CALIFORNIA JUDGES BENCHGUIDE

THE INDIAN CHILD WELFARE ACT

CALIFORNIA INDIAN LEGAL SERVICES

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California Judges Benchguide

The Indian Child Welfare Act

Table of Contents

I. Scope and Use of Benchguide

This Benchguide provides an overview of the California laws and procedures for handling Indian child custody proceedings subject to the Indian Child Welfare Act (the "ICWA" or "Act").[1] It should be noted at the very outset that the Act applies to proceedings involving an Indian child regardless of whether the tribe exercises any of its rights under the Act (which are described in detail herein), or is even involved in the case. If an "Indian child" is before the court in a "child custody proceeding," the Act applies.

Under its definition of "child custody proceeding," the Act specifies the types of custody cases to which it does and does not apply. The focus is not on what a proceeding is called, or whether it is a private action or an action brought by a public agency, but on whether the proceeding meets a definition set forth in the Act.[2] The Act covers any temporary placement where the child need not be returned upon demand, and includes placement in a foster home or institution or the home of a guardian or Indian custodian. The Act also covers any proceeding resulting in adoption or termination of parental rights. This would generally include juvenile, family court and probate guardianship actions.

However, by its terms, the Act does not apply to all custody cases. The Act itself does not extend to custody disputes between parents in divorce proceedings, or to placements based on acts that would be criminal if committed by adults.[3] Recent California laws further clarify the divorce exemption to include any custody dispute between parents not resulting in adoption or termination of parental rights.[4]

Readers familiar with California Indian Legal Services' 2000 edition of the Benchguide will note our new format and updated law summaries. This revised edition attempts to focus upon the areas of greatest concern and interest for our readers. This Benchguide includes a summary of the relevant law and procedure, resource information, and appendices which include the text of the Act, the Bureau of Indian Affairs' ("BIA") *Guidelines for State Courts: Indian Child Welfare Act* (the "BIA Guidelines"), California All County Letters/All County Information Notices pertaining to the ICWA, and the text of Senate Bill 678 (SB 678), a 2006 law that brought significant changes to California dependency, family, and probate guardianship law with respect to Indian children. Some information is also provided specific to the ICWA's application in particular types of proceedings.[5]

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[1] 25 U.S.C. § 1901 *et seq.*

[2] 25 U.S.C. § 1903(1).

[3] *Ibid.* Note, however, that the ICWA expressly allows states to adopt higher standards of protection should they choose; for a discussion of California law regarding the ICWA's application in delinquency proceedings, see § XII of this Benchguide ("Delinquency").

[4] *See* §§ IV(A) and IV(B) of this Benchguide ("Proceedings Covered by the Act" and "Proceedings Not Covered by the Act").

[5] *See* §§ XI through XIV of this Benchguide regarding dependency, delinquency, probate guardianship, and family law proceedings.

In addition, the Benchguide incorporates recent California law allowing "tribal customary adoption" (TCA) to be selected as a permanent plan if identified by the tribe.[6] TCA occurs under the laws of a child's tribe and does not require termination of parental rights.[7] This addition to California law, effective July 1, 2010, applies only in dependency cases and is specifically exempted from independent and agency adoptions.[8] The TCA provisions will sunset on January 1, 2014, unless legislation deletes or extends that date.[9] The new statute was borne out of the tensions between tribal cultural norms, existing state law, the desire to have Indian children in permanent safe homes, and an aversion to the legal construct of a parental rights termination. Further adding to the need for TCA in California is the lack of robust tribal court systems. The process of TCA is built around the existing dependency law process, but provides that the tribe will create the framework for the adoption and the state court will adopt the tribe's framework.

This edition also attempts to better address the potential for collaboration between state courts and tribal courts.[10] In a time of continuously shrinking resources, it is all the more important that courts not view the ICWA's purpose as merely jurisdictional. There is at least an equal focus on the provision of services to address behaviors that are placing children and families in peril.

[6] Assem. Bill No. 1325 (2009-2010 Reg. Sess.); 2009 Cal. Stats., ch. 287; Welf. & Inst. Code § 366.24; *see* § XI(E) of this Benchguide ("Tribal Customary Adoption"); *see also* Appendix D of this Benchguide for the full text of AB 1325.

[7] Welf. & Inst. Code § 366.24(c)(10).

[8] Fam. Code § 8600.5.

[9] Welf. & Inst. Code §§ 16508, 316.5(j), and 366.21(n).

[10] *See* §§ III(A)(2)(b)(vii) and V of this Benchguide ("Concurrent Jurisdiction" and "Jurisdiction under the Act").

II. Historical Context

The ICWA significantly impacts proceedings involving the custody of Indian children. In most situations, the Act calls for the placement of Indian children within a specified order of preference, providing for higher evidentiary standards and mandating strict notice procedures. Child custody proceedings and other actions pursuant to state law can be invalidated for failure to follow the ICWA's procedural requirements. Understanding some basic principles of Indian law may help to place the ICWA within a legal context. This section provides the reader with a brief background of general Indian law principles, and also several statistics which underscore the relevance of the Act in California.

A. Basic Principles of Indian Law

Described as "domestic dependent nations," Indian tribes have a unique status in the American legal system.[1] The leading Indian law treatise explains this concept well: "domestic because [Indian tribes] are within the United States and dependent because they are subject to federal power. They are nations because they exercise sovereign power over people, property, and events within their borders."[2] Under the Indian Commerce Clause, Congress has the exclusive authority to regulate commerce with Indian tribes.[3] In general, tribal sovereignty is limited by overriding federal authority only to the extent expressly declared by Congress, or where inconsistent with a tribe's legal status.[4] Consequently, states are preempted from exercising any authority over Indian tribes where doing so would clash with federal authority or policy.[5]

In recent years the U.S. Supreme Court has somewhat narrowed the scope of tribal sovereignty with regard to a tribe's ability to exercise power in "Indian country" over non-tribal members.[6] Despite this trend, the federal government must still exercise its plenary power over Indian tribes consistent with certain federal obligations. The relationship between the U.S. and tribes has been characterized as that between a guardian and ward, with the U.S. having trust responsibilities toward tribes.[7] It is a political relationship between nations, and is not based on a racial classification of Native Americans.[8] Because of this unique relationship, Congress can treat Native Americans differently from other racial or ethnic groups without running afoul of traditional equal protection rules.[9] Indeed, tribes are "distinct… political communities."[10]

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[1] *Cherokee Nation v. Georgia* (1831) 30 U.S. 1, 16-17.
[2] Felix S. Cohen, *Cohen's Handbook of Federal Indian Law* 1 (Nell J. Newton et al. eds., LexisNexis 2005) (1941).
[3] U.S. Const., art. I, § 8, cl. 3.
[4] *See generally New Mexico v. Mescalero Apache Tribe* (1983) 462 U.S. 324; *United States v. Wheeler* (1978) 435 U.S. 313; *Montana v. United States* (1981) 450 U.S. 544.
[5] *Worcester v. Georgia* (1832) 31 U.S. 515; *Williams v. Lee* (1959) 358 U.S. 217; *New Mexico v. Mescalero Apache Tribe* (1983) 462 U.S. 324.
[6] "Indian country" defined at 18 U.S.C. § 1151; *Strate v. A-1 Contractors* (1997) 520 U.S. 438; *Nevada v. Hicks* (2001) 533 U.S. 353; *Plains Commerce Bank v. Long Family Land and Cattle Co.* (2008) 554 U.S. 316.
[7] *Cherokee Nation v. Georgia* (1831) 30 U.S. 1, 17.
[8] *Morton v. Mancari* (1974) 417 U.S. 535, 553-555; *U.S. v. Antelope* (1977) 430 U.S. 641, 645-647.
[9] *Ibid.*
[10] *Worcester v. Georgia* (1832) 31 U.S. 515, 519.

As an incident to sovereignty, tribes have the inherent authority to regulate domestic relations among their members.[11] Tribes also have the authority to regulate other important internal matters, such as tribal membership.[12] In many ways, the ICWA is simply the codification of a tribe's legal rights as they existed before its passage.

In 2006, the California Legislature adopted Senate Bill 678, codifying the ICWA and many provisions of the BIA Guidelines into state law.[13] The clarification of the state's role in ICWA proceedings marked a significant step forward in California's application of the Act. To further clarify application of the Act, the California Rules of Court were expanded to provide practitioners with a more detailed interpretation of the Act's substantive and procedural requirements.[14]

B. Native Americans in California

California tribes are numerous and diverse, reflecting a rich past. All California tribes have been extensively impacted by various colonialism and expansion activities. Among the most commonly documented are the spread of Spanish missions, the Gold Rush, the federal government's secret refusal to ratify 18 signed treaties with California tribes in 1852, militias paid by the state to hunt Indians, the advent of rancherias, and the Indian boarding school system.[15] While it might help state actors to better appreciate the wrongs that Indian people suffered, and by extension the underlying problems that a remedial statute like the ICWA was enacted to address,[16] cataloguing the long history of atrocities against the Native population is too voluminous a task for this publication. One example, however – one that involved both the judicial and legislative bodies of the state – may help to illustrate the basis for the widespread distrust of government by many Indian persons today.

In 1850, California passed the "Act for the Government and Protection of Indians."[17] The actual provisions of the statute stood in stark contrast to its benevolent title. In addition to permitting Indians to be flogged and punished for vagrancy, it permitted any person to go before a state justice of the peace and ask that an Indian who had been convicted and punished by fine to be indentured to that person, for so long as the court felt was called for in order to pay off the fine.[18] Indentured servitude being tantamount to slavery, practices akin to slavery soon sprung up, including auctions at which indentured servants were sold to the highest bidder, as well as persons bailing Indian convicts out of jail in order to acquire their "services."

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[11] *See, e.g., Fisher v. District Court* (1976) 424 U.S. 382 (authority to grant on-reservation adoption); *Nofire v. United States* (1897) 164 U.S. 657 (authority to grant marriage license); *Conroy v. Conroy* (8th Cir. 1978) 575 F.2d 175 (authority to divide marital property).

[12] *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49.

[13] Sen. Bill No. 678 (2005-2006 Reg. Sess.); 2006 Cal. Stats., ch. 838; *see* Appendix C of this Benchguide.

[14] Cal. Rules of Court, Title 5, Div. 2, Ch. 2.

[15] *See*, Professor Edward D. Castillo (1998) California Native American Heritage Commission, *Short Overview of California Indian History*, http://ceres.ca.gov/nahc/califindian.html (last visited on May 15, 2012).

[16] BIA Guidelines §A; *Rich v. Maples* (Cal. 1867) 33 Cal. 102, 105 ("A remedial statute is one which provides a means for the enforcement of a right or the redress of a wrong").

[17] Stats. 1850, ch. 133 (April 22, 1850); *see also*, Kimberly Johnston-Dodds, *Early California Laws and Policies Related to California Indians* (California Research Bureau, California State Library 2002).

[18] Stats. 1850, ch. 133, § 14.

Another provision allowed the courts to authorize the indenture of Indian children, ostensibly under the guise of "apprenticeship."[19] The practical effect of this law was to support the wide-scale kidnapping and sale of Indians, especially young women and children (some as young as three or four).[20] Women and girls were sold for labor or as sexual partners. Children were divided into categories by age and strength and were used for stock management and agriculture, or were trained to act as domestic servants. Reports of the times indicated children for sale were often acquired by the expedient practice of killing their parents, which had the additional benefit of absolving the seller from the need to acquire the permission of a parent for the "apprenticeship."[21]

It has been estimated that as many as 10,000 California Indians were indentured or sold pursuant to this law.[22] These actions and similar, along with illness and starvation, a multitude of local raids, regional conflicts, and wars, have molded a history of attrition from which tribes are still emerging. It is estimated that from the arrival of the Spanish missionaries to the end of the 19th century, the Indian population went from approximately 300,000 to 30,000 – a 90% decline.[23]

The BIA currently recognizes 110 California tribes.[24] Some of these tribes are among the most sophisticated in the United States. However, of the federally-recognized tribes, a significant number also represent formerly terminated tribes which have only been restored in recent years via litigation or legislation. Termination was the process by which Congress ceased to recognize a tribe's government, distributed tribal assets and terminated the federal government's trust relationship with a tribe. Between 1954 and 1966, Congress terminated over 100 tribes and bands, most of them in Oregon and California.[25] A shift in federal policy ended the "termination era" and ushered in a period of critical examination of the termination process, which in turn resulted in a number of lawsuits seeking to restore recognition to terminated tribes.

An example of such a restoration lawsuit involving California tribes is the *Tillie Hardwick* class action.[26] This litigation, settled in the 1980s, reinstated the federal recognition of 17 terminated California tribes.[27] Since the 1980s, a number of California tribes have also been restored either through litigation or legislative acts. However, since tribal operations and governing structures had been interrupted for twenty to forty years or more, it is not uncommon to encounter restored tribes that are in various stages of organization.[28]

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[19] Stats. 1850, ch. 133, § 3.
[20] Kimberly Johnston-Dodds, *Early California Laws and Policies Related to California Indians* 10-12 (California Research Bureau, California State Library 2002).
[21] *Ibid.*
[22] Robert F. Heizer, *The Destruction of California Indians* 219 (University of Nebraska Press 1993).
[23] Sherburne F. Cook, *Historical Demography* in *Handbook of North American Indians, Volume 8 (California)* 91 (R. F. Heizer vol. ed., W. C. Sturtevant gen. ed., Smithsonian Institution 1978).
[24] 74 Fed. Reg. 40218.
[25] American Indian Policy Review Commission, U.S. Congress, *Final Report Submitted to Congress May 17, 1977* 447-453 (U.S. Gov't Printing Office, 1977).
[26] *Hardwick, et al. v. United States, et al.*, No. C-79-1710 (N.D. Cal., December 22, 1983).
[27] *Ibid.*
[28] *See* § IV(C)(4) of this Benchguide for a discussion of federal recognition.

Although the federal government currently recognizes 110 California tribes, there are many more tribes in the state. California is home to many unrecognized tribes as well as tribes terminated in the 1950s and 1960s who were never restored to recognition.[29] Today, Indian reservations and rancherias encompass approximately over 450,000 acres in California, but a number of federally-recognized California tribes have no lands at all. Tribes which do not have reservation lands or any land holdings are known as "landless" tribes. Membership rolls for California tribes range from under 25 people for the very smallest tribes to the Yurok Tribe with over 5,700 members.[30]

In addition, many Native Americans in California belong to out-of-state tribes. When termination and assimilation were regarded as proper federal policies during the 1950s and 1960s, many Indian families were moved to California via a "voluntary" program.[31] The Urban Indian Relocation Program transported thousands away from reservations to designated relocation cities, such as Los Angeles, San Francisco, Oakland and San Jose. In an ironic twist, the program was headed by Dillon S. Myer, who had previously overseen the program under which Japanese-Americans were moved to internment camps during World War II. According to the 2010 Census, 362,801 individuals in California identified as being American Indian or Alaskan Native alone, and an additional 360,424 individuals identified as being American Indian/Alaskan Native in combination with at least one other race.[32] The majority of the state's current Indian population represents Indian people from out-of-state tribes who were relocated.[33] At the 2000 Census, California had the highest American Indian/Alaskan Native population of any state in the nation,[34] and Los Angeles had the largest American Indian/Alaskan Native population of any city in the country with 150,000 reporting such heritage alone or in combination with another race.[35]

Many myths have developed regarding the growth of Indian gaming in California. There is a common misperception that all tribes have casinos and as a consequence all Indians are now wealthy. In fact, out of the 110 federally-recognized tribes in California, just over half of them operate casinos.[36] Furthermore, the profitability of these economic enterprises varies widely

[29] *See* Advisory Council on California Indian Policy, Final Reports and Recommendations to the Congress of the United States Pursuant to Public Law 102-416, "Executive Summary," p. 16 (September 1997).
[30] California Indian Assistance Program, 2004 Field Directory of the California Indian Community, Dep't of Hous. & Comty. Dev. (2004); email from E. C. Jackson, Enrollment Director, Yurok Tribe to CILS (March 2, 2012).
[31] *See* Advisory Council on California Indian Policy, Final Reports and Recommendations to the Congress of the United States Pursuant to Public Law 102-416, "The ACCIP Historical Overview Report: The Special Circumstances of California Indians," p. 15 (September 1997).
[32] U.S. Census Bureau, *The American Indian and Alaska Native Population: 2010 (C2010BR-10)*, Table 2 (January 2012).
[33] Stella Ogunwole, *We the People: American Indians and Alaska Natives in the United States*, U.S. Census Bureau (February 2006) http://www.census.gov/prod/2006pubs/censr-28.pdf (last visited May 15, 2012), and U.S. Census Bureau, *Census 2000 PHC-T-18: American Indian and Alaska Native Tribes in California: 2000* (June 2004) http://www.census.gov/population/www/cen2000/briefs/phc-t18/tables/tab019.pdf (last visited May 15, 2012).
[34] U.S. Census Bureau, *(ST-99-46) States Ranked by American Indian and Alaska Native Population, July 1, 1999* (August 30, 2000) Population Estimates Program, Population Division, U.S. Census Bureau, Washington, DC 20233, http://www.census.gov/population/estimates/state/rank/aiea.txt (last visited May 15, 2012).
[35] U.S. Census Bureau, *More Than 300 Counties Now "Majority-Minority*, U.S. Census Bureau News (August 9, 2007).
[36] National Indian Gaming Commission, U.S. Dept. of the Interior, *Gaming Tribe Report* (July 6, 2011).

depending primarily on location. A recent national study indicates that while economic indicators improved for on-reservation Indians in the decade between 1990 and 2000, and more significantly for gaming tribes than non-gaming tribes, Indians on reservations are still economically disadvantaged in comparison to the United States' population as a whole. For example, the average household income for Indians is still less than half that of the general population, the Indian family poverty rate is three times higher than the national average, the unemployment rate is twice as high for Indians, and Indians have half the college graduation rate of the general population.[37]

⇨ **BEST PRACTICE**: *A federally-recognized tribe is a tribe for all purposes of the ICWA, whether located in California or in another state. Under California law, a court may allow a non-federally-recognized tribe to participate in a dependency proceeding involving a child who would otherwise be an Indian child under Section 1903(4) of the ICWA.*[38]

[37] *See,* Jonathan B. Taylor and Joseph P. Kalt, *American Indians on Reservations: A Databook of Socioeconomic Change Between the 1990 and 2000 Censuses,* The Harvard Project on American Indian Economic Development (Harvard University 2005).

[38] Fam. Code § 185; Welf. & Inst. Code § 306.6.

III. Overview of the Indian Child Welfare Act

A. ICWA Policy and Legislative History

Congress passed the ICWA to counteract widespread misuse of state child protection powers with regard to Indian children, which had resulted in wrongful removal of such children from their Indian families and subsequent placement with non-Indian families.[1] The ICWA helps to fulfill an important aspect of the federal government's trust responsibility to tribes by protecting the bond between Indian children and their tribes, which is by definition in the "best interest" of those children.[2] In doing so, the ICWA ultimately serves both the best interests of Indian children and the stability and security of Indian tribes and families.[3]

Because the Act protects the best interests of Indian children as well as the rights of parents, Indian custodians, and Indian tribes, the Act applies regardless of whether a child's tribe exercises any of its rights under the Act, or is even involved in the case.

1. The Problem Leading to the Passage of the ICWA

Congressional hearings in the mid-1970s revealed a pattern of wholesale public and private removal of Indian children from their homes, undermining Indian families and threatening the survival of Indian tribes and tribal cultures.[4] At the national level, studies in the years leading up to the passage of the ICWA found that:

- Indian children were approximately six to seven times as likely as non-Indian children to be placed in foster care or adoptive homes;[5] and,
- Approximately 25-35% of all Indian children were removed from their homes and placed in foster care or adoptive homes, or institutions such as boarding schools.[6]

In California specifically:

- Indian children were more than eight times as likely as non-Indian children to be placed in adoptive homes;
- Over 90% of California Indian children subject to adoption were placed in non-Indian homes; and,
- 1 of every 124 Indian children in California was in a foster care home, compared to a rate of 1 in 367 for non-Indian children.[7]

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[1] 25 U.S.C. § 1901.
[2] *Ibid.*
[3] 25 U.S.C. § 1902.
[4] *Indian Child Welfare Program: Hearings Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs* (1974) 93rd Cong., 2d Sess. 3 (statement of William Byler) (http://narf.org/icwa/federal/lh/hear040874/, last visited May 15, 2012).
[5] Sherwin Broadhead et al., *Report on Federal, State, and Tribal Jurisdiction: Final Report to the American Indian Policy Review Commission* 81-85 (U.S. Gov't Printing Office 1976).
[6] H.R. Rep. 95-1386, 1978 U.S.C.C.A.N. 7530, 7531.
[7] Sherwin Broadhead et al., *Report on Federal, State, and Tribal Jurisdiction: Final Report to the American Indian*

Congress determined that Indian children who are placed for adoption into non-Indian homes frequently encounter problems in adjusting to cultural environments much different than their own.[8] Such problems include being stereotyped into social and cultural identities which they know little about, and a corresponding lack of acceptance into non-Indian society.[9] Due in large part to states' failures to recognize the different cultural standards of Indian tribes and the tribal relations of Indian people, Congress concluded that the Indian child welfare crisis was of massive proportions and that Indian families face vastly greater risks of involuntary separation than are typical for our society as a whole.[10] These involuntary separations created social chaos within tribal communities. The emotional problems embedded in Indian children hampered their ability as adults to positively contribute to tribal communities, and left families in extended mourning mode, significantly impairing their ability to meet their tribal citizenship responsibilities.

2. California's Implementation of the ICWA via Senate Bill 678 and Other Laws

a. Policy and Purpose in Applying the ICWA through State Statute

Prior to the adoption of Senate Bill 678 in 2006, many California tribes struggled to convince courts, county social workers, and attorneys that the ICWA was not just a rote procedural hurdle, but rather that they should embrace the spirit and purpose of the ICWA. Despite the enactment of the Act in 1978, there arose in the years leading up to SB 678 a widespread perception of institutional resistance and a belief that the Act's application had often been inconsistent and perfunctory. For example, essential requirements such as proving the detriment of returning a child to his or her Indian family, a requirement that can be satisfied only with expert testimony, were frequently met with boilerplate declarations ratifying state agencies' actions. Some attempts to transfer cases to tribal court were resisted by counties due to a perception that tribal forums were inferior.

When state courts considered permanent plans for tribal children, adoption was prioritized, rather than guardianship, in spite of the effect which the termination of parental rights often has on a child's tribal membership and identity. Prior to the passage of SB 678, if the parents did not comply with or complete a reunification plan, the range of permanence options narrowed and was weighted toward termination of the parent-child relationship – a concept that is alien and offensive to many Indian tribes due to the emotional harm associated with the disassociation of the child from his or her cultural transmitters, as well as the loss of benefits and rights available to tribal members.

Procedurally, in order to avoid termination of parental rights, a recognized exception had to exist. Such exceptions included consideration of a sibling bond, for example, but did not include any consideration of the effects that terminating parental rights would have on the child's

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Policy Review Commission 81-82 (U.S. Gov't Printing Office 1976).

[8] *See* H.R. Rep. No. 95-1386, 1978 U.S.C.C.A.N. 7530, 7531-7532.

[9] Dr. Joseph Westermeyer, *Cross-Racial Foster Home Placement Among Native American Psychiatric Patients*, 69 Journal of the Nat'l Medical Assoc. 231, 231-232 (1977); *Indian Child Welfare Program: Hearings Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs*, 93rd Cong., 2d Sess. 46-50 (1974) (testimony of Dr. Westermeyer).

[10] *See* H.R. Rep. No. 95-1386, 1978 U.S.C.C.A.N. 7530, 7531-7532.

relationship to his or her tribal community and culture. Once adoption was identified as the permanent plan, there was no provision for an enforceable post-adoption agreement allowing the child a way to maintain contact with extended family and the tribal community.

Before SB 678 took effect, the Act had generally been applied through the California Rules of Court, case law, and the BIA Guidelines, but had not been codified on a state level. This lack of codification led to inconsistent applications of the Act.[11] SB 678 was intended to harmonize federal legislation and intent with California law.[12] In a way, it was one of the most far-reaching state laws in the country; because California has such a large population of Indians from non-California tribes,[13] and because any Indian child who falls under the jurisdiction of the dependency, delinquency, family and probate courts is within its scope, the provisions of SB 678 could potentially affect hundreds of tribes across the country. The final legislation was the culmination of efforts by State Senator Denise Moreno Ducheny (its sponsor), California Indian Legal Services, and a host of others.

With the enactment of Assembly Bill 1325 (AB 1325) in 2009, California instituted "tribal customary adoption" as a new permanency option in dependency cases that does not include termination of parental rights (and the resulting severance of the cultural and social ties that the ICWA endeavors to protect).[14] Credit for this legislation is due in large part to the Soboba Band of Luiseño Indians.

b. Key Provisions

A number of the ICWA's and SB 678's key provisions are briefly summarized below. More detailed coverage of each of these provisions appears in later sections of this Benchguide.

i. Applicability

The ICWA and complementary California law apply where Indian children are involved in foster care placements, guardianships, and conservatorships, if in any of these types of proceedings (whether voluntary or involuntary, temporary or long-term) the parent or Indian custodian does not retain the right to have the child returned upon demand;[15] custody awards to a non-parent where a parent objects;[16] terminations of parental rights (including a petition to declare an Indian child free from the custody or control of a parent);[17] preadoptive and adoptive placements (including voluntary relinquishments);[18] and, certain delinquency proceedings.[19]

[11] *See, e.g.,* § III(C) of this Benchguide ("Constitutionality and the 'Existing Indian Family Exception'").
[12] Ducheny, Denise M., Senate Daily Journal for the 2005-2006 Regular Session, pp. 5606–5607 (August 31, 2006).
[13] *See* § II(B) of this Benchguide ("Native Americans in California").
[14] *See* § XI(E) of this Benchguide ("Tribal Customary Adoption") and Appendix D.
[15] 25 U.S.C. § 1903(1)(i); Fam. Code § 170(c).
[16] Fam. Code §§ 170(c), 3041(e).
[17] 25 U.S.C. § 1903(1)(ii); Fam. Code §§ 170(c), 7822(e), 7892.5.
[18] 25 U.S.C. § 1903(1)(iii) and (iv); Fam. Code § 8620.
[19] *See* § XII of this Benchguide ("Delinquency Proceedings").

ii. Notice

One of the most crucial requirements of the ICWA, and yet one of the most frequent areas of noncompliance,[20] is the provision of notice whenever "it is known or there is reason to know that an Indian child is involved" in a proceeding.[21] Lack of proper notice may result in a parent, Indian custodian, or tribe being unaware of the very existence of a proceeding, and thus prejudicially denied the chance to exercise legal rights under the Act in a timely manner.[22]

Notice must be sent to the child's parents or legal guardian, Indian custodian (if any), and to all federally-recognized tribes of which the child is or may be a member (or in some circumstances, the BIA).[23] Notice must provide certain details in order to allow the tribe(s) to confirm membership or eligibility for membership and to advise the parties of their rights. For the purposes of providing proper notice, any party who knowingly and willfully misrepresents or conceals a fact regarding whether a child is an Indian child is subject to sanctions by the court.[24]

iii. Duty to Inquire

SB 678 imposed an affirmative and continuing duty to inquire whether a child is or may be an Indian child.[25] The continuing nature of this duty means, for example, that a duty to provide notice will be triggered even in the midst of a case if information comes to light that was not previously available suggesting that the child is or may be Indian.[26] This duty applies to all of the following: the courts, court-connected investigators, county welfare departments, probation departments, licensed adoption agencies, adoption service providers, investigators, petitioners, appointed guardians or conservators, and appointed fiduciaries.[27]

iv. Active Efforts

The ICWA requires that any party seeking a foster care placement or a termination of parental rights must first show that "active efforts" have been made by that party "to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."[28] SB 678 incorporated this requirement into the Family Code, Probate Code, and Welfare & Institutions Code.[29]

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[20] *In re I.G.* (2005) 133 Cal.App.4th 1246, 1254-1255.

[21] 25 U.S.C. § 1912(a); *see* Fam. Code § 180(c), Prob. Code § 1460.2(a); Welf. & Inst. Code § 224.2(b); Cal. Rules of Court, rule 5.481(b); *see* § VI of this Benchguide ("Notice").

[22] 25 U.S.C. § 1914; *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1424-1426; *In re Marinna J.* (2001) 90 Cal.App.4th 731, 739.

[23] 25 U.S.C. § 1912(a); Fam. Code, § 180; Prob. Code § 1460.2; Welf. & Inst. Code § 224.2; Cal. Rules of Court, rule 5.481(b).

[24] Welf. & Inst. Code § 224.2(e).

[25] Welf. & Inst. Code § 224.3(a); Cal. Rules of Court, rule 5.481(a); *In re Desiree F.* (2000) 83 Cal.App.4th 460, 470; *see* § VI(A) of this Benchguide ("When Notice and Inquiry are Required").

[26] Welf. & Inst. Code § 224.3(f); *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1424; *In re Junious M.* (1983) 144 Cal.App.3d 786 (notice required even though Indian heritage raised for first time in midst of hearing to have minor declared free from parental custody and control, five (5) years after dependency was first established).

[27] Cal. Rules of Court, rule 5.481(a).

[28] 25 U.S.C. § 1912(d).

[29] Fam. Code §§ 177(a), 3041(e), and 7892.5; Prob. Code § 1459.5(b); Welf. & Inst. Code §§ 224.6(b), 361(d),

The ICWA does not define active efforts. While SB 678 did not define the term either, it set forth several provisions to assist courts and responsible parties in ensuring that active efforts are truly made. Specific active efforts will necessarily vary on a case-by-case basis,[30] as they must be designed "to accomplish the goal which Congress has set: to avoid the breakup of Indian families whenever possible" by addressing the underlying problems which threaten a particular family.[31] In a proceeding involving an Indian child, active efforts must take into account the prevailing social and cultural values of the Indian child's tribe.[32] Furthermore, any resources available through the child's "extended family, tribe, tribal and other Indian social service agencies, and individual Indian caregiver service providers" must be utilized when making active efforts.[33] The party responsible for making active efforts must prove to the court that they were made, and were unsuccessful, by clear and convincing evidence.[34]

SB 678 also created additional "active efforts" requirements not related to the provision of remedial and rehabilitative services. These include making (and documenting in the record) active efforts to comply with the ICWA's placement preferences,[35] and, if there is no preferred placement available, making active efforts to place the child "with a family committed to enabling the child to have extended family visitation and participation in the cultural and ceremonial events of the child's tribe."[36]

Updates to the California Rules of Court in 2008 further provide that "active efforts" shall include the responsible party taking any necessary steps towards enrolling a child in a tribe if the child is eligible for membership in that tribe.[37]

⇨ **BEST PRACTICE**: *Strong judicial oversight of the enrollment status of an Indian child is important. The court should determine a child's enrollment status as early in the case as possible, and if the child is eligible for membership but not enrolled, should ensure that the party responsible for making active efforts does everything necessary, in consultation with tribal officials, to enroll the child as soon as possible.*[38] *No matter where an Indian child is ultimately placed, failure to enroll can jeopardize a myriad of benefits that are assuredly in the child's best interest, including (but not necessarily limited to) inheritance rights, tribal land assignments, per capita payments, health care benefits, school enrollment, educational support services, housing, hunting and fishing rights, the right to gather other natural resources, employment training services, and priority hiring rights.*

361.7, and 366.26(c)(2)(B); *see also*, § VIII of this Benchguide ("Evidentiary Requirements").

[30] Welf. & Inst. Code § 361.7(b).

[31] *Letitia V. v. Superior Court* (2000) 81 Cal.App.4th 1009, 1016.

[32] Welf. & Inst. Code § 361.7(b).

[33] *Ibid*.

[34] *In re Michael G.* (1998) 63 Cal.App.4th 700, 712.

[35] Welf. & Inst. Code § 361.31(k).

[36] Welf. & Inst. Code § 361.31(i).

[37] Cal. Rules of Court, rules 5.482(c) and 5.484(c).

[38] Whether a child qualifies for membership, and what documentation or other evidence is required for enrollment, are decisions left exclusively to the child's tribe. *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49.

v. Qualified Expert Witness

Prior to a foster care placement (as defined by the Act) or a termination of parental rights, the ICWA requires that a "qualified expert witness" testify that a parent's or Indian custodian's continued custody of a child would be likely to result in serious physical or emotional harm.[39] SB 678 addressed this subject in two significant ways – one, by providing examples of certain persons likely to qualify as expert witnesses and the probable characteristics thereof, and two, by prohibiting the use of an employee of the person or party seeking a foster care placement or termination of parental rights.[40] The most common effect of the latter provision is to prevent a county social worker from acting as an expert witness in a case where the county is seeking foster care placement or termination of parental rights.

A further limitation on the testimony of the qualified expert witness applies to the use of a declaration or affidavit in lieu of actual testimony. Over the course of time, social services agencies and attorneys, when confronted with the expert witness requirement, would instead submit a written declaration to support the necessary findings. Despite the fact that the ICWA specified the need for expert testimony, the practice became widespread. The changes made by SB 678 now require a stipulation in writing by the parties in order to prove a case by declaration, as well as the court's satisfaction that the stipulation was "knowingly, intelligently and voluntarily" entered into.[41]

vi. Transfer of Case

An Indian child's tribe can petition the court to transfer a child custody proceeding involving a child who is not domiciled or residing on a reservation to tribal court at any time.[42] The only specific limitations are where a parent objects to the transfer or the court finds good cause to deny the transfer.[43] The good cause standard for a court to disallow a transfer was not defined in the ICWA. SB 678 defined a good cause standard and specifically provided that "[s]ocioeconomic conditions and the perceived adequacy of tribal social services or judicial systems may not be considered in a determination that good cause exists."[44] Many tribal courts operate informally on tribal custom and tradition, which the ICWA itself permits.[45]

In California, a reunification plan might last as long as 18 months. SB 678 established that it is not an unreasonable delay in filing a petition for a transfer to tribal court to wait until reunification efforts have failed and services have been terminated.[46] Simply put, good cause to deny a transfer does not exist solely by virtue of the fact that a tribe chooses to afford a parent

[39] 25 U.S.C. § 1912(e) and (f); *see* § VIII(B)(1) of this Benchguide ("Selection of an Expert Witness").
[40] Welf. & Inst. Code § 224.6; Fam. Code § 177(a); Prob. Code § 1459.5(b); Cal. Rules of Court, rule 5.484(a).
[41] Welf. & Inst. Code § 224.6(e); Cal. Rules of Court, rule 5.484(a)(2); *see* Fam. Code § 177(a), Prob. Code § 1459.5(b).
[42] 25 U.S.C. § 1911(b); Welf. & Inst. Code § 305.5(b); Cal. Rules of Court, rule 5.483(b); *see* Fam. Code § 177(a), Prob. Code § 1459.5(b); *see also* § V of this Benchguide ("Jurisdiction under the Act").
[43] *Ibid.*
[44] Welf. & Inst. Code § 305.5(c).
[45] 25 U.S.C. § 1903(12).
[46] Welf. & Inst. Code § 305.5(c)(2)(B); Cal. Rules of Court, rule 5.483(d)(2)(B); *see* Fam. Code § 177(a), Prob. Code § 1459.5(b).

time to comply with court-ordered services before seeking a transfer. SB 678 also provided that the burden of establishing good cause to deny a transfer to tribal court rests on the party objecting to the transfer.[47]

Normally, when a child is to be placed out of state, the Interstate Compact on Placement of Children (ICPC) applies.[48] SB 678 added Family Code section 7907.3 to clarify that the ICPC does not apply to "any placement, sending, or bringing of an Indian child into another state pursuant to a transfer of jurisdiction to a tribal court under Section 1911 of the [ICWA]."[49]

vii. Concurrent Jurisdiction

The ICWA provides for both state court and tribal court jurisdiction over an Indian child.[50] In California, jurisdiction is a somewhat complicated matter due to the interaction between the ICWA and Public Law 83-280,[51] but it is safe to say that Indian tribes and the state generally share concurrent jurisdiction over Indian child custody proceedings.

The potential benefits of state and tribal cooperation within this jurisdictional framework are many. Tribes often have access to resources that a state court may not (or at least may be unaware of), such as: inpatient rehabilitation services; drug testing; transportation to court, visitations, and court-ordered services; visitation supervision; job training and placement programs; re-entry services; educational placement and scholarships; housing; cultural support services, such as language classes; summer camps/programs for minors; and, placement options with supportive services. Out-of-state tribes offer similar services, or contract to provide them in California (e.g., the Friendship House Association of American Indians, Inc., in San Francisco). Many of these services are specifically oriented towards Native American values and beliefs, and thus may be more likely to reach a successful outcome than those of non-Indian orientation.

Unfortunately, the potential benefits of concurrent jurisdiction are largely unrealized. Often tribes and state courts/agencies are considered adversaries. At best, there may be limited cooperation long after a case has been initiated – long after cooperation and tribal services could have been most effective. While the California Tribal Court/State Court Forum has recently made some advancement toward better collaborative efforts, there appears to be a long way to go before wise use of concurrent jurisdiction becomes the norm rather than the exception.[52]

viii. Appointment of Counsel

The ICWA requires appointment of counsel for indigent parents "in any removal, placement, or termination proceeding."[53] SB 678 codified this requirement into various sections

[47] Welf. & Inst. Code § 305.5(c)(4); *see* Fam. Code § 177(a), Prob. Code § 1459.5(b).
[48] Fam. Code § 7901.
[49] Fam. Code § 7907.3.
[50] 25 U.S.C. § 1911.
[51] *See* § V of this Benchguide ("Jurisdiction under the Act").
[52] More information on the Tribal Court/State Court Forum, including legislative and rule proposals, is available at the Judicial Council of California/Administrative Office of the Courts website at www.courts.ca.gov/3065.htm (last visited May 15, 2012).
[53] 25 U.S.C. § 1912(b).

of the Welfare & Institutions Code, Family Code, and Probate Code.[54] These sections clarify that, in addition to dependency and delinquency matters, a parent or Indian custodian who cannot afford an attorney is entitled to have one appointed in a guardianship, conservatorship, or petition to declare an Indian child free from the custody and control of a parent.

ix. Placement Preferences

Indian children in child custody proceedings must be placed within a mandatory order of preference for placements, absent good cause to the contrary, in order to protect the best interests of the Indian child and the child's tribe by ensuring a culturally-appropriate placement.[55] According to the U.S. Supreme Court, these placement preferences are "[t]he most important substantive requirement imposed on state courts" by the ICWA.[56]

SB 678 codified these placement preferences into state law.[57] The legislation declared that California has an interest in "protecting the essential tribal relations and best interest of an Indian child by… placing the child, whenever possible, in a placement that reflects the unique values of the child's tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the child's tribe and tribal community."[58] Thankfully, SB 678 made it plain that adhering to the ICWA's placement mandate, and encouraging and protecting an Indian child's tribal membership and connection to his or her tribe, is in the best interest of that child.[59]

x. Exceptions to Terminating Parental Rights

Perhaps the most significant change made by SB 678 was the new exception to termination of parental rights. The new exception applies where termination of parental rights would be detrimental to an Indian child, including but not limited to cases where: (1) termination would substantially interfere with the child's connection to his or her tribal community or the child's tribal membership rights; or, (2) the child's tribe identifies guardianship, long term foster care with a fit and willing relative, tribal customary adoption or another permanent plan.[60]

Severing the legal relationship of a parent and child is not a concept that is culturally recognized by most Indian tribes. A child's membership or eligibility for membership is typically predicated on proving the membership or eligibility of lineal ancestors. When the parent-child relationship is severed, an Indian child often loses his or her right to membership. This may result in a tremendous impact on the child – cultural (loss of access to the tribal community, cultural knowledge/teachings, and cultural events), political (loss of voting

[54] Welf. & Inst. Code § 317; Fam. Code § 180(b)(5)(G)(v); Prob. Code §§ 1460.2(b)(5)(G)(v) and 1474.
[55] 25 U.S.C. § 1915; *see* § IX of this Benchguide ("Placement").
[56] *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 36.
[57] Welf. & Inst. Code § 361.31.
[58] Fam. Code § 175(a); Prob. Code §1459(a); Welf. & Inst. Code §§ 224(a).
[59] *Ibid.*
[60] Welf. & Inst. Code § 366.26(c)(1)(B)(vi). Note that SB 678 did not include tribal customary adoption in the second scenario listed – tribal customary adoption was added to that scenario by AB 1325 (2009) which went into effect July 1, 2010 (*see* § XI(E) of this Benchguide for more on tribal customary adoption).

rights/ability to participate in tribal government), and economic (loss of benefits conditioned upon tribal membership).

The exceptions added by SB 678 are important because they allow alternative plans for Indian children and should reorient social service agencies away from the narrow view that conventional adoption is always the best placement for a child.[61] Tribal customary adoption was intended to further limit terminations of parental rights and is yet another reason why courts and social services do not have to fall back on conventional adoption as a permanent plan.

B. Protecting Indian Children: the "Best Interest" Standard

The ICWA revolutionized the "best interest of the child" standard as applied to Indian children by providing a specific definition for the best interest of an Indian child.[62] Most states use a "best interest" standard in child custody proceedings. Generally, the best interest of a child is deemed to be a stable placement with an adult who becomes the psychological parent.[63] In passing the ICWA, Congress was concerned that states were applying a subjective best interest standard to the detriment of Indian children by overlooking essential aspects of tribal social and cultural standards.[64]

To solve this problem, Congress declared that the best interest of an Indian child (not just the child's tribe) would be served by protecting "the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society."[65] This policy is carried out by following the four objectives:

- Jurisdictional provisions and intervention rights designed to enhance tribal control and involvement in Indian child custody cases;
- Adoption of minimum standards for removal of Indian children from their families;
- Culturally-appropriate placement of Indian children in Indian homes; and,
- Support of tribal child and family service programs.[66]

Cultural considerations (e.g., Indian child-rearing norms and practices) and concern for tribal heritage are relevant to proper application of the Act. Assessment, treatment and placement standards require adherence to cultural dictates.[67] However, the Act is not simply an effort to strengthen Indian culture. The Act acknowledges a special relationship between tribes and the federal government as well as between tribes and their members, which are founded on more than cultural considerations. Indians as members of tribes are not simply separate racial or cultural groups, but also separate political groups.[68] Indian tribes stand in a government-to-

[61] Welf. & Inst. Code § 366.26(b).
[62] 25 U.S.C. § 1902.
[63] *See, e.g.*, J. Goldstein, et al., *Beyond the Best Interests of the Child* (1979) p. 53.
[64] H.R. Rep. No. 95-1386, 2d Sess. p. 19 (1978), 1978 U.S.C.C.A.N. 7530, p. 7541; *see* 25 U.S.C. § 1901(5).
[65] H.R. Rep. No. 95-1386, 2d Sess. p. 23 (1978), 1978 U.S.C.C.A.N. 7530, p. 7546; *see* 25 U.S.C. §§ 1901-1902.
[66] 25 U.S.C. §§ 1901-18.
[67] *See* 25 U.S.C. §§ 1912, 1915; *see also*, Welf. & Inst. Code § 361.7(b).
[68] *Morton v. Mancari* (1974) 417 U.S. 535, 553 n.24 (membership in federally-recognized tribe is political, rather

government relationship with the United States.[69] An Indian child is a "citizen" of a tribe and entitled to the incidents of that status as determined both by the laws of the federal government and the tribe.

