



# **DEPENDENCY LAW AND SKILLS PROGRAM HANDBOOK**

*Presented by*



*through the support of California Department of Social Services (CDSS)*

## 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 Dependency Law and Skills Program Handbook is intended to serve as a reference tool for tribal advocates in their participation in dependency proceedings. The Handbook 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 The Dependency Law and Skills Program Handbook are only that – suggested tips.

When referring to the Dependency Law and Skills Program Handbook, 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 that can cross over to number of other legal areas. As the law is 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 please refer to the **ICWA Advocate Guide**. Even still, further research and/or consulting with an attorney may be appropriate. CILS is available to represent individual tribes on cases consistent with our intake policies.

## Credits

This publication was financially assisted by grant funds from the Legal Services Corporation (LSC), the State Bar of California, and the California Department of Social Services. The opinions, findings, and conclusions in this publication are those of the author and not necessarily those of LSC, the State Bar of California or the California Department of Social Services. California Indian Legal Services gratefully acknowledges the LSC, the State Bar of California and the California Department of Social Services.

## I. DEMYSTIFYING THE JUVENILE DEPENDENCY SYSTEM

### a. Governing Laws

- Federal legislation or statutes: Passed by Congress and apply to all of the 50 states.
  - United States Code (“U.S.C.”)
    - Indian Child Welfare Act (ICWA) or the Act means 25 U.S.C. 1901 et seq.
  - Code of Federal Regulations
    - 25 C.F.R. §§ 23.11 – 23.13
- The Bureau of Indian Affairs (BIA) Guidelines for State Courts and Agencies in Indian Child Custody Proceedings

Provide standard procedures and best practices to be used in Indian child welfare proceedings in State courts.<sup>1</sup>

Clarify minimum federal standards and that ICWA is to be liberally construed to the benefit of Indians.<sup>2</sup>

The updated Guidelines issued in February 2015 supersede and replace the Guidelines published in 1979 (44 FR 67584).<sup>3</sup>

Should be applied in all proceedings and stages of a proceeding in which the ICWA is or becomes applicable.

While courts have said that the Guidelines are not legally binding, the California courts have stated that the Guidelines are entitled to “great weight.”

*\*\*\* Federal regulations which we anticipate being consistent with the 2015 guidelines are in the process of being published in the Code of Federal Regulations. If and when that occurs, those provisions will become binding on the courts. \*\*\**

The updated Guidelines can be found online at:

<http://www.bia.gov/cs/groups/public/documents/text/idc1-029637.pdf>

- State legislation or statutes: Passed by the California Legislature and apply to all state court proceedings.
  - Applicable Codes

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.

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<sup>1</sup> See, BIA Guidelines (Feb. 2015) 80 Fed Reg 10146, 10147

<sup>2</sup> BIA Guidelines (Feb. 2015) 80 Fed Reg 10150

<sup>3</sup> BIA Guidelines (Feb. 2015) 80 Fed Reg 10150

These codes can be found online at <http://www.leginfo.ca.gov/calaw.html> or <http://leginfo.legislature.ca.gov/faces/codes.xhtml>.

Applicable to juvenile dependency cases is the Welfare & Institutions Code §200-395; for juvenile delinquency is Welfare & Institutions Code §600 et seq.

- Case law: The courts' interpretations and applications of legislation, rules, and prior judicial decisions.
- 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.

The Rules of Court can be accessed online at:

<http://www.courts.ca.gov/rules.htm>

- Local Rules of Court: There are special rules that counties make that apply only to the courts within its county. The rules do not contradict or override state legislation. They are just further interpretation of a state Code or Rule.
- 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 Agency because it is their own legal interpretation.

#### **b. Court System**

- Supreme Court = The Supreme Court of California is the state's highest court. Its decisions are binding on all other California courts. It has the authority to review decisions of the state Courts of Appeal. This reviewing power enables the Supreme Court to decide important legal questions and to maintain uniformity in the law.
- Courts of Appeal = have appellate jurisdiction. California has six appellate districts (three of which have multiple divisions)
- Superior courts = trial jurisdiction over all criminal and civil cases.

The state court that will have jurisdiction (authority) in your juvenile case will be the court in the county:

- In which the child resides;

“Resides” = 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, determines the residence of the child. Welf. & Inst. Code §17.1(a)

- 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 Welf. & Inst. Code §§300 or 601 or 602.<sup>4</sup>

Printable Court Maps can be accessed online at <http://www.courts.ca.gov/12267.htm>

You can also locate the court house for your case at <http://www.courts.ca.gov/find-my-court.htm>

### c. Child Welfare Generally

- Parents have a constitutional right to the care, custody, and control of their children.
- These rights are subject to limitation. States have power to intervene in the family for reasons specified under the law. = “Jurisdiction”

### d. Jurisdiction

#### ➤ “Jurisdiction”

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.)

#### ➤ “Subject Matter” Jurisdiction

- In California, these reasons are listed under Welfare and Institutions Code §§ 300 et seq. (for dependents) or 600 et seq. (for delinquency).

- “Dependency” or “juvenile dependency” is the area of law involving children who are or may be at risk of abuse or neglect.

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<sup>4</sup> Cal. Rules of Court, rule 5.510; Welf. & Inst. Code §§327, 651

➤ Differences Between Children’s Cases and Other Cases

Paramount concern is always the best interests of the child

Confidentiality of proceedings

Court’s Exclusive Jurisdiction Over All Issues Relating to The Child’s Custody

➤ Unlike in family court, the focus is not resolving disputes between the parents. Rather the orders will be based on the protection and best interests of the child.

➤ The juvenile court judge will not hear consider any family law dispute (including child support disputes and/or divorce matters).

➤ “Personal” Jurisdiction

➤ Regardless of the child’s residence or domicile, where an Indian child is a *ward of a tribal court*, the Indian tribe shall retain exclusive jurisdiction.<sup>5</sup>

➤ In California, “An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who *resides or is domiciled within the reservation of such tribe*, except where such jurisdiction is otherwise vested in the State by existing federal law” [PL 280]<sup>6</sup>

➤ Where the tribe has exclusive jurisdiction over a matter, the state court has no jurisdiction to hear the matter and must transfer the proceeding to tribal court.<sup>7</sup>

➤ In California through a combination of P.L. 280 and the ICWA, California tribes and the state share concurrent jurisdiction over child welfare cases. This means that either the state or the tribe may acquire valid initial jurisdiction in child dependency cases, even where a child is domiciled or resides on the reservation.

➤ Where the child’s residence or domicile is not on the reservation, PL-280 does not apply. However, the ICWA may divest the state court of dependency jurisdiction, in that the tribe has “referral jurisdiction,”<sup>8</sup> and “on the petition of either parent, the Indian custodian, or the Indian child’s tribe, in the absence of good cause to the contrary and absent objection by either parent, must transfer (i.e., “refer”) such a proceeding to the jurisdiction of the tribe.”<sup>9</sup>

➤ A Tribe may reassume exclusive jurisdiction over child custody proceedings

**e. Emergency Removal**

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<sup>5</sup> 25 U.S.C. § 1911(a)

<sup>6</sup> 25 U.S.C. § 1911(a)

<sup>7</sup> 25 U.S.C. §§ 1911(a), 1922; Welf. & Inst. Code § 305.5(a); Cal. Rules of Court, rule 5.483(a)

<sup>8</sup> 25 U.S.C. § 1911(b)

<sup>9</sup> 25 U.S.C. § 1911(b)

- The state can remove a child *temporarily* located off the reservation in order to prevent imminent physical damage or harm to the child – i.e., in an “emergency.”<sup>10</sup>
- “Emergency removal” = Where the removal is needed to prevent *imminent physical damage or harm* to the child.<sup>11</sup>
- ▶ Active efforts must be shown.
- ▶ If the court finds that the Indian child was improperly removed or retained, the court must:
  - terminate the proceeding
  - and
  - the child must be returned immediately to his or her parents or Indian custodian.

Exception - If it can be shown that returning the child to his parent or custodian would subject the child to imminent physical damage or harm.<sup>12</sup>

- ▶ Any emergency removal or emergency placement of any Indian child under state law must *be as short as possible*.<sup>13</sup>

Each involved agency or court must:

- Diligently investigate and document whether the removal or placement is proper and continues to be necessary to prevent imminent physical damage or harm to the child;
- Promptly hold a hearing to hear evidence and evaluate whether the removal or placement continues to be necessary whenever new information is received or assertions are made that the emergency situation has ended; and
- Immediately terminate the emergency removal or placement once the court possesses sufficient evidence to determine that the emergency has ended.<sup>14</sup>
- ▶ If the agency that conducts an emergency removal of a child whom the agency knows or has reason to know is an Indian child, the agency must:
  - Treat the child as an Indian child until the court determines that the child is not an Indian child;
  - Conduct active efforts to prevent the breakup of the Indian family as early as possible, including, if possible, before removal of the child;
  - Immediately take and document all practical steps to confirm whether the child is an Indian child and to verify the Indian child's tribe;

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<sup>10</sup> 25 U.S.C. §§ 1922

<sup>11</sup> 25 U.S.C. § 1922

<sup>12</sup> 25 U.S.C. § 1920; 80 Fed Regs 10156, B.9, (b); Welf. & Inst. Code § 305.5(e)

<sup>13</sup> BIA Guidelines (Feb. 2015) 80 Fed Regs 10155, B.8, (b)

<sup>14</sup> BIA Guidelines (Feb. 2015) 80 Fed Regs 10155, B.8, (b)

- Immediately notify the child's parents or Indian custodians and Indian tribe of the removal of the child;
  - Take all practical steps to notify the child's parents or Indian custodians and Indian tribe about any hearings regarding the emergency removal or emergency placement of the child; and
  - Maintain records that detail the steps taken to provide any required notifications under BIA Guidelines B.6.<sup>15</sup>
- ▶ In California notice of the removal to the tribe must be done *no later than the next working day*.<sup>16</sup>
  - ▶ 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.<sup>17</sup>
  - ▶ Temporary emergency custody should not be continued for more than 30 days, unless:
    - A hearing, noticed in accordance with the Guidelines, is held and results in a determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert witness; or
    - Extraordinary circumstances exist.<sup>18</sup>

## II. INDIAN CHILD WELFARE ACT (ICWA)

### a. OVERVIEW OF ICWA

#### i. Purpose and History

- ICWA is simply one aspect of dependency, and is best understood as a part of the dependency system.
- 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.
- ICWA establishes minimum standards, and states are free to adopt more stringent laws for Indian children. California did so in 2006, when it codified much of the ICWA into state law with Senate Bill 678 (a.k.a. "Cal-ICWA"). Similarly in 2010 California added a new permanency option for Indian children called Tribal Customary Adoption ("TCA").

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<sup>15</sup> BIA Guidelines (Feb. 2015) 80 Fed Regs 10155, B.8, (c)

<sup>16</sup> Welf. & Inst. Code § 305.5(a)

<sup>17</sup> Welf. & Inst. Code § 305.5(a)

<sup>18</sup> BIA Guidelines (Feb. 2015) 80 Fed Regs 10155, B.8, (e)

## ii. When Does ICWA Apply?

- ICWA applies whenever an Indian child is the subject of a state “child custody” proceeding as defined by the Act.
- ICWA applies whether or not a tribe formally intervenes in a case.
- What is a “child custody” proceeding?

Under the ICWA:

“Child custody proceeding” shall mean and include—

- (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.”<sup>19</sup>

In California, ICWA applies 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 rule 5.481(a). The other requirements of this chapter contained in 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;

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<sup>19</sup> 25 U.S.C. § 1903(1); BIA Guidelines (Feb. 2015) 80 Fed Regs 10151

(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 rule 7.1015.<sup>20</sup>

### iii. When ICWA Does Not Apply?

➤ ICWA does not apply to:

- Tribal court proceedings;
- Placements based upon an act by the Indian child which, if committed by an adult, would be deemed a criminal offense;
- An award, in a divorce proceeding, of custody of the Indian child to one of the parents.
- Voluntary placements that do not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand.<sup>21</sup>
  - Voluntary placements in which a parent consents to a foster care placement or seeks to permanently terminate his or her rights or to place the child in a preadoptive or adoptive placement are covered.<sup>22</sup>
  - California Rules of Court regarding ICWA do not apply to *voluntary foster care* and *guardianship* placements where the child can be returned to the parent or Indian custodian on demand.<sup>23</sup>

### iv. KEY TERMS

- “Indian” means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in 43 C.F.R. § 1606.<sup>24</sup>
- “Indian tribe” = any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians because of their status as Indians, including any Alaska Native village as defined in 43 U.S.C. 1602(c).<sup>25</sup>
- 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.” 25 U.S.C. § 1903(4); BIA Guidelines (Feb. 2015) 80 Fed Regs 10151; Welf. & Inst. Code § 224.1; Cal. Rules of Court, rule 5.502(19)

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<sup>20</sup> Cal. Rules of Court, rule 5.480

<sup>21</sup> BIA Guidelines (Feb. 2015) 80 Fed Regs 10151, A.3(f)

<sup>22</sup> BIA Guidelines (Feb. 2015) 80 Fed Regs 10151, A.3(g)

<sup>23</sup> Cal. Rules of Court, rule 5.480

<sup>24</sup> 25 U.S.C. § 1903(3); BIA Guidelines (Feb. 2015) 80 Fed Regs 10151

<sup>25</sup> 25 U.S.C. § 1903(8); BIA Guidelines (Feb. 2015) 80 Fed Regs 10151

The tribe has the definitive word on whether a child is or is not a member. Its determination is conclusive on the state court.<sup>26</sup>

- “Parent” means 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.
- “Indian custodian” means any person who has legal custody of an Indian child under tribal law or custom or under State law, whichever is more favorable to the rights of the parent, or to whom temporary physical care, custody, and control has been transferred by the parent of such child.
- “Extended family member” is defined by the law or custom of the Indian child’s tribe or, in the absence of such law or custom, 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.
- “Indian child's tribe” =

If the tribes are able to reach an agreement, the agreed upon tribe should be designated as the Indian child's tribe.<sup>27</sup>

If the tribes do not agree, the court must make that determination as follows:

- 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.
- 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.

