



Family Courts

Requirements Under the Indian Child Welfare Act, Federal Regulations and California laws*

I. Determining Application and Definitions

- A. ICWA inquiry must be done in every case, including those arising under the Family Code, that may result in adoption, termination of parental rights, or the granting of care and custody of a to someone other than the child's parents where the parents cannot have the child returned on demand. The goal of this inquiry is to determine whether the child is an Indian child. If this inquiry gives "reason to believe" the child may be an Indian child, further inquiry as discussed below is required. If at any point there is "reason to know" the child is an Indian child, then ICWA will apply to the "Indian child custody proceeding". The definition of "Indian child custody proceeding" includes cases under the Family Code resulting in an adoption (i.e., agency, independent, intercountry, relative, guardian, domestic partner, and stepparent), termination of parental rights, freedom from parental custody and control, or other child custody proceeding under the Family Code, (i.e., Fam. Code, §§ 3041, 7541, 7600 et seq., 7660 et seq., 7800 et seq., 8500 et seq., 8600, 8700 et seq., 8800 et seq., and 9000 et seq.) that involve an Indian child. (25 U.S.C. § 1903(1); Fam. Code, § 170(c); Cal. Rules of Court, rule 5.480.)
- B. An "Indian child" is under the age of 18, unmarried and is either (a) a member of an Indian tribe or (b) eligible for membership and the biological child of a member. (25 U.S.C. § 1903(4); Fam. Code § 170 (a))
- C. An "Indian custodian" is an Indian person who has custody of an Indian child under tribal or state law or to whom temporary physical custody and control of such child has been given by the child's parent. (25 U.S.C. § 1903(6); Fam. Code § 170(a))
- D. "Foster care placement" includes 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. (25 U.S.C. §1903(1)(i))

II. Investigation/Inquiry

- A. *Initial inquiry*: Before filing a petition, application, or other request of the court that could result in any of the outcomes set out in I. A. above, the party seeking the order must ask the child (if the child is old enough), the parents, the Indian custodian or guardian, and available extended family members or others who would reasonably know, whether the child is or may be an Indian child. (Fam. Code §177(a); Welf. & Inst. Code, § 224.2(a) & (b); California Rules of Court, rule 5.481(a)). Regardless of whether there is any Indian ancestry, the party must then complete the *Indian Child Inquiry Attachment* (form ICWA-010(A)) and attach it to the petition. Wherever possible, prior to the first appearance, each of the child's parents, Indian custodian, or guardian should complete the *Parental Notification of Indian Status* (form ICWA-020), and those forms should be filed with the court. (Welf. & Inst. Code, § 224.2; Fam. Code, § 177(a); Cal. Rules of Court, rule 5.481(a).) If the parents are not available before the first appearance, the court will order them to fill out the ICWA-020 forms at the first appearance. If the parents do not appear, the Court will order the party filing the petition, application, or other request to use reasonable diligence to find the parents and have them complete the ICWA-020 forms. (Cal. Rules of Court, rule 5.481(a)(3)).
- B. *Court's inquiry on the record*: At the first appearance by each participant, the court must ask the participant whether they know or have reason to know the child is an Indian child and instruct them to inform the court if they subsequently receive information providing reason to know the child is an Indian child. (25 C.F.R. § 23.107; Fam. Code § 177(a); Welf. & Inst. Code § 224.2(c); Cal. Rules of Court, rule 5.481(a))
- C. *Affirmative and continuing duty to inquire*: The court, court-connected investigator, party seeking the order (i.e., petitioner), adoption service provider, and licensed adoption agency all have an affirmative and continuing duty to inquire whether a child is or may be an Indian child. This means that inquiry

*All citations in this chart are to the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.), federal regulations implementing ICWA found at 25 C.F.R. Part 23, federal Guidelines for Implementing the Indian Child Welfare Act 2016 available on the BIA website at <https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf>; California Welfare & Institutions Code, California Family Code, and California Rules of Court current as of January 1, 2020.

is not a one-time occurrence. If the child's parents are not present or available at the first appearance and ICWA-020 forms are not completed and filed, the court **must** order the party to use reasonable diligence to find the parents and complete the ICWA-020 forms. (Cal. Rules of Court, rule 5.481(a)(3).)