As discussed elsewhere in this section, California has enacted its own laws reinforcing the definition of an Indian child's best interest.[70] A state court may not justify the breakup of Indian families and tribes simply by casting its ruling in subjective terms of "best interest." As a matter of federal and state law, the ICWA's provisions must be met in order to truly guard the best interests of Indian children.

C. Constitutionality and the "Existing Indian Family Doctrine"

The ICWA has survived numerous constitutional challenges by parties claiming that the Act constitutes disparate treatment based on race.[71] Prior to SB 678, there was a split in the California Courts of Appeal regarding a judicially-created exception to application of the ICWA known as the "existing Indian family doctrine," which viewed an existing and significant social or cultural connection to an Indian tribe or community as a prerequisite necessary to render an application of the ICWA constitutional.[72]

The doctrine received mixed treatment in California; surprisingly, some favorable treatment occurred even after Assembly Bill 65 in 1999, which was enacted with the specific intent of halting use of the doctrine and abrogating previous supportive holdings.[73] The California Legislature returned to the issue with SB 678 in an effort to more clearly require application of the ICWA according to the plain language of the federal law. Two particular provisions of SB 678 illustrate the Legislature's intent:

- "It is in the interest of an Indian child that the child's membership in the child's Indian tribe and connection to the tribal community be encouraged and protected, regardless of whether the child is in the physical custody of an Indian parent or Indian custodian at the commencement of a child custody proceeding, the parental rights of the child's parents have been terminated, or where the child has resided or been domiciled."[74]

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than racial, distinction).

[69] *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe* (1991) 489 U.S. 505, 509.

[70] *See* §§ III(A)(2)(b)(ix) and § III(C) of this Benchguide ("Placement Preferences" and "Constitutionality and the 'Existing Indian Family Doctrine'").

[71] *See, e.g., In re Marcus S.* (Me. 1994) 638 A.2d 1158; *In re Guardianship of D.L.L.* (S.D. 1980) 291 N.W.2d 278; *In re Appeal Pima County Juvenile Action* (Ariz. Ct. App. 1981) 635 P.2d 187, *cert. denied*, (1982) 455 U.S. 1007; *In re Miller* (Mich. Ct. App. 1990) 451 N.W.2d 576; *State ex rel. Children Services Div. v. Graves* (Or. Ct. App. 1993) 848 P.2d 133.

[72] *See, e.g., In re Bridget R.* (1996) 41 Cal.App.4th 1483, 1491-1492; *In re Alexandria Y.* (1996) 45 Cal.App.4th 1483, 1493-1494.

[73] Assem. Com. on Judiciary, Analysis of Assem. Bill No. 65 (1999–2000 Reg. Sess.) as amended Apr. 27, 1999, p. 1; *In re Vincent M.* (2007) 150 Cal.App.4th 1247, 1264 (discussing use of the doctrine in *In re Santos Y.* (2001) 92 Cal.App.4th 1274); *see also* All County Information Notice I-122-00 in Appendix E (re: elimination of doctrine).

[74] Welf. & Inst. Code § 224(a)(2) (emphasis added); *accord* Fam. Code § 175(a)(2) (emphasis added); Prob. Code § 1459(a)(2) (emphasis added); *see* Cal. Rules of Court, rule 5.485(b).

And,

- "A determination by an Indian tribe that an unmarried person, who is under the age of 18 years, is either (1) a member of an Indian tribe or (2) eligible for membership in an Indian tribe and a biological child of a member of an Indian tribe shall constitute a significant political affiliation with the tribe and shall require the application of the federal Indian Child Welfare Act to the proceedings."[75]

The only two cases addressing the existing Indian family doctrine since the passage of SB 678 have both rejected it.[76] At this time, there should be no doubt that the application of the existing Indian family doctrine is no longer permissible in California.

⇨ **BEST PRACTICE**: *Because of the history of a split in California courts regarding the application of the existing Indian family doctrine, there may still be some confusion by persons appearing before the court. Any argument referring to the doctrine can be extinguished simply by referring to SB 678 and subsequent case law.*

[75] Welf. & Inst. Code § 224(c) (emphasis added).
[76] *In re Adoption of Hannah S.* (2006) 142 Cal.App.4th 988; *In re Vincent M.* (2007) 150 Cal.App.4th 1247.

IV. General Application of the Act

A. Proceedings Covered by the Act

Indian child custody proceedings to which the ICWA and supplementary California laws apply include foster care placements, guardianships, and conservatorships, if in any of these types of proceedings (whether voluntary or involuntary, temporary or long-term) the parent or Indian custodian does not retain the right to have the child returned upon demand; custody awards to non-parents where parents object; terminations of parental rights; preadoptive and adoptive placements (including voluntary relinquishments); and, certain delinquency proceedings.[1] An important detail sometimes overlooked is that the determination of whether the ICWA applies to a particular proceeding is the responsibility of the court, and not of any state or county department or agency involved with the case.[2]

B. Proceedings Not Covered by the Act

1. Divorce Proceedings

The ICWA expressly does not apply to "an award, in a divorce proceeding, of custody to one of the parents."[3] The ICWA does not define "divorce," however, and attention must be paid to what is occurring in a proceeding. The fact that two parents are involved or that the matter is a family law action does not necessarily eliminate the proceeding from the Act's coverage. For example, an action by one parent to terminate parental rights of the other parent is clearly covered by the Act.[4]

2. Educational Placements

The Act excludes any placement situation where the parent or Indian custodian is not deprived of the right to regain custody of the Indian child upon demand.[5] The most common situation is a parent placing the child in a school or religious education program.

C. Interested Parties

1. Indian Child

The ICWA applies only to proceedings which involve an "Indian child." The Act defines an Indian child as any unmarried person who is under eighteen and is either: (a) a member of an

[1] 25 U.S.C. §§ 1903(1); Fam. Code §§ 170(c); Prob. Code § 1459.5; Welf. & Inst. Code § 224(b); Cal. Rules of Court, Rule 5.480; *see* § XII of this Benchguide ("Delinquency Proceedings").

[2] Fam. Code § 177(a); Prob. Code § 1459.5(b); *see* Welf. & Inst. Code § 224.3(e)(3); *see* Cal. Rules of Court, Rule 5.482(d).

[3] 25 U.S.C. § 1903(1); *accord* BIA Guidelines § B.3(b).

[4] *In re Crystal K.* (1990) 226 Cal.App.3d 655, *cert. denied* (1991) 502 U.S. 862; *Adoption of Lindsay C.* (1991) 229 Cal.App.3d 404; *In re Suzanna L.* (2002) 104 Cal.App.4th 223.

[5] BIA Guidelines § B.3 Commentary.

Indian tribe, or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.[6]

Determining whether a child is an Indian child may potentially be complicated by the rules and processes of the child's tribe. Some tribes have sophisticated enrollment systems with specific membership criteria and presumptions. Others do not have formal enrollment processes and make membership determinations based on their own factors. Of course, the determination of whether a child is Indian is not a racial question, but rather a question of political status.[7] Tribal membership is an exclusively tribal question.[8] A tribe's determination that a child is an Indian child is conclusive.[9] The role of tribes in membership determinations absolutely requires that tribes be consulted, and the final answer in an Indian status determination may vary depending upon the law of the tribe(s) involved.

a. Multiple Definitions of "Indian"

The ICWA defines an "Indian" as any member of an "Indian tribe," which is in turn defined as "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary [of the Interior] because of their status as Indians."[10] A similar definition applies to Alaskan Natives.[11]

However, the above is not the only definition of "Indian" in the ICWA. The other applies only to Title II of the Act, governing grants and funds for on- and off-reservation child and family service programs.[12] Section 1934 specifies that for the purposes of Sections 1932 and 1933, the term Indian is defined in 25 U.S.C. section 1603(c).[13] Section 1603(c) sets forth the broader Indian Health Care Improvement Act definition, which, for health-related services, is any person who:

> [1] …irrespective of whether he or she lives on or near a reservation, is a member of a tribe, band, or other organized group of Indians, including those tribes, bands, or groups terminated since 1940 and those recognized now or in the future by the State in which they reside, or who is a descendant, in the first or second degree, of any such member, or
>
> [2] is an Eskimo or Aleut or other Alaska Native, or
>
> [3] is considered by the Secretary of the Interior to be an Indian for any purpose, or
>
> [4] is determined to be an Indian under regulations promulgated by the Secretary.[14]

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[6] 25 U.S.C. § 1903(4)*; see* Welf. & Inst. Code § 224.1(a).
[7] *Morton v. Mancari* (1974) 417 U.S. 535, 553 n.24.
[8] *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 72, fn 32; *United States v. Bruce* (2005) 394 F.3d 1215, 1225 ("[O]ne of an Indian tribe's most basic powers is the authority to determine its own membership").
[9] *In re Junious M*. (1983) 144 Cal.App.3d 786, 793, *quoting* BIA Guidelines § B.1(b)(i); *see* Welf. & Inst. Code §§ 224(c) and 224.3(e)(1).
[10] 25 U.S.C. § 1903(3), (8).
[11] *Ibid.*; *see* 43 U.S.C. §§ 1602 and 1606.
[12] 25 U.S.C. §§ 1932 and 1933.
[13] 25 U.S.C. § 1934.
[14] 25 U.S.C. § 1603(13).

The issue of defining Indians in California is even more complex. The Indian Health Care Improvement Act contains a special eligibility definition for California Indians, again regarding health-related services, which includes:

(1) Any member of a federally recognized Indian tribe.

(2) Any descendant of an Indian who was residing in California on June 1, 1852, but only if such descendant--

(A) is a member of the Indian community served by a local program of the Service, and

(B) is regarded as an Indian by the community in which such descendant lives.

(3) Any Indian who holds trust interests in public domain, national forest, or reservation allotments in California.

(4) Any Indian of California who is listed on the plans for distribution of the assets of rancherias and reservations located within the State of California under the Act of August 18, 1958 (72 Stat. 619), and any descendant of such an Indian.[15]

⇨ **BEST PRACTICE:** *Because of the broad definition applicable to Indian child and family programs funded under the Act, a tribal program may provide services to Indians and Indian children that are not members of their tribe. Consequently, a representative may be present in court on an Indian child's case as a service provider, instead of as a representative of an Indian child's tribe. The status of such representatives should not simply be assumed. Clarify the capacity and authority of all participants in a proceeding.*[16]

b. Membership and Federal Recognition

As previously mentioned, an "Indian child" must either be: (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.[17] One common mistake in interpreting that membership language is equating membership with formal enrollment. An individual does not necessarily need to be formally enrolled in a tribe to be a member.[18] Additionally, if there is knowledge or reason to know that a child is Indian, there is an affirmative duty on the court to treat the child as an Indian child and to order active efforts be made to secure tribal membership for the child.[19]

[15] 25 U.S.C. § 1679(a).
[16] *See* Cal. Rules of Court, Rule 5.534(i)(1).
[17] 25 U.S.C. § 1903(4).
[18] *In re Junious M.* (1983) 144 Cal. App. 3d 786, 796 (appellate court reversed trial court's decision that the ICWA did not apply because neither the child nor his Indian mother were enrolled members of the tribe); *In re Jack C., III* (2011) 192 Cal.App. 4th 967, 978-982 (determining membership and eligibility for membership is the "sole province" of the tribe; where neither children or father were formally enrolled in tribe, but where tribe determined that children and father would be enrolled once certain "bureaucratic requirements" were met, trial court should have proceeded as though the children were Indian children).
[19] Cal. Rules of Court, rules 5.482(c) and 5.484(c); Welf. & Inst. Code § 361.7; *see* Fam. Code § 177(a) and Prob. Code § 1459.5(b).

Membership may be verified by either the tribe or the BIA.[20] The tribe's determination is always conclusive, while the BIA's determination is conclusive absent a contrary determination by the tribe.[21]

2. Parent

"Parent" means "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions carried out under tribal law or custom."[22] However, "an unwed father whose paternity has not been acknowledged or established" is not a parent under the Act.[23] Conversely, "acknowledgment" is sufficient to establish paternity for purposes of applicability of the ICWA.

Other states have grappled with a situation where an unwed Indian father seeks to establish paternity in order to bring the case within the Act.[24] In *In re Baby Boy Doe*, the court held that evidence, including a father's membership application to a tribe on the child's behalf and the filing of paternity affidavit with the state and tribe, was sufficient to support the trial court's finding that the father, an Indian, was one of the "Indian child's" natural parents; thus, the trial court's decision that the ICWA did not apply to the parental rights termination and adoption proceedings was not harmless error.[25]

3. Indian Custodian and Extended Family

a. Indian Custodian

An "Indian custodian" is defined as "any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent" of an Indian child.[26] Indian custodians have many of the same rights as parents under the Act.[27] However, recent California case law indicates some willingness by courts to curtail these rights for some custodians.[28] Until recently, no California case had addressed the mechanics of establishing Indian custodian status. The court in *In re G.L.* not only recognized that an Indian custodian can be created with or without a written instrument, but also that the court need not consider the nature, frequency, and duration of contact between an Indian child and his or her Indian custodian in order for status as an Indian custodian to be valid.[29]

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[20] BIA Guidelines § B.1.
[21] Welf. & Inst. Code § 224(c); BIA Guidelines § B.1(b)(I).
[22] 25 U.S.C. § 1903(9).
[23] 25 U.S.C. § 1903(9); *In re Daniel M.* (2003) 110 Cal.App.4th 703, 708-709.
[24] *See In re Appeal in Maricopa County Juvenile Action No. A-25525* (Ariz. 1983) 667 P.2d 228 (Arizona court found that an affidavit by the unwed father was sufficient to establish paternity and bring the case within the Act).
[25] *Matter of Baby Boy Doe* (Idaho 1993) 849 P.2d 925, 932, *cert. denied* (1993) 510 U.S. 860.
[26] 25 U.S.C. § 1903(6); Welf. & Inst. Code § 224.1(a).
[27] *See generally* 25 U.S.C. § 1901 *et seq*.
[28] *In re G.L.* (2009) 177 Cal.App.4th 683, 694-695 (failure to notify Indian custodian grandmother of her right to intervene and to appointed counsel did not violate the ICWA, since Indian custodian status was revoked soon after court and county learned of status, and from time status was discovered to time status was revoked, no hearing occurred that had an adverse impact on grandmother's rights as an Indian custodian.)
[29] *Id.* at 693.

The rights of an Indian custodian include:

- Section 1911(b) and (c) - the right to request a transfer of proceedings and the right to intervene in state court;
- Section 1912(a) and (b) - the right to notice and appointment of counsel where the proceedings involve foster care or termination of parental rights;
- Section 1912(c) - the right to access information;
- Section 1912(d) and (f) - the right to an active efforts showing and heightened evidentiary standards established by the Act, including expert testimony; and,
- Section 1913 - the right to give consent to voluntary adoptive placements and the right to withdraw consent to foster placement.

⇨ **BEST PRACTICE:** *The Act does not require a writing to create an Indian custodial placement. Reliance on Indian custodial status and a writing to evidence the Indian custodial status (either a form executed by a parent or a document, such as a resolution, evidencing a tribal act) can be a useful tool for achieving an appropriate outcome for a child. This approach has been used with success to essentially "back a child out of a case" and allow dismissal where an appropriate placement exists or is available but otherwise applicable rules make accomplishing the placement difficult. Examples include early placement with an Indian relative where absence of parties prevents stipulation, and simplifying interstate placement of children where a tribe has an Indian custodial placement available on their reservation.*

b. Extended Family

An "extended family member" may be defined either: (1) "by the law or custom of the Indian child's tribe;" or, (2) "in the absence of such law or custom, as a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent."[30] Extended family members are afforded certain rights, as Congress realized that states had all too often failed to recognize that in Indian communities, people outside of the nuclear family commonly share in child care responsibilities. Through the interplay of state and federal law, extended family members are also given certain rights to social service funding.[31]

4. Tribe

The ICWA redefines the parties who have a right to participate in Indian child custody proceedings which are subject to the Act. The ICWA acknowledges that tribes have an interest in their children "which is distinct from, but on a parity with the interests of the parents."[32]

[30] 25 U.S.C. § 1903(2); *accord* Welf. & Inst. Code § 224.1(c).

[31] *See* All County Letter No. 95-07 located in the Appendices of this Benchguide and Welf. & Inst. Code § 11401 (the Aid to Families with Dependent Children - Foster Care program is available to fund extended families, where Indian children have been placed with them).

[32] *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 52, *quoting In re Adoption of Halloway* (Utah 1986) 732 P.2d 962, 969.

This relationship between Indian tribes and their children finds no parallel in other ethnic groups in the United States because of the unique legal status of tribes.[33] One purpose behind giving tribes more influence in the fate of their children is to promote tribal self-determination. In other words, determining who will have the care and custody of tribal children is a fundamentally important way to preserve tribal identity and culture. Thus, the fate of Indian children is a matter of tribal sovereignty.

The ICWA gives tribes a number of procedural rights. Tribes have an absolute right to intervene in state child custody proceedings involving their children.[34] Also, tribal courts are designated as the preferred forum for determining custody and adoption matters involving Indian children.[35] The court cannot ignore the tribe's interests in an Indian child involved in a custody proceeding, even if those interests conflict with the parents' interests or desires. Ultimately, a proceeding may be invalidated if the court ignores a tribe's interests in its children.

It is worth repeating that an Indian tribe under the Act is any Indian tribe, band, nation or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in 43 U.S.C. section 1602(c).[36] Note that such a definition does not include Canadian, Mexican or other foreign indigenous tribes.[37]

a. Unrecognized Tribes in California

Under California law, even a non-federally-recognized tribe may participate in dependency proceedings involving a child who would otherwise be an "Indian child" under the act, but for the tribe's unrecognized status.[38] It should be noted, however, that petitions by members of unrecognized tribes do not formally trigger the ICWA notice requirements.[39] The court may allow an unrecognized tribe to participate in the following ways, upon request by the tribe:

1. Be present at the hearing;
2. Address the court;
3. Request and receive notice of hearings;
4. Request to examine court documents relating to the proceeding;
5. Present information to the court that is relevant to the proceeding;
6. Submit written reports and recommendations to the court; and
7. Perform other duties and responsibilities as requested or approved by the court.[40]

[33] *Ibid.*
[34] 25 U.S.C. § 1911(c); *see* § VII of this Benchguide ("Intervention").
[35] 25 U.S.C. § 1911; Welf. & Inst. Code § 305.5; Cal. Rules of Court, Rule 5.483; *see* § V of this Benchguide ("Jurisdiction under the Act").
[36] 25 U.S.C. § 1903(8); Welf. & Inst. Code § 224.1(a).
[37] *Ibid.*
[38] Welf. & Inst. Code § 306.6(a).
[39] *In re K.P.* (2009) 175 Cal.App.4th 1, 6 (when mother was a member of non-recognized tribe, the ICWA did not give rise to obligation to notice).
[40] Welf. & Inst. Code § 306.6(b).

b. Eligibility for Multiple Memberships

The Act defines an "Indian child's tribe" as "(a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts."[41] Factors to consider in addressing the question of "more significant contacts" may include:

- The length of residence on or near the reservation of each tribe and frequency of contacts with each tribe;
- The child's participation in activities of each tribe;
- The child's fluency in the language of each tribe;
- Whether there has been a previous adjudication with respect to the child by a court of one of the tribes;
- Residence on or near one of the tribes' reservation by the child's relatives;
- Tribal membership of custodial parent or Indian custodian;
- Interest asserted by a tribe; and,
- The child's self-identification.[42]

If an Indian child is a member or eligible for membership in more than one tribe, the BIA Guidelines suggest it may be appropriate to allow all tribes which the child is affiliated with to intervene in the proceeding.[43]

[41] 25 U.S.C. § 1903(5).
[42] Welf. & Inst. Code § 224.1(e)(2)(A)-(H); *see* BIA Guidelines § B.2.
[43] Commentary to section B.2 of the BIA Guidelines includes the following discussion:

> We have received several recommendations that "Indian child's tribe" status be accorded to all tribes in which a child is eligible for membership. The fact that Congress, in the definition of "Indian child's tribe," provided a criterion for determining which is *the* Indian child's tribe, is a clear indication of legislative intent that there be only one such tribe for each child. For purposes of transfer of jurisdiction, there obviously can be only one tribe to adjudicate the case. To give more than one tribe "Indian child's tribe" status for purposes of the placement preferences would dilute the preference accorded by Congress to the tribe with which the child has the more significant contacts.
>
> A right of intervention could be accorded a tribe with which a child has less significant contacts without undermining the right of the other tribe. A state court can, if it wishes and state law permits, permit intervention by more than one tribe. It could also give a second tribe preference in placement after attempts to place a child with a member of the first tribe or in a home or institution designated by the first tribe has proved unsuccessful. So long as the special rights of *the* Indian child's tribe are respected, giving special status to the tribe with the less significant contacts is not prohibited by the Act and may, in many instances, be a good way to comply with the spirit of the Act.

V. Jurisdiction under the Act

The ICWA is a powerful jurisdictional statute. The U.S. Supreme Court has held that the jurisdictional provisions of the ICWA are at the very heart of the law.[1] In fact, the ICWA has been deemed one of the most complex jurisdictional statutes ever enacted. On a national level, the overall scheme of the ICWA is that tribes have primary jurisdiction over custody proceedings, while state court jurisdiction over such matters is narrowly prescribed. However, in California, this scheme is altered by application of other federal law, as discussed below. The general rule in California is that tribes and the state share concurrent jurisdiction over child custody proceedings.

When an Indian child is involved in a state court child custody proceeding, the court must first determine whether it has jurisdiction over the child. In the context of the ICWA, the question of jurisdiction involves two factors: (1) the jurisdictional status of the tribe; and (2) the jurisdictional status of the child. Tribes in many states retain exclusive jurisdiction over child custody proceedings involving Indian children. However, tribes in some states (including California) were divested of this exclusive authority because those tribes are subject to limited state civil jurisdiction under 28 U.S.C. section 1360 (enacted as part of what is commonly known as P.L. 280).[2] For the most part, the child's jurisdictional status is determined by his or her residence or domicile.

A. Exclusive versus Non-Exclusive

Unless otherwise vested in the state, an Indian tribe has exclusive jurisdiction over child custody proceedings involving an Indian child who resides or is domiciled on the reservation, or who is a ward of the tribal court, regardless of domicile.[3] In such cases where the tribe has exclusive jurisdiction, the state court has no jurisdiction to hear custody proceedings involving the Indian child and must transfer the proceeding to tribal court.[4] Moreover, individual Indians who are exclusively within the tribe's jurisdiction cannot waive that jurisdiction and may not initiate in state court a child custody proceeding involving Indian children.[5]

There are two noted exceptions to exclusive tribal jurisdiction afforded under the ICWA. First, in an emergency removal situation, a state can exercise jurisdiction over a child temporarily located off the reservation in order to prevent imminent physical damage or harm to the child. State courts may only use this authority for temporary emergency removals, and the state must ensure that the placement is terminated as soon as it is no longer necessary to prevent imminent harm to the child.[6] Further, the state "shall expeditiously initiate an Indian child

[1] *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 36.
[2] *See* Pub. L. No. 83-280 (August 15, 1953). 28 U.S.C. § 1360 addresses states' limited civil jurisdiction, while 18 U.S.C. § 1162 addresses criminal jurisdiction.
[3] 25 U.S.C. § 1911(a).
[4] *See* Welf. & Inst. Code § 305.5(a); Cal. Rules of Court, Rule 5.483(a).
[5] *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30.
[6] 25 U.S.C. § 1922; Welf. & Inst. Code § 305.5(f).

custody proceeding. . ., transfer the child to the jurisdiction of the Indian child's tribe, or restore the child to the parent or Indian custodian, as may be appropriate."[7]

The second exception is that states can validly exercise concurrent jurisdiction over Indian children residing or domiciled on a reservation where the federal government has delegated limited civil jurisdiction to the state in which the tribe is located.[8] The Ninth Circuit Court of Appeals has held that tribes located in a P.L. 280 state were divested of exclusive jurisdiction by the ICWA's incorporation of P.L. 280.[9] Under P.L. 280, Congress delegated to the states civil jurisdiction over private causes of actions involving Indians in "Indian country."[10]

The effect of P.L. 280 is to create concurrent jurisdiction between the state and the Indian child's tribe.[11] In these states, even if a child is domiciled or resides on the reservation, the state may acquire valid initial jurisdiction.[12] However, the state shall transfer the proceeding to the jurisdiction of the child's tribe, upon the petition by either parent, the Indian custodian, or the child's tribe, unless the court finds that good cause exists not to transfer jurisdiction.[13] This has also been called "referral" jurisdiction or "concurrent but presumptively tribal" jurisdiction.[14] If the tribal court declines to accept transfer of the proceeding, the state court retains jurisdiction.[15]

Tribes from California and other P.L. 280 states may petition to reassume exclusive jurisdiction pursuant to 25 U.S.C. section 1918.[16] Where a tribe has reassumed jurisdiction (or where the tribe is not located in a P.L. 280 state and has exclusive jurisdiction already), and an Indian child residing or domiciled within that tribe's reservation is removed by state authorities, California law requires notice to the tribe no later than the next business day, and transfer of the proceedings to tribal court within 24 hours of receipt of a written notice from the tribe that the child is Indian.[17] It is important for state courts to make an individualized jurisdictional determination for each custody proceeding involving an Indian child, as California houses a significant population of Indians from non-California tribes. In addition, several California tribes have either reassumed jurisdiction (*e.g.*, the Washoe Tribe of Nevada and California, located primarily in Nevada, has reassumed exclusive jurisdiction over its territory in Alpine County, California), or exercise concurrent jurisdiction such that a child may already be a ward of a tribal court (*e.g.*, the Hoopa Valley Tribe in Humboldt County).

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[7] 25 U.S.C. § 1922; *see* Welf. & Inst. Code § 305.5(f).
[8] 25 U.S.C. § 1911(a).
[9] *Doe v. Mann* (9th Cir. 2005) 415 F.3d 1038, 1061.
[10] 28 U.S.C. § 1360; *see* 18 U.S.C. § 1151 for definition of "Indian country."
[11] *Native Village of Venetie I.R.A. Council v. Alaska* (9th Cir. 1991) 944 F.2d 548, 561-562; *In re M.A.* (2006) 137 Cal.App.4th 567, 574.
[12] 25 U.S.C. § 1911(a).
[13] 25 U.S.C. § 1911(b); Welf. & Inst. Code § 305.5(b); Cal. Rules of Court, rule 5.483(b); *see* Fam. Code § 177(a) and Prob. Code § 1459.5; *see also*, subsection (D) below regarding transfers to tribal court.
[14] *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30*; In re M.A.* (2006) 137 Cal.App.4th 567; *In re M.M.* (2007) 154 Cal.App.4th 897, 907; *In re Jack C., III* (2011) 192 Cal.App.4th 967, 982.
[15] 25 U.S.C. § 1911(b); Welf. & Inst. Code § 305.5(c)(1)(C).
[16] *See Doe v. Mann* (9th Cir. 2005) 415 F.3d 1038, 1064 ("[T]he explicit references to Public Law 280 in ICWA… demonstrate that Congress intended Public Law 280 states to have jurisdiction over Indian child dependency proceedings unless tribes availed themselves of Section 1918 in order to obtain exclusive jurisdiction").
[17] Welf. & Inst. Code § 305.5(a); *see* Cal. Rules of Court, rule 5.483(a).

If the state court determines that the Indian child resides or is domiciled on a reservation on which the tribe has exclusive jurisdiction, or if the child is a ward of a tribal court, the state court has no jurisdiction to hear the case in non-emergency situations.[18]

Additionally, under 25 U.S.C. section 1919 and Welfare and Institutions Code section 10553.1, Indian tribes are authorized to enter into agreements with states respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between states and Indian tribes.[19]

⇨ **BEST PRACTICE:** *While California tribes do not have primary jurisdiction over custody proceedings, it is important to bear in mind that an Indian child has an interest in his or her life as a tribal citizen that Congress has specifically sought to protect. Interests asserted by a tribe are not interests that compete with what is best for the child – instead, they are calculated to protect what is best for an Indian child. The provisions of the ICWA do not demonstrate that a tribe's interest in child custody proceedings diminishes as the family's connections to the tribe diminishes. Rather, they reflect an attempt to bolster the ability of tribes to impact cases involving tribal children, even when those cases are heard in distant forums. However, the tribe's governmental authority to exert control over Indian child custody cases is impacted by standard rules of jurisdictional analysis applicable to any government.*

B. Improper Removal of an Indian Child

Where a petitioner in an Indian child custody proceeding has improperly removed the child from the custody of a parent or Indian custodian, or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over the petition and shall immediately return the child to the parent or Indian guardian, unless the child would be subject to substantial and immediate danger or threat of danger.[20] These provisions usually arise where adoptive parents refuse to return a child to a parent who has validly revoked consent after the adoption.

⇨ **BEST PRACTICE:** *Section 1922 of the Act authorizes emergency removal of an Indian child in certain circumstances. Both 25 U.S.C. section 1922 and Welfare and Institutions Code section 305.5(f) refer to emergency removal of an Indian child who is a resident or is domiciled on a reservation, but who is temporarily located off the reservation. There is no similar provision allowing emergency custody of an Indian child who is not a resident of or domiciled on a reservation. However, the language in Section 1922 addresses what would otherwise be a jurisdictional impediment to a state court making an emergency custody order. No such impediment exists as to an off-reservation Indian child. Hence, a state court may remove such a child on an emergency basis relying on its inherent judicial authority, and look to the standards set forth in Section 1922 and accompanying authority when making emergency orders involving an off-reservation Indian child.*[21]

[18] 25 U.S.C. § 1911(a); *see* 25 U.S.C. § 1922.
[19] 25 U.S.C. § 1919; Welf. & Inst. Code § 10553.1
[20] 25 U.S.C. § 1920; Welf. & Inst. Code § 305.5(e).
[21] *See, e.g., In re Desiree F.* (2000) 83 Cal.App.4th 460, 476.

If the court has reason to believe that the child has been improperly removed or detained, the court should stay the proceeding until it can make a determination on the issue.[22] Since a finding of improper removal would affect the state court's jurisdiction over the matter, the court should decide the issue before moving to the merits.[23] The tribe, Indian child, parent or Indian custodian has standing to seek invalidation of a foster care placement (as defined by the Act) or termination of parental rights involving a child improperly removed from the custody of a parent or Indian custodian.[24]

C. Domicile and Residence

Under the ICWA, the tribe's exclusive jurisdiction over Indian children is determined by the domicile or residence of the child (unless the child is a ward of the tribal court, in which case residence or domicile is irrelevant).[25] Although the ICWA does not define "residence" or "domicile," the U.S. Supreme Court has ruled that the determination of domicile is a matter of federal law.[26] In *Mississippi Band of Choctaw Indians*, the Court indicated that a minor's domicile is determined by that of his or her parents, or his or her mother where the parents are not married.[27] Furthermore, the Court concluded that any interpretation of state law on domicile that conflicts with an assertion of tribal jurisdiction over tribal children undermines the ICWA's operative scheme. Therefore, the ICWA preempts any such inconsistent construction of state law.[28] The ICWA also prevents parents from circumventing tribal jurisdiction by placing children off the reservation shortly after birth.[29] Applying these rules, the Court concluded that the Mississippi Choctaw Tribe had exclusive jurisdiction over newborn twins who had never been on the reservation but whose parents were tribal members domiciled on the reservation. This finding was made even though the parents had gone to great lengths to give birth off the reservation so that they could place their children with a non-Indian couple.[30]

The ICWA broadly defines "reservation" to mean "Indian country."[31] Indian country includes: (a) all land within the limits of any Indian reservation, including fee land and trust land, (b) all dependent Indian communities, and (c) all Indian allotments, including rights-of-way running through those allotments.[32] A discussion of the complex body of law further defining Indian country is beyond the scope of this Benchguide.

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[22] BIA Guidelines § B.8.
[23] *Ibid.*; *but see In re Bridget R.* (1996) 41 Cal.App.4th 1483, 1517 (the statutory lack of jurisdiction does not foreclose a custody hearing to protect the child's due process rights).
[24] 25 U.S.C. § 1914; *see* § X of this Benchguide ("Invalidation").
[25] 25 U.S.C. § 1911(a).
[26] *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30.
[27] *Id.* at 48; s*ee* Welf. & Inst. Code § 305.5(d) (Indian child's domicile or residence determined by that of parent, guardian, or Indian custodian with whom child maintained primary place of abode at start of proceedings).
[28] *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 51-52.
[29] *Id.* at 51.
[30] *Ibid.*
[31] 25 U.S.C. § 1903(10).
[32] 25 U.S.C. § 1903(10); 18 U.S.C. § 1151.

D. Transfer of Jurisdiction

While a state court may have valid initial jurisdiction over an Indian child custody proceeding, the ICWA expresses a preference for tribal jurisdiction in matters concerning custody of the tribe's children.[33] Thus, upon petition by the tribe, either parent or the Indian custodian, the state court shall transfer the proceeding to the tribal court unless either parent objects or there is good cause not to transfer.[34] Of course, the tribal court may decline to exercise jurisdiction, and the state would then maintain jurisdiction.[35] The ICWA's sections on transfer of jurisdiction apply to both involuntary and voluntary proceedings.[36]

A petition to transfer jurisdiction may be submitted at any time during the proceeding. However, the petition may be denied for good cause if not timely made.[37] Including the granting of time extensions, child custody proceedings are usually commenced thirty days after the child's parents, Indian custodian or tribe are notified of the pending action.[38] Obviously, lack of proper notice to a parent, tribe or Indian custodian can seriously affect the timing of a petition to transfer. If the parties are not notified of an Indian child custody proceeding until it has already progressed to a late stage, the transfer petition should be granted if made within a "reasonable time" after receipt of valid notice.[39] Furthermore, SB 678 specifically provided that "[i]t shall not, in and of itself, be considered an unreasonable delay for a party to wait until reunification efforts have failed and reunification services have been terminated before filing a petition to transfer."[40]

After a transfer petition is received, the state should hold a hearing to determine whether to grant the petition. Note that there is no need for adversary proceedings on a transfer petition if either parent or the tribal court opposes it, since both have the power to veto transfers of jurisdiction.[41] The state court must hold a hearing if the court believes or another party asserts that good cause exists not to transfer the proceeding to tribal court.[42] The California Rules of Court state that "[i]f the court believes, or any party asserts, that good cause to deny the request exists, the reasons for that belief or assertion must be stated in writing, in advance of the hearing, and made available to all parties who are requesting the transfer, and the petitioner must have the opportunity to provide information or evidence in rebuttal of the belief or assertion."[43]

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[33] *In re M.M.* (2007) 154 Cal.App.4th 897, 907; *In re Jack C., III* (2011) 192 Cal.App.4th 967, 982.
[34] 25 U.S.C. § 1911(b); Welf. & Inst. Code § 305.5(b); Cal. Rules of Court, rule 5.483(b).
[35] 25 U.S.C. § 1911(b); Welf. & Inst. Code § 305.5(c)(1)(C); Cal. Rules of Court, rule 5.483(d)(1)(C).
[36] *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 36.
[37] Welf. & Inst. Code § 305.5(c); Cal. Rules of Court, rule 5.483(d); *In re Robert T.* (1988) 200 Cal.App.3d 657 (good cause found to deny request to transfer jurisdiction from state court due to 16-month delay between permanency planning hearing and tribe's first expression of intent to intervene; note that this was a pre-SB 678 case, and tribe argued that waiting to see results of reunification was appropriate).
[38] 25 U.S.C. § 1912(a); *see* Cal. Rules of Court, rule 5.482(a); *see* Welf. & Inst. Code § 224.2(d).
[39] Welf. & Inst. Code § 305.5(c)(2)(B); *see also*, Cal. Rules of Court, rule 5.483(d)(2)(B).
[40] *Ibid.*
[41] 25 U.S.C. § 1911(b); Welf. & Inst. Code § 305.5(c)(1)(A) or (C); BIA Guidelines § C.2 Commentary.
[42] Cal. Rules of Court, rule 5.483(d)(3).
[43] Cal. Rules of Court, rule 5.483(f)(2).

The burden of establishing good cause is on the party opposing the transfer.[44] The ICWA does not set forth an express standard of proof by which good cause must be proved.[45] Since the jurisdictional scheme of the ICWA in California is "concurrent but presumptively tribal",[46] there is a strong argument that the appropriate standard of proof is at least clear and convincing evidence, rather than merely a preponderance of the evidence. The choice between state court and tribal court is not a choice between two equally-preferred venues, since the ICWA favors tribal court jurisdiction. A preponderance of the evidence may be enough to justify a permissive transfer from one county to another in a non-ICWA case,[47] but that same standard should not be held sufficient to overcome a specific statutory preference for tribal court jurisdiction.

The Act does not define good cause to deny transfer petitions. However, California has enacted Welfare and Institutions Code section 305.5, which lists reasons that either shall or may constitute good cause to deny a transfer petition:

(1) If a petition to transfer proceedings as described in subdivision (b) is filed, the court shall find good cause to deny the petition if one or more of the following circumstances are shown to exist:

  (A) One or both the parents object to the transfer.

  (B) The child's tribe does not have a "tribal court".[48]

  (C) The tribal court of the child's tribe declines the transfer.

(2) Good cause not to transfer the proceeding may exist if:

  (A) The evidence necessary to decide the case cannot be presented in tribal court without undue hardship to the parties or the witnesses, and the tribal court is unable to mitigate the hardship by making arrangements to receive and consider the evidence or testimony by use of remote communication, by hearing the evidence or testimony at a location convenient to the parties or witnesses, or by use of other means permitted in the tribal court's rules of evidence or discovery.

  (B) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition within a reasonable time after receiving notice of the proceeding, provided the notice complied with Section 224.2. It shall not, in and of itself, be

[44] Welf. & Inst. Code § 305.5(c)(4); *see* Cal. Rules of Court, rule 5.483(f)(1).

[45] 25 U.S.C. § 1911(b).

[46] *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30*; In re M.A.* (2006) 137 Cal.App.4th 567; *In re M.M.* (2007) 154 Cal.App.4th 897, 907; *In re Jack C., III* (2011) 192 Cal.App.4th 967, 982.

[47] *See, e.g.*, Welf. & Inst. Code § 375; *In re Jon N.* (1986) 179 Cal.App.3d 156, 158 (fn. 2). It should be noted that in such permissive transfer situations, the best interest of the child must be considered when determining which county is appropriate. (*In re J.C.* (2002) 104 Cal.App.4th 984, 992.) In an ICWA case, the best interest of an Indian child is protected by application of the ICWA, including the provisions for transfer to tribal court. (25 U.S.C. §§ 1901(5), 1902.)

[48] Note that the ICWA's definition of "tribal court" is very broad and will include almost any tribal entity having authority over child custody proceedings, including those operating under tribal custom. (25 U.S.C. § 1903(12).) Also note that state law prohibits consideration of "the perceived adequacy of tribal… judicial systems" in making a good cause finding. (Welf. & Inst. Code § 305.5(c)(3).)

considered an unreasonable delay for a party to wait until reunification efforts have failed and reunification services have been terminated before filing a petition to transfer.

(C) The Indian child is over 12 years of age and objects to the transfer.

(D) The parents of the child over 5 years of age are not available and the child has little or no contact with the child's tribe or members of the child's tribe.

(3) Socioeconomic conditions and the perceived adequacy of tribal social services or judicial systems may not be considered in a determination that good cause exists.

(4) The burden of establishing good cause to the contrary shall be on the party opposing transfer. If the court believes, or any party asserts, that good cause to the contrary exists, the reasons for that belief or assertion shall be stated in writing and made available to all parties who are petitioning for the transfer, and the petitioner shall have the opportunity to provide information or evidence in rebuttal of the belief or assertion.

(5) Nothing in this section or Section 1911 or 1918 of Title 25 of the United States Code shall be construed as requiring a tribe to petition the Secretary of the Interior to reassume exclusive jurisdiction pursuant to Section 1918 of Title 25 of the United States Code prior to exercising jurisdiction over a proceeding transferred under subdivision (b).[49]

In 1988, a California appellate court held that transfer may be denied if not in the child's best interests.[50] In that case, the transfer petition was filed 16 months after dependency was declared and the child had bonded with his foster family.[51] Subsequently, the U.S. Supreme Court ruled that bonding of an Indian child to non-Indian custodians is not a sufficient reason to avoid application of the ICWA and does not outweigh the tribe's interests in making the custodial decision.[52] Similarly, in 2000, a California appellate court held that failure to give the tribe proper notice requires invalidation of a juvenile dependency proceeding, even though parental rights had been terminated. The court ruled that, on remand, if the tribe elects not to assume jurisdiction, the juvenile court must comply with the ICWA, and factors flowing from a placement made "in flagrant violation of the ICWA, including but not limited to bonding with [the child's] current foster family and the trauma which may occur in terminating that placement, shall not be considered in determining whether good cause exists to deviate from the placement preferences" of the ICWA.[53]

A recent case illustrates changes that SB 678 made to state law on the subject. The issues in *In re Jack C., III* included the timing of the petition to transfer and what constitutes good cause to deny a petition to transfer. Regarding the former, the Fourth District Court of Appeal

[49] Welf. & Inst. Code § 305.5(c)(1)-(5); *see* Cal. Rules of Court, rule 5.483(d).
[50] *In re Robert T.* (1988) 200 Cal.App.3d 657, 667.
[51] *Ibid.*
[52] *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 53.
[53] *In re Desiree F.* (2000) 83 Cal.App.4th 460, 475-76.

held that "a determination based merely on the passage of time would impermissibly contravene an express statutory provision to the contrary" (referring to Welfare and Institutions Code section 305.5(c)(2)(B).[54] Regarding the latter, the appellate court held that the trial court's failure to hold an evidentiary hearing on whether the tribal court could mitigate hardships posed by the geographical distance between the tribal court (northern Minnesota) and most of the parties and witnesses (San Diego) meant that good cause to deny the transfer had not been proved.[55] To remedy this jurisdictional error, the appellate court ordered the case transferred to the tribe.[56]

If the state court transfers the proceeding, it should make an order transferring the physical custody of the child to a designated tribal court representative.[57] Moreover, once the state court transfers the proceeding, it does not retain concurrent jurisdiction over the case.[58] In *In re M.M.*, the juvenile court transferred a dependency proceeding to tribal court.[59] Minor's counsel did not request a stay of the transfer order. The court ordered the clerk to complete the transfer and the tribal court accepted jurisdiction.[60] Subsequently, minor's counsel filed a notice of appeal from the juvenile court's transfer order. The appellate court determined "that the transfer of Minor's case to the courts of a wholly separate sovereign has deprived the California courts of jurisdiction over this case."[61] The court relied on the only published case that directly addressed how an ICWA transfer order affects the jurisdiction of the transferor court.[62] The court also analogized the issue to removal from state court to federal court, stating "when an action is removed from state court to federal court, the state court loses jurisdiction to proceed further with the matter."[63] Therefore, the court dismissed the appeal for lack of jurisdiction.[64]

⇨ **BEST PRACTICE:** *California Rules of Court, rule 5.843(h) lays out the procedure for the court to follow after transferring the case to tribal court. The court must utilize Form ICWA-050 (Notice of Petition and Petition to Transfer Case Involving Indian Child to Tribal Jurisdiction) and Form ICWA-060 (Order on Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction).*

E. Declination of Jurisdiction by Tribal Court

A tribal court may decline to accept a transfer of jurisdiction over an Indian child custody proceeding from a state court.[65] If a state court receives a transfer petition, it should give the tribal court written notice stating how much time the tribal court has to respond, providing a minimum of twenty days from receipt of the notice.[66] The state court must receive proof of

[54] *In re Jack C., III* (2011) 192 Cal.App.4th 967, 985.
[55] *Id*. at 986-987.
[56] *Id*. at 987-988.
[57] Cal. Rules of Court, rule 5.483(h).
[58] *See In re M.M.* (2007) 154 Cal.App.4th 897.
[59] *Id.* at 901.
[60] *Id.* at 905.
[61] *Id.* at 906.
[62] *Id*. at 911-912.
[63] *Id.* at 912.
[64] *Id.* at 917.
[65] 25 U.S.C. § 1911(b); Welf. & Inst. Code § 305.5(c)(1)(C); Cal. Rules of Court, rule 5.483(d)(1)(C).
[66] BIA Guidelines § C.4(b).

acceptance by the tribal court before dismissing the proceeding or terminating jurisdiction.[67] The law does not specify whether this proof may be written or oral; the BIA Guidelines allow either.[68] Since tribal courts must take affirmative action to decline a transfer of jurisdiction, state courts should not assume that a tribal court has declined jurisdiction merely because the tribal court has not responded.[69] The BIA Guidelines recommend that tribal courts hear any arguments from the parties on whether the tribal court should accept or decline the transfer of jurisdiction.[70]

F. Full Faith and Credit

The federal government and states must give full faith and credit to a tribe's "public acts, records, and judicial proceedings" applicable to Indian child custody proceedings.[71] While tribes must give full faith and credit to other tribes in such cases, there is no requirement that tribes give the same deference to state decisions.[72] To be entitled to full faith and credit, a state court must find that the public act, record or judicial order is related to an Indian child custody proceeding. In addition, state courts are permitted to look beyond a tribal order to examine the jurisdictional basis for the tribal court's entry of the order.[73] Of course, a state court may also require that the proper evidentiary foundation be laid for admitting a document or court order into evidence.[74] Most tribal records are admissible under the public records or business records exception to the hearsay rule.

