

Placements of Indian Children in Juvenile Proceedings: What Judges & Attorneys Need to Know

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Land Acknowledgement

We would like to acknowledge our presentation is brought to you today from the original and current lands of the Ohlone people in the San Francisco Bay Area, where our Judicial Council of California Office is currently located. We thank the Ohlone ancestors and present tribal communities.

Objectives for this training

Understand

Understand that relationship building, and collaboration is necessary with tribal communities and agency stakeholders;

Appreciate

Appreciate the importance of tribal & cultural connections for all Native American children and families;

Recognize

Recognize the legal rights of all children in foster care and in the juvenile justice system to maintain their cultural identity and connections; and

Understand

Understand the legal basis of the ICWA placement preferences and good cause to deviate.

- ➔ Legal requirements governing placements of Indian children
- ➔ Challenges
- ➔ Common issues
- ➔ What can judicial officers and attorneys look out for?

Introduction & Background

- ➔ Keeping Indian children within their families and communities is one of the most central values of the ICWA
- ➔ Do not forget about the importance of prevention!
- ➔ Collaborate with your tribal programs
- ➔ Communication between courts, agencies and tribes
- ➔ Mutual respect for the government-to-government relationship

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Promising Practice Tips

Collaboration with tribes before a petition is filed

Inquiry made at the hotline and will either go to the ICWA unit if an Indian child

Recruitment & training of tribal and non-tribal foster families

San Diego Protocol & The Tribal Assessment Center

Resource guide

Working with the Intertribal Court & partnering with tribes

The Indian Child Welfare Act

- ➔ 25 U.S.C. 1901 et seq.
- ➔ Welfare & Institutions Code 224 and related statutes

(Statutes, regulations & rules available at:

<https://www.courts.ca.gov/8709.htm>)

Placement Preferences (25 U.S.C. 1915(b); WIC 319(h)(1)(A); WIC 361.31(b))

Foster Care Placements

- (1) A member of the Indian child's extended family;
- (2) Foster home that is licensed, approved, or specified by the child's tribe;
- (3) An Indian foster home licensed or approved by a non-Indian licensing authority;
- (4) An institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the child's needs

Adoptive Placements

- (1) A member of the Indian child's extended family;
- (2) Other members of the child's tribe;
- (3) Other Indian families

The child's tribe can establish a different order of preference

If the child's tribe has established by resolution a different order of preference than that specified in ICWA, the court/agency shall follow the order of preference established by the Tribe's, so long as that placement is the least-restrictive setting appropriate to the particular needs of that Indian child.

25 U.S.C. 1915(c)

25 C.F.R. 23.131(c)

Cal. Welf. & Inst. Code 361.31(d)

Extended Family

- ▶ **The most preferred placement for an Indian Child is with a member of the child's extended family (25 U.S.C. 1903(2); WIC 361.31)**
- ▶ **Definition of "extended family member"**
 - ▶ Defined by the law or custom of the Indian child's tribe, or, in the absence of such law or custom,
 - ▶ An adult who is the Indian child's grandparent, aunt, uncle, brother, sister, brother-in-law, sister-in-law, niece, nephew, first or second cousin, or stepparent

- **WIC 361.31(f)** The prevailing social and cultural standards of the Indian community in which the parent or extended family members of an Indian child reside, or with which the parent or extended family members maintain social and cultural ties, or the prevailing social and cultural standards of the Indian child's tribe shall be applied in meeting the placement preferences under this section. A determination of the applicable prevailing social and cultural standards may be confirmed by the Indian child's tribe or by the testimony or other documented support of a qualified expert witness, as defined in subdivision (c) of Section 224.6, who is knowledgeable regarding the social and cultural standards of the Indian community.
- **WIC 361.31(g)** Any person or court involved in the placement of an Indian child shall use the services of the Indian child's tribe, whenever available through the tribe, in seeking to secure placement within the order of placement preference established in this section and in the supervision of the placement.

Social and Cultural Standards

- ▶ **Hypothetical:** Maternal grandmother would like placement but cannot care for the child on her own. There is a wide range of support around her home to assist her in caring for the child. Can she still be approved? Yes! Tribal communities do not look at a nuclear family/one primary caregiver, but at the community network.
- ▶ **Hypothetical:** Placement with a relative who has non-exemptible criminal history, but who the tribe knows has reformed and is now an upstanding member of the community who poses no risk to the child. The court can consider placement pursuant to SB 354.

Assess the strengths of the COMMUNITY, not just the individual asking for placement.

When do the placement preferences apply?

- ▶ Emergency proceedings (pre-filing; Detention) (WIC 319(h)(1)(A))
 - ▶ As soon as it becomes known OR there is “reason to know” the child is an Indian child
 - ▶ Social Workers: Ask at the initial contact (hotline or first contact w/ parent/child/relative)
 - ▶ Attorneys: Ask your client
 - ▶ Judges: Ask parents, children, and all family members present for Detention hearing
- ▶ Indian Child Custody Proceedings (Disposition, subsequent placement) (WIC 351.31(b))
- ▶ Adoption/Permanency (WIC 361.31(c))

Every time a new placement is needed, the preferences apply and need to be considered!