“More significant contacts” – In making this determination, the court shall consider, among other things, the following factors:

- The length of residence on or near the reservation of each tribe and frequency of contact with each tribe.
- The child’s participation in activities of each tribe.
- The child’s fluency in the language of each tribe.
- Whether there has been a previous adjudication with respect to the child by a court of one of the tribes.
- Residence on or near one of the tribes’ reservations by the child parents, Indian custodian or extended family members.
- Tribal membership of custodial parent or Indian custodian.

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<sup>26</sup> BIA Guidelines (Feb. 2015) 80 Fed Regs 10153, B.3(a)-(d); Welf. & Inst. Code § 224.3(e)(1)

<sup>27</sup> BIA Guidelines (Feb. 2015) 80 Fed Regs 10153, B.4(d)(i)

- Interest asserted by each tribe in response to the notice specified in Welfare and Institutions Code § 224.2.
- The child's self-identification.<sup>28</sup>

If the child is eligible but not yet a member of a tribe, the agency should take the steps necessary to obtain membership for the child in the tribe that is designated as the Indian child's tribe.<sup>29</sup>

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.<sup>30</sup>

The court is required to state its determination, and the reasons for it, in writing.<sup>31</sup>

All tribes which received notice of the child custody proceeding must be notified in writing of the determination and a copy of that document must be filed with the court and sent to each party to the proceeding and to each person or governmental agency that received notice of the proceeding.<sup>32</sup>

- Tribal court means a court with jurisdiction over child custody proceedings, including a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe vested with authority over child custody proceedings.
- Reservation means Indian country as defined in 18 U.S.C 1151, including any lands, title to which is held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation.
- Imminent physical damage or harm means present or impending risk of serious bodily injury or death that will result in severe harm if safety intervention does not occur.
- Active efforts are intended primarily to maintain and reunite an Indian child with his or her family or tribal community.
- Continued custody means physical and/or legal custody that a parent already has or had at any point in the past. The biological mother of a child has had custody of a child.
- Custody means physical and/or legal custody under any applicable tribal law or tribal custom or State law. A party may demonstrate the existence of custody by looking to tribal law or tribal custom or state law.
- Voluntary placement means a placement that either parent has, of his or her free will, chosen for the Indian child, including private adoptions.
- Upon demand means that the parent or Indian custodians can regain custody simply upon request, without any contingencies such as repaying the child's expenses.

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<sup>28</sup> 25 U.S.C. 1903(5); BIA Guidelines (Feb. 2015) 80 Fed Regs 10151; Welf. & Inst. Code § 224.1

<sup>29</sup> BIA Guidelines (Feb. 2015) 80 Fed Regs 10153, B.4(d)(iii)

<sup>30</sup> Welf. & Inst. Code § 224.1(e)(1)

<sup>31</sup> Welf. & Inst. Code § 224.1(d)

<sup>32</sup> BIA Guidelines (Feb. 2015) 80 Fed Regs 10153, B.4(3)

## b. NOTICE AND INQUIRY

### i. Legal Background

- Notice and inquiry provisions are critical components of serving the Congressional and state legislature's goal of preserving tribes and Indian families.<sup>33</sup>
- Inquiry
  - ▶ Agencies/courts must ask whether there is reason to believe a child that is subject to a child custody proceeding is an Indian child.<sup>34</sup>
  - ▶ Court must confirm that the agency used active efforts to work with all tribes of which the child may be a member to verify membership.<sup>35</sup>
- Notice
  - ▶ 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."

*\*\*\* Remember, notice ensures that tribes will be afforded the chance to assert their rights under the ICWA. \*\*\**

### ii. Inquiry

*i. What is "a reason to believe" the child is or may be an Indian child?*

- The BIA Guidelines provides that "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."<sup>36</sup>

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<sup>33</sup> 25 U.S.C. 1901, 1902; Welf. & Inst. Code §224

<sup>34</sup> BIA Guidelines, B.2(a)

<sup>35</sup> BIA Guidelines, B.2(b)(2)

<sup>36</sup> BIA Guidelines (Feb. 2015) 80 Fed Regs 10152, B.2(c)

- The Welfare and Institutions Code adds that “a reason to believe that a child may be known to be an Indian child” exists if: “(1) ... or one or more of the child’s biological parents, grandparents, or great-grandparents are or were a member of a tribe.”<sup>37</sup>

- Similarly, the California Rules of Court provide the following considerations

“(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

(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.<sup>38</sup>

- The BIA Guidelines provide that the

- The court must confirm that the agency used active efforts to work with all tribes of which the child may be a member to verify whether the child is in fact a member or eligible for membership in any tribe.<sup>39</sup>
- The agency must get verification, in writing, from all tribes in which it is believed that the child is a member or eligible for membership, as to whether the child is an Indian child.<sup>40</sup>

#### *ii. How Is Inquiry Made?*

- The duty under this obligation belongs to the court, the county welfare department, probation department, licensed adoption agency, adoption service provider, investigator, petitioner, and appointed guardian or conservator of the person, and appointed fiduciary.<sup>41</sup>
- 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);

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<sup>37</sup> See, Welf and Inst. Code §224.3(b)

<sup>38</sup> Welf. & Inst. Code § 224.3(b); Ca.Rules of Court, rule 5.481(a)(5)(A)-(C)

<sup>39</sup> 80 Fed Regs 10152, B.2(b)(2))

<sup>40</sup> 80 Fed Regs 10152, B.2(a)

<sup>41</sup> Cal. Rules of Court, rule 5.481(a))

(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.”<sup>42</sup>

- The department must complete the Indian Child Inquiry attachment (ICWA-010) and attach it to the petition. <sup>43</sup>
- The BIA Guidelines also recommends the court ask each party (including the guardian ad litem and the agency representative) to certify *on the record* whether they have discovered or know of any information that suggests or indicates the child is an Indian child. <sup>44</sup>
- Then at the first court appearance by a parent, Indian custodian, or guardian, the court must order that the parents complete an ICWA-020 form. <sup>45</sup>
- If no parent appears at the first hearing, or is unavailable to the initiation of the proceeding, the court *must* order the department to use *reasonable diligence* to find a parent, Indian custodian, or guardian in order to have Parental Notification of Indian Status (form ICWA-020) completed. <sup>46</sup>
- It is from that information that the court must render the required notice using ICWA-030; Notice JV-135 as required by Welfare and Institutions Code §224.2.
- The duty to inquire about a child’s Indian status is affirmative and continuing. <sup>47</sup>
- A parent’s silence on the issue and/or murky information does not waive the court’s affirmative duty to inquire. <sup>48</sup>
- The showing required to trigger the statutory notice provisions is minimal... Welf. & Inst. § 224.3(b) Even a hint may suffice for this minimal showing.”<sup>49</sup>
- At a minimum, a conflict in the evidence exists which gives rise to a duty of further inquiry by the social worker and by the juvenile court. <sup>50</sup>

### iii. Notice

- Once a social worker retains a child that “the court knows or has reason to know” is an Indian child, notice of detention must be provided to the Indian guardian and the tribe or to the Bureau of Indian Affairs if the tribe cannot be ascertained. <sup>51</sup>

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<sup>42</sup> Cal. Rules of Court, rule 5.481(a)(4)

<sup>43</sup> Cal. Rules of Court, rule 5.481(a)(1)

<sup>44</sup> BIA Guidelines (Feb. 2015) 80 Fed Regs 10152, B.2(b)(1)

<sup>45</sup> Cal. Rules of Court, rule 5.481(a)(2)

<sup>46</sup> Cal. Rules of Court, rule 5.481(a)(2)-(3)

<sup>47</sup> BIA Guidelines (Feb. 2015) 80 Fed Regs 10152, B.2(b)(1); Welf. & Inst. Code §224.3(a); Cal. Rules of Court, rule 5.481(a)

<sup>48</sup> See, *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1165-1168, where the court cannot discern whether father meant to convey that while he was not a registered member of a Cherokee tribe, his own father was registered.

<sup>49</sup> *In re D. C.* (2015) 243 Cal.App.4th 41, 61, citing *In re Miguel E.* (2004) 120 Cal.App.4th 521, 549 (emphasis added).

<sup>50</sup> Welf. & Inst. Code § 224.3(a), (c); Cal. Rules of Court, rule 5.481(a)

<sup>51</sup> 25 U.S.C § 1912; See, 25 C.F.R. § 23.11; 80 Fed Regs 10153-10154, B.6(a); Welf. & Inst. Code § §224.2, 290.1(f)

- Notice must be to all tribes to which the child may be a member or eligible for membership until the court makes a determination as to which tribe is the child's tribe. <sup>52</sup>
- The notice is supposed to be sent to the chairperson, unless the tribe designates another agent. <sup>53</sup>
- 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." <sup>54</sup>
- To be clear, a copy of all notice(s) must always be sent to the BIA in all cases subject to the Act. <sup>55</sup>This provision however, is separate and distinct from the requirements for rendering substituted service.
- There must be documentation of the compliance in that the original or a copy of each notice sent and any return receipts *and responses received*, must be filed with the juvenile court. <sup>56</sup>
- Duty is continuing and ongoing <sup>57</sup>
- 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:

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<sup>52</sup> BIA Guidelines (2015) 80 Fed Regs 10152, 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)

<sup>53</sup> Welf. & Inst. Code § 224.2(a)(2); Cal. Rules of Court, rule 5.481(b)(4)

<sup>54</sup> 25 C.F.R. § 23.12

<sup>55</sup> 25 C.F.R. § 23.11(a)

<sup>56</sup> BIA Guidelines § B.6(g); Welf. & Inst. Code § 224.2(c); Cal. Rules of Court, rule 5.482(b)

<sup>57</sup> See Welf. & Inst. Code § 224.3(d), (f); Cal. Rules of Court, rule 5.481(b); Welf. & Inst. Code § 224.3(f)

(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.

(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.

(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 Act.

- ▶ 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.<sup>58</sup>
- If the identity or location of the parent or Indian custodian or the tribe cannot be determined, notice must be sent to the specified office of the Bureau of Indian Affairs. (For California that is the Sacramento office).
  - ▶ The BIA has 15 days to provide notice as required.
  - ▶ If, after a reasonable time following the sending of notice, but in no event less than 60 days, no determinative response to the notice is received, the court may determine that ICWA does not apply to the case unless further evidence of the applicability of the Act is later received.<sup>59</sup>

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<sup>58</sup> BIA Guidelines § B.2(b)(1)

<sup>59</sup> Cal. Rules of Court rule 5.664.

- ▶ 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.<sup>60</sup>

### c. TRANSFER TO TRIBAL COURT

#### i. Legal Background

- If the tribe has exclusive jurisdiction, transfer is mandatory.
- 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.<sup>61</sup>
- 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.”
- This means that so long as the tribe has designated some adjudicatory body to preside over such cases, a transfer is appropriate.
- If the tribal court and state court have concurrent jurisdiction, transfer is presumed = “Transfer jurisdiction”
  - ▶ Presumption is that upon petition by the tribe, either parent or the Indian custodian, the state court must transfer the proceeding to the tribal court unless:
    - i. Either parent objects
    - or
    - ii. There is good cause not to transfer.<sup>62</sup>

#### Mandatory denial:

- The child's tribe does not have a "tribal court" or any other administrative body as defined in section 1903 of the Indian Child Welfare Act: "a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated 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;" or
- The tribal court of the child's tribe declines the transfer.<sup>63</sup>

#### Denial is discretionary:

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<sup>60</sup> Welf. & Inst. Code § 224.2 (d); See also, BIA Guidelines § B.7.

<sup>61</sup> 25 U.S.C. § 1903(12)

<sup>62</sup> 25 U.S.C. § 1911(b); Welf. & Inst. Code § 305.5(b); Cal. Rules of Court, rule 5.483(b).