- D. *Concealing or falsifying facts concerning Indian status/sanctions*: Any party who falsifies or conceals a material fact concerning whether the child is an Indian child or counsels a party to do so is subject to sanctions by the court. (Welf. & Inst. Code, § 224.3(e); Fam. Code, § 180(f).)
- E. *Further inquiry*: If, as a result of this inquiry or from any other source, any of the persons with a duty to inquire has “reason to believe” that the child is an Indian child, they must make further inquiry to learn about the child's Indian heritage. In particular they must **(1)** interview the child, the child's parents, available extended family members, and anyone else who might reasonably have information about the child's heritage to gather the information required by Welf. & Inst. Code § 224.3(a)(5); **(2)** contact the Bureau of Indian Affairs (BIA) and the California Department of Social Services (CDSS) for assistance in contacting appropriate tribes; and **(3)** contact the tribes the child may be affiliated with by phone, fax and email to determine the child's Indian status. (Welf. & Inst. Code, § 224.2(e); Fam. Code, § 177(a); Cal. Rules of Court, rule 5.481(a)(4).) The petitioner must on an ongoing basis include in its filings a detailed description of all inquiries, and further inquiries it has undertaken, and all information received pertaining to the child's Indian status, as well as evidence of how and when this information was provided to the relevant tribes. Whenever new information is received, that information must be expeditiously provided to the tribes. (Cal. Rules of Court, Rule 5.481(a)(5).)
- F. *Reason to know*: If the petitioner or the court ever have reason to know the child is an Indian child, in addition to the further inquiry discussed in E. above, formal notice as discussed in V below must be provided and all provisions of ICWA must be applied unless and until a determination can be made that the child is NOT an Indian child. (25 C.F.R. § 23.107(b); Fam. Code § 177(a); Welf. & Inst. Code § 224.(f), (g) & (i)). There is “reason to know” if:
1. A person having an interest in the child, including the child, an officer of the court, a tribe, an Indian organization, a public or private agency, or a member of the child's extended family informs the court that the child is an Indian child.
 2. The residence or domicile of the child, the child's parents, or Indian custodian is on a reservation or in an Alaska Native village.
 3. Any participant in the proceeding, officer of the court, Indian tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child.
 4. The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child.
 5. The court is informed that the child is or has been a ward of a tribal court.
 6. The court is informed that either parent or the child possess an identification card indicating membership or citizenship in an Indian tribe. (25 C.F.R. § 23.107; Welf. & Inst. Code, § 224.2(d); Cal. Rules of Court, rule 5.481(b).)
- G. *Document inquiry on petitions*: Item 8 on form ADOPT-200 requires you to indicate whether the child may have Indian ancestry and to attach the *Adoption of Indian Child* (form ADOPT-220) if you answer yes. (Note: Completion of the ADOPT-220 form is **in addition to** completion of the ICWA-010(A) and ICWA-020 forms.)

III. Consent Requirements for Voluntary Proceedings (25 U.S.C. § 1913; 25 C.F.R. §§23.124-23.128; Fam. Code, § 8606.5)

- A. In voluntary proceedings that could lead to one of the outcomes discussed in I A. above, the court must ask all participants to state on the record whether there is reason to believe the child is an Indian child. (25 C.F.R. §23.124)
- B. If there is “reason to believe” the court must ensure that inquiry and further inquiry as discussed in II above have been completed and must determine whether there is “reason to know” the child is an Indian child. (25 C.F.R. §23.124)
- C. If there is “reason to know” the child is an Indian child, or if the court concludes the child is an Indian child, the court must ensure that the placement of the child complies with 25 C.F.R. §§23.129-23.132. (25 C.F.R. §23.124)
- D. ICWA sets out special requirements when a parent or Indian custodian voluntarily gives up rights regarding an Indian child. A valid consent must meet the following criteria:
- Not be given within 10 days after the birth of the child;
 - Be in writing, be recorded before a judge of the court, and be accompanied by the judge's certificate that the terms and consequences of the consent have been fully explained in detail and have been fully understood by the parent or Indian custodian;
 - If the parent or Indian custodian does not understand English, the court must certify that the explanation has been interpreted into a language that the parent or Indian custodian understands;
 - If the consent is custody under Family Code section 3041, it must provide that the parent or Indian custodian may withdraw consent at any time

and upon such withdrawal of consent, all provisions of the Indian Child Welfare Act, including inter alia 25 U.S.C. § 1913(b), shall apply;

- If the consent relates to the termination of parental rights or adoptive placement, the consent of the parent may be withdrawn for any reason at any time before the entry of the final decree of termination or adoption as the case may be, and the child shall be returned to the parent. (25 U.S.C. § 1913(c); 25 C.F.R. §23.125.)

IV. Right to Counsel (25 U.S.C. § 1912(b); Fam. Code, §§ 7860, 7862)

Indigent parents and Indian custodians are entitled to court-appointed counsel in any involuntary proceeding.