Approval/Licensing Requirements

Placements for Indian children must be approved/licensed

- ▶ Emergency Approval (ERFA) WIC 361.4
 - ▶ CLETS
 - ▶ CACI
 - ▶ In-home physical inspection

All relatives who come forward must be assessed (WIC 309)

Practice tip: make sure the detention report addresses whether there are relatives available for placement and whether they can be approved on an emergency basis

Types of Approvals

Tribally Approved Home

- Tribe approves the home; county may assist in conducting criminal/CACI clearance of adults in the home

Resource Family Home

- County conducts the background check and approves the home

Tribally Specified Home

- Tribe requests a specific placement from several Agency-approved options

Compelling Reason

- Child-Specific

What should judges/attorneys look for?

Detention Report

- Relatives/NREFMs available for placement
 - Whether there is criminal/CWS history (not WHAT it is, but whether it exists)

Disposition Report

- Family Finding Efforts
- Consultation with tribe
- Analysis of where proposed placements fit within placement preferences
 - Good cause if asking to deviate (coming up!)

Changes after SB 354

When a relative/NREFM is available, but the Agency is not recommending placement:

- ▶ Court has the discretion to order a placement for a relative who is not a TAH or ERFA/RFA if the court finds the placement is not a risk to the child's health/safety (WIC 361.2(e)(11); WIC 361.4)
- ▶ Formerly non-exemptible convictions
- ▶ Agency to use reasonable efforts to help a relative/NREFM obtain necessary items if the sole reason preventing emergency placement is resources.

Changes after SB 354

- ▶ Health & Safety Code 1522(g)(2)(A)(iv): All criminal convictions for relatives have the potential to be exempted during the RFA assessment process if there is proof the relative has rehabilitated since the conviction and is of present good character.
 - ▶ Time may be required to pass before the exemption can be processed.
- ▶ Exemptions may not be transferred for the placement of other children.
- ▶ Applies to adults living in the home of a relative or extended family member of an Indian child.
- ▶ This does not apply to NREFMs seeking child-specific placement.

Placement Options

Emergency Relative Placement (pending further approval)

- Requires CLETS, CACI, in-home inspection (WIC 361.4)

Tribally Approved Home

- May be a nonrelated tribal foster parent, relative, NREFM

Resource Family Home

- May be a nonrelated foster parent, relative, NREFM

Tribally Specified Home

- Tribe requests a specific placement from several Agency-approved options

Court-Authorized Placement (SB 354, WIC 361.2(e)(11))

- Relative who is not RFA approved or a TAH, *if* the court finds no risk to the child's health/safety

Statutory Guidance & Items to Consider for Placement

Consider placement preferences and order detention in such a home if possible

- Placement must be in “least restrictive setting that most approximates a family situation and in which the child’s special needs, if any, may be met.”
- Child must “also be placed within reasonable proximity to child’s home, taking into account any special needs.”
- Where appropriate, consider parent and/or child’s views.
- Consider prevailing social and cultural standards of Indian community.
- Use services of tribe when available to secure placement within preferences.

Deviating from the placement preferences: Good Cause

This finding is made by the Court, and must be made on the record or in writing, by clear and convincing evidence:

- The request of one or both parents, if they attest, they have reviewed the placement options, if any, that comply with the preference;
- The request of the child, if of sufficient age and capacity;
- The presence of a sibling attachment that can be maintained only through a particular placement;
- The extraordinary physical, mental, or emotional needs of the Indian child, including specialized treatment services that may be unavailable in the community where a preferred placement is located;
- The unavailability of a suitable placement after the juvenile court determines a diligent search has been conducted

Things that are not good cause

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- ➔ Socioeconomic status
- ➔ Ordinary bonding and attachment flowing from the time spent in a non-preferred placement made in violation of ICWA
- ➔ *In re Alexandria P.* (2016) 1 Cal.App.5th 331 child can be placed in one home for reunification and move to another if reunification is unsuccessful.



Practice tips

Building relationships with out of state relatives

Involve the tribe in all decision-making as a collaborative team for the family

Involve everyone in the child's life to provide feedback and don't be quick to turn people away

Discussions with current caregiver if a move is being contemplated

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What to look for

What if ICWA does not apply?

- ▶ **Foster Care Bill of Rights (WIC 16001.9):** All children are entitled to be placed with a relative or NREFM if an appropriate and willing individual is available.
 - ▶ (11) To be provided the names and contact information for...representatives designated by the child's Indian tribe to participate in the juvenile court proceeding, and to communicate with these individuals privately.
 - ▶ (14) To have social contacts with people outside of the foster care system... If the child is an Indian child, to have the right to have contact with tribal members and members of their Indian community consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe.
 - ▶ (15) To attend religious services, activities, and ceremonies of the child's choice, including, but not limited to, engaging in traditional Native American religious practices.
 - ▶ (16) To participate in extracurricular, cultural, racial, ethnic, personal enrichment...
 - ▶ (20) To have child welfare and probation personnel and legal counsel who have received instruction on the federal Indian Child Welfare Act of 1978...
 - ▶ (21) To have recognition of the child's political affiliation with an Indian tribe or Alaskan village...



Communication/transparency is key!



When in doubt, ask questions!



Keep an open mind

Questions?

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Thank you!

If you have questions or comments, please contact:

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