<sup>63</sup> Cal. Rules of Court, rule 5.483(d)(1); Welf. & Inst. Code § 305.5

Although ICWA does not define “good cause”, California state law lists 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

- 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.

- *Unreasonable delay* in requesting transfer

The court will consider whether there 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<sup>64</sup>

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<sup>64</sup> Cal. Rules of Court, rule 5.483(d)(2)

▶ Court may not consider:

- Whether or not the case is at an advanced stage (per new BIA Guidelines – not binding);
- The Indian child’s contacts with the tribe or reservation;
- Socio-economic conditions or any perceived inadequacy of the tribal or BIA social services or judicial systems; or
- The tribal court’s prospective placement <sup>65</sup>

**ii. Process and How to Request**

- A petition to transfer jurisdiction may be submitted at any time during the proceeding.
- If it appears there is good cause to deny a transfer, the court must hold an evidentiary hearing on the transfer and make its findings on the record. <sup>66</sup>
- The burden of establishing good cause is on the party opposing the transfer. <sup>67</sup>
- Tribal court must be properly notified of the request
- A tribal court may decline to accept a transfer of jurisdiction. <sup>68</sup>
- For that reason, tribal court has to have accepted the case in order for the transfer to finalize
- The state court must receive proof of acceptance by the tribal court before dismissing the proceeding or terminating jurisdiction. <sup>69</sup>
- If the tribal court declines to accept transfer of the proceeding, the state court retains jurisdiction. <sup>70</sup>
- Any appeal to the transfer order must be made before the transfer to tribal jurisdiction is finalized. <sup>71</sup> This means, you must ask for the “matter to be stayed” so that the order does not go into effect for that amount of time allowing you time to file the Notice of Appeal.
- 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. <sup>72</sup>

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).

- After transfer occurs the court must proceed as follows:

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<sup>65</sup> Cal. Rules of Court, rule 5.483(e)

<sup>66</sup> Cal. Rules of Court, rule 5.483(d)(3)

<sup>67</sup> Welf. & Inst. Code § 305.5(c)(4); see Cal. Rules of Court, rule 5.483(f)(1)

<sup>68</sup> 25 U.S.C. § 1911(b); Welf. & Inst. Code § 305.5(c)(1)(C); Cal. Rules of Court, rule 5.483(d)(1)(C)

<sup>69</sup> Welf. & Inst. Code § 305.5(b)

<sup>70</sup> 25 U.S.C. § 1911(b); Welf. & Inst. Code § 305.5(c)(1)(C)

<sup>71</sup> Cal. Rules of Court, rule 5.483(h)

<sup>72</sup> Cal. Rules of Court, rule 5.483(h)

- If the court has received proof that the tribal court has accepted the transfer of jurisdiction, the court must dismiss or terminate jurisdiction

and

- The court then makes an order transferring the physical custody of the child to a designated representative of the tribal court (not necessarily the same "designated representative" identified in the Notice of Designation of Tribal Representative and Notice of Intervention in a Court Proceeding Involving an Indian Child (form ICWA-040));

and

- Then include in the Order on Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction (form ICWA-060) all contact information for the designated tribal court representative.<sup>73</sup>

#### **d. INTERVENTION**

##### **i. Legal Background**

- The child's tribe has an absolute right to intervene under both state and federal law.<sup>74</sup>
- This right can be invoked at any time, even if for the first time on appeal. <sup>75</sup>
- 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. <sup>76</sup>
- 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. <sup>77</sup>

##### **ii. Process to Request**

- The tribe may appear by counsel or by a representative of the tribe designated by the tribe to intervene on its behalf. <sup>78</sup> The Indian child's tribe and Indian custodian may intervene through counsel or by a designated representative.
- It can be done orally or in writing. <sup>79</sup>
- Two forms:

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<sup>73</sup> Cal. Rules of Court, rule 5.483(i)

<sup>74</sup> 25 U.S.C. § 1911(c); Welf. & Inst. Code § 224.4.

<sup>75</sup> 25 U.S.C. § 1911(c); Fam. Code § 177(a); Prob. Code § 1459.5(b); Welf. & Inst. Code § 224.4; Cal. Rules of Court, rule 5.482(e)

<sup>76</sup> See Code of Civ. Proc. § 387; see also Cal. Rules of Court, rule 5.482(e) and Judicial Council form ICWA-040

<sup>77</sup> BIA Guidelines § B.7(d)

<sup>78</sup> Cal. Rules of Court, rule 5.534(i)

<sup>79</sup> Cal. Rules of Court, rule 5.534(i)

- ▶ Notice of Intervention – State Form- “ICWA-040 -- Notice of Designation of Tribal Representative and Notice of Intervention in a Court Proceeding Involving an Indian Child”

A fillable form can be accessed online at

<http://www.courts.ca.gov/documents/icwa040.pdf>.

The tribe and/or Indian custodian *may, but is not required to*, file this form. <sup>80</sup>

- ▶ Notice of Intervention – Attorney Form

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). <sup>81</sup>

#### **e. HEIGHTENED BURDEN OF PROOF**

- Applicable standards of evidence/proof:
  - ▶ Foster care = clear and convincing evidence, including testimony of a qualified expert witness.
  - ▶ Termination of Parental Rights = beyond a reasonable doubt, including testimony of a qualified expert witness.<sup>82</sup>
- The existence of particular conditions in the home must be connected to the likelihood of serious emotional or physical damage to the child.
  - ▶ By itself the following do not constitute clear and convincing evidence: isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or non-conforming social behavior.<sup>83</sup>

#### **f. ACTIVE EFFORTS**

##### **i. Legal Background**

- Any party petitioning a state court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court that prior to, and until the commencement of, the proceeding, “active efforts [were] made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts [were] unsuccessful.” <sup>84</sup>
- Clear and convincing evidence of the active efforts is required. <sup>85</sup>

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<sup>80</sup> Cal Rules of Court, rule 5.482(e)

<sup>81</sup> Cal Rules of Court, rule 5.534(i)(1)

<sup>82</sup> See, BIA Guidelines, D.3

<sup>83</sup> See, BIA Guidelines, D.3(c)

<sup>84</sup> 25 U.S.C. §§ 1912(f); BIA Guidelines D.2 80 Fed Regs 10156; Welf. & Inst. Code §361.7; Cal Rules of Court rule 5.484(c)

<sup>85</sup> In re Michael G. (1998) 63 Cal.App.4th 700, 714

- “Active Efforts”
  - ▶ Term “active efforts” has had varying interpretations.<sup>86</sup>
  - ▶ Active efforts are more than the reasonable efforts required by Title IV-E
  - ▶ California
    - What constitutes active efforts shall be assessed on a case-by-case basis.
    - The 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.
    - Active efforts shall utilize the available resources of the Indian child’s extended family, tribe, tribal and other Indian social service agencies, and individual Indian caregiver service providers.<sup>87</sup>
- The BIA Guidelines characterize active efforts as “identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services.”<sup>88</sup>
- ▶ BIA Guidelines provides a non-exclusive list of active efforts
  - (1) Engaging the Indian child, the Indian child’s parents, the Indian child’s extended family members, and the Indian child’s custodian(s);
  - (2) Taking steps necessary to keep siblings together;
  - (3) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
  - (4) Identifying, notifying, and inviting representatives of the Indian child’s tribe to participate;
  - (5) Conducting or causing to be conducted a diligent search for the Indian child’s extended family members for assistance and possible placement;
  - (6) Taking into account the Indian child’s tribe’s prevailing social and cultural conditions and way of life, and requesting the assistance of representatives designated by the Indian child’s tribe with substantial knowledge of the prevailing social and cultural standards;
  - (7) Offering and employing all available and culturally appropriate family preservation strategies;
  - (8) Completing a comprehensive assessment of the circumstances of the Indian child’s family, with a focus on safe reunification as the most desirable goal;
  - (9) Notifying and consulting with extended family members of the Indian child to provide family structure and support for the Indian child, to assure cultural connections, and to serve as placement resources for the Indian child;

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<sup>86</sup> See, 25 U.S.C. §§ 1903, 1912(d)

<sup>87</sup> Welf. & Inst. Code §361.7(b); See also, 25 U.S.C. §§ 1903, 1912(d), Cal. Rules of Court, Rule 5.484(c)(1)-(2)

<sup>88</sup> BIA Guidelines § A.2(2)

- (10) Making arrangements to provide family interaction in the most natural setting that can ensure the Indian child's safety during any necessary removal;
- (11) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or extended family in utilizing and accessing those resources;
- (12) Monitoring progress and participation in services;
- (13) Providing consideration of alternative ways of addressing the needs of the Indian child's parents and extended family, if services do not exist or if existing services are not available;
- (14) Supporting regular visits and trial home visits of the Indian child during any period of removal, consistent with the need to ensure the safety of the child; and
- (15) Providing post-reunification services and monitoring.<sup>89</sup>

➤ **Common Issues**

1) **Attend and Participate in Proceedings**

Incarcerated Parents

- Right to notice
- Right to be present

The court must allow the parent to physically attend for: jurisdictional<sup>90</sup> or dispositional hearing<sup>91</sup>, and any permanency planning hearing<sup>92</sup> in which termination of parental rights is at issue.

The court may order the parent be permitted to physically attend any other hearing in a dependency proceeding, including but not limited to a detention hearing or a review hearing.

- Right to services

Unless one of the provisions applies to bypass or otherwise deny the parent reunification services, the parent must be provided reunification services. The mere fact that the parent is incarcerated is not a basis for the denial or failure to provide services.<sup>93</sup>

~ Advocate Checkpoint ~

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<sup>89</sup> BIA Guidelines (Feb. 2015) 80 Fed Regs 10150, A.2

<sup>90</sup> Welf. & Inst. Code § 355

<sup>91</sup> Welf. & Inst. Code § 358 or 361

<sup>92</sup> Welf. & Inst. Code § 366.26

<sup>93</sup> See, Welf. & Inst. Code § 290.1-294; Cal. Rules of Court, rule 5.530

- Does the social worker report show that the social worker made active efforts to investigate what services and programs exist in the facility?
- Does the report show that the worker made active efforts to ensure that parent has access to those services?
- To the extent that the services are not already available at the facility, has the social worker developed alternative methods for delivering the services?

### Children

- Any child that is subject to a juvenile court hearing is entitled to be present at the hearing.<sup>94</sup>
  - ▶ If the child is not present and is 10 years of age or older, 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.

The court will not continue the hearing if the court finds that it is in the best interest of the child not to continue the hearing.

Any such continuance must be only for that period of time necessary to provide notice and secure the presence of the child.

- ▶ The court may issue any and all orders reasonably necessary to ensure that the child has an opportunity to attend.<sup>95</sup>

~ Advocate Checkpoint ~

- Are there transportation challenges?
- Is distance a barrier?
- Does the child have any special needs that are a barrier to attending?

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<sup>94</sup> Cal. Rules of Court, rule 5.534(p), Welf. & Inst. Code §349

<sup>95</sup> Cal. Rules of Court, rule 5.534(p), Welf. & Inst. Code §366.26(h)(2)

- The court must allow the child, if the child so desires, to address the court and participate in the hearing.<sup>96</sup>

## 2) Development and Input Into Case Plan

- There must be an individual case plan<sup>97</sup> for each child receiving foster care payments.<sup>98</sup>
- 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.<sup>99</sup>
- Every dependent child is entitled to participate in age-appropriate "extracurricular, enrichment, and social activities."<sup>100</sup>
- The case plan must describe the services to be provided concurrently to achieve legal permanence for the child if reunification efforts fail.<sup>101</sup>
- If the court finds the agency did not consult with the child's tribe, the court must order the agency to do so, unless the court finds that the tribe is unable, unavailable, or unwilling to participate.<sup>102</sup>
- Similarly the court must find whether the child and parents were actively involved in the development of the case plan.<sup>103</sup> If the court finds a lack of involvement, it must order the agency to ensure such participation.<sup>104</sup>
- The case plan must be updated as the service needs of the child and family dictate.<sup>105</sup> At minimum, the case plan must be updated with each status review, but no less than every six months.<sup>106</sup>

### ~ Advocate Checklist ~

- Was there collaboration with the Tribe on the development of the case plan?
- Are the "active efforts" documented?
- Are there regular status updates to the Tribe?
- Was input from the Tribe requested at every juncture?

