointed pursuant to the Probate Code.)¹⁰⁴

Other persons are not entitled to be present, but the court has discretion to allow those whom the court deems to have a direct and legitimate interest in the case or in the work of the court.

⇒ **PRACTICE POINTER:** *If you have concern over a person's presence in the courtroom, you can tactfully ask the court for the basis for why the person has "direct" and "legitimate" interest in the case.*

D. Who is Allowed to Participate in the Hearing?

1. Referee

Some counties have the dependency proceedings heard by a "referee," rather than a judge. A referee may be appointed to perform subordinate judicial duties assigned by the presiding judge of the juvenile court. By party stipulation, the referee may act as a temporary judge with the same powers as a judge of the juvenile court.¹⁰⁵

Proceedings heard by a referee (not acting as a temporary judge) are conducted in the same manner as proceedings heard by a judge, except that the child and parent (or guardian) have the right to request that the referee's decision be reviewed by a juvenile court judge.¹⁰⁶ Rehearings of matters heard before a referee must be conducted de novo (anew) before a judge of the juvenile court.

An application for a rehearing of a proceeding before a referee not acting as a temporary judge may be made by the child, parent, or guardian at any time before the expiration of 10 calendar days after service of a copy of the order and findings.

The application may be directed to all, or any specified part of, the findings or orders. The application must contain a brief statement of the factual or legal reasons for requesting the rehearing.¹⁰⁷

¹⁰⁴ Cal. Rules of Court, rule 5.530(b); Welf. & Inst. Code §§ 290.1, 290.2.

¹⁰⁵ Cal. Const., art VI, sec.22; Cal. Rules of Court, rule 5.536.

¹⁰⁶ Cal. Rules of Court, rule 5.538.

¹⁰⁷ Welf. & Inst. Code § 252-254; See, Cal. Rules of Court, rule 5.542.

The referee's orders become effective immediately unless the orders are vacated or modified on rehearing by order of a juvenile court judge.

⇒ **PRACTICE POINTER:** *Exception* – The following orders made by a referee do not become effective unless expressly approved by a juvenile court judge within two court days: (1) Any order removing a child from the physical custody of the person legally entitled to custody; or (2) Any order the presiding judge of the juvenile court requires to be expressly approved.¹⁰⁸

If there has not been an application for rehearing or if the juvenile court judge has not ordered a rehearing on the judge's own motion, an order of a referee becomes final 10 calendar days after service of a copy of the order and findings under California Rules of Court, rule 5.538.¹⁰⁹

2. Parent

Parents have the right to attend all hearings, except no notice is required for a parent whose parental rights have been terminated.

a. Rights of Incarcerated Parents to Notice

To facilitate timely and effective notice of hearings to incarcerated parents, the social services agency must use the prisoner location system developed by the Department of Corrections and Rehabilitation.

For the jurisdictional hearing, a dispositional hearing, or a Welfare and Institutions Code § 366.26 permanency planning hearing, the notice must: (1) inform the incarcerated parent of his or her right to be physically present at the hearing and (2) explain how the parent may secure his or her presence or, if he or she waives the right to be physically present, appearance and participation.

For a review hearing, or any other hearing in a dependency proceeding, the notice must inform the incarcerated parent of his or her options for requesting physical or telephonic appearance at and participation in the hearing.

b. Rights of Incarcerated Parents – Right to Attend

For the jurisdictional hearing, dispositional hearing, or a Welfare and Institutions Code § 366.26 permanency planning hearing, the court must order that the incarcerated parent be temporarily removed from the institution where he or she is confined and be produced for the hearing.

If the incarcerated parent is not physically present at these hearings, the hearing cannot be held unless the court has received:

- A knowing waiver of the right to be physically present signed by the parent;

¹⁰⁸ Welf. & Inst. Code § 249.

¹⁰⁹ Cal. Rules of Court, rule 5.540.

or

- A declaration, signed by the person in charge of the institution in which the parent is incarcerated, or his or her designated representative, stating that the parent has indicated, by express statement or action, an intent not to be physically present at the hearing.

Even if the incarcerated parent waived his/her right to be physically present or who has not been ordered to appear before the court, the court may still, at the request of any party or on its own motion, permit an incarcerated parent to appear and participate in a hearing by telephone or videoconference consistent with the requirements of California Rules of Court rule 5.531.

⇒ **PRACTICE POINTER:** *If no technology complying with California Rules of Court, rule 5.531 is available, the court may proceed without his or her appearance and participation.*

For all other hearings, including but not limited to a detention hearing or a review hearing, the court may order that the incarcerated parent be temporarily removed from the institution where he or she is confined and be produced before the court for the hearing.¹¹⁰

3. Child

A child who is the subject of a juvenile court hearing is entitled to be present at all hearings. The court must allow the child, if the child so desires, to address the court and participate in the hearing.

If the child is 10 years of age or older and he or she is not present at the hearing, the court must determine whether the child was properly notified of his or her right to attend the hearing and ask why the child is not present at the hearing and whether the child was given an opportunity to attend.

If the court finds that the child was not properly notified or that the child wished to be present and was not given an opportunity to be present, the court must continue the hearing to allow the child to attend unless the court finds that it is in the best interest of the child not to continue the hearing.

⇒ **PRACTICE POINTER:** *Any such continuance must be only for that period of time necessary to provide notice and secure the presence of the child. This means that rather than cause further delay in the proceedings, it might be appropriate to ask the court to make accommodations in the court schedule, including to reschedule other matters, so that this matter can be heard without delay.¹¹¹*

¹¹⁰ Welf. & Inst. Code § 290.1-294; Cal. Rules of Court, rule 5.530.

¹¹¹ Welf. & Inst. Code § 349; Cal. Rules of Court, rule 5.534(p).

4. “Social Services Agency”

A “social services agency” is a private state-licensed agency or public agency and their employees, agents or officials involved in and/or seeking to place a child in a child custody proceeding.¹¹²

In the juvenile dependency system, the terms “social services agency,” “department,” “child welfare department,” “department of child and family services,” and “child welfare services” are used interchangeably. Note: This Guide uses the term “social services agency.”

Usually the county’s office of the “county counsel” is the attorney for the social services agency.¹¹³ However, in rare occasions (usually in smaller or more rural counties) the social services agency might be represented by a private attorney or law firm.

5. Parents’ Attorney

A “parent” is any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom.

“Parent” does not include an unwed father where paternity has not been acknowledged or established.¹¹⁴ This means that the parent must have “presumed” (legal) parent status before certain legal protections are given. (See Section XIV, Parentage). This rule is important as the person’s status (or lack thereof) can affect placement options, right to reunification and/or related services. So it is critical that the determination of parentage be made as soon as possible.

⇒ **PRACTICE POINTER:** *Although an “alleged” parent is not a “party” to the proceedings and is limited in their participation, it is still helpful for an attorney to assist the “alleged” parent to achieve “presumed” status. The court can and should make an inquiry of the mother and other persons with knowledge regarding parentage. (See Section XIV, Parentage.) To qualify as a parent, an unwed father need only take reasonable steps to establish or acknowledge paternity. Such steps may include acknowledging paternity in the action at issue or establishing paternity through genetic testing.*¹¹⁵

The court can appoint the parent an attorney if it is determined that the parent is indigent and unable to pay for an attorney.¹¹⁶ A parent could also hire their own attorney.

Any attorney that appears in a dependency proceeding must have completed the certification to practice in dependency law.¹¹⁷ Under certain circumstances, a court’s finding(s) and order(s) made as the result of a parent’s “ineffective assistance of counsel” might be subject to being reversed.

¹¹² BIA Guidelines § A.2

¹¹³ Welf. & Inst. Code § 318.5.

¹¹⁴ 25 U.S.C. § 1903(9).

¹¹⁵ BIA Guidelines § A.2.

¹¹⁶ Welf. & Inst. Code § 317(a).

¹¹⁷ See, Welf. & Inst. Code § 317.5 requiring “competent” counsel; See also, Cal. Rules of Court, rule 5.660(d) for definition of “competent” counsel.

Technically, the parent has a right to waive the right to being represented by an attorney. This is a similar right to that right of persons in a criminal hearing. In order for a parent to waive the right to an attorney, the court would have to find that the parent's waiver was "knowing" and "intelligent."¹¹⁸

6. Child's Representation

a. Attorney

The child has a right to a court-appointed attorney.¹¹⁹

i. Dual Role of Representing the Child's "Best Interest" and "Stated Wishes"

A "primary responsibility of counsel appointed to represent a child. . . shall be to advocate for the protection, safety, and physical and emotional well-being of the child."¹²⁰ "Counsel shall be charged in general with the representation of the child's interests."¹²¹

This means that the attorney must do their due diligence to determine what is the child's "best interest" and also "stated wishes."

- "If the child is four years of age or older, counsel shall interview the child to determine the child's wishes and assess the child's well-being, and shall advise the court of the child's wishes. Counsel shall not advocate for the return of the child if, to the best of his or her knowledge, return of the child conflicts with the protection and safety of the child."¹²²
- "Counsel shall investigate the interests of the child beyond the scope of the juvenile proceeding, and report to the court other interests of the child that may need to be protected by the institution of other administrative or judicial proceedings. Counsel representing a child in a dependency proceeding is not required to assume the responsibilities of a social worker, and is not expected to provide nonlegal services to the child."¹²³

ii. One Attorney for Multiple Children in the Case

The court may appoint a single attorney to represent a group of siblings involved in the same dependency proceeding.¹²⁴ In fact, judicial decisions¹²⁵ have held that the court should initially appoint a single attorney to represent all siblings in a dependency matter unless there is

¹¹⁸ Welf. & Inst. Code § 317(b).

¹¹⁹ Welf. & Inst. Code § 317(c)(1).

¹²⁰ Welf. & Inst. Code § 317(c)(2).

¹²¹ Welf. & Inst. Code § 317(e)(1).

¹²² Welf. & Inst. Code § 317(e)(2).

¹²³ Welf. & Inst. Code § 317(e)(2).

¹²⁴ Cal. Rules of Court, rule 5.660(c)(A).

¹²⁵ See, for example, *In re Celine R.* (2003) 31 Cal.4th 45, 58.

an actual conflict of interest or a reasonable likelihood that an actual conflict of interest will arise.

An attorney must decline to represent one or more siblings in a dependency proceeding, and the court must appoint a separate attorney to represent the sibling or siblings, if, at the outset of the proceedings:

- An actual conflict of interest exists among those siblings; or
- Circumstances specific to the case present a reasonable likelihood that an actual conflict of interest will arise.¹²⁶

After the initial appointment, the court should relieve an attorney from representation of multiple siblings only if an actual conflict of interest arises.¹²⁷ It is not necessary for an attorney to withdraw from representing some or all of the siblings if there is merely a reasonable likelihood that an actual conflict of interest will develop.¹²⁸

What is a “conflict of interest”? The following circumstances, standing alone, do not necessarily demonstrate an actual conflict of interest or a reasonable likelihood that an actual conflict of interest will arise:

- The siblings are of different ages;
- The siblings have different parents;
- There is a purely theoretical or abstract conflict of interest among the siblings;
- Some of the siblings appear more likely than others to be adoptable; or
- The siblings may have different permanent plans.¹²⁹

An actual conflict of interest is also not shown where, standing alone, the following circumstances exist:

- The siblings express conflicting desires or objectives, but the issues involved are not material to the case;

or

- The siblings give different or contradictory accounts of the events, but the issues involved are not material to the case.¹³⁰

¹²⁶ Cal. Rules of Court, rule 5.660(c)(1)(B).

¹²⁷ See, *In re Celine R.* (2003) 31 Cal.4th 45, 58.

¹²⁸ Cal. Rules of Court, rule 5.660(c)(2)(C).

¹²⁹ Cal. Rules of Court, rule 5.660(c)(1)(C).

¹³⁰ Cal. Rules of Court, rule 5.660(c)(2)(B).

⇒ **PRACTICE POINTER:** *Any concern that arises in the attorney’s ability to represent multiple children (e.g., inability to fully and fairly represent each) should promptly be brought to the court’s attention.*

Attorneys have a duty to use their best judgment in analyzing whether, under the particular facts of the case, it is necessary to decline appointment or request withdrawal from appointment due to a purported conflict of interest.

If an attorney believes that an actual conflict of interest exists at appointment or develops during representation, the attorney must take any action necessary to ensure that the siblings’ interests are not prejudiced, including:

- Notifying the juvenile court of the existence of an actual conflict of interest among some or all of the siblings;
- and
- Requesting to withdraw from representation of some or all of the siblings.¹³¹

If the court determines that an actual conflict of interest exists, the court must relieve an attorney from representation of some or all of the siblings.¹³²

However, even after an actual conflict of interest arises, the court might allow the attorney to continue to represent one or more siblings whose interests do not conflict. This can only occur if:

- The attorney has successfully withdrawn from the representation of all siblings whose interests conflict with those of the sibling or siblings the attorney continues to represent;
- The attorney has exchanged no confidential information with any sibling whose interest conflicts with those of the sibling or siblings the attorney continues to represent; and
- Continued representation of one or more siblings would not otherwise prejudice the other sibling or siblings.¹³³

b. “CAPTA-GAL” (“Child Abuse Prevention and Treatment Act Guardian Ad Litem”)

Each child gets an appointed CAPTA guardian ad litem. Most often the child’s attorney is also appointed as the CAPTA-GAL. The court might instead appoint the Court Appointed

¹³¹ Cal. Rules of Court, rule 5.660(c)(2)(D).

¹³² Cal. Rules of Court, rule 5.660(c)(2)(E).

¹³³ Cal. Rules of Court, rule 5.660(c)(2)(F).

Special Advocate (CASA) as the CAPTA-GAL.¹³⁴ Even if the child’s attorney is appointed as the CAPTA-GAL, it is important to remember that it is a different and separate status. The responsibilities owed to the child as the child’s attorney differ from that as the CAPTA-GAL.

This status applies exclusively to dependency proceedings. It is distinct from the definitions of “guardian ad litem” in all other juvenile, civil, and criminal proceedings. The general duties and responsibilities of a CAPTA-GAL are:

- To obtain firsthand a clear understanding of the situation and needs of the child; and
- To make recommendations to the court concerning the best interest of the child.

This might involve advising the court of information regarding an interest or right of the child to be protected or pursued in other judicial or administrative forums (e.g., special education matter, personal injury claim, probate matter, etc.). If the CAPTA-GAL learns of any such interest or right, s/he must notify the court immediately and seek instructions from the court as to any appropriate procedures to follow.¹³⁵

7. De Facto Parent

A “de facto parent” is defined as a person who has been found by the court to have assumed, on a day-to-day basis, the role of parent, fulfilling both the child's physical and psychological needs for care and affection, and who has assumed that role for a substantial period.¹³⁶

On a sufficient showing, the court may recognize the child's present or previous custodian as a de facto parent and grant him or her standing to participate as a party in the dispositional hearing and any subsequent hearing that child’s status is at issue.

The de facto parent may:

- Be present at the hearing;
- Be represented by retained counsel or, at the discretion of the court, by appointed counsel; and
- Present evidence.¹³⁷

⇒ **PRACTICE POINTER:** *A de facto parent is not legally the same as a parent, and therefore, does not have the same procedural and substantive rights in the proceedings.*

¹³⁴ See, Cal. Rules of Court, rule 5.660(b)(3), (f); Welf. & Inst. Code § 326.5.

¹³⁵ Cal. Rules of Court, rules 5.660(g), 5.662(b), (d).

¹³⁶ Cal. Rules of Ct. rule 5.502(10).

¹³⁷ Cal. Rules of Court, rule 5.534(e).

8. CASA (“Court Appointed Special Advocate”)

A CASA is an adult person who volunteers to be a support person for the child during the proceedings. The person is not the child’s attorney. The person is not a party to the case.

However, because of the person’s relationship with the child, the court may receive information from the CASA (whether verbally or in a written report) about the best interests of the child.¹³⁸ The CASA is to:

- Provide independent, factual information to the court.
- Represent the best interests of the child involved, and consider the best interests of the family.
- At the request of the judge, monitor cases to ensure that the court’s orders have been fulfilled.¹³⁹

Even though the CASA often speaks with caregivers, educators, and others involved in a child’s life, it is important to remember that the CASA is still bound by confidentiality restrictions.¹⁴⁰ Specifically, all otherwise confidential records and information acquired or reviewed by a CASA during the course of his or her duties shall remain confidential and shall be disclosed only pursuant to a court order.¹⁴¹

The competence requirements for the CASA do not include the ICWA specifically. Instead, the CASA is expected have some training in:

- Dynamics of child abuse and neglect;
- Court structure, including juvenile court laws,;
- Social services systems;
- Child development;
- Cultural competency and sensitivity relating to, and best practices for, providing adequate care to lesbian, gay, bisexual, and transgender youth;
- Interviewing techniques;
- Report writing;
- Roles and responsibilities of a CASA;
- Rules of evidence and discovery procedures; and
- Problems associated with verifying reports.¹⁴²

¹³⁸ Cal. Rules of Court, rule 5.655(b)(1).

¹³⁹ Welf. & Inst. Code § 102.

¹⁴⁰ Welf. & Inst. Code § 102.

¹⁴¹ Welf. & Inst. Code § 102.

¹⁴² Welf. & Inst. Code § 102(d).

⇒ **PRACTICE POINTER:** *While many CASAs may have familiarity with the ICWA, you may also find that a CASA on a particular case has no knowledge of the requirements for cases involving an Indian child.*

⇒ **PRACTICE POINTER:** *These rules do not apply to limit the right of a CASA from a CASA program operated by the child's Indian tribe or Indian organization.¹⁴³*

9. “Indian Custodian”

An “Indian custodian” is defined 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.¹⁴⁴

An Indian custodian has the same procedural rights as that of the parent in a juvenile dependency action. (e.g., right to appointed counsel, right to participate, etc.)

10. Caregiver

The child's caregiver has a right to notice.¹⁴⁵ The social services agency will provide notice of the hearing 15-30 days before the hearing.¹⁴⁶

At least 10 days before the hearing, the caregiver will receive a summary of the social worker's recommendation for the hearing.¹⁴⁷ The caregiver can also get the medication application summary and medication order.¹⁴⁸

The current caregiver has the right to be heard in the dispositional hearing (if it is serving as a permanency hearing under Welfare and Institutions Code § 361.5(f)), statutory review hearings, permanency hearings, and Welfare and Institutions Code § 366.26 hearings, including the right to submit information to the court before the hearing.

- The caregiver can submit written information about the child using the Caregiver Information Form (form JV-290) or in the form of a letter to the court.
- The notice sent to the caregiver must provide the JV-290 form, explain this right, and explain how to file the form.¹⁴⁹
- For this reason, the caregiver has a right to receive from the social worker a summary of his or her recommendations for disposition, and any recommendations for change in custody or status.¹⁵⁰

¹⁴³ Welf. & Inst. Code § 110.

¹⁴⁴ 25 U.S.C. § 1903(6).

¹⁴⁵ Cal. Rules of Court, rule 5.534(n).

¹⁴⁶ Welf. & Inst. Code § 293(a)(6).

¹⁴⁷ Welf. & Inst. Code § 366.21(c); See also Cal. Rules of Court, rules 5.534(n), 5.708(c) (all review hearings); See also, Cal. Rules of Court, rules 5.710(b), 5.715(b), 5.720(b), 5.722(b).

¹⁴⁸ Welf. & Inst. Code § 369.5(c)(2).

¹⁴⁹ Welf. & Inst. Code §§ 366.21(c).

11. Relatives

Relatives are entitled to receive notice.¹⁵¹ On a sufficient showing, the court may permit a relative of the child or youth to:

- Be present at the hearing; and
- Address the court.¹⁵²

Relatives of the child have the right to submit written information about the child to the court at any time. Written information about the child may be submitted to the court using Relative Information (form JV-285) or in a letter to the court.¹⁵³

12. Regarding Court-Appointed Attorneys for All Parties

a. Experience and Education

Every party in a dependency proceeding who is represented by an attorney is entitled to competent counsel.¹⁵⁴

“Competent counsel” is defined as an attorney who is a member in good standing of the State Bar of California, who has participated in training in the law of juvenile dependency, and who demonstrates adequate forensic skills, knowledge and comprehension of the statutory scheme, the purposes and goals of dependency proceedings, the specific statutes, rules of court, and cases relevant to such proceedings, and procedures for filing petitions for extraordinary writs. The court may require evidence of the competency of any attorney appointed to represent a party in a dependency proceeding.

Only those attorneys who have completed a minimum of eight hours of training or education in the area of juvenile dependency, or who have sufficient recent experience in dependency proceedings in which the attorney has demonstrated competency, may be appointed to represent parties. Attorney training must include:

- An overview of dependency law and related statutes and cases;
- Information on child development, child abuse and neglect, substance abuse, domestic violence, family reunification and preservation, and reasonable efforts; and
- For any attorney appointed to represent a child, instruction on cultural competency and sensitivity relating to, and best practices for, providing adequate care to lesbian, gay, bisexual, and transgender youth in out-of-home placement.

¹⁵⁰ Cal. Rules of Court, rule 5.534(n).

¹⁵¹ Cal. Rules of Court, rule 5.534(f).

¹⁵² Cal. Rules of Court, rule 5.534(f).

¹⁵³ Cal. Rules of Court, rule 5.534(f).

¹⁵⁴ Welf. & Inst. Code § 317.5(a), (b).

- Within every three years, attorneys must complete at least eight hours of continuing education related to dependency proceedings.¹⁵⁵

b. Standards of Representation

Attorneys or their agents are expected to:

- Meet regularly with clients.
 - This requirement includes even where the client is a child, regardless of the child's age or the child's ability to communicate verbally.
 - The attorney for the child must have sufficient contact with the child to establish and maintain an adequate and professional attorney-client relationship.
 - This does not mean that the attorney for the child is required to assume the responsibilities of a social worker and is not expected to perform services for the child that are unrelated to the child's legal representation.
- Contact social workers and other professionals associated with the client's case.
- Work with other counsel and the court to resolve disputed aspects of a case without a contested hearing.
- Adhere to the mandated timelines.

¹⁵⁵ Cal. Rules of Court, rule 5.660(d).

VII. HEARINGS

A. Initial (“Detention”) Hearing

If, after receiving a referral, the investigation by a social worker (and sometimes law enforcement) results in a recommendation that a child be at least temporarily removed (“detained”), that recommendation must go before a judge on an expedited basis in the form of a petition.

The purpose of the initial hearing is to determine whether there is a “prima facie” showing (a showing on the face of the petition) that the child may be described under by one or more of the provisions of Welfare and Institutions Code § 300(a)-(j). The petition does not have to allege wrongdoing by both parents – it is proper even if it contains allegations against only one parent.

If there is enough evidence to show that the child may be so described, then the court will set the matter for a jurisdiction hearing where the court will decide if the child is described under one of those subsections.

⇒ **PRACTICE POINTER:** *The amount of evidence necessary at detention is less than is required at jurisdiction, usually because it is an emergency situation. It is important to know that the social services agency is not deciding, even though it may seem that way, and they are usually approaching a court before all the parties have met or consulted with legal counsel. Often it is even before a tribe has been notified about a case and given a chance to determine if a child is a member or eligible for membership.*

1. Commencing the Proceedings

The court must advise any self-represented child, parent, or guardian of the right to be represented by counsel and, if applicable, of the right to have counsel appointed.¹⁵⁶

The parties may be represented by privately retained attorneys, but most often will be appointed an attorney from a panel of attorneys who regularly practice dependency law. While a parent can waive their right to an attorney, this is highly inadvisable. Juvenile law is a specialized area, and the attorneys that appear in these actions are required to have certain minimum certifications.

The court will also advise the parties regarding:

- The contents of the petition;
- The nature of, and possible consequences of, juvenile court proceedings;
- If the child has been taken into custody, the reasons for the initial detention and the purpose and scope of the detention hearing; and,

¹⁵⁶ Cal. Rules of Court, rule 5.534(g); Welf. & Inst. Code § 317.

- that if the petition is sustained and the child is declared a dependent of the court and removed from the custody of the parent or guardian, the court-ordered reunification services must be considered to have been offered or provided on the date the petition is sustained or 60 days after the child's initial removal, whichever is earlier.¹⁵⁷

⇒ **PRACTICE POINTER:** *As a matter of practice, courts will often ask a parent if they waive a reading of the procedural rights. Since the appointed attorneys are familiar with those rights, as a matter of course, usually waive the reading of the rights on behalf of the parent. The advocate should be familiar with those rights, however.*

2. Preliminary Inquiries by the Court

At the initial hearing on a petition, the court must make an inquiry as to the identity and address of any and all presumed or alleged parents of the child. (See Section XIV, Parentage.)

The court will also ask that each parent submit a Parental Notification of Indian Status (ICWA-020) form. The form is intended to elicit information to determine whether the child is or may be an Indian child under the ICWA. (See Section IV, Notice and Inquiry.)

