



## Indian Child Welfare Act (“ICWA”) Requirements\*

**Applicability** (25 U.S.C. §§1901-1923, 1903(i); 25 C.F.R. §§23.2, 23.103, 23.107; Guidelines B.1 & B.2; W.I.C. §§224.1, 224.3; Fam. Code §170; Prob. Code, §§1459.5(a), 1516.5(d); Rule 5.480)

ICWA applies to any state court case involving an Indian child that may result in a voluntary or involuntary foster care placement; guardianship placement; custody placement under Family Code section 3041; declaration freeing a child from the custody & control of one or both parents; termination of parental rights; or voluntary or involuntary adoptive placement including all proceedings under WIC sections 300 et seq. & 601 & 602 et seq. when the child is in foster care or at risk of entering foster care & one of the following: 1) the proceedings are based on conduct that would not be a crime if committed by an adult, 2) the court is setting a hearing to terminate parental rights, or 3) the court finds that the foster care placement is based entirely on conditions within the child’s home & not even in part upon the child’s criminal conduct.

**Indian Child** (25 U.S.C. §1903(4); 25 C.F.R. §23.2; Guideline B.1; Fam. Code, §170(a); Prob. Code, §1449(a); WIC, §224.1(a) & (b))

Is an unmarried person under the age of 18 who is (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe & is a biological child of a member of an Indian tribe. Indian child may include a person over 18, but under 21, years who is a dependent of the court unless that person elects not to have ICWA apply. A determination by a tribe or the Bureau of Indian Affairs (BIA), absent a determination by the tribe to the contrary, that a child is or is not a member or eligible for membership is conclusive. The child is NOT required to be affiliated with the same tribe the parent is a member of. (25 U.S.C. §1903(4)). Enrollment is NOT required to establish membership unless the tribe confirms that enrollment is required. (WIC, §224.2(h))

**Indian Custodian** (25 U.S.C. §1903(6); 25 C.F.R. §23.2; Fam. Code, §170(a); Prob. Code, §1449(a); WIC, §224.1(a))

Is any person who has legal custody of an Indian child under tribal law or custom or state law or to whom temporary physical care, custody, & control has been transferred by the parent.

**Intervention/Invalidation** (25 U.S.C. §§1911(c), 1914; Fam. Code, §§175(e), 177(a); Prob. Code, §§1459(e), 1459.5(b); WIC, §§224(e), 224.4; Rules 5.482(d) & 5.487)

An Indian custodian, & Indian child’s tribe have the right to intervene at any point in the proceeding. If ICWA applies, the Indian child, parent, Indian custodian, or the child’s tribe may petition any court of competent jurisdiction to invalidate the proceedings for not complying with the requirements of sections 1911 (jurisdiction; transfer; intervention; full faith and credit to public acts, records, and judicial proceedings of Indian tribes), 1912 (notice, appointment of counsel, examination of reports or other documents, active efforts, qualified expert witness testimony) or 1913 (consent requirements) of ICWA.

**Inquiry** (25 C.F.R. §23.107(a); Fam. Code, §177(a); Prob. Code, §§1459.5(b), 1513(h); WIC, §224.2; Rules 5.481(a) & (b); 5.482(c) & 5.668(c))

In all child custody proceedings, the court & the petitioner, including a social worker, a probation officer, a licensed adoption agency or adoption service provider, or an investigator must ask the child, the parents or legal guardians, Indian custodian and extended family members as soon as possible whether there is information indicating the child is or may be an Indian child & must affirm on the petition that inquiry has been made. If that initial inquiry gives reason to believe the child is an Indian child, further inquiry regarding the possible Indian status of the child must be done as soon as practical. This further inquiry must include at a minimum interviewing the parents, Indian custodian and extended family members to gather ancestry information, contacting the California Department of Social Services (CDSS) & the BIA for assistance in identifying tribes and tribal contact information, contacting others that may reasonably be expected to have information about the child’s status, and contacting tribe(s) by telephone, facsimile or email and sharing with the tribe(s) any information the tribe(s) require to make a determination about the child’s status. In all child custody cases, at their first court appearance, the parent or guardian must be ordered

\*Based on The Indian Child Welfare Act 25 U.S.C. §§ 1901-1963; Indian Child Welfare Act Regulations 25 C.F.R. Part 23; Guidelines for Implementing the Indian Child Welfare Act; and California statutes and rules of court.

to complete *Parental Notification of Indian Status* (form ICWA-020), & the court must ask all participants whether they have information indicating the child is or may be an Indian child & instruct them to inform the court if they subsequently receive such information.

