

INDIAN CHILD WELFARE ACT

General
Existing Indian Family Doctrine
Applicability
Notice
Intervention
Removal

GENERAL:

ICWA is federal legislation to protect Indian people and their culture from extinction. (25 U.S.C. § 1902; *In re Crystal K.* (1990) 226 Cal.App.3d 655, 661.) Thus, ICWA protects not just individual rights but also the interests of the tribe. (*Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 52.) “ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes and families.” (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 469.)

“It is clear then that the Indian child welfare crisis is of massive proportions and that Indian families face vastly greater risks of involuntary separation than are typical of our society as a whole.” H.R. Rep. No. 95-1386, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7532.

Indian relationship solely an issue for Congress. (*Seminole Tribe of Florida v. Florida* (1996) 517 U.S. 44, 60; *Worcester v. State of Georgia* (1832) 31 U.S. 515, 561.)

“Although the Guidelines do not have a binding effect on this court, the construction of a statute by the executive department charged with its administration is entitled to great weight.” (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 474; accord, *Fresno County Dept. of Children & Family Services v. Superior Court* (2004) 122 Cal.App.4th 626, 642-643; *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1422, fn. 3; *In re Krystal D.* (1994) 30 Cal.App.4th 1778, 1801, fn. 7; *In re Junious M.* (1983) 144 Cal.App.3d 786, 792, fn.7.) Guidelines are not binding. (*In re Michael G.* (1998) 63 Cal.App.4th 70, 714.)

Determination that half-siblings did not qualify is not determinative. Blood quantum is not determinative. Enrollment in a tribe is not required. (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 254 [parents' lack of enrollment not dispositive]; *In re Desiree F.* (2000) 83 Cal.App.4th 460, 470; *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1422; *In re Junious M.* (1983) 144 Cal.App.3d 786, 796; *In re Jonathan D.* (2001) 92 Cal.App.4th 105.)

Indian tribe must be federally recognized. (25 U.S.C. § 1903(8); *In re Vanomi P.* (1989) 216 Cal.App.3d 156; *In re John V.* (1992) 5 Cal.App.4th 1201.)

In re S.B. (2005) 130 Cal.App.4th 1148, 1156-1158:

Among the stated purposes of the ICWA are “to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture” (25 U.S.C. § 1902.)

In general, the ICWA applies to any state court proceeding involving the foster care or adoptive placement of, or the termination of parental rights to, an Indian child. (25 U.S.C. §§ 1903(1), 1911(1)-(3), 1912-1918, 1920, 1921.) “Indian child” is defined as a child who 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).)

We are concerned with three types of ICWA provisions, which we will call the “notice provisions,” the “substantive provisions,” and the “enforcement provision.”

First, under the notice provisions, if “the court knows or has reason to know that an Indian child is involved,” the social services agency must “notify . . . the Indian child’s tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention.” (25 U.S.C. § 1912(a).) “If the identity or location of . . . the tribe cannot be determined,” the notice need only be given to the BIA. (*Ibid.*) “No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by . . . the tribe or the [BIA].” (*Ibid.*)

Second, under the substantive provisions, the Indian child’s tribe has “a right to intervene at any point in the proceeding.” (25 U.S.C. § 1911(c).) As a condition of any foster care placement or termination of parental rights, the court must 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.” (25 U.S.C. § 1912(d).) The court also must find, based at least in part on the “testimony of 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.” (25 U.S.C. §§ 1912(e), (f).) For a foster care placement, this must be proven “by clear and convincing

evidence.” (25 U.S.C. § 1912(e).) For termination of parental rights, it must be proven “beyond a reasonable doubt.” (25 U.S.C. § 1912(f).)

Third and finally, under the enforcement provision, on the petition of the Indian child, a parent from whose custody an Indian child has been removed, or the Indian child’s tribe, “any court of competent jurisdiction” must invalidate any “action for foster care placement or termination of parental rights” that violated the notice provision or any of the substantive provisions. (25 U.S.C. § 1914.)

A host of subsidiary requirements have been adopted to implement, interpret, and enlarge upon this statutory language. These requirements are embodied in: (1) federal regulations (25 C.F.R. § 23.1 et seq.), which are binding in all federal and state courts by virtue of the Supremacy Clause (see *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 814); (2) federal “Guidelines for State Courts” (Guidelines) (44 Fed.Reg. 67584 (Nov. 26, 1979)), which by their terms are “not intended to have binding legislative effect” (ibid.); (3) a state rule of court (Cal. Rules of Court, rule 1439); (4) several “mandatory” state Judicial Council forms (JV-130, JV-135; see also Gov. Code, § 68511); and (5) sections 31-515 and 31-520 of the state Child Welfare Services Manual of Policies and Procedures (CWS Manual) (see *In re Asia L.* (2003) 107 Cal.App.4th 498, 506). [fn: Available at <<http://www.cdss.ca.gov/getinfo/pdf/cws4.pdf>>, as of June 30, 2005.]

For example, the ICWA notice provisions, by their terms, apply if “the court knows or has reason to know that an Indian child is involved” (25 U.S.C. § 1912(a).) The ICWA does not define “reason to know.” Neither do the controlling federal regulations. (See 25 C.F.R. § 23.11(a).) The Guidelines, however, require “the state court [to] make inquiries to determine if the child involved is a member of an Indian tribe or if a parent of the child is a member of an Indian tribe and the child is eligible for membership in an Indian tribe.” (Guidelines, § B.5.a, 44 Fed.Reg. at p. 67588, italics added.) The state rule of court provides that “[t]he court [and] the county welfare department . . . have an affirmative duty to inquire whether a child for whom a [dependency] petition . . . is to be, or has been, filed is or may be an Indian child.” (Cal. Rules of Court, rule 1439(d).) Judicial Council form JV-135, effective January 1, 2005, provides for a parent to indicate whether the child is or might be an Indian child.

The CWS Manual, finally, provides that “the social worker shall: [¶] . . . [i]dentify in the petition that the child is or may be an Indian child as defined by the ICWA.” (CWS Manual, § 31-515.) “To make such a determination, the social worker shall ask the child, his parent or custodian

whether the child is or may be a member of an Indian tribe, or whether the child identifies himself/herself as a member of a particular Indian organization.” (CWS Manual, § 31-515.111.) If the child’s Indian status cannot be determined before the first hearing, the social worker must “[a]dvice the court of all information which indicates that the child may be an Indian child,” “[a]dvice the court of all efforts made to establish the child’s status as an Indian child,” and “[c]ontinue contacts with the BIA until the question of the child’s status as an Indian child . . . has been resolved and the resolution is documented in the case record for future reference.” (CWS Manual, § 31-515.2.)

The ICWA expressly permits “[s]tate or [f]ederal law [to] provide[] a higher standard of protection . . . than the rights provided under” the ICWA. (25 U.S.C. § 1921.) This simply means, however, that the ICWA does not preempt such higher state standards. It does not incorporate such higher state standards into the ICWA itself. The enforcement provision, by its terms, applies only to violations “of sections 1911, 1912, and 1913 of this title” (25 U.S.C. § 1914); it does not purport to address the penalty for other violations of federal or state law.

Under section 1911(a), ICWA creates a tribal and individual right of action. (*Doe v. Mann* (9th Cir. 2005) 415 F.3d 1038, 1047.)

“Noncompliance with ICWA has been a continuing problem in juvenile dependency proceedings conducted in this state” (*In re I.G.* (2005) 133 Cal.App.4th 1246, 1254-1255.)

Determining whether a tribe should be federally recognized is a function of the executive branch. (*United States v. John* (1978) 437 U.S. 634, 652-653.) Congress requires the publishing of the list in the federal register. (25 U.S.C. § 479a-1.) (*Agua Caliente Band of Cahuilla Indians v. Superior Court (Fair Political Practices Com.)* (2006) 40 Cal.4th 239, 243, fn. 1.) The federal register need not be the only source of the tribal addresses, as CPS can rely on its own list. (*In re N.M.* (2008) 161 Cal.App.4th 253, 268.)