⇒ **PRACTICE POINTER:** *The tribe has vital information regarding the possibility that the ICWA applies. You might wish to ask for an opportunity to address the court on this issue. Also make sure to provide the names and basis for your assertion that the child is an Indian child. For the process and discussion regarding Intervention, see Section V, Preliminary Considerations.*

3. Presentation of Evidence

The court must read, consider, and reference any reports submitted by the social worker and any relevant evidence submitted by any party or counsel.¹⁵⁸ The court must examine the child's parent, guardian, or other person having knowledge relevant to the issue of detention and must receive any relevant evidence that the petitioner, the child, a parent, a guardian, or counsel for a party wishes to present.¹⁵⁹

The child, the parent or guardian, and the tribe have the right to right to confront and cross-examine:

- Any person the court examines, as described above,
- and
- The preparer of a police report, probation or social worker report, or other document submitted to the court.

¹⁵⁷ Cal. Rules of Court, rule 5.668(a); See Welf. & Inst. Code §§ 316, 316.2.

¹⁵⁸ Cal. Rules of Court, rule 5.674(b); Welf. & Inst. Code § 319.

¹⁵⁹ Cal. Rules of Court, rule 5.674(c); Welf. & Inst. Code § 319(a).

If the child, parent or guardian, or tribe asserts the right to cross-examine preparers of documents submitted for court consideration, the court may not consider any such report or document unless the preparer is made available for cross-examination.¹⁶⁰

4. Findings and Orders

No child may be ordered detained by the court unless the court finds that a prima facie showing has been made that the child is described by Welfare and Institutions Code § 300, that continuance in the home of the parent or guardian is contrary to the child's welfare, and that one or more of the grounds for detention exists.¹⁶¹ Otherwise, the court must order the child released from custody.

Whether the child is released or detained at the hearing, the court must determine whether reasonable efforts have been made to prevent or eliminate the need for removal and must make one of the following findings:

- Reasonable efforts have been made; or
- Reasonable efforts have not been made.

The court must not order the child detained unless the court, after inquiry regarding available services, finds that there are no reasonable services that would prevent or eliminate the need to detain the child or that would permit the child to return home.

If the court orders the child detained, the court must:

- Determine if there are services that would permit the child to return home pending the next hearing and state the factual bases for the decision to detain the child;
- Specify why the initial removal was necessary; and
- If appropriate, order services to be provided as soon as possible to reunify the child and the child's family.¹⁶²

5. Regarding Interim Placement

If the child cannot be returned to the physical custody of his or her parent or guardian, the court shall determine if there is a relative who is able and willing to care for the child.¹⁶³ (See Section VIII, Placement Preferences.)

¹⁶⁰ Cal. Rules of Court, rule 5.674(d); Welf. & Inst. Code § 311, 319.

¹⁶¹ Cal. Rules of Court, rule 5.676(a); Welf. & Inst. Code § 319.

¹⁶² Cal. Rules of Court, rule 5.678(c); see, Welf. & Inst. Code § 319(d).

¹⁶³ Welf. & Inst. Code § 319(b)(3), (f); Cal. Rules of Court, rule 5.674(b)(1).

⇒ **PRACTICE POINTER:** *It should be noted that at this stage, the child is only “detained” and not legally “removed.” As such, courts may not treat it as a “placement” because the court has not yet taken jurisdiction, and therefore the hierarchy of placements does not yet apply. Advocates need to be careful about agreeing to detention-placements, or allowing detention-placements to last for so long that they become a de facto placement.*

6. Setting the Jurisdiction Hearing

If child is not detained, the jurisdiction hearing must be held within 30 days of the date the petition is filed. If child is detained, the jurisdiction hearing must be set within 15 court days of the order of detention.¹⁶⁴

⇒ **PRACTICE POINTER:** *Some counties set the disposition hearing for the same date as the jurisdiction hearing. In the interest of judicial economy (i.e., to be efficient) the court will often ask that the evidence for both hearings be presented at the same time. It is important to remember, though, that even if the court schedules the hearings for the same date, the court still must make the findings and orders for each hearing separately. The jurisdiction findings and orders must be made before the court makes the disposition findings and orders.*

¹⁶⁴ Cal. Rules of Court, rule 5.670(f); see Welf. & Inst. Code § 334.

B. Jurisdiction Hearing

Not all courts have authority over all topics and all persons. “Jurisdiction” means, generally, whether a particular court has the authority to hear a particular case and to exercise power over particular persons involved in that case.

Juvenile courts are courts of limited jurisdiction, meaning that until the court “takes jurisdiction” it has only a very narrow power to act, and even after taking jurisdiction, it has only the powers set forth in dependency and delinquency law, and can only exercise those powers over persons who the law brings within its jurisdiction.

So, the court arguably should not make any orders until jurisdiction has been established. However, because of the emergency nature of most dependency cases, juvenile courts have been granted the power to make limited temporary orders, pending the jurisdictional hearing—including temporary detention (not necessarily a temporary placement), ordering physical and psychological evaluations, stay-away orders, visitation, and others.

In determining whether a court has jurisdiction, the court will ask three questions:

1. Does the court have authority over the subject matter of the case?

The juvenile court has the authority to hear matters relating to the abuse and neglect of children.

2. Does the court have authority over the persons?

The court will have authority over the persons if the child is found to be described by one or more of the provisions of Welfare and Institutions Code § 300(a)-(j).

3. Has it been sufficiently proved that the child does in fact fall under one of the recognized grounds for jurisdiction?

The court must find by a preponderance of evidence that the child is described by one or more of the provisions of Welfare and Institutions Code § 300(a)-(j). (“Preponderance of evidence” means more likely than not – in other words, more than 50% likely.)

1. What Happens at the Hearing?

At the beginning of the jurisdiction (“juris”) hearing, the petition must be read to those present. If requested by the child or the parent, guardian, or adult relative, the court must explain the meaning and contents of the petition and the nature of the hearing, its procedures, and the possible consequences.¹⁶⁵

The court must ensure that the parent, guardian, or adult relative, and the child (if old enough to understand) have been informed of their right to be represented by counsel. If counsel

¹⁶⁵ Cal. Rules of Court, rule 5.682(a); See, Welf. & Inst. Code § 353.

has not already been appointed, the court must do so if the person wants an attorney and is unable to afford counsel. The court will then determine if there is a preponderance of evidence that the child is at risk of abuse or neglect as defined by Welfare and Institutions Code § 300.

Jurisdiction can be taken based on the conduct of one parent. A juvenile court may assume jurisdiction over a child regardless of whether the child was in the physical custody of both parents or was in the sole legal or physical custody of only one parent at the time that the events or conditions occurred that brought the child within the jurisdiction of the court.¹⁶⁶

If jurisdiction is taken, the parents are advised of their rights. The court must then inquire whether the parent or guardian intends to admit or deny the allegations of the petition. After accepting an admission, plea of no contest, or submission, the court must proceed to a disposition hearing.¹⁶⁷ However, if the parent or guardian denies the allegations of the petition, the court must hold a contested hearing and determine whether the allegations in the petition are true.¹⁶⁸

2. Admissibility of Evidence

Any legally admissible evidence that is relevant to the circumstances or acts that are alleged to bring the child within the jurisdiction of the juvenile court and may be received in evidence.¹⁶⁹ With limited exception,¹⁷⁰ the admission and exclusion of evidence must be in accordance with the Evidence Code as it applies to civil cases.¹⁷¹

Even though it has hearsay evidence contained in it, the social worker's report is admissible and is sufficient to support a finding that the child is described by Welfare and Institutions § 300. The report must have been provided to all parties and their counsel within a reasonable time before the hearing. Also, the preparer of the report must be made available for cross-examination on the request of any party. The social worker who prepared the report does not have to be at the hearing, and can be on standby, as long as the preparer can be present in court within a reasonable time.¹⁷²

⇒ **PRACTICE POINTER:** *It is not uncommon for tribes to be omitted from service of various court reports. If the jurisdiction report is not provided to the parties or their counsel within a reasonable time before the hearing, the court may grant a reasonable continuance if requested by a party. The continuance cannot exceed 10 days.*¹⁷³

The court may also hear testimony from parents, guardians, social workers, or other witnesses. Testimony by a parent, guardian, or other person who has the care or custody of the

¹⁶⁶ Welf. & Inst. Code § 302(a).

¹⁶⁷ Cal. Rules of Court, rule 5.682(g).

¹⁶⁸ Cal. Rules of Court, rule 5.684(a); Welf and Inst C. § 355.

¹⁶⁹ Welf. & Inst. Code § 354.

¹⁷⁰ Welf. & Inst. Code § 355.1(c), (d), (e).

¹⁷¹ See, Cal. Rules of Court, rule 5.684(b); Welf. & Inst. Code §§ 355, 355.1.

¹⁷² Cal. Rules of Court, rule 5.684(c); Welf. & Inst. Code § 354.

¹⁷³ Welf. & Inst. Code § 354(b)(3).

child made the subject of a proceeding under Welfare and Institutions Code § 300 shall not be admissible as evidence in any other action or proceeding.¹⁷⁴

3. Determining Whether the Petition is Sustained

After hearing the evidence, the court shall make a finding as to whether or not the child is described by Welfare and Institutions Code § 300 and the specific subdivision(s) under which the petition was brought.¹⁷⁵

If the court determines by a preponderance of the evidence that the allegations of the petition are true, the court will “take jurisdiction.” Once it does so, the court has exclusive jurisdiction of all issues regarding custody and visitation of the child, and all issues and actions regarding the parentage of the child.¹⁷⁶

If the court finds that the allegations of the petition are not true, it shall order that the petition be dismissed and the child be returned to the physical custody of the parent or guardian immediately. Absent agreement with the parent otherwise, the child must be returned no more than two working days following the date of that finding.¹⁷⁷

After finding that a child is described by Welfare and Institutions § 300, the court then must decide the proper disposition to be made of the child.¹⁷⁸ In other words, by taking jurisdiction over the child, the court has the power and authority to tell the family what to do. At the disposition hearing, the court will make orders telling the family what they are to do to alleviate the abuse or neglect on which the court’s jurisdiction is based.

¹⁷⁴ Welf. & Inst. Code § 355.1(f).

¹⁷⁵ Welf. & Inst. Code § 355.1.

¹⁷⁶ Cal. Rules of Court, rule 5.510; Welf. & Inst. Code §§ 302(c), 304.

¹⁷⁷ Cal. Rules of Court, rule 5.684(h); Welf. & Inst. Code § 355.1.

¹⁷⁸ Welf. & Inst. Code § 358.

C. Disposition Hearing

1. Advice for the Tribal Advocate

The disposition (“dispo”) hearing is the most important hearing from an ICWA advocate’s standpoint. It is the hearing at which critical findings and orders are made. It affects the entire tenor of a case, because it decides whether a case plan is going to occur with the children remaining home, or being removed from their parents or guardian, or if services to the parents or guardian will be bypassed altogether.

Disposition starts, but should not end, with a social services report submitted by the social services agency. The study will always include a “case plan” at the end, which is a roadmap for how the parents get their children returned, or, if a non-removal case, how they may eventually stop being supervised by the social services agency. A disposition report must include a discussion of all matters relevant to disposition and a recommendation.¹⁷⁹ It is critical to understand that the social services agency does not make disposition decisions. The social services agency makes recommendations, but only the court can make a final decision.

In making recommendations, the social worker should first interview parents and all potential caretakers, including relatives. Where a tribe is involved the social worker should identify tribal placements, or placements that would qualify for the ICWA placement preferences (see Section VIII, Placement Preferences). In addition, the social worker should identify any obstacles or conditions in the home that need to be corrected so that the proposed plan can be successful. The report must also identify, specifically, the efforts that have been made by the social services agency to prevent removal of a child, and how the plan will achieve reunification. For Indian children, an additional requirement is that the social services agency must show how they have made “active efforts” to prevent the breakup of the Indian family. (See Section III(B), Pre-Removal, on Active Efforts and Section VII(C)(6)(F)(v), Hearings, on Disposition Hearings).

The social worker does not prepare his or her report in a vacuum, and must consider any documentation or statements submitted by the parents, family or tribe. A tribal representative or advocate should be allowed to submit evidence and documentation for the report, including suggested services, placements, or culturally appropriate referrals. A tribe may even go so far as to submit an alternate case plan.

An advocate should scrutinize both the plan and the narrative supporting the recommended disposition, because many times it is boilerplate, meaning that it is the same as many other plans, and not tailored to the specific needs of a particular Indian family. If the case plan is something that is always uniform, then the child, parents, and tribe are denied the opportunity to have a culturally-customized plan -- one that is more likely to succeed. It is the advocate’s role to make sure the court knows of any shortcomings in a plan, and even where a parent’s attorney does not object, the advocate can, and should, if a plan is deficient.

¹⁷⁹ Cal. Rules of Court, rule 5.690.

A key fork in the disposition road is whether to recommend “family maintenance” (FM) or “family reunification” (FR). Just because a child has been removed does not mean that the court must keep the Indian family apart. The law allows a removal only so long as the conditions necessitating removal continue to exist. When those conditions no longer exist, the court should return a child to his or her home.

Advocates should be mindful of the distinction between “findings” and “orders.” Findings are conclusions made by the judge about facts or the law that support an order. Some findings are required to make an order, and if missing or incomplete, then the order may be deficient. Many judges will read their findings aloud in open court. The process is long, and seemingly dull, and it is easy for parents or advocates to not pay attention—particularly if the advocate does not have a copy of the proposed findings and orders to read along. Virtually every dispositional report, and case plan, will include suggested findings and orders at the end of the report. If no objections are made, the court will usually adopt what has been submitted by the social worker. This is a key spot for an advocate to act.

One finding that is not always made is whether a child is an Indian child. An ICWA advocate should review any proposed findings and orders requested by the social services agency to be certain that the court is making a finding that there is an Indian child, and that the ICWA applies. Once that is done, then all of the requirements which flow from the ICWA will apply.

2. Purpose and Background

Once the court has found that the child is abused or neglected as defined in one or more of the provisions of Welfare and Institutions § 300(a)-(j), the court must then proceed to a disposition hearing.¹⁸⁰

The purpose of the disposition hearing is to make such orders to ensure the safety, protection, and well-being of the child.¹⁸¹

The court will consider a full array of social and health services to help the child and family and to prevent re-abuse of children.¹⁸² The focus must also be on the preservation of the family to the extent possible.¹⁸³

3. Timing

If the child remains in the home, the disposition hearing cannot occur later than 30 days after finding jurisdiction.¹⁸⁴

If the child is out of the home, the disposition hearing must occur no later than 10 court days after finding jurisdiction. No continuance can be granted that would cause the disposition

¹⁸⁰ Cal. Rules of Court, rule 5.684(g); Welf. & Inst. Code § 356.

¹⁸¹ See, Welf. & Inst. Code § 300.2.

¹⁸² See, Welf. & Inst. Code § 300.2.

¹⁸³ See, Welf. & Inst. Code § 300.2.

¹⁸⁴ Welf. & Inst. Code § 358; Cal. Rules of Court, rule 5.686.

hearing to be completed more than 60 days after the detention hearing. A limited exception to this is if the court finds “exceptional circumstances,” but even then, in no event may the disposition hearing be continued more than six months after the detention hearing.¹⁸⁵

⇒ **PRACTICE POINTER:** *Until the child is ordered “removed” at disposition, the child is only “detained” from the parent. The difference in terminology is important. Arguably, the “detention” is not a “foster placement” or “removal” to trigger the ICWA. Still, because of the lack of clarity on this issue, the danger remains that the longer the child remains at a home, the harder it becomes to support a move. It can become a de facto placement. For this reason, a lay advocate must stay aware of the court deadlines.*

4. Evidence

a. Social Study Report

At least 48 hours before the disposition hearing is set to begin, the social worker must provide the social study report.¹⁸⁶ A continuance within statutory time limits must be granted on the request of a party who has not been furnished a copy of the social study in accordance with this rule.¹⁸⁷

The court must receive the social services agency’s report into evidence. The report shall include the individual child’s case plan developed pursuant to Welfare and Institutions Code § 16501.1.¹⁸⁸

The social worker report is to include, but is not limited to:

- Whether the social services agency or social worker has considered either of the following:
 - Child protective services as a possible solution to the problems at hand, and has offered these services to qualified parents if appropriate under the circumstances;
 - or
 - Whether the child can be returned to the custody of his or her parent who is enrolled in a certified substance abuse treatment facility that allows a dependent child to reside with his or her parent.¹⁸⁹
- If the social services agency alleges that the parent should not be provided reunification services (i.e. be “bypassed”), the report must explain why the parent

¹⁸⁵ See Welf. & Inst. Code § 352; Cal. Rules of Court, rule 5.550(a).

¹⁸⁶ Cal. Rules of Court, rule 5.690(a)(2).

¹⁸⁷ Cal. Rules of Court, rule 5.690(a)(2).

¹⁸⁸ Welf. & Inst. Code § 358; Cal. Rules of Court, rule 5.690(b).

¹⁸⁹ Welf. & Inst. Code § 358.1(a); Cal. Rules of Court, rule 5.690(a)(1)(B)(i).

should be denied services pursuant to Welfare and Institutions Code § 361.5(b).¹⁹⁰ (See Section III(B), Pre-Removal, on Active Efforts, and Section VII(C)(6)(F)(v), Hearings, Disposition Hearings, on Active Efforts).

- What plan is being recommended to return the child to his or her parent(s) and for achieving legal permanence for the child if efforts to reunify fail.¹⁹¹
- Whether the best interests of the child will be served by granting reasonable visitation rights with the child to his or her grandparents.¹⁹²
- Whether the child has siblings under the court's jurisdiction, and, if any siblings exist, all of the following:
 - The nature of the relationship between the child and his or her siblings.
 - The appropriateness of developing or maintaining the sibling relationships.
 - If the siblings are not placed together in the same home, why the siblings are not placed together and what efforts are being made to place the siblings together, or why those efforts are not appropriate.
 - If the siblings are not placed together, all of the following:
 - The frequency and nature of the visits between the siblings.
 - If there are visits between the siblings, whether the visits are supervised or unsupervised. If the visits are supervised, a discussion of the reasons why the visits are supervised, and what needs to be accomplished in order for the visits to be unsupervised.
 - If there are visits between the siblings, a description of the location and length of the visits.
 - Any plan to increase visitation between the siblings.
 - The impact of the sibling relationships on the child's placement and planning for legal permanence.

The factual discussion shall include a discussion of indicators of the nature of the child's sibling relationships, including, but not limited to, whether the siblings were raised together in the same home, whether the siblings have shared significant common experiences or have existing close and strong bonds, whether either sibling expresses a desire to visit or live with his or her sibling, as

¹⁹⁰ Cal. Rules of Ct. 5.690(a)(1)(D).

¹⁹¹ Welf. & Inst. Code § 358.1(b) Cal. Rules of Court, rule 5.690(a)(1)(B)(ii).

¹⁹² Welf. & Inst. Code § 358.1(c).

applicable, and whether ongoing contact is in the child's best emotional interest.¹⁹³

- Whether the right of the parent or guardian to make educational decisions for the child should be limited. If the study or evaluation makes that recommendation, it shall identify whether there is a responsible adult available to make educational decisions for the child.¹⁹⁴ (See Section XII, Advocating for the Child.)
- A discussion regarding the efforts to comply with the social services agency's family finding obligations.

To help the court determine whether the social worker exercised due diligence in conducting the required investigation to identify, locate, and notify the child's relatives, the report can include whether the social worker did any of the following:

- Asked the child, in an age-appropriate manner and consistent with the child's best interest, about his or her relatives;
 - Obtained information regarding the location of the child's relatives;
 - Reviewed the child's case file for any information regarding relatives;
 - Telephoned, e-mailed, or visited all identified relatives;
 - Asked located relatives for the names and locations of other relatives;
 - Used internet search tools to locate relatives identified as supports; or
 - Developed tools, including a genogram, family tree, family map, or other diagram of family relationships, to help the child or parents to identify relatives.¹⁹⁵
- Family Finding Determination:
 - The number of relatives identified and the relationship of each to the child;
 - The number and relationship of those relatives who were located and notified;
 - The number and relationship of those relatives who are interested in ongoing contact with the child; and
 - The number and relationship of those relatives who are interested in providing placement for the child.¹⁹⁶

¹⁹³ Welf. & Inst. Code § 358.1(d).

¹⁹⁴ Welf. & Inst. Code § 358.1(e).

¹⁹⁵ Cal. Rules of Court, rule 5.695(g).

- The appropriateness of any relative placement.¹⁹⁷
- Whether the caregiver desires, and is willing, to provide legal permanency for the child if reunification is unsuccessful.¹⁹⁸
- For an Indian child, in consultation with the Indian child's tribe, whether tribal customary adoption is an appropriate permanent plan for the child if reunification is unsuccessful.¹⁹⁹

b. Other Relevant and Material Evidence

The court must receive into evidence any other relevant and material evidence as may be offered, including, but not limited to, the willingness of the caregiver to provide legal permanence for the child if reunification is unsuccessful.²⁰⁰

⇒ **PRACTICE POINTER:** *This can include evidence from the tribe, if, for example, the tribe disagrees with something in the social study report, such as the services being provided, a proposed placement, etc., or wishes to provide the court a basis on which to take some other requested action.*

5. Case Plan

Whenever social services are provided, the social worker must prepare a case plan. A written case plan must be completed and filed with the court by the date of disposition or within 60 calendar days of either the initial removal or of the in-person response (where the child was not taken into custody), whichever occurs first.²⁰¹

When considering the appropriateness of the case plan, the court must determine whether the social worker solicited and integrated into the case plan the input of the child, the child's family, and the child's identified Indian tribe. This includes determining whether, in consultation with the child's tribe, tribal customary adoption is an appropriate permanent plan for the child if reunification is unsuccessful.

If the court finds that the social worker did not solicit and integrate into the case plan the input of the child, the child's family, the child's identified Indian tribe, and other interested parties, the court must order that the social worker solicit and integrate into the case plan their input. The court will not make this order if it determines that the non-solicited entity was unable, unavailable, or unwilling to participate.²⁰²

¹⁹⁶ Cal. Rules of Court, rules 5.637, 5.690(a)(1)(C).

¹⁹⁷ Welf. & Inst. Code § 358.1(h).

¹⁹⁸ Welf. & Inst. Code § 358.1(i).

¹⁹⁹ Welf. & Inst. Code § 358.1(j).

²⁰⁰ Welf. & Inst. Code § 358; Cal. Rules of Court, rule 5.690(b).

²⁰¹ Cal. Rules of Court, rule 5.690(c)(1).

²⁰² Cal. Rules of Court, rule 5.690(c)(2)(A), (B).

⇒ **PRACTICE POINTER:** *The social services agency often requests that the court make a finding that a party was “unable, unavailable, or unwilling to participate” in the development of the case plan. Any such request should be scrutinized. The case plan is very important for resolving the issues that brought the matter before the court. So input is critical. And any request to be relieved from that obligation should be supported by facts to support that claim.*

6. Options for Disposition

a. Voluntary Relinquishment

A parent may voluntarily relinquish the child to the state Department of Social Services, to a county adoption agency, or to a licensed private adoption agency if the department, county adoption agency, or licensed private adoption agency is willing to accept the relinquishment.²⁰³

b. Terminate Jurisdiction

The court can dismiss the petition with specific reasons stated in the minutes.²⁰⁴

c. Not Declare the Child a “Dependent of the Court” and Place the Child Under a Program of Supervision

The court can place the child under a program of supervision and order that services be provided.²⁰⁵ Consent would be needed from the child’s parents or guardian.²⁰⁶

If a program of supervision is undertaken, the social worker must attempt to ameliorate the conditions that brought the child within the court’s jurisdiction by providing or arranging for all appropriate child welfare services to keep the family together.²⁰⁷

The services can be provided only within the time periods specified in Welfare and Institutions Code §§ 16506 and 16507.3.²⁰⁸

If the family subsequently is unable or unwilling to cooperate with the services being provided, the social worker may file a petition with the juvenile court pursuant to Welfare and Institutions Code § 332. The petition will be based on the fact that a petition finding abuse or neglect was previously sustained and that disposition providing a program of supervision was ineffective in ameliorating the situation requiring the child welfare services.²⁰⁹

²⁰³ For further discussion, see Welf. & Inst. Code § 361(b).

²⁰⁴ Cal. Rules of Court, rule 5.695(a)(1).

²⁰⁵ Cal. Rules of Court, rule 5.695(a)(2); Welf. & Inst. Code § 360(b).

²⁰⁶ Welf. & Inst. Code § 301.

²⁰⁷ Welf. & Inst. Code §§ 301, 360(b).

²⁰⁸ Welf. & Inst. Code §§ 301, 360(b).