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<sup>96</sup> Cal. Rules of Court, rule 5.534(p), Welf. & Inst. Code §349

<sup>97</sup> 42 U.S.C. §675(1)

<sup>98</sup> See 42 U.S.C. §622(a)

<sup>99</sup> Welf. & Inst. Code §16501.1(a)

<sup>100</sup> Welf. & Inst. Code §362.05

<sup>101</sup> Welf. & Inst. Code §16501.1(f)

<sup>102</sup> Cal Rules of Court 5.708(g)(3)

<sup>103</sup> Welf. & Inst. Code §16501.1(d)(1)

<sup>104</sup> Cal. Rules of Court. 5.706(d)(2), 5.708(g)

<sup>105</sup> Welf. & Inst. Code § 16501.1(d)

<sup>106</sup> Welf. & Inst. Code §16501.1(d)

### 3) Visitation

- Visitation must be ordered between the parent or guardian and the child.
- 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.<sup>107</sup>
- Where the child was removed, 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.<sup>108</sup>
- Visitation shall be as frequent as possible, consistent with the well-being of the child.<sup>109</sup> No visitation order shall jeopardize the safety of the child.<sup>110</sup>

~ Advocate Checkpoint ~

- Have all persons important to the child been identified?
  - Has the social worker been informed of these persons?
  - Has arrangements been made to facilitate the child's contact with these persons?
  - What barriers exist to these contacts?
  - Are there alternative methods for facilitating the contact? (i.e., telephone, email, Skype?)
  - Are there other additions needed in the Case Plan to effectuate active efforts? (funding for calls etc.?)
  - Did tribe report these needs in its hearing report?
  - Did the court make clear orders providing for these needs?
- The language of the order is very important.

~ Advocate Checklist ~

- ▶ Terms Clear and Unambiguous
- ▶ Frequency
- ▶ Location
- ▶ Supervised vs. Unsupervised

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<sup>107</sup> Welf. & Inst. Code § 361.2(a)(2), 16002(b).

<sup>108</sup> Welf. & Inst. Code § 361.2(i).

<sup>109</sup> Welf. & Inst. Code §361.2(a)(1)(A)

<sup>110</sup> Welf. & Inst. Code §361.2(a)(1)(B)

#### 4) Placement Preferences

- The U.S. Supreme Court has characterized ICWA’s placement preferences as “[t]he most important substantive requirement imposed on state courts.”<sup>111</sup>
- 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.<sup>112</sup> The placement preferences have also been incorporated into California law.<sup>113</sup>
- Applies 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.<sup>114</sup>
- Applies 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.<sup>115</sup>

##### i. Foster Care and Pre-adoptive Placement Preferences

- ▶ Least restrictive environment that most closely approximates their family is required.<sup>116</sup>
- ▶ 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.
- ▶ 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.<sup>117</sup>

*Dual intent: to minimize the disruption on a child's life and promote reunification.*

##### ii. Adoptive Placement Preferences

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<sup>111</sup> *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 36

<sup>112</sup> 25 U.S.C. § 1915(a), (b).

<sup>113</sup> Welf. & Inst. Code § 361.31(b), (c).

<sup>114</sup> 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.”

<sup>115</sup> Welf. & Inst. Code §224.2(b); See also, 25 U.S.C. §1916

<sup>116</sup> 25 U.S.C. § 1915(b); Welf. & Inst. Code § 361.31(b).

<sup>117</sup> 25 U.S.C. § 1915(b); Welf. & Inst. Code § 361.31(b)

- In descending order, preferences must be given as follows:<sup>118</sup>

1. A member of the child's "extended family."
2. Other members of the child's tribe.
3. Another Indian family.<sup>119</sup>

*At this point reunification with the parents is not likely to be achieved, so the child's need for permanence takes paramount importance over the need for keeping children close to their current home and to their parents.*

- "Extended Family" is governed by the ICWA, not state law.
  - ▶ The ICWA defines "extended family" by first deferring to the Indian child's tribe.<sup>120</sup>
  - ▶ 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."
- Courts must also apply the tribe's social and cultural standards when determining an Indian child's placement.<sup>121</sup>
- 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.<sup>122</sup>
- 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.
- The child's tribe may establish a different order of preference than the defaults specified in the ICWA.<sup>123</sup>

### iii. Good cause to place outside of the mandated preferences

- The burden to establish good cause is on party seeking the departure.<sup>124</sup>
- Good cause must be proved by "clear and convincing evidence."<sup>125</sup>

- ▶ **What is "good cause"?**

A good cause finding may be based on:

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<sup>118</sup> See, 25 U.S.C. § 1911(d); Welf & Inst. Code § 224.5

<sup>119</sup> 25 U.S.C. § 1915(b)

<sup>120</sup> 25 U.S.C. § 1903(2)

<sup>121</sup> 25 U.S.C. § 1915(d); Welf. & Inst. Code §361.31(f)

<sup>122</sup> Welf. & Inst. Code § 361.31(g); Cal. Rules of Court, rule 5.482(g)

<sup>123</sup> 25 U.S.C. § 1915(c)).

<sup>124</sup> BIA Guidelines (Feb. 2015) 80 Fed Regs. 10158, F.4(b); Welf. & Inst. Code § 361..31(j); Cal. Rules of Court, rule 5.484(b)(3)

<sup>125</sup> BIA Guidelines § F.4(b)

- (A) The requests of the parent or Indian custodian;
- (B) The requests of the Indian child, when of sufficient age;
- (C) The extraordinary physical or emotional needs of the Indian child *as established by a qualified expert witness*; or
- (D) The unavailability of suitable families based on a documented diligent effort to identify families meeting the preference criteria.<sup>126</sup>

▶ **“Good Cause” Is Not:**

- It is not sufficient to place with a non-preferred placement simply because the tribe has not located a placement.
- The socio-economic status of any placement relative to another placement.<sup>127</sup>
- There is no independent consideration of best interest consideration; the preferences reflect the best interests of an Indian child in light of the purposes of the Act
- No bonding exception
- No “existing Indian family doctrine” in California<sup>128</sup>

- ▶ Where no preferred placement is available, “active efforts” must then be made (and documented) to ensure that the 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.<sup>129</sup>
- ▶ The 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 specified in the BIA Guidelines sections F.2. or F.3, and explain why the preferences could not be met.<sup>130</sup>
- ▶ The record must document what efforts were made to comply with the ICWA’s placement preferences, and that record must be made available to the child’s tribe at any time.<sup>131</sup>

➤ Documented family finding efforts must be made:

*Due Diligence to Find Family*

In determining whether the social worker has exercised due diligence in conducting the required investigation to identify, locate, and notify the child's relatives, the court can consider whether the social worker:

<sup>126</sup> Welf. & Inst. Code §361.3, Cal. Rules of Court, Rule 5.484(b)(2); BIA Guidelines § F.4(c)

<sup>127</sup> BIA Guidelines § F.4(d)

<sup>128</sup> Welf & Inst. Code §224.2(a)(2)

<sup>129</sup> Welf. & Inst. Code § 361.31(i); see also, Cal. Rules of Court, Rule 5.484(b)(6)

<sup>130</sup> BIA Guidelines (Feb. 2015) 80 Fed Regs 10157, F.1.(b)

<sup>131</sup> 25 U.S.C. § 1915(e); See, Welf. & Inst. Code §361.7(c)

- 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.<sup>132</sup>

#### *Family Finding Determination*

The social worker report should include:

- 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.<sup>133</sup>
- The appropriateness of any relative placement. <sup>134</sup>
  - Whether the caregiver desires, and is willing, to provide legal permanency for the child if reunification is unsuccessful. <sup>135</sup>
  - 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.<sup>136</sup>
- If an able and willing relative or an able and willing nonrelative extended family member is available and requests temporary placement of the child pending the detention hearing, county welfare department must initiate an assessment of the relative's or nonrelative extended family member's suitability.<sup>137</sup>

<sup>132</sup> Cal. Rules of Court, rule 5.695(f), (g)

<sup>133</sup> Cal. Rules of Court, rule 5.637, 5.690(a)(1)(C)

<sup>134</sup> Welf. & Inst. Code § 358.1(h)

<sup>135</sup> Welf. & Inst. Code § 358.1(i)

<sup>136</sup> Welf. & Inst. Code § 358.1(j)

<sup>137</sup> Welf. & Inst. Code § 306.5(d)(1)

- The social worker shall, to the extent that it is practical and appropriate, place the minor together with any siblings or half-siblings who are also detained.

If the siblings cannot be placed together, the social worker report must include a statement regarding the social worker's continuing efforts to place the siblings together or why those efforts are not appropriate.<sup>138</sup>

#### iv. Home Evaluation

- Before placing a child in the home of a relative, or the home of any prospective guardian or other person who is not a licensed or certified foster parent, the county social worker shall visit the home to ascertain the appropriateness of the placement.<sup>139</sup>
  - The following *must* be checked
    - A criminal records check shall be conducted with regard to all persons over 18 years of age living in the home, and on any other person over 18 years of age, other than professionals providing professional services to the child, known to the placing entity who may have significant contact with the child, including any person who has a familial or intimate relationship with any person living in the home.<sup>140</sup>
  - The follow *may* be checked
    - A criminal records check may be conducted on any person over 14 years of age living in the home who the county social worker believes may have a criminal record.<sup>141</sup>
- Federally recognized Indian tribes are authorized to approve or license a home for foster care or adoptive purposes.<sup>142</sup> Rather than the home being required to obtain a state or county license, the tribe's approval or license can be according to its own socially and culturally appropriate standards.<sup>143</sup>
- These have historically always been done by the County. More recently, Title IV-E Tribes have been able to obtain access to summary criminal background information and CACI information through the California Department of Justice.
- Federally recognized Indian tribes are authorized to approve or license a home for foster care or adoptive purposes. Rather than the home being required to obtain a state or county license, the tribe's approval or license can be according to its own socially and culturally appropriate standards. See, 25 U.S.C. § 1931.
- New legislation allows Tribes to assess and where appropriate provide criminal background exemptions. These exemptions must be done in accordance with state exemption standards.
  - ▶ Where the potential placement would satisfy the ICWA's placement preferences, the county must request an exemption ("waiver"). The request is made through California Department of Social Services (CDSS).<sup>144</sup>

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<sup>138</sup> Welf. & Inst. Code § 306.5

<sup>139</sup> Welf. & Inst. Code §361.4(a)

<sup>140</sup> Welf. & Inst. Code §361.4(b)

<sup>141</sup> Welf. & Inst. Code §361.4(b)

<sup>142</sup> 25 U.S.C. § 1915

<sup>143</sup> See, 25 U.S.C. § 1931.

<sup>144</sup> See, Welf. & Inst. Code §361.4

- ▶ An Indian tribe may make its own request for a criminal record exemption for a potential placement, *either* from a county with the proper authority *or* from the state Department of Social Services directly.<sup>145</sup>

## **g. QUALIFIED EXPERT WITNESS**

### **i. Legal Background**

- To meet the heightened burden of proof for foster care placement or termination of parental rights, the petitioner must present the testimony of one or more “qualified experts,” demonstrating 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.<sup>146</sup>
- ICWA itself does not establish precise qualifications for an expert witness.
- The BIA Guidelines do provide though 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. Member of the child's tribe recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices
    2. Member of another tribe recognized by the child's tribe as a qualified expert witness
    3. Layperson recognized by the child's tribe...
    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 in the child's tribe.<sup>147</sup>
- The Welfare and Institutions Code also provide a list of persons that “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.
  - (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.

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<sup>145</sup> Welf. & Inst. Code § 361.4(f)

<sup>146</sup> 25 U.S.C. §1912(e)-(f); Welf. & Inst. Code § 224.6(c); Cal Rules of Court, rule 5.484(a)(1)

<sup>147</sup> BIA Guidelines (Feb. 2015) 80 Fed Regs 10157, D.4

(3) A professional person having substantial education and experience in the area of his or her specialty.<sup>148</sup>

- A tribe may authorize another tribe to act as its representative in a child custody case, including performing expert witness services.<sup>149</sup>
- The expert should not be an employee of the agency recommending foster care placement or termination of parental rights.<sup>150</sup>
- The expert witness should not be the advocate.

## ii. Common Issues

- 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.”<sup>151</sup>
- 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.<sup>152</sup>
- Only one expert witness is required under federal rules of construction.
- The court may accept a declaration or affidavit from the expert witness in place of testimony.<sup>153</sup>
  - ▶ But it is not permitted unless:
    - the parties stipulate to such in writing, and
    - the court determines that the stipulations were made knowingly, intelligently, and voluntarily.<sup>154</sup>

~ Advocate Checkpoint ~

- ▶ Ask:
  - What subject the witness is an “expert” in?
  - What qualifications the witness has that qualifies the witness as an “expert” on that subject?
  - What opinion/belief did they reach based on that expertise?
  - What information did they rely on to reach that opinion/belief?
  - Was the information complete and accurate?
  - Are there any issues or indication of bias?

## h. PERMANENCY PLANNING

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<sup>148</sup> Welf. & Inst. Code § 224.6(c)

<sup>149</sup> BIA Guidelines (Feb. 2015) 80 Fed Regs 10151, B.4(d)

<sup>150</sup> Welf. & Inst. Code § 224.6(6)

<sup>151</sup> 25 U.S.C. § 1912(e), (f); Welf. & Inst. Code §§ 224.6(b)(1), 361.7(c)

<sup>152</sup> Welf. & Inst. Code §§ 224.6(b)(2)

<sup>153</sup> Welf. & Inst. Code § 224.6(e)

<sup>154</sup> Welf. & Inst. Code § 224.6(e)

- 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”).
- However, in an ICWA case, given the potential harm to an Indian child which may result from termination of parental rights, the advocate should be prepared to articulate the possibility of that harm, and to argue other permanency options to the court.