EXISTING INDIAN FAMILY DOCTRINE:

The Existing Indian Family Doctrine applies to block intervention or action from intervention by a tribe. (*In re Santos Y.* (2001) 92 Cal.App.4th 1274 [2d Dist., Div. 2: boy in adoptive home for two years after placed there when 3 months old]; *Crystal R. v. Superior Court* (1997) 59 Cal.App.4th 703, 706, overruled in *In re Vincent M.* (2007) 150 Cal.App.4th 1247, 1267; see also *id.* at p. 1271 (conc. opn. of Bamattre-Manoukian,

J.) [6th Dist.]; *In re Bridget R.* (1996) 41 Cal.App.4th 1483, 1497-1498 [2d Dist., Div. 3: must live on reservation or be culturally or socially connected to the Indian community; twins in adoptive home for two years since birth after mother relinquished]; *In re Alexander Y.* (1996) 45 Cal.App.4th 1483 1493-1494 [4th Dist., Div. 3]; cf. *In re Alicia S.* (1998) 65 Cal.App.4th 79, 88 [5th Dist.: “existing Indian family doctrine not exist but statute allows placement with non-Indian for good cause]; *In re Wanomi P.* (1989) 216 Cal.App.3d 156, 168; *In re Derek W.* 2(1999) 73 Cal.App.4th 828.)

But some courts have rejected the doctrine. (See, e.g., *In re Vincent M.* (2007) 150 Cal.App.4th 1247, 1260-1267 [6th Dist.]; *Adoption of Hannah S.* (2006) 142 Cal.App.4th 988, 994-996 [acknowledging a conflict of authority, 3d Dist. says the doctrine does not apply to ICWA]; *Adoption of Lindsay C.* (1991) 229 Cal.App.3d 404 [1st Dist.]; *In re Crystal K.* (1990) 226 Cal.App.3d 655 [3d Dist.]; *In re Junious M.* (1983) 144 Cal.App.3d 786 [the tribe makes the determination]; *In re Desiree F.* (2000) 83 Cal.App.4th 460, 472-475; *In re Laura F.* (2000) 83 Cal.App.4th 583, 595 [not follow full faith and credit clause]; *In re Naomi P.* (1989) 216 Cal.App.3d 156; *In re Derek W.* (1999) 73 Cal.App.4th 828, 833.) The tribe exclusively decides who is an Indian child. (*In re Junious M.* (1983) 144 Cal.App.3d 786, 793; see generally *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 19, 72, fn. 32; but see *In re Laura F.* (2000) 83 Cal.App.4th 583, 595 [not follow full faith and credit clause].) “The only exceptions to application of ICWA’s provisions have been specified by Congress; judicial creation of additional exceptions of any kind are not permitted.” (*Adoption of Hannah S.* (2006) 142 Cal.App.4th 988, 996.)

Even if the Existing Indian Family Doctrine might apply, notice must be given under ICWA before determining whether the applies because the tribe has a right to litigate the issue. (*In re Suzanna L.* (2002) 104 Cal.App.4th 223, 234, 236.)

9 states adopted the Existing Indian Family Doctrine: Alabama, Indiana, Kansas, Kentucky, Louisiana, Missouri, New York, Oklahoma, Tennessee, and Washington. 9 states rejected the doctrine: Alaska, Arizona, Idaho, Illinois, Michigan, Minnesota, New Jersey, South Dakota, and Utah. (*In re Santos Y.* (2001) 92 Cal.App.4th 1274; 1304, fn. 16.) The doctrine started in Kansas soon after ICWA was enacted. (*Adoption of Hannah S.* (2006) 142 Cal.App.4th 988, 995, citing *In re Adoption of Baby Boy L.* (1982) 231 Kan. 199 [643 P.2d 168, 175].)

Congress rejected amending ICWA in 1995-1996 session. The United States Supreme Court has denied certiorari in eight cases. The California Supreme Court has denied review. (*In re Santos Y.* (2001) 92 Cal.App.4th 1274; 1205 & fn. 17.)

Under the doctrine, ICWA applies only to situations to which a child is not being

removed from an existing Indian family. (*In re Santos Y.* (2001) 92 Cal.App.4th 1274; 1303.)

“[U]nder the Fifth, Tenth and Fourteenth Amendments to the United States Constitution, ICWA does not and cannot apply to invalidate termination of parental rights respecting an Indian child who is not domiciled on a reservation, unless the child’s biological parent, or parents, are not only of American Indian descent, but also maintain a significant social, cultural, or political relationship with their tribe.” (*In re Santos Y.* (2001) 92 Cal.App.4th 1274; 1306, quoting *In re Bridget R.* (1996) 41 Cal.App.4th 1483, 1492; but see *In re Vincent M.* (2007) 150 Cal.App.4th 1247, 1267 [ICWA does not violate the Tenth Amendment because Welf. & Inst. Code, § 360.6 requires the state court to comply with ICWA].)

It violates the Equal Protection Clause under the strict scrutiny test because without the cultural connection, there is not a sufficient compelling state interest for race based disparate treatment. (*In re Santos Y.* (2001) 92 Cal.App.4th 1274; 1317-1321; *In re Bridget R.* (1996) 41 Cal.App.4th 1483, 1508-1510.)

Indian child is arguably not a “political classification” because *Morton v. Mancari* (1974) 417 U.S. 535, 553-554 involve matters of exclusively Indian concern and had almost no application to other situations (*Rice v. Cayetano* (2000) 528 U.S. 495, 520). (*In re Santos Y.* (2001) 92 Cal.App.4th 1274; 1318-1319, 1321.)

Not justified by “Indian Commerce Clause” of Article I, section 8, clause 3 because there was no substantial nexus between Indian commerce and child custody proceedings. Thus, under Tenth Amendment, Congress cannot interfere with the rights of the states. (*In re Santos Y.* (2001) 92 Cal.App.4th 1274; 1309, 1322-1323; *In re Bridget R.* (1996) 41 Cal.App.4th 1483, 1510-1511; but see *County of Oneida v. Oneida Indian Nation* (1984) 470 U.S. 226, 234 [only federal government can regulate relations with Indians]; *Worcester v. The State of Georgia* (1832) 31 U.S. 515, 561 [same].)

Welfare and Institutions Code section 360.6 cannot override federal and constitutional authority. (*In re Santos Y.* (2001) 92 Cal.App.4th 1274; 1317.)

On the other hand, the Existing Indian Family Doctrine is not found in the federal statute. (*In re Vincent M.* (2007) 150 Cal.App.4th 1247, 1265.) It is a “[c]ontroversial judicially created exception to the ICWA that has become known as the ‘existing family doctrine.’ ” (*In re Vincent M.* (2007) 150 Cal.App.4th 1247, 1260.)

The Fourteenth Amendment does not apply to the federal government. Therefore, the Equal Protection Clause of the Fourteenth Amendment cannot invalidate ICWA. There is an equal protection component of the Due Process Clause to the Fifth Amendment. “The United States Supreme Court has held that ‘[t]he decisions of this Court leaves no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classification.’ (*United*

States v. Antelope (1977) 430 U.S. 641, 645.) Instead, tribal Indians belong to a political group that is specially recognized by federal law as a sovereign nation.” (*Flynt v. California Gambling Control Commission* (2002) 104 Cal.App.4th 1125, 1141.) In *Flynt*, publisher Larry Flynt, who also owned card rooms in Los Angeles sued to invalidate under the Equal Protection Clause California’s compact with Indian tribes to permit gambling on reservations under the federal Indian Gaming Regulatory Act. The Attorney General’s Office, representing the state gambling commission, successfully argued the rational basis test applied and the statutes were valid.