²⁰⁹ Welf. & Inst. Code §§ 301, 360(c).

d. Appoint a Legal Guardian for the Child

The court may appoint a legal guardian for the child if:

- The parent has advised the court that the parent does not wish to receive family maintenance services or family reunification services;
 - The parent has executed and submitted Waiver of Reunification Services (JV-195) form;
 - The court finds that the parent, and the child if of sufficient age and comprehension, knowingly and voluntarily waive their rights to reunification services and agree to the appointment of the legal guardian;
- and
- The court finds that the appointment of the legal guardian is in the best interest of the child.²¹⁰

The court can appoint a legal guardian without declaring the child a dependent of the court.²¹¹ If the court instead declares the child to be a dependent of the court, then a 6-month review hearing must be set.²¹²

e. Declare Dependency and Permit the Child to Remain at Home with an Order of Family Maintenance Services to be Provided

The court can order that the child be declared a dependent of the court, but permit the child to remain at home with an order that the family be provided services to maintain the child in the home.²¹³ The child's status must be reviewed no later 6 months after the date of the original disposition order.²¹⁴

f. Remove and Place with Non-Custodial Parent

If the court decides to order the removal of the child from the child's home, the court shall first determine whether the child has a parent who wants custody of the child, and who the child was not residing with at the time that the events or conditions arose that brought the child within dependency jurisdiction.²¹⁵

If that parent requests custody, the court must place the child with the parent unless it finds that placement would be detrimental to the safety, protection, or physical or emotional

²¹⁰ Cal. Rules of Court, rule 5.695(a)(3), (b)(1); Welf. & Inst. Code § 360(a).

²¹¹ Cal. Rules of Court, rule 5.695(a)(3), (b)(2).

²¹² Cal. Rules of Court, rule 5.695(a)(4).

²¹³ Cal. Rules of Court, rule 5.695(a)(5).

²¹⁴ Cal. Rules of Court, rule 5.695(j).

²¹⁵ Welf. & Inst. Code § 361.2(a).

well-being of the child. The fact that the parent is enrolled in a certified substance abuse treatment facility that allows a dependent child to reside with his or her parent shall not be, for that reason alone, prima facie evidence that placement with that parent would be detrimental.²¹⁶

If the court places the child with that parent it may do either of the following:

Option No. 1 - Terminate jurisdiction

The court can order that the parent become legal and physical custodian of the child and terminate jurisdiction.²¹⁷

When the juvenile court terminates its jurisdiction has two options:

- The court can refer the matter to the family court to issue orders determining the custody of, or visitation with, the child.
- or
- The court may issue orders itself determining the custody of, or visitation with, the child. The court can also issue protective orders. (See Section XIII, Restraining and Protective Orders.) When making the orders, the juvenile court is not bound by the same presumptions in family court regarding joint custody. The court must look to the best interest of the child.

Visitation can be granted to the non-custodial parent.²¹⁸ However, the court can issue conditions in the orders, including, for example, a requirement that the parent continue substance abuse services.

Any custody order made by the juvenile court is final and can only be modified or terminated on a showing of (1) a significant change of circumstances and (2) a showing that the modification or termination is in the best interests of the child.²¹⁹

Option No. 2 – Offer Services and Set a Review Hearing

The court can also order custody to a noncustodial parent with services to one or both parents pursuant to Welfare and Institutions Code § 361.2(b)(3).²²⁰

The court may order that reunification services be provided to the parent or guardian from whom the child was removed. The court can decide instead to order services be provided

²¹⁶ Welf. & Inst. Code § 361.2(a).

²¹⁷ Cal. Rules of Court, rule 5.695(a)(A); Welf. & Inst. Code § 361.2(b)(1).

²¹⁸ Welf. & Inst. Code 361.2(b).

²¹⁹ Welf. & Inst. Code § 309.

²²⁰ Cal. Rules of Court, rules 5.620(c)(3), 5.695(a)(B).

only to the parent who is assuming physical custody of the child. The court can order both parents comply with services.²²¹

The court can decide to order a supervised placement and home visit prior to deciding between the options.

Before placing the child with the non-custodial parent, the court must consider any concerns that have been raised by the child's current caregiver regarding the parent.²²² For this reason, the court might decide to order that the previously non-custodial parent assume custody subject to the jurisdiction of the juvenile court and require that a home visit be conducted within three months.²²³ After the social worker conducts the home visit and files his or her report with the court, the court may then take action under one of the above two options (i.e., close the case with custody orders or maintain jurisdiction with services).²²⁴

g. Declare Dependency and Remove from the Parent or Guardian

“Removal” means a court order that takes away the care, custody, and control of a dependent child or ward from the child's parent or guardian, and places the care, custody, and control of the child with the court, under the supervision of the agency responsible for the administration of child welfare or the county probation department.²²⁵

A child shall not be removed from his or her parents or guardian who the child resided with at the time the petition was initiated, unless the juvenile court makes certain findings. For an Indian child, the court must find by clear and convincing evidence that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.²²⁶

⇒ **PRACTICE POINTER:** *Evidence that shows only the existence of community or family poverty or isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child.*²²⁷

For an Indian child, the court must also find that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.²²⁸

²²¹ Welf. & Inst. Code § 361.2(b)(3).

²²² Welf. & Inst. Code § 361.2 (b)(2).

²²³ Welf. & Inst. Code § 361.2(b)(2).

²²⁴ Welf. & Inst. Code § 361.2(b)(2).

²²⁵ Cal. Rules of Court, rule 5.502.

²²⁶ Welf. & Inst. Code § 361(c)(6); 25 U.S.C. § 1912(e).

²²⁷ BIA Guidelines § D.3.

²²⁸ Welf. & Inst. Code §§ 361(d), 361.7(a); 25 U.S.C. § 1912(d).

i. Qualified Expert Witness

Under California law an “expert,” who is offering “expert testimony,” must be on a topic that is beyond common experience, so that the expert’s opinion will assist the court.²²⁹ An “expert” can testify on matters based on his or her special knowledge, skill, training or experience,²³⁰ and can rely on hearsay or another person’s statements in forming an opinion.²³¹

Federal law does not establish precise qualifications for an expert witness in an ICWA case. The BIA Guidelines provide that:

- “A qualified expert witness should have specific knowledge of the Indian tribe's culture and customs.

Persons with the following characteristics, in descending order, are presumed to meet the requirements for a qualified expert witness:

- (1) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices;
- (2) A member of another tribe who is recognized to be a qualified expert witness by the Indian child's tribe based on their knowledge of the delivery of child and family services to Indians and the Indian child's tribe;
- (3) A layperson who is recognized by the Indian child's tribe as having substantial experience in the delivery of child and family services to Indians, and knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe;

and

- (4) A professional person having substantial education and experience in the area of his or her specialty who can demonstrate knowledge of the prevailing social and cultural standards and childrearing practices within the Indian child's tribe.”²³²

The Welfare and Institutions Code also provides a list of persons who “most likely” meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:

- (1) “A member of the Indian child’s tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices;

²²⁹ See Evid. Code § 801(a).

²³⁰ Evid. Code § 801(b).

²³¹ Evid. Code § 804.

²³² BIA Guidelines § D.4.

- (2) Any expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child’s tribe;

and

- (3) A professional person having substantial education and experience in the area of his or her specialty.²³³

The expert should not be an employee of the social services agency recommending foster care placement or termination of parental rights.²³⁴

⇒ **PRACTICE POINTER:** *Many counties will ask the advocate to produce the expert witness, but that is not only improper, it is tactically questionable. The county has the burden of proving its case, and it is not the tribe’s or the advocate’s role to assist—even though sometimes the tribe and the county are aligned in their interests. That does not mean that a tribe or a lay advocate cannot obtain and produce their own expert witness who has a different opinion than the county expert. In fact, once the advocate knows what the county’s expert believes, if it is contrary to the tribe’s position, it may be necessary to counteract that opinion with another expert.*

⇒ **PRACTICE POINTER:** *A county might also suggest that the advocate serve as the expert. Although it may be tempting for the advocate to do so (either for the county or to contradict the county), it is highly ill-advised, because the advocate has converted themselves into a witness. Normally a lawyer cannot act as both attorney and witness, and the same reasoning would apply to an advocate. Mixing the roles and double-dipping not only invites disqualification, it deprives the tribe of full representation. Later in the case, the expert witness could be called again, and if the tribe’s position has changed, the expert will, in effect become an adverse witness to its own client.*

ii. What Does the Expert Testify About?

Both state and federal law require the expert witness to testify on the question of whether “continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.”²³⁵ In California, though, the court is also to consider evidence concerning the prevailing social and cultural standards of the Indian child’s tribe, including that tribe’s family organization and child-rearing practices.²³⁶

⇒ **PRACTICE POINTER:** *You may want to remind the court and parties that there are compelling reasons for the court to ensure that an expert witness does possess knowledge or experience specific to the Indian child’s tribe.*

²³³ Welf. & Inst. Code § 224.6 (c).

²³⁴ Welf. & Inst. Code § 224.6(6).

²³⁵ 25 U.S.C. § 1912(e), (f); Welf. & Inst. Code §§ 224.6(b)(1), 361.7(c).

²³⁶ Welf. & Inst. Code § 224.6(b)(2).

Primarily, both state and federal law are premised on the protection of the Indian child's connection to his or her tribal community and culture.²³⁷ For that reason, an expert witness with knowledge or experience specific to the Indian child's tribe also allows the court to satisfy the requirement of considering evidence of "the prevailing social and cultural standards of the Indian child's tribe, including that tribe's family organization and childrearing practices," which is also mandatory.²³⁸

iii. How Many Experts?

The exact wording of the ICWA calls for "qualified expert witnesses," implying testimony by multiple expert witnesses. However, California courts have held that only one expert witness is required under federal rules of construction.

iv. Method of Qualified Expert Witness Testimony

"Testimony" means live testimony. The court may accept a declaration or affidavit from the expert witness in place of testimony if the parties stipulate in writing.²³⁹ A stipulation is a binding agreement for a particular case on a particular issue. For that reason, the court must be satisfied that the party made a knowing, intelligent, and voluntary stipulation.

⇒ **PRACTICE POINTER:** *The social services agency may request that the expert be permitted to appear telephonically for a number of reasons. Sometimes it is because the personal appearance by an expert witness is difficult. Often it will likely be due to cost. Any waiver of the expert's personal appearance must be carefully thought out. Without the personal appearance, it may be difficult to effectively cross-examine the expert on the expert's findings and the basis thereof.*

Because the rules require a stipulation must be knowingly and intelligently made, it is questionable whether an advocate could ever waive (give up) those rights for a tribe, without some written evidence. In other words, since a court has to be satisfied that a party knows what they are giving up, it is risky for an advocate to allow the social services agency a short-cut without getting permission from the tribe, and have that become part of the record.

v. Active Efforts

The ICWA does not define "active efforts." However, California statutory law provides that "active efforts shall be assessed on a case-by-case basis... active efforts shall be made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe... (and) shall utilize the available resources of the Indian child's extended family, tribe, tribal and other Indian social services agencies, and individual Indian caregiver service providers."²⁴⁰ The BIA Guidelines characterize active efforts as "identifying

²³⁷ 25 U.S.C. §§ 1901, 1902; Welf. & Inst. Code § 224(a), (b).

²³⁸ Welf. & Inst. Code § 224.6(b)(2); Cal. Rules of Court, rule 5.484(a).

²³⁹ Welf. & Inst. Code § 224.6(e).

²⁴⁰ Welf. & Inst. Code § 361.7(b); see Cal. Rules of Court, rule 5.484(c).

appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services.²⁴¹

One can reasonably believe that the “active efforts” required by the ICWA are to some degree above and beyond the standard “reasonable services” offered in non-ICWA cases.²⁴² In passing the ICWA, Congress seemed to recognize that a higher level of services was called for, citing the “massive proportions” of the “Indian child welfare crisis” and the “cultural disorientation... sense of powerlessness, [and] loss of self-esteem” contributing to the crisis, arising largely from “long-established federal policy and from arbitrary acts of government.”²⁴³

However, some California cases state that active efforts and reasonable services are equivalent. These cases trace back to a 1998 decision in which the court remarked that the two terms were “essentially undifferentiable” due to the importance that reunification services hold in the dependency system as a whole.²⁴⁴

It should be noted that case was decided long before SB 678, at a time when (as the court in that case acknowledged) “active efforts” did not mandatorily include application of the tribe’s social and cultural standards, nor the use of the tribe’s and extended family’s available services. At the time, those actions were merely advisory; as of 2006, they are now required by state law.²⁴⁵ The position that there is no difference between active efforts and reasonable services would seem to overlook that fact. It also overlooks the fact that while California law allows for bypass of the reunification services required by Title IV-E of the Social Security Act,²⁴⁶ it requires that active efforts be made regardless of the provisions for bypass.²⁴⁷

The BIA Guidelines enacted in 2015 support the distinction, stating that “(a)ctive efforts are intended primarily to maintain and reunite an Indian child with his or her family or tribal community and constitute more than reasonable efforts as required by Title IV-E of the Social Security Act.”²⁴⁸ The BIA Guidelines also provide that “active efforts are separate and distinct from requirements of the Adoption and Safe Families Act”, and “ASFA’s exceptions to reunification efforts do not apply to ICWA proceedings.”²⁴⁹

⇒ **PRACTICE POINTER:** *In any case where bypass of reunification services is requested under Welfare and Institutions Code § 361.5, an advocate should be sure to notify the court on the record of the separate requirement for active efforts as set out in Welfare and Institutions Code § 361.7.*

²⁴¹ BIA Guidelines § A.2(2).

²⁴² See, e.g., All County Information Notice I-43-04 (p. 7) and All County Letter 08-02 (pp. 10-11) (noting a difference between active efforts and reasonable efforts).

²⁴³ H.R. Rep. 95-1386, 1978 U.S.C.C.A.N. 7530, 7531 and 7534.

²⁴⁴ *In re Michael G.* (1998) 63 Cal.App.4th 700, 714.

²⁴⁵ Welf. & Inst. Code § 361.7(b).

²⁴⁶ Welf. & Inst. Code § 361.5).

²⁴⁷ Welf. & Inst. Code § 361.7 (“Notwithstanding Welfare and Institutions Code § 361.5,” evidence of active efforts must be provided to the court).

²⁴⁸ BIA Guidelines § A.2.

²⁴⁹ BIA Guidelines § A.2(15). Again, the Guidelines are not binding on state courts, but they are entitled to “great weight.” (*In re Brandon T.* (2008) 164 Cal.App.4th 1400, 1412.)

vi. Case Plan for Reunification Services

Whenever a child is removed from a parent's or guardian's custody, the court must order the social worker to provide child welfare services to the child and the child's mother and statutorily presumed father or guardians.²⁵⁰ On a showing that that the services will benefit the child, the court may decide to order services for the child and the biological father.²⁵¹

The right to reunification services even extends to a parent or guardian who is incarcerated, institutionalized, or detained by the United States Department of Homeland Security, or has been deported to his or her country of origin. Reasonable services must be offered to the parent or guardian unless the court determines, by clear and convincing evidence, those services would be detrimental to the child.²⁵²

If the child was under 3 years of age or is part of a sibling group of a child who was under 3 years of age at the time of the initial removal, the reunification services are to be provided for a period of 6 months from the dispositional hearing, but no longer than 12 months from the date the child entered foster care.²⁵³ For a child that is 3 years of age or older at the time of the initial removal, the reunification services are to be provided beginning with the dispositional hearing and ending 12 months after the date the child entered foster care.²⁵⁴

⇒ **PRACTICE POINTER:** *The above limitations apply to reunification services. The time for receiving services can go beyond that period if the child is returned to the parent or guardian and the services are no longer services to “reunify” but rather to “maintain” the family – i.e., family maintenance services.²⁵⁵ This is due to the fact that under the law, there are limits for how long the child should be in an out-of-home foster placement.*

Reunification services can be extended for a period that exceeds 18 months after the date the child was originally removed from physical custody of his or her parent or guardian shown, but only under the limited condition that it can be shown that:

- the child will be returned and safely maintained in the parent's home within the extended time, or
- that reasonable services have not been provided to the parent or guardian.²⁵⁶

⇒ **PRACTICE POINTER:** *If the parent or guardian regains physical custody of the child during the applicable time period, the running of the time period is not interrupted.²⁵⁷ This means that if the child is later removed again from the parent or guardian's custody, the length of reunification services is still limited by that deadline.*

²⁵⁰ Welf. & Inst. Code § 361.5(a).

²⁵¹ Welf. & Inst. Code §§ 361.5(a).

²⁵² For further discussion regarding the services see Welf. & Inst. Code § 361.5(e).

²⁵³ Welf. & Inst. Code § 361.5(a)(1)(B).

²⁵⁴ Welf. & Inst. Code § 361.5(a)(1)(A).

²⁵⁵ Welf. & Inst. Code § 361.5(a)(1)(B).

²⁵⁶ Welf. & Inst. Code § 361.5(a)(3).

²⁵⁷ Welf. & Inst. Code § 361.5(a)(3).

vii. Where Reunification Services to a Parent are “Bypassed”

Reunification services can be denied (“bypassed”) to a parent when the court finds, by clear and convincing evidence, any of the circumstances set forth at Welfare and Institutions Code § 361.5(b). The court would still, though, continue to permit the parent to visit the child unless it finds that visitation would be detrimental to the child.²⁵⁸

⇒ **PRACTICE POINTER:** *As discussed above, advocates should be aware that Welfare and Institutions Code § 361.7 requires “active efforts” at remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, in spite of any bypass ordered under Welfare and Institutions Code § 361.5.*

viii. Visitation – Parents and Siblings

In order to maintain ties between the parent or guardian and any siblings and the child, and to provide information relevant to deciding if, and when, to return custody of the child, any order placing a child in foster care and ordering reunification services must provide visitation between the parent or guardian and the child. The visits must be as frequent as possible, consistent with the well-being of the child.²⁵⁹

⇒ **PRACTICE POINTER:** *Incarcerated parents have a right to visit their children. However, this is subject to the fact that the court can consider whether the visitation is in the best interest of a child victim.²⁶⁰*

Visitation must be ordered between the child and any siblings, unless the court finds by clear and convincing evidence that sibling interaction is contrary to the safety or well-being of either child.²⁶¹

No visitation order shall jeopardize the safety of the child.²⁶²

ix. Visitation - Grandparents

If the court has ordered the child be removed from the physical custody of his or her parent(s), the court must consider whether the family ties and best interest of the child will be served by granting visitation rights to the child’s grandparents. The court shall clearly specify those rights to the social worker.²⁶³

²⁵⁸ Welf. & Inst. Code § 361.5(f).

²⁵⁹ Welf. & Inst. Code § 361.2(a)(1)(A).

²⁶⁰ See, Welf. & Inst. Code § 362.6.

²⁶¹ Welf. & Inst. Code § 361.2(a)(2). 16002(b).

²⁶² Welf. & Inst. Code § 361.2(a)(1)(B).

²⁶³ Welf. & Inst. Code § 361.2(i).

7. Placement

In any out-of-home placement, the child must be placed in accordance with the placement preferences mandated by the ICWA. (See Section VIII, Placement Preferences.) State law provides that the social services agency shall ensure placement of a child in a home that, to the fullest extent possible, best meets the day-to-day needs of the child. A home that best meets the day-to-day needs of the child must satisfy all of the following criteria:

- The child's caregiver is able to meet the day-to-day health, safety, and well-being needs of the child.
- The child's caregiver is permitted to maintain the least restrictive family setting that promotes normal childhood experiences.
- The child is permitted to engage in reasonable, age-appropriate day-to-day activities that promote normal childhood experiences for the child.²⁶⁴

8. Educational and Developmental Service Decision Making

The court order must specifically address any limitation on the right of the parent or guardian to make the child's educational or developmental-services decisions. If the court orders the parent or guardian's decision making be limited, the limitations may not exceed those necessary to protect the child.²⁶⁵

9. Set a Review Hearing

The child's status must be reviewed no later 6 months after the date of the original disposition order.²⁶⁶

²⁶⁴ See, Welf. & Inst. Code § 361.2(k).

²⁶⁵ Welf. & Inst. Code § 361(a)(1).

²⁶⁶ Cal. Rules of Court, rule 5.695(j).

D. Review Hearings

1. Background and Purpose

No less than once every six months, the status of every dependent child must be reviewed. The date is calculated from the date of the original dispositional hearing, until the hearing described in Welfare and Institutions Code § 366.26 is completed.²⁶⁷

At the review hearing, the court must return the child unless it is proved by a preponderance of evidence (i.e., a showing of likelihood of 50% or more) that the child would be at substantial risk if returned to the parent.²⁶⁸ The court will also determine whether the social services agency made the required efforts to assist the family in alleviating the risk of harm and whether there are any other services that might be appropriate.

2. General Requirements

At the review hearing, the court must consider the safety of the child and must determine all of the following:

- Whether the placement remains necessary and appropriate.
- Whether the social services agency has complied with the case plan in making active efforts to return the child to a safe home and to complete any steps necessary to finalize the permanent placement of the child.
- For a child 10 years of age or older, this includes the efforts to maintain relationships between a child and individuals important to the child, consistent with the child's best interests.
- Whether there should be any limitation on the right of the parent or guardian to make educational decisions or developmental-services decisions for the child.
- The extent of progress that the parent or guardian has made toward alleviating or mitigating the causes necessitating placement in foster care.²⁶⁹

If the child is to remain out of the home, the court must also state a date that the child is likely to be returned to and safely maintained in the home, or placed for adoption, tribal customary adoption, legal guardianship, placed with a fit and willing relative, or in another planned permanent living arrangement.²⁷⁰

²⁶⁷ Welf. & Inst. Code § 366(a)(1).

²⁶⁸ Welf. & Inst. Code § 366.21(e)(1), Cal. Rules of Court, rules 5.708(d)(1), 5.710(b).

²⁶⁹ Welf. & Inst. Code § 366(a)(1).

²⁷⁰ Welf. & Inst. Code § 366(a)(2).

3. Findings Regarding Siblings

If the child has siblings under the court's jurisdiction, the court must make findings as to each of the following:

- The nature of the relationship between the child and his or her siblings.
- The appropriateness of developing or maintaining the sibling relationships.²⁷¹
 - If the siblings are not placed together in the same home

The court must determine the reason why the siblings are not placed together and what efforts are being made to place the siblings together, or why those efforts are not appropriate. The court must also determine each of the following:

- The frequency and nature of the visits between the siblings.
 - If there are visits between the siblings, whether the visits are supervised or unsupervised. If the visits are supervised, a discussion of the reasons why the visits are supervised, and what needs to be accomplished in order for the visits to be unsupervised.
 - If there are visits between the siblings, a description of the location and length of the visits.
 - Any plan to increase visitation between the siblings.
- The impact of the sibling relationships on the child's placement and planning for legal permanence.
 - The continuing need (if any) to suspend sibling interaction.²⁷²

The factors the court may consider in making a determination regarding the nature of the child's sibling relationships may include, but are not limited to:

- Whether the siblings were raised together in the same home,
- Whether the siblings have shared significant common experiences or have existing close and strong bonds, and
- Whether either sibling expresses a desire to visit or live with his or her sibling, as applicable, and whether ongoing contact is in the child's best emotional interests.

²⁷¹ See, Welf. & Inst. Code § 16002.

²⁷² See, Welf. & Inst. Code § 16002(c).

4. Review Report

The review report must be provided to the parties at least 10 calendar days prior to the hearing. If the recipient's address is within California, the report must be mailed at least 15 calendar days prior to the hearing. If the recipient's address is outside of California, the report must be mailed at least 20 calendar days prior to the hearing.²⁷³

⇒ **PRACTICE POINTER:** *If the report was not provided at least 10 calendar days prior to the hearing, the court must grant a reasonable continuance of up to 10 days.²⁷⁴ This is particularly important for the advocate to know when he or she needs to discuss the report's contents and recommendations with a tribal social services director or committee in order to ascertain the tribe's position for the review hearing.*

An exception exists where:

- The party or his or her counsel has expressly waived the requirement that the report be provided within the 10-day period.
- The court finds that the party's ability to proceed at the hearing is not prejudiced by the lack of timely service of the report.
- However, in making this determination, the court must presume that a party is prejudiced by the lack of timely service of the report. The court can only determine that the party is not prejudiced if there is clear and convincing evidence to the contrary.²⁷⁵

5. Providing for the Child's Health, Safety, and Wellbeing While out of Home

At each review hearing, the court will consider the child's health, safety, and wellbeing, and whether the placement is the least restrictive and most family-like environment.

The social services agency must ensure, to the greatest extent possible, that the placement meets the day-to-day needs of the child.²⁷⁶ The child's placement should allow the child to engage in reasonable, age-appropriate day-to-day activities, using a "reasonable and prudent parent" standard.²⁷⁷

The social worker must develop a plan for ongoing oversight and coordination of the child's health care services.²⁷⁸

²⁷³ See, Welf. & Inst. Code § 366.05, 366.21(c).