**Reason to Know the Child Is an Indian Child** (25 C.F.R. §23.107(c); Fam. Code, §177(a); Prob. Code, §1459.5(b); WIC, §224.2(d); Rule 5.481(b))

The following circumstances give “reason to know” the child is an Indian child: 1. A person having an interest in the child provides information suggesting that the child is an Indian child; 2. The residence or domicile of the child, the child’s parents, or an Indian custodian is on a reservation or other tribal lands or in an Alaska Native village; 3. The child is or was a ward of a tribal court; or 4. Either parent or the child possesses an I.D. card indicating membership in an Indian tribe. If there is “reason to know” the court must require the petitioner to provide evidence that the petitioner has used due diligence to identify and work with all tribes the child may be affiliated with to verify the child’s status; require formal ICWA notice by registered or certified mail return receipt requested as discussed below; and must treat the child as an Indian child unless and until the court can confirm that the child is not an Indian child in accordance with WIC § 224.2(i).

**Notice** (25 U.S.C. §1912(a); 25 C.F.R. §§23.11 & 23.111; Guidelines D.1-D.7; Fam. Code, §180; Prob. Code, §1460.2; WIC, §§224.3, 727.4(a)(2); Rule 5.481(c))

When: For any hearing that may culminate in an order for foster care placement, including a guardianship placement, termination of parental rights or declaration freeing the child from the custody & control of one or both parents, preadoptive placement or adoptive placement.

How: Party seeking foster care placement, guardianship, termination of parental rights, or order declaring the child free from the custody & control of one or both parents, must notify the parent(s), Indian custodian, & the tribe(s) there is reason to know the child is a member of or eligible for membership in, of the pending proceedings by registered or certified mail, return receipt requested as specified in Fam. Code, §180, Prob. Code, §1460.2, or WIC, §224.3. *Notice of Involuntary Child Custody Proceedings for an Indian Child* (form ICWA-030) is required to be completed & sent for all cases except excluded delinquency proceedings, for every hearing that may culminate in one of the outcomes listed above. In addition to the information included on form ICWA-030, the party must also include: 1. Information regarding the Indian child’s Indian custodian including: all known names, including maiden, married, former, & aliases; current & former addresses; birthdates; places of birth & death; tribal enrollment numbers; & any other identifying information, if known. 2. A copy of the child’s birth certificate if available. 3. A copy of the petition by which the proceeding was initiated. 4. The location, mailing address, & telephone number of the court & all parties notified. When a child’s Indian tribe is identified, the tribe is entitled to notice of all other hearings and service of all documents in the same manner as all other parties.

**Active Efforts** (25 U.S.C. §1912(d); 25 C.F.R. §§23.2 & 23.120; Guidelines E.1-E.6; Fam. Code, §§177(a), 3041(e); Prob. Code, §1459.5(b); WIC, §§ 224.1(f), 361.7; Rule 5.485(c))

The party seeking an involuntary foster care placement, guardianship, order freeing the child from the custody & control of one or both parents, or termination of parental rights must provide evidence to the court that active efforts have been made to provide remedial services & rehabilitative programs designed to prevent the breakup of the Indian family & that these efforts were unsuccessful. What constitutes active efforts is assessed on a case-by-case basis. Active efforts must be affirmative, active, thorough, & timely. If an agency is involved, active efforts must begin at first contact with the family when there is reason to know the child may be an Indian child. If an agency is involved, active efforts must include assisting the parents through the steps of a case plan & accessing or developing the resources necessary to satisfy the case plan. Active efforts must consider the prevailing social & cultural values & way of life of the Indian child’s tribe. Active efforts must include the available resources of extended family members, the tribe, Indian social service agencies, & individual Indian caregivers. Active efforts must be documented in detail in the record.