“It is an ‘undisputed fact that Congress has plenary authority to legislate for the Indian tribe in all matters.’ (*United States v. Wheeler* (1978) 435 U.S. 313, 319.)” (*People v. Ramirez* (2007) 128 Cal.App.4th 1464, 1474.) “The plenary power of Congress to deal with the special problems of Indians” and “the assumption of a guardian-ward status” permitted Congress to enact laws to protect the interests of Indian tribes. (*Morton v. Mancari* (1974) 417 U.S. 535, 551-552.) The statute would be constitutional “[as] long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians.” (*Id.*, at p. 555.) “[T]his preference does not constitute ‘racial discrimination.’ Indeed, it is not even a ‘racial’ preference. Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. (*Id.*, at pp. 553-554, fn. omitted.) “The preference is not directed towards a ‘racial’ group consisting of ‘Indians’; instead, it applies only to members of ‘federally recognized’ tribes. This operates to exclude many individuals who are racially to be classified as “Indians.’ In this sense, the preference is political rather than racial in nature. . . .” (*Id.*, at p. 553, fn. 24.) The “central purpose of the Indian Commerce Clause,” according to the Supreme Court, “is to provide Congress with plenary power to legislate in the field of Indian affairs.” (*Cotton Petroleum Corp. v. New Mexico* (1989) 490 U.S. 163, 192.) Further, the Treaty Clause (U.S. Const., art. II, § 2, cl. 2) does not literally authorize Congress to act legislatively, but treaties made pursuant to that power can authorize Congress to deal with matters with which otherwise “Congress could not deal.” (See *Missouri v. Holland* (1920) 252 U.S. 433.) Treaties with Indian tribes have empowered Congress to legislate the extent of a tribe’s sovereignty. (*United States v. Lara* (2004) 541 U.S. 193, 202-203.)

“The United States Supreme Court has consistently rejected claims that laws that treat Indians as a distinct class violate equal protection. [Citations.] The different treatment of Indians and non-Indians under ICWA is based on the political status of the parents and children and the quasi-sovereign nature of the tribe. [Citations.] We apply the rational basis test to [the] County’s challenges, and we conclude ICWA is rationally related to the protection of the integrity of American Indian families and tribes and is rationally related to the fulfillment of Congress’s unique guardianship obligations toward Indians.” (*Adoption of Hannah S.* (2006) 142 Cal.App.4th 988, 996, quoting *In the*

Interest of A.B. (2003) 2003 N.D. 98 [663 N.W.2d 625, 636]; accord, *In re Vincent M.* (2007) 150 Cal.App.4th 1247, 1266-1267.)

“As *Mancari* illustrates, a tribal preference is not transformed from a political to a racial classification that requires strict scrutiny merely because the vehicle for the preference consists of individual members of tribes.” (*Artichoke Joe’s v. Norton* (E.D. Cal. 2002) 216 F.Supp.2d 1084, 1132.) “Individual members are benefitted [sic] not because they are Indian per se but because they are members of tribes that have entered into compact” (*Ibid.*) The Supreme Court “has repeatedly that the peculiar semisovereign and constitutionally recognized status of Indians justifies special treatment on their behalf when rationally related to the Government’s ‘unique obligation toward the Indians.’” (*Washington v. Fishing Vessel Assn.* (1979) 443 U.S. 658, 673, fn. 20, quoting *Mancari, supra.*) “It is settled that ‘the unique legal status of Indian tribes under federal law’ permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive.” (*Washington v. Yakima Indian Nation* (1979) 439 U.S. 463, 500-501; see also *Delaware Tribal Business Com. v. Weeks* (1977) 430 U.S. 73, 85.) The Supreme Court “has never overturned a statute or treaty affecting Indians or natives.” (*Williams v. Babbitt* (9th Cir. 1997) 115 F.3d 657, 663.) “‘[A]t least during the first century of America’s national existence . . . Indian affairs were more an aspect of military and foreign policy than a subject of domestic or municipal law.’ [Citation.] Insofar as that is so, Congress’ legislative authority would rest in part, not upon ‘affirmative grants of the Constitution,’ but upon the Constitution’s adoption of preconstitutional powers necessarily inherent in any Federal Government, namely powers that this Court has described as ‘necessary concomitants of nationality.’ [Citations.]” (*United States v. Lara* (2004) 541 U.S. 193, 201.)

“Much of the theory that underpins Indian Law is that the Indian tribes possessed certain sovereign rights based on their existence as distinctive political entities exercising authority over their members prior to the incorporation of their territory into the United States, *United States v. Wheeler*, 435 U.S. 313, 322 (1978); thus, ‘tribes retain whatever sovereignty they had as the original inhabitants of this continent to the extent that sovereignty has not been removed by Congress.’ *Montana v. Gilham*, 133 F.3d 1133, 1137 (9th Cir. 1998).” (*Kahawaiolaa v. Norton* (9th Cir. 2004) 386 F.3d 1271, 1272.) “Historically, a formal relationship between the United States and American Indian Tribes has been political, rather than race based Indeed, historical evidence suggests that ‘the Founders regarded Indians as distinct nations to be dealt with diplomatically and at arm’s length.’ [Citation.]” (*Kahawaiolaa v. Norton* (9th Cir. 2004) 386 F.3d 1271, 1278.) ICWA does not violate due process. (*In re Vincent M.* (2007) 150 Cal.App.4th 1247, 1265.)

APPLICABILITY:

ICWA applies to foster placements, guardianship, and delinquencies when the

minor commits an act that would not amount to a crime if committed by an adult under Welfare and Institutions Code sections 300 et seq., 601, 602, 727-728; Probate Code sections 1500 et seq. and 2112. Applies to termination of parental rights under Family Code sections 7660-7664 and Welfare and Institutions Code sections 366.26, 727.31, and 727.4. Applies to pre-adoptive and adoptive placements under Family Code section 8500 et seq. and Welfare and Institutions Code sections 366.26 and 727.31. It does not apply to divorce proceedings (25 U.S.C. § 1903(1)), but does apply to private adoptions. (*Adoption of Lindsay C.* (1991) 229 Cal.App.3d 404; *In re Crystal K.* (1990) 226 Cal.App.3d 655; *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 699, 701 [applies in dependency cases where the minor is placed in foster care, though eventually placed with the father]; but see *In re Alejandro A.* (2008) 160 Cal.App.4th 1343, 1347-1348 [does not apply to delinquency placement].)

ICWA has no practical application at the detention hearing. (*In re S.B.* (2005) 130 Cal.App.4th 1148, 1162.) It applies at the jurisdictional and dispositional hearings. (*In re S.B.* (2005) 130 Cal.App.4th 1148, 1164.)

ICWA does not apply when the court orders family maintenance. (*In re Alexis H.* (2005) 132 Cal.App.4th 11, 14-16.)

“A child custody proceeding is defined to include any proceeding involving foster care placement, termination of parental rights, preadoptive placement, or adoption proceedings. (25 U.S.C. § 1903(1).) California Rules of Court, rule 1439(b) provides that title 25 United States Code sections 1911 and 1912, in the ICWA apply to ‘all proceedings under section 300 et seq., including detention hearings, jurisdiction hearings, disposition hearings, reviews, hearings under section 366.26, and subsequent hearings affecting the status of the Indian child.’ ” (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 473.)

ICWA does not apply to marital dissolutions (25 U.S.C. § 1903(1)), but marital dissolutions do not include terminating parental rights. (*Adoption of Lindsay C.* (1991) 229 Cal.App.3d 404, 408 [private adoption by step-father from Indian father]; *In re Crystal K.* (1990) 226 Cal.App.3d 655, 661-662 [same].)

ICWA does not apply to delinquency proceedings, at least as long as the minor is accused of an offense which would be a crime if committed by an adult. (25 U.S.C. § 1903(1); *In re Enrique O.* (2006) 137 Cal.App.4th 728, 732-736; *In re Lindsay C.* (1991) 221 Cal.App.3d 404, 408.)

“The courts of this state must yield to governing federal law.” (*In re Desiree F.*

(2000) 83 Cal.App.4th 460, 469.)

ICWA does not pre-empt state law unless there is a direct conflict. (*Letitia V. v. Superior Court* (2000) 81 Cal.App.4th 1009, 1011; *In re Michael G.* (1998) 63 Cal.App.4th 700 [not apply beyond a reasonable doubt standard]; *In re Brandon M.* (1997) 54 Cal.App.4th 1387, 1399 [de facto parent].)

Juvenile court shall give tribal decisions full faith and credit. (25 U.S.C. § 1911(d); but see *In re Laura F.* (2000) 83 Cal.App.4th 583 [tribal resolution opposing adoption not a judgment entitled to full faith and credit].) “The tribe’s decision that a child is or is not a member, or eligible to be a member is determinative.” (Cal. Rules of Court, rule 1439(g)(1); *In re Desiree F.* (2000) 83 Cal.App.4th 460, 470.)