²⁷⁴ Welf. & Inst. Code § 366.05.

²⁷⁵ Welf. & Inst. Code § 366.05.

²⁷⁶ Welf. & Inst. Code § 361.2(k).

²⁷⁷ As defined by Welf. & Inst. Code §§ 362.04(a), 361.2(k).

²⁷⁸ Welf. & Inst. Code § 16010.2.

6. Case Plan

The case plan should address the needs of the child, in addition to that of the parent.²⁷⁹ The child's case plan is designed to:

- Ensure that the child receives protection and safe and proper care and case management;
- Provide services to improve conditions in the parent's home;
- Facilitate the child's safe return to a safe home or the child's permanent placement;
- Address the child's needs while in foster care;
- Ensure the educational stability of the child while in foster care;
- Describe the services to be provided concurrently to achieve legal permanence for the child if reunification efforts fail.²⁸⁰

All children and parents must be actively involved in the development of the case plan.²⁸¹ If the court finds a lack of involvement, it must order the social services agency to ensure such participation.²⁸²

The court must determine whether the social services agency consulted with the Indian child's tribe, and whether the tribe was actively involved in the development of the case plan and plan for permanent placement. If not, the court must order the social services agency to do so, unless the court finds that the tribe is unable, unavailable, or unwilling to participate.²⁸³

The case plan must also support the child's relationship with persons important to them. For siblings, the social services agency must make the required effort to place the children together. Where that is not possible, the social services agency must develop visits between the siblings unless it has been determined that visitation is contrary to the safety or well-being of any sibling.²⁸⁴ For non-siblings, the social services agency must make the required effort to maintain relationships between a child (if 10 years of age or older) and individuals other than the child's siblings who are important to the child, consistent with the child's best interests.²⁸⁵

The case plan must be updated as the service needs of her child and family dictate.²⁸⁶ At minimum, the case plan must be updated in conjunction with each status review, but no less than every six months.²⁸⁷

²⁷⁹ Welf. & Inst. Code § 16501.

²⁸⁰ Welf. & Inst. Code § 16501.1.

²⁸¹ Welf. & Inst. Code § 16501.1(d)(1)

²⁸² Cal. Rules of Court, rules 5.706(d)(2), 5.708(g).

²⁸³ See, Cal. Rules of Court, rule 5.708(g)(3).

²⁸⁴ Welf. & Inst. Code § 16002.

²⁸⁵ Welf. & Inst. Code § 366(a)(1)(B).

²⁸⁶ Welf. & Inst. Code § 16501.1(d).

7. Visitation

In order to maintain ties between the parent or guardian and any siblings and the child, and to provide information relevant to deciding if, and when, to return a child to the custody of his or her parent or guardian, visitation shall be as frequent as possible, consistent with the well-being of the child. However, the visits cannot jeopardize the safety of the child.²⁸⁸

The court will consider the limitations of an incarcerated parent, including the right to continued contact with the child.²⁸⁹

Sibling visitation can be suspended or denied only on a finding by clear and convincing evidence that sibling interaction is contrary to the safety or well-being of either child.²⁹⁰

The court will determine whether the social services agency fulfilled its required obligation to facilitate the visitation.²⁹¹ For an Indian child, those efforts must be “active”.²⁹²

8. Evidence to Support the Court’s Determination

In making its findings, the court must have read and considered the review report.²⁹³ It must read and consider the reports of the caregiver, if any. The court must consider the statements and wishes of a child over age 12. The court must consider any other admissible and relevant evidence provided.²⁹⁴

9. How I Can Help?

As with earlier hearings, a tribe and its ICWA advocate can submit materials to the social worker as part of the review. Even when an advocate does not submit materials to the social worker for the report (which are to be filed 10 days before the review hearing) the advocate should scrutinize the report and narrative and compare it with the case plan and goals.

Regardless of the type of plan, for ICWA purposes, the review hearing is an opportunity for the advocate to alert the court to any non-compliance by the social services agency or parties, or to highlight successful actions.

An advocate can assist by looking at the reunification plan with a critical eye and asking why the disposition orders were not successful in reunifying the family. For example, the questions can include but are not limited to:

²⁸⁷ Welf. & Inst. Code § 6501.1(d).

²⁸⁸ Welf. & Inst. Code § 362.1(a)(1)(A).

²⁸⁹ See, Welf. & Inst. Code §§ 366.21(f), 361.5(e)(1., Cal. Rules of Court, rule 5.708(d)(3)(C).

²⁹⁰ Welf. & Inst. Code § 362.1(a)(2).

²⁹¹ Cal. Rules of Court, rule 5.708(d)(3)(C).

²⁹² See, Welf. & Inst. Code §§ 361.7, 366(a)(1)(B); Cal. Rules of Court, rule 5.708(i)(2).

²⁹³ See, Cal. Rules of Court, rule 5.708(c)(3), Welf. & Inst. Code § 366.21(d).

²⁹⁴ Cal. Rules of Court, rule 5.708(c).

- Were the services to the family not fully appropriate to meet their needs and/or alleviate the risk of harm?
- Did new or different issues arise since the time the services were ordered?
 - If new or different issues have arisen, are new and/or modified case plan provisions needed to support the family?
 - If new issues have not arisen, then the question is whether the family just needs more time to complete their requirements (in light of the statutory time for the parents to complete the goals of their case plan)?

10. Specific Review Hearings

a. 6-Month Review Hearing

The first review hearing must be held six months after the initial dispositional hearing, but no later than 12 months after the date the child entered foster care (as defined by Welfare and Institutions Code § 361.49), whichever occurs earlier.²⁹⁵

i. Presumption is Return of Child to Parent(s)

The presumption is return of the child to the physical custody of his or her parent or legal guardian unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child.²⁹⁶

If the child is returned, the court may:

- order the termination of dependency jurisdiction if the child can be protected without the need for further court supervision.²⁹⁷

or

- order continued dependency services and set a review hearing to occur within 6 months.²⁹⁸

If the child is not returned, there is a presumption of continuation of reunification services. The court must order any additional services reasonably believed to facilitate the return of the child to the parent or guardian's custody. However, the court must inform the parent or

²⁹⁵ Welf. & Inst. Code § 366.21(e)(1).

²⁹⁶ Cal. Rules of Court, rule 5.710(b)(1); Welf. & Inst. Code § 366.21(e)(1).

²⁹⁷ See, Welf. & Inst. Code § 364; Cal. Rules of Court, rule 5.706(e)(1).

²⁹⁸ Cal. Rules of Ct. 5.710(b)(1).

legal guardian that if the child cannot be returned home by the 12-month permanency hearing, a proceeding pursuant to Welfare and Institutions Code § 366.26 may be instituted.²⁹⁹

- Exception - Where the child or a sibling was under 3 years of age when taken into custody.

If the child was under three years of age on the date of the initial removal, the court may schedule a Welfare and Institutions Code § 366.26 hearing.

- Exception - Where the parent's whereabouts remain unknown.

The court can set a Welfare and Institutions Code § 366.26 hearing where the child was removed initially under Welfare and Institutions Code § 300(g), and where the court finds by clear and convincing evidence that the whereabouts of the parent are still unknown, or the parent has failed to contact and visit the child.

- Exception - Where the child was placed with the non-custodial parent.

Where the court has placed the child with the previously noncustodial parent pursuant to Welfare and Institutions Code § 361.2, the court must determine whether supervision is still necessary. If the child's can be protected without the need for continued court supervision, the court will terminate supervision and transfer permanent custody to that parent.³⁰⁰

⇒ **PRACTICE POINTER:** *The decision to terminate services is made as to each parent – in other words, services can be extended or terminated as to only one parent and not the other. Where one parent is getting continued reunification services, there is no reason not to give the other parent the opportunity to attempt those services. The only difference is that the social services agency no longer has to make efforts to assist. While the social services agency may state that it is available should the parent seek it, without a legal obligation, there might not be the same incentive to do so. There also would not be the same documentation of those efforts, if any.*

ii. Continued Reunification Services

If one of the above exceptions does not apply, the court must direct that any reunification services previously ordered continue to be offered to the parent or legal guardian.³⁰¹

The court can, however, modify the terms and conditions of those services as appropriate or order additional services reasonably believed to facilitate the return of the child to the parent or legal guardian.³⁰²

²⁹⁹ Welf. & Inst. Code § 366.21(e)(2).

³⁰⁰ See, Welf. & Inst. Code § 366.21(e)(6).

³⁰¹ See, Cal. Rules of Court, rule 5.710(b); Welf. & Inst. Code § 366.21(e)(7).

³⁰² See, Cal. Rules of Court, rule 5.710(b); Welf. & Inst. Code § 366.21(e)(7).

The services offered are to serve the dual purpose of assisting the parent(s) to reunify and also to concurrently prepare the child for permanence.

b. 12-Month Permanency Hearing

Following the 6-month review hearing, another hearing is required to be held within six months.³⁰³ However, unlike the 6-month review hearing, this hearing is called a “permanency review hearing.” The reason is that the focus of this hearing is determining the child’s permanent plan – i.e., the permanent plan is to return to the parent(s) or to set a Welfare and Institutions Code § 366.26 selection and implementation hearing.³⁰⁴

⇒ **PRACTICE POINTER:** *The timing for the “12-month” hearing can be confusing. On one hand the court must review the case of a child in foster care at least every six months. On the other hand, the hearing to follow the “6-month review” hearing is to be set for “no later than 12 months from the date the child ‘entered foster care.’”³⁰⁵*

It is important to remember that due to continuances, the “12-month” review might not actually occur six months after the “6-month” review hearing.

The “12-month permanency review” hearing is scheduled, not from the date of the six month review, but rather from the date the child “entered foster care” which is the earlier of the date of the date the petition was sustained or 60 days after the initial removal of the child.³⁰⁶

The effect is not insignificant. Only in limited circumstances can the court order reunification services beyond this statutory timeline. Part of the court’s determination at this hearing will include making additional detriment and active effort findings. In context, however, these findings could be based only on a short period of time between hearings. For this reason, requests for continuances at earlier stages should be taken seriously and not granted without cause.

i. Presumption is Return of Child to Parent(s)

As with the 6-month review hearing, the presumption at the 12-month review hearing is a return of the child to the parent or guardian’s physical custody unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child.³⁰⁷

If the child is returned, the court will continue to monitor the family and hold a hearing at least every six months. The hearing, however, will be pursuant to a Family Maintenance Review

³⁰³ Welf. & Inst. Code § 366(a)(1).

³⁰⁴ Welf. & Inst. Code § 366.21(f)(1); Cal. Rules of Court, rule 5.715(b).

³⁰⁵ See, Cal. Rules of Court, rule 5.710(b), 5.715(a); Welf. & Inst. Code § 366.21(e)(7).

³⁰⁶ Welf. & Inst. Code §§ 361.49, 366.21(f)(1).

³⁰⁷ Welf. & Inst. Code § 366.21(f)(1), Cal. Rules of Court, rule 5.715(b)(1).

Hearing under Welfare and Institutions Code § 364. (See Section VII(D)(10)(e), Family Maintenance Review Hearing.)

If the child is not returned to the parent, the case can be continued if the court can make specific required findings.³⁰⁸ To continue the reunification services beyond the statutory deadline, the court must find either:

- There is a substantial probability that the child will be returned to the parent or guardian’s physical custody and safely maintained in the home within the extended period of time,
- or
- That reasonable services have not been provided to the parent or legal guardian.³⁰⁹

The reunification services are for no more than 18 months from the date the child was originally taken from the parent or guardian’s physical custody.³¹⁰

In order to find a “substantial probability” that the child will be returned to the parent or guardian’s physical custody and safely maintained in the home within the extended period of time, the court must find all of the following:

- That the parent or legal guardian has consistently and regularly contacted and visited with the child.
- That the parent or legal guardian has made significant progress in resolving problems that led to the child’s removal from the home.
- The parent or legal guardian has demonstrated the capacity and ability both to complete the objectives of his or her treatment plan and to provide for the safety, protection, physical and emotional well-being, and special needs of the child.³¹¹

The court must consider, among other factors, the parent or legal guardian’s good faith efforts to maintain contact with the child.³¹²

⇒ **PRACTICE POINTER:** *The significance of the above findings cannot be overstated. The factors should be viewed in light of the entire reunification period. Be cautious of any attempt to continue services based only on recent, sporadic, or tenuous progress and/or engagement by the parents.*

³⁰⁸ Welf. & Inst. Code § 366.21(g)(1).

³⁰⁹ Welf. & Inst. Code § 366.21(g)(1); Cal. Rules of Court, rule 5.715(b)(4)(A).

³¹⁰ Welf. & Inst. Code § 366.21(g)(1).

³¹¹ Welf. & Inst. Code § 366.21(g)(1), Cal. Rules of Court, rule 5.715(b)(4)(A)(i).

³¹² Welf. & Inst. Code § 366.21(g)(3), Cal. Rules of Court, rule 5.715(b)(4)(A)(ii).

This is not to say that a parent or guardian's efforts should go unnoticed, but rather, the parent could and still should continue their efforts not only for the practical reason of a continued relationship with the child (custodial or otherwise) but also because there is the legal option of filing a request to change the order any time before the Welfare and Institutions Code § 366.26 orders are made.

If the child is not returned to the parent or guardian and further reunification services are not ordered, the court must schedule a Welfare and Institutions Code § 366.26 hearing to occur within 120 days.³¹³

c. 18-Month Permanency Review Hearing

A permanency review hearing shall occur within 18 months after the date the child was originally removed from the parent or guardian's physical custody.³¹⁴

i. Presumption is Return of Child to parent(s)

As with the 6-month and 12-month reviews, the presumption at the 18-month review hearing is that the child will be returned to the parent or legal guardian's physical custody unless the court finds, by a preponderance of the evidence, that the return would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child.³¹⁵

The court will consider the efforts and/or progress of each parent or guardian and the extent to which he or she availed himself or herself of services provided.³¹⁶ The court will take into account the particular barriers to a minor parent, or an incarcerated, institutionalized, detained, or deported parent's or legal guardian's access to those services and ability to maintain contact with his or her child.³¹⁷

If the child is returned, the court will continue to monitor the family and hold a hearing at least every six months. The hearing, however, will be pursuant to a Family Maintenance Review Hearing under Welfare and Institutions Code § 364. (See Section VII(D)(10)(e), Family Maintenance Review Hearing.)

If the child is not returned to the parent, the case can be continued only in very limited, specific circumstances. The court must find by clear and convincing evidence that the best interests of the child would be met by the provision of additional reunification services where:

- The parent or legal guardian is making significant and consistent progress in a court-ordered residential substance abuse treatment program;

³¹³ Welf. & Inst. Code § 366.21(g)(4).

³¹⁴ Welf. & Inst. Code § 366.22(a)(1), Cal. Rules of Court, rule 5.720(a).

³¹⁵ Welf. & Inst. Code § 366.22, Cal. Rules of Court, rule 5.720(b).

³¹⁶ Welf. & Inst. Code § 366.22(a)(1).

³¹⁷ Welf. & Inst. Code § 366.22(a)(1).

- A parent who was either a minor parent or a nonminor dependent parent at the time of the initial hearings making significant and consistent progress in establishing a safe home for the child's return;

or

- The parent was recently discharged from incarceration, institutionalization, or the custody of the United States Department of Homeland Security and is making significant and consistent progress in establishing a safe home for the child's return.³¹⁸

The court shall continue the case only if it finds that there is a substantial probability that the child will be returned to the parent or guardian's physical custody and safely maintained in the home within the extended period of time or that reasonable services have not been provided to the parent or legal guardian.

In order to find a substantial probability that the child will be returned to the parent or guardian's physical custody and safely maintained in the home within the extended period of time, the court is required to find all of the following:

- The parent or legal guardian has consistently and regularly contacted and visited with the child.
- In the prior 18 months, the parent or legal guardian has made significant and consistent progress in resolving problems that led to the child's removal from the home.
- The parent or legal guardian has demonstrated the capacity and ability both to complete the objectives of his or her substance abuse treatment plan as evidenced by reports from a substance abuse provider as applicable, or complete a treatment plan after discharge from incarceration, institutionalization, or detention, or following deportation to his or her country of origin and his or her return to the United States, and to provide for the child's safety, protection, physical and emotional well-being, and special needs.³¹⁹

The court's decision to continue the case based on a finding of substantial probability that the child will be returned to the parent or guardian's physical custody is a compelling reason for determining that a hearing held pursuant to Welfare and Institutions Code § 366.26 is not in the best interests of the child.³²⁰ Still, the reunification services are for no more than 24 months from the date the child was originally taken from the parent or guardian's physical custody.³²¹

³¹⁸ Welf. & Inst. Code § 366.22(b), Cal. Rules of Court, rule 5.720(b)(3)(A).

³¹⁹ Welf. & Inst. Code § 366.22(b); Cal. Rules of Court, rule 5.720(b)(3)(A).

³²⁰ Welf. & Inst. Code § 366.22(b).

³²¹ Welf. & Inst. Code § 366.22(b).

d. 24-Month Subsequent Permanency Review Hearing

The subsequent permanency review hearing shall occur within 24 months after the date the child was originally removed from the parent or guardian's physical custody.³²² As above, the presumption continues to be a return of the child to the parent or guardian's physical custody unless the court finds, by a preponderance of the evidence, that the return of the child would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child.³²³

e. Family Maintenance Review Hearings

The question for the hearing is whether continued supervision is necessary.³²⁴ The court has two options at this hearing – to terminate jurisdiction or to continue services to maintain the child in the home.

i. Terminate Jurisdiction and Issue Custody Orders

The court must terminate its dependency jurisdiction unless the court finds that the petitioner has established by a preponderance of the evidence that existing conditions would justify initial assumption of jurisdiction under Welfare and Institutions Code § 300 or that such conditions are likely to exist if supervision is withdrawn.³²⁵

Failure of the parent or legal guardian to participate regularly in any court-ordered treatment program constitutes prima facie evidence that the conditions that justified initial assumption of jurisdiction still exist and that continued supervision is necessary.³²⁶

⇒ **PRACTICE POINTER:** *The question is not whether both parents or guardians made progress. The question is whether the conditions still exist to warrant continued court supervision. This means that if the child is sufficiently protected by either parent, then the court must terminate jurisdiction. The court is not permitted to maintain jurisdiction just to wait for the other parent to make progress. This is important because a case could close before a parent or guardian completes his or her case plan. As such, the custody orders made by the court upon termination of dependency may consider that parent's lack of completion.*

When the juvenile court terminates its jurisdiction, it has two options: it can refer the matter to the family court to issue orders determining the custody of, or visitation with, the child; or, it may issue orders itself determining the custody of, or visitation with, the child. Additionally, the court can also issue protective orders pursuant to Welfare and Institutions Code § 213.5. (See Section XIII, Restraining and Protective Orders.)

³²² Welf. & Inst. Code § 366.25(a)(1), Cal. Rules of Court, rule 5.722(a).

³²³ Welf. & Inst. Code § 366.25(a)(1), Cal. Rules of Court, rule 5.722(b).

³²⁴ Cal. Rules of Court, rule 5.706(e); Welf. & Inst. Code § 364.

³²⁵ Cal. Rules of Court, rule 5.706(e); Welf. & Inst. Code § 364(c).

³²⁶ Cal. Rules of Court, rule 5.706(e); Welf. & Inst. Code § 364.

When making the “exit” custody orders, the juvenile court is not bound by the same presumptions in family court regarding joint custody. The court must look to the best interest of the child.

Visitation can be granted to the non-custodial parent.³²⁷ However, the court can issue conditions in the orders, including, for example, a requirement that the parent continue substance abuse services.

Any custody orders made by the juvenile court are final and can only be modified or terminated on a showing of: (1) a significant change of circumstances and (2) a showing that the modification or termination is in the best interests of the child.³²⁸

ii. Continue Family Maintenance Services and Court Supervision

If the court’s continued supervision is necessary, family maintenance services will be continued and a review hearing will be set within six months.³²⁹

E. Selection and Implementation Hearing (Welf. & Inst. Code § 366.26)

1. Purpose

The focus of the selection and implementation hearing (a.k.a. permanency hearing, “two-six,” or “366.26” hearing) is the child’s permanent plan. The information the court will consider will relate only to its goal of providing a stable permanent home for the child.

At some earlier hearing, the court will already have made a finding that reunification with the parent(s) was not to occur and terminated those services. As such, the parent’s rights and interest in the child is not at issue at this hearing. Although the parents may wish to address their interest in the child, the court will not deem it relevant to the findings and orders to be issued at this hearing.

Should any party wish to address the parent or guardian’s interest in the child and/or the progress he or she has made towards reunification, such information must be brought to consider by way of what is commonly referred to as a “388 petition.”³³⁰

2. Whether to Terminate Parental Rights

In a non-ICWA case, there is a presumption that termination of parental rights is appropriate. If there is clear and convincing evidence that the child is likely to be adopted, the court must terminate parental rights and order the child placed for adoption (this is often referred to “standard” or “conventional adoption,” as compared to tribal customary adoption, or “TCA”).

³²⁷ Welf. & Inst. Code 361.2(b).

³²⁸ Welf. & Inst. Code § 309; Fam. Code § 3021.

³²⁹ Cal. Rules of Court, rule 5.706(e); Welf. & Inst. Code § 364(d).

³³⁰ Welf. & Inst. Code § 388 (petition to change a court order).

However, in an ICWA case, given the potential harm to an Indian child which may result from termination of parental rights,³³¹ the advocate should be prepared to articulate the possibility of that harm, and to argue other permanency options to the court, under the exceptions and case law discussed below.

3. Standard of Proof

The court may not order a termination of parental rights unless the court's order is supported by evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical harm to the child.³³²

⇒ **PRACTICE POINTER:** *There is disagreement on when this finding must be made. Because the ICWA is a federal law, it does not identify the particular California hearing at which the determination of “beyond a reasonable doubt” must be made. The courts have held though that based on the family-protective policies underlying the ICWA, it is reasonable to assume that the determination must be made when, or within a reasonable time before, the termination of parental rights decision is made.*³³³

Courts have held, however, that this does not mean that the determination must be made simultaneously with the termination decision at the Welfare and Institutions Code § 366.26 hearing. Instead, it makes sense for the court to make the determination at the final review hearing when the court decides on a permanent plan.

Courts have held that the court need not then repeat this determination at the Welfare and Institutions Code § 366.26 hearing, absent a showing by the parent of changed circumstances or that the period between the two hearings was substantially longer than 120 days.

Courts have even upheld a finding made substantially outside the 120-day statutory period.³³⁴ Since the issue is not yet clear in the courts, be aware of it and keep a careful eye on whether: (1) the court does make the necessary finding, and (2) when the court makes the finding, that there is evidentiary support for the finding. The court should not be merely making a perfunctory effort to check the box.

4. Exceptions to Termination of Parental Rights

There are several exceptions to the statutory preference for termination of parental rights. These include the following situations:³³⁵

³³¹ See discussion of Tribal Customary Adoption at Section VII(E)(5) below.

³³² 25 U.S.C. § 1912(f); BIA Guidelines § D.3; Welf. & Inst. Code § 366.26(c)(2)(B); See Cal. Rules of Court, rule 5.484(a).

³³³ *In re Matthew Z.* (2000) 80 CA4th 545, 552.

³³⁴ See, *In re Barbara R.* (2006) 137 Cal.App.4th 941, 949 (11-month period between referral and permanency hearings was substantially longer than 120-day statutory period; however, reversal not automatic – burden remains on parent to show the finding was stale).

³³⁵ See Welf. & Inst. Code § 366.26(c).

- a. **Where the child is living with a relative who is unable or unwilling to adopt, but not because the relative is unwilling to accept legal or financial responsibility for the child, and the removal of the child from the relative would be detrimental to the child. For purposes of an Indian child, “relative” includes an “extended family member,” as defined in the ICWA.**

⇒ **PRACTICE POINTER:** *The relative must be willing and capable of providing the child with a stable and permanent environment. Usually this will be through legal guardianship. The relative may be unwilling to adopt for a variety of reasons – often in Indian families it may be that the relative is not comfortable with ending the legal relationship between parent and child, whether through conventional adoption or TCA.*

- b. Where the court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances:
 - i. The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.
 - ii. The child is 12 years of age or older and objects to termination of parental rights.
 - iii. The child is placed in a residential treatment facility, where adoption is unlikely or undesirable, and continuation of parental rights will not prevent finding the child a permanent family placement if the parents cannot resume custody when residential care is no longer needed.
 - iv. **The child is living with a foster parent or Indian custodian who is unable or unwilling to adopt the child because of exceptional circumstances, which do not include an unwillingness to accept legal or financial responsibility for the child, and removing the child would be detrimental.**

Exception - This does not apply to any child who is either (a) under six years of age, or (b) a member of a sibling group where at least one child is under six years of age and the siblings are, or should be, permanently placed together.

