



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

**Applicability** (25 U.S.C. §§ 1901-1923, 1903(i); Prob. Code, §§ 1459.5(a), 1516.5(d); Cal. Rules of Court, rule 5.480)

ICWA applies to any state court proceeding 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 and 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. and 601 and 602 et seq. when the child is in foster care or at risk of entering foster care and 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 and not even in part upon the child’s criminal conduct..

**Indian Child** (25 U.S.C. § 1903(4); 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 and 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.

**Indian Custodian** (25 U.S.C. § 1903(6); 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, and 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; Cal. Rules of Court, rule 5.482(e))

An Indian child, Indian custodian, and 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 ICWA.

**Inquiry** (Fam. Code, § 177(a); Prob. Code, §§ 1459.5(b), 1513(h); WIC, § 224.3; Cal. Rules of Court, rule 5.481)

In all child custody proceedings, the court and 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, and the Indian custodian as soon as possible whether the child may be an Indian child and must record the information, if applicable, on the petition. In all juvenile cases, at their first court appearance, the parent or guardian must be ordered to complete *Parental Notification of Indian Status* (form ICWA-020).

**Circumstances That May Provide Reason to Know the Child Is an Indian Child** (Fam. Code, § 177(a); Prob. Code, § 1459.5(b); WIC, § 224.3(b); Cal. Rules of Court, rule 5.481(a)(5))

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 in a predominantly Indian community; or 3. The child or family has received services or benefits that are available to Indians, from a tribe or a federal agency, such as the Indian Health Service.

**Notice** (25 U.S.C. § 1912(a); Fam. Code, § 180; Prob. Code, § 1460.2; WIC, §§ 224.2, 727.4(a)(2); Cal. Rules of Court, rule 5.481(b))

When: It is known or there is reason to know that an Indian child is involved unless it is determined that ICWA does not apply in accordance with WIC, § 224.3.

How: Party seeking foster care placement, guardianship, or termination of parental rights must notify the parent and Indian custodian, and the Indian child’s tribe, of the pending proceedings in the manner specified in Fam. Code, § 180, Prob. Code, § 1460.2, or WIC, § 224.2. *Notice of Involuntary Child Custody Proceedings for an Indian Child* (form ICWA-030) is required to be completed and sent for all proceedings except excluded delinquency proceedings. 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, and aliases; current and former addresses; birthdates; places of birth and death; tribal enrollment numbers; and 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, and telephone number of the court and all parties notified.

**Active Efforts** (25 U.S.C. § 1912(d); Fam. Code, §§ 177(a), 3041(e); Prob. Code, § 1459.5(b); WIC, § 361.7; Cal. Rules of Court, rule 5.484(c))

The party seeking an involuntary foster care placement, guardianship, or termination of parental rights must provide evidence to the court 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 were unsuccessful. What constitutes active efforts is assessed on a case-by-case basis. Active efforts must consider the prevailing social and cultural values and way of life of the Indian child’s tribe. Active efforts to provide services must include pursuit of any steps necessary to secure tribal membership for a child if the child is eligible for membership in a given tribe, as well as attempts to use the available resources of extended family members, the tribe, Indian social service agencies, and individual Indian caregivers.

**Qualified Expert Witness Testimony** (25 U.S.C. § 1912(e); Fam. Code, §§ 177(a), 3041(e); Prob. Code, § 1459.5(b); WIC, §§ 224.6, 361.7(c); Cal. Rules of Court, rule 5.484(a))

Before the court orders foster care or adoptive placement, establishes a guardianship or terminates parental rights, the court must require testimony of a qualified expert witness regarding whether continued custody of the child by the parent or Indian custodian is likely to cause the child serious emotional or physical damage. This person 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 qualified expert witness are:

1. 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 childrearing practices;