An alleged father cannot contest on appeal ICWA issues. (*In re Daniel M.* (2003) 110 Cal.App.4th 703, 707-708.)

ICWA applies to federally recognized tribes. Although Welfare and Institutions Code section 306.6, subdivision (d) permits notice to a tribe that is not federally recognized, there is no error when there is failure to do so. (*In re A.C.* (2007) 155 Cal.App.4th 282, 286-287; but see 25 U.S.C. § 1921 [state law applies if it affords greater protection].)

NOTICE: AFFIRMATIVE DUTY

“The juvenile court and the county welfare department have an affirmative duty to inquire whether the child subject to the dependency petition *is or may be* an Indian child. (Cal. Rules of Court, rule 1439(d).)” (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 470; accord, *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1264 [error to not give copies of notice to trial court for determination, though copies sent to the court of appeal]; *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1413 [court has duty to inquire on ancestry]; but see *In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1429 [rule of court requiring a continuing duty does not apply to dependencies which began before Jan. 1, 2005].)

“While the petitioning agency may have the duty to provide ICWA notice, it is the role of the juvenile court, not the agency, to determine whether the ICWA notice is proper.” (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 852.)

Error when there was no evidence the social worker asked a parent about Indian ancestry. (*In re J.N.* (2006) 138 Cal.App.4th 450, 461.)

Policy: “One of the primary purposes of giving notice to the tribe is to enable the tribe to determine whether the child involved in the proceedings is an Indian child.” (*In*

re Desiree F. (2000) 83 Cal.App.4th 460, 470.) “Notice is a key component of the congressional goal to protect and preserve Indian tribes and Indian families. . . . Without notice, these important rights granted by the Act become meaningless.” (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421.) This is because “ ‘the statute and all cases applying the Act unequivocally require actual notice to the tribe’ [or the Bureau of Indian Affairs] of both the proceedings and of the right to intervene. (*Id.*, at p. 1422.)” (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 469-470; accord *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1264-1265, 1267; *In re Jeffrey A.* (2002) 103 Cal.App.4th 1103, 1108, citing 25 C.F.R. § 23.11(a).) “The ICWA presumes it is in the best interests of the child to retain tribal ties and cultural heritage and in the interest of the tribe to preserve its future generations, a most important resource.” (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 469.)

Error when the parent was not asked to fill out a JV-130 form. (*In re H.B.* (2008) 161 Cal.App.4th 115, 121.)

Prejudice: Failure to fill out JV-130 form is state error, so subject to harmless error analysis. (*In re H.B.* (2008) 161 Cal.App.4th 115, 121-122.)

NOTICE: ‘REASON TO KNOW MIGHT BE INDIAN CHILD’

“To ensure a tribe’s right to intervene, the ICWA requires ‘where the court knows or has reason to know that an Indian child is involved,’ the party seeking termination of parental rights to intervene. (25 U.S.C. § 1912(a); see also *Adoption of Lindsay C.* (1991) 229 Cal.App.3d 404, 408.)” (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 469.) “The Indian status of the child need not be certain. Notice is required whenever the court knows or has reason to believe the child is an Indian child. (§ 1912(a))” (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1422; (25 U.S.C. § 1912(a); *In re Alicia M.* (2008) 161 Cal.App.4th 1189, 11968 [saying on the JV-130 form the minor might have Apache or Navajo heritage was sufficient]; *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1407-1408 [only a “minimal showing” is enough to trigger notice requirement; father’s suggestion that ancestors might be Indians were enough]; *In re Suzanna L.* (2002) 104 Cal.App.4th 223, 231-232 [when maternal grandparents are Indian though uncertain as to which tribe; failure to give notice of right to intervene renders notice defective]; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 252, 256-258 [mother’s statement that have some Cherokee blood triggers the notice requirement; require only a suggestion, implication, or hint to trigger the court’s sua sponte requirement]; *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1265-1266 [if there exists “probable cause” which exists when great-great grandparent born on reservation, great grandparent received BIA services until 1994, aunt went to Indian school and was tribal council member, family gave names]; see *In re Alliyah G.* (2003) 109 Cal.App.4th 939, 942 [enough evidence that not an Indian child when parents say there was no Indian

blood]; but see *In re O.K.* (2003) 106 Cal.App.4th 152, 156-157 [information from paternal grandmother that might be Indian blood or that father “may have Indian in him” too vague to trigger notice requirement]; *In re Aaron R.* (2005) 130 Cal.App.4th 697, 707-708 [grandmother saying she has associated with a tribe not enough to require notice or to require further inquiry by CPS].)

There exists reason to believe the minor might have Indian heritage, though did not know which tribe; should give notice to BIA. (*In re Joseph P.* (2006) 140 Cal.App.4th 1524, 1530.)

ICWA does not apply if the minor lived near an Indian reservation but there was no evidence of Indian heritage. (*In re Alejandro A.* (2008) 160 Cal.App.4th 1343, 1347.)

NOTICE: TO ALL TRIBES

“Formal notice of the proceedings must be sent to all tribes in which the minor may be eligible for membership. (Rule 1439(f)(3))” (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 475-476; accord, *In re Marinna J.* (2001) 90 Cal.App.4th 731, 739-740; but see *In re Edward H.* (2002) 100 Cal.App.4th 1, 4-5 [lack of notice to two of three Choctaw tribes adequate because sent notice to BIA]; *In re C.D.* (2003) 110 Cal.App.4th 214, 227 [lack of notice to one of three tribes not invalid because also served notice to BIA].) If the tribe is not known, notice shall be sent to BIA. (Rule 1439(f)(4).) Lack of notice to BIA harmless when tribe already said minor did not qualify. (*In re Christopher I.* (2003) 106 Cal.App.4th 533, 567.)

A list of federally recognized tribes are found at 65 Fed. Reg. 13298 (Mar. 13, 2000) and 67 Fed. Reg. 46328 (July 12, 2002) A list of the proper addresses to where to send the notices is at 66 Fed. Reg. 74451 (Dec. 12, 2001). The Guidelines in the Federal Register are not binding on state courts. (44 Fed. Reg. 67584, 67585 (Nov. 26, 1979).)

Notice need not be sent to a tribe which has been absorbed into another tribe. (*In re Louis S.* (2004) 117 Cal.App.4th 622, 632-633.)

Father’s last minute comment that might be from a certain tribe did not require new notices. (*In re Joseph P.* (2006) 140 Cal.App.4th 1524, 1531.)

Amendments effective January 1, 2007 to state statutes concerning ICWA notice do not apply to court findings made before then, though the court subsequently reiterated the findings. (*In re William K.* (2008) 161 Cal.App.4th 1, 12.)

Welfare and Institutions Code sections 224-224.6 and 2008 amendments to California Rules of Court did not diminish the requirement to provide notice. (*In re Alicia M.* (2008) 161 Cal.App.4th 1189, 1198-1201.)

NOTICE: TO BIA

Under Welfare and Institutions Code section 224.2, notice must be sent to each tribe, even if notice is sent to BIA. (*In re Alicia M.* (2008) 161 Cal.App.4th 1189, 1201-1202; *In re J.T.* (2007) 154 Cal.App.4th 986, 993-994; cf. *In re Edward H.* (2002) 100 Cal.App.4th 1, 4 [under old law, even if a tribe is known, notice to BIA is sufficient].)

“[I]f the identity or location of the tribe cannot be determined, the notice shall be given to the Secretary of the Interior.” (25 U.S.C. § 1912(a); *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1406; *In re Louis S.* (2004) 117 Cal.App.4th 662, 632-633 [notice to BIA eliminated need to notice certain known tribes]; *In re Suzanna L.* (2002) 104 Cal.App.4th 223, 232 [if the tribe is unknown, then notify BIA]; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 253 [if the tribe is unknown, notify BIA]; *In re Desiree F.* (2000) 83 Cal.App.4th 460, 469; *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1422.)