V. ICWA Notice Requirements

- A. If there is “reason to know” (See Section II (F) above) that the child is an Indian child, notice in form ICWA-030 must be sent to the child’s parents or guardians, the Indian custodian (if any), the tribe, the Sacramento office of the BIA (if applicable), and the Secretary of the Interior (if applicable) for each hearing that could culminate in a result under section I. A, above. (25 U.S.C. § 1912(a); Welf. & Inst. Code, § 224.3; Fam. Code, § 180; California Rules of Court, rule 5.481(b).) In addition to the notice on form ICWA-030 required for specific hearing types, once a child’s tribe has been identified, the tribe must be provided with all other notices provided to any other party to the case.
- B. *What to send:* Send mandatory form ICWA-030, *Notice of Child Custody Proceeding for Indian Child*, including attachments and copies of the petition.
- C. *Where/who to notice:* Notice must be sent to the child’s parents, including the adoptive parents, the guardian, the Indian custodian (if any), and the child’s potential tribe(s).
- D. *How to send ICWA-030 notice:* Formal ICWA notice on the ICWA-030 for the specified hearings must be sent by registered or certified mail, return receipt requested, or personal service.
- E. *Where to send tribal notice:* When sending notices to the child’s tribe(s), the notices must be addressed to the tribal chair or the tribe’s designated agent for service of ICWA notice. A link to the list of designated agents for service of ICWA notice may be found on the BIA website at <https://www.bia.gov/bia/ois/dhs/icwa>. Send notice to all tribes of which the child may be a member or eligible for membership until the court determines which tribe is the child’s tribe, after which notice need be sent only to that tribe. (Welf. & Inst. Code, §§ 224.2, 224.3; California Rules of Court, rule 5.481(c).)
- F. *Purpose of notice:* The purpose of notice is to let the tribe(s) know of the child custody proceeding potentially involving an Indian child and allow the tribes to investigate to determine whether the child is a tribal member or eligible for membership and whether or not to participate in the proceedings. Therefore, it is important that the information you provide be complete and accurate. If it is not, your notice may be held to be inadequate. (25 U.S.C. § 1912(a); Welf. & Inst. Code, § 224.3; California Rules of Court, rule 5.481(b).)
- G. *How to prove notice:* File **with the court** copies of all notices, the certified mail receipts, all return receipts (green postcards), and all responses from a tribe or the BIA. (Note: It is not sufficient for you to state or testify that notice was sent. The notices themselves and proof of notice must be filed with the court. (Fam. Code, § 180 (d); Welf. & Inst. Code, § 224.3(c); Cal. Rules of Court, rule 5.482(c).)

VI. Intervention/Tribal Participation (25 U.S.C. § 1911(c); Fam. Code, § 177(a); Welf. & Inst. Code, § 224.4; Cal. Rules of Court, rules 5.482(d), 5.534(e))

- A. The child’s parents, Indian custodian, and tribe have an absolute right to intervene at any point in the proceedings.
- B. The tribe may choose to be represented by an attorney or may designate a non-attorney to act as tribal representative for the state court proceedings. In any case, the tribe is entitled to all the rights of a party.
- C. If the tribe does not formally intervene as a party, it may still exercise those rights listed in California Rules of Court, rule 5.534(e)(2).
- D. The court must facilitate tribal participation in hearings by permitting telephonic or other remote appearance options without a fee. (25 C.F.R. § 23.133; Guidelines Welf. & Inst. Code § 224.2(k))

(Note: If the child is an Indian child, ICWA applies whether or not a tribe takes any formal steps in the proceedings.)

VII. Timing/Continuance (25 U.S.C. § 1912(a); Fam. Code, § 180(e); Welf. & Inst. Code, § 224.3(d); Cal. Rules of Court, rule 5.482(a))

- A. No hearing can be held until at least 10 days after receipt of notice by the child’s parents, Indian custodian, and tribe(s).
- B. On request, the parents, Indian custodian, and tribe are entitled to up to 20 additional days to prepare for a hearing.

VIII. Active Efforts (25 U.S.C. § 1912(d); 25 C.F.R. §§ 23.2 & 23.120; Guideline E.; Fam. Code, § 177(a); Welf. & Inst. Code, § 361.7; Cal. Rules of Court, rule 5.485(c).)

- A. In any involuntary proceeding involving an Indian child, the party seeking the order must provide proof that active efforts have been made to provide remedial and rehabilitative programs and services to prevent the breakup of the Indian family and that these efforts have proven unsuccessful.
- B. Active efforts must be made in a manner consistent with the prevailing social and cultural conditions and way of life of the child's tribe and must use the available resources of the extended family, the tribe, and other Indian services.
- C. Active efforts must be documented in detail in the record.