The full faith and credit provision of the ICWA does not require a state court to apply a tribe's law in violation of the state's own legitimate policy, nor does it empower a tribe to control the outcome of the state court proceeding. While the Constitution requires each state to give effect to official acts of other states, the deference owed to another state's judgments vs. statutes may differ. An obligation is exacting as to judgments, provided there is jurisdiction over the parties and subject matter. The same rule does not necessarily apply to statutes – full faith and credit does not compel a state either to substitute another state's statutes for its own dealing with a subject matter which it is competent to legislate, or to apply another state's (or tribe's) statutory law in violation of its own legitimate public policy.[75]

[67] Welf. & Inst. Code § 305.5(b).
[68] BIA Guidelines § C.4(b).
[69] BIA Guidelines § C.4 Commentary.
[70] BIA Guidelines § C.4(c).
[71] 25 U.S.C. § 1911(d); Welf. & Inst. Code § 224.5.
[72] 25 U.S.C. § 1911(d).
[73] *See, e.g., Application of DeFender* (S.D. 1989) 435 N.W.2d 717 (state court may evaluate whether tribe had personal jurisdiction over mother before granting comity to tribal court custody order); *In re Welfare of R.I.* (Minn. Ct. App. 1987) 402 N.W.2d 173 (state court not required to defer to tribal court order where tribal court had no jurisdiction to make child ward of court).
[74] *See, e.g., Quinn v. Walters* (OR 1994) 881 P.2d 795.
[75] *In re Laura F.* (2000) 83 Cal.App.4th 583; *cert. denied* (2001) 532 U.S. 979 (tribal resolution opposing adoption was a public act or record entitled to judicial notice, but not a judgment entitled to full faith and credit).

VI. Notice

Notice and inquiry are crucial components serving the Congressional goal of preserving tribes and Indian families. Notice ensures that tribes will be afforded the chance to assert their rights under the ICWA, and thus notice is mandatory.[1] "Because '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, [ICWA] notice requirements are strictly construed.' The notice sent to the Indian tribes must contain enough identifying information to be meaningful. A social worker has 'a duty to inquire about and obtain, if possible, all of the information about a child's family history' required under regulations promulgated to enforce ICWA."[2]

The Act also requires notice to parents and Indian custodians to help protect their procedural rights. Notice serves two purposes: "(1) it enables the tribe to investigate and determine whether the minor is an Indian child; and (2) it advises the tribe of the pending proceedings and its right to intervene or assume tribal jurisdiction."[3] Proceedings which take place without proper notice may violate the ICWA, and any action taken therein is subject to invalidation.[4]

A. When Notice and Inquiry are Required

Notice must be sent to the parents or Indian custodian and the tribe in any involuntary proceeding, where the court "knows or has reason to know" that an Indian child is involved.[5] The party seeking the foster care placement or the termination of parental rights is responsible for sending notice.[6] The court is ultimately responsible for ensuring that notice is provided. Notice requirements arise even where the child's Indian status is not certain.[7] A "minimal showing" that a child may be an Indian child triggers the notice requirement.[8] Actual or constructive knowledge of the child's Indian status triggers the notice provisions.[9] California law requires notice of hearings be sent until it is determined that the Act does not apply.[10]

There is an affirmative and continuing duty to inquire about a child's Indian status.[11] A failure to inquire may prevent sufficient notice from being provided.[12] Whenever there is reason

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[1] *In re Robert A.* (2007) 147 Cal.App.4th 982, 989.
[2] *Id.* at 987 (internal citations omitted).
[3] *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1265, quoting *In re Desiree F.* (2000) 83 Cal.App.4th 460, 470.
[4] 25 U.S.C. § 1914; *In re Damian C.* (2009) 178 Cal.App.4th 192, 199.
[5] 25 U.S.C. § 1912(a); Welf. & Inst. Code § 224.2(a); *see* Cal. Rules of Court, rule 5.481(b).
[6] *Ibid.*
[7] *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1422; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 261.
[8] *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1407. *But see In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, 1520-21; *In re Z.N.* (2009) 181 Cal.App.4th 282, 298; *In re O.K.* (2003) 106 Cal.App.4th 152, 157 (information may be too vague and speculative to trigger the notice requirement).
[9] H.R. Rep. 95-1386, at 21 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7544.
[10] Welf. & Inst. Code § 224.2(b).
[11] Welf. & Inst. Code § 224.3(a); Cal. Rules of Court, rule 5.481(a); *In re Desiree F.* (2000) 83 Cal.App.4th 460, 470.
[12] *In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1385-1390 (no inquiry made, but no information about possible

to believe an Indian child may be involved, verification of the child's membership status must be sought from the child's family (including the child's Indian custodian and extended family), the child's tribe or the BIA.[13]

California Rules of Court, rule 5.481(a)(5) sets out the following list of circumstances that may provide reason for the court to believe that a child is an Indian child:

(A) The child or a person having an interest in the child, including an Indian tribe, an Indian organization, an officer of the court, a public or private agency, or a member of the child's extended family, informs or otherwise provides information suggesting that the child is an Indian child to the court, the county welfare agency, the probation department, the licensed adoption agency or adoption service provider, the investigator, the petitioner, or any appointed guardian or conservator;

(B) The residence or domicile of the child, the parents, or the Indian custodian is or was in a predominantly Indian community; or

(C) The child or the child's family has received services or benefits from a tribe or services that are available to Indians from tribes or the federal government, such as the U.S. Department of Health and Health Services, Indian Health Service, or Tribal Temporary Assistance to Needy Families benefits.[14]

Even after custody proceedings have started, if the court discovers that the ICWA applies, notice must be provided.[15] Lack of notice can also be raised for the first time on appeal.[16] However, notice requirements do not apply to emergency removal actions carried out under Section 1922 of the Act.[17]

While the express terms of the ICWA require notice in state involuntary proceedings for foster care placement (as defined by the Act) or termination of parental rights,[18] the U.S. Supreme Court has confirmed that tribes must be notified of voluntary adoption proceedings.[19]

Indian heritage provided at trial level; on appeal, offer of proof of Indian heritage necessitated remand with option to petition trial court for invalidation upon showing that ICWA should have been applied); *In re A.G.* (2012) 204 Cal.App.4th 1390 (Department's failure to investigate father's claimed Indian heritage by interviewing known relatives of father led to deficient notice and remand).

[13] Welf. & Inst. Code § 224.3(c); Cal. Rules of Court, rule 5.481(a)(4); *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1425 (the burden to prove the child's Indian status is not on the parents, and their silence does not waive the court's affirmative duty to inquire); *In re Junious M.* (1983) 144 Cal.App.3d 786, 786 (tribes have sole authority to determine a child's tribal membership status).

[14] Cal. Rules of Court, rule 5.481(a)(5).

[15] *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1422; *see* Welf. & Inst. Code § 224.3(d); Cal. Rules of Court, rule 5.481(b).

[16] *In re B.R.*, 176 Cal. App. 4th 773, 779 (2009).

[17] *In re Desiree F.* (2000) 83 Cal.App.4th 460, 476; *D.E.D. v. State* (Alaska 1985) 704 P.2d 774, 779.

[18] 25 U.S.C. § 1912(a)

[19] *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 53; *see Adoption of Lindsay C.* (1991) 229 Cal.App.3d 404, 415-16.

Additionally, Family Code section 8620 states:

> If a parent is seeking to relinquish a child pursuant to section 8700 or execute an adoption placement agreement pursuant to section 8801.3, the department, licensed adoption agency, or adoption service provider, as applicable shall ask the child and the child's parent or custodian whether the child is, or may be, a member of, or eligible for membership in an Indian tribe or whether the child has been identified as a member of an Indian organization.[20]

If it is determined that the child is or may be an Indian child, the department must send notice, requesting confirmation of the child's Indian status, to the child's parent or custodian and to any tribe of which the child is or may be a member or eligible for membership.[21]

B. Who Must Be Notified

Notice of a pending Indian child custody proceeding must be sent to the parent or Indian custodian and the child's tribe.[22] California requires that notice to the tribe must be sent to the tribal chairperson, unless the tribe designates another agent.[23] If the child is or may be eligible for membership in more than one tribe, notice must be sent to each tribe.[24]

If the parents, Indian custodian or tribe cannot be determined or located, the notice must be sent to the BIA as the designated agent for the Secretary of the Interior.[25] Under these circumstances, the BIA should be involved because it has better access to resources to discover such information.[26] Addresses for the various BIA offices where notice may be sent are listed in 25 C.F.R. section 23.11(c).

⇨ **BEST PRACTICE:** *The Act requires service directly on the parent, Indian custodian and tribe when their identity and location is known. Substitute service on the BIA is required only when identity or location is unknown. The regulations, however, require that a copy of all notice(s) be sent to the BIA in <u>all</u> cases subject to the Act.[27] Hence, service of notice on the BIA is both required by federal regulations and an appropriate step to take to eliminate the potential for problems resulting from inadvertent failure to serve any additional unidentified tribes the child may be eligible for membership in.*

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[20] Fam. Code § 8620.
[21] Fam. Code §§ 180, 8620(a)(3)(A).
[22] 25 U.S.C. § 1912(a); Welf. & Inst. Code § 224.2; Fam. Code § 180; Prob. Code § 1460.2; Cal. Rules of Court, rule 5.481(b).
[23] Welf. & Inst. Code § 224.2(a)(2); Fam. Code § 180(b)(2); Prob. Code § 1460.2(b)(2); Cal. Rules of Court, rule 5.481(b)(4); 25 C.F.R. § 23.12.
[24] Welf. & Inst. Code § 224.2(a)(3); Fam. Code § 180(b)(3); Prob. Code § 1460.2(b)(3); *see* Cal. Rules of Court, rule 5.481(b)**.**
[25] 25 U.S.C. § 1912(a); Welf. & Inst. Code § 224.2(a)(4); Fam. Code § 180(b)(4); Prob. Code § 1460.2(b)(4); Cal. Rules of Court, rule 5.481(b); *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1406 (notice to Secretary is accomplished by notice to BIA).
[26] *See* Welf. & Inst. Code § 224.3(c).
[27] 25 C.F.R. § 23.11(a).

C. Form of Notice

Under the ICWA, notice must be sent by registered mail with return receipt requested.[28] Although there is authority indicating that technical compliance with the ICWA's notice provisions is not required if there is substantial compliance (e.g., certified instead of registered mail), in all cases, actual notice of the proceedings and the right to intervene is required. Mere awareness of the proceedings is insufficient.[29] A California court has held that the notice requirement is not satisfied unless there is strict adherence to the federal statute.[30]

Notice must be sent directly to the parents, Indian custodians, and the child's tribe, when their identity and location are known, with a copy to the BIA.[31] Where the parents, Indian custodian, or tribe cannot be determined or located, notice must be sent to the appropriate BIA office by registered mail with return receipt requested.[32] The notice must include the following information, if known:[33]

(A) The name, birthdate, and birthplace of the Indian child;

(B) The name of the Indian tribe(s) in which the child is a member or may be eligible for membership;

(C) All names known of the Indian child's biological parents, grandparents, and great-grandparents, or Indian custodians, including maiden, married and former names or aliases, as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, and any other identifying information;

(D) A copy of the petition by which the proceeding was initiated.

(E) A copy of the child's birth certificate, if available.

(F) The location, mailing address, and telephone number of the court and all parties notified.

(G) A statement of the following:

  (i) The absolute right of the child's parents, Indian custodians, and tribe to intervene in the proceeding.

  (ii) The right of the child's parents, Indian custodians, and tribe to petition the court to transfer the proceeding to the tribal court of the Indian child's tribe, absent objection by either parent and subject to declination by the tribal court.

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[28] 25 U.S.C. § 1912(a); Welf. & Inst. Code § 224.2(a)(1); Fam. Code § 180(b)(1); Prob. Code § 1460.2(b)(1); Cal. Rules of Court, rule 5.481(b).

[29] *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421-22.

[30] *In re Desiree F.* (2000) 83 Cal.App.4th 460, 472.

[31] 25 C.F.R. § 23.11(a).

[32] 25 C.F.R. § 23.11(b), (c)(12).

[33] Welf. & Inst. Code § 224.2; Fam. Code §180; Prob. Code §1460.2; *see* 25 C.F.R. § 23.11(d); *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1422-23; *In re A.G.* (2012) 204 Cal.App.4th 1390 (Department failed to investigate father's claimed Indian heritage by interviewing known relatives of father, and thus information about biological relatives omitted from notice).

(iii) The right of the child's parents, Indian custodians, and tribe to, upon request, be granted up to an additional 20 days from the receipt of the notice to prepare for the proceeding.

(iv) The potential legal consequences of the proceedings on the future custodial and parental rights of the child's parents or Indian custodians.

(v) That if the parents or Indian custodians are unable to afford counsel, counsel will be appointed to represent the parents or Indian custodians pursuant to Section 1912 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 *et seq*.).

(vi) That the information contained in the notice, petition, pleading, and other court documents is confidential, so any person or entity notified shall maintain the confidentiality of the information contained in the notice concerning the particular proceeding and not reveal it to anyone who does not need the information in order to exercise the tribe's rights under the Indian Child Welfare Act (25 U.S.C. Sec. 1901 *et seq*.).[34]

If proper notice is not given, the trial court may lack jurisdiction over the child, and the proceedings may be invalidated under 25 U.S.C. section 1914.[35] When a notice error is found on appeal, the most common approach appears to be a limited remand with an order to provide proper notice, and if the child is in fact an "Indian child", with instructions to apply the ICWA and to inform the parties of their right to petition for invalidation.[36] In addition, where a child has been affirmatively determined not to be an "Indian child" in spite of deficient notice, some courts have found such deficiencies to be harmless error.[37]

On receiving the notice, the BIA must make reasonable documented efforts to locate and notify the parents or Indian custodian and tribe. The BIA has 15 days to provide notice to the parents or Indian custodian and tribe or to notify the court that it needs additional time.[38]

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[34] Welf. & Inst. Code § 224.2(a)(5); Fam. Code § 180(b)(5); Prob. Code § 1460.2(b)(5).

[35] *In re Junious M.* (1983) 144 Cal.App.3d 786, 791; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 254; *see* Welf. & Inst. Code § 224(e), Fam. Code § 175(e), and Prob. Code § 1459(e); *see also*, § X of this Benchguide ("Invalidation").

[36] *In re Brooke C.* (2005) 127 Cal.App.4th 377, 384-386; *In re Veronica G.* (2007) 157 Cal.App.4th 179; *In re Damian C.* (2009) 178 Cal.App.4th 192.

[37] *In re I.W.* (2009) 180 Cal.App.4th 1517, 1529-1530 ("[P]roper and effective ICWA notice is critically important in dependency cases… [but] [a] deficiency in notice may be harmless when it can be said that, if proper notice had been given, the child would not have been found to be an Indian child and the ICWA would not have applied"); *In Re Melissa R.* (2009) 177 Cal.App.4th 24, 33-34 (claim that county social services agency failed to comply with ICWA notice requirements was moot, as 20-year old woman would not be an "Indian child" subject to ICWA proceedings if the challenged orders were reversed); *In Re E.W.* (2009) 170 Cal.App.4th 396, 400-403 ("Deficiencies in an ICWA notice are generally prejudicial but may be deemed harmless under some circumstances"; error in sending ICWA notices referencing only one of two siblings with same parents, and error in addressing notices to tribes rather than to designated agents for service of ICWA notice, were harmless errors since tribes responded with indication that children were not "Indian children").

[38] 25 U.S.C. § 1912(a); 25 C.F.R. § 23.11(f).

D. Effect of Notice on Pending Proceeding

No foster care placement or termination of parental rights proceeding shall be held until at least 10 days after receipt of notice by the parent or Indian custodian and the tribe or BIA.[39] Proof of notice must be filed with the court in advance of the hearing.[40] State courts 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 by the tribe.[41] If requested, the parent, Indian custodian or tribe must be granted up to 20 additional days to prepare.[42] The ICWA sets minimum time limits, and the court may grant more time to prepare where state law permits.[43]

A failure to comply with the notice requirement or deficient notice is usually prejudicial error requiring reversal and remand, unless the tribe participated in or indicated no interest in the proceeding.[44] A failure to comply with the notice requirement is not "a mere technicality,"[45] but creates "the strong likelihood of reversal on appeal."[46]

The issue of compliance with notice requirements may be raised for the first time on appeal.[47] The ICWA protects the tribe's rights independent of the other parties, and a parent or Indian custodian cannot waive the tribe's rights.[48] However, a parent may waive his or her own personal right to object to a failure to comply with the ICWA's notice requirements.[49]

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[39] 25 U.S.C. § 1912(a); Welf. & Inst. Code § 224.2(d); Fam. Code § 180(e); Prob. Code § 1460.2(e); Cal. Rules of Court, rule 5.482(a)(1).

[40] Welf. & Inst. Code § 224.2(c); Fam. Code § 180(d); Prob. Code § 1460.2(d); *see* Cal. Rules of Court, rule 5.482(a)(1).

[41] *In re Desiree F.* (2000) 83 Cal.App.4th 460, 465.

[42] 25 U.S.C. § 1912(a); Welf. & Inst. Code § 224.2(d); Fam. Code § 180(e); Prob. Code § 1460.2(e); Cal. Rules of Court, rule 5.482(a)(3).

[43] 25 U.S.C. § 1921.

[44] *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1411; *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1265.

[45] *In re Elizabeth W.* (2004) 120 Cal.App.4th 900, 908.

[46] *In re H.A.* (2002) 103 Cal.App.4th 1206, 1214.

[47] *In re B.R.* (2009) 176 Cal.App.4th 773, 779; *In re Suzanna L.* (2002) 104 Cal.App.4th 223, 231–32.

[48] *See In re Kahlen W.* (1991) 233 Cal.App.3rd 1414, 1424-25 (the ICWA protects the right of the tribe independent of any rights held by either parent).

[49] *In re S.B.* (2005) 130 Cal.App.4th 1148, 1160 (where tribe was notified and did not object to prior actions, and where parent had appeared or waived appearance at every hearing prior to hearing at which parent asserted notice objection, parent's failure to object earlier waived right to object on appeal. Note, however, that this case was decided prior to SB 678 and the "affirmative and continuing duty to inquire" enacted by SB 678 at Welf. & Inst. Code § 224.3(a). As such, the *In re S.B.* holding should be contrasted with post-SB 678 case law such as *In re Noreen G.* (2010) 181 Cal.App.4th 1359); *In re Z.W.* (2011) 194 Cal.App.4th 54, 63-67 (after case was appealed and remanded to trial court "for the purpose of curing ICWA notice defects", and where parent was represented by counsel at post-remand ICWA compliance hearing and raised no objections to content of new notices being provided, parent forfeited right to object to sufficiency of new notices on second appeal).

VII. Intervention

A. Right of Tribe and Indian Custodian to Intervene

The ICWA and supplementary California laws revolutionized the right of interested parties to intervene in Indian child custody proceedings by giving both the child's tribe and Indian custodian an absolute right to intervene at any point in any of the following proceedings:

- Foster care placements, guardianships, and conservatorships, if in any of these types of proceedings (whether voluntary or involuntary, temporary or long-term) the parent or Indian custodian does not retain the right to have the child returned upon demand;
- Custody awards to non-parents over the objection of parents;
- Termination of parental rights;
- Preadoptive and adoptive placements (including voluntary relinquishments); and,
- Certain delinquency proceedings.[1, 2]

The right to intervene may be invoked at any time in a proceeding involving an Indian child, even if for the first time on appeal.[3]

There are no federal guidelines on the mechanism for intervention. The California Rules of Court provide that an intervention may be effected either orally or in writing, and may, but is not required to, utilize Form ICWA-040 (*Notice of Designation of Tribal Representative and Notice of Intervention in a Court Proceeding Involving an Indian Child*).[4] However, if the tribe does not appear by counsel, but instead appears by other designated representative, some form of written authentication (e.g., tribal council resolution) must be provided to the court stating the representative's name and verifying that the representative is authorized to appear pursuant to an official act of the tribe.[5]

A tribe may choose not to formally intervene, but instead to seek the court's permission to simply participate in the proceedings, including receiving notice of and attending hearings,

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[1] 25 U.S.C. §§ 1903(1), 1911(c); Fam. Code §§ 170(c), 177(a), 180(b)(5)(G)(i), and 8620(a)(3)(B) and (c); Prob. Code § 1459.5; Welf. & Inst. Code §§ 224.1(c), 224.2(a)(5)(G)(i), and 224.4; Cal. Rules of Court, rule 5.482(e); *see Stanley v. Illinois* (1972) 405 U.S. 645, 657-658 (parents have a constitutional right to be a party in a child custody proceeding) and *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 52 ("the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents").

[2] *See* § XII of this Benchguide ("Delinquency Proceedings").

[3] 25 U.S.C. § 1911(c); Fam. Code § 177(a); Prob. Code § 1459.5(b); Welf. & Inst. Code § 224.4; Cal. Rules of Court, rule 5.482(e); *In re Desiree F.* (2000) 83 Cal.App.4th 460, 472 (the tribe may intervene at any point, including after parental rights have been terminated); *Matter of Begay (N.M.App. 1988)* 107 N.M. 810, 812-813 (the tribe may intervene on appeal even when it did not intervene in earlier proceedings).

[4] Cal. Rules of Court, rule 5.482(e); s*ee, e.g., In re Alexandria Y.* (1996) 45 Cal.App.4th 1483, 1485 (notice of intervention by letter); *In re Crystal K.* (1990) 226 Cal.App.3d 655, 658, *cert. denied* (1991) 502 U.S. 862 (notice by motion); *People ex rel. J.I.H.* (S.D. 2009) 768 N.W.2d 168, 170 (notice by oral motion).

[5] Cal. Rules of Court, rule 5.534(i)(1).

addressing the court, examining documents, submitting written reports and recommendations, and performing other activities requested or approved by the court.[6] The request to participate may also be made by use of the aforementioned Form ICWA-040. Of course, a tribe's request to participate does not negate the right to formally intervene later in the proceedings.

A non-federally-recognized tribe may seek the court's permission to participate in what would be an Indian child custody proceeding if the child's tribe were federally recognized.[7]

⇨ **BEST PRACTICE:** *It can be useful to have the ICWA-040 form available in the court room.*

B. Extension of Time

None of the proceedings listed above (except for the detention hearing in dependency and delinquency cases) may be held until at least 10 days after receipt of notice by the parent or Indian custodian and the tribe or Secretary of the Interior.[8] If requested, the parent, Indian custodian or tribe must be granted up to 20 additional days to prepare for any such proceeding (except under the circumstances listed at California Rules of Court, rule 5.482(a)(3)).[9]

Tribes routinely request the 20-day extension as a matter of course to prepare for proceedings. The right to such an extension is a matter of both federal law and supplementary state law specifically intended to apply to the area of Indian child welfare, and in dependency cases will therefore prevail over other state law provisions of more general application which require showing of good cause for continuances.[10] Given a defendant's right to a speedy trial, the application of this extension in delinquency cases is as yet unclear.[11]

C. Access to Court Documents and Records

Every party to the proceedings listed above has the right to examine all reports or other documents filed with the court on which any decision regarding the action may be based.[12] Social services caseworkers typically file a report with the court before a hearing, summarizing case narratives, notes, activities, and any recommendations to the court on how to proceed. A Court-Appointed Special Advocate ("CASA") may also file a report.[13] Parents, Indian custodians and tribes may find such reports useful in preparing for proceedings. In addition, access to a caseworker's actual notes may be critical when cross-examining for indications of potential cultural bias or inappropriate conclusions concerning Indian people or the requirements of the ICWA. Although this raw data may not technically be "filed with the court," courts have routinely ordered production of all relevant information when such issues have arisen.

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[6] Cal. Rules of Court, rule 5.534(i)(2).
[7] Fam. Code § 185; Welf. & Inst. Code § 306.6.
[8] 25 U.S.C. § 1912(a); Fam. Code §§ 180(d), (e), and 8620(d); Prob. Code § 1460.2(d), (e); Welf. & Inst. Code § 224.2(c), (d); Cal. Rules of Court, rule 5.482(a)(1), (a)(2).
[9] 25 U.S.C. §1912(a); Fam. Code §180(e); Prob. Code § 1460.2(e); Welf. & Inst. Code § 224.2(d); Cal. Rules of Court, rule 5.482(a)(3).
[10] Fam. Code §§ 7668, 7871.
[11] Welf. & Inst. Code § 352; *see* § XII of this Benchguide ("Delinquency Proceedings").
[12] 25 U.S.C. § 1912(c).
[13] Welf. & Inst. Code §§ 102(c), 104.

VIII. Evidentiary Requirements

A. Specific Evidence Required

The ICWA established two specific evidentiary requirements for both involuntary foster care placements and actions terminating parental rights:

> (1) A finding 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," supported by the testimony of a "qualified expert witness"; and,
>
> (2) Proof that "active efforts [were] made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts [were] unsuccessful."[1]

The ICWA does not define the phrase "continued custody." However, one California court has held that its meaning is broader than simply physical custody, and that the ICWA's requirements must be met even if the parent has no physical custody of the Indian child and only occasional contact with the child.[2]

The phrase "breakup of the Indian family" means "a situation in which the family is unable or unwilling to raise the child in a manner that is not likely to endanger the child's emotional or physical health."[3]

The ICWA applies these two requirements to all actions within its definition of "foster care placement" (placements in foster care homes or institutions, guardianships, and conservatorships," when the parent or Indian custodian cannot have the child returned upon demand) and all actions "resulting in the termination of the parent-child relationship."[4] The rights afforded to parents under the ICWA extend to "any biological parent or parents [whether Indian or non-Indian] of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom."[5]

In order to ensure better compliance with the ICWA, California incorporated the above requirements for active efforts and expert witness testimony into state laws and Rules of Court addressing involuntary foster care placements, guardianships, custody awards to a non-parent when a parent objects, conservatorships and terminations of parental rights.[6]

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[1] 25 U.S.C. §§ 1912(d)-(f).
[2] *In re Crystal K.* (1990) 226 Cal.App.3d 655, 667-668, *cert denied* (1991) 520 U.S. 862.
[3] BIA Guidelines § D.2 Commentary; *see In re Crystal K.* (1990) 226 Cal.App.3d 655, 667.
[4] 25 U.S.C. § 1903(1).
[5] 25 U.S.C. § 1903(9); *In re Riva M.* (1991) 235 Cal.App.3d 403, 411, n.6.
[6] Fam. Code §§ 177(a), 3041(e), and 7892.5; Prob. Code § 1459.5; Welf. & Inst. Code §§ 224.6(b), 361(d), 361.7, and 366.26(c)(2)(B); Cal. Rules of Court, rule 5.484(a).

B. Likelihood of Serious Emotional or Physical Damage to Child

1. Selection of an Expert Witness

The ICWA itself does not establish precise qualifications for an expert witness. California law provides a list of non-exclusive examples of persons who may qualify as expert witnesses: "a social worker, sociologist, physician, psychologist, traditional tribal therapist and healer, tribal spiritual leader, tribal historian, or tribal elder."[7] Subsection (c) of the same section also provides a list of the characteristics of those most likely to qualify as expert witnesses:

(1) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.

(2) Any expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.

(3) A professional person having substantial education and experience in the area of his or her specialty.

The expert witness cannot be "an employee of the person or agency pursuing or recommending foster care placement or a termination of parental rights."[8] In other words, a county social worker is prohibited from acting as the expert witness. If there is difficulty in locating a qualified expert witness, the court or party responsible for arranging for such testimony is encouraged to consult with the Indian child's tribe or the BIA office which services that tribe.[9]

While the exact wording of the ICWA calls for "qualified expert witnesses," implying testimony by multiple expert witnesses, California courts have held that only one expert witness is required under federal rules of construction.[10]

Technically, the expert witness' testimony is only required to address the question of whether "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."[11] Thus, some California courts have held that an expert witness does not necessarily need to possess special knowledge of or experience with the child's Indian tribal customs and culture.[12]

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[7] Welf. & Inst. Code § 224.6(a).

[8] Welf. & Inst. Code § 224.6(a).

[9] Welf. & Inst. Code § 224.6(d); BIA Guidelines § D.4 and Commentary thereto.

[10] 1 U.S.C. § 1 ("words importing the plural include the singular"); *In re Riva M.* (1991) 235 Cal.App.3d 403, 411; *In re Brandon T.* (2008)164 Cal.App.4th 1400, 1411-1412; BIA Guidelines § D.4.

[11] 25 U.S.C. § 1912(e), (f); Welf. & Inst. Code §§ 224.6(b)(1), 361.7(c).

[12] *In re Krystle D.* (1994) 30 Cal.App.4th 1778, 1801-1803 (expert witness is not required to have "expertise in Indian matters." Note, however, that the appellate court also acknowledged that the trial court "had the benefit of testimony of experts in tribal customs and childrearing practices" from additional expert witnesses); *In re M.B.* (2010) 182 Cal.App.4th 1496, 1503-1505 ("The purpose of the Indian expert's testimony is to offer a cultural perspective on a parent's conduct with his or her child, to prevent the unwarranted interference with the parent-child relationship due to cultural bias," but such cultural perspective is not required where the parental behavior at issue

However, there are compelling reasons for the court to ensure that an expert witness does possess knowledge or experience specific to the Indian child's tribe. Foremost, perhaps, is the fact that an Indian child's connection to his or her tribal community and culture is a relationship which the ICWA was intended to protect, and which the State of California has firmly declared its own commitment to protecting.[13]

An Indian child's membership in a tribe (or eligibility for membership) typically depends upon the membership of the child's parent in that same tribe. When the parent-child relationship is severed, an Indian child often loses his or her right to membership, which in turn leads to further losses: for example, the loss of regular contact with the tribal community, of the ability to take part in cultural events, of access to tribal sources of knowledge about the tribe's history and traditions, of the right to vote in tribal elections, and of the right to participate in tribal government. These are equally as important as (if not more important than) access to economic, educational, and/or health benefits that an Indian child's tribe may provide to its members, which the child will also be at risk of losing with the loss of his or her right to membership.

Such barriers to an Indian child's ability to form a relationship with his or her tribe, and to understand and value his or her Indian heritage, are precisely why many Indian tribes prefer long-term foster care or guardianship to adoption. They are also why California provides its courts with the discretion to determine that termination of parental rights may not be in an Indian child's best interest if it would result in a substantial interference with the child's connection to or membership in his or her tribe, or when the child's tribe identifies guardianship, long-term foster care, or other permanent living arrangement as the preferred alternative to adoption.[14] Use of an expert witness familiar with the Indian child's tribe can provide the court with valuable knowledge about the workings of the tribe, and what present or future losses the child may sustain if parental rights are terminated.

An expert witness with knowledge or experience specific to the Indian child's tribe also allows the court to satisfy the requirement of considering evidence of "the prevailing social and cultural standards of the Indian child's tribe, including that tribe's family organization and child-rearing practices," which is mandatory in addition to the testimony of an expert witness.[15]

There are decisions in other states suggesting that if cultural bias issues exist, an expert witness must have special knowledge regarding the placement of Indian children, and failure of the court to inquire about such special knowledge may result in a reversal of the proceeding.[16]

(father's prior conviction for molestation of minor, and mother's subsequent exposure of child to father in spite of risk of sexual abuse) does not need to be placed in a cultural context in order to find a risk of serious harm).

[13] 25 U.S.C. §§ 1901, 1902; Fam. Code § 175(a), (b); Prob. Code § 1459(a), (b); Welf. & Inst. Code § 224(a), (b); *see Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 37 *quoting* House Report, at 23, U.S.Code Cong. & Admin.News 1978, at 7546 ("The ICWA thus, in the words of the House Report accompanying it, 'seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society"').

[14] Welf. & Inst. Code § 366.26(c)(1)(B)(vi); Cal. Rules of Court, rule 5.485(b).

[15] Welf. & Inst. Code § 224.6(b)(2); Cal. Rules of Court, Rule 5.484(a).

[16] *See, e.g., In re D.S.* (Ind. 1991) 577 N.E.2d 572, 575-576; *In re N.L.* (Okla. 1988) 754 P.2d 863, 867-868.

Arguments against the requirement of a qualified expert witness with special knowledge of the Indian child's tribe are often based on the presentation of behavioral deficiencies (such as personality disorders, poor judgment, neglectful living circumstances, poor understanding and awareness, high child abuse potential, or limited parenting skills) as personality or functional problems that have nothing to do with cultural heritage. Similarly, a parent's lack of motivation towards remedial/rehabilitative services and/or negative perception of such services may be identified as problems unrelated to cultural bias.

However, it cannot be definitively said that characteristics such as personality disorder, poor judgment, neglectful living circumstances, lack of motivation, etc., have nothing to do with cultural heritage. Indeed, these conclusions are often largely driven by the cultural heritage of both the evaluator and the client.[17] Unfamiliarity with culture and community standards can result in misdiagnosis and tragic losses of Indian children from their Indian families and tribes.[18]

The United States Supreme Court, quoting from testimony offered in support of the ICWA, has noted the following:

> One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and child rearing. Many of the individuals who decide the fate of [Indian] children are at best ignorant of [tribal] cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.[19]

In the same vein, the BIA Guidelines state the following:

> The legislative history of the Act makes it pervasively clear that Congress attributes many unwarranted removals of Indian children to cultural bias on the part of the courts and social workers making the decisions. In many cases children were

[17] *See*, McGoldrick, *Ethnicity and Family Therapy* (6th ed. 1986), 6. ("Problems (whether physical or mental) can be neither diagnosed nor treated without understanding the frame of reference of the person seeking help as well as that of the helper."). *See*, Sue, *Counseling the Culturally Diverse* (1981), 27-28 (Relative to appellant's noted disinterest in insight and unreceptiveness to counseling referrals) "Racial or ethnic factors may act as impediments to counseling. Misunderstandings that arise from cultural variations in communication may lead to alienation and/or inability to develop trust and rapport. . . . This may result in early termination of therapy." Minorities, including Native Americans, have been documented to terminate counseling after only one session at a rate of 50% as compared to a 30% rate for Anglos. "Counselors who believe that having clients obtain insight into their personality dynamics and who value verbal, emotional, and behavioral expressiveness as goals in counseling are transmitting their own cultural values. This generic characteristic of counseling is not only antagonistic to lower-class values, but also to different cultural ones." *Id.* at 38.

[18] Jewelle Gibbs, *Children of Color: Psychological Interventions with Culturally Diverse Youth*,61 (2003) (Studies of American Indian children during diagnostic interviews have identified behaviors that may negatively affect assessment outcome: nonassertive, non-spontaneous, and soft-spoken verbal interaction; limited eye contact; discomfort and decreased performance on timed tasks; and, selective performance of only those skills that contribute to the betterment of the group).

[19] *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 34-35, *quoting* Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong., 2d Sess. (1978).

> removed merely because the family did not conform to the decision-maker's stereotype of what a proper family should be – without any testing of the implicit assumption that only a family that conformed to the stereotype could successfully raise children. Subsection (c) makes it clear that mere non-conformance with such stereotypes or the existence of other behavior or conditions that are considered bad does not justify a placement or termination under the standards imposed by Congress.
>
> [K]nowledge of tribal culture and child rearing practices will frequently be very valuable to the court. Determining the likelihood of future harm frequently involves predicting future behavior – which is influenced to a large degree by culture. Specific behavior patterns will often need to be placed in the context of the total culture to determine whether they are likely to cause serious emotional harm.[20]

If personal appearance by an expert witness having knowledge of or experience with the Indian child's tribe is difficult, note that the court may also accept a declaration or affidavit from the witness in place of testimony, so long as all parties stipulate to such in writing, and so long as the court determines that the stipulations were made knowingly, intelligently, and voluntarily.[21]

While the expert witness requirement is not constitutionally compelled and therefore may be waived expressly or by failure to object at the trial court level, a stipulation or failure to object constitutes a waiver only if the court is satisfied that the party has been fully advised of the requirements of the ICWA, and has knowingly, intelligently and voluntarily waived them.[22] Parents cannot waive the tribe's right to expert witness testimony, and the tribe cannot waive the parents' rights to the same.[23] Thus, where multiple parties are involved in an ICWA case, the requirement for expert witness testimony will remain unless all parties entitled thereto each make a knowing, intelligent, and voluntary waiver.

2. Two Standards of Proof

In support of a finding "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," the Act requires that there must be clear and convincing evidence.[24] For all actions which result in termination of the parent-child relationship, the Act's standard of proof in support of the same determination is elevated to evidence beyond a reasonable doubt.[25]

Again, California has incorporated these same standards into state laws addressing involuntary foster care placements, guardianships, conservatorships, custody placements with a non-parent over the objections of a parent, freeing a child from the custody and control of one or both parents, terminations of parental rights, and adoptive placements.[26]

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[20] BIA Guidelines §§ D.3 and D.4, Commentary.
[21] Welf. & Inst. Code § 224.6(e).
[22] Welf. & Inst. Code § 361(c)(6)(A); Cal. Rules of Court, rule 5.484(a)(2); *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 707-708.
[23] *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 706-707.
[24] 25 U.S.C. § 1912(e).
[25] 25 U.S.C. §§ 1903(1), 1912(f).
[26] Fam. Code §§ 177, 3041(e), and 7892.5(b); Prob. Code § 1459.5; Welf. & Inst. Code §§ 361(c), 361.7(c), and 366.26(c)(2)(B)(ii); Cal. Rules of Court, rules 5.480, 5.484, 5.485.

The BIA Guidelines strongly suggest that the evidence justifying the removal of Indian children from their families must not be based on socio-economic conditions. Cognizant of the rationale and historical basis for the ICWA, the BIA Guidelines explain that evidence of "community or family poverty, crowded or inadequate housing, alcohol abuse or non-conforming social behavior" is insufficient to support foster care placement or termination of parental rights.[27]

The ICWA provides that, where a state or federal law applicable to child custody proceedings applies "a higher standard of protection to the rights of the parent or Indian custodian of an Indian child" than the ICWA itself, courts shall apply that higher standard.[28] California law both echoes this provision and extends it further, applying any higher federal or state standard of protection not only to a child's parent or Indian custodian, but also to the child's tribe.[29] This addition demonstrates yet again the Legislature's intent to protect the connection between an Indian child and his or her tribe.

C. Active Efforts

1. What Constitutes Active Efforts

The ICWA does not provide a definition of "active efforts."[30] California law states that "active efforts shall be assessed on a case-by-case basis… active efforts shall be made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe... [and] shall utilize the available resources of the Indian child's extended family, tribe, tribal and other Indian social service agencies, and individual Indian caregiver service providers."[31] The California Rules of Court, in addition to the above, also state that "[e]fforts to provide services must include pursuit of any steps necessary to secure tribal membership for a child if the child is eligible for membership in a given tribe."[32]

California cases have made the following characterizations:

> [T]imely and affirmative steps… taken to accomplish the goal which Congress has set: to avoid the breakup of Indian families whenever possible by providing services designed to remedy problems which might lead to severance of the parent-child relationship.[33]

And,

> "Passive efforts are where a plan is drawn up and the client must develop his or her own resources towards bringing it to fruition. Active efforts ... [are] where the state caseworker takes the client through the steps of the plan rather than

[27] BIA Guidelines § D.3(c).
[28] 25 U.S.C. § 1921.
[29] Fam. Code § 175(d); Prob. Code § 1459(d); Welf. & Inst. Code § 224(d).
[30] 25 U.S.C. §§ 1903, 1912(d).
[31] Welf. & Inst. Code § 361.7(b); *see* Cal. Rules of Court, Rule 5.484(c); *see* BIA Guidelines § D.2.
[32] Cal. Rules of Court, Rule 5.484(c)(2).
[33] *Letitia V. v. Superior Court* (2000) 81 Cal.App.4th 1009, 1016.

> requiring that the plan be performed on its own. For instance, rather than requiring that a client find a job, acquire new housing, and terminate a relationship with what is perceived to be a boyfriend who is a bad influence, the Indian Child Welfare Act would require that the caseworker help the client develop job and parenting skills necessary to retain custody of her child."[34]

One could reasonably believe that the "active efforts" required by the ICWA are to some degree above and beyond the standard "reasonable services" offered in non-ICWA cases.[35] In passing the Act, Congress seemed to recognize that a higher level of services was called for, citing the "massive proportions" of the "Indian child welfare crisis" and the "cultural disorientation… sense of powerlessness, [and] loss of self-esteem" contributing to the crisis, arising largely from "long-established federal policy and from arbitrary acts of government."[36]

However, some recent California cases state that active efforts and reasonable services are effectively equivalent.[37] These cases trace back to a 1998 case, *In re Michael G.*, in which the court remarked that the two terms were "essentially undifferentiable" due to the importance that reunification services hold in the dependency system as a whole.[38] It should be remembered that *Michael G.* was decided long before SB 678, at a time when (as the *Michael G.* court acknowledged) "active efforts" did not mandatorily include application of the tribe's social and cultural standards, nor the use of the tribe's and extended family's extended services.[39] At the time, those actions were merely advisory; as of 2006, they are now required by state law,[40] and the position that there is no difference between active efforts and reasonable services would seem to overlook that fact.