⇒ **PRACTICE POINTER:** *This is similar to the “living with a relative” exception discussed above, but instead applies to a foster parent or Indian custodian (if that person is not defined as “extended family” under tribal law or custom). The individual must be willing and capable of providing the child with a stable and permanent environment.*

- v. There would be substantial interference with a child’s sibling relationship, given the nature and extent of the relationship. The considerations include, but are not limited to, whether the child was raised with a sibling in the same home, shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child’s best interest, including the child’s long-term emotional interest.

vi. The child is an Indian child and there is a compelling reason for determining that termination of parental rights would not be in the best interest of the child, including, but not limited to:

Termination of parental rights would substantially interfere with the child's connection to his or her tribal community or the child's tribal membership rights.

or

The child's tribe has identified guardianship, foster care with a fit and willing relative, tribal customary adoption, or another planned permanent living arrangement for the child.

⇒ **PRACTICE POINTER:** *This is commonly referred to as the "Indian child exception," even though there are other exceptions discussed above which may also apply to an Indian child.*

c. Where the social services agency has not met its heightened burden for an Indian child:

- i. If at the hearing terminating parental rights, the court has found that active efforts were not made.
- ii. If termination of parental rights is not supported by evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child.

d. Where the court determines for an Indian child that tribal customary adoption (TCA) is an appropriate permanent plan.

5. Tribal Customary Adoption

a. Overview

Tribal customary adoption (TCA) is a unique permanency option in two ways.³³⁶ First, although it is a state court adoption, it incorporates the customs, traditions, or laws of an Indian child's tribe, in that the tribe generates a Tribal Customary Adoption Order (TCAO). The state court issues its order after giving full faith and credit to the TCAO. Second, it does not require termination of parental rights, sparing the child any ill effects of that termination on their tribal membership rights or inheritance rights.

³³⁶ See Welf. & Inst. Code § 366.24 generally for the nuts and bolts of TCA.

b. Potential Harmful Effects of Terminating Parental Rights

Termination of parental rights severs the legal bond between parent and child. In some tribes this may affect a child's rights to membership, as they will no longer be able to legally trace their ancestry to a tribal member. Even where tribal membership is not at risk, an Indian child's inheritance rights regarding real and personal property held in trust by the federal government for his or her biological family will likely suffer if a standard adoption is ordered. The federal American Indian Probate Reform Act of 2004 generally severs the rights of adopted-out children to inherit such property from their biological parents, and from their extended family as well unless the child and family maintain a "family relationship" after adoption.³³⁷

In addition to the property itself, there are valuable benefits which can arise from the ownership of trust property. These rights can include, but are not limited to, hunting and fishing or other use rights, or membership in settlements like the recent *Cobell v. Jewell* litigation.³³⁸

c. TCA Ensures That the Connection Between Child and Tribe is Protected.

The California Legislature has declared that it is in the best interest of an Indian child to have a connection to his or her tribe encouraged and protected, and has further declared that the state is committed, whenever possible, to assist the child in establishing and maintaining a relationship with his or her tribe and tribal community.³³⁹ Because a tribe can include terms in the TCAO which require periodic contact with the tribe, attendance at cultural events, etc., a California appellate court has recognized that TCA is the only permanency option which can ensure the connection between a child and his or her tribe is maintained.³⁴⁰ Therefore, absent evidence that a TCA would be detrimental to a child, it should be ordered as the permanent plan in order to make certain that his or her best interest and the state's goal are both met.

d. TCA Allows a Tribe to Protect a Child's Indian Inheritance Rights.

When drafting the TCAO, the tribe must address the child's inheritance rights.³⁴¹ This permits the tribe to overcome the default provisions of the federal American Indian Probate Reform Act as discussed above, and keep the child's right to inherit from his or her biological family intact. Considerations like this may fly under the radar when a child is only a year or two old, but they can turn out to be very important later in life to the child, and to the child's future children as well. One of the many benefits of a TCA, at least from the child's and tribe's perspective, is the ability to define within the TCA order what the child's trust property rights will be.

³³⁷ 25 U.S.C. § 2206(j)(2)(B)(iii).

³³⁸ The *Cobell v. Jewell* litigation resulted in a \$3.4 billion settlement in 2009 to compensate trust property owners for years of mismanagement of their trust assets by the Department of the Interior. (*Cobell v. Jewell* (formerly *Cobell v. Salazar*), U.S. District Court for the District of Columbia, case no. 1:96CV01285-JR, settlement filed on December 7, 2009.

³³⁹ Welf. & Inst. Code § 224(a)(1), (2).

³⁴⁰ *In re A.M.* (2013) 215 Cal.App.4th 339, 349.

³⁴¹ Welf. & Inst. Code § 366.24(c)(10).

e. TCA Should Be Seen as the Default Option for an Indian Child

In creating TCA as a permanent option for Indian children, the Legislature “recognize[d] that the termination of parental rights will normally cause detriment to an Indian child by interfering with his or her tribal connections.”³⁴²

In re H.R. is not binding on all courts in the state, but its reasoning is sound.³⁴³ A standard adoption will normally have the potential for significant adverse effects on an Indian child’s best interest. Even if the child’s membership in the tribe will not be at risk, there is no option other than TCA which can ensure a continuing connection between child and tribe. An adoptive placement may indicate willingness to keep a child connected to his or her tribe and culture, but there is no guarantee that over the years they will actually do so.

TCA provides a child with “the same stability and permanence of traditional adoption without terminating parental rights.”³⁴⁴ It is no less permanent than a standard adoption, and like a standard adoption, “gives the child the best chance at [a full] emotional commitment from a responsible caretaker” as compared to guardianship or foster care.³⁴⁵

Tribal customary adoptive parents have all of the rights, privileges, and duties of any other adoptive parents.³⁴⁶ They will not be subject to the tribe making future changes to the terms of the TCA, because the order is ultimately a state court order once given full faith and credit, not a tribal court order. And the adoptive parents may influence the terms of the TCA order before it is issued by presenting evidence to the tribe of the child’s best interest.³⁴⁷ Generally speaking, tribes should recognize that TCA orders should be flexible to the extent appropriate in order to accommodate the many possible future interests and commitments a child may have as he or she grows up.

As such, TCA is superior to conventional adoption as a permanent plan for Indian children.

f. The TCA Process

Welfare and Institutions Code § 366.24 sets forth the process for completing a TCA. All County Letter 10-47 (Oct. 27, 2010) is also instructive, operating as the de facto regulations implementing TCA until formal regulations are issued.

⇒ **PRACTICE POINTER:** *One crucial beginning point for the advocate to remember is that TCA can only occur if identified as an appropriate permanent plan by the tribe. Social services agencies are obligated to consult with tribes about TCA. However, if the tribe prefers TCA to*

³⁴² *In re H.R.* (2012) 208 Cal.App.4th 751, 763 (referencing an exception to TPR discussed at (3)(b)(vi) above).

³⁴³ *In re H.R.*, *supra*.

³⁴⁴ *In re H.R.*, *supra* at 763.

³⁴⁵ *Id.* at 759, citing *In re Celine R.* (2003) 31 Cal.4th 45, 53; see also, *id.* at 763 (with TCA, “an Indian child’s interest in stability and permanence no longer provides a counterbalance to the child’s interest in maintaining his or her tribal connection”).

³⁴⁶ Welf. & Inst. Code § 366.24(c)(13).

³⁴⁷ Welf. & Inst. Code § 366.24(c)(7).

conventional adoption, it behooves the tribe not to wait for such consultation. TCA can be identified as a concurrent plan even while reunification efforts are underway, so that if reunification does not succeed, TCA has already been put forth as the preferred alternative.

The TCA process is as follows:

- i. The tribe identifies TCA as an appropriate permanent plan. This should occur as early as possible in the proceedings, although the court will not actually designate TCA as the child's permanent plan until the Welfare and Institutions Code § 366.26 hearing.
- ii. A home study of the prospective adoptive home must occur. It is prudent to begin this early on, although as discussed below, a continuance of the Welfare and Institutions Code § 366.26 hearing of up to 180 days may and should be ordered by the court (an initial continuance of up to 120 days, plus an additional continuance of up to 60 days if necessary). The tribe may either choose to conduct the home study itself, or may designate another entity to conduct it. If the tribe designates another entity, that entity must consult with the tribe in order to apply the tribe's prevailing social and cultural standards in evaluating the home.

⇒ **PRACTICE POINTER:** *Due to limited resources and restrictions on access to the criminal background check process, tribes will usually designate another entity to complete the home study (e.g., county adoption agency or private, California-licensed adoption agency) unless there is any reason to believe that the prospective adoptive home would not be approved by that entity.*

⇒ **PRACTICE POINTER:** *If the tribe designates another entity for the home study, the tribe must approve the home study before TCA may be ordered as the child's permanent plan.*

- iii. The tribe must create a TCA order (TCAO) in whatever forum the tribe has authorized for such actions (tribal court, tribal council, tribal child welfare committee, etc.). Before the TCAO is finalized, the tribe must allow the child, birth parents, or Indian custodian and the tribal customary adoptive parents and their counsel, if applicable, to present evidence to the tribe regarding the TCA and the child's best interest. This does not necessarily need to be in person (i.e., in a formal hearing before the tribal forum issuing the TCAO). If resources or other considerations do not make such a hearing feasible, the tribe may choose to allow those parties to present evidence by written submission to the forum.

⇒ **PRACTICE POINTER:** *The TCAO must address the following topics: the modification of the legal relationship of the birth parents or Indian custodian and the child, including contact, if any, between the child and the birth parents or Indian custodian; the responsibilities (if any) of the birth parents or Indian custodian; the child's inheritance rights; and, the child's legal relationship with the tribe.*

The order may address other topics, such as contact between the child and tribe, attendance at cultural or ceremonial events, etc., but cannot include any child support obligation from the

birth parents or Indian custodian. There is a conclusive presumption that any parental rights or obligations not specified in the TCAO vest in the adoptive parents.

- iv. The tribe must file the TCAO with the court at least 20 days prior to the date set by the court for the continued Welfare and Institutions Code § 366.26 hearing.
- v. At the continued Welfare and Institutions Code § 366.26 hearing, the court will decide whether it may afford the TCAO full faith and credit. The court must do so unless it finds either that:
 - Due process was not afforded (i.e., if the tribe did not provide the child, birth parents, or Indian custodian and the tribal customary adoptive parents and their counsel, if applicable, with the opportunity to present evidence to the tribe, or did not provide those parties with adequate notice prior to their opportunity to do so),
 - or
 - That the TCAO somehow conflicts with some important public policy of the state (for example, if the TCAO creates requirements so onerous or restrictive on the proposed adoptive parents that the state's public policy of encouraging permanency via adoption whenever possible is offended.)
- vi. Once the court affords full faith and credit to TCAO, and the tribe approves the home study, the child is then eligible for TCA as his or her permanent placement.
- vii. The agency and adoptive parents must then sign a tribal customary adoptive placement agreement and adoption assistance agreement.
- viii. The adoptive parents may then file the petition for adoption.
- ix. The adoptive placement must be supervised for a period of six months unless either of the following circumstances exists:
 - The child is a foster child of the adoptive parents whose foster care placement was supervised before the signing of the adoptive placement agreement, in which case the supervisory period may be shortened by one month for each month the child has been in foster care with those parents.
 - or
 - The child is to be adopted by a relative with whom he or she has an established relationship.
- x. If, after the TCA is completed and dependency jurisdiction is terminated, some dispute as to compliance with the terms of the TCAO arises, the party seeking to

enforce compliance may bring the matter back before the juvenile court. However, the court may not order compliance with the TCAO without first finding that the party seeking the enforcement participated, or attempted to participate, in good faith, in family mediation services of the court or dispute resolution through the tribe regarding the conflict, prior to the filing of the enforcement action.³⁴⁸

g. Selecting the Permanent Plan

After receiving evidence at the Welfare and Institutions Code § 366.26 hearing, the court must act in the following order of preference:

- Terminate the rights of the parent(s) and order that the child be placed for adoption.

The court must then proceed with the adoption after the appellate rights of the parties have been exhausted – 60 days after the date the court orders the termination of parental rights and orders adoption as the permanent plan.³⁴⁹

- Order a plan of tribal customary adoption.
- Appoint a relative with whom the child is currently residing as legal guardian for the child. Parental rights are not terminated.

The court will then order that letters of guardianship issue.³⁵⁰

If the child has been placed with the relative for at least six months, the court must terminate its dependency jurisdiction, except if the relative objects or on a finding of exceptional circumstances.³⁵¹

If after the order for guardianship is made, a change of circumstances arises to indicate that TCA may be an appropriate plan for the child, the court may vacate its previous order dismissing dependency jurisdiction over the child and order that a hearing be held pursuant to Welfare and Institutions Code § 366.26 to determine whether adoption or continued legal guardianship is the most appropriate plan for the child.³⁵²

- Identify adoption or TCA as the permanent placement goal and order that efforts be made to locate an appropriate adoptive family for the child within a period not to exceed 180 days.

³⁴⁸ Welf. & Inst. Code § 366.26(i)(2).

³⁴⁹ Welf. & Inst. Code § 366.26(b)(1).

³⁵⁰ Welf. & Inst. Code § 366.26(b)(3).

³⁵¹ Welf. & Inst. Code § 366.3(a).

³⁵² Welf. & Inst. Code § 366.3(c); see, Welf. & Inst. Code § 366.3(b)(1) regarding revocation or termination of an ordered guardianship.

- Appoint a nonrelative legal guardian for the child. Parental rights are not terminated.
- Order that the child be permanently placed with a fit and willing relative. Parental rights are not terminated.
- Order that the child remain in foster care, but with a permanent plan of return home, adoption, legal guardianship, or placement with a fit and willing relative, as appropriate.³⁵³ The court will then order that the periodic review hearing be set pursuant to Welfare and Institutions Code § 366.3.
- Order that the child remain in foster care subject to the conditions of Welfare and Institutions Code § 366.3(c)(4). Parental rights are not terminated.

The court will then order that a periodic review hearing be set pursuant to Welfare and Institutions Code § 366.3.

F. Post Permanency Review Hearings

1. Purpose and Background

Where jurisdiction has not been dismissed, the child's status must be reviewed at least every six months. The hearing is for the purpose of determining whether or not reasonable efforts to finalize a permanent placement for the child have been made.³⁵⁴

The court must inquire about the progress being made to provide a permanent home for the child and must determine each of the following:

- Whether the placement continues to be necessary and appropriate.
- If the child is 10 years of age or older, whether the social worker made efforts to identify individuals important to the child, consistent with the child's best interests.
- Whether the child's permanent plan continues to be appropriate and is being complied with.
 - This includes efforts to maintain relationships between a child who is 10 years of age or older and those individuals who are important to the child.
 - This also includes efforts to identify a prospective adoptive parent or legal guardian, including, but not limited to, child-specific recruitment efforts and listing on an adoption exchange.

³⁵³ Welf. & Inst. Code § 366.26(c)(4)(B)(ii).

³⁵⁴ Welf. & Inst. Code § 366.3(d). Note: for a review hearing that follows the termination of parental rights see Welf. & Inst. Code §§ 366.3(d), (g), 366.28.

- Whether the agency has complied with the case plan by making reasonable efforts either to return the child to the safe home of the parent or to complete whatever steps are necessary to finalize the permanent placement of the child.
- If the reviewing court determines that another period of reunification services is in the child's best interests, and that there is a significant likelihood of the child's return to a safe home due to changed circumstances of the parent, the specific reunification services required to effect the child's return to a safe home shall be described.
- Whether there should be any limitation on the right of the parent or guardian to make educational decisions or developmental-services decisions for the child.
 - If the court specifically limits the right of the parent or guardian to make educational decisions or developmental-services decisions for the child, the court must, at the same time, appoint a responsible adult to make educational decisions or developmental-services decisions. (See Section XII, Advocating for the Child, for further discussion.)
- Whether the services provided to the child are adequate.
- The parent or legal guardian's progress toward alleviating or mitigating the causes necessitating the child's placement in foster care.
- The likely date by which the child may be returned to, and safely maintained in, the home, placed for adoption, legal guardianship, placed with a fit and willing relative, or, for an Indian child, in consultation with the child's tribe, placed for tribal customary adoption, or, if the child is 16 years of age or older, and no other permanent plan is appropriate at the time of the hearing, in another planned permanent living arrangement.
- Whether the child has any siblings under the court's jurisdiction, and, if any siblings exist, all of the following:
 - The nature of the relationship between the child and his or her siblings.³⁵⁵
 - The appropriateness of developing or maintaining the sibling relationships.
 - If the siblings are not placed together in the same home, the reason why the siblings are not placed together and what efforts are being made to place the siblings together, or why those efforts are not appropriate.
 - If the siblings are not placed together, all of the following:

³⁵⁵ The factors the court may consider as indicators of the nature of the child's sibling relationships include, but are not limited to, whether the siblings were raised together in the same home, whether the siblings have shared significant common experiences or have existing close and strong bonds, whether either sibling expresses a desire to visit or live with his or her sibling, as applicable, and whether ongoing contact is in the child's best emotional interests.

- The frequency and nature of the visits between the siblings.
 - If there are visits between the siblings, whether the visits are supervised or unsupervised. If the visits are supervised, a discussion of the reasons why the visits are supervised, and what needs to be accomplished in order for the visits to be unsupervised.
 - If there are visits between the siblings, a description of the location and length of the visits.
 - Any plan to increase visitation between the siblings.
- The impact of the sibling relationships on the child’s placement and planning for legal permanence.
- For a child who is 14 years of age or older, the services needed to assist the child to make the transition from foster care to successful adulthood.

2. Where the Child is 16 Years of Age or Older

Where the permanent plan is to return home, adoption, legal guardianship, or placement with a fit and willing relative, any barriers to achieving the permanent plan and the efforts made by the social services agency must be addressed.³⁵⁶

If there is another planned permanent living arrangement, the court shall do all of the following:

- Ask the child about his or her desired permanency outcome.
- Explain why, as of the hearing date, another planned permanent living arrangement is the best permanency plan for the child.
- State for the record the compelling reason or reasons why it continues not to be in the best interest of the child to return home, be placed for adoption ,or TCA, be placed with a legal guardian, or be placed with a fit and willing relative.³⁵⁷

The social services agency’s report prepared for the hearing shall include a description of all of the following:

- The intensive and ongoing efforts to return the child to the home of the parent, place the child for adoption, or establish a legal guardianship, as appropriate.
- The steps taken to do both of the following:

³⁵⁶ Welf. & Inst. Code § 366.3(h)(4).

³⁵⁷ Welf. & Inst. Code § 366.3(h)(2).

- Ensure that the child’s care provider is following the reasonable and prudent parent standard.
- Determine whether the child has regular, ongoing opportunities to engage in age- or developmentally-appropriate activities, including consulting with the child about opportunities for the child to participate in those activities.³⁵⁸

3. Review Appropriateness of Setting of Welfare and Institutions Code § 366.26 Hearing

At the review hearing, the court must consider all permanency planning options for the child. This includes considering whether the child should be returned to the home of the parent. The court will also consider the appropriateness of adoption, TCA, legal guardianship, placement with a fit and willing relative, and a planned permanent living arrangement.³⁵⁹

The court must order that a Welfare and Institutions Code § 366.26 hearing be held unless there is clear and convincing evidence of a compelling reason for determining that such a hearing is not in the best interest of the child.³⁶⁰

A compelling reason would be because the child is being returned to the home of the parent, the child is not a proper subject for adoption, or no one is willing to accept legal guardianship as of the hearing date. The court must make factual findings identifying any barriers to achieving the permanent plan.³⁶¹

If the court orders that a Welfare and Institutions Code § 366.26 hearing be set, the court must direct the agency supervising the child and the county adoption agency, or the state Department of Social Services (if it is acting as an adoption agency) to prepare an assessment under Welfare and Institutions Code §§ 366.21(i) or 366.22(b). The hearing will be set for within 120 days.³⁶²

³⁵⁸ Welf. & Inst. Code § 366.3(h)(3).

³⁵⁹ Welf. & Inst. Code § 366.3(h)(1).

³⁶⁰ Welf. & Inst. Code § 366.3(h)(1).

³⁶¹ Welf. & Inst. Code § 366.3(h)(1).

³⁶² Welf. & Inst. Code § 366.3(i).

VIII. PLACEMENT PREFERENCES

A. Background and Purpose

Perhaps the most significant event to occur in a dependency case is the selection of an out-of-home placement. The ICWA sets forth two orders of preference for placement of Indian children – one for adoptive placements, and the other for foster care and preadoptive placements.³⁶³ The placement preferences have also been incorporated into California law.³⁶⁴

The term “preference” is misleading, in that to some it implies an optional standard. However, the U.S. Supreme Court has held it to be a mandatory standard, absent “good cause” to place outside of the preferences. The Court has also characterized compliance with the placement preferences as “the most important substantive requirement imposed on state courts.”³⁶⁵ What may or may not constitute “good cause” is discussed further below, but in short, absent a sufficient showing of good cause the placement preferences must be met (assuming, of course, that a preferred placement is available).

The placement preferences exist because “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children,” and because, as a matter of law, if an out-of-home placement is necessary, it is in an Indian child’s best interest to be placed whenever possible “in a placement that reflects the unique values of the child’s tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the child’s tribe and tribal community.”³⁶⁶

Tribal advocates should be aware that placement can be a contentious issue, not just vis-à-vis a social services agency, but also within the family and tribe. Not all parents or family members will agree on who is appropriate for placement. For example, the ICWA gives top priority to “extended family members,” and has a specific definition of who is considered extended family. However, the ICWA does not differentiate between Indian and non-Indian family members. Consequently, a non-Indian father’s brother (the uncle) would fall within the placement preferences even though he is non-Indian. This means that the highest placement preference may actually go to a non-Indian relative.

B. When Do the Placement Preferences Apply?

The preferences apply any time that an Indian child is removed from the physical custody of his or her parents or Indian custodian and cannot have the child returned upon demand.³⁶⁷

³⁶³ 25 U.S.C. § 1915(a), (b).

³⁶⁴ Welf. & Inst. Code § 361.31(b), (c).

³⁶⁵ *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 36.

³⁶⁶ 25 U.S.C. §§ 1901, 1902; Welf. & Inst. Code § 224(a)(1).

³⁶⁷ Welf. & Inst. Code § 361.31; See also, 25 U.S.C. §§ 1903(1), 1915(a), (b); BIA Guidelines § F.1(a) – setting forth placement preference order in all “foster care placements.”

The preferences apply not only to the initial placement of an Indian child after removal, but also when a child is removed from a foster care home or institution, guardianship, or adoptive placement for subsequent further placement.³⁶⁸

C. Foster Care and Preadoptive Placement Preferences

When a foster placement is necessary, children are supposed to be placed in the least restrictive environment that most closely approximates their family.³⁶⁹ The law also requires the social services agency to place children as close as possible to their current home, and take into account any special needs. In addition, preference must be given (in descending order) to the following:

1. A member of the Indian child's extended family;
2. A foster home licensed, approved, or specified by the Indian child's tribe;
3. An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
4. 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.

The purpose of requiring a placement close to the child's current home is to minimize the disruption on a child's life, by (if possible) avoiding changes in school and neighborhood, but also to allow parents close proximity and frequent visits while they work on their reunification plans. Dispositions that only afford limited 1-2 hour visits, once or twice a week, are inadequate and do not allow a family sufficient time to maintain their relationships.

For this reason, an advocate should normally ask for maximized and frequent visits. Some social workers will ask to supervise visits, and cite limited resources and personnel as reasons why they cannot offer longer or more frequent visits. However, unless there is some compelling reason to supervise, there is no reason to limit visits to once or twice a week—it is an obstacle to reunification and a recipe for failure.

Decisions about where children are placed and who they are placed with can, and does, have an ancillary effect on the success of a dispositional plan, and whether the social services agency can be said to have made active efforts to prevent the breakup of the family.

D. Adoptive Placement Preferences

Preference for an adoptive placement must be given (again, in descending order) to the following:

1. A member of the child's "extended family."

³⁶⁸ Welf. & Inst. Code § 224.2(b); See also, 25 U.S.C. § 1916.

³⁶⁹ 25 U.S.C. § 1915(b); Welf. & Inst. Code § 361.31(b).

2. Other members of the child's tribe.
3. Another Indian family.³⁷⁰

When an adoptive placement is necessary, the child's need for permanence takes paramount importance over the need for keeping children close to their current home and to their parents. At that point reunification with the parents is not likely to be achieved.