NOTICE: TO INDIAN CHAIR

Notice was defective when not sent to the Indian chair or designated agent. (*Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779, 783 [sent to an old address]; *In re H. A.* (2002) 103 Cal.App.4th 1206, 1213.)

Under 25 Code of Federal Regulations 23.12, the Federal Register lists designated agents and addresses. Though lists maintained by the state DSS might make sending notice easier, the Agency should rely on the Federal Register. (*In re Alicia M.* (2008) 161 Cal.App.4th 1189, 1201-1202, fn. 6.)

Sending notice to the incorrect address was harmless when the tribe received actual notice. (*In re J.T.* (2007) 154 Cal.App.4th 986, 994; *In re Mary G.* (2007) 151 Cal.App.4th 184, 211; *In re K.W.* (2006) 144 Cal.App.4th 1349, 1360; but see *Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779, 784 [though someone signed the return receipt, there was no evidence the person was authorized when notice was sent to the wrong address and no further showing of prejudice was required].)

But merely because a return receipt was signed by the wrong person at the wrong address does not indicate the notice was properly sent. (*In re Alicia M.* (2008) 161 Cal.App.4th 1189, 1197-1201; *In re J.T.* (2007) 154 Cal.App.4th 986, 994.)

NOTICE: TIMELINESS OF DISCOVERY NOT RELEVANT

“Notice is mandatory, regardless of how late in the proceedings a child’s possible Indian heritage is uncovered.” (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1424; *In re Suzanna L.* (2002) 104 Cal.App.4th 223, 231; *In re Jonathan D.* (2001) 92

Cal.App.4th 105, 111; accord, *In re Desiree F.* (2000) 83 Cal.App.4th 460, 472; but see *In re S.M.* (2004) 118 Cal.App.4th 1108, 1115, fn. 3 [in dictum, stating a parent should not be able to raise ICWA for the first time on an appeal from an order denying a modification petition where no claims are raised on the denial of the petition].)

NOTICE: BY REGISTERED MAIL

“Section 1912(a) of the Act requires notice to the parents, Indian custodian, and tribe by *registered mail return receipt requested* of any child custody proceeding and of the rights afforded to each by the Act. (See § 1911(b), (c); *In re Suzanna L.* (2002) 104 Cal.App.4th 223, 232 [duty on petitioning potential adopter when it is a private adoption]; *In re H. A.* (2002) 103 Cal.App.4th 1206, 1212-1213 [certified mail not acceptable if there is no return receipt]; *In re Jeffrey A.* (2002) 103 Cal.App.4th 1103, 1108 [cannot rely on presumption under Evid. Code, § 664 or just because the social worker said so; must send copy to the “Indian parent” but waived]; *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421; but see *id.* at p. 1422 [citing cases where certified mail return receipt was sufficient].)

Notice was sufficient though the tribe never received actual notice. (*In re Jasmine G.* (2005) 127 Cal.App.4th 1109, 1118.)

NOTICE: CONTENT OF THE NOTICE

“[T]o establish tribal identity, it is necessary to provide as much information as is known on the Indian child’s direct lineal ancestors.” (25 C.F.R. § 23.11(b) (2003).) “A tribe’s mere awareness of a dependency proceeding involving a possible Indian child is not considered sufficient notice under the ICWA.” (*In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1266, internal quotation marks omitted.) “Notice under the ICWA must, of course, contain enough information to constitute meaningful notice.” (*In re Karla C.* (2003) 113 Cal.App.4th 166, 175.) Notice is meaningless if it lacks sufficient information. (*In re D.T.* (2003) 113 Cal.App.4th 1449, 1455; *In re Manuel E.* (2004) 120 Cal.App.4th 521, 550.)

An allegation in a petition or evidence simply that there was a prior allegation of unfitness is not substantial evidence without evidence the allegation was substantiated. (*In re Manuel E.* (2004) 120 Cal.App.4th 521, 547.)

“The notice is meaningless because the tribe could not adequately search its records for the relevant people.” (*In re Louis S.* (2004) 117 Cal.App.4th 622, 631 [misspelled one name. no information on another person, other problems].)

Under federal regulations, proper notice should include: (1) the name of Indian child, birthdate and birthplace; (2) the name of tribe(s) (eligible for) enrollment; (3) the names, current, and former addresses of biological parents, grandparents, and any “Indian

custodian,” including married and unmarried names, aliases, birthdates, place of birth and death, tribal enrollment number, other identifying information; (4) a copy of the petition and initial social worker report; (5) a statement of right of parent and Indian custodian to intervene; (6) a statement of right of appointed counsel; (7) a statement of right of 20 day continuance; (8) the location, mailing address, phone number of court and all parties notified; (9) a wanting of consequences of possible removal and termination of parental rights; and (10) an advisement should be kept confidential. (25 C.F.R. 23.11(d) & (e); *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1422-1423; *In re C.D.* (2003) 110 Cal.App.4th 214, 224; *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1266 [defective when not include about the dependency proceeding, no court number or date]; >*In re S.M.* (2004) 118 Cal.App.4th 1108, 1115 [inadequate when tribe writes back requesting specific information]; see *In re O.K.* (2003) 106 Cal.App.4th 152, 156 [relying on Guidelines found at 44 Fed.Reg. 67584, 67587 (Nov. 26, 1979)]; *In re H. A.* (2002) 103 Cal.App.4th 1206, 1211-1212 [relying on Guidelines B.5]; *In re Suzanna L.* (2002) 104 Cal.App.4th 223, 232 [inadequate notice when not advise tribe of right to intervene]; *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 705 [notice deficient because listed birthplace of parents unknown and the birthplace of the minor as “California”]; but see *Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779, 784 [incomplete information of an ancestor who did not claim Indian ancestry could not have been prejudicial].)

But “[c]ompliance requires no more than completion of a preprinted form promulgated by the State of California, Health and Welfare Agency, for the benefit of county welfare agencies [citation] and the attachment of a copy of the dependency petition [to] the form entitled, ‘NOTICE OF INVOLUNTARY CHILD CUSTODY PROCEEDINGS INVOLVING AN INDIAN CHILD’ and numbered ‘SOC319,’ seeks to conform with the [BIA regulation].” (*In re H. A.* (2002) 103 Cal.App.4th 1206, 1211; accord *In re Desiree F.* (2000) 83 Cal.App.4th 460, 475 [dictum: the form is sufficient]; contra, *In re C.D.* (2003) 110 Cal.App.4th 214, 225 [the forms do not comply with the requirements in the C.F.R].)

“The Guidelines are not binding on state courts. [Citation.] However, ‘cases that have resolved notice questions have followed the Guidelines in giving a broad reading to the obligation to give notice and redressing notice violations. . . .’ [Citations.]” (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 255.) “The construction of a statute by the executive department charged with its administration is entitled to great weight.” (*In re Junious M.* (1983) 144 Cal.App.3d 786, 792, fn. 7; see *In re L.B.* (2003) 110 Cal.App.4th 1420, 1425, fn. 3 [guidelines have been adopted in California].)

The burden is on CPS to obtain the background information and provide it in the notice. (*In re S.M.* (2004) 118 Cal.App.4th 1108, 1115-1116 [notice inadequate when social worker failed to gather sufficient information]; *In re C.D.* (2003) 110 Cal.App.4th 214, 226.) Inadequate notice when the record shows the social worker possessed

additional information that was not included in the notice. (*In re Gerardo A.* (2004) 119 Cal.App.4th 988, 995.)

But cannot assume from silent record that the social worker failed to question family members about ICWA. (*In re N.E.* (2008) 160 Cal.App.4th 766, 769-771; *In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1430; *In re Gerardo A.* (2004) 119 Cal.App.4th 988, 995; but see *In re J.N.* (2006) 138 Cal.App.4th 450, 461.) As long as CPS made some inquiry, its duty has been fulfilled. (*In re S.B.* (2005) 130 Cal.App.4th 1148, 1161.) There is no error when a relative obtain information but fails to relay it to the social worker. (*In re X.V.* (2005) 132 Cal.App.4th 794, 804.)

Inadequate ICWA notice when most of the form marked unknown and record not show when sent, tribe and BIA said needed more information. (*In Francisco W.* (2006) 139 Cal.App.4th 695, 700, 703-704.)