There is also a broader argument that active efforts should exceed reasonable services. Active efforts must be targeted at the underlying threat to the stability of the Indian family. It is well known that Indian tribes and families were subjected to hundreds of years of attempted genocide and assimilative practices such as boarding schools and forced relocations. Less well known are the ongoing effects of that systematic cultural destruction passed from one generation to the next. Some scholars have termed this "historical trauma" or "intergenerational trauma," positing that "children [who] were bereft of culturally integrated behaviors that led to positive self-esteem, a sense of belonging to family and community and a solid American Indian identity… were ill-prepared for raising their own children" when they became adults.[41] Put another way, the repeated harm to generation after generation of Indian families created a void that will require generations of healthy family practices to fill again. Congress appears to have

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[34] *In re K.B.* (2009) 173 Cal.App.4th 1275, 1287, *quoting A.A. v. State* (Alaska 1999) 982 P.2d 256, 261 (emphasis added).

[35] *See, e.g.*, All County Information Notice I-43-04 (p. 7) and All County Letter 08-02 (pp. 10-11) in Appendix E (noting a difference between active efforts and reasonable efforts).

[36] H.R. Rep. 95-1386, 1978 U.S.C.C.A.N. 7530, 7531 and 7534.

[37] *In re S.B.* (2005) 130 Cal.App.4th 1148; *In re Adoption of Hannah S.* (2006) 142 Cal.App.4th 988; *In re C.B.* (2010) 190 Cal.App.4th 102.

[38] *In re Michael G.* (1998) 63 Cal.App.4th 700, 714. The case was not decided upon these grounds.

[39] *Ibid.*

[40] Welf. & Inst. Code § 361.7(b).

[41] Maria Yellow Horse Brave Heart, Ph.D. and Lemyra M. DeBruyn, Ph.D., *The American Indian Holocaust: Healing Historical Unresolved Grief*, 8 (n. 2) American Indian and Alaska Native Mental Health Research 60, 63-64 (1998).

acknowledged this at least to some extent when enacting the ICWA, finding that "federal boarding school and dormitory programs contribute to the destruction of Indian family and community life."[42]

2. Use of Tribal Services

Some cases state that the use of services available through a tribe or through Indian social service agencies would not have been any more successful than standard services in addressing the problems that led to the breakup of the Indian family.[43] However, courts should be aware of two things. The first is that the use of such services (where available) is now a mandatory component of proving that active efforts were made.[44] The second is that tribes often have access to services specifically oriented towards Indian cultural values and beliefs, which may be much more likely to reach a successful outcome than similar non-Indian services. After all, isn't it reasonable to believe that sending a Christian person to a Christian-oriented rehabilitative program has a better chance of success than sending that person to a Buddhist-oriented program?

3. Standard of Proof

As the Act is silent on the particular standard of proof required for finding that active remedial and rehabilitative efforts were made and were unsuccessful, the standard is simply that of clear and convincing evidence, even in terminations of parental rights.[45]

4. Other Active Efforts Requirements

SB 678 specified additional "active efforts" unrelated to the provision of remedial and rehabilitative services. These requirements include making (and documenting in the record) active efforts to comply with the ICWA's placement preferences,[46] and, if there is no preferred placement available, making active efforts to place the child "with a family committed to enabling the child to have extended family visitation and participation in the cultural and ceremonial events of the child's tribe."[47]

Amendments to the California Rules of Court in 2008 further provide that "active efforts" require the party responsible for making those efforts to take all necessary steps towards enrolling a child in a tribe if the child is eligible for membership in that tribe.[48]

5. Where Active Efforts Might Not Be Required

Active efforts must be made "[n]otwithstanding Section 361.5 [of the Welfare and Institutions Code]."[49] However, in certain extreme situations, some courts have ruled that active

[42] H.R. Rep. 95-1386, 1978 U.S.C.C.A.N. 7530, 7531.
[43] *See, e.g., In re S.B.* (2005) 130 Cal.App.4th 1148, 1165.
[44] Welf. & Inst. Code § 361.7(b).
[45] Cal. Rules of Court, Rule 5.485(a)(1); *In re Michael G.* (1998) 63 Cal.App.4th 700, 709-712.
[46] Welf. & Inst. Code § 361.31(k).
[47] Welf. & Inst. Code § 361.31(i).
[48] Cal. Rules of Court, rules 5.482(c) and 5.484(c).
[49] Welf. & Inst. Code § 361.7(a).

efforts may not be required where a parent's behavior has clearly demonstrated that remedial services or rehabilitation would be fruitless. In one such case, the mother's extensive history of drug abuse and failure to correct her behavior despite substantial active efforts being provided during the prior dependencies of several of her children meant that further active efforts in the current case of another child "would be *nothing but* an idle act" not required by law.[50]

In another such case, the father had a previous conviction for lewd and lascivious acts on a child. The mother had been provided with reunification services relating to drug abuse and parenting skills during a prior dependency case involving her four children, and had also been provided services regarding prevention of sexual abuse during the current case involving three of those same children. In spite of those services, in spite of the risk of further sexual abuse by the father, and in violation of the conditions of his parole, the mother allowed the father to move back in with the family. The father was then alleged to have molested the mother's 14-year-old daughter, and the mother, while denying that the abuse had occurred, apparently told her daughter to "'forget about' the abuse or to 'get over it and move on.'"[51] The court found that "[the father's] history clearly demonstrate[d] the futility of offering reunification services,"[52] and that the mother had failed to benefit from the active efforts made during the prior and current dependency proceedings.[53]

Former California Rules of Court, rule 1439 provided conditions for a waiver of the active efforts requirement.[54] However, that rule (renumbered to 5.664 effective January 1, 2007) was repealed effective January 1, 2008. Neither the ICWA nor any current California law provides for a waiver of the active efforts requirement.

[50] *Letitia V. v. Superior Court* (2000) 81 Cal.App.4th 1009, 1016 (emphasis in original).
[51] *In re K.B.* (2009) 173 Cal.App.4th 1275, 1285.
[52] *Id.* at 1284.
[53] *Id.* at 1288.
[54] *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 708.

IX. Placement

A. Tribal Social and Cultural Standards

The ICWA sets forth certain placement preferences for all actions within its definition of "foster care placement" (foster care placements, guardianships, conservatorships, and placements in an "institution," when the parent or Indian custodian cannot have the child returned upon demand), preadoptive placements, and adoptive placements, which must be followed by state courts in Indian child custody proceedings, absent good cause to the contrary.[1] The U.S. Supreme Court has characterized these placement preferences as "[t]he most important substantive requirement imposed on state courts."[2]

The ICWA expressly declares that, when it becomes necessary to remove an Indian child from his or her home, the child's subsequent placement "will reflect the unique values of Indian culture."[3] Thus, courts must apply tribal social and cultural standards when determining an Indian child's placement.[4] The importance of unique Indian social and cultural standards cannot be overemphasized – the historical lack of understanding of such standards by state courts and agencies, and the resulting effects on the populations of Indian tribes and the self-identification of Indian children, is precisely why the ICWA was enacted, as "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."[5] A tribe might rely on its social and cultural standards, for example, in defining who qualifies as a child's "extended family member," or in approving a particular foster home, or in establishing an order of placement preference different than that set forth in the ICWA,[6] or in issuing a tribal customary adoption order.[7]

California has also recognized the significance of culturally-appropriate placement to both Indian children and tribes, and has declared that the policy of the state shall be to place an Indian child, "whenever possible, in a placement that reflects the unique values of the child's tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the child's tribe and tribal community."[8] Furthermore, the California Legislature has expressly declared that an Indian child's own best interests are served by protecting and encouraging "the child's membership in the child's Indian tribe and connection to the tribal community… regardless of whether the child is in the physical custody of an Indian parent or Indian custodian at the commencement of a child custody proceeding, the parental rights of the child's parents have been terminated, or where the child has resided or been domiciled."[9]

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[1] 25 U.S.C. §§ 1903(1), 1915(a), (b).
[2] *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 36.
[3] 25 U.S.C. §1902.
[4] 25 U.S.C. §1915(d).
[5] 25 U.S.C. §1901(3); *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 32-37.
[6] 25 U.S.C. §§ 1903(2), 1915(b)(ii), (c).
[7] Welf. & Inst. Code § 366.24.
[8] Fam. Code § 175(a)(1); Prob. Code §1459(a)(1); Welf. & Inst. Code §§ 224(a)(1), 361.31(f); *see* Fam. Code §§ 3041 and 8710 (referring to Welf. & Inst. Code § 361.31).
[9] Welf. & Inst. Code § 224(a)(2); Prob. Code § 1459(a)(2); *see* Fam. Code § 175(a)(2); *see* Cal. Rules of Court,

California recently created further support for tribal cultures and customs by enacting legislation that requires the juvenile court and social workers to consider and recommend "tribal customary adoption" as an additional permanent placement option, without termination of parental rights.[10] With this new option, tribes are able to respond in a culturally appropriate manner to ensure that Indian children have meaningful connections with their tribal communities while also receiving permanency.

B. Placement Preferences

Seeking better compliance with the ICWA's placement preferences, SB 678 codified those preferences into state law and created specific Rules of Court to address placement in Indian child custody proceedings.[11] Any services available from the child's tribe must be utilized in effecting placement.[12] There are two different orders of placement preference. Placement preferences for adoptive placements are as follows, in descending order of priority:

(1) A child's extended family member.

(2) A member of the child's tribe.

(3) Another Indian family.[13]

The placement preferences for preadoptive and similar placements (foster care, guardianship, etc.) are listed below in descending order of priority. Note that such placements must also take into account the placement's approximation to a family, the child's special needs (if any), the restrictiveness of the setting, and the proximity to the child's home:

(1) A child's extended family member.

(2) A foster home licensed, approved, or specified by the child's tribe.

(3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority.

(4) An institution approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.[14]

The above preferences apply not only to the initial placement of an Indian child after removal, but also when a child is removed from a foster care home or institution, guardianship, or adoptive placement for subsequent further placement.[15] As mentioned previously, the Indian

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rule 5.485(b) (court may find that termination of parental rights is not in child's best interest where there would be interference with connection to tribal community or tribal rights, or where tribe identifies alternative permanent plan); *see also* § XI(E), ¶ 2 of this Benchguide for more on impacts to child's connection to tribe and tribal rights.

[10] Assem. Bill No. 1325 (2009-2010 Reg. Sess.); 2009 Cal. Stats., ch. 287; Welf. & Inst. Code § 366.24.

[11] Welf. & Inst. Code § 361.31; *see* Fam. Code §§ 177(a), 3041(e), and 8710; Prob. Code § 1459.5(b); Cal. Rules of Court, rules 5.484(b).

[12] Welf. & Inst. Code § 361.31(g); Cal. Rules of Court, Rule 5.482(g).

[13] 25 U.S.C. § 1915(a); Welf. & Inst. Code § 361.31(c).

[14] 25 U.S.C. § 1915(b); Welf. & Inst. Code § 361.31(b).

[15] Fam. Code § 175(b); Prob. Code § 1459(b); Welf. & Inst. Code § 224(b).

child's tribe may establish a different order of preference than those above, which must be followed so long as it is the least restrictive setting appropriate to the child's particular needs.[16]

In cases where no preferred placement is available, "active efforts" must then be made (and documented) to ensure that the child's placement is "with a family committed to enabling the child to have extended family visitation and participation in the cultural and ceremonial events of the child's tribe."[17] Also note that the record must document what efforts were made to comply with the ICWA's placement preferences, and that record must be made available to the child's tribe at any time.[18]

C. Good Cause for Deviation from Order of Preference

1. Grounds for Good Cause

Certain circumstances may create "good cause" for the court to order a deviation from the above placement preferences.[19] The burden of proving that good cause for deviation exists is on the party requesting the court for a deviation.[20] A good cause finding may be based on:

(A) The requests of the parent or Indian custodian;

(B) The requests of the Indian child, when of sufficient age;

(C) The extraordinary physical or emotional needs of the Indian child as established by a qualified expert witness; or

(D) The unavailability of suitable families based on a documented diligent effort to identify families meeting the preference criteria.[21]

The finding that good cause for deviation from the placement preferences exists is a decision that must be made by the court, not by a local or state agency, in consideration of all of the Indian child's interests as well as those of the child's tribe.[22] It is misguided to view the best interest of the child as being opposed to that of the tribe, or to view the application of the Act as only in the tribe's interest. In truth, and by statute, an Indian child's best interest and the interest of his or her tribe are intertwined.

Emotional bonding between a child and his or her placement which occurs as a result of a local or state agency's failure to comply with the ICWA cannot constitute good cause for deviating from the ICWA's placement preferences, although considerable trauma to the child may occur as a result.[23]

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[16] 25 U.S.C. § 1915(c); Welf. & Inst. Code § 361.31(d); Cal. Rules of Court, Rule 5.484(b)(4).
[17] Welf. & Inst. Code § 361.31(i); *see also,* Cal. Rules of Court, Rule 5.484(b)(6).
[18] 25 U.S.C. § 1915(e).
[19] 25 U.S.C. § 1915(a), (b); Welf. & Inst. Code § 361.31(h); Cal. Rules of Court, Rule 5.484(b); Fam. Code § 177(a); Probate Code § 1459.5(b).
[20] Welf. & Inst. Code § 361.31(j); Cal. Rules of Court, Rule 5.484(b)(3); Fam. Code § 177(a); Probate Code § 1459.5(b).
[21] Cal. Rules of Court, Rule 5.484(b)(2).
[22] Welf. & Inst. Code § 361.31(h); Cal. Rules of Court, Rule 5.484(b)(1)-(3).
[23] *In re Desiree F.* (2000) 83 Cal.App.4th 460, 476; *see Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 53-54.

Given the U.S. Supreme Court's recognition of the importance of the placement preferences, the findings by both Congress and the California Legislature of an Indian child's own interest in establishing and maintaining a relationship with his or her tribe, and the potential impacts of the child's loss of tribal membership rights, it is recommended that courts give careful consideration to those factors, and to the underlying reasons for the placement preferences themselves, when weighing the possibility of a good cause deviation. It must be remembered that a profound lack of understanding of Indian culture, and the effects which placement of Indian children with non-Indian families had on both Indian children and their tribes, is precisely what moved Congress to pass the ICWA in the first place.

2. Criminal Record Exemptions

Criminal background checks are required for placement of dependent children with relatives or prospective guardians who are not licensed or certified foster parents.[24] If a criminal record exists, placement may or may not be authorized pursuant to the Health and Safety Code.[25] Certain violent felonies are an absolute bar to placement.[26] An exemption may be granted for other crimes, including violent misdemeanors, if there is reason to believe that the potential placement is of good character and would not pose a risk of harm to the child.[27] The state has adopted regulations that govern the granting of criminal record exemptions.[28]

The Third District Court of Appeal held in *In re Jullian B.* that in light of the purposes underlying the ICWA, a party seeking placement of an Indian child must request a "waiver" (now termed an "exemption") for a potential placement with a criminal record if that placement would satisfy the ICWA's preferences, or must "adequately support its reasons for not doing so if failure to request a waiver results in a placement that contravenes the ICWA preferences."[29] According to the court's holding, an exemption cannot be unreasonably denied, "for to do so would necessarily frustrate goals the ICWA is intended to achieve."[30] If these requirements are not met, the party seeking placement cannot meet its burden of proving good cause to deviate from the ICWA's placement preferences.[31]

When *Jullian B.* was decided, the relevant statute allowed a county to request an exemption from the California Department of Social Services (DSS). However, the statute did not allow the DSS to delegate its exemption-granting authority to a county, which in *Jullian B.* is what the DSS wanted to do.[32] The county would not accept the responsibility of granting an exemption, and since that was the only option being offered by the DSS, the county concluded that requesting an exemption for the potential placement was futile.[33]

[24] Welf. & Inst. Code § 361.4(b).
[25] Welf. & Inst. Code § 361.4(d)(2); Health & Safety Code § 1522.
[26] Health & Safety Code § 1522(g)(1)(A)-(C); Cal. Penal Code §§ 220, 243.4, 264.1.
[27] Welf. & Inst. Code § 361.4(d)(2); Health & Safety Code § 1522(g)(1).
[28] Title 22 Cal. Code of Regs. §§ 80000 *et seq*.
[29] *In re Jullian B.* (2000) 82 Cal.App.4th 1337, 1347.
[30] *Ibid.*
[31] *Id*. at 1350.
[32] *Id.* at 1350-1351.
[33] *Id.* at 1349.

The statute was changed in 2001 to allow a county to request permission from the state to grant exemptions itself.[34] That is, in 2000 the county had the responsibility of requesting an exemption or of explaining why, "based on the merits of the individual case and subject to review for abuse of discretion, it did not do so."[35] In 2000, the state had the responsibility of exercising "sound discretion" in considering the exemption request.[36] When the statute changed in 2001, both of those responsibilities became the county's, where a county has requested permission from the state to grant exemptions (and has been given that permission).[37]

In addition, an Indian tribe may make its own request for a criminal record exemption for a potential placement, either from a county with the proper authority or from the state DSS directly.[38] Once a tribe requests an exemption from one of those two entities, it serves as an election of that entity, and only that entity may then decide whether to grant the tribe's request.[39] (In other words, a tribe may not first request an exemption from one entity, have that request denied, and then make the same request to the other entity.) However, this tribal request option in no way relieves the party seeking to place an Indian child from its independent duty to pursue a criminal record exemption, or to adequately explain its reasons for not doing so.[40]

[34] Cal. Senate Bill No. 884 (2001 Cal. Stats. ch. 445).
[35] *In re Jullian B.*, *supra* at 1350.
[36] *Ibid*.
[37] Welf. & Inst. Code § 361.4(d)(3).
[38] Welf. & Inst. Code § 361.4(f).
[39] *Ibid*.
[40] *Ibid*.

X. Invalidation

A. Coverage and Standing

A state court child custody proceeding may be "invalidated" if certain provisions of the ICWA are violated.[1] This is often referred to as the "enforcement provision" of the ICWA. An invalidation may be based on a violation of any provision set forth in 25 U.S.C. section 1911 (addressing jurisdictional issues, including transfer to tribal court, intervention, and full faith and credit to tribal acts and proceedings), section 1912 (addressing issues in involuntary custody proceedings, including notice, time extensions, appointment of counsel, examination of documents filed with the court, active remedial/rehabilitative efforts, and evidentiary requirements), or section 1913 (addressing issues in voluntary custody proceedings, including consent, the court's certification thereof, and withdrawal of consent).

Invalidation may be sought by the Indian child, the child's tribe, or a parent or Indian custodian from whose custody the child was removed.[2]

B. "Court of Competent Jurisdiction"

The ICWA provides that a party with standing to petition for invalidation may do so in "any court of competent jurisdiction."[3] However, that term is not defined by the Act.

When an Indian child is a dependent child, a ward of the juvenile court, or otherwise the subject of an open or pending juvenile court proceeding, the juvenile court is clearly a "court of competent jurisdiction."[4] The question is whether the juvenile court is the only such court, or whether other courts may also have the jurisdiction to hear a petition to invalidate.

On the trial court level, it has been established that a petition to invalidate a juvenile court ruling cannot be brought in superior court, because both a juvenile court and a superior court are departments of the same court – since they are coextensive, a superior court lacks the authority to overrule a juvenile court.[5]

On the appellate level, several courts have discussed Section 1914 as though an appeal of a juvenile court order is itself an "enforcement" proceeding under the ICWA, apparently with no petition for invalidation having first been made in the juvenile court.[6] However, those courts' references to Section 1914 have largely been within the context of whether a particular party has standing to appeal. On the other hand, several appellate courts have considered invalidations

[1] 25 U.S.C. § 1914; Fam. Code § 175(e); Prob. Code § 1459(e); Welf. & Inst. Code § 224(e); Cal. Rules of Court, rule 5.486.
[2] 25 U.S.C. § 1914.
[3] *Ibid.*
[4] Cal. Rules of Court, rule 5.486.
[5] *Slone v. Inyo Co. Juvenile Court* (1991) 230 Cal.App.3d 263, 268-270.
[6] *In re B.R.* (2009) 176 Cal.App.4th 773; *In re A.B.* (2008) 164 Cal.App.4th 832; *In re S.M.* (2004) 118 Cal.App.4th 1108; *In re Louis S.* (2004) 117 Cal.App.4th 622; *In re Daniel M.* (2003) 110 Cal.App.4th 703; *In re Pedro N.* (1995) 35 Cal.App.4th 183; *In re Riva M.* (1991) 235 Cal.App.3d 403.

when first requested at the juvenile court level, or taken the position that a petition for invalidation must first be submitted to the juvenile court, with the appellate court only able to consider an invalidation after the juvenile court's ruling on the petition.[7, 8]

On the federal court level, the Ninth Circuit Court of Appeals has held that the ICWA creates federal question jurisdiction, thus permitting a federal district court to review a state court's actions for violations of the ICWA.[9] Specifically, the Ninth Circuit held: 1) that "Congress may authorize federal district courts to review state court judgments," 2) that a federal district court is a "court of competent jurisdiction" as set forth in the ICWA, and 3) that "§1914 grants federal district courts the authority to invalidate state court actions that violate [25 U.S.C.] §§ 1911, 1912, and 1913."[10]

C. Form of Petition for Invalidation

The ICWA provides that certain parties "may petition… to invalidate" but does not specify or limit what form the petition should take. There is no Judicial Council form for such an action. The most commonly accepted procedure is to file a "petition to invalidate" with the juvenile court (but see above regarding appellate courts' and federal courts' involvement as well). In other states, a petition for a writ of habeas corpus, a motion for reconsideration or a motion for relief from judgment have also been used.[11]

D. Extent of Proceedings Invalidated

Most ICWA cases discussing invalidation in California are centered on a failure to provide proper notice as required by Section 1912(a), a long-standing problem in this state.[12] California appellate courts have taken varied and inconsistent positions when addressing the question of whether a failure to notice constitutes prejudicial error.[13] Most have decided that a failure to notice is generally, but not always, subject to a harmless error analysis, and is not an absolute mandate for invalidation of all proceedings subsequent to the failure to notice. These courts have frequently dealt with violations of Section 1912(a) by remanding to the lower court with an order to provide proper notice, while leaving the lower court's orders made after notice was initially required (orders made in jurisdictional or dispositional hearings, orders to

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[7] *In re Jonathon S.* (2005) 129 Cal.App.4th 334; *see also In re Damien C.* (2009) 178 Cal.App.4th 192; *In re K.B.* (2009) 173 Cal.App.4th 1275; *In re Veronica G.* (2007) 157 Cal.App.4th 179; *In re Brooke C.* (2005) 127 Cal.App.4th 377; *In re Desiree F.* (2000) 83 Cal.App.4th 460.

[8] Some courts have even required that an objection to a particular ICWA violation be made at the trial level as a precondition to invalidation. This creates a problem where (as often happens) a tribe was not noticed or did not participate in the case at the trial level, and appears contrary to the tribe's right to intervene at any time in a proceeding, even if for the first time on appeal -- *see* § VII of this Benchguide ("Intervention").

[9] *Doe v. Mann* (2005) 415 F.3d 1038, *cert. denied*, 547 U.S. 1111.

[10] *Id.* at 1041-1048.

[11] *Application of Angus* (Ore. 1982) 655 P.2d 208, *cert. denied*, 464 U.S. 830 (parents' use of habeas corpus because of a violation of the Act resulted in the minor being illegally detained).

[12] *In re I.G.* (2005) 133 Cal.App.4th 1246, 1254-1255 (discussing the "virtual epidemic of cases where reversals have been required because of noncompliance with ICWA").

[13] *See, e.g., In re Brooke C.* (2005) 127 Cal.App.4th 377, 384-386; cf. *Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779, 784-785, *In re Desiree F., supra* at 474-475.

discontinue reunification efforts, etc.) intact pending the results of the notice.[14] If the child is not determined to be an Indian child, those orders are reinstated and the failure to notice deemed harmless error. However, if the child is determined to be an Indian child, then the appellate court informs (or directs the lower court to inform) the appellant of their right to seek invalidation.

In the above type of cases, the most common scenario is that the child's Indian heritage is uncertain as to which particular tribe or tribes he or she may be a member of (or eligible for membership in), leading to his or her tribe(s) receiving no actual notice of the court proceedings and no opportunity to inform the court whether the child is in fact an Indian child according to the ICWA. Since a failure to give notice prevents a tribe, parents, or Indian custodian from being able to participate or otherwise exercise their ICWA rights (in the case of a tribe, from being able to intervene or transfer the case to tribal court), some remedy is obviously required. However, when the child's status as an Indian child is unclear, appellate courts have often ordered a limited remand as above in order to allow a permanent plan to be finalized as soon as possible should the child not be an Indian child. This is a logical approach – after all, if the child is not an Indian child, then the same procedures and standards would apply to his or her case as to any other child's.

However, in cases where the child is determined to be an Indian child, a more extensive remedy is necessary in order to ensure that all of the applicable requirements of Sections 1911, 1912, and 1913 have been satisfied. These may be cases in which the child's tribe has provided affirmation of the child's status as an Indian child in spite of a failure to notice, or in which the tribe has otherwise sought to become involved in the proceedings but has been wrongfully denied.[15] If the child is determined to be an Indian child, then courts must be mindful of the heightened protections for Indian children, families, and tribes as discussed in detail throughout this Benchguide (e.g., requirements for "active" remedial/rehabilitative efforts, application of the tribe's social and cultural standards, use of the tribe's services whenever available, etc.). If the child is not found to be an Indian child, then a violation of Sections 1911, 1912, or 1913 might be harmless. If, however, a child is an Indian child, then invalidation of all proceedings dating back to the ICWA violation in question is entirely appropriate, as to do otherwise would be to ignore the basic reasons for which the ICWA and complementary state laws were passed.

E. Timing of Petition

Section 1914 does not establish a time period within which a petition to invalidate must be made. As above, most of the cases examining the timing of an action in which invalidation is raised involve the issue of notice. A few courts have held that a parent who has appeared or waived appearance at hearings in which certain orders are made may lose the right to later challenge those orders unless the challenge is timely made.[16]

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[14] *In re Brooke C.*, *supra*; *In re Veronica G.* (2007) 157 Cal.App.4th 179; *In re Damian C.* (2009) 178 Cal.App.4th 192.

[15] *See, e.g., In re Desiree F., supra* (failure to notice, failure to appoint counsel for parent, failure to provide expert witness testimony, and failure to allow the child's tribe to intervene).

[16] *In re Pedro N.* (1995) 35 Cal.App.4th 183, 190-191 ("[Section 1914] may even excuse a parent's failure to raise an ICWA objection in the trial court. (Citation.) However, it does not authorize a court to defer or otherwise excuse a parent's delay in presenting his or her petition until well after the disputed action is final." Note, however, that the *Pedro N.* court acknowledged that it was addressing only the parent's appeal and "[did] not attempt to determine the

The more common position, however, appears to be that any party may contest a failure to notice even if for the first time on appeal, as ultimately it is the responsibility of the courts, and not parents, children, or tribes, to ensure compliance with the ICWA's notice requirements.[17] This comports with the fact that a tribe may intervene "at any point in the proceeding," even if its first involvement in the case is on appeal.[18] The same logic should apply to the remainder of the substantive provisions in Sections 1911, 1912, and 1913 as well; it is worth noting that the California Welfare and Institutions Code and the California Rules of Court specifically state that a waiver of certain of the ICWA's evidentiary requirements may only be done "knowingly, intelligently, and voluntarily" and must be in writing.[19]

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rights of any tribe" in its decision.) *See also, In re S.B.* (2005) 130 Cal.App.4th 1148 (A parent cannot waive a tribe's rights under the ICWA, but can waive his or her own rights in certain circumstances; when a parent appears or waives appearance at multiple hearings but does not object to notice violation at any of those hearings, later objection may be precluded.)

[17] *In re B.R.* (2009) 176 Cal.App.4th 773, 779-780 ("We agree with the view taken in *In re Marinna J.* [citation omitted], which questioned the conclusion reached in *Pedro N.* and observed that 'it would be contrary to the terms of the [ICWA] to conclude ... that parental inaction could excuse the failure of the juvenile court to ensure that notice ... was provided to the Indian tribe named in the proceeding.' [Citation omitted.] Similarly, the Court of Appeal in *Dwayne P. v. Superior Court* [citation omitted] (*Dwayne P.*), rejected *Pedro N.* and held that the juvenile court had a sua sponte duty to ensure compliance with ICWA notice requirements 'since notice is intended to protect the interests of Indian children and tribes despite the parents' inaction.' [Citation omitted.] We agree with *In re Marinna J.* and *Dwayne P.* that the parents' failure to raise the ICWA issue now before us does not prevent us from considering the issue on the merits"). *See also, In re A.B.* (2008) 164 Cal.App.4th 832, 839 (fn. 4); *In re Alice M.* (2008) 161 Cal.App.4th 1189, 1195-1196; *Nicole K. v. Superior Court, supra* at 783 (fn. 1).

[18] 25 U.S.C. § 1911(c); Fam. Code § 177(a); Welf. & Inst. Code § 224.4; Cal. Rules of Court, rule 5.482(e); *see also* Prob. Code § 1459.5; *In re Desiree F.*, 83 Cal.App.4th 460 (2000) (tribe may intervene at any point, including after parental rights have been terminated); *Matter of Begay*, 107 N.M. 810, 812-813 (N.M.App. 1988) (tribe may intervene on appeal even when it did not intervene in earlier proceedings).

[19] Welf. & Inst. Code §§ 224.6(e), 361(c)(6)(A); Cal. Rules of Court, rule 5.484(a)(2).

XI. Dependency Proceedings

Although the Indian Child Welfare Act is essentially a component of the process and procedures applied in state dependency cases, ICWA advocates and some attorneys have tended to view its practice as separate and distinct from the dependency process. In reality there are very few areas where the ICWA is inconsistent with state dependency law – rather, it operates as an enhancement of the state procedures pertaining to Indian children.

In the early years of the ICWA's enactment, some social services agencies and courts were deferential to Indian tribes and their representatives, while others were resistant to the imposition of additional procedural requirements above and beyond those required by state law. The need to harmonize state and federal law was essentially accomplished on a case-by-case basis, and applied to California courts by administrative rule. Of the cases that were reported, a large percentage dealt primarily with the "notice" issue and never reached the nuances of how to apply the Act once proper notice had been given.

Aside from the policy purpose of enacting the ICWA to preserve Indian families, and when necessary to allow tribes to intervene offering culturally-appropriate services, utilizing placement preferences, and preserving a child's right to his or her relationship with his or her tribal community and political system, a further advantage in effectuating the ICWA is that it affords the court additional placement resources and additional service providers, including the recently-added permanent plan option of tribal customary adoption, which in essence allows for children to maintain a connection with their tribe and culture without terminating parental rights.[1] Where state dependency law and the ICWA intersect, the practical effect is the availability of supplementary tools to keep Indian families intact.

In basic procedure terms, state dependency cases consist of the following components.[2]

(1) Voluntary Services
(2) Initial or Detention Hearing
(3) Jurisdictional Hearing
(4) Dispositional Hearing
(5) Placement Review Hearings
(6) Permanent Plan Hearing
(7) Post-Permanency Review Hearings
(8) Adoptions

However, within the context of the ICWA, the additional protections discussed in the remainder of this section are imposed.

[1] Welf. & Inst. Code §366.24.
[2] Welf. & Inst. Code, Divisions 2 – 2.5.

A. Notice and Right to Intervene

Under California law the courts and social services agencies are required to make inquiry as to whether a minor child may fall within the definition of an "Indian child" under the Act.[3] Once the duty to inquiry has been met (and it is a continuing duty),[4] notice of the proceedings must be given to the child's parents, the Indian custodian, and the child's tribe or tribes.[5] Setting aside the mechanics of giving notice, which have caused endless complexities for certain counties, the reason for giving notice is to afford such parties a right to intervene in the proceedings. Ordinarily the parents will have notice, although there can be circumstances where a father is recognized by a tribe as a biological father, but not by the agency.

The notice must advise the parent or Indian custodian and tribe, among other things, of their right to intervene.[6] Intervention not only affords the tribe or Indian custodian party status, but also adds additional service requirements for prospective reports and compels them to receive discovery and disclosure of documents.[7] As a practical matter, social services agencies often do not treat intervening tribes comparably to other parties, and as a consequence, reports, studies or other documents are not given simultaneously as those given to other parties. This leads to delay and the need for unnecessary requests for continuance. The Judicial Council has adopted certain forms for intervention in the case by a tribe or Indian custodian, but the forms are permissive, not mandatory. A tribe may intervene at any time in the proceeding,[8] and need not do so in writing.[9]

If, on the other hand, a tribe elects to not formally intervene, it may still participate in the hearings via a representative.[10] California Rules of Court, rule 5.534(i) attempts to distinguish those roles, but it is clear that the tribe need not hire an attorney to participate. Some courts have taken issue with whether the tribal representative in this capacity can only examine court documents, but not receive copies as formal discovery. A similar but unresolved issue exists as to whether the non-intervening representative can question witnesses, raise objections, or perform other attorney-like duties absent consent of the court. Perhaps a practical and useful analogy for this situation is to consider the tribe as a *pro se* litigant who simply cannot afford to hire counsel. Seen in this light, a tribal representative should be afforded all the procedural due process rights of any other *pro se* party.

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[3] Welf. & Inst. Code § 224.3; Cal. Rules of Court, rule 5.481(a).

[4] Welf. & Inst. Code § 224.3(a); Cal. Rules of Court, rule 5.481(a); *In re Desiree F.* (2000) 83 Cal. App.4th 460, 470;

[5] 25 U.S.C. § 1912(a); Welf. & Inst. Code §§ 224.2; Cal. Rules of Court, rule 5.481(b); *see* § VI of this Benchguide ("Notice").

[6] BIA Guidelines § B.5(b).

[7] 25 U.S.C. § 1912(c); *see* § VII of this Benchguide ("Intervention").

[8] 25 U.S.C. § 1911(c); Welf. & Inst. Code § 224.4; Cal. Rules of Court, rule 5.482(e); Fam. Code § 177(a); Probate Code § 1459.5(b); *In re Desiree F.* (2000) 83 Cal.App.4th 460, 472 (the tribe may intervene at any point, including after parental rights have been terminated); *Matter of Begay* (N.M.App. 1988) 107 N.M. 810, 812-813 (the tribe may intervene on appeal even when it did not intervene in earlier proceedings).

[9] Cal. Rules of Court, rule 5.482(e); *see People ex rel. J.I.H.* (S.D. 2009) 768 N.W.2d 168, 170 (notice by oral motion).

[10] Cal. Rules of Court, rule 5.534(i)(1); *see* § VII of this Benchguide ("Intervention").

B. Detriment and Active Efforts Findings

1. Detriment

In addition to the removal findings required under state law, the ICWA adds a required finding of detriment. The detriment finding has two parts. First, the petitioning party must show that the return of custody of the Indian child to his or her parents (or Indian custodian) is likely to cause serious emotional or physical damage.[11] Second, the court must consider evidence regarding the tribe's social and cultural standards and child-rearing practices.[12]

The detriment finding must be based on the testimony of a qualified expert witness.[13] Both the BIA Guidelines and the Welfare and Institutions Code set forth examples of those most likely to qualify as expert witnesses and the probable characteristics thereof.[14] Members of the child's Indian tribe who are recognized by the tribal community as knowledgeable in tribal customs, family organization, and child rearing practices are arguably the most likely to qualify as an expert witness for Indian child custody proceedings.[15] Perhaps for that reason, many courts have requested that tribes produce the "qualified expert witness" in these types of cases. However, the fact that a tribal member or tribal ICWA worker may be the most qualified witness does not shift the burden of proof to the tribe to substantiate the detriment finding. There may be any number of instances where a tribe's position is aligned with a county's, but that in and of itself does not convert the tribe into the petitioner.

Until it was clarified by the 2006 legislation, some controversy existed over whether testimony could include a written declaration by the qualified expert witness. Since the testimony was not intended to be a republication of the social services report or rote affirmation of its statements and conclusions, there was some benefit in having the expert in court to testify, especially if the purpose of the testimony was to assist the court in understanding tribal customs before making the detriment finding. Over time the process degenerated into a paper endorsement of everything that social services agencies submitted for disposition, which was ameliorated to some extent by SB 678's requirement that a waiver of the testimony or a stipulation of such be knowing, intelligent, and voluntary, and submitted in writing to the court for approval.[16] As with any other waiver, the court should make detailed inquiry of each party.

Finally, it is worth noting that there is a front end and back end detriment finding that must be made. The front end is triggered by a foster care placement,[17] but a back end finding is also required before terminating parental rights.[18] Often it is erroneously assumed that the detriment finding does not need to be made before a "placement" is made which seemingly

[11] 25 U.S.C. § 1912 (e), (f); Welf. & Inst. Code § 224.6(b)(1), 361.7(c); Cal. Rules of Court, rules 5.484(a) and 5.485(a).
[12] Welf. & Inst. Code § 224.6(b)(2); Cal. Rules of Court, Rule 5.484(a).
[13] 25 U.S.C. § 1912(e), (f); Welf. & Inst. Code §§ 224.6(b)(1), 361.7(c); Cal. Rules of Court, Rule 5.4849(a)(1).
[14] BIA Guidelines § D.4(b); Welf. & Inst. Code § 224.6; *see* § VIII(B)(1) of this Benchguide ("Selection of an Expert Witness").
[15] Welf. & Inst. Code § 224.6(c)(1).
[16] Welf. & Inst. Code § 224.6(e).
[17] Welf. & Inst. Code §§ 361.7(c), 224.6(b)(1).
[18] 25 U.S.C. § 1912(f).

excludes emergency placements or detention orders. The definition of an "Indian child custody proceeding" (thereby triggering the ICWA) includes temporary or long term foster care.[19] "Foster care placement" is a defined term under ICWA,[20] but temporary placement is not defined. Foster care is defined as an involuntary removal where the parent or Indian custodian cannot have the child returned on demand.[21] The argument can be made that even before the court makes a dispositional placement, because the parents or Indian custodian cannot have a child returned on demand, the detriment finding should be made upon removal. In courts where the intended statutory timelines are extended and the detention order becomes a de facto placement order, it becomes all the more important.

2. Active Efforts

Perhaps the most cited but least articulated augmentation of California dependency law is the "active efforts" requirement. As its name implies, active efforts are something more than passive efforts. However, old case law attempted to render active efforts equivalent to reasonable efforts.[22] The passage of SB 678 in 2006 and the Legislature's retention of two distinct standards could be seen as an affirmation that the two are not identical, and as a repudiation of the *Michael G.* "essentially undifferentiable" melding of active and reasonable efforts.[23] It seems clear that they are two separate and arguably tiered standards, even though it may be difficult to catalogue the differences. There are also policy reasons for finding active efforts to consist of more than reasonable efforts.[24]

Many social services agencies view the reunification service plans they provide as customized and targeted to the particular families over whom the court has taken jurisdiction. But the fact remains that in many instances only "flyer services" are offered, packets of information for individuals who are overwhelmed with the system's process and its jargon, and who are not always adept at navigating complicated emotional issues. And while some have quarreled with what they see as special treatment for Indian children, the challenges to those heightened standards have been made and lost,[25] and the application of active efforts designed to prevent the breakup of the Indian family remain required by law.[26]

While it is not possible to identify a specific laundry list of required active efforts, as they must be tailored according to the details of each case, some examples of active efforts identified by California case law include direct assistance by the caseworker to help the parent develop job and parenting skills, and the caseworker's guidance of the client through the plan rather than

[19] Welf. & Inst. Code § 224.1(d).
[20] 25 U.S.C. § 1903(1)(i).
[21] *Ibid.*
[22] *In re Michael G.* (1998) 63 Cal.App.4th 700, 714.
[23] *Ibid.*
[24] *See* § VIII(C)(1) of this Benchguide ("What Constitutes Active Efforts").
[25] *See, e.g., In re Marcus S.* (Me. 1994) 638 A.2d 1158; *In re Guardianship of D.L.L.* (S.D. 1980) 291 N.W.2d 278; *In re Appeal Pima County Juvenile Action* (Ariz.Ct.App. 1981) 635 P.2d 187, *cert. denied* (1982) 455 U.S. 1007; *In re Miller* (Mich.Ct.App. 1990) 451 N.W.2d 576; *State ex rel. Children Services Div. v. Graves* (Or.Ct.App. 1993) 848 P.2d 133.
[26] 25 U.S.C. § 1912(d); Welf. & Inst. Code §§ 361(d), 361.7, 727.4(d)(5)(D); Cal. Rules of Court, rule 5.484(c).

merely creating a plan and hoping it is followed.[27] At a minimum, the court is required to articulate on the record that active efforts were made and that those efforts have proved unsuccessful.[28] The active efforts finding is ongoing and the court should make the finding (as well as state the factual basis for it on the record) at each stage, including the detention, dispositional, periodic reviews up to and including the termination of parental rights, selection and implementation hearings.

C. Dispositional Issues

Once jurisdiction has been found, the ICWA's dispositional issues largely mirror those of regular dependency cases. However, compliance with the ICWA placement preferences is a key component of the Act. The preferences for Indian children are addressed in more detail in section IX of this Benchguide ("Placement"), but the overriding policy is that any placement should be in the least restrictive setting that most approximates the Indian child's family setting.[29] In addition, the placement should be within a reasonable proximity to the child's home.[30] For all practical purposes, compliance with the placement requirements of the Welfare and Institutions Code and the ICWA, as with non-Indian dependency cases, is best effectuated with family members. This is in part because extended family members, who typically have a vested interest in the family's success, will be more likely to coordinate visitation even when a social services agency cannot do so, and thus avoid the potential for conflicting agendas when foster parents are adverse to the biological parents' or Indian custodians' interests.

In cases where placement has been made outside of the ICWA's placement preferences, the prolonged period of initiating, implementing, and completing reunification plans may elevate the bonding vs. placement preference dispute to new levels. At this stage of the case concurrent planning is often initiated. The Welfare and Institutions Code now requires that tribal customary adoption be considered by the agencies, and they must consult with tribes to determine if this is an appropriate permanency option if the Indian child does not reunify with parents.[31]

D. Transfer to Tribal Court

The ability of tribes to transfer cases to tribal courts is a further distinction from regular dependency actions. Jurisdictional issues and transfers to tribal court are discussed more thoroughly in section V of this Benchguide ("Jurisdiction"). It should be noted that the ICWA provides an expansive definition of a tribal court, which includes a court established under the code or custom of an Indian tribe or any other administrative body of a tribe which is vested with authority over child custody proceedings.[32] The scope of that definition includes a tribal council, or in the case of some California tribes, consortium courts. It is not limited to the traditional state definition of a "court." So long as the tribe has designated some adjudicatory body to preside over such cases, a transfer is appropriate.