#### i. **TRIBAL CUSTOMARY ADOPTION**

- TCA is a unique permanency option in two ways.<sup>155</sup>
  - ▶ 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.
    - a. County agencies must consult with the tribe throughout the case about the appropriateness of TCA as the permanent plan.
    - b. Tribe may identify TCA as the permanent plan.
    - c. TCA is ordered at the §366.26 hearing.
    - d. §366.26 hearing is continued up to 120 days for Tribe to develop TCAO and for home study to be conducted.
    - e. TCAO is filed 20 days before the continued §366.26 date.
    - f. Count agency files Addendum Report 7 days before continued 366.26 date.
    - g. Court orders full faith and credit of TCAO.
    - h. Adoption assistance agreement completed, TCA finalized, dependency jurisdiction dismissed.

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

#### ii. **GUARDIANSHIP**

- Another exception to the statutory preference for termination of parental rights is 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.
  - a. If guardianship is identified as the appropriate permanent plan, there must be an assessment to support the recommendation.<sup>156</sup>
  - b. The assessment must be read and considered by the court prior to the appointment, and this shall be reflected in the minutes of the court.<sup>157</sup>
  - c. The court will then order that letters of guardianship issue.<sup>158</sup>
  - d. 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.<sup>159</sup>
  - e. 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.<sup>160</sup>

### iii. CONTINUED FOSTER CARE

- After receiving evidence at the Welfare and Institutions Code § 366.26 hearing, the court can 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.<sup>161</sup>
- This is the lowest of the order of preference for the permanent plan.
- This occurs where:
  - the child is living with an approved relative who is willing and capable of providing a stable and permanent environment, but not willing to become a legal guardian as of the hearing date, the court shall order a permanent plan of placement with a fit and willing relative.<sup>162</sup>

and

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<sup>156</sup> Welf. & Inst. Code §366.26(d)

<sup>157</sup> Welf. & Inst. Code §366.26(d)

<sup>158</sup> Welf. & Inst. Code § 366.26(b)(3).

<sup>159</sup> Welf. & Inst. Code § 366.3(a).

<sup>160</sup> Welf. & Inst. Code § 366.3(c); see, Welf. & Inst. Code § 366.3(b)(1) regarding revocation or termination of an ordered guardianship.

<sup>161</sup> Welf. & Inst. Code § 366.26(c)(4)(B)(ii).

<sup>162</sup> Welf. & Inst. Code §366.26(b)(6)

- the removal would be seriously detrimental to the emotional well-being of the child because the child has substantial psychological ties to the relative caretaker.<sup>163</sup>
- The court is required to make factual findings to identify the barriers to achieving a more permanent plan higher on the order of preferences.<sup>164</sup>
- The focus remains on achieving a permanent plan for the child. The courts orders 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. <sup>165</sup>
- The court will then order that the periodic review hearing be set pursuant to Welfare and Institutions Code §366.3. <sup>166</sup>
- The court will then order that the periodic review hearing be set pursuant to Welfare and Institutions Code §366.3. <sup>167</sup>

## j. REQUESTS TO INVALIDATE

### i. Legal Background

- If *certain* provisions of the ICWA are violated the state court child custody proceeding may be “invalidated.”<sup>168</sup>
- Violations for: <sup>169</sup>
  - 25 U.S.C. section 1911 (addressing jurisdictional issues, including transfer to tribal court, intervention, and full faith and credit to tribal acts and proceedings)
  - 25 U.S.C. section 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. section 1913 (addressing issues in voluntary custody proceedings, including consent, the court’s certification thereof, and withdrawal of consent).
- Also, make sure to make as *clear, documented, and timely* objection to particular ICWA violation and request for invalidation.

### ii. Process and How to Request

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<sup>163</sup> Welf. & Inst. Code §366.26(c)(4)(B)(i)

<sup>164</sup> Welf. & Inst. Code §366.26(c)(4)(A)

<sup>165</sup> Welf. & Inst. Code §366.26(c)(4)(B)(ii)

<sup>166</sup> Welf. & Inst. Code §366.26(b)(6)

<sup>167</sup> Welf. & Inst. Code §366.26(b)(7)

<sup>168</sup> 25 U.S.C. § 1914; Fam. Code § 175(e); Prob. Code § 1459(e); Welf. & Inst. Code § 224(e); Cal. Rules of Court, rule 5.486

<sup>169</sup> 25 U.S.C. § 1914

- 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. <sup>170</sup>
- ICWA provides that a party with standing to petition for invalidation may do so in “any court of competent jurisdiction.” <sup>171</sup>
  - ▶ That term is not defined by the Act.
  - ▶ California Rules of Court provides that the juvenile court is a court of competent jurisdiction with the authority to hear the request to invalidate the foster placement or termination of parental rights. <sup>172</sup>
- The ICWA does not specify or limit the method or form to bring the petition.
- ICWA does not give a deadline for a request to invalidate.<sup>173</sup> But it should not be delayed.

### III. OTHER ADVOCATE ACTIONS & ACTIVITIES

#### a. REQUEST TO CHANGE VENUE

##### i. Legal Background

- The proper court in which to commence proceedings to declare a child a dependent or ward of the court is the juvenile 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.<sup>174</sup>
- No transfer unless court determines the transfer will protect or further the child's best interest. <sup>175</sup>

##### ii. Process and How to Request

- 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

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<sup>170</sup> 25 U.S.C. § 1914

<sup>171</sup> 25 U.S.C. § 1914

<sup>172</sup> Cal. Rules of Court, rule 5.486(b)

<sup>173</sup> See, 25 U.S.C. §1914

<sup>174</sup> Cal. Rules of Court, rule 5.510; Welf. & Inst. Code §327

<sup>175</sup> Cal. Rules of Court, rule 5.610(e)

- 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.
  - 
  - 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.<sup>176</sup>

*For information on the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) see, Family C. §§ 3421, 3400-3465.*

**b. APPLICATION TO COMMENCE PROCEEDINGS (WELF. & INST. CODE §329)**

- *Any* person may make an application to the agency to commence juvenile court proceedings.<sup>177</sup>
- The application must be in the form of an affidavit alleging facts showing the child is described in Welfare and Institutions Code § 300.<sup>178</sup>
- The social worker must then proceed under Welfare and Institutions Code §329.<sup>179</sup>
- This means that the agency has three weeks from the date of the application to file a petition.
- If after one month, it does not, the applicant can apply to the juvenile court to review the agency's action in failing or refusing to file a petition.<sup>180</sup>
- The juvenile court will review the agency's refusal or failure to file a petition by proceeding under Welfare and Institutions Code §331.
- The juvenile court will then either affirm the agency's decision not to file a petition or will order that juvenile proceedings be commenced.<sup>181</sup>

**c. PETITION FOR "MODIFICATION" OR "CHANGE OF ORDER" (WELF. & INST. CODE §388)**

- A petition for modification hearing may be filed by:

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<sup>176</sup> See, Cal. Rules of Court, rule 5.612(a); Welf. & Inst. Code §§ 378, 753.

<sup>177</sup> Cal. Rules of Court, rule 5.520(a), (c); Welf. & Inst. Code § 329

<sup>178</sup> Cal. Rules of Court, rule 5.520(a), (c); Welf. & Inst. Code § 329

<sup>179</sup> Cal. Rules of Court, rule 5.520(a), (c); Welf. & Inst. Code § 329

<sup>180</sup> Welf. & Inst. Code § 331

<sup>181</sup> Welf. & Inst. Code § 331

- The probation officer, the parent, the guardian, the child, the attorney for the child, or any other person having an interest in a child who is a ward if the requested modification is not for a more restrictive level of custody;
  - The social worker, regarding a child who is a dependent, if the requested modification is not for a more restrictive level of custody; or
  - The parent, the guardian, the child, the attorney for the child, or any other person having an interest in a child who is a dependent.<sup>182</sup>
- Where if upon change of circumstances or new evidence the court is to:
- change, modify, or set aside an order previously made;
- or
- terminate the jurisdiction of the court over the child. <sup>183</sup>
- If all parties stipulate to the requested modification, the court may order modification without a hearing.
- The petition may be denied “ex parte” (i.e., without a hearing)
- If there is no stipulation and the petition is sufficient on its face (“prima facie” showing), the court must either:
- order that a hearing on the petition be held within 30 calendar days after the petition is filed;
- or
- order a hearing for the parties to argue whether an evidentiary hearing on the petition should be granted or denied.
- If after that hearing, the court grants an evidentiary hearing, it must still be held within 30 calendar days *after the petition is filed*. <sup>184</sup>
- Notice is required.<sup>185</sup>
- Contents of petition
- ▶ A petition for modification must be liberally construed in favor of its sufficiency.
  - ▶ The petition must be verified and, to the extent known to the petitioner, must contain the following:
    - (1) The name of the court to which the petition is addressed;

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<sup>182</sup> Cal. Rules of Court, rule 5.560(e)

<sup>183</sup> Cal. Rules of Court, rule 5.560(d); Welf. & Inst. Code §388

<sup>184</sup> Cal. Rules of Court, rule 5.570(f)

<sup>185</sup> See, Cal. Rules of Court, rule 5.570(g); Welf. & Inst. Code §§ 224.2, 290.2(e), 291(g)

- (2) The title and action number of the original proceeding;
- (3) The name and age of the child;
- (4) The address of the child, unless confidential under this section;
- (5) The name and address of the parent or guardian of the child;
- (6) The date and general nature of the order sought to be modified;
- (7) A concise statement of any change of circumstance or new evidence that requires changing the order or, for requests under Welfare and Institutions Code §388(c)(1)(B), a concise statement of the relevant action or inaction of the parent or guardian;
- (8) A concise statement of the proposed change of the order;
- (9) A statement of the petitioner's relationship or interest in the child, if the petition is made by a person other than the child; and
- (10) A statement whether or not all parties agree to the proposed change.<sup>186</sup>

#### **d. RESTRAINING ORDER**

- Once a dependency petition has been and until it is dismissed or dependency is terminated, the juvenile court has the power to issue restraining orders to protect the child.<sup>187</sup>
- Purpose for the restraining order

To prevent the restrained person from:

- 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.<sup>188</sup>

- Order can exclude a person from a residence or dwelling

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<sup>186</sup> Cal. Rules of Court, rule 5.570(a)(1)-(10); Welf. & Inst. Code §§ 388, 778

<sup>187</sup> See, Cal. Rules of Court, rule 5.620(b), 5.630(a); Welf. & Inst. Code §213.5(a)

<sup>188</sup> Welf. & Inst. Code §213.5

This order may be issued for the time and on the conditions that the court determines, regardless of which party holds legal or equitable title or is the lessee of the residence or dwelling.

However, such an order can be made only on a showing of all of the following:

- (A) Facts sufficient for the court to ascertain that the party who will stay in the dwelling has a right under color of law to possession of the premises.
- (B) That the party to be excluded has assaulted or threatens to assault the other party or any other person under the care, custody, and control of the other party, or any minor child of the parties or of the other party.

and

- (C) That physical or emotional harm would otherwise result to the other party, to any person under the care, custody, and control of the other party, or to any minor child of the parties or of the other party.<sup>189</sup>

➤ 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.<sup>190</sup>
- Can be made at any scheduled hearing.<sup>191</sup>
- If the application is submitted in writing, there are forms that must be used. <sup>192</sup>
- Different forms for restraining orders involving domestic violence.<sup>193</sup>

▶ Application Without Notice

The court may grant the petition and issue a temporary order even where no notice was given to the restrained person.

If the court grants the temporary restraining order, the court must order that the matter be set for a hearing to show cause why the order should not be granted. <sup>194</sup>

▶ 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. <sup>195</sup>

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<sup>189</sup> Welf. & Inst. Code §213.5(e)

<sup>190</sup> Cal. Rules of Court, rule 5.620(b)(1)

<sup>191</sup> Cal. Rules of Court, rule 5.620(b)(1)

<sup>192</sup> Cal. Rules of Court, rule 5.620(b)(1)

<sup>193</sup> See, Welf. & Inst. Code §215.5(i); See, Fam. C. §600 et. seq., 6380(i)

<sup>194</sup> See, Welf. & Inst. Code §213.5(c)(1)

<sup>195</sup> See, Welf. & Inst. Code §213.5(d)(1)

The order 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.<sup>196</sup>

If the juvenile case is dismissed, the restraining order remains in effect until it expires or is terminated.<sup>197</sup>

➤ Hearing on application for restraining order

The court will consider the proof on the application and any attachments additional declarations or documentary evidence, the contents of the juvenile court file, testimony, or any combination of these.<sup>198</sup>

➤ Before any hearing on the issuance of a restraining order the court must ensure that a criminal records search is or has been conducted.

➤ Service is required of the issued order.<sup>199</sup>

➤ Issued order must be transmitted to law enforcement<sup>200</sup>

#### **e. ADVOCATING FOR THE WELLBEING OF THE CHILD**

➤ 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.”<sup>201</sup>

➤ 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.