Waiver: A parent waives the failure of CPS to make a better inquiry. (*In re S.B.* (2005) 130 Cal.App.4th 1148, 1160.)

Standard of review: The trial court's finding that ICWA notice was adequate is reviewed for abuse of discretion. (*In re J.T.* (2007) 154 Cal.App.4th 986, 991.)

Retroactivity: Though notice was provided before January 1, 2007, the court's order was made afterwards, so the law in effect after January 1, 2007 applies. (*In re J.T.* (2007) 154 Cal.App.4th 986, 991-992.)

Prejudice: Error in ICWA notice is harmless if omitted information concerns an ancestor with no Indian ancestry. (*In re Alexis H.* (2005) 132 Cal.App.4th 11, 14-16.)

NOTICE: RECORD OF NOTICE

"To satisfy the notice provisions of the Act and to provide a proper record for the juvenile court and the appellate courts, DSS should follow a two-step procedure. First, it should identify any possible tribal affiliations and send proper notice to those entities, return receipt requested. (Rule 1439(f).) Second, DSS should provide the juvenile court a copy of the notice sent and the return receipt, as well as any correspondence received from the Indian entity relevant to the minor's status. If the identify or location of the tribe cannot be determined, the same procedure should be used with respect to notice to BIA." (*In re Marinna J.* (2001) 90 Cal.App.4th 731, 739, fn. 4; accord, *In re Rayna N.* (2008) 163 Cal.App.4th 262, 267 [did not provide copies of return receipts to the tribes]; *In re Mary G.* (2007) 151 Cal.App.4th 184, 210-211 [reverse when the tribes's responses were not part of the record]; *In re Asia L.* (2003) 107 Cal.App.4th 498, 507-509; *In re H. A.* (2002) 103 Cal.App.4th 1206, 1214-1215 [CPS requirement]; *In re Jennifer A.* (2002)

103 Cal.App.4th 692, 703-704 [the juvenile court could not have determined if ICWA applied without knowing whether proper notice was given]; accord, *In re I.G.* (2005) 133 Cal.App.4th 1246, 1253 [reverse when ICWA notice was not part of the record]; *In re Elizabeth W.* (2004) 120 Cal.App.4th 900, 907-908 [no copies of return receipts in the court file, though information was in the social worker report]; *In re S.M.* (2004) 118 Cal.App.4th 1108, 1118 [CPS should file all responses from the tribes]; *In re Karla C.* (2003) 113 Cal.App.4th 166, 178-179 [when also not in the record on appeal]; but see *In re L.B.* (2003) 110 Cal.App.4th 1420, 1424-1425 [failure to provide record of notice is appellant's fault for not providing a complete record and can presume social worker complied with legal requirements].).

Should not rely on notice provided after the notice of appeal. (See *In re Zeth S.* (2003) 31 Cal.4th 396, 405; *In re Glorianna K.* (2005) 125 Cal.App.4th 1443, 1451 [deny § 909 motion to include subsequent notice to Indian tribes because of authentication objection on appeal and because appellant unable to respond]; but see *In re S.M.* (2004) 118 Cal.App.4th 1108, 1117, fn. 5; *In re L.B.* (2003) 110 Cal.App.4th 1420, 1426; *In re C.D.* (2003) 110 Cal.App.4th 214, 226.)

NOTICE: SUSPEND COURT PROCEEDINGS FOR TEN DAYS

“In accordance with the ICWA (25 U.S.C. § 1912(a)), all proceedings should have been suspended until a minimum of 10 days after the Tribe received the notice.” (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 471; accord, *In re Jonathan D.* (2001) 92 Cal.App.4th 105, 111.) Thus, “state court have no jurisdiction to proceed with dependency proceedings involving a possible Indian child until a period of at least 10 days after the receipt of such notice.” (*Id.*, at p. 474.) “Once formal notification is given to the tribe(s), proceedings cannot commence until all applicable time periods have passed. (25 U.S.C. § 1912(a).)” (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 476; accord, *In re Jonathan D.* (2001) 92 Cal.App.4th 105, 110; *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267; see *In re Louis S.* (2004) 117 Cal.App.4th 622, 634 [thus reviewed the order from the 12 month review hearing as well]; but see *In re Brooke C.* (2005) 127 Cal.App.4th 377, 384 [lack of notice not jurisdictional error]; *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1410-1411.)

Welfare and Institutions Code sections 224.3, subdivision (e)(3) and 224.2 require waiting 60 days after sending notice before making a court finding. (*In re Justin S.* (2007) 150 Cal.App.4th 1426, 1437.) Failure to wait 60 days after notice did not matter when there was no evidence an Indian tribe sought to intervene within 60 days. (*In re N.M.* (2008) 161 Cal.App.4th 253, 266-267.)

NOTICE: NO MORE NOTICE WHEN TRIBE INTERVENES

Need not send initial notice anymore once a tribe intervenes. (*In re Krystle D.*

(1994) 30 Cal.App.4th 1778.)

NOTICE: IMPLIED FINDING OF THE COURT

A court's implied finding that ICWA did not apply. (*In re Asia L.* (2003) 107 Cal.App.4th 498, 506; *In re Levi U.* (2000) 78 Cal.App.4th 191 [no reply implies tribe wishes not to intervene], but see *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 705.)

“While the petitioning agency may have the duty to provide ICWA notice, it is the role of the juvenile court, not the agency, to determine whether the ICWA notice is proper.” (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 852, relying on *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1266-1267 and also citing *In re Jeffrey A.* (2002) 103 Cal.App.4th 1103, 1108; *In re Marianna J.* (2001) 90 Cal.App.4th 731, 739; *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 703, 705.)

NOTICE: WAIVER

Waiver: Failure to object to lack of notice under ICWA does not waive the issue. (Cal. Rules of Court, rule 1439(m) [enacted in 1995]; *In re J.T.* (2007) 154 Cal.App.4th 986, 991; *In re Nikki R.* (2003) 106 Cal.App.4th 844, 849; *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1408; *In re H. A.* (2002) 103 Cal.App.4th 1206, 1211; *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 707; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 257-258 [nor was it invited error; even if brought after terminating services]; *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267-1268 [disagreeing with *Riva M.* because tribe refused to intervene and court used the higher burden of proof, and *Pedro N.* because in that case attempted to undo jurisdiction after termination of parental rights]; *In re Marinna J.* (2001) 90 Cal.App.4th 731, 738-739 [parental inaction could not waive rights of tribe, disagreeing with *Pedro N.*]; see *In re Stephanie M.* (1994) 7 Cal.4th 295, 316; *In re Desiree F.* (2000) 83 Cal.App.4th 460, 471; *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1425 [“parents are not necessarily knowledgeable about tribal government or membership and their interests may diverge from those on the tribe and those of each other”]; *In re Gerardo A.* (2004) 119 Cal.App.4th 988, 993 [no waiver of inadequate notice when the notice was not sent to the parent]; *In re Riva M.* (1991) 235 Cal.App.3d 403, 411; *In re Pedro N.* (1995) 35 Cal.App.4th 183 [parent with knowledge of ICWA applicability waives notice issues when failed to challenge the court's action until after termination of parental rights; but *Marinna J.* and *Dwayne P.*].)

“We are well aware that trial counsel for a parent in dependency proceedings rarely bring ICWA notice deficiencies to the attention of the juvenile court. That job, it seems, is routinely left to appellate counsel for the parent.” (*In re Justin S.* (2007) 150 Cal.App.4th 1426, 1436.)

Waiver: Failing to object to defect in the notice at a remand hearing waives the claim. (*In re N.M.* (2008) 161 Cal.App.4th 253, 269; *In re Amber F.* (2007) 150

Cal.App.4th 1152, 1156 [failure to object to defects in the notice on remand waives the issue]; *In re X.V.* (2005) 132 Cal.App.4th 794, 802-804 [failure to object to defects in notice on remand waives the issue on appeal]; but see *In re Alicia M.* (2008) 161 Cal.App.4th 1189, 1195-1197 [6th District holds there is no waiver, especially when the prior problem was failure to inquire and current problem was notice sent to the wrong addresses].)