This is an important distinction for the advocate to be aware of. Often foster parents who were more appropriate placements while reunification efforts were underway will seek to be an Indian child's permanent placement, even though they are not within the ICWA's order of adoptive placement, and even though the tribe or has identified a preferred placement. (The most common basis for this, bonding, is discussed further below under subsection G, Good Cause to Deviate from the Placement Preferences.)

E. Federal/Tribal vs. State Definitions

1. "Extended Family" and "Non-Extended Family Members"

Advocates should bear in mind that the controlling definition of the term "extended family" in an ICWA case is that set forth in the ICWA, not in state law.

The ICWA defines "extended family" by first deferring to the Indian child's tribe.³⁷¹ If tribal law or custom does not provide a definition, the ICWA's default is "a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent."

⇒ **PRACTICE POINTER:** *A party might try to include the state definition of a "non-related extended family member" (NREFM) within the definition of "extended family." Under state law, a NREFM is "an adult caregiver who has an established familial relationship with a relative of the child, or a familial or mentoring relationship with the child."³⁷² There may be cases where this does not conflict with tribal law or custom, but where it does – perhaps where a NREFM is being used in an attempt to stretch the ICWA's placement preferences, and to avoid a change in placement – tribal advocates should be sure to object.*

2. "Extended Family" and De Facto Parents

Parties opposing a change in placement to one preferred under the ICWA may also attempt to bring the California creation of a "de facto parent" into the scope of an Indian child's extended family. This is usually done in reliance on a pre-SB 678 case in which the court determined that a child's former stepfather, with whom he had a long-standing relationship prior to the initiation of dependency proceedings, was a "de facto parent" and was appropriately included within the child's "extended family."³⁷³

³⁷⁰ 25 U.S.C. § 1915(b).

³⁷¹ 25 U.S.C. § 1903(2).

³⁷² Welf. & Inst. Code § 362.7(b).

³⁷³ *In re Brandon M.* (1997) 54 Cal.App.4th 1387.

Advocates should be aware that *Brandon M.* was a highly fact-specific decision, and should not be seen as persuasive authority in the most common circumstance in which it is offered – when a foster parent wishes to be a child’s permanent placement, rather than allow the child to change placements to one preferred under the ICWA. Advocates should also be aware that in almost 20 years since being decided, *Brandon M.* has never been cited in any published California appellate decision as authority for the proposition that a de facto parent is “extended family” as defined by the ICWA.

F. Incorporation of Tribal Services, Standards, and Preferences

Anyone involved in the placement of an Indian child must use any available services of the Indian child’s tribe in seeking to secure placement within the order of preference.³⁷⁴

Courts must also apply the tribe’s social and cultural standards when determining an Indian child’s placement.³⁷⁵ Because most courts will not be familiar with those standards, advocates should be prepared to articulate them and to guide the court in how they should affect the placement decision.

Under the ICWA’s full faith and credit provision, tribally-approved or -licensed homes are entitled to treatment similar to foster homes licensed by the state.³⁷⁶ What this means is that a placement specified by a tribe does not have to meet state licensing requirements in order to be approved.

Finally, the child’s tribe may establish a different order of preference than the defaults specified in the ICWA.³⁷⁷ It might, for example, place particular importance on children being placed with other siblings, even if those siblings are not in the home of an ICWA-preferred placement.

G. Good Cause to Deviate from the Placement Preferences

Advocates need to be aware of the orders of preference, and if a party is seeking to go outside of either of the applicable orders, then an advocate should insist that they identify any and all efforts made to locate a preferred placement. The law puts the obligation on the party who is not following the preferences to demonstrate good cause to deviate from the preferences.³⁷⁸ Good cause must be proved by “clear and convincing evidence,” a higher standard than the normal preponderance of the evidence standard.³⁷⁹

³⁷⁴ Welf. & Inst. Code § 361.31(g); Cal. Rules of Court, rule 5.482(g).

³⁷⁵ 25 U.S.C. § 1915(d); Welf. & Inst. Code 361.31(f).

³⁷⁶ See, 25 U.S.C. § 1911(d); Welf & Inst. Code § 224.5.

³⁷⁷ 25 U.S.C. § 1915(c).

³⁷⁸ Welf. & Inst. Code § 361.31(j).

³⁷⁹ BIA Guidelines § F.4(b).

1. What is “Good Cause?”

The ICWA does not define what circumstances may constitute “good cause.” California statutes do not definitively address the question either. According to the California Rules of Court and the BIA Guidelines, however, a good cause finding could be based on one or more of the following (note that these are not exclusive factors):

- a. The request of the parents, if both parents attest that they have reviewed the placement options that comply with the order of preference.
- b. The request of the child, when of sufficient age, and if the child is able to understand and comprehend the decision that is being made.
- c. The extraordinary physical or emotional needs of the child, such as specialized treatment services that may be unavailable in the community where families who meet the criteria live, as established by testimony of a qualified expert witness.³⁸⁰
- d. The unavailability of a placement after a showing by the applicable party, and a determination by the court, that active efforts have been made to find placements meeting the preference criteria, but none have been located.³⁸¹

⇒ **PRACTICE POINTER:** *The mere presence of one of the first two factors should not in and of itself be seen as definitive. The question for the court is whether, in light of the specifics of a particular case, the factor(s) being cited as grounds for good cause are sufficiently weighty to overcome the strong presumption that it is in an Indian child’s best interest to be placed within the preferred order of placement.*

For example a child’s father does not succeed in his case plan, has reunification services terminated, and at the child’s permanency hearing, will permanently lose his right to parent, either via standard adoption or TCA. The child’s tribe has identified an adoptive placement with two of the child’s siblings, but the child’s foster parents (who are not an ICWA-preferred placement) also wish to adopt. The father and foster parents reach an agreement whereby the father will oppose a change in placement, and will claim that his opposition constitutes good cause to avoid the placement preferences, in exchange for the foster parents granting him liberal visitation with his child once they complete the adoption.

³⁸⁰ The BIA Guidelines go on to provide that the “extraordinary physical or emotional needs of the child do[] not include ordinary bonding or attachment that may have occurred as a result of a placement or the fact that the child has, for an extended amount of time, been in another placement that does not comply with the Act. The good cause determination does not include an independent consideration of the best interest of the Indian child because the preferences reflect the best interests of an Indian child in light of the purposes of the Act.” (BIA Guidelines § F.4(c)(3).)

³⁸¹ Cal. Rules of Court, rule 5.484(b)(2); BIA Guidelines § F.4(c).

2. What is Not “Good Cause?”

It is not sufficient to place with a non-preferred placement simply because the tribe has not located a placement. The social services agency has an independent duty under the law to diligently search for preferred placements.

The court should consider only whether a placement in accordance with the preferences meets the physical, mental and emotional needs of the child, and may not depart from the preferences based on the socio-economic status of any placement relative to another placement.³⁸²

a. Bonding

Advocates should be especially aware that emotional bonding between a child and a placement which occurs as a result of a local or state agency’s failure to comply with the ICWA cannot constitute good cause for deviating from the ICWA’s placement preferences even if considerable trauma to the child may occur as a result.³⁸³

However, one California appellate court recently held that when a child is placed with a non-preferred placement, but without any violation of the ICWA, bonding which occurs must be considered.³⁸⁴ That court held that good cause may lie where disrupting such a bond would create a “significant risk” of “serious harm.”³⁸⁵

⇒ **PRACTICE POINTER:** *A common misconception is that the best interest of the child is opposed to that of the tribe, or that the ICWA operates only in the tribe’s interest. In truth, and by statute, an Indian child’s best interest and the interest of his or her tribe are intertwined. In enacting ICWA and Cal-ICWA, Congress and the Legislature declared that it is in the child’s best interest to maintain his or her relationship and connection with his or her tribe.*

b. There is No “Existing Indian Family Doctrine” in California

Prior to SB 678, there was a split in the California appellate courts regarding a judicially-created exception to application of the ICWA known as the “existing Indian family doctrine,” which viewed an existing and significant social or cultural connection to an Indian tribe or community as a prerequisite necessary to render an application of the ICWA constitutional.

With SB 678, the Legislature made it clear that the “existing Indian family doctrine” could not be used to avoid the plain language of the ICWA. Two particular provisions of SB 678 illustrate the Legislature’s intent:

³⁸² BIA Guidelines § F.4(d).

³⁸³ *In re Desiree F.* (2000) 83 Cal.App.4th 460, 476; *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 53-54.

³⁸⁴ *In re Alexandria P.* (2014) 228 Cal.App.4th 1322.

³⁸⁵ *Id.* at 1354-1355.

“It is in the interest of an Indian child that the child's membership in the child's Indian tribe and connection to the tribal community be encouraged and protected, regardless of whether the child is in the physical custody of an Indian parent or Indian custodian at the commencement of a child custody proceeding, the parental rights of the child's parents have been terminated, or where the child has resided or been domiciled.”³⁸⁶

and

“A determination by an Indian tribe that an unmarried person, who is under the age of 18 years, is either (1) a member of an Indian tribe or (2) eligible for membership in an Indian tribe and a biological child of a member of an Indian tribe shall constitute a significant political affiliation with the tribe and shall require the application of the federal Indian Child Welfare Act to the proceedings.”³⁸⁷

The only cases addressing the existing Indian family doctrine since the passage of SB 678 have rejected it.³⁸⁸ At this time, there should be no doubt that the existing Indian family doctrine is no longer good law in California.

⇒ **PRACTICE POINTER:** *Because of the history of a split in California courts regarding the application of the existing Indian family doctrine, there may still be some confusion by persons appearing before the court. Any argument referring to the doctrine can be extinguished simply by referring to SB-678 and subsequent case law.*

3. What if No Preferred Placement is Available?

The record must document the efforts to comply with the ICWA's placement preferences. The record must be made available to the child's tribe at any time.³⁸⁹

The social services agency must demonstrate through clear and convincing evidence that a diligent search has been conducted to seek out and identify placement options that would satisfy the placement preferences, and if the preferences could not be met, explain why not.³⁹⁰

In cases where no preferred placement is available, active efforts must be made (and documented) to ensure that a child's placement is “with a family committed to enabling the child to have extended family visitation and participation in the cultural and ceremonial events of the child's tribe.”³⁹¹

³⁸⁶ Welf. & Inst. Code § 224.2(a)(2).

³⁸⁷ Welf. & Inst. Code § 224(c).

³⁸⁸ See, e.g., *In re Adoption of Hannah S.* (2006) 142 Cal.App.4th 988; *In re Vincent M.* (2007) 150 Cal.App.4th 1247.

³⁸⁹ 25 U.S.C. § 1915(e); see, Welf. & Inst. Code § 361.7(c).

³⁹⁰ BIA Guidelines § F.1.(b).

³⁹¹ Welf. & Inst. Code § 361.31(i); see also, Cal. Rules of Court, rule 5.484(b)(6).

H. Criminal Background Checks

Criminal background checks are required for placement of dependent children with relatives or prospective guardians who are not licensed or certified foster parents. Placement might not be allowed if the proposed caregiver has a criminal record.³⁹² Certain violent felonies are an absolute bar to placement. However, an exemption may be granted for other crimes, including violent misdemeanors, where there is reason to believe that the potential placement is of good character and would not pose a risk of harm to the child.³⁹³

A California appellate court has held that in light of the purposes underlying the ICWA, a party seeking placement of an Indian child must either: (a) request a “waiver” (now termed an “exemption”) for a potential placement with a criminal record if that placement would satisfy the ICWA’s preferences, or (b) “adequately support its reasons for not doing so if failure to request a waiver results in a placement that contravenes the ICWA preferences.”³⁹⁴ An exemption cannot be unreasonably denied because “to do so would necessarily frustrate goals the ICWA is intended to achieve.” If these requirements are not met, the party seeking placement cannot meet its burden of proving good cause to deviate from the ICWA’s placement preferences.

It should be noted that when *Jullian B.* was decided, the relevant statute allowed a county to request an exemption from the California Department of Social Services (CDSS). However, the statute did not allow CDSS to delegate its exemption-granting authority to a county, which in *Jullian B.* is what the CDSS wanted to do. The county would not accept the responsibility of granting an exemption, and since that was the only option being offered by the CDSS the county concluded that requesting an exemption for the potential placement was futile.

The statute was changed in 2001 to allow a county to request permission from the state to grant exemptions itself. That is, in 2000 the county had the responsibility of requesting an exemption or of explaining why, “based on the merits of the individual case and subject to review for abuse of discretion, it did not do so.”³⁹⁵ In 2000, the state had the responsibility of exercising “sound discretion” in considering the exemption request. When the statute changed in 2001, both of those responsibilities became the county’s, where a county has requested permission from the state to grant exemptions (and has been given that permission).

⇒ **PRACTICE POINTER:** *In addition, a tribe may make its own request for an exemption for a potential placement, either from a county with the proper authority or from CDSS directly.*³⁹⁶ *Once a tribe requests an exemption from one of those two entities, it serves as a choice of that entity, and only that entity may then decide whether to grant the request. (In other words, a tribe may not first request an exemption from one entity, have that request denied, and then make the same request to the other entity.)*

³⁹² Welf. & Inst. Code § 361.4(d)(2); Health & Safety Code § 1522.

³⁹³ Welf. & Inst. Code § 361.4(d)(2); Health & Safety Code § 1522(g)(1).

³⁹⁴ *In re Jullian B.* (2000) 82 Cal.App.4th 1337, 1347.

³⁹⁵ *In re Jullian B.*, *supra* at 1350.

³⁹⁶ Welf. & Inst. Code § 361.4(f).

However, this tribal request option in no way relieves the party seeking to place an Indian child from its independent duty to pursue a criminal record exemption, or to adequately explain its reasons for not doing so. Thus, so long as the county has the power to grant exemptions, a tribe can wait and see if the county grants an exemption to a potential placement, based on that individual's request and the county's obligation to consider such an exemption. If the exemption is denied, the tribe might then choose to seek an exemption directly from the state.

I. Records of Placement

A record of each placement of an Indian child must be maintained by the state. The record must evidence the efforts to comply with the order of preference.³⁹⁷ Such records must be made available at any time at the request of the BIA and/or the tribe.³⁹⁸

The BIA Guidelines provide that the records must include, at minimum:

- The petition or complaint;
 - All substantive orders entered in the proceeding;
 - A complete record of, and basis for, the placement determination;
- and
- If the placement deviates from the placement preferences, a detailed explanation of all efforts to comply with the placement preferences and the court order authorizing departure from the placement preferences.³⁹⁹

³⁹⁷ 25 U.S.C. § 1915(e); Welf. & Inst. Code § 361.31(k).

³⁹⁸ 25 U.S.C. § 1915(e).

³⁹⁹ BIA Guidelines § F.1(e).

IX. INVALIDATION

State court child custody proceeding may be “invalidated” if certain provisions of the ICWA are violated.⁴⁰⁰

A. What Violations Are Subject to Invalidation?

Any provision set forth in:

- 25 U.S.C. § 1911 - addressing jurisdictional issues, including transfer to tribal court, intervention, and full faith and credit to tribal acts and proceedings.
- 25 U.S.C. § 1912 - addressing issues in involuntary custody proceedings, including notice, time extensions, appointment of counsel, examination of documents filed with the court, active remedial/rehabilitative efforts, and evidentiary requirements.
- 25 U.S.C. § 1913 - addressing issues in voluntary custody proceedings, including consent, the court’s certification thereof, and withdrawal of consent.

B. Who Can Request Invalidation?

Invalidation may be sought by the Indian child, the child’s tribe, or a parent or Indian custodian from whose custody the child was removed.⁴⁰¹

C. Where Does the Request to Invalidate Occur?

The ICWA provides that a party with standing to petition for invalidation may do so in “any court of competent jurisdiction.”⁴⁰²

⇒ **PRACTICE POINTER:** *That term is not defined by the ICWA, however. There is disagreement amongst the various courts as to what “any court of competent jurisdiction” means. While courts agree that the “juvenile court” is generally a court of competent jurisdiction, the case law differs about whether a request for invalidation can or must be brought to another superior court, the federal court, and/or the appellate court. If a violation of one of the above sections occurs, an advocate should be sure to make a clear, documented, and timely objection to the violation on the record, and to request invalidation, in order to preserve the tribe’s rights on appeal. Due to the lack of clarity on this issue, the advocate may also wish to seek legal counsel for further guidance.*

⁴⁰⁰ 25 U.S.C. § 1914; Welf. & Inst. Code § 224(e); Cal. Rules of Court, rule 5.486.

⁴⁰¹ 25 U.S.C. § 1914.

⁴⁰² 25 U.S.C. § 1914.

D. How to Petition to Invalidate?

The ICWA mentions only that certain parties “may petition... to invalidate.”⁴⁰³ It does not, however, specify or limit what form the petition should take. The most commonly accepted procedure is to file a “petition to invalidate” with the juvenile court.

There, however, is no Judicial Council form for such an action. In other states, a petition for a writ of habeas corpus, a motion for reconsideration or a motion for relief from judgment have also been used.⁴⁰⁴

E. When to Petition to Invalidate?

No deadline to petition to invalidate exists in the ICWA. However, to wait until appeal to assert for the first time a request for invalidation runs the risk of the issue being considered “forfeited.” Therefore, any petition to invalidate should be brought as soon as the violation is known to have occurred.

⁴⁰³ 25 U.S.C. § 1914.

⁴⁰⁴ See, *Application of Angus* (Ore. 1982) 655 P.2d 208, *cert. denied*, 464 U.S. 830 (parents’ use of habeas corpus because of a violation of the ICWA resulted in the child being illegally detained).

X. DISCOVERY AND RIGHTS TO ACCESS

A. Access to Case Information Under the ICWA

The ICWA provides that “all parties to a dependency or delinquency proceeding involving an Indian child, including the child’s parents, the child, the child’s Indian custodian, and the child’s tribe have the right to examine all reports or other documents filed with the court in the proceeding.”⁴⁰⁵

Opposing parties may try to read the “filed with the court” proviso as prohibiting tribes’ access to documents usually not filed with the court, such as social worker notes and delivered service logs (“DSLs”). However, as discussed below, California law expands the scope of the case information which tribes may access.

B. Expanded Access to Case Information Under State Law

State law was recently amended to clarify that tribes have access to a wide range of documents when a case involves a child who is a member, or eligible for membership, in a tribe. The clarification provides that a tribe’s social services department may “inspect” a juvenile case file, even if the tribe has not formally intervened in a case.⁴⁰⁶ Presumably this also extends to receiving information about the case from another entity involved in it (e.g., the social services agency), especially in light of the social services agency’s duties to make active efforts to prevent the need for the child’s removal and its duty to utilize the tribe’s available resources (such as tribal social services) in making those active efforts.⁴⁰⁷

Where a tribe intervenes, its representative (whether an attorney or ICWA advocate) is entitled to a copy of the case file without a court order.⁴⁰⁸

⇒ **PRACTICE POINTER:** *Notwithstanding the above, ICWA advocates may still encounter resistance to obtaining copies of case files without a court order, due to California Rules of Court rule 5.552(b)(2). Advocates should be aware that where a statute and rule of court conflict, the statute will prevail – meaning that the provisions of Welfare and Institutions Code § 827, which do not require a tribe to obtain a court order, control over the provisions of California Rules of Court rule 5.552. It may help all involved to understand that Welfare and Institutions Code § 827 was amended effective Jan. 1, 2015 to clarify tribes’ rights of access, while Rule 5.552 was not amended to match (having been last amended in 2009).*

This is consistent with the BIA Guidelines, which state that a tribe has the right to “timely examination of all reports or other documents filed with the court and all files upon which any decision with respect to such action may be based.”⁴⁰⁹ This also comports logically

⁴⁰⁵ 25 U.S.C. § 1912(c).

⁴⁰⁶ Welf. & Inst. Code § 827(f), (a)(1)(K).

⁴⁰⁷ Welf. & Inst. Code § 361.7; Cal. Rules of Court, rule 5.484(c).

⁴⁰⁸ Welf. & Inst. Code § 827(f), (a)(5), (a)(1)(E).

⁴⁰⁹ BIA Guidelines § D.1(a)

with a tribe's status as a party upon intervention, and with the general principle that all parties to a case have equal rights in the proceedings.⁴¹⁰

C. Contents of “Juvenile Case File”

A juvenile case file consists of the petition(s) filed, reports of the probation officer or social worker, and all other documents filed in that case or made available to the probation officer or social worker in making his or her report, or made available to the judge, referee, or other hearing officer, and thereafter retained.⁴¹¹

California Rules of Court, rule 5.552 details what may normally be included in the case file:

- All documents filed in a juvenile court case;
- Reports to the court by probation officers, social workers of child welfare services programs, and CASA volunteers;
- Documents made available to probation officers, social workers of child welfare services programs, and CASA volunteers in preparation of reports to the court;
- Documents relating to a child concerning whom a petition has been filed in juvenile court that are maintained in the office files of probation officers, social workers of child welfare services programs, and CASA volunteers;
- Transcripts, records, or reports relating to matters prepared or released by the court, probation department, or child welfare services program; and
- Documents, video or audio tapes, photographs, and exhibits admitted into evidence at juvenile court hearings.

⇒ **PRACTICE POINTER:** *Should a record be needed for preparation and participation in a hearing, but it is not fitting easily into one of the above sections, remind the court and the parties that the court has an inherent discretionary ability to order whatever discovery it believes is appropriate.*⁴¹²

Although delivered service logs and social worker notes are usually not filed with the court, they are certainly (or, if timely prepared, at least should certainly) be “available... in preparation of reports to the court,” and courts routinely order production of them if there is any dispute as to their inclusion within the “case file.”

⇒ **PRACTICE POINTER:** *Tribes may find social worker delivered service logs (“DSLs”) and social worker notes very useful in preparing for proceedings. These documents will detail the social services agency’s interactions with the parents, child(ren), tribe, and service providers. They may include information which is not contained in report(s) to the court. They may also be*

⁴¹⁰ See Cal. Code of Civ. Proc. § 387.

⁴¹¹ Welf. & Inst. Code § 827(e).

⁴¹² See, Welf. & Inst. Code § 827 (a)(3)(A), (b)(1).

useful when cross-examining for indications of potential cultural bias or inappropriate conclusions concerning Indian people or the requirements of the ICWA.

D. Obtaining Discovery/Access to Case Files

The California Rules of Court require that pre-hearing discovery rules must be liberally construed in favor of informal disclosures, although subject to a party showing privilege or other good cause not to disclose specific material or information.⁴¹³ Disclosure is an ongoing obligation and must be done even if an initial response has already been made.⁴¹⁴

Additionally, disclosures must be made in time to permit that party to make beneficial use of them.⁴¹⁵ The discovery must be completed in a timely manner to avoid the delay or continuance of a scheduled hearing.⁴¹⁶

Certain disclosures are required automatically by certain parties, while others must be requested. They are as follows:

1. From Social Services Agency (Petitioner)

Required disclosures:

- Petitioner must disclose any evidence or information within its possession or control that is favorable to the child, parent, or guardian.
- Once the petition is filed, the social services agency must promptly deliver to or make accessible for inspection and copying by the child and the parent or guardian, or their counsel, copies of the police, arrest, and crime reports relating to the pending matter.
- Exception - Privileged information may be omitted or redacted. However, notice of the omission must be given simultaneously.⁴¹⁷

Disclosures upon timely request:

- Probation reports prepared in connection with the pending matter relating to the child, parent, or guardian;
- Records of statements, admissions, or conversations by the child, parent, or guardian;
- Records of statements, admissions, or conversations by any alleged co-participant;
- Names and addresses of witnesses interviewed by an investigating authority in connection with the pending matter;

⁴¹³ Cal. Rules of Court, rule 5.546(a).

⁴¹⁴ Cal. Rules of Court, rule 5.546 (k).

⁴¹⁵ Cal. Rules of Court, rule 5.546 (g).

⁴¹⁶ Cal. Rules of Court, rule 5.546 (i).

⁴¹⁷ Cal. Rules of Court, rule 5.546 (b), (c).

- Records of statements or conversations of witnesses or other persons interviewed by an investigating authority in connection with the pending matter;
 - Reports or statements of experts made regarding the pending matter, including results of physical or mental examinations and results of scientific tests, experiments, or comparisons;
 - Photographs or physical evidence relating to the pending matter;
- and
- Records of prior felony convictions of the witnesses each party intends to call.⁴¹⁸

2. From Parent or Guardian

Disclosures upon timely request:

- All relevant material and information within the parent's or guardian's possession or control. Be aware, though, that if the parent or guardian is represented by an attorney, a request for the disclosure must be made to the attorney.⁴¹⁹

E. Restrictions on Discovery

1. Disclosure Cannot Be to the Detriment of a Child

Access to juvenile case files is prohibited if disclosure is detrimental to the safety, protection, or physical or emotional well-being of a child who is directly or indirectly connected to the juvenile case.⁴²⁰

2. Privileged or Confidential Materials

If a juvenile case file (or even any portion thereof) is privileged or confidential pursuant to any state law or federal law or regulation, the requirements of that state law or federal law or regulation prohibiting or limiting release of the juvenile case file or any portions thereof shall prevail.⁴²¹

F. Ordering Disclosure is in the Inherent Authority of the Court

Notwithstanding the above, juvenile courts, like other courts, have the inherent power to order discovery. If any party refuses to permit disclosure of information or inspection of materials, the requesting party may move the court for an order requiring timely disclosure of the

⁴¹⁸ Cal. Rules of Court, rule 5.546 (d).