IX. Evidentiary Requirements (25 U.S.C. § 1912(e) & (f); 25 C.F.R. §§ 23.131 & 23.122; Guideline G.; Welf. & Inst. Code, §§ 361, 361.31, 361.7(c); Fam. Code, §§ 177(a) & 7892.5; Cal. Rules of Court, rule 5.485(a))

- A. Before an order for the involuntary "foster-care placement"¹ of an Indian child (i.e., an order under Fam. Code, § 3041) there must be clear and convincing evidence, including the testimony of at least one qualified expert witness (QEW), that taking into account the prevailing social and cultural standards of the child's tribe, continued custody of the child with the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
- B. Before an order involuntarily terminating parental rights to an Indian child, there must be evidence supported by the testimony of at least one QEW **beyond a reasonable doubt** that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
- C. *Who can serve as a QEW?* A person knowledgeable in the prevailing social and cultural standards of the Indian child's tribe, including that tribe's family organization and child-rearing practices can serve as a QEW. Likely persons include, a person designated by the tribe, a member of the child's tribe who is recognized by the tribal community as having the necessary expertise, an expert with substantial experience in the delivery of services to Indians and extensive knowledge of prevailing social and cultural standards and child-rearing practices of the child's tribe. (25 U.S.C. § 1912(e); Welf. & Inst. Code, § 224.6; Fam. Code, § 177(a); Cal. Rules of Court, rule 5.485(a).)

X. Placement Preferences (25 U.S.C. § 1915; 25 C.F.R. §§ 23.129-23.132; Fam. Code, § 177(a); Welf. & Inst. Code, § 361.31; Cal. Rules of Court, rule 5.485(b))

- A. *Foster-care placement:* ICWA establishes a hierarchy of preferences for involuntary "foster-care placement". Placements must be in the least restrictive setting that most approximates a family, in which the child's special needs, if any, may be met and which is in reasonable proximity to his or her home. In any foster-care placement, preference shall be given, in descending order, to (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 that has a program suitable to meet the Indian child's needs.
- B. *Adoptive placement:* In any adoptive placement, preference shall be given, in absence of good cause to the contrary, to placement with (1) a member of the child's extended family, (2) other members of the Indian child's tribe, (3) other Indian families, or (4) if no such placement is available, with a family committed to maintaining the child's connections with his or her tribe. (Note: Even in a case involving the voluntary relinquishment of an Indian child, the adoptive placement preferences should be followed.)
- C. *Tribe may alter order of preferences:* The child's tribe may by resolution adopt another order of preference. (25 U.S.C. § 1915(c); Welf. & Inst. Code §361.31(d); Cal. Rules of Court, rule 5.485(b)(6).)
- D. *Must consult with tribe on placement:* Any person involved in the placement of an Indian child must consult with the child's tribe to secure a placement that complies with the ICWA placement preferences. Placement preferences must be analyzed and the tribe consulted each time there is a change in the child's placement. (Cal. Rules of Court, rules 5.482(f) & 5.485(b)(4).)
- E. *Good cause to deviate:* The court must find good cause to justify deviating from the placement preferences. The burden of establishing good cause to deviate is on the party requesting the deviation. The court may consider 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 preferences, the request of the child if of sufficient age and capacity, the presence of a

¹ ICWA defines such placement as any action removing an Indian child from a parent or Indian custodian for placement with another, where the parent or Indian custodian cannot have the child returned on demand but where parental rights have not been terminated. (25 U.S.C. § 1903(1)(i).)

sibling attachment that can be maintained only through a specific placement, the extraordinary physical or emotional needs of the child, or the unavailability of a suitable placement within the preferences, but only with proof that there was a diligent search for a placement within the preferences. A placement may not depart from the preferences based on the socioeconomic status of a placement or solely on the basis of ordinary bonding and attachment that flowed from time spent in a placement in violation of ICWA. (25 C.F.R. § 23.132; Fam. Code § 177(a); Welf. & Inst. Code § 361.31, Cal. Rules of Court, rule 5.485(b)(5))

XI. Notice to Secretary of Interior/Child's Right to Know (25 U.S.C. §§ 1917, 1951; Fam. Code, §§ 9208, 9209)

- A. On the adoption of an Indian child, the clerk of the court must send notice to the Secretary of the Interior. This notice must provide sufficient information to establish the following:
1. The name and tribal affiliation of the child;
 2. The names and addresses of the biological parents;
 3. The names and addresses of the adoptive parents; and
 4. The identity of any agency having files or information relating to the adoptive placement.
- If the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the information above must still be disclosed, but the affidavit shall be included with the other information. (Fam. Code §9208)
- B. On turning 18, an adopted Indian child is entitled to all information necessary to protect any rights flowing from the individual's tribal relationship.