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[27] *In re K.B.* (2009) 173 Cal.App.4th 1275, 1287, *citing A.A. v. State* (Alaska 1999) 982 P.2d 256, 261; *see* § VIII(C)(1) of this Benchguide ("What Constitutes Active Efforts").
[28] Welf. & Inst. Code § 361(d).
[29] Welf. & Inst. Code § 361.31(d).
[30] Welf. & Inst. Code § 361.31(b).
[31] Welf. & Inst. Code §§ 358.1(j), 361.5(f) and (g), and 366.26(b).
[32] 25 U.S.C. § 1903(12).

E. Tribal Customary Adoption

Assembly Bill 1325 went into effect on July 1, 2010. It allows traditional forms of adoption practiced by tribes ("tribal customary adoption") to be recognized by California courts as another available permanency option.[33] Tribal customary adoption is highly significant in that it does not require termination of parental rights. Under prior state law, once reunification services were exhausted, social services agencies gave preference to terminating the parent-child relationship unless one of a handful of exceptions applied. The concept of severing the relationship between parent and child does not fit within most tribal cultures, and for that reason tribal customary adoption creates a more culturally-appropriate option. This has the added value of preserving any rights or benefits which flow from a child's tribal membership, which otherwise might be at risk when parental rights are terminated. Such rights and benefits may include inheritance rights, tribal land assignments, per capita payments, health care benefits, school enrollment, educational support services, housing, hunting and fishing rights, the right to gather other natural resources, employment training services, and priority hiring rights.

When an Indian child cannot be reunified with the birth parents within the statutorily required time, the child's tribe can identify tribal customary adoption as the preferred permanent plan. The state court may continue the case for up to 120 days to provide the tribe time to complete the tribal adoption through their governance process, custom, tradition or ceremony, and for the tribe to prepare the Tribal Customary Adoption Order (TCAO) that establishes the rights and responsibilities of the parties in light of the complex interests of all involved.[34]

At minimum, the TCAO must address: 1) modification of the legal relationship between the birth parents or Indian custodian and the child (including any contact between the child and the birth parents/Indian custodian, any remaining responsibilities of the birth parents/Indian custodian, and the child's inheritance rights), and 2) the nature of the legal relationship between the child and the tribe.[35] The TCAO may not include any child support obligation from the birth parents/Indian custodian. Finally, there is a conclusive presumption that any parental rights or obligations not specified in the TCAO will vest automatically in the adoptive parents.[36]

The tribe is required to afford all parties due process while completing the TCAO. The tribe is required to file the TCAO with the state court no less than 20 days prior to the date of the continued hearing.[37] The court also has discretion to order a continuance for up to another 60 days to allow for completion of the TCAO. Once complete, the TCAO is filed in the state court and, barring any challenges, the state court extends full faith and credit to the tribe's TCAO.[38] Upon accepting the TCAO, the state court issues an adoption order and terminates jurisdiction.[39]

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[33] For more on the implementation of tribal customary adoption, including rules of court and court forms which have been amended to include it as a permanency option, see the Administrative Office of the Courts' website at http://www.courts.ca.gov/12569.htm (last visited May 15, 2012).
[34] Welf. & Inst. Code § 366.24(c)(6), (10).
[35] Welf. & Inst. Code § 366.24(c)(10).
[36] *Ibid.*
[37] Welf. & Inst. Code § 366.24(c)(6).
[38] Welf. & Inst. Code §§ 366.24(c)(6) and (8), 366.26(e)(2).
[39] Welf. & Inst. Code § 366.24(c)(14).

F. Termination of Parental Rights

As has been addressed in other sections of this Benchguide, when an Indian child is subject to a dependency proceeding which has reached the termination of parental rights stage, additional exceptions in lieu of termination apply. State law acknowledges exceptions when the termination of parental rights would substantially interfere with the child's connection to his or her tribal community and membership rights, as well as when the child's tribe has identified guardianship, long-term foster care or another planned living arrangement for the child.[40] Finally, prior to termination of parental rights, the court's determination that continued custody of the child by the parent or Indian custodian is likely to result in serious harm to the child, supported by the testimony of a qualified expert witness, must reach a higher standard of proof – that of evidence beyond a reasonable doubt.[41]

[40] Welf. & Inst. Code § 366.26(c)(1)(B)(vi). The discretionary vs. obligatory nature of these exceptions has recently been at issue in some California cases, such as *In re T.S.* (2009) 175 Cal. App. 4th 1031. The appellate court in *T.S.* concluded that a juvenile court has discretion to reject a tribe's identified alternate permanent plan (here, guardianship), despite language in the California Senate's analysis of SB 678 to the contrary. The court appears to have reached its conclusion based almost entirely on the particular guardians whom the tribe identified, rather than on consideration of the effect that termination of parental rights would have on the child's connection to his tribe, tribal membership, and rights flowing from membership.

[41] 25 U.S.C. § 1912(f).

XII. Delinquency Proceedings

Although the language of the ICWA expressly excludes from its definition of child custody proceedings placements based on an act which, if committed by an adult, would be deemed a crime**,** [1] in some circumstances the ICWA may or does still apply.[2] Most proceedings under Welfare and Institutions Code section 600 *et seq*. (i.e., delinquency cases) are not subject to the Act when the minor is adjudicated, has a disposition, or is removed from his or her home based on an act that would be criminal if it were committed by an adult. However, not all California delinquency cases involve removal and placement based on the "criminal acts" of the minor, and therefore some delinquency cases are subject to the ICWA. Moreover, SB 678, which codified the ICWA in California statutes in 2006, added and expanded the class of applicable cases to include Section 600 delinquency cases.[3]

In considering whether the Act applies to a case, the focus is not on what a proceeding is called, or whether it is a private action or an action brought by a public agency, but rather on whether the proceeding meets one of the definitions set forth in the Act.[4] Accordingly, a state's characterization of a proceeding as "criminal" is not necessarily determinative.[5]

In 2005 the Judicial Council attempted to comply with the ICWA in part based on the state's Title IV-E audit which found California non-compliant. Title IV-E funds are derived from the Adoption and Safe Families Act (ASFA) and come with certain restrictions attached. California was one of a handful of states that used Title IV-E funds to pay for juvenile justice placements.[6] A 1998 federal government report estimated that California used $180 million of IV-E funds for juvenile justice placements.[7] By 1999 the amount of IV-E funds used for delinquent minors in foster care had risen to $300 million.[8]

The source of funds used for delinquent placements is relevant because in 1999-2000 California attempted to comply with the federal IV-E restrictions by enacting Assembly Bill 575. The Social Security Act prohibits states from using foster care funds for placements in facilities operated primarily for detention. Therefore, where IV-E funds are used to pay for foster care, the placement should not be based on punishing conduct that would be a crime if committed by an adult, but instead should be designed to further the child's best interest.[9]

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[1] 25 U.S.C. § 1903(1).
[2] Welf. & Inst. Code § 224.3(a).
[3] *See* Welf. & Inst. Code § 224.3(a).
[4] 25 U.S.C. § 1903(1).
[5] *See California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202 (the U.S. Supreme Court ruled California's criminal statutes governing conduct of bingo did not apply to Indian reservations under Public Law 280, because the state's statute was, in effect, regulatory rather than criminal in nature).
[6] United States General Accounting Office Report of Congressional Requestors, *Foster Care: HHS Should Ensure that Juvenile Justice Placements are Reviewed*, 5 (June 2000).
[7] *Ibid.*
[8] Assembly Committee on Social Services, Analysis of Assem. Bill No. 575 (1999-2000 Reg. Sess.) April 21, 1999, p. 5.
[9] *See* Welf. & Inst. Code § 202(e), *citing* Welf. & Inst. Code § 727.3.

Any ambiguity that may have remained after the Rules of Court amendments in 2005 was removed when SB 678 specifically applied the ICWA to some delinquency placements.[10] Until SB 678's passage, the only case directly addressing the ICWA's applicability to delinquencies was *In re Enrique O.*[11] *Enrique O.* found that the rule governing the applicability of the ICWA to Section 600 cases (then California Rules of Court, rule 1439) was inconsistent with federal law. At that time, the bulk of the ICWA's provisions were applied to the juvenile courts not through statute, but through the Rules of Court, and on that basis such rules have the force of law only to the extent that they do not conflict with legislation.[12] But the *Enrique O.* ruling did not entirely answer the question, because it left the door open to applying the ICWA for foster care placements based on probation violations, status offenses, or violation of other court orders that are not in and of themselves criminal. What *Enrique O.* declined to find was, since a foster care placement is always a consideration (especially when a minor is detained from their parents), whether the ICWA should apply to such cases.

SB 678 presumably removed the doughnut-hole ambiguity that parts of the ICWA had been applied by rule only, not by statute. However, the cases that followed show that there is anything but a consensus in the appellate districts on when or whether to apply the Act to delinquent minors who are in, or at risk to be placed in, foster care. Following SB 678's passage, *In re Alejandro A.* essentially affirmed *Enrique O.*'s adult criminal act exclusion, but it did so based on a lack of evidence in that record that the child in question was an Indian child.[13] The court also declined to state (again because of an inadequate record) whether the particular program where the minor was sent constituted a foster program. *Alejandro A.* did not offer any specific criteria to analyze which group homes or programs approximate foster care – ultimately, the answer may rest on whether IV-E funds are used.

The court in *R.R. v. Superior Court* struck down a standing order in Sacramento County that the ICWA did not apply in delinquency cases, did not impose a duty of inquiry as to whether the minor is an Indian child, and did not require notice to minor's tribe.[14] Unlike *Enrique O.*, the minor in *R.R.* committed a probation violation by not complying with the terms of his youth center "contract." The *R.R.* court declined to address whether the "act" that qualifies for the criminal act exception is the probation violation, or the underlying legal violation that caused the minor to be put on probation in the first place. Instead, the court noted that a minor is at risk of entering foster care even when there exist unresolved conditions in the minor's family that may necessitate entry into foster care.[15]

Moreover, *R.R.* affirmed the Legislature's ability to exceed the minimum federal standards of the ICWA and refuted the notion that the higher state standards were preempted by the less protective federal law. So long as state law is consistent with the force and purpose of federal law, and not in direct conflict, then preemption does not occur.[16] *R.R.* acknowledges not only the tribe's right to receive notice of the proceedings, but also to intervene in a delinquency

[10] Welf. & Inst. Code § 224.3(a); Cal. Rules of Court, rule 5.480.
[11] *In re Enrique O.* (2006) 137 Cal.App.4th 728.
[12] *Id.* at 735, *citing In re Richard S.* (1991) 54 Cal.3d 857, 863.
[13] *In re Alejandro A.* (2008) 160 Cal.App.4th 1343, 1347.
[14] *R.R. v. Superior Court* (2009) 180 Cal.App.4th 185, 194.
[15] *Id* at 203, *citing* Welf. & Inst. Code § 727.4(d)(2).
[16] *Id.* at 208, *citing In re Brandon M.* (1997) 54 Cal.App.4th, 1387, 1393.

case, transfer it to tribal court (or tribal jurisdiction if it has no court), and participate in the proceedings, which would include obtaining discovery.[17]

By contrast, the subsequent case of *In re W.B., Jr.*, took issue with *R.R. v. Superior Court* and directly contradicted the holding that the ICWA applies to delinquencies.[18] The court in *W.B.* acknowledged that the newly enacted Welfare and Institutions Code section 224.3 imposed an affirmative duty to inquire whether a minor for whom a Section 300 or Section 601/602 petition is filed is an Indian child and at risk of entering foster care, but interpreted such application to limited circumstances – such as dual status cases under Section 241.1 or cases where the act would not be criminal if committed by an adult, such as underage drinking.[19] *W.B.* declined to impose an expanded application because the court found it was pre-empted by state law. The court reasoned that the definition of 25 U.S.C. section 1903(l) was in conflict with Welfare and Institutions Code section 224.3 because of the criminal act exception as applied to all delinquency proceedings.[20]

Despite the fact that *W.B.* could have been decided on narrower grounds (namely, that the placement at issue was not a foster care placement, but was a public or private institute), the court's ruling cannot be reconciled with that in *R.R.* and thus invited a higher level of review. The case was indeed accepted for review by the California Supreme Court, with oral arguments scheduled for May 30, 2012.

A. Mandatory Application of the ICWA in Section 602 Proceedings

1. Placement (Title IV-E Federally-Funded Foster Care Reimbursement Cases)

Some delinquency proceedings result in a minor being committed to a locked or secure facility such as California Division of Juvenile Justice (previously called California Youth Authority) or Juvenile Hall. However, other delinquency dispositions result in a minor being sent to a less restrictive "placement." These placements are made for the child's welfare where the court has found the child is at risk of entering foster care after reasonable efforts have been made to prevent the need for removal of the child from his or her home.[21] Such placements would include foster care placements made with relatives, foster care with strangers, licensed group homes, shelter care homes and treatment facilities pursuant to Welfare and Institutions Code section 11402.

In order to qualify for IV-E foster care funding, the placement must be based not on the criminal conduct of the minor, but on the best interests and welfare of the child. This finding in effect means that a child is being placed in foster care similar to a Section 300 dependency placement case. The findings that the court must make to effectuate placement of the child in a foster care case are identical to those of a Section 300 case, which is why they bring the proceeding within the definition of a child custody proceeding covered by the ICWA.

[17] *Id.* at 194, *citing* Welf. & Inst. Code §§ 224.2, 224.3.
[18] *In re W.B., Jr.* (2010) 106 Cal.Rptr.3d 1, 4-5.
[19] *Id.* at 3-4.
[20] *Id.* at 4-5, *citing Stephens v. County of Tulare (2006) 38 Cal.4th 793, 801–802.*
[21] *See, e.g.*, Welf. & Inst. Code §§ 636 and 727 *et seq.*; Cal. Rules of Court, rule 5.480.

Typically the delinquency court will make a finding that the child is entering foster care or is "at risk of entering foster care."[22] The application of the ICWA by California Rules of Court, rule 5.480 is broad – it applies to all child custody proceedings under Section 300 and to all proceedings under "[S]ections 601 and 602 *et seq*. in which the child is at risk of entering foster care or is in foster care, including detention hearings, jurisdiction hearings, disposition hearings, review hearings, hearings under section 366.26, and subsequent hearings affecting the status of the Indian child."[23]

Again, the finding that the court makes is that the placement is being made for something other than criminal conduct by the minor. The fact that in such cases, a finding is also made that the child has committed a crime, does not in and of itself exclude the case from the ICWA's coverage. However, some courts disagree.[24]

⇨ **BEST PRACTICE:** *While the use of Title IV-E funds to pay for a child's placement is not what triggers the application of the ICWA, the findings required to qualify the placement for federal foster care funding are the same findings that require application of the ICWA. Section 602 placements which are in fact based on commission of a crime are treated differently than placements made for the minor's benefit. Such placements are ineligible for Title IV-E funding.*

Consider this example: Dell is 13 years old and a member of a recognized California tribe. Dell unlawfully takes a motor vehicle. The juvenile court either accepts an admission by Dell or it adjudges that Dell is a Section 602 ward based on his theft of the vehicle. At the dispositional hearing the court finds that: 1) Dell is not going home, 2) Dell is an Indian child, and 3) Dell is committed to the Division of Juvenile Justice for three years. The ICWA does not apply at this point because even though Dell is removed from his home he is not going to a "foster care placement." What if Dell is not committed to a "locked facility," but instead goes to a group home that is funded by Title IV-E? Yes, the ICWA should then apply.

2. Guardianship and Termination of Parental Rights Proceedings

Pursuant to Welfare and Institutions Code section 728, effective 1998, juvenile courts have authority to terminate or modify guardianships of the person of a child previously established under the Probate Code, or appoint a guardian, co-guardian, or successor guardian of the person of the child, if the child is the subject of a petition filed under Welfare and Institutions Code sections 300, 601, or 602. All proceedings to modify or terminate a guardianship granted under this Section 728 were previously held in the juvenile court, even if the wardship or dependency proceedings had otherwise been terminated.

Guardianship proceedings clearly fall within the definition of foster care placements set forth in the Act. "Foster care placements" refer to "any action removing an Indian child from its parents or Indian custodian for temporary placement in a foster home or institution or home

[22] Cal. Rules of Court, rule 5.480(1).
[23] *Ibid.*
[24] *See In re W.B., Jr.* (2010) 182 Cal.App.4th 126 and *In re Alejandro A.* (2008) 160 Cal.App.4th 1343.

of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where the parental rights have not been terminated."[25] For Section 600 dispositional matters, guardianship is a subset of foster care. If a guardianship is pursued in the juvenile court relative to an Indian child who is a ward of the juvenile court, the ICWA applies to the Section 602 proceeding in which the guardianship activity occurs.

Similarly, the 1999 amendments to California law authorize the termination of parental rights for wards of the juvenile court who are placed in out-of-home care pursuant to Welfare and Institutions Code section 727.3 (involving IV-E funded foster placement).[26] The ICWA covers "any action resulting in the termination of the parent-child relationship."[27] When any delinquency case moves to guardianship or termination of parental rights, it would then be subject to the Act and all its procedural safeguards and placement preferences.

3. Minimum Federal Standards as Applied to Section 602 Proceedings

Once the juvenile court applies the ICWA to a delinquency case, the minimum federal standards as discussed in the prior chapters apply to the case.[28] For example, California Rules of Court require probation departments in delinquency cases to fulfill many of the same requirements as county welfare departments must in dependency cases.[29]

Some minimum federal standards or requirements of the ICWA are difficult to apply in the delinquency context, and are seemingly incongruous – for example, the mandatory waiting periods prior to proceeding with a court hearing after notice. The ICWA requires that "[n]o foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent, Indian custodian and the tribe or Secretary."[30] However, there is a conflicting time constraint on the juvenile court in a wardship proceeding to provide a child with a speedy adjudication of his or her case. For example, if a minor is detained at the time the petition is filed, the clerk must calendar the petition to be heard, and the hearing must be commenced within 15 judicial days from the date of the detention order.[31]

The conflict between the federal statutory right of the tribe to have notice in advance of the proceedings and the ward's right to have speedy adjudication cannot always be harmonized, and where this occurs it is probable that a court will give greater deference to the individual's constitutional right. This is an area which the appellate courts may need to address on a case-by-case basis, recognizing that the difficulty in applying all of the ICWA's rules on the front end of a case does not allow a court to disregard the Act in subsequent hearings. However, there is case law finding that the rights afforded under the ICWA are statutory rights and not constitutionally-based rights, and thus it may be argued that the right to speedy adjudication, especially when a child is detained, is a constitutionally-based right which supersedes the statutory rights provided under the ICWA.

[25] 25 U.S.C. § 1903(1) (emphasis added).
[26] Welf. & Inst. Code § 727.31.
[27] 25 U.S.C. § 1903(1)(ii).
[28] 25 U.S.C. § 1902.
[29] *See* Cal. Rules of Court, rule 5.481.
[30] 25 U.S.C. § 1912(a).
[31] Welf. & Inst. Code § 657(a)(1); Cal. Rules of Court, Rule 5.774(b).

There are other aspects of delinquency proceedings where application of the Act may conflict with the rights of an Indian child under both state and federal law. Where there is a conflict between the varying provisions of the ICWA and state law, the "higher standard of protection to the rights of the Indian parent or Indian custodian of an Indian child" shall apply.[32]

4. Permissive Tribal Participation in Section 602 Proceedings

To the extent the policy underlying juvenile law in California remains treatment and rehabilitation of the child, tribal involvement in Section 602 proceedings is consistent with the purposes of the ICWA, even when there has not been a finding that the child is at risk of entering foster care. In such cases, many tribes actively pursue involvement in Section 602 cases on a permissive basis in an effort to provide services and locate appropriate placements, which can be formalized through an agreement authorized by 25 U.S.C. section 1919.

Tribal participation in Section 602 proceedings at all stages is consistent with both federal policy set forth in the ICWA as well as state policy governing juvenile delinquency proceedings. While application of the ICWA may impose additional requirements, it can also enhance the court's ability to effectively respond to the needs of the child involved. Many state courts have embraced the idea of "wraparound services" (wraparound services were implemented in 1997 under SB 163, and allow California counties to use non-federal aid to families with dependent children-foster care funds to provide families and children with alternatives to group home care).[33] Examples include the following:

- **Accessing Additional Services.** Special services and benefits may be available to an Indian child. If the Indian status of the child is verified via tribal or BIA documentation, some of these services may be available to a ward of the court. In particular, the Indian Health Services, an agency of the Department of Health and Human Service, maintains many programs within California that offer medical and therapeutic services. Many tribes operate Indian Child Welfare Programs under Title II of the ICWA. These programs may serve both members and nonmember Indians. Finally, Indian tribes may be interested in providing services to a member child that may otherwise not be available.

- **Expanded Placement and Funding Options.** The court has an obligation to secure the safety and welfare of children in its care. Both delinquent and dependent minors must be placed in homes that meet the requirements of applicable law. The ICWA authorizes placement in the home of extended family, as defined by the child's tribe, or, in the absence of a tribal definition, as defined in the Act. A broad tribal definition of extended family may authorize placement in homes not otherwise authorized by state law. In addition, the Act authorizes placement in homes "licensed, approved, or specified by the Indian child's tribe" or in an "institution for children approved by an Indian tribe or operated by an Indian organization which has a

[32] 25 U.S.C. § 1921.
[33] *See In re W.B.* (2010) 182 Cal.App.4th 126, 129 n.2.

program suitable to meet the Indian child's needs."[34] If the court confirms tribal approval of a home or institution, the Act requires that the placement receive preference in placement absent good cause to the contrary. Tribes can, via tribal resolution, qualify a home for placement that would not otherwise be an eligible placement. Courts can augment placement options for Indian children by working with the child's tribe.

Counties may claim state and federal Aid to Families with Dependent Children – Foster Care funds on behalf of an eligible Indian child in foster care placement made pursuant to the ICWA. These placements "may include a state licensed or approved facility and any home of a relative or non-relative located on or off the reservation which is licensed, approved or specified by the Indian child's tribe."[35] Hence, a child's tribe can both qualify a home for placement and funding, even if the home would not otherwise be eligible for placement.

5. Tribe's Right to be Present at Section 602 Proceedings

The policy underlying the ICWA strongly supports tribal involvement in Section 602 proceedings. This is especially true since the declared California policy underlying juvenile law remains treatment and rehabilitation of the child. Accordingly, tribes should actively pursue at least permissive involvement in Section 602 cases and make efforts to provide services and locate appropriate placements.

The California Rules of Court are adopted by the California Judicial Council pursuant to its constitutional and statutory authority to adopt rules for court administration, practice, and procedure. The rules apply to every action and proceeding to which the juvenile court law applies.[36] Chapter 3 of the Juvenile Court Rules sets forth rules governing the general conduct of juvenile court proceedings.[37] Rule of Court 5.530 provides, in pertinent part, as follows:

"The following persons are <u>entitled to be present</u>: …

(2) All parents, de facto parents, Indian custodians, and guardians of the child…

(3) Counsel representing the child or the parent, de facto parent, guardian, adult relative or Indian custodian or the tribe of an Indian child; …

(7) A <u>representative of the Indian child's tribe</u>;…"[38]

As a matter of California law, Indian tribes have a right to be present at every juvenile proceeding involving Indian children, including Section 602 proceedings. California Rules of Court, rules 5.530 and 5.480 contain reasonable measures to promote court administration and practice and to further the purposes of both the juvenile court law and the ICWA. By allowing

[34] 25 U.S.C. § 1915.
[35] SDSS All County Letter No. 95-07 (February 9, 1995) (*see* Appendix E); s*ee* Welf. & Inst. Code § 11401.
[36] Cal. Rules of Court, rule 5.480(1).
[37] Cal. Rules of Court, rules 5.530-5.553.
[38] Cal. Rules of Court, rule 5.530(b) (emphasis added).

tribes to be present for all Section 602 proceedings involving Indian children, tribes can monitor cases to assure proper consideration of the Indian child's best interests.

⇨ **BEST PRACTICE:** *Section 601 "status offense" proceedings in practice do not result in placements and would not trigger a detention hearing. But the ICWA by its own terms still applies in a 601 proceeding. Section 601 cases involve truancy, runaways, and refusal to obey parents, where the minor's acts alone, do not constitute delinquent conduct. Further, in any proceeding where the child is not placed or detained at all (for example, is sent home with the parents on probation), the ICWA does not apply because there is no "placement."*

XIII. Probate Guardianship Proceedings

The ICWA is applicable to guardianships of the person or conservatorship proceedings that take place outside of the juvenile court.[1] Such cases are typically filed in probate court, but some counties may hear guardianship proceedings in family court, especially in cases where proceedings began as a custody dispute between parents.[2]

Although the ICWA was incorporated into the California Probate Code by SB 678 in 2006, its application to probate guardianships was not new law.[3] Most, but not all, ICWA issues arise in dependency cases rather than probate guardianships. Nevertheless, the same minimum standards are applicable to all Indian child custody proceedings, including probate guardianship and conservatorship proceedings.[4]

While there is little, if any, case law interpreting the mechanics of applying the ICWA to probate court proceedings, there is no ambiguity as to whether it applies. The language imported into the Probate Code mirrors that contained throughout the ICWA, and it is clear that tribes have analogous rights in such cases, including intervention, requiring a finding of detriment based on testimony by a qualified expert witness, ability to transfer the case to tribal court or jurisdiction, compliance with placement preferences, and compelling the removing party to meet the active efforts standard.[5] In addition, a tribe (or Indian custodian) having intervened in such proceeding, should be entitled to disclosure and discovery, and also the right to invalidate any proceedings that do not comply with the Act.[6]

The following sections address how application of the ICWA impacts the typical probate guardianship proceedings.

A. Applicability of the ICWA to Probate Guardianships of the Person

Probate Code section 1459.5 by its own terms applies the ICWA to guardianship proceedings when the proposed ward is an Indian child and the proposed guardian is not the natural parent or Indian custodian of the proposed ward. When the proposed guardian is nominated by the parents, and they still retain the ability to have the Indian child returned on

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[1] Prob. Code § 1459.5.

[2] S*ee, e.g., Ericka K. v. Brett D.* (2008) 161 Cal.App.4th 1259, 1264 (where ICWA applied to a custody dispute wherein the caregiver joined and was awarded custody).

[3] *See* former Prob. Code § 2112, enacted 1990 and repealed by Sen. Bill No. 678 (2005-2006 Reg. Sess.); 2006 Cal. Stats. ch. 838, Sec. 27.

[4] *See* Prob. Code § 1449 (defining Indian custody proceedings, and incorporating the definitions in 25 U.S.C. § 1903); § 1459 (placement of Indian children and legislative findings); § 1459.5 (application of the ICWA); § 1460.2 (notice where an Indian child is involved); § 1474 (appointment of counsel for Indian custodian or parent(s)); § 1500.1 (consent to nomination of guardian by Indian child's parent); § 1510(c)(6) (petition contents to include names and addresses of Indian custodian and child's tribe); § 1511(i) (notice must be given to Indian custodian or tribe); § 1513(h) (investigation and recommendation regarding proposed guardianship must contain consultation with Indian child's tribe and include any information provided by tribe); § 1601 (Indian child's tribe and Indian custodian have standing to petition for termination of guardianship).

[5] Prob. Code § 1459.5(b), incorporating Welf. & Inst. Code §§ 224.4, 224.6, 305.5, 361.31, and 361.7.

[6] *See* Cal. Rules of Court, rule 7.1015(b), incorporating Cal. Rules of Court, rules 5.480 to 5.487.

demand, then the Act arguably would not apply. The more common scenario, however, is when a relative obtains physical custody of an Indian child, or attempts to do so, and then files for temporary guardianship letters. In such circumstance the legislation does not distinguish between the removing relative and the social services agency in dependency cases. Nomination of a proposed guardian is governed by Probate Code section 1500 and is discussed below along with consent to nominations of guardians.

B. Nomination of Guardian

A parent or parents may nominate a guardian using Judicial Council Form GC-211. This is a multipurpose form and includes: 1) *Consent of Proposed Guardian*, used to indicate that the proposed guardian consents to serving as the child's guardian; 2) *Nomination of Guardian*; and, 3) *Consent to Appointment of Guardian and Waiver of Notice*. If the parents nominate a guardian and both of them consent to the appointment, then the petition will be considered uncontested. However, that does not alter a tribe's rights, nor will it alter the substantive applicability of the ICWA to the proceeding.

A parent is generally permitted to nominate a person to be appointed guardian of their child.[7] The nomination may be made either before or after the petition for the appointment of the guardian is filed, in the petition itself, or at the hearing.[8] Both parents must nominate or consent to the nomination of the same guardian, unless one of the parents is deceased, lacks mental capacity, or is otherwise not required.[9]

Consent to nomination or appointment of guardian by the parent(s) of an Indian child is governed by Probate Code section 1500.1. Parental consent given by the parent(s) is not valid unless it is: 1) executed in writing at least 10 days after the child's birth and recorded before a judge, and 2) certified by the judge that the terms and consequences of the consent were fully explained in detail in English and were fully understood by the parent or that they were interpreted into a language that the parent understood.[10] Under Section 1500.1, the parent of an Indian child may withdraw his or her consent to guardianship for any reason at any time prior to the issuance of letters of guardianship, at which time the child shall be returned to the parent.[11]

C. Inquiry

As with other ICWA proceedings, there is a continuing duty to inquire whether the child involved is or may be an Indian child.[12] Form ICWA-010(A) (*Indian Child Inquiry Attachment)* must be completed and attached to the petition. This duty is shared with the court, court investigators, and/or county officers appointed to conduct an investigation.[13] The court must provide a petitioner with, and have him or her complete, Form ICWA-020 (*Parental Notification of Indian Status).*

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[7] Prob. Code § 1500.
[8] Prob. Code § 1502.
[9] Prob. Code § 1500.
[10] Prob. Code § 1500.1; *also* 25 U.S.C. § 1913.
[11] Prob. Code § 1500.1.
[12] Welf. & Inst. Code § 224.3(a); Cal. Rules of Court, rule 5.481(a).
[13] *Ibid.*

D. Notice

Notice of the time and place of the hearing on the petition for appointment of guardian should be given as provided in sections 415.10 or 415.30 of the Code of Civil Procedure at least 15 days before the hearing. The persons or tribes required to receive notice are listed in Probate Code section 1511. A copy of the petition must be included and the court may not shorten the time for giving the notice.[14]

If it is known, or there is reason to know, that the proposed ward may be an Indian child, Probate Code section 1460.2 imposes additional notice requirements. Notice sent to the parents, legal guardian, Indian custodian, and child's tribe must be sent by registered or certified mail with return receipt requested, and must include information that allows the tribe to determine whether the child is an Indian child.[15] The notice must also inform the parents, Indian custodian, and tribe of their substantive rights, including a right to intervene, petition for transfer to tribal court, and to request an additional 20 days from the receipt of the notice to prepare for the proceeding.[16] The parents or Indian custodians are also informed of their right to request appointment of counsel if they are unable to afford representation pursuant to the ICWA.[17] Subsequent notices must comply with Probate Code sections 1460.2 and 1511, and the court can impose sanctions if a party knowingly and willfully falsifies or conceals a material fact concerning whether the child is or may be an Indian child.[18]

As noted above, California Rules of Court, rule 7.1015 specifically addresses the applicability of the ICWA in guardianship and conservatorship proceedings, and incorporates Rules 5.480 through 5.487 in their entirety. Consequently, any references to social workers, probation officers, county probation departments, or county social welfare departments in those rules should apply to the petitioner for the appointment of a guardianship or conservatorship, including the notice requirements.[19]

E. Interested Parties

1. Indian Child

A minor's wishes receive consideration and are given due weight if the child is of sufficient age and capacity to reason so as to form an intelligent preference,[20] and Probate Code section 1470 permits court-appointment of counsel to minors. [21]

[14] Prob. Code § 1511(a).
[15] Prob. Code § 1460.2.
[16] *Ibid.*
[17] *Ibid.*
[18] Prob. Code § 1460.2(f).
[19] Cal. Rules of Court, rule 7.1015(b); *see* § VI of this Benchguide ("Notice").
[20] Fam. Code § 3042.
[21] Prob. Code § 1470.

2. Petitioner

Section 1510(a) of the Probate Code identifies who may petition for appointment of a guardian. It may be a parent, a relative, an unrelated third party, or the child. Most commonly it is the person seeking to be appointed as guardian. Where the petitioner is also the proposed guardian they must complete the Judicial Council Form GC-212 (*Confidential Guardian Screening Form*) to file with their petition.[22] This form is used to assist the worker charged with completing an investigation report for the court.

3. Parents

Where the parent or parents are contesting a guardianship and the ICWA is applicable, but the parent(s) cannot afford legal counsel, Probate Code section 1474 provides for the appointment of counsel by the court. Their ability to request appointed counsel should be included in any notice they receive under Probate Code section 1460.2(b)(5)(G)(v). Probate Code section 1474 adopts 25 U.S.C. section 1912(b), which makes provision for appointed counsel in such cases, but arguably calls for compensation to come from the Secretary of the Interior (practically speaking, the BIA). The ICWA allows an appointment where state law makes no provision for counsel, but the circular funding logic contained in Probate Code section 1474 renders that an open question.

Since the interest of parents in making decisions about the care, custody, and control of their children has been characterized as the oldest of the fundamental liberty interests,[23] and since the U.S. Supreme Court has affirmed that "the Due Process Clause [of the Constitution] does not permit a state to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made,"[24] any deferment in appointing counsel while the funding issue is pending could infringe on a parent's constitutional rights. The better practice would be to appoint counsel at the earliest possible stage of the proceeding if requested.

4. Indian Custodian

Until recently there were not any cases interpreting the Indian custodian provision of the ICWA as to how Indian custodian status could be established or revoked. The court in *In re G.L.* acknowledged that an Indian custodian can be designated by a parent with or without a writing. [25] Moreover, the court rejected the agency's assertion that such status requires some minimum frequency or duration to qualify as an Indian custodian.[26] Although the court in *G.L.* ruled that the designation as an Indian custodian can be revoked, it affirmed the process by which such custodianship may be established. It serves as an informal guardianship, and under the ICWA an Indian custodian is entitled to the same rights and privileges as a parent in an ICWA probate guardianship.

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[22] Cal. Rules of Court, rule 7.1001.
[23] *Kyle O. v. Donald R.* (2000) 85 Cal.App.4th 848, 861, *quoting Troxel v. Granville* (2000) 530 U.S. 57, 64-65.
[24] *Troxel v. Granville* (2000) 530 U.S. 57, 72-73.
[25] *In re G.L.* (2009) 177 Cal.App.4th 683, 693.
[26] *Ibid*.

5. Child's Tribe

The Indian child's tribe not only is an interested party but can participate and exercise its rights under the Act that are the subject of the other sections in this publication. In that capacity, the tribe (whether it intervenes or not) can participate in guardianship proceedings and invoke the applicable provisions of the ICWA. As noted in other sections, if the proceeding involves an Indian child, the ICWA will apply whether or not the tribe intervenes or participates.

F. Investigation Reports, Expert Evaluations, and Indian Expert Witnesses

1. Investigation Reports

Probate Code section 1513 requires an investigation report with recommendations be filed with the court. If the proposed guardian is a relative, it may be made by a court or probate investigator. If the proposed guardian is a non-relative, then it is made by the agency that investigates potential dependency actions.[27] The Probate Code defines "relative" in Section 1513(g). Tribes and tribal people often have a broader understanding of the term "relative." While a petitioner may be an "extended family member" for purposes of placement in an ICWA proceeding, they may still be considered a non-relative for investigation report purposes.

An investigation report must be reviewed and considered by the court prior to making any appointment of guardian.[28] In addition to the general substance required to be included in the investigation report, Probate Code section 1513(h) requires the investigator to consult with the tribe and include any information which the tribe provides in his or her report.

In *In re Noreen G.*, the appellate court found that an incomplete report was harmless error where the information that was omitted from the report was thoroughly presented and considered at trial in the form of testimony.[29] In an ICWA case the testimony of a qualified expert witness to support a finding of detriment does not fulfill the requirement in Probate Code section 1513(h). This section requires that the investigator consult with the Indian child's tribe and include the information provided by the tribe in the report for purposes of compiling a social history. While there may be some overlap, this recommendation is not necessarily coextensive with the requirements imposed on a qualified expert.

2. Assessing Costs

Probate Code section 1513.1(a) distributes the court's or county's cost of the investigation to parent(s) or person charged with minor's support and maintenance, and the guardian, proposed guardian, or estate, unless the court finds hardship. A tribe should be excluded from any expense assessment as it is not responsible for the support and maintenance of the minor.

[27] Prob. Code § 1513(a).
[28] Prob. Code § 1513(b).
[29] *In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1381.

G. Appointment Hearing

Generally, under Probate Code section 1514, upon hearing the petition the court may appoint a guardian of the person if it appears necessary or convenient. The court's decision is further governed by Chapters 1 and 2 of Division 8, Part 2 of the Family Code.[30] Unless otherwise noted, guardianship hearings and determinations are made according to the rules and practice of civil action.[31] The default standard of proof is set by Evidence Code section 115 as a preponderance of the evidence. When a parent objects, or the proceeding involves an Indian child, the standard of proof changes.[32]

If a parent objects to another person being appointed guardian, the court must find, by clear and convincing evidence, that leaving legal custody with the parent would be detrimental to the child, and that awarding custody to the other person will serve the child's best interest.[33] A rebuttable presumption that the requirements of Family Code sections 3041(a) and (b) have been met is created where the court finds, by a preponderance of the evidence, that the proposed guardian is a person who has assumed the role of a parent for a substantial period of time.[34] Detriment to the child includes the harm of removing the child from a stable placement with a person who has assumed the role of a parent for a substantial period of time.[35] Finding detriment does not require a finding of parental unfitness.[36]

If the parent objects in a case involving an Indian child, then the ICWA's evidentiary standards set forth in 25 U.S.C. section 1912(d), (e), and (f), and the placement preferences and standards of Section 1922, all apply. This includes Section 1912(d)'s requirement that the petitioner satisfy the court by clear and convincing evidence that active efforts have been made to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.[37]

Section 1912(e) of the ICWA requires the court to determine that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. This determination must be supported by clear and convincing evidence, including the testimony of a qualified expert witness.[38]

H. Placement

Once detriment is determined by clear and convincing evidence as required in Family Code sections 3041(a)-(d), and the ICWA requirements of Section 1912 (d), (e) and (f) have been met, the court must make a placement determination. Due weight and consideration must

[30] Prob. Code § 1514(b)(1).
[31] Prob. Code § 1000.
[32] *Guardianship of Jenna G.* (1998) 63 Cal.App.4th 387, 393.
[33] Fam. Code §§ 3041(a) & (b); *Guardianship of Stephen G.* (1995) 40 Cal.App.4th 1418, 1432.
[34] Fam. Code § 3041(d).
[35] Fam. Code § 3041(c).
[36] *Ibid*.; *see Guardianship of Zachary H.* (1999) 73 Cal.App.4th 51, 62.
[37] *See* § VIII(C) of this Benchguide ("Active Efforts").
[38] *See* § VIII(B) of this Benchguide ("Likelihood of Serious Emotional or Physical Damage to Child").

be given to the minor's wishes, if they are of sufficient age and capacity to reason so as to form an intelligent preference.[39]

Under the Family Code, the court looks to the best interests of the child when choosing a guardian.[40] First preference is given to "the person in whose home the child has been living in a wholesome and stable environment."[41] Second preference is to any other person deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.[42] However, if the proposed guardianship involves an Indian child, then the standards of the ICWA are applicable in making a placement with a nonparent.[43]

I. Temporary Guardianships and ICWA Compliance Issues

Probate Code section 2250 addresses temporary guardianships, which are limited to circumstances where good cause can be shown. This provision does not explicitly incorporate any ICWA provisions, but if a temporary order is made, it appears to fall within the "foster care placement" definition found in the ICWA and the Act should apply.[44]

California Rules of Court, rule 5.482 (which applies to dependency proceedings) has been incorporated into Rule 7.1015 covering ICWA guardianships. A temporary guardianship order is analogous to an emergency detention. In fact, Family Code section 3041(e) specifically incorporates Section 1922 of the ICWA, which does allow for the emergency placement under state law, in order to prevent imminent physical damage or harm to the child. Proceedings subject to the ICWA shall be expeditiously initiated, transfer to tribal court may occur, or restoration to the parent or Indian custodian shall occur immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

J. Termination of Guardianship

Probate Code section 1601 sets forth the criteria to terminate a probate guardianship, and the court is charged with using a "best interest" standard in determining whether to do so. Notably, both the ward's tribe and Indian custodian are specified as parties that can petition for termination.

[39] Fam. Code § 3042.
[40] Fam. Code § 3041.
[41] Fam. Code § 3040(a)(2).
[42] Fam. Code § 3040(a)(3).
[43] Fam. Code § 3041(e).
[44] 25 U.S.C. § 1903(1)(i).

XIV. Family Law Proceedings

The ICWA applies to state child custody proceedings involving an Indian child (including family law adoptions and other family law cases) that will result in a non-parent receiving custody. In order to promote the stability and security of Indian tribes and families, the Act provides minimum standards, both procedural and substantive, that govern the removal of Indian children from their families.[1]

The California Legislature has declared its commitment to encouraging and protecting Indian children's connections to their tribes and tribal communities.[2] With the passage of SB 678 in 2006, the application of the ICWA to adoption and guardianship proceedings is now clear.[3] "[C]learly delineate[d] expectations regarding the child welfare services system's approach to working with Indian children, their parents and their tribes."[4] The provisions of SB 678 specific to family law were codified throughout the California Family Code, including the addition of Part 3 ("Indian Children") to Division 1. This particular section of the Benchguide provides a comprehensive look at the ICWA's application to family law cases in California.