<p>2. any expert witness with 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 child's tribe; and 3. a professional person having substantial education and experience in the area of his or her specialty.</p>
<p><b>Placement Preferences</b> (25 U.S.C. § 1915; Fam. Code, § 177(a); Prob. Code, § 1459.5(b); WIC, § 361.31; Cal. Rules of Court, rule 5.484(b))  The following placement preferences and standards must be followed in any case in which an Indian child is removed from the physical custody of his or her parents or Indian custodian. <u>Foster Care, Guardianships, and Custody to Non-parent</u>: If reason to know the child is an Indian child, the court must order the least restrictive setting that most approximates a family situation within reasonable proximity to the Indian child's home and meets the child's special needs, if any. Preference must be given in the following order:  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; 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.  <u>Adoptive Placements</u>: Preference must be given in the following order: 1. a member of the Indian child's extended family; 2. other members of the Indian child's tribe; 3. another Indian family. The tribe, by resolution, may establish a different preference order, which must be followed if it provides for the least restrictive setting.</p>
<p><b>Placement Standards and Records</b> (25 U.S.C. § 1915; 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); Cal. Rules of Court, rule 5.484(b)(1))  The preferences of the Indian child and the parent must be considered. Placement standards must be the prevailing social and 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 and cultural ties. A determination of the applicable prevailing social and cultural standards may be confirmed by the Indian child's tribe or qualified expert witness testimony. The California Department of Social Services must maintain a record of each placement of an Indian child and active efforts to comply with the placement preferences.</p>
<p><b>Burden of Proof and Qualified Expert Witness</b> (25 U.S.C. § 1912(e), (f); Fam. Code, §§ 3041(e), 7892.5; Prob. Code, § 1459.5(b); WIC, §§ 361.7(c), 366.26(c)(2)(B); Cal. Rules of Court, rule 5.484(a))  The burden of proof to place a child in foster care, appoint a guardian, and award custody to a non-parent is <i>clear and convincing evidence</i>, including testimony of a qualified expert witness. The burden of proof to terminate parental rights is <i>beyond a reasonable doubt</i>, including testimony of a qualified expert witness.</p>
<p><b>Good Cause to Deviate From the Placement Preferences</b> (25 U.S.C. § 1915; WIC, § 361.31(h); Cal. Rules of Court, rule 5.484(b)(2) and (3))  The court may determine that good cause exists not to follow the placement preferences, which may include the following considerations:  1. Requests of the parent or Indian custodian or Indian guardian; 2. Requests of the Indian child; 3. Extraordinary physical or emotional needs of the Indian child as established by a qualified expert witness; and 4. Unavailability of suitable families based on a diligent effort to identify families meeting the preference criteria.  The party requesting a different order has the burden of establishing good cause.</p>
<p><b>Adoption</b> (25 U.S.C. §§ 1917, 1951; Fam. Code, § 9208; Cal. Rules of Court, rule 5.487)  The court must provide the Secretary of the Interior a copy of the adoption order and other information needed to show: 1. the name and tribal affiliation of the Indian child; 2. the names and addresses of the biological parents; 3. the names and addresses of the adoptive parents; 4. the identity of any agency having files or information relating to such adoptive placement; and 5. any confidential parent affidavits. At the request of an adopted Indian child over age 18, the adoptive or foster parents, or the tribe, the Secretary must disclose information about enrollment or any rights or benefits associated with membership in the tribe. If the documents contain a confidential parent affidavit, the Secretary must certify to the tribe the information necessary for enrollment. 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, and other information as may be necessary to protect any rights flowing from the individual's relationship to the tribe..</p>
<p><b>Jurisdiction and Transfer</b> (25 U.S.C. § 1911(a), (b); Fam. Code, § 177(a); Prob. Code, § 1459.5(b); WIC, § 305.5 Cal. Rules of Court, rule 5.483)  <u>Exclusive Jurisdiction</u>: If an Indian child is a ward of the tribal court or resides or is domiciled on a reservation 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 an Indian child, the child-custody proceeding must be transferred to the tribe within 24 hours after receiving the written determination from the tribe.  <u>Transfer to Tribal Jurisdiction</u>: 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.</p>
<p><b>Right to Counsel</b> (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.</p>
<p><b>Examination of Reports and Documents</b> (25 U.S.C. § 1912(c); Fam. Code, § 177(a); Prob. Code, § 1459.5(b))  The parent, Indian child, Indian custodian, tribe, and their attorneys have the right to examine all court documents related to the dependency case.</p>
<p><b>Full Faith and Credit</b> (25 U.S.C. § 1911(d); Fam. Code, § 177(a); Prob. Code, § 1459.5(b); WIC, § 224.5)  Full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe is required.</p>
<p><b>Right to Additional Time</b> (25 U.S.C. § 1912 (a); Fam Code § 180(e); Prob. Code § 1460.2(e); WIC §224.2(d); Cal. Rules of Court, rule 5.482(a))  With the exception of the detention hearing, and jurisdiction hearing in a delinquency case, and certain disposition hearings in a delinquency case, the court cannot proceed until 10 days after receipt of notice by tribe(s) and BIA and must grant 20 extra days for preparation if requested..</p>