➤ 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.<sup>202</sup>

➤ So it appears that the court is unaware of a child’s needs outside of the immediate proceedings, it is best to speak up.

#### **i. Placement**

To the fullest extent possible, 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.

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<sup>196</sup> See, Welf. & Inst. Code §213.5(d)(1)

<sup>197</sup> Cal. Rules of Court, rule 5.630(i)

<sup>198</sup> Cal. Rules of Court, rule 5.630(f)

<sup>199</sup> Cal. Rules of Court, rule 5.630(g)

<sup>200</sup> Welf. & Inst. Code §213.5(g)

<sup>201</sup> Welf. & Inst. Code § 202(a)

<sup>202</sup> Cal. Rules of Court, rule 5.660

- 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.<sup>203</sup>

**ii. Assigning Educational and Developmental-Services Decision-Making Rights**

- ▶ Children in the system are disproportionately represented as to disabilities, and “face systemic challenges to attaining self-sufficiency.
- ▶ 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 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.”<sup>204</sup>
- ▶ *At the detention hearing* the court must decide who shall hold educational and developmental-services decision-making rights, and identify the rights holder(s).<sup>205</sup>
- ▶ *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.<sup>206</sup>

**iii. Informing the court of the youth’s interest**

At any time after the petition is filed and until the court’s jurisdiction is terminated, any interested person may advise the court of information regarding an interest or right of the child to be protected or pursued in other judicial or administrative forums.

- If the court determines that further action on behalf of the child is required to protect or pursue any interests or rights, the court must appoint an attorney for the child, if the child is not already represented by counsel, and do one or all of the following:
  - Refer the matter to the appropriate agency for further investigation and require a report to the court within a reasonable time;
  - Authorize and direct the youth’s attorney to initiate and pursue appropriate action;
  - Appoint a guardian ad litem for the child. The guardian may be the CASA volunteer already appointed as a CAPTA guardian ad litem or a person who will act only if required to initiate appropriate action; or

<sup>203</sup> See, Welf. & Inst. Code § 361.2(k)

<sup>204</sup> Cal. Rules of Court, rule 5.651 - Advisory Committee Comment

<sup>205</sup> Cal. Rules of Court, rule 5.651(b)(1).

<sup>206</sup> Cal. Rules of Court, rule 5.651(b)(2)

- Take any other action to protect or pursue the interests and rights of the child.<sup>207</sup>

#### iv. 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.

#### v. 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.<sup>208</sup>

*For a finding of mental disorder see Welf. & Inst. Code § 5250, 5260.10 et seq., 5350 et seq.*

*For a finding of substance abuse see Welf. & Inst. Code §359*

#### vi. Psychotropic Medication

- ▶ "Psychotropic medications" = 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.<sup>209</sup>
- ▶ 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.<sup>210</sup>
- ▶ 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.<sup>211</sup>
- ▶ Notice must be given to the parties, including the child's tribe.<sup>212</sup>
- ▶ The notice will include:
  - 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;

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<sup>207</sup> Cal. Rules of Court, rule 5.660

<sup>208</sup> Cal. Rules of Court, rule 5.645(a); Welf. & Inst. Code §§ 319.1, 3571, 705, 6550, 6551

<sup>209</sup> Cal. Rules of Court, rule 5.640(a); Welf. & Inst. Code § 369.5(d)

<sup>210</sup> Cal. Rules of Court, rule 5.640(b); See, Welf. & Inst. Code § 369.5(a)

<sup>211</sup> Welf. & Inst. Code §§ 202(d), 369.5(a)

<sup>212</sup> Cal. Rules of Court, rule 5.640(c)(7)

- 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.
- ▶ An Opposition to the medication application can be filed. The Opposition to Application Regarding Psychotropic Medication (form JV-222) is required within four court days of service of notice of the pending application for psychotropic medication.
  - ▶ The court may grant the application without a hearing (despite the Opposition) or may set the matter for hearing.
  - ▶ The order for authorization is effective until terminated or modified by court order or until 180 days from the order, whichever is earlier.
  - ▶ Psychotropic medications may be administered without court authorization in an emergency situation.

#### vii. Joinder of Agencies

- ▶ “Joinder” = The court may join in the proceedings any agency that the court determines has failed to meet a legal obligation to provide services to a child or a nonminor or nonminor dependent youth.<sup>213</sup>
- ▶ The court may not impose duties on an agency beyond those required by law.<sup>214</sup>

*For more information see Cal. Rules of Court, rule 5.575(b); See Welf and Inst. Code § 362, 365.*

#### viii. Youth Transferring Between Dependency and Delinquency Systems

- ▶ 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), an assessment must be done to determine the status that will better achieve child’s best interest and the protection of society.<sup>215</sup>
- ▶ The assessment must be done jointly by the social services agency and probation department.<sup>216</sup>
- ▶ Welfare and Institutions Code § 241.1(b) requires each county to develop a written protocol on the joint assessment.

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<sup>213</sup> Cal. Rules of Court, rule 5.575(a)

<sup>214</sup> Cal. Rules of Court, rule 5.575(a)

<sup>215</sup> Welf. & Inst. Code § 241.1; Cal. Rules of Court, rule 5.512

<sup>216</sup> See, Cal. Rules of Court, rule 5.512(d).

- ▶ Courts often do not provide notice or participation to the Indian child

## f. MAKING ARGUMENT AND OBJECTIONS

### ➤ Opening Argument

- Do not argue the law or facts
- Put the anticipated evidence into perspective
- Introduce and tell the story
  - Catchline/Grabber
    - “Father is not perfect, who is? But he when he made mistake, he did what we can only ask for a parent to do in the best interest of the child, which is to step up and do what the parent needs to do to protect the child.”
- List the issue the judge will have to decide
  - “You will be asked to decide whether the child’s placement with father would be detrimental to the safety, protection, or physical or emotional well-being of the child.”
- The Story
  - **“You will hear evidence that ....** Father In the 8 months since, father has maintained daily unsupervised visitation, is appropriate with the child, and is in full compliance with the strict requirements of his probation. This includes random and frequent drug testing. He and mom are no longer together.”

### ➤ Closing Argument

- I.R.A.C.

### ➤ Making Objections

- Common Objections
- Relevance
- Leading Questions
- Form of the Question
- Privilege
- Hearsay
- Lack of Personal Knowledge
- Lacks foundation
- Improper Expert Opinion
- Settlement Discussions
- Argumentative

- Assumes Facts Not In Evidence

## VI. STAGES OF DEPENDENCY- WHAT TO LOOK FOR

### a. Pre-Detention Investigation and Prevention

#### i. Referrals for Child Abuse or Neglect

- The identity of the person that made the referral is kept confidential.<sup>217</sup> The person can also make the referral anonymously.<sup>218</sup>
- So long as the referral was not made falsely or with reckless disregard of its truth or falsity, the reporting party should not be subject to any civil or criminal liability for having made the report. (See, Pen. C. §11172(a))
- Any substantiated referrals will be reported to the Department of Justice.<sup>219</sup>
- A warrant is not needed to take the child into temporary custody where:

- When the officer has reasonable cause for believing that the minor is at risk of abuse or neglect (as described in Welfare and Institutions Code § 300),

and,

that the minor has an immediate need for medical care, or the minor is in immediate danger of physical or sexual abuse, or the physical environment or the fact that the child is left unattended poses an immediate threat to the child's health or safety.<sup>220</sup>

The officer must first attempt to contact the child's parent or guardian to see if the person is able to assume custody of the child.<sup>221</sup>

If the parent or guardian cannot be contacted, the peace officer shall notify a social worker in the county welfare department to assume custody of the child.<sup>222</sup>

- The parent is in the hospital and release of the minor to a parent poses an immediate danger to the child's health or safety.<sup>223</sup>
- Where the child is already before the juvenile dependency court juvenile court and the officer has reasonable cause for believing that the minor has violated an order of the juvenile court or has left any placement ordered by the juvenile court.<sup>224</sup>

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<sup>217</sup> See, Pen. C. §11167(d)

<sup>218</sup> See, Pen. C. §11167(f)

<sup>219</sup> See, Pen. C. §11169(a)

<sup>220</sup> See, Welf. & Inst. Code §305(a)

<sup>221</sup> See, Welf. & Inst. Code §305(a)

<sup>222</sup> See, Welf. & Inst. Code §305(a)

<sup>223</sup> See, Welf. & Inst. Code §§305(b), 305.6

<sup>224</sup> See, Welf. & Inst. Code §305(c)

- Where the child is found in any street or public place suffering from any sickness or injury which requires care, medical treatment, hospitalization, or other remedial care.<sup>225</sup>
- Remember, ICWA allows for the emergency removal where the removal is needed in order to prevent imminent physical damage or harm to the child, but only as long as is necessary.<sup>226</sup>
- The officer must either: release the minor<sup>227</sup> or deliver the child to the social worker.
- The social worker must then immediately investigate.
- The law presumes the social worker will release the child to the parents unless certain conditions exist as outlined in Welfare and Institutions Code § 309(a)

## ii. Active Efforts To Prevent Detention

- In order to prevent removal, the “active efforts” requirement begins from the moment the *possibility* arises that an 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. <sup>228</sup>

Active efforts must be conducted even while it is still being investigated whether the child is an Indian child under the ICWA. <sup>229</sup>

- Before the child is into custody, a social worker must consider whether the child can remain safely in his or her residence.

~ Advocate Checkpoint ~

- Are there any services that can be given to either parent or to the child to eliminate the need to remove the minor from the custody of his or her parent, guardian, or caretaker?
- Are there programs or services that the parent(s) can be referred to that would eliminate the need to take temporary custody of the minor? Has the parent(s) already been referred to such assistance?
- Can the offending person leave the child’s home? If so, are there any other orders that need to be made to ensure the child’s safety – i.e., a restraining order?
- Is the parent willing to accept services and participate in corrective efforts?

*Alternatives to detention must be addressed, as specified in Welf. & Inst. Code §§ 305-307.*

- If an alternative to detention is available, the law requires the social service agency to consider less restrictive alternatives. The county welfare department must provide or arrange for the family maintenance services to maintain the child in his or her own home. <sup>230</sup>

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<sup>225</sup> See, Welf. & Inst. Code §305(d)

<sup>226</sup> 25 U.S.C. §1922

<sup>227</sup> See, Welf. & Inst. Code §307(a), (b)

<sup>228</sup> BIA Guidelines (Feb. 2015) 80 Fed Regs 10152, B.1(a)

<sup>229</sup> BIA Guidelines (Feb. 2015) 80 Fed Regs 10152, B.1(b)

- In lieu of a petition the social worker could undertake a program of supervision of the child.<sup>231</sup>
  - ▶ In determining whether to undertake a program of informal supervision the social worker must consider:
    - If the condition or conduct is not considered serious, whether the child has had a problem in the home, school, or community that indicates that some supervision would be desirable;
    - Whether the child and the parent or guardian seem able to resolve the matter with the assistance of the social worker or probation officer and without formal court action;
    - Whether further observation or evaluation by the social worker or probation officer is needed before a decision can be reached;
    - The attitudes of the child and the parent or guardian;
    - The age, maturity, and capabilities of the child;
    - The dependency or delinquency history, if any, of the child;
    - The recommendation, if any, of the referring party or agency;
    - The attitudes of affected persons; and
    - Any other circumstances that indicate that a program of informal supervision would be consistent with the welfare of the child and the protection of the public.<sup>232</sup>
  - ▶ Can occur only if child's parent or guardian consents to the informal supervision.<sup>233</sup>
  - ▶ If the parent or guardian complies but the objectives have not all been met, the social worker may extend the period up to an additional six months, with the consent of the parent or guardian.
  - ▶ If the parent or guardian refused to cooperate with the services being provided, the social worker may file a petition with the juvenile court.
- Whether to file the petition is in the discretion of the social worker.<sup>234</sup>

In determining whether to file a petition, the social worker must consider all of the following:

- (1) Whether any of the statutory criteria listed in California Rules of Court, rules 5.770 and 5.772 relating to the fitness of the child are present;

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<sup>230</sup> See, Welf. & Inst. Code § 16506(a); See, Welf. & Inst. Code § 328

<sup>231</sup> Welf. & Inst. Code § 301(a)

<sup>232</sup> Cal. Rules of Court 5.516(b)

<sup>233</sup> Welf. & Inst. Code § 301; Cal. Rules of Court 5.514(e)(1)

<sup>234</sup> Cal. Rules of Court, rule 5.520(a)-(b); Welf. & Inst. Code §325

- (2) Whether the alleged conduct would be a felony;
- (3) Whether the alleged conduct involved physical harm or the threat of physical harm to person or property;
- (4) If the alleged condition or conduct is not serious, whether the child has had serious problems in the home, school, or community that indicate that formal court action is desirable;
- (5) If the alleged condition or conduct is not serious, whether the child is already a ward or dependent of the court;
- (6) Whether the alleged condition or conduct involves a threat to the physical or emotional health of the child;
- (7) Whether a chronic, serious family problem exists after other efforts to resolve the problem have been made;
- (8) Whether the alleged condition or conduct is in dispute and, if proven, whether court-ordered disposition appears desirable;
- (9) The attitudes of the child and the parent or guardian;
- (10) The age, maturity, and capabilities of the child;
- (11) Whether the child is on probation or parole;
- (12) The recommendation, if any, of the referring party or agency;
- (13) The attitudes of affected persons;
- (14) Whether any other referrals or petitions are pending; and
- (15) Any other circumstances that indicate that the filing of a petition is necessary to promote the welfare of the child or to protect the public.<sup>235</sup>