A. Adoption Proceedings

The ICWA applies to all family law cases involving an Indian child where the outcome will be a final adoption decree: both agency adoptions and independent adoptions (including stepparent and relative adoptions), whether voluntary or involuntary.[5]

1. Voluntary Adoption Proceedings

In addition to concerns about involuntary removals of Indian children, Congress was aware that Indian children could be deprived of their cultural heritage through voluntary placements.[6] Thus, the ICWA covers both voluntary and involuntary proceedings. Tribes have many of the same rights during voluntary proceedings as during involuntary proceedings, including the right to notice and the right to intervene.[7] In addition, guaranteeing informed consent, there are strict consent requirements for voluntary foster care placements and adoptions.[8]

In California, parental rights may be voluntarily terminated in two ways: agency adoptions and independent adoptions. If a child is delivered to an adoption agency for

[1] 25 U.S.C. §§ 1901-1902; *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 32-37; *In re Alicia S.* (1998) 65 Cal.App.4th 79, 81.
[2] Fam. Code § 175.
[3] Sen. Bill No. 678 (2005-2006 Reg. Sess.); 2006 Cal. Stats., ch. 838, §§ 1-57.
[4] Ducheny, Denise M., Senate Daily Journal for the 2005-2006 Regular Session, pp. 5606–5607 (August 31, 2006).
[5] Fam. Code §§ 170(c), 8620, 8700.
[6] Select Committee on Indian Affairs, Sen. Rep. 95-597 (to Accompany S. 1214) on Indian Child Welfare Act of 1977 (1977-1978, 1st Sess.) Nov. 1, 1977.
[7] Fam. Code § 8620.
[8] 25 U.S.C. § 1913; Fam. Code § 8606.5.

placement, parental rights are terminated on the filing of the relinquishment form with the California Department of Social Services ("the Department").[9] A parent may also consent to an independent adoption, in which case parental rights are terminated by decree of adoption.[10]

a. Notice and Inquiry in Voluntary Proceedings

The enactment of SB 678 codified the requirements for inquiry and notice in voluntary child custody proceedings.[11] These inquiry and notice requirements clarified existing practices in many counties. Without notice, a tribe would not be able to exercise its right to intervene or to assert jurisdiction and transfer jurisdiction.[12] Thus, even prior to the enactment of SB 678, courts consistently required that tribes receive notice of state voluntary proceedings.[13]

In voluntary adoption proceedings, the duty to inquire about Indian ancestry and to provide notice is borne by the Department, the licensed adoption agency, or the adoption service provider, as applicable.[14] In all cases where a parent is seeking to relinquish the custody of their child, both the child and the child's parent or custodian must be asked if the child is or may be eligible for membership in an Indian tribe.[15] This inquiry must be documented and provided to the court for review. If there is reason to believe that the child is of Indian descent, notice must be provided to all Indian tribes in which the child may be eligible for membership.[16] Among other requirements, the notice must describe the nature of the proceedings and must advise the tribe of its right to intervene.[17]

⇨ **BEST PRACTICE:** *The Court of Appeal in* In re R.S. *seemingly held that the ICWA's inquiry and notice requirements do not apply to voluntary relinquishment cases.*[18] *This holding is highly questionable, however, where it fails to address the inquiry and notice requirements of Family Code section 8620, which apply to voluntary relinquishment cases under a plain reading of the statute. In addition, the court may have failed to appreciate that a tribe which is not noticed has no ability to exercise its right to intervene, which is guaranteed by Family Code sections 170 and 177(a) and Welfare and Institutions Code section 224, and which creates a risk of invalidation pursuant to the ICWA.*

Notice is often cited as the most critical component of the ICWA. For this reason, and because failure to properly notice is reversible error, California law provides for civil penalties of up to $20,000 where a person, other than a birth parent of the child, in one of a number of ways attempts to avoid notice requirements of the ICWA.[19]

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[9] Fam. Code § 8700(j).
[10] Fam. Code § 8617.
[11] Fam. Code §§ 180 and 8620.
[12] 25 U.S.C. § 1911(a)-(c).
[13] *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30; *In re Junious M.* (1983) 144 Cal.App.3d 786 (tribe's right to intervene is meaningless if the tribe has no notice of the pending action); *Adoption of Lindsay C.* (1991) 229 Cal.App.3d 404; *In re Crystal K.* (1990) 226 Cal.App.3d 655, *cert. denied* (1991) 502 U.S. 862.
[14] Fam. Code § 8620(a).
[15] *Ibid.*
[16] Fam. Code §§ 177, 180, 8620; Cal. Rules of Court, rule 5.481(b).
[17] *See* § VI of this Benchguide ("Notice") for additional notice requirements.
[18] *In re R.S.* (2009) 179 Cal.App.4th 1137.
[19] Fam. Code § 8620(g-h).

b. Consent Requirements

Both the Act and California law establish procedures and substantive requirements that must be followed to validate a voluntary foster placement, termination of parental rights, or adoption of an Indian child.[20] The consent provisions apply to both Indian and non-Indian parents, as well as to Indian custodians.[21] These consent provisions are designed to ensure that voluntary placements of Indian children are not coerced and are fully informed.[22] Four conditions are needed to establish valid consent in voluntary proceedings:

(1) The consent must be in writing;

(2) The consent must be recorded before a court of competent jurisdiction;

(3) The presiding judge must certify that the terms and consequences of the consent were fully explained in detail; and,

(4) The presiding judge must certify that the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language the person understood.[23]

⇨ **BEST PRACTICE**: *There is an apparent inconsistency between when the ICWA at 25 U.S.C. section 1913 says a voluntary termination of parental rights is valid and when Family Code 8700 says a voluntary termination of parental rights is final. The ICWA is clear in requiring written consent to be reviewed and certified by a judge in a court of competent jurisdiction in order to be valid. However, Family Code section 8700 provides that a voluntary relinquishment is final when filed with the department (absent certain exceptions).*

The consent document must contain the name and birth date of the Indian child, the name of the child's tribe, any tribal identification number, and the name and address of the consenting parent or Indian custodian.[24] For foster placements, the consent document must contain the name and address of the person who arranged the placement or the name and address of the foster parents, if known at the time of consent.[25] For adoptive placements, the name and address of the person or entity arranging for the placement must be included in the consent document.[26]

The Act also regulates execution of the consent. Where an Indian child resides or is domiciled on a reservation, the tribal court is the only court with competent jurisdiction to record the consent unless the tribe has been divested by federal law of exclusive jurisdiction over child custody matters.[27] Otherwise, any tribal, state or federal court with competent jurisdiction may record the consent. The consent must be executed in open court, absent a request for

[20] 25 U.S.C. § 1913; Fam. Code § 8606.5.
[21] 25 U.S.C. §§ 1903(9) and 1913(a).
[22] *In re Adoption of a Child of Indian Heritage* (N.J. 1988) 543 A.2d 925.
[23] 25 U.S.C. § 1913; Fam. Code § 8606.5.
[24] BIA Guidelines, § E.2(a).
[25] BIA Guidelines, § E.2(b).
[26] BIA Guidelines, § E.2(c).
[27] 25 U.S.C. § 1911(a); *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 51 n.26; *see* § V of this Benchguide ("Jurisdiction under the Act") for a discussion of tribal jurisdiction.

confidentiality or anonymity.[28] Finally, any consent given before or within ten days of the child's birth is invalid.[29]

c. Withdrawal of Consent

In any voluntary adoption proceeding, the parent or Indian custodian may withdraw consent at any time before the entry of a final decree of adoption.[30] If consent is withdrawn, the child must be returned to the parent or Indian custodian as soon as practicable.[31] The parent must file the withdrawal in the court where the consent was originally recorded, and the court clerk must notify the party who arranged for the adoptive placement.[32]

After the final decree of adoption is entered, the parent may withdraw consent only on the grounds that the consent was obtained through fraud or duress and may petition the court to vacate the decree.[33] The court must vacate the decree and return the child to the parent if the court finds that the consent was indeed given under fraud or duress.[34] Under the ICWA, adoption orders that have been effective for at least two years may not be vacated unless otherwise permitted under state law.[35] However, under California law, an action to vacate an adoption decree based on fraud may be brought within three years after entry of the decree, or within 90 days of discovery of the fraud, whichever is earlier.[36]

If an adoption is vacated or set aside for any reason, a parent or Indian custodian may petition for return of the child. The court must grant the petition unless it would not be in the best interests of the child under the ICWA's strict standard of proof.[37]

d. Certificate Degree of Indian Blood

In a voluntary adoption proceeding involving an Indian child, the Department must ensure that birth parents of Indian ancestry who seek to relinquish the child for adoption provide sufficient information to the Department or the adoption agency so that a Certificate Degree of Indian Blood (CDIB) can be obtained from the BIA.[38] An adoption agency must provide the same information and documentation to the Department at the Department's request.[39] This information becomes a part of the adoptee's file and may be released to the adoptee once the adoptee reaches the age of 18.[40]

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[28] BIA Guidelines § E.1 and Commentary.
[29] 25 U.S.C. § 1913(a); Fam. Code § 8606.5.
[30] 25 U.S.C. § 1913(c); Fam. Code § 8606.5(b).
[31] BIA Guidelines § E.4.
[32] *Ibid.*
[33] 25 U.S.C. § 1913(d); Fam. Code § 8606.5(c).
[34] *Ibid.*
[35] *Ibid.*
[36] Fam. Code § 9102(b).
[37] 25 U.S.C. §§ 1912, 1916(a).
[38] Fam. Code § 8619.
[39] 22 C.C.R. § 35387.
[40] Fam. Code § 8619; 22 C.C.R. § 35385(a).

2. Involuntary Adoption Proceedings

Involuntary adoption proceedings involving an Indian child under the Family Code require the court to make both of the two findings listed below prior to declaring any Indian child free from the custody and control of a parent (and thus eligible for adoption).

(1) The court must find by clear and convincing evidence that active efforts were made in accordance with Welfare and Institutions Code section 361.7, Family Code section 7892.5 and California Rules of Court, rule 5.485(a).

(2) The court must make a determination supported by evidence beyond a reasonable doubt, including testimony of one or more "qualified expert witnesses" as defined in Welfare and Institutions Code section 224.6[41] and Family Code section 177(a), that the continued custody of the Indian child by the parent is likely to result in serious emotional or physical damage to the child.[42]

3. Postadoptive Contact Agreements

The Family Code provides for postadoptive contact agreements by recognizing that "some adoptive children may benefit from either direct or indirect contact with birth relatives, including the birth parent or parents or an Indian tribe, after being adopted."[43] In cases involving Indian children, postadoptive contact agreements can help ensure an ongoing relationship between the child and his or her tribe, as these agreements may include provisions for visitation, future contact, and the sharing of information about the child, not only with birth relatives and birth parents, but also with the child's Indian tribe. The court may order the parties to engage in mediation services in an effort to reach a postadoptive contact agreement in adoption cases involving an Indian child if a birth parent, birth relative, or Indian tribe so petitions the court.[44]

⇨ **BEST PRACTICE:** *Where the parties fail to negotiate in good faith, the court has the authority to modify or issue new orders, including initiating guardianship proceedings instead of adoption or authorizing a different adoptive placement for the child.[45] The court can and should place a heavy emphasis on the terms of the postadoptive agreement as it relates to contact between the child and the tribe; at minimum, the agreement should ensure access to benefits and social/cultural contacts that will allow for the healthy development of the child's tribal identity. If appropriate, tribal representatives should be invited to participate in adoption hearings to show support and an ongoing commitment to the child.*

[41] NOTE: Fam. Code § 7892.5 mistakenly cites to Welf. & Inst. Code § 224.5 in its text, but the description of "qualified expert witness" is actually at Welf. & Inst. Code § 224.6.
[42] Fam. Code §§ 177, 7892.5; Cal. Rules of Court, Rule 5.485.
[43] Fam. Code §§ 8616.5(a), 8620(f).
[44] Fam. Code § 8616.5(k)(1).
[45] Fam. Code § 8616.5(k)(2).

4. Information Required to be Sent to the BIA

In all cases involving an Indian child where the outcome is an adoption decree, the court must provide to the BIA the information listed below within 30 days of the decree:[46]

(1) A copy of the adoption decree;

(2) The name and tribal affiliation of the child;

(3) The names and addresses of the biological parents;

(4) The names and addresses of the adoptive parents; and

(5) The identity of any agency maintaining files and records regarding the adoptive placement.

This list is intended to gather evidence sufficient to allow the tribe and/or the individual to begin to determine eligibility for tribal membership. In cases where a biological parent has requested by affidavit confidentiality of his or her identity, the court must provide the affidavit to the BIA, which in turn must ensure the confidentiality of the information.[47]

B. Custody Cases Where Actual Custody is with a Non-Parent

The ICWA applies to proceedings that could award custody of an Indian child to a nonparent (or Indian custodian), such as placements under Section 3041 of the Family Code.[48] The party seeking custody in these proceedings must complete Form ICWA-010(A) and attach it to the petition.[49] If there is reason to know that an Indian child is the subject of the proceeding, notice must be provided.[50] Under Family Code section 3041, where it is determined that the proceeding involves an Indian child, the court shall (whether or not the tribe has intervened):

(1) Apply the evidentiary standards provided in the ICWA and Welfare and Institutions Code sections 224.6 and 361.7; and,

(2) Apply the placement preferences and standards set out in Welfare and Institutions Code section 361.31.

C. Custody Disputes between Parents

The ICWA specifically excludes custody awards to a parent in a "divorce proceeding."[51] Therefore, the impact of the ICWA is limited in custody proceedings unless custody is to be awarded to a nonparent, or one parent is seeking to terminate the other parent's rights.

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[46] Fam. Code § 9208; Cal. Rules of Court, rule 5.487; *see In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1406 (notice to Secretary is accomplished by notice to BIA).
[47] Fam. Code § 9208; Cal. Rules of Court, rule 5.487.
[48] Fam. Code § 3041; Cal. Rules of Court, rule 5.480.
[49] Cal. Rules of Court, rule 5.481.
[50] *See* § VI of this Benchguide ("Notice") for detailed information on notice requirements under the ICWA.
[51] 25 U.S.C. § 1903.

RESOURCE DIRECTORY

Resource Directory

Over the past decade, a number of ICWA resources and guides have been published. Some provide guidance on the federal law, some provide a history of the ICWA, and others share sample forms or official tribal contact information. Many are available online. This chapter provides an overview of these ICWA resources, with emphasis given to free resources.

A. Government Sites

1. Bureau of Indian Affairs (BIA)

Site: www.bia.gov

Three common references are available at this site. These references are updated roughly every year to two years:

a. List of Federally Recognized Tribes
Link: www.bia.gov/idc/groups/xraca/documents/text/idc011463.pdf

b. List of Designated Agents for Service of Process
Link: www.bia.gov/WhatWeDo/ServiceOverview/SocialServices/index.htm

c. Tribal Leaders Directory
Link: www.bia.gov/idc/groups/xois/documents/text/idc002652.pdf

[The Directory normally includes the latest lists of references (a) and (b) in its appendix section as well.]

2. California Administrative Office of the Courts

Site: www.courts.ca.gov

The California courts' website provides a number of ICWA-related resources:

a. Judicial Council Forms
Link: www.courts.ca.gov/forms.htm (Select form group "Indian Child Welfare Act")

b. The Tribal Projects Unit
Link: www.courts.ca.gov/programs-tribal.htm

This provides a number of ICWA resources such as:

i. ICWA Job Aids for State Courts and Agencies

ii. ICWA Education Materials (including the AOC's Bench Handbook, articles & video presentations on the Indian Child Welfare Act, and trainings offered).

iii. ICWA Laws, Rules, and Regulations (including the Rules of Court)

iv. Statewide Directory of Services for Native American Children & Families

v. California ICWA Expert Witness List

vi. Tribal Customary Adoption information (including legislation, rules & forms, drafter contact information and frequently asked questions)

B. Public Sites

1. California Indian Legal Services (CILS)

Site: www.calindian.org

CILS remains the only California statewide non-profit corporation organized to provide legal assistance and representation to Native Americans. This Benchguide, along with other ICWA self-help handouts, are available online. Among the ICWA-related self-help packets include "What is the Indian Child Welfare Act?," "What is an Indian Custodian?," and "Unsealing Birth Records" (for adult Indian adoptees). In addition to the Benchguide, CILS staff often provides ICWA trainings for tribes, social services, county and private attorneys, CASA workers and judicial officers.

Contact information for each of the field offices:

Bishop Office
873 N. Main Street, Suite 120, Bishop, CA 93514
Tel: (760) 873-3581; or toll free: (800) 736-3582; Fax: (760) 873-7461

Counties Served:
Alpine, Inyo, Kern, Mono, Tuolumne

Escondido Office
609 S. Escondido Boulevard, Escondido, CA 92025
Tel: (760) 746-8941 or toll free: (800) 743-8941; Fax: (760) 746-1815

Counties Served:
Imperial, Los Angeles, Orange, Riverside, San Bernardino, San Diego, Santa Barbara, Ventura

Eureka Office
324 F Street, Eureka, CA 95501
Tel: (707) 443-8397 or toll free: (800) 347-2402; Fax: (707) 443-8913

Counties Served:
Del Norte, Humboldt, Lassen, Modoc, Shasta, Siskiyou, Trinity

Sacramento Office
117 J Street, Suite 300, Sacramento, CA 95814
Tel: (916) 978-0960; or toll free: (800) 829-0284; Fax: (916) 400-4891

Counties Served:
Alameda, Amador, Butte, Calaveras, Colusa, Contra Costa, El Dorado, Fresno, Glenn, Kings, Lake, Madera, Marin, Mariposa, Mendocino, Merced, Monterey, Napa, Nevada, Placer, Plumas, Sacramento, San Benito, San Francisco, San Joaquin, San Luis Obispo, San Mateo, Santa Clara, Santa Cruz, Sierra, Solano, Sonoma, Stanislaus, Sutter, Tehama, Tulare, Yolo, Yuba

2. **Native American Rights Fund (NARF)**
   Site: www.narf.org/icwa/index.htm

NARF offers "A Practical Guide to the Indian Child Welfare Act" (with updates through Sept. 2011) at its website along with numerous other resources. The site is not focused on any one state, but it provides a thorough general treatment of the ICWA. There are case law examples and indices covering many different jurisdictions, historical reports and documents, and lists of additional federal, state, and tribal resources.

3. **Tribal Court Clearinghouse**
   Site: www.tribal-institute.org

The Tribal Court Clearinghouse offers a collection of tribal codes and court information. It provides a comprehensive free source of tribal court materials in the country. Their ICWA Resources page (www.tribal-institute.org/lists/icwa.htm) provides not only the ICWA and BIA Guidelines but also the General Accounting Offices' study on the implementation of the ICWA and a number of scholarly articles on the impact of the ICWA.

APPENDICES

Appendices

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Appendix A:

THE INDIAN CHILD WELFARE ACT

25 U.S.C. §§ 1901 *et seq.*

UNITED STATES CODE ANNOTATED
TITLE 25. INDIANS
CHAPTER 21 – INDIAN CHILD WELFARE ACT

§ 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds--

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

§ 1902. Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation 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, and by providing for assistance to Indian tribes in the operation of child and family service programs.

§ 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term--

(1) "child custody proceeding" shall mean and include--

> (i) "foster care placement" which shall mean 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;
>
> (ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;
>
> (iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a

foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) “adoptive placement” which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) “extended family member” shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) “Indian” means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43;

(4) “Indian child” means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) “Indian child's tribe” means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) “Indian custodian” means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) “Indian organization” means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) “Indian tribe” means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43;

(9) “parent” means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) “reservation” means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) “Secretary” means the Secretary of the Interior; and

(12) “tribal court” means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

§ 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such

proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, 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.

(f) Parental rights termination orders; evidence; determination of damage to child

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.

§ 1913. Parental rights; voluntary termination

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

§ 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

§ 1915. Placement of Indian children

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with--

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the

placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

§ 1916. Return of custody

(a) Petition; best interests of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

(b) Removal from foster care home; placement procedure

Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

§ 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

§ 1918. Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceed-

ings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval

If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Pending actions or proceedings unaffected

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title.

§ 1919. Agreements between States and Indian tribes

(a) Subject coverage

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agree-

ments which provide for concurrent jurisdiction between States and Indian tribes.

(b) Revocation; notice; actions or proceedings unaffected

Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

§ 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception

Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

§ 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

§ 1922. Emergency removal or placement of child; termination; appropriate action

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

§ 1923. Effective date

None of the provisions of this subchapter, except sections 1911(a), 1918, and 1919 of this title, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after November 8, 1978, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

§ 1931. Grants for on or near reservation programs and child welfare codes

(a) Statement of purpose; scope of programs

The Secretary is authorized to make grants to Indian tribes and organizations in the establishment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custo-

dian shall be a last resort. Such child and family service programs may include, but are not limited to--

(1) a system for licensing or otherwise regulating Indian foster and adoptive homes;

(2) the operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care;

(4) home improvement programs;

(5) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;

(6) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;

(7) a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs; and

(8) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.

(b) Non-Federal matching funds for related Social Security or other Federal financial assistance programs; assistance for such programs unaffected; State licensing or approval for qualification for assistance under federally assisted program

> Funds appropriated for use by the Secretary in accordance with this section may be utilized as non-Federal matching share in connection with funds provided under Titles IV-B and XX of the Social Security Act [42 U.S.C.A. §§ 620 et seq.,1397 et seq.] or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized to be appropriated for use under this chapter. The provision or possibility of assistance under this chapter shall not be a basis for the denial or reduction of any assistance otherwise authorized under Titles IV-B and XX of the Social Security Act or any other federally assisted program. For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State.

§ 1932. Grants for off-reservation programs for additional services

The Secretary is also authorized to make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs which may include, but are not limited to--

(1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate State standards of support for maintenance and medical needs;

(2) the operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and em-

ployment, recreational activities, and respite care; and

(4) guidance, legal representation, and advice to Indian families involved in child custody proceedings.

§ 1933. Funds for on and off reservation programs

(a) Appropriated funds for similar programs of Department of Health and Human Services; appropriation in advance for payments

> In the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements with the Secretary of Health and Human Services, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health and Human Services: *Provided*, That authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

(b) Appropriation authorization under section 13 of this title

> Funds for the purposes of this chapter may be appropriated pursuant to the provisions of section 13 of this title.

§ 1934. "Indian" defined for certain purposes

For the purposes of sections 1932 and 1933 of this title, the term "Indian" shall include persons defined in section 1603(c) of this title.

§ 1951. Information availability to and disclosure by Secretary

(a) Copy of final decree or order; other information; anonymity affidavit; exemption from Freedom of Information Act

> Any State court entering a final decree or order in any Indian child adoptive placement after November 8, 1978, shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show--
>
> (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 such adoptive placement.

Where the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained and such information shall not be subject to the Freedom of Information Act (5 U.S.C. 552), as amended.

(b) Disclosure of information for enrollment of Indian child in tribe or for determination of member rights or benefits; certification of entitlement to enrollment

> Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be

necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe.

§ 1952. Rules and regulations

Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter.

§ 1961. Locally convenient day schools

(a) Sense of Congress

It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families.

(b) Report to Congress; contents, etc.

The Secretary is authorized and directed to prepare, in consultation with appropriate agencies in the Department of Health and Human Services, a report on the feasibility of providing Indian children with schools located near their homes, and to submit such report to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives within two years from November 8, 1978. In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades.

§ 1962. Omitted

§ 1963. Severability

If any provision of this chapter or the applicability thereof is held invalid, the remaining provisions of this chapter shall not be affected thereby.

Appendix B:

BIA GUIDELINES

44 Fed. Reg. 67584 (Nov. 26, 1979)

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Guidelines for State Courts; Indian Child Custody Proceedings

This notice is published in exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 DM 8.

There was published in the Federal Register, Vol. 44, No. 79/Monday, April 23, 1979 a notice entitled Recommended Guidelines for State Courts—Indian Child Custody Proceedings. This notice pertained directly to implementation of the Indian Child Welfare Act of 1978, Pub. L. 95-608, 92 Stat. 3069, 25 U.S.C. 1901 *et seq.* A subsequent Federal Register notice which invited public comment concerning the above was published on June 5, 1979. As a result of comments received, the recommended guidelines were revised and are provided below in final form.

Introduction

Although the rulemaking procedures of the Administrative Procedures Act have been followed in developing these guidelines, they are not published as regulations because they are not intended to have binding legislative effect. Many of these guidelines represent the interpretation of the Interior Department of certain provisions of the Act. Other guidelines provide procedures which, if followed, will help assure that rights guaranteed by the Act are protected when state courts decide Indian child custody matters. To the extent that the Department's interpretations of the Act are correct, contrary interpretations by the courts would be violations of the Act. If procedures different from those recommended in these guidelines are adopted by a state, their adequacy to protect rights guaranteed by the Act will have to be judged on their own merits.

Where Congress expressly delegates to the Secretary the primary responsibility for interpreting a statutory term, regulations interpreting that term have legislative effect. Courts are not free to set aside those regulations simply because they would have interpreted that statute in a different manner. Where, however, primary responsibility for interpreting a statutory term rests with the courts, administrative interpretations of statutory terms are given important but not controlling significance. *Batterton* v. *Francis*, 432 U.S. 416, 424-425 (1977).

In other words, when the Department writes rules needed to carry out responsibilities Congress has explicity imposed on the Department, those rules are binding. A violation of those rules is a violation of the law. When, however, the Department writes rules or guidelines advising some other agency how it should carry out responsibilities explicitly assigned to it by Congress, those rules or guidelines are not, by themselves, binding. Courts will take what this Department has to say into account in such instances, but they are free to act contrary to what the Department has said if they are convinced that the Department's guidelines are not required by the statute itself.

Portions of the Indian Child Welfare Act do expressly delegate to the Secretary of the Interior responsibility for interpreting statutory language. For example, under 25 U.S.C. 1918, the Secretary is directed to determine whether a plan for reassumption of jurisdiction is "feasible" as that term is used in the statute. This and other areas where primary responsibility for implementing portions of the Act rest with this Department, are covered in regulations promulgated on July 31, 1979, at 44 FR 45092.

Primary responsibility for interpreting other language used in the Act, however, rests with the courts that decide Indian child custody cases. For example, the legislative history of the Act states explicitly that the use of the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child. S. Rep. No. 95-597, 95th Cong., 1st Sess. 17 (1977). The Department's interpretation of statutory language of this type is published in these guidelines.

Some commenters asserted that Congressional delegation to this Department of authority to promulgate regulations with binding legislative effect with respect to all provisions of the Act is found at 25 U.S.C. 1952, which states, "Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter." Promulgation of regulations with legislative effect with respect to most of the responsibilities of state or tribal courts under the Act, however, is not necessary to carry out the Act. State and tribal courts are fully capable of carrying out the responsibilities imposed on them by Congress without being under the direct supervision of this Department.

Nothing in the legislative history indicates that Congress intended this Department to exercise supervisory control over state or tribal courts or to legislate for them with respect to Indian child custody matters. For Congress to assign to an administrative agency such supervisory control over courts would be an extraordinary step.

Nothing in the language or legislative history of 25 U.S.C. 1952 compels the conclusion that Congress intended to vest this Department with such extraordinary power. Both the language and the legislative history indicate that the purpose of that section was simply to assure that the Department moved promptly to promulgate regulations to carry out the responsibilities Congress had assigned it under the Act. Assignment of supervisory authority over the courts to an administrative agency is a measure so at odds with concepts of both federalism and separation of powers that it should not be imputed to Congress in the absence of an express declaration of Congressional intent to that effect.

Some commenters also recommended that the guidelines be published as regulations and that the decision of whether the law permits such regulations to be binding be left to the court. That approach has not been adopted because the Department has an obligation not to assert authority that it concludes it does not have.

Each section of the revised guidelines is accompanied by commentary explaining why the Department believes states should adopt that section and to provide some guidance where the guidelines themselves may need to be interpreted in the light of specific circumstances.

The original guidelines used the word "should" instead of "shall" in most provisions. The term "should" was used to communicate the fact that the guidelines were the Department's interpretations of the Act and were not intended to have binding legislative effect. Many commenters, however, interpreted the use of "should" as an attempt by this Department to make statutory requirements themselves optional. That was not the intent. If a state adopts those guidelines, they should be stated in mandatory terms. For that reason the word "shall" has replaced "should" in the revised guidelines. The status of these guidelines as interpretative rather than legislative in nature is adequately set out in the introduction.

In some instances a state may wish to establish rules that provide even greater protection for rights guaranteed by the Act than those suggested by these guidelines. These guidelines are not intended to discourage such action. Care should be taken, however, that the

provision of additional protections to some parties to a child custody proceeding does not deprive other parties of rights guaranteed to them by the Act.

In some instances the guidelines do little more than restate the statutory language. This is done in order to make the guidelines more complete so that they can be followed without the need to refer to the statute in every instance. Omission of any statutory language, of course, does not in any way affect the applicability of the statute.

A number of commenters recommended that special definitions of residence and domicile be included in the guidelines. Such definitions were not included because these terms are well defined under existing state law. There is no indication that these state law definitions tend to undermine in any way the purposes of the Act. Recommending special definitions for the purpose of this Act alone would simply provide unnecessary complications in the law.

A number of commenters recommended that the guidelines include recommendations for tribal-state agreements under 25 U.S.C. 1919. A number of other commenters, however, criticized the one provision in the original guidelines addressing that subject as tending to impose on such agreements restrictions that Congress did not intend should be imposed. Because of the wide variation in the situations and attitudes of states and tribes, it is difficult to deal with that issue in the context of guidelines. The Department is currently developing materials to aid states and tribes with such agreements. The Department hopes to have those materials available later this year. For these reasons, the provision in the original guidelines concerning tribal-state agreements has been deleted from the guidelines.

The Department has also received many requests for assistance from tribal courts in carrying out the new responsibilities resulting from the passage of this Act. The Department intends to provide additional guidance and assistance in that area also in the future. Providing guidance to state courts was given a higher priority because the Act imposes many more procedures on state courts than it does on tribal courts.

Many commenters have urged the Department to discuss the effect of the Act on the financial responsibilities of states and tribes to provide services to Indian children. Many such services are funded in large part by the Department of Health, Education, and Welfare. The policies and regulations of that Department will have a significant impact on the issue of financial responsibility. Officials of Interior and HEW will be discussing this issue with each other. It is anticipated that more detailed guidance on questions of financial responsibility will be provided as a result of those consultations.

One commenter recommended that the Department establish a monitoring procedure to exercise its right under 25 U.S.C. 1915(e) to review state court placement records. HEW currently reviews state placement records on a systematic basis as part of its responsibilities with respect to statutes it administers. Interior Department officials are discussing with HEW officials the establishment of a procedure for collecting data to review compliance with the Indian Child Welfare Act.

Inquiries concerning these recommended guidelines may be directed to the nearest of the following regional and field offices of the Solicitor for the Interior Department:

Office of the Regional Solicitor, Department of the Interior, 510 L Street, Suite 408, Anchorage, Alaska 99501, (907) 265–5301.

Office of the Regional Solicitor, Department of the Interior, Richard B. Russell Federal Building, 75 Spring St., SW., Suite 1328, Atlanta, Georgia 30303, (404) 221–4447.

Office of the Regional Solicitor, Department of the Interior, c/o U.S. Fish & Wildlife Service, Suite 308, 1 Gateway Center, Newton Corner, Massachusetts 02158, (617) 829–9258.

Office of the Field Solicitor, Department of the Interior, 686 Federal Building, Fort Snelling, Twin Cities, Minnesota 55111, (612) 725–3540.

Office of the Regional Solicitor, Department of the Interior, P.O. Box 25007, Denver Federal Center, Denver, Colorado 80225, (303) 234–3175.

Office of the Field Solicitor, Department of the Interior, P.O. Box 548, Aberdeen, South Dakota 57401, (605) 225–7254.

Office of the Field Solicitor, Department of the Interior, P.O. Box 1538, Billings, Montana 59103, (406) 245–6711.

Office of the Regional Solicitor, Department of the Interior, Room E–2753, 2800 Cottage Way, Sacramento, California 95825, (916) 484–4331.

Office of the Field Solicitor, Department of the Interior, Valley Bank Center, Suite 280, 201 North Central Avenue, Phoenix, Arizona 85073, (602) 261–4756.

Office of the Field Solicitor, Department of the Interior, 3610 Central Avenue, Suite 104, Riverside, California 92506, (714) 787–1560.

Office of the Field Solicitor, Department of the Interior, Window Rock, Arizona 86515, (602) 871–5151.

Office of the Regional Solicitor, Department of the Interior, Room 5068, Page Belcher Federal Building, Tulsa, Oklahoma 74103, (918) 581–7501.

Office of the Field Solicitor, Department of the Interior, Room 7102, Federal Building & Courthouse, 500 Gold Avenue, S.W., Albuquerque, New Mexico 87101, (505) 766–2547.

Office of the Field Solicitor, Department of the Interior, P.O. Box 397, W.C.D. Office Building, Route 1, Anadarko, Oklahoma 73005, (405) 247–6673.

Office of the Field Solicitor, Department of the Interior, P.O. Box 1508, Room 319, Federal Building, 5th and Broadway, Muskogee, Oklahoma 74401, (918) 683–3111.

Office of the Field Solicitor, Department of the Interior, c/o Osage Agency, Grandview Avenue, Pawhuska, Oklahoma 74056, (918) 287–2431.

Office of the Regional Solicitor, Department of the Interior, Suite 6201, Federal Building, 125 South State Street, Salt Lake City, Utah 84138, (801) 524–5677.

Office of the Regional Solicitor, Department of the Interior, Lloyd 530 Building, Suite 607, 500 N.E. Multnomah Street, Portland, Oregon 97232, (503) 231–2125.

Guidelines for State Courts

A. Policy

(1) Congress through the Indian Child Welfare Act has expressed its clear preference for keeping Indian children with their families, deferring to tribal judgment on matters concerning the custody of tribal children, and placing Indian children who must be removed from their homes within their own

families or Indian tribes. Proceedings in state courts involving the custody of Indian children shall follow strict procedures and meet stringent requirements to justify any result in an individual case contrary to these preferences. The Indian Child Welfare Act, the federal regulations implementing the Act, the recommended guidelines and any state statutes, regulations or rules promulgated to implement the Act shall be liberally construed in favor of a result that is consistent with these preferences. Any ambiguities in any of such statutes, regulations, rules or guidelines shall be resolved in favor of the result that is most consistent with these preferences.

(2) In any child custody proceeding where applicable state or other federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Indian Child Welfare Act, the state court shall apply the state or other federal law, provided that application of that law does not infringe any right accorded by the Indian Child Welfare Act to an Indian tribe or child.

A. Commentary

The purpose of this section is to apply to the Indian Child Welfare Act the canon of construction that remedial statutes are to be liberally construed to achieve their purpose. The three major purposes are derived from a reading to the Act itself. In order to fully implement the Congressional intent the rule shall be applied to all implementing rules and state legislation as well.

Subsection A.(2) applies to canon of statutory construction that specific language shall be given precedence over general language. Congress has given certain specific rights to tribes and Indian children. For example, the tribe has a right to intervene in involuntary custody proceedings. The child has a right to learn of tribal affiliation upon becoming 18 years old. Congress did not intend 25 U.S.C. 1921 to have the effect of eliminating those rights where a court concludes they are in derogation of a parental right provided under a state statute. Congress intended for this section to apply primarily in those instances where a state provides greater protection for a right accorded to parents under the Act. Examples of this include State laws which: impose a higher burden of proof than the Act for removing a child from a home, give the parents more time to prepare after receiving notice, require more effective notice, impose stricter emergency removal procedure requirements on those removing a child, give parents greater access to documents, or contain additional safeguard to assure the voluntariness of consent.

B. Pretrial requirements

B.1. Determination That Child Is an Indian

(a) When a state court has reason to believe a child involved in a child custody proceeding is an Indian, the court shall seek verification of the child's status from either the Bureau of Indian Affairs or the child's tribe. In a voluntary placement proceeding where a consenting parent evidences a desire for anonymity, the court shall make its inquiry in a manner that will not cause the parent's indentity to become publicly known.

(b)(i) The determination by a tribe that a child is or is not a member of that tribe, is or is not eligible for membership in that tribe, or that the biological parent is or is not a member of that tribe is conclusive.

(ii) Absent a contrary determination by the tribe that is alleged to be the Indian child's tribe, a determination by the Bureau of Indian Affairs that a child is or is not an Indian child is conclusive.

(c) Circumstances under which a state court has reason to believe a child involved in a child custody proceeding is an Indian include but are not limited to the following:

(i) Any party to the case, Indian tribe, Indian organization or public or private agency informs the court that the child is an Indian child.

(ii) Any public or state-licensed agency involved in child protection services or family support has discovered information which suggests that the child is an Indian child.

(iii) The child who is the subject of the proceeding gives the court reason to believe he or she is an Indian child.

(iv) The residence or the domicile of the child, his or her biological parents, or the Indian custodian is known by the court to be or is shown to be a predominantly Indian community.

(v) An officer of the court involved in the proceeding has knowledge that the child may be an Indian child.

B.1. Commentary

This guideline makes clear that the best source of information on whether a particular child is Indian is the tribe itself. It is the tribe's prerogative to determine membership criteria and to decide who meets those criteria. *Cohen, Handbook of Federal Indian Law* 133 (1942). Because of the Bureau of Indian Affairs' long experience in determining who is an Indian for a variety of purposes, its determinations are also entitled to great deference. *See, e.g., United States* v. *Sandoval*, 231, U.S. 28, 27 (1913).

Although tribal verification is preferred, a court may want to seek verification from the BIA in those voluntary placement cases where the parent has requested anonymity and the tribe does not have a system for keeping child custody matters confidential.

Under the Act confidentially is given a much higher priority in voluntary proceedings than in involuntary ones. The Act mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones. Cf. 25 U.S.C. § 1912 with 25 U.S.C. § 1913. For voluntary placements, however, the Act specifically directs state courts to respect parental requests for confidentiality. 25 U.S.C. § 1915(c) The most common voluntary placement involves a newborn infant. Confidentiality has traditionally been a high priority in such placements. The Act reflects that traditional approach by requiring deference to requests for anonymity in voluntary placements but not in involuntary ones. This guideline specifically provides that anonymity not be compromised in seeking verification of Indian status. If anonymity were compromised at that point, the statutory requirement that requests for anonymity be respected in applying the preferences would be meaningless.

Enrollment is not always required in order to be a member of a tribe. Some tribes do not have written rolls. Others have rolls that list only persons that were members as of a certain date. Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative. *United States* v. *Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979).

The guidelines also list several circumstances which shall trigger an inquiry by the court and petitioners to determine whether a child is an Indian for purposes of this Act. This listing is not intended to be complete, but it does list the most common circumstances giving rise to a reasonable belief that a child may be an Indian.

B.2. Determination of Indian Child's Tribe

(a) Where an Indian child is a member of more than one tribe or is eligible for membership in more than one tribe but is not a member of any of them, the court is called upon to determine with which tribe the child has more significant contacts.

(b) The court shall send the notice specified in recommended guideline B.4. to each such tribe. The notice shall

specify the other tribe or tribes that are being considered as the child's tribe and invite each tribe's views on which tribe shall be so designated.

(c) In determining which tribe shall be designated the Indian child's tribe, the court shall consider, among other things, the following factors:

(i) length of residence on or near the reservation of each tribe and frequency of contacts with each tribe;

(ii) child's participation in activities of each tribe;

(iii) child's fluency in the language of each tribe;

(iv) whether there has been a previous adjudication with respect to the child by a court of one of the tribes;

(v) residence on or near one of the tribes' reservation by the child's relatives;

(vi) tribal membership of custodial parent or Indian custodian;

(vii) interest asserted by each tribe in response to the notice specified in subsection B.2.(b) of these guidelines; and

(viii) the child's self identification.

(d) The court's determination together with the reasons for it shall be set out in a written document and made a part of the record of the proceeding. A copy of that document shall be sent to each party to the proceeding and to each person or governmental agency that received notice of the proceeding.

(e) If the child is a member of only one tribe, that tribe shall be designated the Indian child's tribe even though the child is eligible for membership in another tribe. If a child becomes a member of one tribe during or after the proceeding, that tribe shall be designated as the Indian child's tribe with respect to all subsequent actions related to the proceeding. If the child becomes a member of a tribe other than the one designated by the court as the Indian child's tribe, actions taken based on the court's determination prior to the child's becoming a tribal member continue to be valid.

B.2. Commentary

This guideline requires the court to notify all tribes that are potentially the Indian child's tribe so that each tribe may assert its claim to that status and the court may have the benefit of the views of each tribe. Notification of all the tribes is also necessary so the court can consider the comparative interest of each tribe in the child's welfare in making its decision. That factor has long been regarded an important consideration in making child custody decisions.

The significant factors listed in this section are based on recommendations by tribal officials involved in child welfare matters. The Act itself and the legislative history make it clear that tribal rights are to be based on the existence of a political relationship between the family and the tribe. For that reason, the guidelines make actual tribal membership of the child conclusive on this issue.

The guidelines do provide, however, that previous decisions of a court made on its own determination of the Indian child's tribe are not invalidated simply because the child becomes a member of a different tribe. This provision is included because of the importance of stability and continuity to a child who has been placed outside the home by a court. If a child becomes a member before a placement is made or before a change of placement becomes necessary for other reasons, however, then that membership decision can be taken into account without harm to the child's need for stable relationships.

We have received several recommendations that "Indian child's tribe" status be accorded to all tribes in which a child is eligible for membership. The fact that Congress, in the definition of "Indian child's tribe," provided a criterion for determining which is *the* Indian child's tribe, is a clear indication of legislative intent that there be only one such tribe for each child. For purposes of transfer of jurisdiction, there obviously can be only one tribe to adjudicate the case. To give more than one tribe "Indian child's tribe" status for purposes of the placement preferences would dilute the preference accorded by Congress to the tribe with which the child has the more significant contacts.

A right of intervention could be accorded a tribe with which a child has less significant contacts without undermining the right of the other tribe. A state court can, if it wishes and state law permits, permit intervention by more than one tribe. It could also give a second tribe preference in placement after attempts to place a child with a member of the first tribe or in a home or institution designated by the first tribe had proved unsuccessful. So long as the special rights of *the* Indian child's tribe are respected, giving special status to the tribe with the less significant contacts is not prohibited by the Act and may, in many instances, be a good way to comply with the spirit of the Act.

Determinations of the Indian child's tribe for purposes of this Act shall not serve as any precedent for other situations. The standards in this statute and these guidelines are designed with child custody matters in mind. A different determination may be entirely appropriate in other legal contexts.

B.3. Determination That Placement Is Covered by the Act

(a) Although most juvenile delinquency proceedings are not covered by the Act, the Act does apply to status offenses, such as truancy and incorrigibility, which can only be committed by children, and to any juvenile delinquency proceeding that results in the termination of a parental relationship.

(b) Child custody disputes arising in the context of divorce or separation proceedings or similar domestic relations proceedings are not covered by the Act so long as custody is awarded to one of the parents.

(c) Voluntary placements which do not operate to prohibit the child's parent or Indian custodian from regaining custody of the child at any time are not not covered by the Act. Where such placements are made pursuant to a written agreement, that agreement shall state explicitly the right of the parent or custodian to regain custody of the child upon demand.

B.3. Commentary

The purpose of this section is to deal with some of the questions the Department has been receiving concerning the coverage of the Act.

The entire legislative history makes it clear that the Act is directed primarily at attempts to place someone other than the parent or Indian custodian in charge of raising an Indian child—whether on a permanent or temporary basis. Although there is some overlap, juvenile delinquency proceedings are primarily designed for other purposes. Where the child is taken out of the home for committing a crime it is usually to protect society from further offenses by the child and to punish the child in order to persuade that child and others not to commit other offenses.

Placements based on status offenses (actions that are not a crime when committed by an adult), however, are usually premised on the conclusion that the present custodian of the child is not providing adequate care or supervision. To the extent that a status offense poses any immediate danger to society, it is usually also punishable as an offense which would be a crime if committed by an adult. For that reason status offenses are treated the same as dependency proceedings and are covered by the Act and these guidelines, while other juvenile delinquency placements are excluded.