Waiver: But a parent waives ICWA issues when he or she states there is no Indian heritage. (*In re E.H.* (2006) 141 Cal.App.4th 1330, 1334.)

Waiver: Not objecting to failure to send notice to appellant as the “Indian parent” waived without objection. (*In re Jeffrey A.* (2002) 103 Cal.App.4th 1103, 1108; *In re L.B.* (2003) 110 Cal.App.4th 1420, 1426.)

Waiver: A parent waives the failure of CPS to make a better inquiry. (*In re S.B.* (2005) 130 Cal.App.4th 1148, 1160.)

Standing: Non-Indian parent has standing to raise ICWA. (*In re Jonathon S.* (2005) 129 Cal.App.4th 334, 339; but see *In re S.M.* (2004) 118 Cal.App.4th 1108, 1115, fn. 3 [dictum]; *In re Isayah C.* (2004) 118 Cal.App.4th 684, 693-694, fn. 9 [dictum].)

NOTICE: REMEDY

Tribe cannot invalidate proceedings where notice was provided and tribe participated with general appearances. (*In re Krystle D.* (1994) 30 Cal.App.4th 1778.)

Remand to give notice; if not tribe intervenes, the juvenile court shall reinstate its orders. (*In re Rayna N.* (2008) 163 Cal.App.4th 262, 207-208 [even after amendments to Welf. & Inst. Code, § 224.2, subd. (d)]; *People v. Lincoln* (2007) 157 Cal.App.4th 196, 185-186 [holding limited remand is appropriate]; *In Francisco W.* (2006) 139 Cal.App.4th 695, 704-10 [holding that limited remand is the appropriate remedy]; *In re I.G.* (2005) 133 Cal.App.4th 1246, 1255 [remand to the supervising dependency judge for expedited adjudication]; *In re Brooke C.* (2005) 127 Cal.App.4th 377, 385 [relief is limited to sending notice]; *In re Suzanna L.* (2002) 104 Cal.App.4th 223, 237; *In re H. A.* (2002) 103 Cal.App.4th 1206, 1215 [“limited remand”]; *In re Jeffrey A.* (2002) 103 Cal.App.4th 1103, 1109; *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 709; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 261; *In re Jonathan D.* (2001) 92 Cal.App.4th 105, 111-112; but see *Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779, 485 [reversed the order terminating parental rights because the court potentially used the wrong burden of proof].) When remand for new ICWA notice, the social worker must give notice to the parent and counsel who must have an opportunity to be heard. (*In*

re Justin S. (2007) 150 Cal.App.4th 1426, 1434-1435.)

With a limited remand for ICWA notice, a parent cannot file a section 388 petition. (*In re Terrance B.* (2006) 144 Cal.App.4th 965, 973-974.)

When reverse, do not reverse all orders. (*In re S.M.* (2004) 118 Cal.App.4th 1108, 1119, fn. 6.) Reverse only the order appealed from. (*In re Jonathon S.* (2005) 129 Cal.App.4th 334, 340; *In re Brooke C.* (2005) 127 Cal.App.4th 377, 385.)

Prejudice: “Section 1914 of the Act provides that any action placing an Indian child in foster care or terminating parental rights may be invalidated upon showing that section 1911, 1912, or 1913 of the Act has been violated.” (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1426.)

“The juvenile court’s failure to secure compliance with the notice provisions of the Act is prejudicial error.” (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1424.) “Courts have consistently held failure to provide required notice requires remand unless the tribe has participated in the proceedings or expressly indicated they have no interest in the proceedings.” (*Ibid.*) Defective notice is “‘usually prejudicial.’ [Citation.]” (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 849-850; *id.* at pp. 854-855 [unless additional evidence shows remand would be futile, must remand for the juvenile court to make the determination].) Failure to properly notify the tribe requires reversal of all orders. (*In re Mary G.* (2007) 151 Cal.App.4th 184, 211 [disagreeing with *Rebecca R.* (*infra*)]; *In re Jonathan D.* (2001) 92 Cal.App.4th at p. 111 [same]; *In re Marinna J.* (2001) 90 Cal.App.4th 731, 738-739; *In re Desiree F.* (2000) 8 Cal.App.4th 460, 472; *In re Derek W.* (1999) 73 Cal.App.4th 828; but see *In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1431 [do not reverse unless it was a miscarriage of justice; here there was no evidence the parents would have reported Indian ancestry if asked]; *In re J. N.* (2006) 138 Cal.App.4th 450, 461-462 [though there is no indication the parents had Indian ancestry]; *In re S.B.* (2005) 130 Cal.App.4th 1148, 1162 [error in notice harmless when the tribe actually participates, the minor would not have been found to be an Indian child, or when the court complied with the higher standard of proof]; *In re Christopher I.* (2003) 106 Cal.App.4th 533, 566-567 [substantial compliance sufficient; failure to notify BIA harmless when tribe decided minor was not eligible]; *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1413 [not reversible per se, harmless here based on subsequent notice sent to BIA]; *In re Junious M.* (1983) 144 Cal.App.3d 786, 794, fn. 8 [lack of notice may not always be prejudicial].) “Since the failure to give proper notice of a dependency proceeding to a tribe with which the dependent child may be affiliated forecloses participation by the tribe, notice requirements are strictly construed.” (*In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267 [failure to strictly comply with the notice requirement is prejudicial error].)

Adoption invalid if not comply with ICWA. (25 U.S.C. § 1914; *In re Desiree F.*

(2000) 83 Cal.App.4th 460, 473-476; but see *In re Laura F.* (2000) 83 Cal.App.4th 583, 594.)

Defect in notice is harmless when the tribe appears in court but chooses not to request any change in orders. (*In re Miracle M.* (2008) 160 Cal.App.4th 834, 846-847.)

Prejudice: Ordering adoption on clear and convincing evidence instead of beyond a reasonable doubt was error but harmless when the parent failed two rehabilitations programs. (*Adoption of Hannah S.* (2006) 142 Cal.App.4th 988, 997-998.)

Prejudice: Violation of state statute on ICWA notice is subject to harmless error analysis. (*In re H.B.* (2008) 161 Cal.App.4th 115, 121-122.)

INTERVENTION:

Response by tribe from someone not identified as the chair or a designated chair does not make the tribe's denial to intervene valid. (*In re H. A.* (2002) 103 Cal.App.4th 1206, 1214.)

If the juvenile court has information that the child is "or may be an Indian child, the court shall proceed as if the child is an Indian child . . . complying with the Act and this rule." (Cal. Rules of Court, rule 1439(e).)

Even if the tribe does not respond to notice, the Act shall be applied to the entire proceeding if the court has reason to now the child is an Indian child. (Cal. Rules of Court, rule 1439(c)(3) & (e).) However, only notice and further inquiry is required if the child may only possess Indian ancestry. (Cal. Rules of Court, rule 1439(e).)

Failure of tribe to respond should be seen as a finding the child does not qualify. But "Absent evidence the notice was sufficient, a tribe's nonresponse may not be deemed 'tantamount to determinations that the minor [is] not an "Indian child" within the meaning of the [ICWA]. [Citations.]'" (*In re Karla C.* (2003) 113 Cal.App.4th 166, 178.)

Under 25 U.S.C. § 1911(a), the Indian tribe has exclusive jurisdiction if the child lives on a reservation. However, California courts have concurrent civil jurisdiction under Public Law 280 (18 U.S.C. § 1162(a) [see also 28 U.S.C. § 1360(a)]). Thus, California dependency courts would have jurisdiction. (See *In re Laura F.* (2000) 83 Cal.App.4th 583; *Native Village of Venetie I.R.A. Council v. State of Alaska* (9th Cir. 1991) 944 F.2d 548.) Under Public Law 280, 11 U.S.C. § 1162(a) and 28 U.S.C. § 1360(a) creates five mandatory states which have jurisdiction over Indians in the state, and other states can opt in. (*Doe v. Mann* (9th Cir. 2005) 415 F.3d 1038, 1048, 1050-1051.) In those states, tribes do not have exclusive jurisdiction over minors on reservations. (*Doe v. Mann* (9th Cir. 2005) 415 F.3d 1038, 1040, 1068.) "ICWA

subsection 1911(b) authorizes transfer of jurisdiction to tribal courts regardless of [Public Law] 280,” and regardless of whether a tribe complies with section 1918. (*In re C.R.H.* (Alaska 2001) 29 P.3d 849, 854.) State jurisdiction in California is exclusive unless the tribe successfully petitions to resume jurisdiction under § 1918, then state jurisdiction is concurrent and not exclusive. (*In re M.A.* (2006) 137 Cal.App.4th 567, 574.) Section 1911(b) authorized transfer to the tribe regardless of Public Law 280 and the tribe’s compliance with section 1918. (*In re M.A.* (2006) 137 Cal.App.4th 567, 593.)