- If a petition is not filed, a written report is required if the child was held in custody for more than 6 hours.<sup>236</sup>
- The initial hearing must be scheduled for no later than the next court (for a detained child) <sup>237</sup>or within 15 *court* days (for a non-detained child). <sup>238</sup>

#### **b. Voluntary Consent To Foster Care Placement**

- Voluntary consent to a foster care placement or to termination of parental rights is required to be:

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<sup>235</sup> Cal. Rules of Court, rule 5.516(c)

<sup>236</sup> Welf. & Inst. Code §313(a); Cal. Rules of Court, rule 5.670(b)

<sup>237</sup> Cal Rules of Ct 5.670(d); See, Welf. & Inst. Code §315

<sup>238</sup> Cal Rules of Ct 5.670(a)

- executed in writing
  - and
  - recorded before a judge of a court of competent jurisdiction
  - and
  - accompanied by the presiding judge's certificate that
  - the terms and consequences of the consent were fully explained in detail
  - and
  - were fully understood by the parent or Indian custodian.
  - The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood.<sup>239</sup>
- Consent is not valid if it does not meet each of the requirements set forth above.
- A key example is the parent's right to withdraw consent and petition the court to vacate a final decree of adoption on the grounds that the consent was obtained through fraud or duress.
  - or
  - The consent given prior to, or within ten days after, birth of the Indian child shall not be valid.<sup>240</sup>
- Consent can be withdrawn at any time.<sup>241</sup> Upon withdrawal, the child shall be returned to the parent or Indian custodian.<sup>242</sup>

**c. The Petition & Initiation of Juvenile Dependency**

**i. Understanding the Elements of the Petition**

- (1) The subdivision of Welfare and Institutions Code section 300 that the child is allegedly described under.

JV-120	Serious Physical Harm (§ 300 (a))
JV-121	Failure to Protect (§ 300 (b))
JV-122	Serious Emotional Damage (§ 300 (c))
JV-123	Sexual Abuse (§ 300 (d))
JV-124	Severe Physical Abuse (§ 300 (e))

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<sup>239</sup> 25 U.S.C. § 1913(a)

<sup>240</sup> 25 U.S.C. § 1913(a)

<sup>241</sup> 25 U.S.C. § 1913(b)

<sup>242</sup> 25 USC § 1913(b)

JV-125	Caused Another Child's Death Through Abuse or Neglect (§ 300 (f))
JV-126	No Provision for Support (§ 300 (g))
JV-127	Freed for Adoption (§ 300 (h))
JV-128	Cruelty (§ 300 (i))
JV-129	Abuse of Sibling (§ 300 (i))

(2) The legal standard for that subdivision.

- **§300(a) = a child who suffered or is at risk to suffer serious *physical harm* inflicted by the parent or guardian.**

Physical harm must be:

- inflicted non-accidentally upon the child
- and
- by the child's parent or guardian

For purposes of this subdivision, "serious physical harm" does not include reasonable and age-appropriate spanking to the buttocks if there is no evidence of serious physical injury.

A court may find there is a substantial risk of serious future injury based on:

- the manner in which a less serious injury was inflicted,
- a history of repeated inflictions of injuries on the child or the child's siblings, or
- a combination of these and other actions by the parent or guardian that indicate the child is at risk of serious physical harm.<sup>243</sup>

- **§300(b) = a child who suffered or is at risk to suffer serious *physical harm or illness* due to one of the following:**

- as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child,
- or
- the willful or negligent failure of the child's parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left,
- or
- by the willful or neglectful failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment,

A child shall not be found to be a person described by this subdivision solely due to the lack of an emergency shelter for the family.

or

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<sup>243</sup> See, Welf. & Inst. Code §300(a)

- by the inability of the parent or guardian to provide regular care for the child due to the parent’s or guardian’s mental illness, developmental disability, or substance abuse.

The child shall continue to be a dependent child pursuant to this subdivision only so long as is necessary to protect the child from risk of suffering serious physical harm or illness.<sup>244</sup>

▪ **§300(c) where a child is suffering, or at risk to suffering serious *emotional damage*.**

The emotional damage must be

- “serious”
- and
- evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others
- and
- the result of the conduct of the parent or guardian or who has no parent or guardian capable of providing appropriate care.

A child shall not be found to be a person described by this subdivision if the willful failure of the parent or guardian to provide adequate mental health treatment is based on a sincerely held religious belief and if a less intrusive judicial intervention is available.<sup>245</sup>

▪ **§300(d) where a child has been or is at substantial risk of being *sexually abused*.**

Applies where the sexual abuse is:

- By his or her parent or guardian or a member of his or her household,
- or the parent or guardian has failed to adequately protect the child from sexual abuse when the parent or guardian knew or reasonably should have known that the child was in danger of sexual abuse.
- “Sexual abuse” = sexual assault *or* sexual exploitation as broadly defined in that section.

▪ **§300(e) = a child who is under the age of five years and has suffered *severe physical abuse***

Could be done by a parent or by any person known by the parent, if the parent knew or should have known that the person was physically abusing the child

“Severe physical abuse” = any of the following:

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<sup>244</sup> See, Welf. & Inst. Code §300(b)(1)

<sup>245</sup> See, Welf. & Inst. Code §300(c)

- any single act of abuse which causes physical trauma of sufficient severity that, if left untreated, would cause permanent physical disfigurement, permanent physical disability, or death;
  - or
  - any single act of sexual abuse which causes significant bleeding, deep bruising, or significant external or internal swelling;
  - or
  - more than one act of physical abuse, each of which causes bleeding, deep bruising, significant external or internal swelling, bone fracture, unconsciousness;
  - or
  - the willful, prolonged failure provide adequate food.<sup>246</sup>
- **§300(f) = where parent or guardian *caused the death* of another child through abuse or neglect.**
  - **§300(g) = a child who has no provision for support, or abandoned**

One of the following conditions must apply:

- the child has been left without any provision for support;
  - or
  - physical custody of the child has been voluntarily surrendered pursuant to Health and Safety Code §1255.7 of the and the child has not been reclaimed within the 14-day period specified Health and Safety Code §1255.7(g);
  - or
  - the child's parent has been incarcerated or institutionalized and cannot arrange for the care of the child;
  - or
  - a relative or other adult custodian with whom the child resides or has been left is unwilling or unable to provide care or support for the child, the whereabouts of the parent are unknown, and reasonable efforts to locate the parent have been unsuccessful.<sup>247</sup>
- **§300(h) = where 12 months have passed since the child has been freed for adoption or an adoption petition has not been granted**

This section applies where the child was freed for adoption by either relinquishment or termination of parental rights.

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<sup>246</sup> Welf. & Inst. Code §300(e)

<sup>247</sup> Welf. & Inst. Code §300(g)

Or an adoption petition has not been granted.<sup>248</sup>

- **§300(i) = a child subject to *acts of cruelty*.**

Could be done by the parent or guardian or a member of his or her household, or the parent or guardian has failed to adequately protect the child from an act or acts of cruelty when the parent or guardian knew or reasonably should have known that the child was in danger of being subjected to an act or acts of cruelty.<sup>249</sup>

- **§300(j) where there has been *sibling abuse or neglect* as defined in §300(a), (b), (d), (e), or (i)**

The court shall consider the circumstances surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling, the mental condition of the parent or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child.<sup>250</sup>

- (3) The narrative of the particular alleged facts that will be used to support the agency's claim that the child is described under that section of Welfare and Institutions Code § 300.

- **“Subsequent Petition” (Welf. & Inst. Code §342)**

The Department shall file a subsequent petition, where it learns that of new facts or circumstances of abuse or neglect that were not already in the original sustained petition.<sup>251</sup>

Important- The new allegations must be different than those under which the original petition was sustained and constitute additional grounds for jurisdiction. <sup>252</sup>

- **“Supplemental Petition” (Welf. & Inst. Code §387)**

Unlike the §342 Subsequent Petition (to assert a new or different basis for jurisdiction), a “Supplemental Petition” pursuant to Welfare and Institutions Code §387 is brought under the original basis for jurisdiction.

The Supplemental Petition §387 is for either:

- a previous disposition is inappropriate or ineffective in rehabilitating or protecting the child,
- or
- the that placement is inappropriate. <sup>253</sup>

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<sup>248</sup> Welf. & Inst. Code §300(h)

<sup>249</sup> Welf. & Inst. Code §300(i)

<sup>250</sup> Welf. & Inst. Code §300(j)

<sup>251</sup> See, Cal. Rules of Court, rule 5.560(b)(1); Welf. & Inst. Code §342

<sup>252</sup> See, Cal. Rules of Court, rule 5.560(b)

<sup>253</sup> Cal. Rules of Court, rule 5.560(c)

The §387 thereby requests that the child be put in a more restrictive placement.

**d. Initial (“Detention”) Hearing**

- The court will advise the parties of the contents of the petition; their rights and the nature of, and possible consequences of, juvenile court proceedings.<sup>254</sup>
- If the child has been taken into protective custody, social worker must also report to the court:
  - The reasons why the child has been removed from the parent’s physical custody,
  - The need, if any, for continued detention,
  - The available services and the referral methods to those services that could facilitate the return of the child to the custody of the child’s parents or guardians,and
  - Whether there are any relatives who are able and willing to take temporary physical custody of the child.<sup>255</sup>
- Counsel is appointed
- Establish parentage
- Inquiry and determination is made as to whether the child is or may be an Indian child.<sup>256</sup>
- The court must read, consider, and reference any reports submitted by the social worker and any relevant evidence submitted by any party or counsel.<sup>257</sup> The parties have a right to cross-examine.
- The child, parent, or guardian has an absolute right to continuance of *one court day* to give time to prepare for the hearing.<sup>258</sup>

If a continuance is granted for any reason, the court must make a finding that either

- The continuance of the child in the parent's or guardian's home is contrary to the child's welfare, or
- Order the child released to the custody of the parent or guardian.<sup>259</sup>

This finding is entered on a temporary basis, without prejudice to any party, which can be reevaluated at the time of the continued detention hearing.<sup>260</sup>

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<sup>254</sup> Cal. Rules of Court, rule 5.668(a); See Welf. & Inst. Code §§ 316, 316.2.

<sup>255</sup> Welf. & Inst. Code §319(b)

<sup>256</sup> Cal. Rules of Court, rule 5.534(i); 25 U.S.C. §§ 1911, 1931-1934

<sup>257</sup> Cal. Rules of Court, rule 5.674(b); Welf. & Inst. Code § 319.

<sup>258</sup> Welf. & Inst. Code §322

<sup>259</sup> Welf. & Inst. Code §319(c)

- Ultimately, the court must 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).
- 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 warranting the court’s supervision of the child
- Separately, the court must determine whether there is a basis to detain the child pending the jurisdiction hearing.
  - ▶ The child will be detained if there is a prima facie showing 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.<sup>261</sup> If not, the child must be returned.
  - ▶ Efforts must be shown to prevent or eliminate the need for removal.
  - ▶ 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
    - If appropriate, order services to be provided as soon as possible to reunify the child and the child's family; and
    - Determine if there is a relative who is able and willing to care for the child, and has been assessed.<sup>262</sup>
- 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.<sup>263</sup>

#### e. Jurisdiction Hearing

- At this hearing, the court must find whether sufficient evidence exists that the child is described by one or more of the provisions of Welfare and Institutions Code § 300(a)-(j).
- 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.<sup>264</sup>

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<sup>260</sup> Welf. & Inst. Code §319, 322; Cal. Rules of Court, rules 5.550(c), 5.672

<sup>261</sup> Cal. Rules of Court, rule 5.676(a); Welf. & Inst. Code § 319.

<sup>262</sup> Welf. & Inst. Code §319(b)(3), (f); Cal Rules of Ct 5.674(b)(1)

<sup>263</sup> Cal. Rules of Court, rule 5.670(f); see Welf. & Inst. Code § 334.

<sup>264</sup> Cal. Rules of Court, rule 5.682(a); See, Welf. & Inst. Code § 353.

➤ 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.<sup>265</sup>

➤ Agency Social Study Report

- ▶ The social worker's report is admissible and is sufficient to support a finding that the child is described by Welfare and Institutions § 300 even though it contains "hearsay".
- ▶ However, the report must have been provided to all parties and their counsel within a reasonable time before the hearing.
- ▶ The preparer of the report must also 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.<sup>266</sup>
- ▶ If there is an objection to the hearsay in the social worker's report

Where a party makes a timely and specifically stated objection to the hearsay, that hearsay in the social worker's report cannot alone be sufficient to support a jurisdictional finding or any ultimate fact upon which a jurisdictional finding is based.