While the Act excludes *placements* based on an act which would be a crime if committed by an adult, it does cover terminations of parental rights even

where they are based on an act which would be a crime if committed by an adult. Such terminations are not intended as punishment and do not prevent the child from committing further offenses. They are based on the conclusion that someone other than the present custodian of the child should be raising the child. Congress has concluded that courts shall make such judgments only on the basis of evidence that serious physical or emotional harm to the child is likely to result unless the child is removed.

The Act excludes from coverage an award of custody to one of the parents "in a divorce proceeding." If construed narrowly, this provision would leave custody awards resulting from proceedings between husband and wife for separate maintenance, but not for dissolution of the marriage bond within the coverage of the Act. Such a narrow interpretation would not be in accord with the intent of Congress. The legislative history indicates that the exemption for divorce proceedings, in part, was included in response to the views of this Department that the protections provided by this Act are not needed in proceedings between parents. In terms of the purposes of this Act, there is no reason to treat separate maintenance or similar domestic relations proceedings differently from divorce proceedings. For that reason the statutory term "divorce proceeding" is construed to include other domestic relations proceedings between spouses.

The Act also excludes from its coverage any placements that do not deprive the parents or Indian custodians of the right to regain custody of the child upon demand. Without this exception a court appearance would be required every time an Indian child left home to go to school. Court appearances would also be required for many informal caretaking arrangements that Indian parents and custodians sometimes make for their children. This statutory exemption is restated here in the hope that it will reduce the instances in which Indian parents are unnecessarily inconvenienced by being required to give consent in court to such informal arrangements.

Some private groups and some states enter into formal written agreements with parents for temporary custody (*See e.g.* Alaska Statutes § 47.10.230). The guidelines recommend that the parties to such agreements explicitly provide for return of the child upon demand if they do not wish the Act to apply to such placements. Inclusion of such a provision is advisable because courts frequently assume that when an agreement is reduced to writing, the parties have only those rights specifically written into the agreement.

B.4. Determination of Jurisdiction

(a) In any Indian child custody proceeding in state court, the court shall determine the residence and domicile of the child. Except as provided in Section B.7. of these guidelines, if either the residence or domicile is on a reservation where the tribe exercises exclusive jurisdiction over child custody proceedings, the proceedings in state court shall be dismissed.

(b) If the Indian child has previously resided or been domiciled on the reservation, the state court shall contact the tribal court to determine whether the child is a ward of the tribal court. Except as provided in Section B.7. of these guidelines, if the child is a ward of a tribal court, the state court proceedings shall be dismissed.

B.4. Commentary

The purpose of this section is to remind the state court of the need to determine whether it has jurisdiction under the Act. The action is dismissed as soon as it is determined that the court lacks jurisdiction except in emergency situations. The procedures for emergency situations are set out in Section B.7.

B.5. Notice Requirements

(a) In any involuntary child custody proceeding, the state court shall 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.

(b) In any involuntary Indian child custody proceeding, notice of the proceeding shall be sent to the parents and Indian custodians, if any, and to any tribes that may be the Indian child's tribe by registered mail with return receipt requested. The notice shall be written in clear and understandable language and include the following information:

(i) The name of the Indian child.

(ii) His or her tribal affiliation.

(iii) A copy of the petition, complaint or other document by which the proceeding was initiated.

(iv) The name of the petitioner and the name and address of the petitioner's attorney.

(v) A statement of the right of the biological parents or Indian custodians and the Indian child's tribe to intervene in the proceeding.

(vi) A statement that if the parents or Indian custodians are unable to afford counsel, counsel will be appointed to represent them.

(vii) A statement of the right of the natural parents or Indian custodians and the Indian child's tribe to have, on request, twenty days (or such additional time as may be permitted under state law) to prepare for the proceedings.

(viii) The location, mailing address and telephone number of the court.

(ix) A statement of the right of the parents or Indian custodians or the Indian child's tribe to petition the court to transfer the proceeding to the Indian child's tribal court.

(x) The potential legal consequences of an adjudication on future custodial rights of the parents or Indian custodians.

(xi) A statement in the notice to the tribe that since child custody proceedings are usually conducted on a confidential basis, tribal officials should keep confidential the information contained in the notice concerning the particular proceeding and not reveal it to anyone who does not need the information in order to exercise the tribe's right under the Act.

(c) The tribe, parents or Indian custodians receiving notice from the petitioner of the pendency of a child custody proceeding has the right, upon request, to be granted twenty days (or such additional time as may be permitted under state law) from the date upon which the notice was received to prepare for the proceeding.

(d) The original or a copy of each notice sent pursuant to this section shall be filed with the court together with any return receipts or other proof of service.

9e) Notice may be personnally served on any person entitled to receive notice in lieu of mail service.

(f) If a parent or Indian custodian appears in court without an attorney, the court shall inform him or her of the right to appointed counsel, the right to request that the proceeding be transferred to tribal court or to object to such transfer, the right to request additional time to prepare for the proceeding and the right (if the parent or Indian custodian is not already a party) to intervene in the proceedings.

(g) If the court or a petitioning party has reason to believe that a parent or Indian custodian is not likely to understand the contents of the notice because of lack of adequate comprehension of written English, a copy of the notice shall be sent to the Bureau of Indian Affairs agency nearest to the residence of that person requesting that Bureau of Indian Affairs personnel arrange to have the notice explained to that person in the language that he or she best understands.

B.5. Commentary

This section recommends that state courts routinely inquire of participants in child custody proceedings whether the child is an Indian. If anyone asserts that the child is an Indian or that there is reason to believe the child may be an Indian, then the court shall contact the tribe or the Bureau of Indian Affairs for verification. Refer to sections B.1 and B.2 of these guidelines.

This section specifies the information to be contained in the notice. This information is necessary so the persons who receive notice will be able to exercise their rights in a timely manner. Subparagraph (xi) provides that tribes shall be requested to assist in maintaining the confidentiality of the proceeding. Confidentiality may be difficult to maintain—especially where small tribes are involved and the likelihood that the family involved is well known by tribal officials is great. Although Congress was concerned with confidentiality, it concluded that the interest of tribes in the welfare of their children justified taking some risks with confidentiality—especially in involuntary proceedings. It is reasonable, however, to ask tribal officials to maintain as much confidentiality as possible consistent with the exercise of tribal rights under the Act.

The time limits are minimum ones required by the Act. In many instances, more time may be available under state court procedures or because of the circumstances of the particular case.

In such instances, the notice shall state that additional time is available.

The Act requires notice to the parent *or* Indian custodian. At a minimum, parents must be notified if termination of parental rights is a potential outcome since it is their relationship to the child that is at stake. Similarly, the Indian custodians must be notified of any action that could lead to the custodians' losing custody of the child. Even where only custody is an issue, noncustodial parents clearly have a legitimate interest in the matter. Although notice to both parents and Indian custodians may not be required in all instances by the Act or the Fourteenth Amendment to the U.S. Constitution, providing notice to both is in keeping with the spirit of the Act. For that reason, these guidelines recommend notice be sent to both.

Subsection (d) requires filing the notice with the court so there will be a complete record of efforts to comply with the Act.

Subsection (e) authorizes personal services since it is superior to mail services and provides greater protection or rights as authorized by 25 U.S.C. 1921. Since serving the notice does not involve any assertion of jurisdiction over the person served, personal notice may be served without regard to state or reservation boundaries.

Subsections (f) and (g) provide procedures to increase the likelihood that rights are understood by parents and Indian custodians.

B.6. Time Limits and Extensions

(a) A tribe, parent or Indian custodian entitled to notice of the pendency of a child custody proceeding has a right, upon request, to be granted an additional twenty days from the date upon which notice was received to prepare for participation in the proceeding.

(b) The proceeding may not begin until all of the following dates have passed:

(i) ten days after the parent or Indian custodian (or Secretary where the parent or Indian custodian is unknown to the petitioner) has received notice;

(ii) ten days after the Indian child's tribe (or the Secretary if the Indian child's tribe is unknown to the petitioner) has received notice;

(iii) thirty days after the parent or Indian custodian has received notice if the parent or Indian custodian has requested an additional twenty days to prepare for the proceeding; and

(iv) Thirty days after the Indian child's tribe has received notice if the Indian child's tribe has requested an additional twenty days to prepare for the proceeding.

(c) The time limits listed in this section are the minimum time periods required by the Act. The court may grant more time to prepare where state law permits.

B.6. Commentary

This section attempts to clarify the waiting periods required by the Act after notice has been received of an involuntary Indian child custody proceeding. Two independent rights are involved—the right of the parents or Indian custodians and the right of the Indian child's tribe. The proceeding may not begin until the waiting periods to which both are entitled have passed.

This section also makes clear that additional extensions of time may be granted beyond the minimum required by the Act.

B.7. Emergency Removal of an Indian Child

(a) Whenever an Indian child is removed from the physical custody of the child's parents or Indian custodians pursuant to the emergency removal or custody provisions of state law, the agency responsible for the removal action shall immediately cause an inquiry to be made as to the residence and domicile of the child.

(b) When a court order authorizing continued emergency physical custody is sought, the petition for that order shall be accompanied by an affidavit containing the following information:

(i) The name, age and last known address of the Indian child.

(ii) The name and address of the child's parents and Indian custodians, if any. If such persons are unknown, a detailed explanation of what efforts have been made to locate them shall be included.

(iii) Facts necessary to determine the residence and the domicile of the Indian child and whether either the residence or domicile is on an Indian reservation. If either the residence or domicile is believed to be on an Indian reservation, the name of the reservation shall be stated.

(iv) The tribal affiliation of the child and of the parents and/or Indian custodians.

(v) A specific and detailed account of the circumstances that lead the agency responsible for the emergency removal of the child to take that action.

(vi) If the child is believed to reside or be domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, a statement of efforts that have been made and are being made to transfer the child to the tribe's jurisdiction.

(vii) A statement of the specific actions that have been taken to assist the parents or Indian custodians so the child may safely be returned to their custody.

(c) If the Indian child is not restored to the parents or Indian custodians or jurisdiction is not transferred to the tribe, the agency responsible for the child's removal must promptly commence a state court proceeding for foster care placement. If the child resides or is domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, such placement must terminate as soon as the imminent physical damage or harm to the child which resulted in the emergency removal no longer exists or as soon as the tribe exercises jurisdiction over the case—whichever is earlier.

(d) Absent extraordinary circumstances, temporary emergency custody shall not be continued for more than 90 days without a determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert witness.

that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

B.7. Commentary

Since jurisdiction under the Act is based on domicile and residence rather than simple physical presence, there may be instances in which action must be taken with respect to a child who is physically located off a reservation but is subject to exclusive tribal jurisdiction. In such instances the tribe will usually not be able to take swift action to exercise its jurisdiction. For that reason Congress authorized states to take temporary emergency action.

Since emergency action must be taken without the careful advance deliberation normally required, procedures must be established to assure that the emergency actions are quickly subjected to review. This section provides procedures for prompt review of such emergency actions. It presumes the state already has such review procedures and only prescribes additional procedures that shall be followed in cases involving Indian children.

The legislative history clearly states that placements under such emergency procedures are to be as short as possible. If the emergency ends, the placement shall end. State action shall also end as soon as the tribe is ready to take over the case.

Subsection (d) refers primarily to the period between when the petition is filed and when the trial court renders its decision. The Act requires that, except for emergencies, Indian children are not to be removed from their parents unless a court finds clear and convincing evidence that the child would be in serious danger unless removed from the home. Unless there is some kind of time limit on the length of an "emergency removal" (that is, any removal not made pursuant to a finding by the court that there is clear and convincing evidence that continued parental custody would make serious physical or emotional harm likely), the safeguards of the Act could be evaded by use of long-term emergency removals.

Subsection (d) recommends what is, in effect, a speedy trial requirement. The court shall be required to comply with the requirements of the Act and reach a decision within 90 days unless there are "extraordinary circumstances" that make additional delay unavoidable.

B.8. Improper Removal From Custody

(a) If, in the course of any Indian child custody proceeding, the court has reason to believe that the child who is the subject of the proceeding may have been improperly removed from the custody of his or her parent or Indian custodian or that the child has been improperly retained after a visit or other temporary relinquishment of custody, and that the petitioner is responsible for such removal or retention, the court shall immediately stay the proceedings until a determination can be made on the question of improper removal or retention.

(b) If the court finds that the petitioner is responsible for an improper removal or retention, the child shall be immediately returned to his or her parents or Indian custodian.

B.8. Commentary

This section is designed to implement 25 U.S.C. § 1920. Since a finding of improper removal goes to the jurisdiction of the court to hear the case at all, this section provides that the court will decide the issue as soon as it arises before proceeding further on the merits.

C. Requests for Transfer to Tribal Court

C.1. Petitions under 25 U.S.C. § 1911(b) for transfer of proceeding

Either parent, the Indian custodian or the Indian child's tribe may, orally or in writing, request the court to transfer the Indian child custody proceeding to the tribal court of the child's tribe. The request shall be made promptly after receiving notice of the proceeding. If the request is made orally it shall be reduced to writing by the court and made a part of the record.

C.1. Commentary

Reference is made to 25 U.S.C. 1911(b) in the title of this section in order to clarify that this section deals only with transfers where the child is not domiciled or residing on an Indian reservation.

So that transfers can occur as quickly and simply as possible, requests can be made orally.

This section specifies that requests are to be made promptly after receiving notice of the proceeding. This is a modification of the timeliness requirement that appears in the earlier version of the guidelines. Although the statute permits proceedings to be commenced even before actual notice is received by parties entitled to notice, those parties do not lose their right to request a transfer simply because neither the petitioner nor the Secretary was able to locate them earlier.

Permitting late transfer requests by persons and tribes who were notified late may cause some disruption. It will also, however, provide an incentive to the petitioners to make a diligent effort to give notice promptly in order to avoid such disruptions.

The Department received a number of comments objecting to any timeliness requirement at all. Commenters pointed out that the statute does not explicitly require transfer requests to be timely. Some commenters argued that imposing such a requirement violated tribal and parental rights to intervene at any point in the proceedings under 25 U.S.C. § 1911(c) of the Act.

While the Act permits intervention at any point in the proceeding, it does not explicitly authorize transfer requests at any time. Late interventions do not have nearly the disruptive effect on the proceeding that last minute transfers do. A case that is almost completed does not need to be retried when intervention is permitted. The problems resulting from late intervention are primarily those of the intervenor, who has lost the opportunity to influence the portion of the proceedings that was completed prior to intervention.

Although the Act does not explicitly require transfer petitions to be timely, it does authorize the court to refuse to transfer a case for good cause. When a party who could have petitioned earlier waits until the case is almost complete to ask that it be transferred to another court and retried, good cause exists to deny the request.

Timeliness is a proven weapon of the courts against disruption caused by negligence or obstructionist tactics on the part of counsel. If a transfer petition must be honored at any point before judgment, a party could wait to see how the trial is going in state court and then obtain another trial if it appears the other side will win. Delaying a transfer request could be used as a tactic to wear down the other side by requiring the case to be tried twice. The Act was not intended to authorize such tactics and the "good cause" provision is ample authority for the court to prevent them.

C.2. Criteria and Procedures for Ruling on 25 U.S.C. § 1911(b) Transfer Petitions

(a) Upon receipt of a petition to transfer by a parent, Indian custodian or the Indian child's tribe, the court must transfer unless either parent objects to such transfer, the tribal court declines jurisdiction, or the court determines that good cause to the contrary exists for denying the transfer.

(b) If the court believes or any party asserts that good cause to the contrary exists, the reasons for such belief or assertion shall be stated in writing and made available to the parties who are petitioning for transfer. The petitioners shall have the opportunity to provide the

court with their views on whether or not good cause to deny transfer exists. C.2. Commentary

Subsection (a) simply states the rule provided in 25 U.S.C. § 1911(b).

Since the Act gives the parents and the tribal court of the Indian child's tribe an absolute veto over transfers, there is no need for any adversary proceedings if the parents or the tribal court opposes transfer. Where it is proposed to deny transfer on the grounds of "good cause," however, all parties need an opportunity to present their views to the court.

C.3. Determination of Good Cause to the Contrary

(a) Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.

(b) Good cause not to transfer the proceeding may exist if any of the following circumstances exists:

(i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.

(ii) The Indian child is over twelve years of age and objects to the transfer.

(iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.

(iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

(c) Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

(d) The burden of establishing good cause to the contrary shall be on the party opposing the transfer.

C.3. Commentary

All five criteria that were listed in the earlier version of the guidelines were highly controversial. Comments on the first two criteria were almost unanimously negative. The first criterion was whether the parents were still living. The second was whether an Indian custodian or guardian for the child had been appointed. These criteria were criticized as irrelevant and arbitrary. It was argued that children who are orphans or have no appointed Indian custodian or guradian are no more nor less in need of the Act's protections that other children. It was also pointed out that these criteria are contrary to the decision in *Wisconsin Potawatomies of the Hannahville Indian Community* v. *Houston*, 397 F. Supp. 719 (W.D. Mich 1973), which was explicitly endorsed by the committee that drafted that Act. The court in that case found that tribal jurisdiction existed even though the children involved were orphans for whom no guardian had been appointed.

Although there was some support for the third and fourth criteria, the preponderance of the comment concerning them was critical. The third criteria was whether the child had little or no contact with his or her Indian tribe for a significant period of time. The fourth was whether the child had ever resided on the reservation for a significant period of time. These criteria were criticized, in part, because they would virtually exclude from transfers infants who were born off the reservation. Many argued that the tribe has a legitimate interest in the welfare of members who have not had significant previous contact with the tribe or the reservation. Some also argued that these criteria invited the state courts to be making the kind of cultural decisons that the Act contemplated should be made by tribes. Some argued that the use of vague words in these criteria accorded state courts too much discretion.

The fifth criteria was whether a child over the age of twelve objected to the transfer. Comment on this criteria was much more evenly divided and many of the critics were ambivalent. They worried that young teenagers could be too easily influenced by the judge or by social workers. They also argued that fear of the unknow would cuase many teenagers to make an ill-considered decision against transfer.

The first four criteria in the earlier version were all directed toward the question of whether the child's connections with the reservation were so tenuous that transfer back to the tribe is not advised. The circumstances under which it may be proper for the state court to take such considerations into account are set out in the revised subsection (iv).

It is recommended that in most cases state court judges not be called upon to determined whether or not a child's contacts with a reservation are so limited that a case should not be transferred. This may be a valid consideration since the shock of changing cultures may, in some cases, be harmful to the child. This determination, however, can be made by the parent, who has a veto over transfer to tribal court.

This reasoning does not apply, however, where there is no parent available to make that decision. The guidelines recommend that state courts be authorized to make such determinations only in those cases where there is no parent available to make it.

State court authority to make such decisions is limited to those cases where the child is over five years of age. Most children younger than five years can be expected to adjust more readily to a change in cultural environment.

The fifth criterion has been retained. It is true that teenagers may make some unwise decisions, but it is also true that their judgment has developed to the extent that their views ought to be taken into account in making decisions about their lives.

The existence of a tribal court is made an absolute requirement for transfer of a case. Clearly, the absence of a tribal court is good cause not to ask the tribe to try the case.

Consideration of whether or not the case can be properly tried in tribal court without hardship to the parties or witnesses was included on the strength of the section-by-section analysis in the House Report on the Act, which stated with respect to the § 1911(b), "The subsection is intended to permit a State court to apply to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected." Where a child is in fact living in a dangerous situation, he or she should not be forced to remain there simply because the witnesses cannot afford to travel long distances to court.

Application of this criterion will tend to limit transfers to cases involving Indian children who do not live very far from the reservation. This problem may be alleviated in some instances by having the court come to the witnesses. The Department is aware of one case under that Act where transfer was conditioned on having the tribal court meet in the city where the family lived. Some cities hav substantial populations of members of tribes from distant reservations. In such situations some tribes may wish to appoint members who live in those cities as tribal judges.

The timeliness of the petition for transfer, discussed at length in the commentary to section C.1, is listed as a factor to be considered. Inclusion of this criterion is designed to encourage the prompt exercise of the right to petition for transfer in order to avoid unnecessary delays. Long periods of uncertainty concerning the future are

generally regarded as harmful to the well-being of children. For that reason, it is especially important to avoid unnecessary delays in child custody proceedings.

Almost all commenters favored retention of the paragraph stating that reservation socio-economic conditions and the perceived adequacy of tribal institutions are not to be taken into account in making good cause determinations. Some commenters did suggest, however, that a case not be transferred if it is clear that a particular disposition of the case that could only be made by the state court held especially great promise of benefiting the child.

Such considerations are important but they have not been listed because the Department believes such judgments are best made by tribal courts. Parties who believe that state court adjudication would be better for such reasons can present their reasons to the tribal court and urge it to decline jurisdiction. The Department is aware of one case under the Act where this approach is being used and believes it is more in keeping with the confidence Congress has expressed in tribal courts.

Since Congress has established a policy of preferring tribal control over custody decisions affecting tribal members, the burden of proving that an exception to that policy ought to be made in a particular case rests on the party urging that an exception be made. This rule is reflected in subsection (d).

C.4. Tribal Court Declination of Transfer

(a) A tribal court to which transfer is requested may decline to accept such transfer.

(b) Upon receipt of a transfer petition the state court shall notify the tribal court in writing of the proposed transfer. The notice shall state how long the tribal court has to make its decision. The tribal court shall have at least twenty days from the receipt of notice of a proposed transfer to decide whether to decline the transfer. The tribal court may inform the state court of its decision to decline either orally or in writing.

(c) Parties shall file with the tribal court any arguments they wish to make either for or against tribal declination of transfer. Such arguments shall be made orally in open court or in written pleadings that are served on all other parties.

(d) If the case is transferred the state court shall provide the tribal court with all available information on the case.

C.4. Commentary

The previous version of this section provided that the state court should presume the tribal court has declined to accept jurisdiction unless it hears otherwise. The comments on this issue were divided. This section has been revised to require the tribal court to decline the transfer affirmatively if it does not wish to take the case. This approach is in keeping with the apparent intent of Congress. The language in the Act providing that transfers are "subject to declination by the tribal court" indicates that affirmative action by the tribal court is required to decline a transfer.

The recommended time limit for a decision has been extended from ten to twenty days. The additional time is needed for the court to become apprised of factors it may want to consider in determining whether or not to decline the transfer.

A new paragraph has been added recommending that the parties assist the tribal court in making its decision on declination by giving the tribal court their views on the matter.

Transfers ought to be arranged as simply as possible consistent with due process. Transfer procedures are a good subject for tribal-state agreements under 25 U.S.C. § 1919.

D. Adjudication of Involuntary Placements, Adoptions, or Terminations or Terminations of Parental Rights

D.1. Access to Reports

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child has the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based. No decision of the court shall be based on any report or other document not filed with the court.

D.1. Commentary

The first sentence merely restates the statutory language verbatim. The second sentence makes explicit the implicit assumption of Congress—that the court will limit its considerations to those documents and reports that have been filed with the court.

D.2. Efforts To Alleviate Need To Remove Child From Parents or Indian Custodians

Any party petitioning a state court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court that prior to the commencement of the proceeding active efforts have been made to alleviate the need to remove the Indian child from his or her parents or Indian custodians. These efforts shall take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. They shall also involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian care givers.

D.2. Commentary

This section elaborates on the meaning of "breakup of the Indian family" as used in the Act. "Family breakup" is sometimes used as a synonym for divorce. In the context of this statute, however, it is clear that Congress meant a situation in which the family is unable or unwilling to raise the child in a manner that is not likely to endanger the child's emotional or physical health.

This section also recommends that the petitioner take into account the culture of the Indian child's tribe and use the resources of the child's extended family and tribe in attempting to help the family function successfully as a home for the child. The term "individual Indian care givers" refers to medicine men and other individual tribal members who may have developed special skills that can be used to help the child's family succeed.

One commenter recommended that detailed procedures and criteria be established in order to determine whether family support efforts had been adequate. Establishing such procedures and requirements would involve the court in second-guessing the professional judgment of social service agencies. The Act does not contemplate such a role for the courts and they generally lack the expertise to make such judgments.

D.3. Standards of Evidence

(a) The court may not issue an order effecting a foster care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one of more qualified expert witnesses, demonstrating that the child's continued custody with the child's parents of Indian custodian is likely to result in serious emotional or physical damage to the child.

(b) The court may not order a termination of parental rights unless the court's order is supported by evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(c) Evidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or non-conforming social behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child. To be clear and convincing, the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding. The evidence must show the causal relationship between the conditions that exist and the damage that is likely to result.

D.3. Commentary

The first two paragraphs are essentially restatement of the statutory language. By imposing these standards, Congress has changed the rules of law of many states with respect to the placement of Indian children. A child may not be removed simply because there is someone else willing to raise the child who is likely to do a better job or that it would be "in the best interests of the child" for him or her to live with someone else. Neither can a placement or termination of parental rights be ordered simply based on a determination that the parents or custodians are "unfit parents." It must be shown that it is shown that it is dangerous for the child to remain with his or her present custodians. Evidence of that must be "clear and convincing" for placements and "beyond a reasonable doubt" for terminations.

The legislative history of the Act makes it pervasively clear that Congress attributes many unwarranted removals of Indian children to cultural bias on the part of the courts and social workers making the decisions. In many cases children were removed merely because the family did not conform to the decision-maker's stereotype of what a proper family should be—without any testing of the implicit assumption that only a family that conformed to that stereotype could successfully raise children. Subsection (c) makes it clear that mere non-conformance with such stereotypes or the existence of other behavior or conditions that are considered bad does not justify a placement or termination under the standards imposed by Congress. The focus must be on whether the particular conditions are likely to cause serious damage.

D.4. Qualified Expert Witnesses

(a) Removal of an Indian child from his or her family must be based on competent testimony from one or more experts qualified to speak specifically to the issue of whether continued custody by the parents or Indian custodians is likely to result in serious physical or emotional damage to the child.

(b) Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:

(i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.

(ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.

(iii) A professional person having substantial education and experience in the area of his or her specialty.

(c) The court or any party may request the assistance of the Indian child's tribe or the Bureau of Indian Affairs agency serving the Indian child's tribe in locating persons qualified to serve as expert witnesses.

D.4 Commentary

The first subsection is intended to point out that the issue on which qualified expert testimony is required is the question of whether or not serious damage to the child is likely to occur if the child is not removed. Basically two questions are involved. First, is it likely that the conduct of the parents will result in serious physical or emotional harm to the child? Second, if such conduct will likely cause such harm, can the parents be persuaded to modify their conduct?

The party presenting an expert witness must demonstrate that the witness is qualified by reason of educational background and prior experience to make judgments on those questions that are substantially more reliable than judgments that would be made by nonexperts.

The second subsection makes clear that knowledge of tribal culture and childrearing practices will frequently be very valuable to the court. Determining the likelihood of future harm frequently involves predicting future behavior—which is influenced to a large degree by culture. Specific behavior patterns will often need to be placed in the context of the total culture to determine whether they are likely to cause serious emotional harm.

Indian tribes and Bureau of Indian Affairs personnel frequently know persons who are knowledgeable concerning the customs and cultures of the tribes they serve. Their assistance is available in helping to locate such witnesses.

E. Voluntary Proceedings

E.1. Execution of Consent

To be valid, consent to a voluntary termination of parental rights or adoption must be executed in writing and recorded before a judge or magistrate of a court of competent jurisdiction. A certificate of the court must accompany any consent and must certify that the terms and consequences of the consent were explained in detail and in the language of the parent or Indian custodian, if English is not the primary language, and were fully understood by the parent or Indian custodian. Execution of consent need not be in open court where confidentiality is requested or indicated.

E.1. Commentary

This section provides that consent may be executed before either a judge or magistrate. The addition of magistrates was made in response to a suggestion from Alaska where magistrates are found in most small communities but "judges" are more widely scattered. The term "judge" as used in the statute is not a term of art and can certainly be construed to include judicial officers who are called magistrates in some states. The statement that consent need not be in open court where confidentiality is desired or indicated was taken directly from the House Report on the Act. A recommendation that the guideline list the consequences of consent that must be described to the parent or custodian has not been adopted because the consequences can vary widely depending on the nature of the proceeding, state law and the particular facts of individual cases.

E.2. Content of Consent Document

(a) The consent document shall contain the name and birthdate of the Indian child, the name of the Indian child's tribe, any identifying number or other indication of the child's membership in the tribe, if any, and the name and address of the consenting parent or Indian custodian.

(b) A consent to foster care placement shall contain, in addition to the information specified in (a), the name and address of the person or entity by or through whom the placement was arranged, if any, or the name and address of the prospective foster parents, if known at the time.

(c) A consent to termination of parental rights or adoption shall contain,

in addition to the information specified in (a), the name and address of the person or entity by or through whom any preadoptive or adoptive placement has been or is to be arranged.

E.2. Commentary

This section specifies the basic information about the placement or termination to which the parent or Indian custodian is consenting to assure that consent is knowing and also to document what took place.

E.3. Withdrawal of Consent to Placement

Where a parent or Indian custodian has consented to a foster care placement under state law, such consent may be withdrawn at any time by filing, in the court where consent was executed and filed, an instrument executed by the parent or Indian custodian. When a parent or Indian custodian withdraws consent to foster care placement, the child shall as soon as is practicable be returned to that parent or Indian custodian.

E.3. Commentary

This section specifies that withdrawal of consent shall be filed in the same court where the consent document itself was executed.

E.4. Withdrawal of Consent to Adoption

A consent to termination of parental rights or adoption may be withdrawn by the parent at any time prior to entry of a *final decree of voluntary termination or adoption* by filing in the court where the consent is filed an instrument executed under oath by the parent stipulating his or her intention to withdraw such consent. The clerk of the court where the withdrawal of consent is filed shall promptly notify the party by or through whom any preadoptive or adoptive placement has been arranged of such filing and that party shall insure the return of the child to the parent as soon as practicable.

E.4. Commentary

This provision recommends that the clerk of the court be responsible for notifying the family with whom the child has been placed that consent has been withdrawn. The court's involvement frequently may be necessary since the biological parents are often not told who the adoptive parents are.

F. Dispositions

F.1. Adoptive Placements

(a) In any adoptive placement of an Indian child under state law preference must be given (in the order listed below) absent good cause to the contrary, to placement of the child with:

(i) A member of the child's extended family;

(ii) Other members of the Indian child's tribe; or

(iii) Other Indian families, including families of single parents.

(b) The Indian child's tribe may establish a different order of preference by resolution. That order of preference must be followed so long as placement is the least restrictive setting appropriate to the child's needs.

(c) Unless a consenting parent evidences a desire for anonymity, the court or agency shall notify the child's extended family and the Indian child's tribe that their members will be given preference in the adoption decision.

F.1. Commentary

This section makes clear that preference shall be given in the order listed in the Act. The Act clearly recognizes the role of the child's extended family in helping to raise children. The extended family should be looked to first when it becomes necessary to remove the child from the custody of his or her parents. Because of differences in cultures among tribes, placement within the same tribe is preferable.

This section also provides that single parent families shall be considered for placements. The legislative history of the Act makes it clear that Congress intended custody decisions to be made based on a consideration of the present or potential custodian's ability to provide the necessary care, supervision and support for the child rather than on preconceived notions of proper family composition.

The third subsection recommends that the court or agent make an active effort to find out if there are families entitled to preference who would be willing to adopt the child. This provision recognizes, however, that the consenting parent's request for anonymity takes precedence over efforts to find a home consistent with the Act's priorities.

F.2. Foster Care or Preadoptive Placements

In any foster care or preadoptive placement of an Indian child:

(a) The child must be placed in the least restrictive setting which

(i) most approximates a family;

(ii) in which his or her special needs may be met; and

(iii) which is in reasonable proximity to his or her home.

(b) Preference must be given in the following order, absent good cause to the contrary, to placement with:

(i) A member of the Indian child's extended family;

(ii) A foster home, licensed, approved or specified by the Indian child's tribe, whether on or off the reservation;

(iii) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) 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.

(c) The Indian child's tribe may establish a different order of preference by resolution, and that order of preference shall be followed so long as the criteria enumerated in subsection (a) are met.

F.2. Commentary

This guideline simply restates the provisions of the Act.

F.3. Good Cause To Modify Preferences

(a) For purposes of foster care, preadoptive or adoptive placement, a determination of good cause not to follow the order of preference set out above shall be based on one or more of the following considerations:

(i) The request of the biological parents or the child when the child is of sufficient age.

(ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.

(iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.

(b) The burden of establishing the existence of good cause not to follow the order of preferences established in subsection (b) shall be on the party urging that the preferences not be followed.

F.3. Commentary

The Act indicates that the court is to give preference to confidentiality requests by parents in making placements. Paragraph (i) is intended to permit parents to ask that the order of preference not be followed because it would prejudice confidentiality or for other reasons. The wishes of an older child are important in making an effective placement.

In a few cases a child may need highly specialized treatment services that are unavailable in the community where the families who meet the preference criteria live. Paragraph (ii) recommends that such considerations be considered as good cause to the contrary.

Paragraph (iii) recommends that a diligent attempt to find a suitable family meeting the preference criteria be made before consideration of a non-preference placement be considered. A diligent attempt to find a suitable family includes at a minimum, contact with the child's tribal social service program, a search of all county or state listings of available Indian homes and contact with nationally known Indian programs with available placement resources.

Since Congress has established a clear preference for placements within the tribal culture, it is recommended in subsection (b) that the party urging an exception be made be required to bear the burden of proving and exception is necessary.

G. Post-Trial Rights

G.1. Petition To Vacate Adoption

(a) Within two years after a final decree of adoption of any Indian child by a state court, or within any longer period of time permitted by the law of the state, a parent who executed a consent to termination of paternal rights or adoption of that child may petition the court in which the final adoption decree was entered to vacate the decree and revoke the consent on the grounds that such consent was obtained by fraud or duress.

(b) Upon the filing of such petition, the court shall give notice to all parties to the adoption proceedings and shall proceed to hold a hearing on the petition. Where the court finds that the parent's consent was obtained through fraud or duress, it must vacate the decree of adoption and order the consent revoked and order the child returned to the parent.

G.1. Commentary

This section recommends that the petition to vacate an adoption be brought in the same court in which the decree was entered, since that court clearly has jurisdiction, and witnesses on the issue of fraud or duress are most likely to be within its jurisdiction.

G.2. Adult Adoptee Rights

(a) Upon application by an Indian individual who has reached age 18 who was the subject of an adoptive placement, the court which entered the final decree must inform such individual of the tribal affiliations, if any of the individual's biological parents and provide such other information necessary to protect any rights flowing from the individual's tribal relationship.

(b) The section applies regardless of whether or not the original adoption was subject to the provisions of the Act.

(c) Where state law prohibits revelation of the identity of the biological parent, assistance of the Bureau of Indian Affairs shall be sought where necessary to help an adoptee who is eligible for membership in a tribe establish that right without breaching the confidentiality of the record.

G.2. Commentary

Subsection (b) makes clear that adoptions completed prior to May 7, 1979, are covered by this provision. The Act states that most portions of Title I do not "affect a proceeding under State law" initiated or completed prior to May 7, 1979. Providing information to an adult adoptee, however, cannot be said to affect the proceeding by which the adoption was ordered.

The legislative history of the Act makes it clear that this Act was not intended to supersede the decision of state legislatures on whether adult adoptees may be told the names of their biological parents. The intent is simply to assure the protection of rights deriving from tribal membership. Where a state law prohibits disclosure of the identity of the biological parents, tribal rights can be protected by asking the BIA to check confidentially whether the adult adoptee meets the requirements for membership in an Indian tribe. If the adoptee does meet those requirements, the BIA can certify that fact to the appropriate tribe.

G.3. Notice of Change in Child's Status

(a) Whenever a final decree of adoption of an Indian child has been vacated or set aside, or the adoptive parent has voluntarily consented to the termination of his or her parental rights to the child, or whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive placement, or adoptive placement, notice by the court or an agency authorized by the court shall be given to the child's biological parents or prior Indian custodians. Such notice shall inform the recipient of his or her right to petition for return of custody of the child.

(b) A parent or Indian custodian may waive his or her right to such notice by executing a written waiver of notice filed with the court. Such waiver may be revoked at any time by filing with the court a written notice of revocation, but such revocation would not affect any proceeding which occurred before the filing of the notice of revocation.

G.3. Commentary

This section provides guidelines to aid courts in applying the provisions of Section 106 of the Act. Section 106 gives legal standing to a biological parent or prior Indian custodian to petition for return of a child in cases of failed adoptions or changes in placement in situations where there has been a termination of parental rights. Section 106(b) provides the whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive placement, or adoptive placement, such placement is to be in accordance with the provisions of the Act—which requires notice to the biological parents.

The Act is silent on the question of whether a parent or Indian custodian can waive the right to further notice. Obviously, there will be cases in which the biological parents will prefer not to receive notice once their parental rights have been relinquished or terminated. This section provides for such waivers but, because the Act establishes an absolute right to participate in any future proceedings and to petition the court for return of the child, the waiver is revocable.

G.4. Maintenance of Records

The state shall establish a single location where all records of every foster care, preadoptive placement and adoptive placement of Indian children by courts of that state will be available within seven days of a request by an Indian child's tribe or the Secretary. The records shall contain, at a minimum, the petition or complaint, all substantive orders entered in the proceeding, and the complete record of the placement determination.

G.4. Commentary

This section of the guidelines provides a procedure for implementing the provisions of 25 U.S.C. § 1915(e). This section has been modified from the previous version which required that all records be maintained in a single location within the state. As revised this section provides only that the records be retrievable by a single office that would make them available to the requester within seven days of a request. For some states (especially Alaska) centralization of the records themselves would create major administrative burdens. So long as the records can be promptly made available at a single location, the intent of this section that the records be readily available will be satisfied.

Forrest J. Gerard,

Assistant Secretary, Indian Affairs.

November 16, 1979.

[FR Doc. 79-36231 Filed 11-23-79; 8:45 am]

BILLING CODE 4310-02-M

Appendix C:

SENATE BILL 678

(2005-2006 Reg. Sess.); 2006 Cal. Stats., ch. 838

Senate Bill No. 678

CHAPTER 838

An act to amend Sections 3041, 7821, 7822, 8616.5, 8620, 8710, and 9210 of, to add Sections 7892.5, 7907.3, 8606.5, 8619.5, 9208, and 9209 to, to add Part 3 (commencing with Section 170) to Division 1 of, and to repeal Section 7810 of, the Family Code, to amend Sections 1510, 1511, 1513, 1516.5, and 1601 of, to add Sections 1449, 1459, 1459.5, 1460.2, 1474, and 1500.1 to, and to repeal Section 2112 of, the Probate Code, and to amend Sections 290.1, 290.2, 291, 292, 293, 294, 295, 297, 305.5, 317, 361, 366, 366.26, 727.4, 10553.1, and 16507.4 of, to add Sections 110, 224, 224.1, 224.2, 224.3, 224.4, 224.5, 224.6, 306.6, 361.31, and 361.7 to, and to repeal Section 360.6 of, the Welfare and Institutions Code, relating to Indian children.

[Approved by Governor September 30, 2006. Filed with Secretary of State September 30, 2006.]

LEGISLATIVE COUNSEL'S DIGEST

SB 678, Ducheny. Indian children.

Existing federal law, the Indian Child Welfare Act, governs the proceedings for determining the placement of an Indian child when that child is removed from the custody of his or her parent or guardian. Existing law authorizes tribes recognized under federal law to intervene in these proceedings.

Existing provisions of state law govern child custody proceedings, adoption proceedings, including postadoption contact agreements, dependency proceedings, including termination of parental rights, the voluntary relinquishment of a child by a parent, and guardianship proceedings. Existing law recognizes that the Indian Child Welfare Act applies if the subject of these proceedings is or may be an Indian child and specifies conforming procedures in these cases with regard to the right to notice and intervention accorded the child's tribe and the standard of proof applied in evaluating the evidence submitted, among other things.

This bill would revise, recast, and expand various provisions of state law to, among other things, apply to certain children who do not come within the definition of an Indian child for purposes of the Indian Child Welfare Act, and would provide that a parent, Indian custodian, or tribe may intervene in child custody proceedings involving children with Indian ancestry, as specified. The bill would also authorize a tribe to participate in dependency proceedings involving an Indian child, as specified. The bill would provide that an Indian child's parent's consent to adoption or guardianship is invalid unless it meets specified standards. The bill would specify that if an Indian custodian or biological parent of an Indian child in

guardianship proceedings lacks the financial ability to retain counsel and requests that appointment, certain provisions of the Indian Child Welfare Act regarding court-appointed counsel would apply.

Existing law also requires, until January 1, 2010, a social worker to make a home visit and conduct a criminal records check of persons living in a home before placing the child in the home. Existing law creates certain notification requirements for probation officers and social workers in child custody cases.

This bill would delete that termination date, thereby making that provision effective indefinitely. This bill would require probation officers and social workers to provide additional notices in cases involving Indian children.

Because this bill would impose additional duties on social workers and other county employees, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

This bill would incorporate additional changes to Section 295 of the Welfare and Institutions Code proposed by SB 1667 to become operative only if this bill and SB 1667 are enacted and become effective on or before January 1, 2007, and this bill is enacted last.

This bill would incorporate additional changes to Section 317 of the Welfare and Institutions Code proposed by AB 2480 to become operative only if this bill and AB 2480 are enacted and become effective on or before January 1, 2007, and this bill is enacted last.

The people of the State of California do enact as follows:

SECTION 1. Part 3 (commencing with Section 170) is added to Division 1 of the Family Code, to read:

PART 3. INDIAN CHILDREN

170. (a) As used in this code, unless the context otherwise requires, the terms “Indian,” “Indian child,” “Indian child’s tribe,” “Indian custodian,” “Indian organization,” “Indian tribe,” “reservation,” and “tribal court” shall be defined as provided in Section 1903 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.).

(b) When used in connection with an Indian child custody proceeding, the terms “extended family member” and “parent” shall be defined as provided in Section 1903 of the Indian Child Welfare Act.

(c) "Indian child custody proceeding" means a "child custody proceeding" within the meaning of Section 1903 of the Indian Child Welfare Act, including a voluntary or involuntary proceeding that may result in an Indian child's temporary or long-term foster care or guardianship placement if the parent or Indian custodian cannot have the child returned upon demand, termination of parental rights, or adoptive placement. An "Indian child custody proceeding" does not include a proceeding under this code commenced by the parent of an Indian child to determine the custodial rights of the child's parents, unless the proceeding involves a petition to declare an Indian child free from the custody or control of a parent or involves a grant of custody to a person or persons other than a parent, over the objection of a parent.

(d) If an Indian child is a member of more than one tribe or is eligible for membership in more than one tribe, the court shall make a determination, in writing together with the reasons for it, as to which tribe is the Indian child's tribe for purposes of the Indian child custody proceeding. The court shall make that determination as follows:

(1) If the Indian child is or becomes a member of only one tribe, that tribe shall be designated as the Indian child's tribe, even though the child is eligible for membership in another tribe.