If the child does not live on a reservation, the matter shall be transferred to a tribal court unless there is good cause. (25 U.S.C. § 1911(b); Cal. Rules of Court, rule 1439(c); see *In re Desiree F.* (2000) 83 Cal.App.4th 460, 469; *Robert T.* (1988) 200 Cal.App.3d 657 [issue handled as a motion on forum non conveniens]; but see *In re Larissa G.* (1996) 43 Cal.App.4th 505 [objection by either parent vetoed transfer].)

California courts view Indian courts as independent sovereigns. (*In re M.M.* (2007) 154 Cal.App.4th 897, 908-909.)

An Indian tribe may appear on its own behalf. (Cal. Rules of Court, rules 1410(b)(7), 1412(i).)

A tribe cannot relitigate the applicability of ICWA in federal court. (*Morrow v. Winslow* (10th Cir. 1996) 94 F.3d 1386, 1390 [the doctrine of *Younger* abstention prevented the issuance of a federal injunction during an ongoing state custody proceeding]; *Comanche Indian Tribe of Okla. v. Hovis* (10th Cir. 1995) 53 F.3d 298, 303 [relying on collateral estoppel]; *Kiowa Tribe of Okla. v. Lewis* (10th Cir. 1985) 777 F.2d 587, 592 [relying on res judicata].) But the federal court can consider an ICWA issue and reverse a state juvenile court if the matter was not litigated in state appellate courts. (*Doe v. Mann* (9th Cir. 2005) 415 F.3d 1038, 1047.) The tribe has a right to effective assistance of counsel. (*Doe v. Mann* (N.D. Cal. 2003) 285 F.Supp.2d 1229, 1239-1240, aff’d, *Doe v. Mann* (9th Cir. 2005) 415 F.3d 1038.)

Waiver: Tribe that intervened waives previous orders by not appealing. (*In re Liliana S.* (2004) 115 Cal.App.4th 585, 589.)

Appealability: An order transferring a case from a California court to a tribal court has been appealed twice without consideration of whether the court of appeal has jurisdiction. (See *In re M.A.* (2006) 137 Cal.App.4th 567, 571, 578; *In re Larissa G.* (1996) 43 Cal.App.4th 505, 508 [reversing the transfer order].) But one court said the California courts lose jurisdiction unless the appellant obtains an immediate stay. (*In re M.M.* (2007) 154 Cal.App.4th 897, 913-916.)

Standard of review: Whether the court properly decided not to transfer to a tribal

court is reviewed for substantial evidence. (*Fresno County Dept. of Children and Family Services v. Superior Court* (2004) 122 Cal.App.4th 626, 644-646.)

REMOVAL:

Indian Child Welfare Act give different evidentiary and procedural rules. (25 U.S.C. § 1912, 1915; *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30.)

Emergency removal and placement is allowed. (*In re Desiree F.* (2000) 83 Cal.App.4th 460.)

Before removal or placement with a non-Indian family, or termination of parental rights, must provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. (25 U.S.C. § 1912(d); *In re Crystal K.* (1990) 226 Cal.App.3d 655, 666; *In re Michael G.* (1998) 63 Cal.App.4th 700 [active measures require clear and convincing evidence]; *In re Matthew Z.* (2000) 80 Cal.App.4th 545 [such a finding may be made when terminate reunification services]; *In re Pima County Juvenile Action* (Ariz. Ct. App. 1981) 635 P.2d 187.) ICWA contemplates services beyond what normally offered. (H. R. Rep. No. 1386, 95th Cong. 2d Sess. 22 (1978).) The rehabilitative services should take into account the prevailing social and cultural conditions and way of life of the child's tribe. (44 Fed.Reg. 67582(D2).) Efforts shall include resources of extended family members, the tribe, Indian social services agencies, and Indian caregivers. (Cal. Rules of Court, rule 1439(k)(2) & (l)(4).) This requirement cannot be waived without an expressed, knowing and intelligent waiver. (Cal. Rules of Court, rule 1439(i)(2) & (j)(2); but see *Letitia V. v. Superior Court* (2000) 81 Cal.App.4th 1009 [failure to provide additional services effectively harmless when parent failed to do services that were court ordered]; *In re William G.* (2001) 89 Cal.App.4th 423 [need not be offered to parent not available to do them].)

No foster placement can be ordered without clear and convincing evidence, including testimony of a qualified expert witness that continued custody is likely to result in serious emotional or physical damage. (25 U.S.C. § 1912(e); *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 704 [applies when previous notice was defective]; but see *In re S.B.* (2005) 130 Cal.App.4th 1148, 1164-1166 [ICWA's requirements for remedial measures and its standard of proof is the same as California's].) Custody means legal or physical custody. (See *In re Crystal K.* (1990) 226 Cal.App.3d 655.) A qualified expert witness requires expertise more than that possessed by a social worker. (H. R. Rep. No. 1386, 95th Cong. 2d Sess. 22 (1978); *In re Pima County Juvenile Action* (Ariz. Ct. App. 1981) 635 P.2d 187; 44 Fed.Reg. 67583, 67593(D4); Cal. Rules of Court, rule 1439(a)(10)(C); Manual of Policies and Procedures, Cal. Dept. of Social Services § 31-

515.14.141; *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 706-707; see *Doe v. Mann* (9th Cir. 2005) 415 F.3d 1038, 1065; but see *In re S.B.* (2005) 130 Cal.App.4th 1148, 1165-1166.) This cannot be waived without an expressed, knowing and intelligent waiver. (See *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 707; *In re Kystle D.* (1994) 30 Cal.App.4th 1778 [can introduce other expert witnesses]; but see *In re Riva M.* (1991) 235 Cal.App.3d 403, 411 [failure to use correct burden of proof waived without objection].)

“In judging the fitness of a particular family, many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists.” H.R. Rep. No. 95-1386, at 10 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7532.

Can depart from preference for placement with Indian family for good cause. (*In re Baby Girl A.* (1991) 230 Cal.App.3d 1611 [good cause includes unsuccessful diligent search for Indian placement, requests of the parents, and extraordinary needs as established by a qualified expert witness]; see *In re Desiree F.* (2000) 83 Cal.App.4th 460 [trauma from moving the minor irrelevant upon flagrant violations of ICWA]; but see *Adoption of Lindsey C.* (1991) 229 Cal.App.3d 404; *In re Liliana S.* (2004) 115 Cal.App.4th 585, 590 [extended family member need not be on a reservation]; *In re Julian B.* (2000) 82 Cal.App.4th 1337, 1346-1347 [family member with criminal record precludes placement under section 361.4]; *In re Matthew Z.* (2000) 80 Cal.App.4th 545 [once makes finding, need not continue to make findings].)

To determine good cause for not placing with Indian family, consider the request of the biological parents or minor, the needs of the minor from the testimony of a qualified expert, unavailability of a suitable family after a diligent search. (*Fresno County Dept. of Children & Family Services v. Superior Court* (2004) 122 Cal.App.4th 626, 642.) There was good cause when the court wished to keep the siblings together. (*Id.* at p. 646.)

“No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” (25 U.S.C. § 1912(f); accord, Cal. Rules of Court, rule 1439(m).)

ICWA provides not additional requirements if a tribe never intervenes. (*In re L.B.* (2003) 110 Cal.App.4th 1420, 1427.)

Standard of review: Review failure to place with Indian family for substantial evidence, even when there was a section 388 petition. (*Fresno County Dept. of Children & Family Services v. Superior Court* (2004) 122 Cal.App.4th 626, 644.)