**Qualified Expert Witness (QEW) Testimony** (25 U.S.C. §1912(e); 25 C.F.R. §§23.121 & 23.122; Guidelines G.1 & G.2; Fam. Code, §§177(a), 3041(e); Prob. Code, §1459.5(b); WIC, §§224.6, 361.7(c); Rule 5.485(a))

To involuntarily order foster care or adoptive placement, guardianship or terminate parental rights, when there is reason to know the child is an Indian child, the court must require testimony of a QEW regarding whether continued custody of the child by the parent or Indian custodian is likely to cause the child serious emotional or physical damage. The QEW cannot be an employee of the person or agency seeking the foster care placement or termination of parental rights.

Persons most likely to meet the requirements for a QEW are: 1. A person designated by the tribe as being qualified to testify to the prevailing social and cultural standards of the tribe; 2. a member of the child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices; 3. An expert witness having substantial experience in the delivery of child and family services to Indians, & extensive knowledge of prevailing social & cultural standards & child-rearing practices of the Indian child's tribe. The court may accept a declaration or affidavit from a QEW in lieu of testimony only if the parties stipulate in writing and the court is satisfied that the stipulation is made knowingly, intelligently, and voluntarily.

**Placement Preferences** (25 U.S.C. §1915; 25 C.F.R. §§23.129-23.132; Guidelines H.1-H.5; Fam. Code, §177(a); Prob. Code, §1459.5(b); WIC, §361.31; Rule5.485(b))

The following placement preferences & standards must be followed whenever there is reason to know the child is an Indian child and the child is removed from the physical custody of his or her parents or Indian custodian. The court must analyze the availability of placements within the preferences in descending order without skipping.

Foster Care, Guardianships, & Custody to Non-parent: The court must order the least restrictive setting that most approximates a family situation within reasonable proximity to the child's home & meets the child's special needs, if any. Preference must be given in the following order: 1. a member of the child's extended family as defined in 25 U.S.C. §1903(2); 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; 4. an institution approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs.

Adoptive Placements: Preference must be given in the following order: 1. a member of the Indian child's extended family as defined in 25 U.S.C. §1903(2); 2. other members of the Indian child's tribe; 3. another Indian family.

For both foster care and adoptive placements, the tribe, may establish a different preference order by resolution. This order of preference must be followed if it provides for the least restrictive setting.

**Placement Standards & Records** (25 U.S.C. §1915; 25 C.F.R. §§23.129-23.132; Guidelines H.1-H.5; Fam. Code, §§177(a), 3041(e), 7892.5; Prob. Code, §1459.5(b); WIC, §§361(c)(6), 361.31, 361.7(c), 366.26(c)(2)(B); Rule5.484(b)(1))

The preferences of the child (if old enough) & the parent(s) must be considered. Placement standards must be the prevailing social & cultural standards of the child's tribe or the Indian community in which the parent or extended family member resides or extended family member maintains social & cultural ties. A determination of the applicable prevailing social & cultural standards may be confirmed by the Indian child's tribe or QEW testimony. CDSS must maintain a record of each placement of an Indian child. CDSS must also maintain evidence of efforts to comply with the placement preferences where ever the placement deviates from the preferences.

**Good Cause to Deviate From the Placement Preferences** (25 U.S.C. §1915; 25 C.F.R. §§23.129-23.132; Guidelines H.1-H.5; WIC, §361.31(h); Rule5.484(b)(2) & (3))

The court may deviate from the placement preferences list above only upon a finding of good cause. If a party asserts there is good cause to deviate from the placement preferences those reasons must be contained in the record either orally or in writing. The party requesting a different order has the burden of establishing good cause. The court may base a decision to deviate from the placement preferences on: 1. The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference; 2. The request of the child, if the child is of sufficient age & capacity to understand the decision that is being made; 3. The presence of a sibling attachment that can be maintained only through a particular placement; 4. The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live; 5. The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining

whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social & cultural ties. A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement. A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.