⁴¹⁹ Cal. Rules of Court, rule 5.546(e).

⁴²⁰ Welf. & Inst. Code § 827(a)(3).

⁴²¹ Welf. & Inst. Code § 827(a)(3).

information or materials.⁴²² The court has the ability to provide whatever safeguards are needed, including but not limited to protective orders, excision, and/or in camera review.⁴²³

1. Protective Orders

If there is no local rule, some of the considerations you may wish to have included in a protective order include:

- Requiring that the records and information obtained from the disclosed social services agency records be used only for the current proceeding and for no other use.
- Requiring that the attorneys only be permitted to make review and make copies as is necessary to participate and prepare for the matter.
- Requiring that the records and information received from the social services agency not be released, directly or indirectly, to anyone not directly connected with the Juvenile Court proceeding.

2. Excision

When some parts of the materials are discoverable but other parts are not, the non-discoverable material may be excised and need not be disclosed. When this is done, the requesting party or counsel must be informed that material has been excised and the material excised must be sealed and preserved in the records of the court for review on appeal.⁴²⁴

G. Motion to Compel Discovery

If a tribe requests discovery from another party and is denied, or is not met with a timely response, a motion to compel may be necessary. The motion must state the items sought and their relevancy, and that a timely request was made but was refused.⁴²⁵

⇒ **PRACTICE POINTER:** *When addressing “relevance” in a motion to compel, some arguments to consider include:*

- *Underlying every one of the court’s determinations in an ICWA case is the existence of “active efforts,” which tribes (as entities whom the ICWA was intended to protect) have an interest in ensuring have been made.*
 - *Active efforts must be directed at remedying the basis for the removal proceedings; therefore, the type of services required depends on the facts of each case.*⁴²⁶

⁴²² Cal. Rules of Court, rule 5.546(f).

⁴²³ See, Cal. Rules of Court, rule 5.546 (g); Welf. & Inst. Code § 827(a) (3).

⁴²⁴ Cal. Rules of Court, rule 5.546 (h).

⁴²⁵ Cal. Rules of Court, rule 5.546(f).

⁴²⁶ Welf. & Inst. Code § 361.7(b).

- *Active efforts must include attempts to use the available resources of extended family members, the tribe, Indian social services agencies, and the individual Indian caregivers.*⁴²⁷
- *There is no bright-line test for determining active efforts. Welfare and Institutions Code § 361.7(b) says, “what constitutes active efforts shall be assessed on a case-by-case basis.”*
- *The records should already exist as active efforts must be documented.*
- *The disclosure is important in determining the child’s needs.*
 - *The state has an interest in providing a stable, permanent home for dependent child who cannot be returned home.*⁴²⁸
 - *Under Welfare and Institutions Code § 361.2(e), the social worker has the duty to determine the child’s placement in accordance with guidelines set forth in that section and in Welfare and Institutions Code § 361.3. The social services agency must ensure to the greatest extent possible, that a placement meets the day-to-day needs of the child.*⁴²⁹
 - *This includes the placement’s ability to provide for the child’s health, safety, and wellbeing, and to provide the least restrictive and most family-like environment.*
 - *The placement should allow the child to engage in reasonable, age-appropriate day-to-day activities, using a “reasonable and prudent parent” standard as defined by Welfare and Institutions Code §§ 362.04(a), 361.2(k).*
 - *The social worker must develop a plan for ongoing oversight and coordination of health care services for the child in foster care.*⁴³⁰ *The goals of the case plan are to:*
 - *Ensure that the child receives the protection and safe and proper care and case management;*
 - *Provide services to improve conditions in the parent’s home;*
 - *Facilitate the child’s safe return to a safe home or the child’s permanent placement; and*
 - *Address the child’s needs while in foster care.*⁴³¹

⁴²⁷ Welf & Inst. Code § 361.7(b); Cal Rules of Court, rule 5.484(c).

⁴²⁸ See, Welf. & Inst. Code § 202.

⁴²⁹ Welf. & Inst. Code § 361.2(k).

⁴³⁰ Welf. & Inst. Code § 16010.2.

⁴³¹ Welf. & Inst. Code § 16501.1(a).

These determinations are particularly important in an ICWA case where there is a need to ensure that the Indian child's tribe was actively involved in the development of the case plan and the plan for permanent placement.⁴³² Cultural considerations and the interests of the child's tribe should also be reflective in the case planning.

H. Granting the Motion and Other Relief

A court order granting discovery may specify the time, place, and manner of the discovery and inspection and may impose terms and conditions on it.⁴³³

If it is brought to court's attention that a person has failed to comply with the above rules of discovery, the court may also:

- Order the person to permit the discovery or inspection of materials not previously disclosed;
- Grant a continuance;
- Prohibit a party from introducing in evidence the material not disclosed, dismiss the proceedings; or
- Enter any other order the court deems just under the circumstances. (Theoretically this could even include "sanctions" – fees paid to the court as a penalty for non-compliance with a duty in a court proceeding.)⁴³⁴

I. Access to State-Maintained Records

States must establish a single location where all records of every voluntary or involuntary foster care, pre-adoptive placement and adoptive placement of Indian children will be available within seven days of a request by an Indian child's tribe or the Secretary.⁴³⁵

The records must contain, at a minimum, the petition or complaint, all substantive orders entered in the proceeding, and the complete record of the placement determination.⁴³⁶

⁴³² See, Cal. Rules of Court, rule 5.708(g)(3).

⁴³³ Cal. Rules of Court, rule 5.546(i).

⁴³⁴ Cal. Rules of Court, rule 5.546(j).

⁴³⁵ BIA Guidelines § G.6(a).

⁴³⁶ BIA Guidelines § G.6(b).

XI. TRANSFERRING BETWEEN DEPENDENCY AND DELINQUENCY

A. Joint Assessment

Unfortunately, it is not uncommon for dependent children who have at some point been deprived of appropriate parenting to engage in behaviors which could potentially bring them into the delinquency system. When a child already described by Welfare and Institutions Code § 300 (dependency) commits an act which falls under Welfare and Institutions Code §§ 601 or 602 (delinquency), the question which system will: 1) serve the child's best interest and 2) serve the protection of society.

In most counties, the social services agency and probation department must conduct a joint assessment to determine which status will better meet those potentially conflicting goals.⁴³⁷ This assessment is conducted under a jointly developed written protocol as described by Welfare and Institutions Code § 241.1(b). The protocol must include, but need not be limited to, a consideration of the following factors:

- The nature of the referral;
- The age of the child;
- The prior record of the child's parents for child abuse;
- The prior record of the child for out-of-control or delinquent behavior;
- The parents' cooperation with the child's school;
- The child's functioning at school, the nature of the child's home environment; and
- The records of other agencies that have been involved with the child and his or her family.

In addition, if the conduct alleged to bring a dependent within delinquency jurisdiction took place in, or under the supervision of, a foster home, group home, or other similar facility, the probation department and the social services agency may (but are not required to) consider whether the conduct was within the scope of behaviors to be managed or treated by the home or facility.⁴³⁸ *This can be a critical factor when trying to keep children with mental health needs or emotional disturbances identified during dependency proceedings out of the delinquency system.*

If the agencies cannot agree on a joint recommendation as to which system will better meet the goals identified above, then the joint assessment shall include each entity's separate recommendation.⁴³⁹

⁴³⁷ Welf. & Inst. Code § 241.1; Cal. Rules of Court, rule 5.512

⁴³⁸ Welf. & Inst. Code § 241.1(b)(3)(B).

⁴³⁹ Cal. Rules of Court, rule 5.512(d).

B. Dual Status

Counties can establish a protocol to provide a child the “dual status” of being both a dependent child and a ward of the court.⁴⁴⁰ In such counties, the intent is to ensure “a seamless transition from wardship to dependency jurisdiction, as appropriate, so that services to the child are not disrupted upon termination of the wardship.”⁴⁴¹ In order to achieve this intent, and to avoid duplication of services or conflicting dependency and delinquency orders, dual status counties must adopt either an “on-hold” system or a “lead court/lead social services agency” system, so that all parties are aware of which entity has primary oversight of the child at different stages of the proceedings.⁴⁴²

C. How Do I Find out What the Protocol is in My County?

A copy of the protocol for the county where your case is held should be accessible through the Judicial Council.⁴⁴³ You might also find that it is easiest and most efficient to ask your local court clerk, county law library, and/or the practitioners in your area, as they might be able to more readily assist in directing you to the information.

D. Hearing

If the child is detained, the hearing on the joint assessment report must occur as soon as possible after or concurrent with the detention hearing, but no later than 15 court days after the order of detention and before the jurisdictional hearing.⁴⁴⁴

If the child is not detained, the hearing on the joint assessment must occur before the jurisdictional hearing and within 30 days of the date of the petition. The juvenile court must conduct the hearing and determine which type of jurisdiction over the child best meets the child's unique circumstances.⁴⁴⁵

At least 5 calendar days before the hearing, notice of the hearing and copies of the joint assessment report must be provided to the child, the child's parent or guardian, all attorneys of record, any CASA volunteer, and any other juvenile court having jurisdiction over the child.⁴⁴⁶

⇒ **PRACTICE POINTER:** *The child's tribe is not among the list of recipients for the notice. Make sure to keep apprised of these developments through alternative means, including maintaining contact with the family and/or social services agency.*

⁴⁴⁰ Welf. & Inst. Code § 241.1(e).

⁴⁴¹ *Id.* at (e)(2).

⁴⁴² *Id.* at (e)(5)(A) and (B).

⁴⁴³ Welf. & Inst. Code § 241.1; Cal. Rules of Court, rule 5.512(i).

⁴⁴⁴ Welf. & Inst. Code § 241.1; Cal. Rules of Court, rule 5.512(e).

⁴⁴⁵ Welf. & Inst. Code § 241.1; Cal. Rules of Court, rule 5.512(e).

⁴⁴⁶ Welf. & Inst. Code § 241.1; Cal. Rules of Court, rule 5.512(f).

E. Participation at the Hearing

The California Supreme Court held several years ago that, in general, tribes are not entitled to notice of delinquency proceedings and that ICWA's substantive provisions do not apply. This means that the tribe does not, as a right, get to participate in delinquency proceedings.

The ICWA will be applied in cases where, if at the disposition stage or at any other point, the court contemplates removing an Indian child from the parental home based on concerns about harmful conditions in the home, and not based on the need for rehabilitation or other concerns related to the child's criminal conduct.⁴⁴⁷

Regardless, tribes can seek the court's permission to participate in delinquency proceedings. This may be advisable in order to ensure that the court is aware of alternatives such as available tribal services, tribal and community support networks, etc. In certain cases the tribe may also be the best party from the dependency proceedings to argue that the child should remain a dependent, rather than a delinquent.

⁴⁴⁷ *In re W.B.* (2012) 55 Cal.4th 30.

XII. ADVOCATING FOR A CHILD’S WELFARE AND WELLBEING

The purpose of both dependency and delinquency law is to protect a child’s best interest, including “to preserve and strengthen the child’s family ties whenever possible.”⁴⁴⁸ As this chapter will discuss, that entails not just the child’s placement if removed from his or her home, but also the child’s educational needs and rights, medical care, and mental health.

The persons responsible for safeguarding the child’s best interest are described above in Section VII, “Going to Court.” However, any interested person may inform the court of a child’s interest or right which needs protection or pursuit in another judicial or administrative forum.⁴⁴⁹ If it appears that the court is unaware of a child’s needs outside of the immediate proceedings, it is best to speak up.

- “Each year in California over 65,000 teenagers become adolescent mothers and 230 teenagers commit suicide. Each year more than 20 percent of California’s teenagers drop out of high school.”
- “Thirty percent of California’s elementary school pupils experience school adjustment problems, many of which are evident the first four years of school, that is, kindergarten and grades 1 to 3, inclusive.”
- “Problems that our children experience, whether in school or at home, that remain undetected and untreated grow and manifest themselves in all areas of their later lives.”
- “There is a clear relationship between early adjustment problems and later adolescent problems, including, but not limited to, poor school attendance, low achievement, delinquency, drug abuse, and high school dropout rates. In many cases, signs of these problems can be detected in the early grades.”
- “It is in California’s best interest, both in economic and human terms, to identify and treat the child difficulties that our children are experiencing before those difficulties become major barriers to later success. It is far more humane and cost-effective to make a small investment in early mental health intervention and prevention services now and avoid larger costs, including, but not limited to, foster care, group home placement, intensive special education services, mental health treatment, or probation supervised care.”⁴⁵⁰

A. Education Rights

This is a significant, but often overlooked aspect of a child’s care. Children in the juvenile system frequently have long-neglected educational needs, and parents in the system may have been long unaware of those needs or unable to meet them. A child in foster care or at risk of entering foster care has a right to a “meaningful opportunity” to meet the state’s academic

⁴⁴⁸ Welf. & Inst. Code § 202(a).

⁴⁴⁹ Cal. Rules of Court, rule 5.660.

⁴⁵⁰ Welf. & Inst. Code § 4371.

achievement standards, through a stable school placement in the least restrictive environment possible, with access to the same “academic resources, services, and extracurricular and enrichment activities that are available to other pupils.”⁴⁵¹

Children in the system are disproportionately represented as to disabilities, and “face systemic challenges to attaining self-sufficiency.”⁴⁵² They may have rights under federal or state disability laws which the court, parent or guardian, social services agency, attorneys, CASA volunteer, local educational agencies, and educational rights holders must affirmatively seek to address. The court in particular “must continually inquire about the educational and developmental-services needs of the youth” and the extent to which they are being addressed.⁴⁵³

1. Educational Liaison

Each local educational agency must designate an “educational liaison” for foster children.⁴⁵⁴ The liaison shall do both of the following:

- Ensure and facilitate the proper educational placement, enrollment in school, and checkout from school of foster children.
- Assist foster children when transferring from one school to another school or from one school district to another school district in ensuring proper transfer of credits, records, and grades.⁴⁵⁵

Additionally, if so designated by the superintendent of the local educational agency, the educational liaison shall notify a foster youth’s attorney and the agency of pending expulsion proceedings.⁴⁵⁶ The educational liaison is not granted any authority that supersedes that of the education rights holder.⁴⁵⁷

a. School of Origin

The role of the educational liaison is advisory with respect to placement decisions and determination of the school of origin.⁴⁵⁸ “School of origin” means the school that the child attended when permanently housed or the school in which the child was last enrolled. If those schools are different, or if there is some other school that the child is connected to and attended during the last 15 months, the educational liaison must consult with the child and educational rights holder to determine which, in light of the child’s best interest, should be deemed the “school of origin.”⁴⁵⁹

⁴⁵¹ Cal. Rules of Court, rule 5.651 - Advisory Committee Comment.

⁴⁵² *Id.*

⁴⁵³ *Id.*

⁴⁵⁴ Welf. & Inst. Code § 48853.5(c).

⁴⁵⁵ Welf. & Inst. Code § 48853.5(c).

⁴⁵⁶ Welf. & Inst. Code § 48853.5(d).

⁴⁵⁷ Welf. & Inst. Code § 48853.5(e).

⁴⁵⁸ Welf. & Inst. Code § 48853.5(e).

⁴⁵⁹ Welf. & Inst. Code § 48853.5(g).

b. Deciding Whether Child Should Maintain their School of Origin

After the above consultation, where it is in the child's best interest to do so, the educational liaison may recommend waiving the child's right to attend his or her "school of origin" and instead enrolling the child in a public school in the child's current area.⁴⁶⁰ Before such recommendation is made, the liaison must provide the child and the educational rights holder with a written explanation of the basis for the recommendation and how the recommendation serves the child's best interest.⁴⁶¹

The child must immediately be enrolled in the new school if the educational liaison, in consultation with the child and the educational rights holder, agrees that the child's best interest is to transfer to a school other than the school of origin.⁴⁶² The educational liaison from a new and former school must each ensure that the student's records are provided to the new school within two days of the request for enrollment.⁴⁶³

2. Conduct of Hearings

To the extent the information is available, at the detention hearing the court must decide who shall hold educational and developmental-services decision-making rights, and identify the rights holder(s). The court must consider the above duties and recommendations of the educational liaison. If the child has a disability, the court must determine which is the environment best suited to meet the child's needs.⁴⁶⁴

At the dispositional hearing and at all subsequent hearings, the court must consider whether the child's educational needs (in addition to physical, mental health, and developmental needs) are being met. The educational rights holder must be identified. The court must direct that person to take all appropriate steps to ensure that the child's needs will be met in the future.⁴⁶⁵

3. Reports

To the extent the information is available, the social worker or the probation officer preparing court reports prior to each hearing must address the following:

- The child's age, behavior, educational level, and developmental status, and any discrepancies between his or her age and his or her level of achievement in education or level of cognitive, physical, and emotional development;
- Educational, physical, mental health, or developmental needs;
- Participation in developmentally-appropriate extracurricular and social activities;

⁴⁶⁰ Welf. & Inst. Code § 48853.5(f)(6).

⁴⁶¹ Welf. & Inst. Code § 48853.5(f)(7).

⁴⁶² Welf. & Inst. Code § 48853.5(f)(4).

⁴⁶³ Welf. & Inst. Code § 48853.5(f)(8)(C).

⁴⁶⁴ Cal. Rules of Court, rule 5.651(b)(1).

⁴⁶⁵ Cal. Rules of Court, rule 5.651(b)(2).

- Whether the child is attending a comprehensive, regular, public or private school;
 - Physical, mental, or learning-related disabilities or other characteristics indicating a need for developmental-services or special education and related services;
 - Where the child is under 3 years of age, whether the child may be eligible for or is already receiving early intervention services or services under the California Early Intervention Services Act⁴⁶⁶ and, if the child is already receiving services, the specific nature of those services;
 - Where the child is between 3 and 5 years of age and is or may be eligible for special education and related services, whether the child is receiving the early educational opportunities provided by Education Code § 56001 and, if so, the specific nature of those opportunities;
 - Whether the child is receiving special education and related services or any other services through a current individualized education program (IEP) and, if so, the specific nature of those services (a copy of the current IEP should be attached to the report unless disclosure would create a risk of harm);
 - Whether the child is receiving services under section 504 of the Rehabilitation Act of 1973⁴⁶⁷ and, if so, the specific nature of those services (if so, a copy of the service plan should be attached, unless disclosure would create a risk of harm);
 - Whether the child is or may be eligible for developmental-services or is already receiving developmental-services and, if already receiving services, the specific nature of those services (the copy of the current plan, if any, should be attached to the report);
 - Whether the parent's or guardian's educational or developmental-services decision-making rights have been or should be limited or restored, and why;
 - The identity of the educational rights holder;
- and
- Recommendations and case plan goals to meet the child's identified needs.⁴⁶⁸

4. Placement Changes That Affect the Child's Educational Stability

Any time the child's placement is changed to a location that could lead to removal from the school of origin, the placement agency must demonstrate and the court must determine whether:

⁴⁶⁶ Govt. Code § 95000 et seq.

⁴⁶⁷ 29 U.S.C. § 701 et seq.

⁴⁶⁸ See, Welf. & Inst. Code § 16010(a), (b).

- The social worker or probation officer notified the court, the child’s attorney, and the educational rights holder, no more than one court day after making the placement decision, of the proposed placement decision.
- If the child had a disability and an active IEP before removal, the social worker or probation officer provided at least 10 days’ written notice to the local educational agency before removal and the receiving special education local plan area (SELPA) of the impending change of placement.⁴⁶⁹

After receipt of the notice, the child’s attorney must, as appropriate, discuss the proposed placement change and the child’s right to attend the school of origin with the child and the education rights holder. The child’s attorney and/or educational rights holder may request a hearing on this issue.⁴⁷⁰ The court may also set a hearing on its own motion. If the removal from the school of origin is disputed, the child must be allowed to remain at the school pending the hearing and the resolution of any disagreement between the child, the parent, guardian, or educational rights holder, and the local educational agency.

A hearing must be set on this issue. The court must determine whether the proposed school placement is in the best interest of the child; determine what is necessary to protect the child’s educational and developmental-services rights; and, make any findings and orders needed to enforce those rights (which may include an order to set a hearing to join the necessary agencies regarding provision of services, including the provision of transportation services, so that the child may remain in his or her school of origin).⁴⁷¹

Factors which the court will consider in determining whether a move is in the child’s best interest include:

- Whether the parent, guardian, or other educational rights holder believes it is in the child’s best interest;
- How the proposed change will affect the stability of the child’s school placement and access to academic resources, services, and extracurricular activities;
- Whether the proposed school placement would allow the child to be placed in the least restrictive educational program; and
- Whether the child has the educational and developmental-services and supports, including those for special education and related services, necessary to meet state academic achievement standards.⁴⁷²

⁴⁶⁹ Cal. Rules of Court, rule 5.651(e)(1).

⁴⁷⁰ Cal. Rules of Court, rule 5.651(e)(2).

⁴⁷¹ See, Welf. & Inst. Code § 362.

⁴⁷² Cal. Rules of Court, rule 5.651(f).

5. Assigning Educational and Developmental-Services Decision-Making Rights

At each hearing, the court must identify the educational rights holder for the child. The parent or guardian holds those rights unless his or her rights have been limited by the court.⁴⁷³ For the court to limit those rights, it must find that:

- The parent or guardian is unavailable, unable, or unwilling to exercise educational or developmental-services rights;
- The county placing agency has made diligent efforts to locate and secure the participation of the parent or guardian;
- The child's educational and developmental-services needs cannot be met without the temporary appointment of a responsible adult.⁴⁷⁴

If court limits the educational rights, the court must determine whether there is a responsible adult who is a relative, nonrelative extended family member, or other adult known to the child and who is available and willing to serve as the youth's educational representative. This determination must be made before the court can appoint an educational representative who is not known to the child.⁴⁷⁵

If the court cannot identify a responsible adult to act as the educational rights holder, and the child is or may be eligible for special education and related services or already has an IEP, the court must refer the child to the responsible local educational agency for prompt appointment of a surrogate parent.⁴⁷⁶ The local educational agency then has 30 calendar days to make reasonable efforts to identify and appoint a surrogate parent. If the appointment of a surrogate parent is not warranted, the court may make educational decisions and/or developmental decisions for the child.⁴⁷⁷

Whenever the court appoints a new or different education rights holder, the clerk will provide a copy of the orders to:

- The child, if 10 years of age or older;
- The attorney for the youth;
- The social worker or probation officer;
- The Indian child's tribe;
- The local foster youth educational liaison;

⁴⁷³ Cal. Rules of Court, rule 5.649(a).

⁴⁷⁴ See, Welf. & Inst. Code § 319(g)(1).

⁴⁷⁵ Welf. & Inst. Code § 319(g)(2).

⁴⁷⁶ Cal. Rules of Court, rule 5.650(d).

⁴⁷⁷ See, Welf. & Inst. Code § 319(g)(3).

- The county office of education foster youth services coordinator;
- The regional center service coordinator, if applicable; and
- The educational rights holder.⁴⁷⁸

6. Educational Rights Holder – Rights

The educational rights holder acts as and holds the rights of the parent or guardian with respect to all decisions regarding the child’s education and developmental-services, and is entitled to:

- Participate in educational or developmental-services meetings and activities;
- Access records and authorize the disclosure of information to the same extent as a parent or guardian;
- Receive notice of and participate in all meetings or proceedings relating to school discipline;
- Advocate for the interests of a child with exceptional needs in matters relating to:
 - The identification and assessment of those needs;
 - Instructional or service planning and program development – including the development of an individualized family service plan, an IEP, an individual program plan, or the provision of other services and supports, if applicable;
 - Placement in the least restrictive program appropriate;
 - The review or revision of the individualized family service plan, the IEP, or the individual program plan; and
 - The provision of a free, appropriate public education (FAPE).
- Attend and participate in the child’s individualized family service plan, IEP, individual program plan, and other educational or service planning meetings;
- Consult with persons involved in the provision of services;
- Notwithstanding any other provision of law, to consent to the child’s individualized family service plan, IEP, or individual program plan, including any related nonemergency medical services, mental health treatment services, and occupational or physical therapy services.⁴⁷⁹

⁴⁷⁸ Cal. Rules of Court, rule 5.650(g).

⁴⁷⁹ Cal. Rules of Court, rule 5.650(e), (f).