*Exception:* The hearsay can be found sufficient to support the jurisdictional finding where any of the following applies:

- The hearsay is admissible under any statutory or judicial hearsay exception;

or

- The hearsay declarant is a child under 12 years of age who is the subject of the petition.

Exception – The hearsay is not sufficient to support the jurisdictional finding where the objecting party establishes that the statement was produced by fraud, deceit, or undue influence and is therefore unreliable;

or

- The hearsay declarant is a peace officer, a health practitioner, a social worker, or a teacher and the statement would be admissible if the declarant were testifying in court;

or

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<sup>265</sup> Welf. & Inst. Code § 354.

<sup>266</sup> Cal. Rules of Court, rule 5.684(c); Welf. & Inst. Code § 354.

- The hearsay declarant is available for cross-examination. Telephone standby is permitted if the person can be present in court within a reasonable time.<sup>267</sup>

➤ Testimony

- ▶ Testimony by a parent, guardian, or other person who has the care or custody of the 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.<sup>268</sup>
- ▶ The privilege not to testify or to be called as a witness against a spouse or domestic partner, and the confidential marital communication privilege, does not apply to dependency proceedings.<sup>269</sup>
- ▶ Testimony by a parent, guardian, or other person who has the care or custody of the minor made the subject of a proceeding under Section 300 shall not be admissible as evidence in any other action or proceeding.<sup>270</sup>
- 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.<sup>271</sup>
- 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.<sup>272</sup>
- If the court determines by a preponderance of the evidence that the allegations of the petition are true, the court will “take jurisdiction.. and set the matter for a disposition hearing.”<sup>273</sup>
- 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.<sup>274</sup>
- The disposition hearing must occur no later than 10 *court* days after finding jurisdiction (if the child is out of the home) and no later than 30 *days* after jurisdiction finding (if the child is in the home).<sup>275</sup>
- No continuance is allowed that would cause the disposition 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.<sup>276</sup>

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<sup>267</sup> Cal. Rules of Court, rule 5.684(d); See, Welf. & Inst. Code §355(c)

<sup>268</sup> Welf. & Inst. Code § 355.1(f).

<sup>269</sup> Cal. Rules of Court 5.684(e); See, Evid. Code, §§ 972, 986

<sup>270</sup> Welf. & Inst. Code §355.1(f)

<sup>271</sup> Welf. & Inst. Code § 355.1.

<sup>272</sup> Cal. Rules of Court, rule 5.684(h); Welf. & Inst. Code § 355.1.

<sup>273</sup> Cal. Rules of Court, rule 5.684(g); Welf. & Inst. Code § 356.

<sup>274</sup> Cal. Rules of Court, rule 5.510; Welf. & Inst. Code §§ 302(c), 304.

<sup>275</sup> Cal. Rules of Court, rule 5.686; Welf. & Inst. Code § 358

<sup>276</sup> See Welf. & Inst. Code § 352; Cal. Rules of Court, rule 5.550(a).

## **f. Disposition**

- The purpose of the disposition hearing is to make such orders to ensure the safety, protection, and well-being of the child.<sup>277</sup>
- 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.<sup>278</sup> The focus must also be on the preservation of the family to the extent possible.<sup>279</sup>
- The social study report is due at least 48 hours before the hearing.<sup>280</sup>
- The court has several options for disposition:
  - a. Parent(s) Voluntary Relinquishment relinquish the child to the state Department of Social Services, to a county adoption agency, or to a licensed private adoption agency<sup>281</sup>
  - b. Terminate Jurisdiction<sup>282</sup>
  - c. Not Declare the Child a “Dependent of the Court” and Place the Child Under a Program of Supervision<sup>283</sup>
  - d. Appoint a Legal Guardian for the Child<sup>284</sup> with or without declaring the child a dependent of the court
  - e. Declare Dependency and Permit the Child to Remain at Home with an Order of Family Maintenance Services to be Provided
  - f. Remove and Place with Non-Custodial Parent<sup>285</sup>
  - g. Declare Dependency and Remove from the Parent or Guardian
- An Indian child cannot be removed unless there is:
  - 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.<sup>286</sup>and

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<sup>277</sup> See, Welf. & Inst. Code § 300.2.

<sup>278</sup> See, Welf. & Inst. Code § 300.2.

<sup>279</sup> See, Welf. & Inst. Code § 300.2.

<sup>280</sup> Cal. Rules of Court, rule 5.690(a)(2).

<sup>281</sup> For further discussion, see Welf. & Inst. Code § 361(b).

<sup>282</sup> Cal. Rules of Court, rule 5.695(a)(1).

<sup>283</sup> Cal. Rules of Court, rule 5.695(a)(2); Welf. & Inst. Code § 360(b).

<sup>284</sup> Cal. Rules of Court, rule 5.695(a)(3), (b)(1); Welf. & Inst. Code § 360(a)

<sup>285</sup> Welf. & Inst. Code § 361.2(a).

<sup>286</sup> Welf. & Inst. Code § 361(c)(6); 25 U.S.C. § 1912(e).

- the court can 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.<sup>287</sup>
- If the child was removed, 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.<sup>288</sup>
- 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. <sup>289</sup>
- 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).
  - ▶ If bypass is recommended, the social study must state why reunification services should not be provided.<sup>290</sup>
  - ▶ Active efforts is still required before reunification services can be bypassed
- Unless jurisdiction is terminated, a review hearing must occur no less than once every six months. This applies whether the child is in an in-home or out-of-home placement. <sup>291</sup>

**g. Review Hearings (where the child is in an out-of-home placement)**

- The court is required to 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.<sup>292</sup>
- The social services agency must be shown to have 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.
- The court must consider the safety of the child and 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.<sup>293</sup>

<sup>287</sup> Welf. & Inst. Code §§ 361(d), 361.7(a); 25 U.S.C. § 1912(d).

<sup>288</sup> Welf. & Inst. Code § 361.5(a).

<sup>289</sup> Welf. & Inst. Code §§ 361.5(a).

<sup>290</sup> Cal. Rules of Court, rule 5.690(a)(1)(D)

<sup>291</sup> Welf. & Inst. Code § 366(a)(1).

<sup>292</sup> Welf. & Inst. Code § 366.21(e)(1), Cal. Rules of Court, rules 5.708(d)(1), 5.710(b).

<sup>293</sup> Welf. & Inst. Code § 366(a)(1).

- The court must consider any other admissible and relevant evidence provided.<sup>294</sup>
- Same presumption to return applies as discussed above.
- If the child is returned, the court will continue to monitor the family and hold a hearing at least every six months – i.e., “Family Maintenance.”
- If the child is not returned:
  - ▶ A case plan is required to address the needs of the child and the parent.<sup>295</sup> Visitation must also be ordered.<sup>296</sup>
  - ▶ The case can be continued if the court can make specific required findings.<sup>297</sup>
- If the court terminates reunification services are not ordered, the court must schedule a Welfare and Institutions Code § 366.26 hearing to occur within 120 days.<sup>298</sup>

**The specific types of Review Hearings are as follows:**

**i. 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.<sup>299</sup>
- Presumption of return.
- 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.<sup>300</sup>
  - or
  - order continued dependency services and set a review hearing to occur within 6 months.<sup>301</sup>
- If the child is *not* returned, at this hearing, a continuation of reunification services is presumed unless one of the following conditions applies.<sup>302</sup>
  - Where the child or a sibling was under 3 years of age when taken into custody.

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<sup>294</sup> Cal. Rules of Court, rule 5.708(c).

<sup>295</sup> Welf. & Inst. Code § 16501.

<sup>296</sup> Welf. & Inst. Code § 362.1(a)(1)(A).

<sup>297</sup> Welf. & Inst. Code § 366.21(g)(1).

<sup>298</sup> Welf. & Inst. Code § 366.21(g)(4).

<sup>299</sup> Welf. & Inst. Code § 366.21(e)(1).

<sup>300</sup> See, Welf. & Inst. Code § 364; Cal. Rules of Court, rule 5.706(e)(1).

<sup>301</sup> Cal. Rules of Court. 5.710(b)(1).

<sup>302</sup> Welf. & Inst. Code § 366.21(e)(2).

- Where the parent’s whereabouts remain unknown.
- Where the child was placed with the non-custodial parent.

## ii. 12-Month Permanency Hearing

- Following the 6-month review hearing, another hearing is required to be held within six months.<sup>303</sup> But unlike the 6-month review hearing, this hearing is called a “permanency review hearing.”
- Same presumption to return applies as discussed above.
- 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 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.<sup>304</sup>
- If the child is not returned to the parent, the case can be continued only if the court can make the following findings.<sup>305</sup>
  - 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.<sup>306</sup>
- 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.<sup>307</sup>
- The court must consider, among other factors, the parent or legal guardian’s good faith efforts to maintain contact with the child.<sup>308</sup>

<sup>303</sup> Welf. & Inst. Code § 366(a)(1).

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

<sup>305</sup> Welf. & Inst. Code § 366.21(g)(1).

<sup>306</sup> Welf. & Inst. Code § 366.21(g)(1); Cal. Rules of Court, rule 5.715(b)(4)(A).

<sup>307</sup> Welf. & Inst. Code § 366.21(g)(1), Cal. Rules of Court, rule 5.715(b)(4)(A)(i).

<sup>308</sup> Welf. & Inst. Code § 366.21(g)(3), Cal. Rules of Court, rule 5.715(b)(4)(A)(ii).

- 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.<sup>309</sup>

### iii. 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.<sup>310</sup>
- It remains presumed 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.<sup>311</sup>
- Reunification services be continued can only be continued under the following circumstances:

(1) that reasonable services have not been provided to the parent or legal guardian.

or

(2) 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

To make this finding, 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.<sup>312</sup>
- Where the child is not returned to the parent or guardian and reunification services are terminated, the court sets a §366.26 selection and implementation hearing.

### iv. 24-Month Subsequent Permanency Review Hearing

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<sup>309</sup> Welf. & Inst. Code § 366.21(g)(1).

<sup>310</sup> Welf. & Inst. Code § 366.22(a)(1), Cal. Rules of Court, rule 5.720(a).

<sup>311</sup> Welf. & Inst. Code § 366.22, Cal. Rules of Court, rule 5.720(b).

<sup>312</sup> Welf. & Inst. Code § 366.22(b); Cal. Rules of Court, rule 5.720(b)(3)(A).

- Hearing must occur within 24 months after the date the child was originally removed from the parent or guardian’s physical custody.<sup>313</sup>
- Called the “subsequent” permanency hearing because it presumes permanency should already be provided for.
- There is no further option to continue reunification services.
- 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.<sup>314</sup>
- Where the child is not returned to the parent or guardian and reunification services are terminated, the court sets a §366.26 selection and implementation hearing.

#### v. Family Maintenance Review Hearings

- To determine whether continued supervision is necessary.<sup>315</sup>
- Dependency jurisdiction must be terminated unless by a preponderance of evidence it is shown that the conditions exist that would justify initial assumption of jurisdiction under Welfare and Institutions Code § 300 or that such conditions are likely to exist if supervision is withdrawn.<sup>316</sup>
- 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.

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

- 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.
- To terminate the parental rights of parent of an Indian child, there must be 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.<sup>317</sup>
- There are several exceptions to the statutory preference for termination of parental rights. As pertinent to Indian children, these exceptions include: <sup>318</sup>

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<sup>313</sup> Welf. & Inst. Code § 366.25(a)(1), Cal. Rules of Court, rule 5.722(a).

<sup>314</sup> Welf. & Inst. Code § 366.25(a)(1), Cal. Rules of Court, rule 5.722(b).

<sup>315</sup> Cal. Rules of Court, rule 5.706(e); Welf. & Inst. Code § 364.

<sup>316</sup> Cal. Rules of Court, rule 5.706(e); Welf. & Inst. Code § 364(c).

<sup>317</sup> 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).

<sup>318</sup> 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.
- 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 including :
  - 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.
  - 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.
- 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.
  - The permanent plan will be ordered according to the following preference (in descending order)
    - Terminate the rights of the parent(s) and order that the child be placed for adoption.
    - Order a plan of tribal customary adoption.
    - Appoint a *relative* with whom the child is currently residing as legal guardian for the child.
    - 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.
    - Appoint a nonrelative legal guardian for the child.
    - Order that the child be permanently placed with a fit and willing relative.
    - 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.
    - Order that the child remain in foster care subject to the conditions of Welfare and Institutions Code § 366.3(c)(4).

### **i. Post Permanency Review Hearings**

- Where jurisdiction has not been dismissed, the child's status must still 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.<sup>319</sup>
- 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.<sup>320</sup>
- 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.<sup>321</sup>

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<sup>319</sup> 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.

<sup>320</sup> Welf. & Inst. Code § 366.3(h)(1).

<sup>321</sup> Welf. & Inst. Code § 366.3(h)(1).