**Burden of Proof & Qualified Expert Witness** (25 U.S.C. §1912(e), (f); 25 C.F.R. §23.121; Guideline G.1; Fam. Code, §§3041(e), 7892.5; Prob. Code, §1459.5(b); WIC, §§361.7(c), 366.26(c)(2)(B); Rule5.484(a))

The burden of proof to place a child in foster care, appoint a guardian, & award custody to a non-parent is *clear & convincing evidence*, including testimony of a qualified expert witness establishing 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. The burden of proof to terminate parental rights is *beyond a reasonable doubt*, including testimony of a qualified expert witness establishing that continued custody of the child by the child's custodian is likely to result in serious emotional or physical damage to the child.

**Adoption** (25 U.S.C. §§1917, 1951; 25 C.F.R. §23.140; Guideline J.2; Fam. Code, §9208; Rule 5.487)

The court must provide the Secretary of the Interior a copy of the adoption order & other information needed to show: 1. the name & tribal affiliation of the Indian child; 2. the names & addresses of the biological parents; 3. the names & addresses of the adoptive parents; 4. the identity of any agency having files or information relating to such adoptive placement; 5. any confidential parent affidavits; and 6. any information relating to Tribal membership or eligibility for Tribal membership of the adopted child. At the request of an adopted Indian child over the age of 18, the court must provide information about the individual's tribal affiliation, biological parents, & other information as may be necessary to protect any rights flowing from the individual's relationship to the tribe.

**Jurisdiction & Transfer** (25 U.S.C. §1911(a), (b); 25 C.F.R. §23.110; Guidelines F.1-F.6; Fam. Code, §177(a); Prob. Code, §1459.5(b); WIC, §305.5 Rule 5.483)

Exclusive Jurisdiction: If an Indian child is a ward of the tribal court or resides or is domiciled on a reservation of a tribe that exercises exclusive jurisdiction, notice must be sent to the tribe by the next working day following removal. If the tribe determines that the child is under the exclusive jurisdiction of the tribe, the state court must dismiss the case & ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including the pleadings & any court record.

Transfer to Tribal Jurisdiction: If the above exclusive jurisdiction does not apply, the tribe, parent, or Indian custodian may petition the court to transfer the proceedings to the tribal jurisdiction. The court must transfer the proceedings unless there is good cause not to do so. Either parent may object to the transfer, or the tribe may decline the transfer of the proceedings.

**Right to Counsel** (25 U.S.C. §1912(b); Fam. Code, §180(b)(5)(G)(v); Prob. Code, §1474; WIC, §317(a)(2))

The parent, Indian custodian, or Indian guardian, if indigent, has the right to court-appointed counsel.

**Examination of Reports & Documents** (25 U.S.C. §1912(c); Fam. Code, §177(a); Prob. Code, §1459.5(b))

The parent, Indian child, Indian custodian, tribe, & their attorneys have the right to examine all court documents related to the Indian child-custody case.

**Full Faith & Credit** (25 U.S.C. §1911(d); Fam. Code, §177(a); Prob. Code, §1459.5(b); WIC, §224.5)

Full faith & credit to the public acts, records, & judicial proceedings of any Indian tribe is required.

**Right to Additional Time** (25 U.S.C. §1912 (a); 25 C.F.R. §23.112; Fam Code §180(e); Prob. Code §1460.2(e); WIC §224.2(d); Rule5.482(a))

With the exception of an emergency proceeding as defined in 25 C.F.R. §23.113 the court cannot go ahead with a hearing that meets the definition of "child custody proceeding" under ICWA until 10 days after receipt of notice by tribe(s) & BIA & must grant 20 extra days for preparation if requested.