The educational rights holder must receive notice of all regularly-scheduled juvenile court hearings and other judicial hearings that might affect the child's education and developmental-services.⁴⁸⁰

7. Educational Rights Holder – Responsibilities

The educational rights holder is responsible for investigating the child's educational and developmental-services needs, determining whether those needs are being met, and acting on behalf of the child in all matters relating to the child's educational or developmental-services to ensure:

- The stability of the child's school placement. At any hearing following a change of educational placement, the educational rights holder must submit a statement to the court indicating whether the proposed change is in the child's best interest and whether any efforts have been made to keep him or her in the school of origin;
- Placement in the least restrictive educational program appropriate to the child's individual needs;
- Access to academic resources, services, and extracurricular and enrichment activities;
- Access to any educational and developmental-services and supports needed to meet state standards for academic achievement and functional performance or, with respect to developmental-services, to promote community integration, an independent, productive, and normal life, and a stable and healthy environment;
- The prompt and appropriate resolution of school disciplinary matters;
- The provision of any other elements of a free, appropriate public education;
- The provision of any appropriate early intervention or developmental-services required by law; and
- To access records for and present evidence in a truancy proceeding.⁴⁸¹

The educational rights holder is also responsible for:

- Meeting with the child at least once and as often as necessary to make decisions that are in the best interest of the child;
- Being culturally sensitive to the child;
- Complying with all federal and state confidentiality laws;⁴⁸²

⁴⁸⁰ Cal. Rules of Court, rule 5.650(j)(1).

⁴⁸¹ Cal. Rules of Court, rule 5.650(f); Cal. Rules of Court, rule 5.652.

⁴⁸² For more on confidentiality, see Welf. & Inst. Code §§ 362.5, 827, 4514, and 5328, as well as Gov. Code § 7579.5(f).

- Participating in, and making decisions regarding, all matters affecting the child’s educational or developmental-services needs; and
- Maintaining knowledge and skills that ensure adequate representation of the child’s needs and interests with respect to education and developmental-services.⁴⁸³

If the educational rights holder asks for assistance in obtaining education and training in the laws, the court must direct the clerk, social worker, or probation officer to inform the educational rights holder of all available resources, including resources available through the California Department of Education, the California Department of Developmental Services, the local educational agency, and the local regional center.⁴⁸⁴

⇒ **PRACTICE POINTER:** *Education and developmental service law is quite complicated. Whether the education rights holder is a parent or an appointed relative, it is important that they be provided with as much support and training as possible to ensure that the child’s needs are being met. So the education rights holder should be informed of and encouraged to seek this training. Participation may be critical in reunification.*

Finally, before each statutory review hearing, the educational rights holder must do one or more of the following:

- Provide information and recommendations concerning the child’s needs to the assigned social worker or probation officer;
- Make written recommendations to the court concerning those needs;
- Attend the review hearing and participate in any part of the hearing that concerns the child’s education or developmental-services.⁴⁸⁵

8. Educational Rights Holder - Term of Appointment

The appointed educational rights holder must make educational or developmental-services decisions until:

- The dismissal of the petition or at the conclusion of the dispositional hearing (if the appointment was made temporarily prior to disposition);
- The rights of the parent or guardian to make educational or developmental-services decisions are fully restored;
- The child reaches age 18, unless the court makes findings that one of the exceptions applies;
- The court appoints another responsible adult as educational rights holder.⁴⁸⁶

⁴⁸³ Cal. Rules of Court, rule 5.650(f).

⁴⁸⁴ Cal Rules of Court, rule 5.650.

⁴⁸⁵ Cal. Rules of Court, rule 5.650(f).

To resign from the appointment, the educational rights holder must provide notice and the opportunity for the social worker, child or child’s attorney to request a hearing. The hearing would be set within 14 days of receipt of the request for hearing. The court may set a hearing on its own motion.⁴⁸⁷

B. Medical Care and Treatment

Whenever a child is taken into temporary custody and is in need of medical, surgical, dental, or other remedial care, the social worker may, upon the recommendation of the attending physician and surgeon, or an attending dentist, authorize the performance of necessary care.

The social worker must notify the parent, guardian, or person standing *in loco parentis* (in the place of the parent) of the child, if any, of the care needed before that care is provided, and if the parent, guardian, or person standing *in loco parentis* objects, that care must be given only upon order of the court.⁴⁸⁸

If the need arises after the petition has already been filed, and there is no parent, guardian, or person standing *in loco parentis* capable of authorizing or willing to authorize the remedial care or treatment for the child, the court may authorize it upon the written recommendation of a licensed physician and surgeon or, if the person needs dental care, a licensed dentist after due notice.⁴⁸⁹

If the need arises after the child has been placed by order of the court within the care and custody or under the supervision of a social worker and there is no parent, guardian, or person standing *in loco parentis* capable of authorizing or willing to authorize the remedial care or treatment for the child, the court may, after due notice to the parent, guardian, or person standing *in loco parentis*, if any, order that the social worker may authorize the care for the child, by licensed practitioners, as necessary.⁴⁹⁰

No court order is required for “immediate emergency medical, surgical, or other remedial care in an emergency situation.” The care must be provided by a licensed physician and surgeon or, if the child needs emergency dental care, by a licensed dentist. The social worker must make reasonable efforts to obtain the consent of, or to notify, the parent, guardian, or person standing *in loco parentis* prior to authorizing emergency care.

“Emergency situation” means a child requires immediate treatment for the alleviation of severe pain or an immediate diagnosis and treatment of an unforeseeable condition or contagious disease which if not immediately diagnosed and treated, would lead to serious disability or death.⁴⁹¹

⁴⁸⁶ Cal. Rules of Court, rule 5.650(g).

⁴⁸⁷ Cal. Rules of Court, rule 5.650(g).

⁴⁸⁸ Welf. & Inst. Code § 369(a).

⁴⁸⁹ Welf. & Inst. Code § 369(b).

⁴⁹⁰ Welf. & Inst. Code § 369(c).

⁴⁹¹ Welf. & Inst. Code § 369(d).

C. Mental Health

Whenever the court believes that the child is or may be mentally ill, the court may stay the proceedings and order that the child be held temporarily in the psychiatric ward of the county hospital or hospital whose services have been approved and/or contracted for by the county, for observation and recommendation concerning their future care, supervision, and treatment. The professional in charge of the facility must submit a written evaluation of the child to the court.⁴⁹²

1. Findings Regarding a Mental Disorder

If the professional in charge of the above facility reports that the child is not in need of intensive treatment, the child must be returned to the juvenile court within 72 hours, and the court then will continue with the dependency or delinquency proceeding.

If the professional in charge of the facility finds that the child is in need of intensive treatment for a mental disorder, the child may be certified for not more than 14 days of involuntary intensive treatment according to Welfare and Institutions Code §§ 5250(c) and 5260(b). The juvenile court proceedings are stayed during this time.

During or at the end of the 14 days, a certification may be sought for additional treatment or for the initiation of proceedings to have a conservator appointed for the child.⁴⁹³

For a child in delinquency proceedings, if he or she is found to be “gravely disabled,” a conservator is appointed. If after an evaluation, it is determined that the delinquency proceedings would be detrimental to the child, the juvenile court must suspend jurisdiction while the conservatorship remains in effect. The proceeding resumes when the conservatorship is terminated.⁴⁹⁴

2. Findings for Substance Abuse

When a child appears to be a danger to himself or others as a result of the use of narcotics, or a restricted dangerous drug, the judge may continue the hearing and proceed under Welfare and Institutions Code § 359:

- The court may order the child taken to a facility designated by the county and approved by the State Department of Health Care Services as a facility for 72-hour treatment and evaluation.
- Thereupon the provisions of Health and Safety Code § 11922 must apply, except that the professional in charge of the facility must make a written report to the court concerning the results of the evaluation of the child.

⁴⁹² Cal. Rules of Court, rule 5.645(a); Welf. & Inst. Code §§ 319.1, 3571, 705, 6550, 6551.

⁴⁹³ See, Welf. & Inst. Code §§ 5260.10 et seq., 5350 et seq.

⁴⁹⁴ Cal. Rules of Court, rule 5.645(b); Welf. & Inst. Code § 6551.

- If the professional in charge of the facility for 72-hour evaluation and treatment reports to the court that the child is not a danger to himself or others as a result of the use of narcotics or restricted dangerous drugs or that the child does not require 14-day intensive treatment, or if the child has been certified for not more than 14 days of intensive treatment and the certification is terminated, the child must be released if the juvenile court proceedings have been dismissed. The child must then be either referred for further care and treatment on a voluntary basis, subject to the disposition of the juvenile court proceedings or, instead, returned to the juvenile court, in which event the court must proceed with the case.

D. Psychotropic Medication

Once a child is declared a dependent or ward and is removed from the custody of the parents or guardian, only the court is authorized to make orders regarding the administration of psychotropic medication.⁴⁹⁵

The court may still make an order delegating its authority to the parent or guardian if it finds that the parent or guardian poses no danger to the child and has the capacity to authorize psychotropic medications. Such order is discretionary and must take into consideration the child's best interests.⁴⁹⁶

"Psychotropic medications" are medications prescribed to affect the central nervous system to treat psychiatric disorders or illnesses. They may include, but are not limited to, anxiolytic agents, antidepressants, mood stabilizers, antipsychotic medications, anti-Parkinson agents, hypnotics, medications for dementia, and psychostimulants.⁴⁹⁷

1. Procedure to Obtain Authorization

For information on this issue, you will find that the following forms will be used to obtain authorization to administer psychotropic medication to a child:

- Application Regarding Psychotropic Medication (form JV-220),
- Prescribing Physician's Statement-Attachment (form JV-220(A)),
- Proof of Notice: Application Regarding Psychotropic Medication (form JV-221),
- Opposition to Application Regarding Psychotropic Medication (form JV-222), and
- Order Regarding Application for Psychotropic Medication (form JV-223).

Local county practice and local rules of court determine the procedures for completing and filing the forms and for the provision of notice.⁴⁹⁸ However, the person(s) responsible for

⁴⁹⁵ Cal. Rules of Court, rule 5.640(b); See, Welf. & Inst. Code § 369.5(a).

⁴⁹⁶ Welf. & Inst. Code §§ 202(d), 369.5(a).

⁴⁹⁷ Cal. Rules of Court, rule 5.640(a); Welf. & Inst. Code § 369.5(d).

⁴⁹⁸ Cal. Rules of Court, rule 5.640(c)(3).

providing notice is/are encouraged to use the most expeditious manner of service possible to ensure timely notice.⁴⁹⁹ The court must then approve, deny, or set the matter for a hearing within seven court days of the receipt of the completed application.⁵⁰⁰

2. Notice

Notice must be given to the following:

- The parents or legal guardians;
- The parents or legal guardians' attorneys of record;
- The child's attorney;
- The child's Child Abuse Prevention and Treatment Act guardian ad litem;
- The child's current caregiver;
- The child's Court Appointed Special Advocate, if any; and
- The child's Indian tribe.⁵⁰¹

The tribe will receive the same notice given to the parents or legal guardians, which is:

- A statement that a physician is asking to treat the child's emotional or behavioral problems by beginning or continuing the administration of psychotropic medication to the child and the name of the psychotropic medication;
- A statement that an Application Regarding Psychotropic Medication (form JV-220) and a Prescribing Physician's Statement-Attachment (form JV-220(A)) are pending before the court;
- A copy of Information About Psychotropic Medication Forms (form JV-219-INFO) or information on how to obtain a copy of the form; and
- A blank copy of Opposition to Application Regarding Psychotropic Medication (form JV-222) or information on how to obtain a copy of the form.

3. Opposition to Psychotropic Medication

A parent or guardian, the child's attorney, the CAPTA-GAL, and/or the Indian child's tribe may oppose the medication application. An opposition to the administration of the proposed psychotropic medication must be filed via a completed Opposition to Application Regarding

⁴⁹⁹ Cal. Rules of Court, rule 5.640(c)(3).

⁵⁰⁰ Cal. Rules of Court, rule 5.640(c)(4).

⁵⁰¹ Cal. Rules of Court, rule 5.640(c)(7).

Psychotropic Medication (form JV-222) within four court days of service of notice of the pending application for psychotropic medication.⁵⁰²

The court may nonetheless grant the application without a hearing (regardless of opposition) or may set the matter for hearing. If the court sets the matter for a hearing, the clerk of the court must provide notice at least two court days before the hearing.⁵⁰³

If the court grants the request or modifies and then grants the request, the order for authorization is effective until terminated or modified by court order or until 180 days from the order, whichever is earlier. If a progress review is set, it may be by an appearance hearing or a report to the court and parties and attorneys, at the discretion of the court.⁵⁰⁴

4. “Emergency Treatment”

Psychotropic medications may be administered without court authorization in an emergency situation. An “emergency situation” occurs when:

- A physician finds that the child requires psychotropic medication to treat a psychiatric disorder or illness;

and

- The purpose of the medication is:
 - To protect the life of the child or others; or
 - To prevent serious harm to the child or others; or
 - To treat current or imminent substantial suffering; and
 - It is impractical to obtain authorization from the court before administering the psychotropic medication to the child.

Still, court authorization must be sought as soon as practical but in no case more than two court days after the emergency administration of the psychotropic medication.⁵⁰⁵

⁵⁰² Cal. Rules of Court, rule 5.640(c)(8).

⁵⁰³ Cal. Rules of Court, rule 5.640(c)(9).

⁵⁰⁴ Cal. Rules of Court, rule 5.640(f).

⁵⁰⁵ Cal. Rules of Court, rule 5.640(g).

XIII. RESTRAINING AND PROTECTIVE ORDERS

A. Purpose

Once a dependency petition has been sustained and until it is dismissed or dependency is terminated, the court has the power to issue restraining orders to protect the child.⁵⁰⁶ The court may issue an order to exclude a person from a residence or dwelling of the person who has care, custody, and control of the child. Depending on the basis for the child's removal, the risk of harm might be eliminated by seeking protective orders such as a restraining order to protect the child.⁵⁰⁷

Behaviors which a restraining order is meant to prevent include:

- Molesting,
- Attacking,
- Striking,
- Stalking,
- Threatening,
- Sexually assaulting,
- Battering,
- Harassing,
- Telephoning
- Destroying the personal property,
- Contacting, either directly or indirectly, by mail or otherwise,
- Coming within a specified distance of, or
- Disturbing the peace of the child or any other child in the household.⁵⁰⁸

B. How to Apply for a Restraining Order

The application may be made orally or by written application, or even may be made on the court's own motion. It can be made at any scheduled hearing.⁵⁰⁹

If the application is submitted in writing, there are certain forms that must be used, which can be found at <http://www.courts.ca.gov/1208.htm>.

C. Application Without Notice

The court may grant the petition and issue a temporary order even where no notice was given to the restrained person. The court must not only consider the documents submitted with the application, but may also review the contents of the juvenile court file.⁵¹⁰

⁵⁰⁶ See, Cal. Rules of Court, rules 5.620(b), 5.630(a); Welf. & Inst. Code § 213.5(a).

⁵⁰⁷ See, Welf. & Inst. Code § 361(c).

⁵⁰⁸ Welf. & Inst. Code § 213.5.

⁵⁰⁹ Cal. Rules of Court, rule 5.620(b)(1).

⁵¹⁰ See, Cal. Rules of Court, rule 5.630(d)(1).

If the court grants the temporary restraining order, the court must order that the matter be set for a hearing. The issue for that hearing is to show cause why the order should not be granted.

The court can allow the restrained person to be served on shortened time before this hearing.⁵¹¹ The court can reissue the temporary restraining order if the restrained person could not be served within the time required for the notice.⁵¹²

D. Application with Notice

Upon notice and hearing, the court can issue a restraining order that is to remain in effect for up to three years. The duration of the restraining order is in the court's discretion.⁵¹³ It will remain in effect unless it is otherwise terminated by the court, extended by mutual consent of all parties to the restraining order, or extended by further order of the court on the motion of any party to the restraining order.⁵¹⁴ If the juvenile case is dismissed, the restraining order remains in effect until it expires or is terminated.⁵¹⁵

E. Criminal Records Search

The court must ensure that a criminal records search is or has been conducted before any hearing on the issuance of a restraining order. Before deciding whether to issue a restraining order, the court must consider the information obtained from the search, including:

- Any conviction for a violent felony specified in § 667.5 of the Penal Code or a serious felony specified in § 1192.7 of the Penal Code;
- Any misdemeanor conviction involving domestic violence, weapons, or other violence;
- Any outstanding warrant;
- Parole or probation status; and
- Any prior restraining order; and any violation of a prior restraining order.⁵¹⁶

F. Domestic Violence

A juvenile court restraining order related to domestic violence must be on specific Judicial Council forms pursuant to Family Code 6380(i).⁵¹⁷ Currently these can be found at <http://www.courts.ca.gov/1271.htm>.

⁵¹¹ See, Welf. & Inst. Code § 213.5(c)(1).

⁵¹² Cal. Rules of Court, rule 5.630(e).

⁵¹³ See, Welf. & Inst. Code § 213.5(d)(1).

⁵¹⁴ See, Welf. & Inst. Code § 213.5(d)(1).

⁵¹⁵ Cal. Rules of Court, rule 5.630(i).

⁵¹⁶ Welf. & Inst. Code § 213.5(j)(1).

⁵¹⁷ See, Welf. & Inst. Code § 215.5(i).

⇒ **PRACTICE POINTER:** *The fact that an order issued by a court was not issued on those forms shall not, in and of itself, make the order unenforceable.*⁵¹⁸

G. Once a Restraining Order is Issued

When a family or juvenile law domestic violence protective order is issued, the restrained person must relinquish his or her firearms.⁵¹⁹

The order must be served, and law enforcement must be notified. The notice occurs by transmitting a copy to a local law enforcement agency for entering into the California Law Enforcement Telecommunications System (CLETS).

Any willful and knowing violation of a restraining order shall be a misdemeanor punishable under Penal Code § 273.65.

⁵¹⁸ See, Welf. & Inst. Code § 215.5(i).

⁵¹⁹ Cal. Rules of Court, rule 5.495(a).

XIV. PARENTAGE

A. Background

The ICWA defines “parent” as 1) any biological parent or 2) any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include an unwed father where paternity has not been acknowledged or established.⁵²⁰ The BIA Guidelines provide that an unwed father only needs to take “reasonable steps” to establish or acknowledge paternity, which may include simply acknowledging paternity or DNA testing.⁵²¹

Under state law, a person must have a legally-recognized “parent child relationship” (“presumed” parent status) in order to have the rights, privileges, duties, and obligations of a parent towards that child.⁵²²

This means that, unless and until the parent obtains the above legal status, the following cannot occur (a non-exclusive list):

Rights: Custody of the child.⁵²³
Participate in the hearing.
Request transfer of the proceedings.
Request for reunification services.⁵²⁴

Responsibilities: Child support.
Duty to protect and care for.

The Legislature has declared that the state has a compelling interest in establishing the paternity of all children, for reasons including child support and family medical history.⁵²⁵ But it is important to keep in mind that “presumed” parent status signifies a legal status. Biological parenthood does not legally equate with “presumed” parent status. A biological parent might not qualify as the “presumed” parent. The “presumed” parent might not be the biological parent.⁵²⁶ For this reason, it is critical to determine parentage early in the proceedings.

B. The Different Types of “Parents”

1. “Alleged” Parent

The person alleged to be a parent to the child could be a man who might be the father of the child but whose biological paternity has not yet been established or who has not yet achieved presumed father status.⁵²⁷

⁵²⁰ 25 U.S.C. § 1903(9).

⁵²¹ BIA Guidelines § A.2.

⁵²² See, Fam. Code § 7601(b).

⁵²³ See, Welf. & Inst. Code § 361.2)

⁵²⁴ See, Welf. & Inst. Code § 361.5(a).

⁵²⁵ Fam. Code § 7570(a).

⁵²⁶ See, Fam. Code § 7601(a).

⁵²⁷ See, *In re Zacharia D.* (1993) 174 Cal.App.4th 808.

Alleged parents' rights and participation in the dependency proceedings are limited. The alleged parent's rights include:

- The right to notice of the hearings.
- The right to appear and request and prove the presumed parent status.⁵²⁸ (The person is appointed counsel for this purpose.)

⇒ **PRACTICE POINTER:** *Some courts are hesitant to appoint an attorney for an alleged parent. However, given the complexity of parentage and the legal ramifications of the determination, the alleged parent should have access to counsel.*⁵²⁹

Unless and until they gain “presumed” status, the alleged parent is not yet a “party” to the case. This means that the person would not be entitled to a copy of all the juvenile records and/or attend the hearing unrelated to the paternity issue.

⇒ **PRACTICE POINTER:** *This is important because oftentimes the social services agency will include allegations in the petition and/or request restrictions on an “alleged” parent. Such a practice is improper. If the person qualifies as a “presumed” parent, then the person should be raised to that status without delay so that the court can proceed on that basis.*

If the person would not qualify as a “presumed” parent, then the person has no rights or responsibilities over the child. The person has no legal duty of support or care for the child. So no dependency jurisdiction can be taken based on the care (or lack thereof) of the child.⁵³⁰ The person is not a party to the action and the court lacks the jurisdiction to make any orders over the person.

2. “Biological” Parent

The status applies where the person has been biologically/genetically linked to the child. A biological parent determination does not require DNA testing – it can be based on testimony, declarations, and/or statements of alleged parents.⁵³¹

However, mere biology does not provide the person with presumed parent status or its related rights and responsibilities. A biological parent's rights are limited to notice of the hearing and the right to request and prove presumed parent status.

The court can, but does not have to, give a biological parent reunification services.⁵³²

The biological parent's family members are considered “relatives” of the child.⁵³³

⁵²⁸ See, *In re Joseph G.* (2000) 83 Cal.App.4th 712.

⁵²⁹ See, Fam. Code § 7605.

⁵³⁰ See, *In re Zacharia D.* (1993) 174 Cal.App.4th 808.

⁵³¹ Cal. Rules of Court, rule 5.635(e)(3).

⁵³² See, Welf. & Inst. Code 361.5(a).

⁵³³ See, Welf. & Inst. Code § 361.3(c)(2).

3. “Presumed” Parent

A person is presumed to be the child’s “natural” parent where the person meets the conditions set forth in Family Code § 7611. A presumed parent may be established if 1) the child is born while the parents were married (or thought they were married), or 2) if the parents married or attempted to marry after the child’s birth and the presumed parent either consents to being named on the birth certificate or agrees or is ordered to pay child support, or 3) the presumed parent receives the child into his or her home and openly holds out the child as his or her own.

Again, “presumed”/“natural” does not mean “biological.” A biological parent might not qualify as the “presumed”/“natural” parent. The “presumed”/“natural” parent might not be the biological parent.

4. “Kelsey S.” Parent

This status was created in the case of *Adoption of Kelsey S.* (1992) 1 Cal.4th 816. There the court recognized an unwed biological father’s right to assert parentage over a child when he was prevented (by the mother or a third person) from asserting his rights sooner. A “*Kelsey S.*” father is given the same rights as a presumed father.

However, to qualify for this status, the father must promptly “come forward and demonstrate a full commitment to his parental responsibilities – emotional, financial, and otherwise.” In other words, if the father knew or should have known of the child’s existence and chose not to pursue his claim (due to conflict with the mother or otherwise), then he would not likely qualify under this status.

5. “Adjudicated” Parent

The status applies where there is a judgment of paternity – usually a child support order. The status does not necessarily equate with a finding of biology, as the court child support orders are often made on a default basis. And the status does not itself serve as a basis for becoming eligible for “presumed” status.⁵³⁴ But it does rebut another person’s claim for presumed status.⁵³⁵

An adjudicated parent’s rights are that of a biological parent (see above).

The judgment of paternity can be set aside if the person is not the biological father. However, in order to do so, a petition must be made, on the earlier of: 1) within two years of the date he knew that there was a judgment against him, or 2) within two years of the date he knew or should have known of the existence of the action to adjudicate his paternity.⁵³⁶

⁵³⁴ See, Fam. Code § 7611.

⁵³⁵ See, Fam. Code § 7612(c).

⁵³⁶ Fam. Code § 7646(a).

C. DNA Testing

The person can request a genetic paternity test if there is not already a paternity judgment in favor of another parent.⁵³⁷

Family Code provisions on paternity testing⁵³⁸ are applicable only where the issue of paternity is unresolved and no final judgment of paternity has been entered.⁵³⁹

⇒ **PRACTICE POINTER:** *The alleged parent can attempt to obtain authority to access the child and submit to genetic testing at his own expense. This cannot be done without court authorization. There are a number of reasons that the child's biology might be important beyond the "presumed" parent status determination – for example, tribal membership eligibility, medical history, etc.*

⁵³⁷ Welf. & Inst. Code § 316.2; Cal. Rules of Court, rule 5.635.

⁵³⁸ Fam. Code § 7550 et seq.

⁵³⁹ See, *In re Margarita D.* (1999) 72 Cal.App.4th 576.