(2) If an Indian child is or becomes a member of more than one tribe, or is not a member of any tribe but is eligible for membership in more than one tribe, the tribe with which the child has the more significant contacts shall be designated as the Indian child's tribe. In determining which tribe the child has the more significant contacts with, the court shall consider, among other things, the following factors:

(A) The length of residence on or near the reservation of each tribe and frequency of contact with each tribe.

(B) The child's participation in activities of each tribe.

(C) The child's fluency in the language of each tribe.

(D) Whether there has been a previous adjudication with respect to the child by a court of one of the tribes.

(E) Residence on or near one of the tribes' reservations by the child's parents, Indian custodian or extended family members.

(F) Tribal membership of custodial parent or Indian custodian.

(G) Interest asserted by each tribe in response to the notice specified in Section 180.

(H) The child's self identification.

(3) If an Indian child becomes a member of a tribe other than the one designated by the court as the Indian child's tribe under paragraph (2), actions taken based on the court's determination prior to the child's becoming a tribal member shall continue to be valid.

175. (a) The Legislature finds and declares the following:

(1) There is no resource that is more vital to the continued existence and integrity of recognized Indian tribes than their children, and the State of California has an interest in protecting Indian children who are members of, or are eligible for membership in, an Indian tribe. The state is

committed to protecting the essential tribal relations and best interest of an Indian child by promoting practices, in accordance with the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) and other applicable law, designed to prevent the child's involuntary out-of-home placement and, whenever the placement is necessary or ordered, by placing the child, whenever possible, in a placement that reflects the unique values of the child's tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the child's tribe and tribal community.

(2) It is in the interest of an Indian child that the child's membership in the child's Indian tribe and connection to the tribal community be encouraged and protected, regardless of any of the following:

(A) Whether the child is in the physical custody of an Indian parent or Indian custodian at the commencement of a child custody proceeding.

(B) Whether the parental rights of the child's parents have been terminated.

(C) Where the child has resided or been domiciled.

(b) In all Indian child custody proceedings the court shall consider all of the findings contained in subdivision (a), strive to promote the stability and security of Indian tribes and families, comply with the federal Indian Child Welfare Act, and seek to protect the best interest of the child. Whenever an Indian child is removed from a foster care home or institution, guardianship, or adoptive placement for the purpose of further foster care, guardianship, or adoptive placement, placement of the child shall be in accordance with the Indian Child Welfare Act.

(c) A determination by an Indian tribe that an unmarried person, who is under the age of 18 years, is either (1) a member of an Indian tribe or (2) eligible for membership in an Indian tribe and a biological child of a member of an Indian tribe shall constitute a significant political affiliation with the tribe and shall require the application of the federal Indian Child Welfare Act to the proceedings.

(d) In any case in which this code or other applicable state or federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child, or the Indian child's tribe, than the rights provided under the Indian Child Welfare Act, the court shall apply the higher standard.

(e) Any Indian child, the Indian child's tribe, or the parent or Indian custodian from whose custody the child has been removed, may petition the court to invalidate an action in an Indian child custody proceeding for foster care, guardianship placement, or termination of parental rights if the action violated Sections 1911, 1912, and 1913 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.). Nothing in this section is intended to prohibit, restrict, or otherwise limit any rights under Section 1914 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.).

177. (a) In an Indian child custody proceeding, the court shall apply Sections 224.2 to 224.6, inclusive, and Sections 305.5, 361.31, and 361.7

of the Welfare and Institutions Code, and the following rules from the California Rules of Court, as they read on January 1, 2005:

(1) Paragraph (7) of subdivision (b) of Rule 1410.

(2) Subdivision (i) of Rule 1412.

(b) In the provisions cited in subdivision (a), references to social workers, probation officers, county welfare department, or probation department shall be construed as meaning the party seeking a foster care placement, guardianship, or adoption under this code.

(c) This section shall only apply to proceedings involving an Indian child.

180. (a) In an Indian child custody proceeding notice shall comply with subdivision (b) of this section.

(b) Any notice sent under this section shall be sent to the minor's parent or legal guardian, Indian custodian, if any, and the Indian child's tribe and shall comply with all of the following requirements:

(1) Notice shall be sent by registered or certified mail with return receipt requested. Additional notice by first-class mail is recommended, but not required.

(2) Notice to the tribe shall be to the tribal chairperson, unless the tribe has designated another agent for service.

(3) Notice shall be sent to all tribes of which the child may be a member or eligible for membership until the court makes a determination as to which tribe is the Indian child's tribe in accordance with subdivision (d) of Section 170, after which notice need only be sent to the tribe determined to be the Indian child's tribe.

(4) Notice, to the extent required by federal law, shall be sent to the Secretary of the Interior's designated agent, the Sacramento Area Director, Bureau of Indian Affairs. If the identity or location of the Indian child's tribe is known, a copy of the notice shall also be sent directly to the Secretary of the Interior unless the Secretary of the Interior has waived that notice in writing and the person responsible for giving notice under this section has filed proof of the waiver with the court.

(5) In addition to the information specified in other sections of this article, notice shall include all of the following information:

(A) The name, birthdate, and birthplace of the Indian child, if known.

(B) The name of any Indian tribe in which the child is a member or may be eligible for membership, if known.

(C) All names known of the Indian child's biological parents, grandparents, and great-grandparents, or Indian custodians, including maiden, married, and former names or aliases, as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, and any other identifying information, if known.

(D) A copy of the petition by which the proceeding was initiated.

(E) A copy of the child's birth certificate, if available.

(F) The location, mailing address, and telephone number of the court and all parties notified pursuant to this section.

(G) A statement of the following:

(i) The absolute right of the child's parents, Indian custodians, and tribe to intervene in the proceeding.

(ii) The right of the child's parents, Indian custodians, and tribe to petition the court to transfer the proceeding to the tribal court of the Indian child's tribe, absent objection by either parent and subject to declination by the tribal court.

(iii) The right of the child's parents, Indian custodians, and tribe to, upon request, be granted up to an additional 20 days from the receipt of the notice to prepare for the proceeding.

(iv) The potential legal consequences of the proceedings on the future custodial rights of the child's parents or Indian custodians.

(v) That if the parents or Indian custodians are unable to afford counsel, counsel will be appointed to represent the parents or Indian custodians pursuant to Section 1912 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.).

(vi) That the information contained in the notice, petition, pleading, and other court documents is confidential, so any person or entity notified shall maintain the confidentiality of the information contained in the notice concerning the particular proceeding and not reveal it to anyone who does not need the information in order to exercise the tribe's rights under the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.).

(c) Notice shall be sent whenever it is known or there is reason to know that an Indian child is involved, and for every hearing thereafter, including, but not limited to, the hearing at which a final adoption order is to be granted. After a tribe acknowledges that the child is a member or eligible for membership in that tribe, or after the Indian child's tribe intervenes in a proceeding, the information set out in subparagraphs (C), (D), (E), and (G) of paragraph (5) of subdivision (b) need not be included with the notice.

(d) Proof of the notice, including copies of notices sent and all return receipts and responses received, shall be filed with the court in advance of the hearing except as permitted under subdivision (e).

(e) No proceeding shall be held until at least 10 days after receipt of notice by the parent, Indian custodian, the tribe, or the Bureau of Indian Affairs. The parent, Indian custodian, or the tribe shall, upon request, be granted up to 20 additional days to prepare for the proceeding. Nothing herein shall be construed as limiting the rights of the parent, Indian custodian, or tribe to 10 days' notice if a lengthier notice period is required under this code.

(f) With respect to giving notice to Indian tribes, a party shall be subject to court sanctions if that person knowingly and willfully falsifies or conceals a material fact concerning whether the child is an Indian child, or counsels a party to do so.

(g) The inclusion of contact information of any adult or child that would otherwise be required to be included in the notification pursuant to this section, shall not be required if that person is at risk of harm as a result of domestic violence, child abuse, sexual abuse, or stalking.

185. (a) In a custody proceeding involving a child who would otherwise be an Indian child based on the definition contained in paragraph (4) of Section 1903 of the federal Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.), but is not an Indian child based on status of the child's tribe, as defined in paragraph (8) of Section 1903 of the federal Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.), the court may permit the tribe from which the child is descended to participate in the proceeding upon request of the tribe.

(b) If the court permits a tribe to participate in a proceeding, the tribe may do all of the following, upon consent of the court:

(1) Be present at the hearing.

(2) Address the court.

(3) Request and receive notice of hearings.

(4) Request to examine court documents relating to the proceeding.

(5) Present information to the court that is relevant to the proceeding.

(6) Submit written reports and recommendations to the court.

(7) Perform other duties and responsibilities as requested or approved by the court.

(c) If more than one tribe requests to participate in a proceeding under subdivision (a), the court may limit participation to the tribe with which the child has the most significant contacts, as determined in accordance with paragraph (2) of subdivision (d) of Section 170.

(d) This section is intended to assist the court in making decisions that are in the best interest of the child by permitting a tribe in the circumstances set out in subdivision (a) to inform the court and parties to the proceeding about placement options for the child within the child's extended family or the tribal community, services and programs available to the child and the child's parents as Indians, and other unique interests the child or the child's parents may have as Indians. This section shall not be construed to make the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.), or any state law implementing the Indian Child Welfare Act, applicable to the proceedings, or to limit the court's discretion to permit other interested persons to participate in these or any other proceedings.

(e) This section shall only apply to proceedings involving an Indian child.

SEC. 2. Section 3041 of the Family Code is amended to read:

3041. (a) Before making an order granting custody to a person or persons other than a parent, over the objection of a parent, the court shall make a finding that granting custody to a parent would be detrimental to the child and that granting custody to the nonparent is required to serve the best interest of the child. Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, shall not appear in the pleadings. The court may, in its discretion, exclude the public from the hearing on this issue.

(b) Subject to subdivision (d), a finding that parental custody would be detrimental to the child shall be supported by clear and convincing evidence.

(c) As used in this section, "detriment to the child" includes the harm of removal from a stable placement of a child with a person who has assumed, on a day-to-day basis, the role of his or her parent, fulfilling both the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment does not require any finding of unfitness of the parents.

(d) Notwithstanding subdivision (b), if the court finds by a preponderance of the evidence that the person to whom custody may be given is a person described in subdivision (c), this finding shall constitute a finding that the custody is in the best interest of the child and that parental custody would be detrimental to the child absent a showing by a preponderance of the evidence to the contrary.

(e) Notwithstanding subdivisions (a) to (d), inclusive, if the child is an Indian child, when an allegation is made that parental custody would be detrimental to the child, before making an order granting custody to a person or persons other than a parent, over the objection of a parent, the court shall apply the evidentiary standards described in subdivisions (d), (e), and (f) of Section 1912 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) and Sections 224.6 and 361.7 of the Welfare and Institutions Code and the placement preferences and standards set out in Section 361.31 of the Welfare and Institutions Code and Section 1922 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.).

SEC. 3. Section 7810 of the Family Code is repealed.

SEC. 4. Section 7821 of the Family Code is amended to read:

7821. A finding pursuant to this chapter shall be supported by clear and convincing evidence, except as otherwise provided.

SEC. 5. Section 7822 of the Family Code is amended to read:

7822. (a) A proceeding under this part may be brought where the child has been left without provision for the child's identification by the child's parent or parents or by others or has been left by both parents or the sole parent in the care and custody of another for a period of six months or by one parent in the care and custody of the other parent for a period of one year without any provision for the child's support, or without communication from the parent or parents, with the intent on the part of the parent or parents to abandon the child.

(b) The failure to provide identification, failure to provide support, or failure to communicate is presumptive evidence of the intent to abandon. If the parent or parents have made only token efforts to support or communicate with the child, the court may declare the child abandoned by the parent or parents.

(c) If the child has been left without provision for the child's identification and the whereabouts of the parents are unknown, a petition may be filed after the 120th day following the discovery of the child and citation by publication may be commenced. The petition may not be heard until after the 180th day following the discovery of the child.

(d) If the parent has placed the child for adoption and has not refused to give the required consent to adoption, evidence of the adoptive placement shall not in itself preclude the court from finding an intent on the part of that parent to abandon the child. If the parent has placed the child for adoption and has refused to give the required consent to adoption but has not taken reasonable action to obtain custody of the child, evidence of the adoptive placement shall not in itself preclude the court from finding an intent on the part of that parent to abandon the child.

(e) Notwithstanding subdivisions (a), (b), (c), and (d), if the parent of an Indian child has transferred physical care, custody and control of the child to an Indian custodian, that action shall not be deemed to constitute an abandonment of the child, unless the parent manifests the intent to abandon the child by either of the following:

(1) Failing to resume physical care, custody, and control of the child upon the request of the Indian custodian provided that if the Indian custodian is unable to make a request because the parent has failed to keep the Indian custodian apprised of his or her whereabouts and the Indian custodian has made reasonable efforts to determine the whereabouts of the parent without success, there may be evidence of intent to abandon.

(2) Failing to substantially comply with any obligations assumed by the parent in his or her agreement with the Indian custodian despite the Indian custodian's objection to the noncompliance.

SEC. 6. Section 7892.5 is added to the Family Code, to read:

7892.5. The court shall not declare an Indian child free from the custody or control of a parent, unless both of the following apply:

(a) The court finds, supported by clear and convincing evidence, that active efforts were made in accordance with Section 361.7 of the Welfare and Institutions Code.

(b) The court finds, supported by evidence beyond a reasonable doubt, including testimony of one or more "qualified expert witnesses" as described in Section 224.5 of the Welfare and Institutions Code, that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child.

(c) This section shall only apply to proceedings involving an Indian child.

SEC. 7. Section 7907.3 is added to the Family Code, to read:

7907.3. The Interstate Compact on the Placement of Children shall not apply to any placement, sending, or bringing of an Indian child into another state pursuant to a transfer of jurisdiction to a tribal court under Section 1911 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.).

SEC. 8. Section 8606.5 is added to the Family Code, to read:

8606.5. (a) Notwithstanding any other section in this part, and in accordance with Section 1913 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.), consent to adoption given by an Indian child's parent is not valid unless both of the following occur:

(1) The consent is executed in writing at least 10 days after the child's birth and recorded before a judge.

(2) The judge certifies that the terms and consequences of the consent were fully explained in detail in English and were fully understood by the parent or that they were interpreted into a language that the parent understood.

(b) The parent of an Indian child may withdraw his or her consent to adoption for any reason at any time prior to the entry of a final decree of adoption and the child shall be returned to the parent.

(c) After the entry of a final decree of adoption of an Indian child, the Indian child's parent may withdraw consent to the adoption upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent, provided that no adoption that has been effective for at least 2 years may be invalidated unless otherwise permitted under state law.

SEC. 9. Section 8616.5 of the Family Code is amended to read:

8616.5. (a) The Legislature finds and declares that some adoptive children may benefit from either direct or indirect contact with birth relatives, including the birth parent or parents or an Indian tribe, after being adopted. Postadoption contact agreements are intended to ensure children of an achievable level of continuing contact when contact is beneficial to the children and the agreements are voluntarily entered into by birth relatives, including the birth parent or parents or an Indian tribe, and adoptive parents. Nothing in this section requires all of the listed parties to participate in the development of a postadoption contact agreement in order for the agreement to be entered into.

(b) (1) Nothing in the adoption laws of this state shall be construed to prevent the adopting parent or parents, the birth relatives, including the birth parent or parents or an Indian tribe, and the child from voluntarily entering into a written agreement to permit continuing contact between the birth relatives, including the birth parent or parents or an Indian tribe, and the child if the agreement is found by the court to have been entered into voluntarily and to be in the best interests of the child at the time the adoption petition is granted.

(2) Except as provided in paragraph (3), the terms of any postadoption contact agreement executed under this section shall be limited to, but need not include, all of the following:

(A) Provisions for visitation between the child and a birth parent or parents and other birth relatives, including siblings, and the child's Indian tribe if the case is governed by the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.).

(B) Provisions for future contact between a birth parent or parents or other birth relatives, including siblings, or both, and the child or an adoptive parent, or both, and in cases governed by the Indian Child Welfare Act, the child's Indian tribe.

(C) Provisions for the sharing of information about the child in the future.

(3) The terms of any postadoption contact agreement shall be limited to the sharing of information about the child, unless the child has an existing relationship with the birth relative.

(c) At the time an adoption decree is entered pursuant to a petition filed pursuant to Section 8714, 8714.5, 8802, 8912, or 9000, the court entering the decree may grant postadoption privileges if an agreement for those privileges has been entered into, including agreements entered into pursuant to subdivision (f) of Section 8620. The hearing to grant the adoption petition and issue an order of adoption may be continued as necessary to permit parties who are in the process of negotiating a postadoption agreement to reach a final agreement.

(d) The child who is the subject of the adoption petition shall be considered a party to the postadoption contact agreement. The written consent to the terms and conditions of the postadoption contact agreement and any subsequent modifications of the agreement by a child who is 12 years of age or older is a necessary condition to the granting of privileges regarding visitation, contact, or sharing of information about the child, unless the court finds by a preponderance of the evidence that the agreement, as written, is in the best interests of the child. Any child who has been found to come within Section 300 of the Welfare and Institutions Code or who is the subject of a petition for jurisdiction of the juvenile court under Section 300 of the Welfare and Institutions Code shall be represented by an attorney for purposes of consent to the postadoption contact agreement.

(e) A postadoption contact agreement shall contain the following warnings in bold type:

(1) After the adoption petition has been granted by the court, the adoption cannot be set aside due to the failure of an adopting parent, a birth parent, a birth relative, an Indian tribe, or the child to follow the terms of this agreement or a later change to this agreement.

(2) A disagreement between the parties or litigation brought to enforce or modify the agreement shall not affect the validity of the adoption and shall not serve as a basis for orders affecting the custody of the child.

(3) A court will not act on a petition to change or enforce this agreement unless the petitioner has participated, or attempted to participate, in good faith in mediation or other appropriate dispute resolution proceedings to resolve the dispute.

(f) Upon the granting of the adoption petition and the issuing of the order of adoption of a child who is a dependent of the juvenile court, juvenile court dependency jurisdiction shall be terminated. Enforcement of the postadoption contact agreement shall be under the continuing jurisdiction of the court granting the petition of adoption. The court may not order compliance with the agreement absent a finding that the party seeking the enforcement participated, or attempted to participate, in good faith in mediation or other appropriate dispute resolution proceedings

regarding the conflict, prior to the filing of the enforcement action, and that the enforcement is in the best interests of the child. Documentary evidence or offers of proof may serve as the basis for the court's decision regarding enforcement. No testimony or evidentiary hearing shall be required. The court shall not order further investigation or evaluation by any public or private agency or individual absent a finding by clear and convincing evidence that the best interests of the child may be protected or advanced only by that inquiry and that the inquiry will not disturb the stability of the child's home to the detriment of the child.

(g) The court may not award monetary damages as a result of the filing of the civil action pursuant to subdivision (e) of this section.

(h) A postadoption contact agreement may be modified or terminated only if either of the following occurs:

(1) All parties, including the child if the child is 12 years of age or older at the time of the requested termination or modification, have signed a modified postadoption contact agreement and the agreement is filed with the court that granted the petition of adoption.

(2) The court finds all of the following:

(A) The termination or modification is necessary to serve the best interests of the child.

(B) There has been a substantial change of circumstances since the original agreement was executed and approved by the court.

(C) The party seeking the termination or modification has participated, or attempted to participate, in good faith in mediation or other appropriate dispute resolution proceedings prior to seeking court approval of the proposed termination or modification.

Documentary evidence or offers of proof may serve as the basis for the court's decision. No testimony or evidentiary hearing shall be required. The court shall not order further investigation or evaluation by any public or private agency or individual absent a finding by clear and convincing evidence that the best interests of the child may be protected or advanced only by that inquiry and that the inquiry will not disturb the stability of the child's home to the detriment of the child.

(i) All costs and fees of mediation or other appropriate dispute resolution proceedings shall be borne by each party, excluding the child. All costs and fees of litigation shall be borne by the party filing the action to modify or enforce the agreement when no party has been found by the court as failing to comply with an existing postadoption contact agreement. Otherwise, a party, other than the child, found by the court as failing to comply without good cause with an existing agreement shall bear all the costs and fees of litigation.

(j) The Judicial Council shall adopt rules of court and forms for motions to enforce, terminate, or modify postadoption contact agreements.

(k) The court may not set aside a decree of adoption, rescind a relinquishment, or modify an order to terminate parental rights or any other prior court order because of the failure of a birth parent, adoptive parent, birth relative, an Indian tribe, or the child to comply with any or all

of the original terms of, or subsequent modifications to, the postadoption contact agreement, except as follows:

(1) Prior to issuing the order of adoption, in an adoption involving an Indian child, the court may, upon a petition of the birth parent, birth relative, or an Indian tribe, order the parties to engage in family mediation services for the purpose of reaching a postadoption contact agreement if the prospective adoptive parent fails to negotiate in good faith to enter into a postadoption contact agreement, after having agreed to enter into negotiations, provided that the failure of the parties to reach an agreement is not in and of itself proof of bad faith.

(2) Prior to issuing the order of adoption, if the parties fail to negotiate in good faith to enter into a postadoption contact agreement during the negotiations entered into pursuant to and in accordance with paragraph (1), the court may modify prior orders or issue new orders as necessary to ensure the best interest of the Indian child is met, including, but not limited to, requiring parties to engage in further family mediation services for the purpose of reaching a postadoption contact agreement, initiating guardianship proceeding in lieu of adoption, or authorizing a change of adoptive placement for the child.

SEC. 10. Section 8619.5 is added to the Family Code, to read:

8619.5. Whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parent voluntary consents to termination of his or her parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant that petition unless there is a showing, in a proceeding subject to the provisions of Section 1912 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.), that the return of custody is not in the best interest of the child.

SEC. 11. Section 8620 of the Family Code is amended to read:

8620. (a) (1) If a parent is seeking to relinquish a child pursuant to Section 8700 or execute an adoption placement agreement pursuant to Section 8801.3, the department, licensed adoption agency, or adoption service provider, as applicable, shall ask the child and the child's parent or custodian whether the child is, or may be, a member of, or eligible for membership in an Indian tribe or whether the child has been identified as a member of an Indian organization. The department, licensed adoption agency, or adoption service provider, as applicable, shall complete the forms provided for this purpose by the department and shall make this completed form a part of the file.

(2) If there is any oral or written information that indicates that the child is, or may be, an Indian child, the department, licensed adoption agency, or adoption service provider, as applicable, shall obtain the following information:

(A) The name of the child involved, and the actual date and place of birth of the child.

(B) The name, address, date of birth, and tribal affiliation of the birth parents, maternal and paternal grandparents, and maternal and paternal great-grandparents of the child.

(C) The name and address of extended family members of the child who have a tribal affiliation.

(D) The name and address of the Indian tribes or Indian organizations of which the child is, or may be, a member.

(E) A statement of the reasons why the child is, or may be, an Indian.

(3) (A) The department, licensed adoption agency, or adoption service provider, as applicable, shall send a notice, which shall include information obtained pursuant to paragraph (2) and a request for confirmation of the child's Indian status, to any parent and any custodian of the child, and to any Indian tribe of which the child is, or may be, a member or eligible for membership. If any of the information required under paragraph (2) cannot be obtained, the notice shall indicate that fact.

(B) The notice sent pursuant to subparagraph (A) shall describe the nature of the proceeding and advise the recipient of the Indian tribe's right to intervene in the proceeding on its own behalf or on behalf of a tribal member relative of the child.

(b) The department shall adopt regulations to ensure that if a child who is being voluntarily relinquished for adoption, pursuant to Section 8700, is an Indian child, the parent of the child shall be advised of his or her right to withdraw his or her consent and thereby rescind the relinquishment of an Indian child for any reason at any time prior to entry of a final decree of termination of parental rights or adoption, pursuant to Section 1913 of Title 25 of the United States Code.

(c) If a child who is the subject of an adoption proceeding after being relinquished for adoption pursuant to Section 8700, is an Indian child, the child's Indian tribe may intervene in that proceeding on behalf of a tribal member relative of the child.

(d) Any notice sent under this section shall comply with Section 180.

(e) If all prior notices required by this section have been provided to an Indian tribe, the Indian tribe receiving those prior notices is encouraged to provide notice to the department and to the licensed adoption agency or adoption service provider, not later than five calendar days prior to the date of the hearing to determine whether or not the final adoption order is to be granted, indicating whether or not it intends to intervene in the proceeding required by this section, either on its own behalf or on behalf of a tribal member who is a relative of the child.

(f) The Legislature finds and declares that some adoptive children may benefit from either direct or indirect contact with an Indian tribe. Nothing in the adoption laws of this state shall be construed to prevent the adopting parent or parents, the birth relatives, including the birth parent or parents, an Indian tribe, and the child, from voluntarily entering into a written agreement to permit continuing contact between the Indian tribe and the child, if the agreement is found by the court to have been entered into

voluntarily and to be in the best interest of the child at the time the adoption petition is granted.

(g) With respect to giving notice to Indian tribes in the case of voluntary placements of Indian children pursuant to this section, a person, other than a birth parent of the child, shall be subject to a civil penalty if that person knowingly and willfully:

(1) Falsifies, conceals, or covers up by any trick, scheme, or device, a material fact concerning whether the child is an Indian child or the parent is an Indian.

(2) Makes any false, fictitious, or fraudulent statement, omission, or representation.

(3) Falsifies a written document knowing that the document contains a false, fictitious, or fraudulent statement or entry relating to a material fact.

(4) Assists any person in physically removing a child from the State of California in order to obstruct the application of notification.

(h) Civil penalties for a violation of subdivision (g) by a person other than a birth parent of the child are as follows:

(1) For the initial violation, a person shall be fined not more than ten thousand dollars ($10,000).

(2) For any subsequent violation, a person shall be fined not more than twenty thousand dollars ($20,000).

SEC. 12. Section 8710 of the Family Code is amended to read:

8710. (a) If a child is being considered for adoption, the department or licensed adoption agency shall first consider adoptive placement in the home of a relative or, in the case of an Indian child, according to the placement preferences and standards set out in subdivisions (c), (d), (e), (f), (g), (h), and (i) of Section 361.31 of the Welfare and Institutions Code. However, if a relative is not available, if placement with an available relative is not in the child's best interest, or if placement would permanently separate the child from other siblings who are being considered for adoption or who are in foster care and an alternative placement would not require the permanent separation, the foster parent or parents of the child shall be considered with respect to the child along with all other prospective adoptive parents where all of the following conditions are present:

(1) The child has been in foster care with the foster parent or parents for a period of more than four months.

(2) The child has substantial emotional ties to the foster parent or parents.

(3) The child's removal from the foster home would be seriously detrimental to the child's well-being.

(4) The foster parent or parents have made a written request to be considered to adopt the child.

(b) In the case of an Indian child whose foster parent or parents or other prospective adoptive parents do not fall within the placement preferences established in subdivision (c) or (d) of Section 361.31 of the Welfare and Institutions Code, the foster parent or parents or other prospective adoptive

parents shall only be considered if the court finds, supported by clear and convincing evidence, that good cause exists to deviate from these placement preferences.

(c) This section does not apply to a child who has been adjudged a dependent of the juvenile court pursuant to Section 300 of the Welfare and Institutions Code.

SEC. 13. Section 9208 is added to the Family Code, to read:

9208. (a) The clerk of the superior court entering a final order of adoption concerning an Indian child shall provide the Secretary of the Interior or his or her designee with a copy of the order within 30 days of the date of the order, together with any information necessary to show 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.

(4) The identity of any agency having files or information relating to that adoptive placement.

(b) If the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include that affidavit with the other information.

SEC. 14. Section 9209 is added to the Family Code, to read:

9209. (a) Upon application by an Indian individual who has reached the age of 18 years and who was the subject of an adoptive placement, the court which entered the final decree of adoption shall inform that individual of the tribal affiliation, if any, of the individual's biological parents and provide any other information as may be necessary to protect any rights flowing from the individual's tribal relationship, including, but not limited to, tribal membership rights or eligibility for federal or tribal programs or services available to Indians.

(b) If the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall inform the individual that the Secretary of the Interior may, upon request, certify to the individual's tribe that the individual's parentage and other circumstances of birth entitle the individual to membership under the criteria established by the tribe.

SEC. 15. Section 9210 of the Family Code is amended to read:

9210. (a) Except as otherwise provided in subdivisions (b) and (c), a court of this state has jurisdiction over a proceeding for the adoption of a minor commenced under this part if any of the following applies:

(1) Immediately before commencement of the proceeding, the minor lived in this state with a parent, a guardian, a prospective adoptive parent, or another person acting as parent, for at least six consecutive months, excluding periods of temporary absence, or, in the case of a minor under six months of age, lived in this state with any of those individuals from soon after birth and there is available in this state substantial evidence concerning the minor's present or future care.

(2) Immediately before commencement of the proceeding, the prospective adoptive parent lived in this state for at least six consecutive months, excluding periods of temporary absence, and there is available in this state substantial evidence concerning the minor's present or future care.

(3) The agency that placed the minor for adoption is located in this state and both of the following apply:

(A) The minor and the minor's parents, or the minor and the prospective adoptive parent, have a significant connection with this state.

(B) There is available in this state substantial evidence concerning the minor's present or future care.

(4) The minor and the prospective adoptive parent are physically present in this state and the minor has been abandoned or it is necessary in an emergency to protect the minor because the minor has been subjected to or threatened with mistreatment or abuse or is otherwise neglected.

(5) It appears that no other state would have jurisdiction under requirements substantially in accordance with paragraphs (1) to (4), inclusive, or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to hear a petition for adoption of the minor, and there is available in this state substantial evidence concerning the minor's present or future care.

(b) A court of this state may not exercise jurisdiction over a proceeding for adoption of a minor if at the time the petition for adoption is filed a proceeding concerning the custody or adoption of the minor is pending in a court of another state exercising jurisdiction substantially in conformity with this part, unless the proceeding is stayed by the court of the other state because this state is a more appropriate forum or for another reason.

(c) If a court of another state has issued a decree or order concerning the custody of a minor who may be the subject of a proceeding for adoption in this state, a court of this state may not exercise jurisdiction over a proceeding for adoption of the minor, unless both of the following apply:

(1) The requirements for modifying an order of a court of another state under this part are met, the court of another state does not have jurisdiction over a proceeding for adoption substantially in conformity with paragraphs (1) to (4), inclusive, of subdivision (a), or the court of another state has declined to assume jurisdiction over a proceeding for adoption.

(2) The court of this state has jurisdiction under this section over the proceeding for adoption.

(d) For purposes of subdivisions (b) and (c), "a court of another state" includes, in the case of an Indian child, a tribal court having and exercising jurisdiction over a custody proceeding involving the Indian child.

SEC. 16. Section 1449 is added to the Probate Code, to read:

1449. (a) As used in this division, unless the context otherwise requires, the terms "Indian," "Indian child," "Indian child's tribe," "Indian custodian," "Indian tribe," "reservation," and "tribal court" shall be

defined as provided in Section 1903 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.).

(b) When used in connection with an Indian child custody proceeding, the terms "extended family member" and "parent" shall be defined as provided in Section 1903 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.).

(c) "Indian child custody proceeding" means a "child custody proceeding" within the meaning of Section 1903 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.), including a voluntary or involuntary proceeding that may result in an Indian child's temporary or long-term foster care or guardianship placement if the parent or Indian custodian cannot have the child returned upon demand, termination of parental rights or adoptive placement.

(d) When an Indian child is a member of more than one tribe or is eligible for membership in more than one tribe, the court shall make a determination, in writing together with the reasons for it, as to which tribe is the Indian child's tribe for purposes of the Indian child custody proceeding. The court shall make that determination as follows:

(1) If the Indian child is or becomes a member of only one tribe, that tribe shall be designated as the Indian child's tribe, even though the child is eligible for membership in another tribe.

(2) If an Indian child is or becomes a member of more than one tribe, or is not a member of any tribe but is eligible for membership in more than one tribe, the tribe with which the child has the more significant contacts shall be designated as the Indian child's tribe. In determining which tribe the child has the more significant contacts with, the court shall consider, among other things, the following factors:

(A) The length of residence on or near the reservation of each tribe and frequency of contact with each tribe.

(B) The child's participation in activities of each tribe.

(C) The child's fluency in the language of each tribe.

(D) Whether there has been a previous adjudication with respect to the child by a court of one of the tribes.

(E) The residence on or near one of the tribes' reservations by the child parents, Indian custodian, or extended family members.

(F) Tribal membership of custodial parent or Indian custodian.

(G) Interest asserted by each tribe in response to the notice specified in Section 1460.2.

(H) The child's self-identification.

(3) If an Indian child becomes a member of a tribe other than the one designated by the court as the Indian child's tribe under paragraph (2), actions taken based on the court's determination prior to the child's becoming a tribal member shall continue to be valid.

SEC. 17. Section 1459 is added to the Probate Code, to read:

1459. (a) The Legislature finds and declares the following:

(1) There is no resource that is more vital to the continued existence and integrity of recognized Indian tribes than their children, and the State

of California has an interest in protecting Indian children who are members of, or are eligible for membership in, an Indian tribe. The state is committed to protecting the essential tribal relations and best interest of an Indian child by promoting practices, in accordance with the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) and other applicable law, designed to prevent the child's involuntary out-of-home placement and, whenever such placement is necessary or ordered, by placing the child, whenever possible, in a placement that reflects the unique values of the child's tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the child's tribe and tribal community.

(2) It is in the interest of an Indian child that the child's membership in the child's Indian tribe and connection to the tribal community be encouraged and protected, regardless of whether or not the child is in the physical custody of an Indian parent or Indian custodian at the commencement of a child custody proceeding, the parental rights of the child's parents have been terminated, or where the child has resided or been domiciled.

(b) In all Indian child custody proceedings, as defined in the federal Indian Child Welfare Act, the court shall consider all of the findings contained in subdivision (a), strive to promote the stability and security of Indian tribes and families, comply with the federal Indian Child Welfare Act, and seek to protect the best interest of the child. Whenever an Indian child is removed from a foster care home or institution, guardianship, or adoptive placement for the purpose of further foster care, guardianship, or adoptive placement, placement of the child shall be in accordance with the Indian Child Welfare Act.

(c) A determination by an Indian tribe that an unmarried person, who is under the age of 18 years, is either (1) a member of an Indian tribe or (2) eligible for membership in an Indian tribe and a biological child of a member of an Indian tribe shall constitute a significant political affiliation with the tribe and shall require the application of the federal Indian Child Welfare Act to the proceedings.

(d) In any case in which this code or other applicable state or federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child, or the Indian child's tribe, than the rights provided under the Indian Child Welfare Act, the court shall apply the higher state or federal standard.

(e) Any Indian child, the Indian child's tribe, or the parent or Indian custodian from whose custody the child has been removed, may petition the court to invalidate an action in an Indian child custody proceeding for foster care or guardianship placement or termination of parental rights if the action violated Sections 1911, 1912, and 1913 of the Indian Child Welfare Act.

SEC. 18. Section 1459.5 is added to the Probate Code, to read:

1459.5. (a) The Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) shall apply to the following guardianship or conservatorship

proceedings under this division when the proposed ward or conservatee is an Indian child:

(1) In any case in which the petition is a petition for guardianship of the person and the proposed guardian is not the natural parent or Indian custodian of the proposed ward, unless the proposed guardian has been nominated by the natural parents pursuant to Section 1500 and the parents retain the right to have custody of the child returned to them upon demand.

(2) To a proceeding to have an Indian child declared free from the custody and control of one or both parents brought in a guardianship proceeding.

(3) In any case in which the petition is a petition for conservatorship of the person of a minor whose marriage has been dissolved, the proposed conservator is seeking physical custody of the minor, the proposed conservator is not the natural parent or Indian custodian of the proposed conservatee and the natural parent or Indian custodian does not retain the right to have custody of the child returned to them upon demand.

(b) When the Indian Child Welfare Act applies to a proceeding under this division, the court shall apply Sections 224.3 to 224.6, inclusive, and Sections 305.5, 361.31, and 361.7 of the Welfare and Institutions Code, and the following rules from the California Rules of Court, as they read on January 1, 2005:

(1) Paragraph (7) of subdivision (b) of Rule 1410.

(2) Subdivision (i) of Rule 1412.

(c) In the provisions cited in subdivision (b), references to social workers, probation officers, county welfare department, or probation department shall be construed as meaning the party seeking a foster care placement, guardianship, or adoption.

SEC. 19. Section 1460.2 is added to the Probate Code, to read:

1460.2. (a) If the court or petitioner knows or has reason to know that the proposed ward or conservatee may be an Indian child, notice shall comply with subdivision (b) in any case in which the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) applies, as specified in Section 1459.5.

(b) Any notice sent under this section shall be sent to the minor's parent or legal guardian, Indian custodian, if any, and the Indian child's tribe, and shall comply with all of the following requirements:

(1) Notice shall be sent by registered or certified mail with return receipt requested. Additional notice by first-class mail is recommended, but not required.

(2) Notice to the tribe shall be to the tribal chairperson, unless the tribe has designated another agent for service.

(3) Notice shall be sent to all tribes of which the child may be a member or eligible for membership until the court makes a determination as to which tribe is the Indian child's tribe in accordance with subdivision (d) of Section 1449, after which notice need only be sent to the tribe determined to be the Indian child's tribe.

(4) Notice, to the extent required by federal law, shall be sent to the Secretary of the Interior's designated agent, the Sacramento Area Director,

Bureau of Indian Affairs. If the identity or location of the Indian child's tribe is known, a copy of the notice shall also be sent directly to the Secretary of the Interior, unless the Secretary of the Interior has waived the notice in writing and the person responsible for giving notice under this section has filed proof of the waiver with the court.

(5) The notice shall include all of the following information:

(A) The name, birthdate, and birthplace of the Indian child, if known.

(B) The name of any Indian tribe in which the child is a member or may be eligible for membership, if known.

(C) All names known of the Indian child's biological parents, grandparents and great-grandparents or Indian custodians, including maiden, married, and former names or aliases, as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, and any other identifying information, if known.

(D) A copy of the petition.

(E) A copy of the child's birth certificate, if available.

(F) The location, mailing address, and telephone number of the court and all parties notified pursuant to this section.

(G) A statement of the following:

(i) The absolute right of the child's parents, Indian custodians, and tribe to intervene in the proceeding.

(ii) The right of the child's parents, Indian custodians, and tribe to petition the court to transfer the proceeding to the tribal court of the Indian child's tribe, absent objection by either parent and subject to declination by the tribal court.

(iii) The right of the child's parents, Indian custodians, and tribe to, upon request, be granted up to an additional 20 days from the receipt of the notice to prepare for the proceeding.

(iv) The potential legal consequences of the proceedings on the future custodial rights of the child's parents or Indian custodians.

(v) That if the parents or Indian custodians are unable to afford counsel, counsel shall be appointed to represent the parents or Indian custodians pursuant to Section 1912 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.).

(vi) That the information contained in the notice, petition, pleading, and other court documents is confidential, so any person or entity notified shall maintain the confidentiality of the information contained in the notice concerning the particular proceeding and not reveal it to anyone who does not need the information in order to exercise the tribe's rights under the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.).

(c) Notice shall be sent whenever it is known or there is reason to know that an Indian child is involved, and for every hearing thereafter, including, but not limited to, the hearing at which a final adoption order is to be granted. After a tribe acknowledges that the child is a member or eligible for membership in the tribe, or after the Indian child's tribe intervenes in a proceeding, the information set out in subparagraphs (C),

(D), (E), and (G) of paragraph (5) of subdivision (b) need not be included with the notice.

(d) Proof of the notice, including copies of notices sent and all return receipts and responses received, shall be filed with the court in advance of the hearing except as permitted under subdivision (e).

(e) No proceeding shall be held until at least 10 days after receipt of notice by the parent, Indian custodian, the tribe or the Bureau of Indian Affairs. The parent, Indian custodian, or the tribe shall, upon request, be granted up to 20 additional days to prepare for the proceeding. Nothing herein shall be construed as limiting the rights of the parent, Indian custodian, or tribe to 10 days' notice when a lengthier notice period is required by statute.

(f) With respect to giving notice to Indian tribes, a party shall be subject to court sanctions if that person knowingly and willfully falsifies or conceals a material fact concerning whether the child is an Indian child, or counsels a party to do so.

(g) The inclusion of contact information of any adult or child that would otherwise be required to be included in the notification pursuant to this section, shall not be required if that person is at risk of harm as a result of domestic violence, child abuse, sexual abuse, or stalking.

SEC. 20. Section 1474 is added to the Probate Code, to read:

1474. If an Indian custodian or biological parent of an Indian child lacks the financial ability to retain counsel and requests the appointment of counsel in proceedings described in Section 1459.5, the provisions of subsection (b) of Section 1912 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) and Section 23.13 of Title 25 of the Code of Federal Regulations are applicable.

SEC. 21. Section 1500.1 is added to the Probate Code, to read:

1500.1. (a) Notwithstanding any other section in this part, and in accordance with Section 1913 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.), consent to nomination of a guardian of the person or of a guardian of the person and the estate given by an Indian child's parent is not valid unless both of the following occur:

(1) The consent is executed in writing at least 10 days after the child's birth and recorded before a judge.

(2) The judge certifies that the terms and consequences of the consent were fully explained in detail in English and were fully understood by the parent or that they were interpreted into a language that the parent understood.

(b) The parent of an Indian child may withdraw his or her consent to guardianship for any reason at any time prior to the issuance of letters of guardianship and the child shall be returned to the parent.

SEC. 22. Section 1510 of the Probate Code is amended to read:

1510. (a) A relative or other person on behalf of the minor, or the minor if 12 years of age or older, may file a petition for the appointment of a guardian of the minor.

(b) The petition shall request that a guardian of the person or estate of the minor, or both, be appointed, shall specify the name and address of the proposed guardian and the name and date of birth of the proposed ward, and shall state that the appointment is necessary or convenient.

(c) The petition shall set forth, so far as is known to the petitioner, the names and addresses of all of the following:

(1) The parents of the proposed ward.

(2) The person having legal custody of the proposed ward and, if that person does not have the care of the proposed ward, the person having the care of the proposed ward.

(3) The relatives of the proposed ward within the second degree.

(4) In the case of a guardianship of the estate, the spouse of the proposed ward.

(5) Any person nominated as guardian for the proposed ward under Section 1500 or 1501.

(6) In the case of a guardianship of the person involving an Indian child, any Indian custodian and the Indian child's tribe.

(d) If the proposed ward is a patient in or on leave of absence from a state institution under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services and that fact is known to the petitioner, the petition shall state that fact and name the institution.

(e) The petition shall state, so far as is known to the petitioner, whether or not the proposed ward is receiving or is entitled to receive benefits from the Veterans Administration and the estimated amount of the monthly benefit payable by the Veterans Administration for the proposed ward.

(f) If the petitioner has knowledge of any pending adoption, juvenile court, marriage dissolution, domestic relations, custody, or other similar proceeding affecting the proposed ward, the petition shall disclose the pending proceeding.

(g) If the petitioners have accepted or intend to accept physical care or custody of the child with intent to adopt, whether formed at the time of placement or formed subsequent to placement, the petitioners shall so state in the guardianship petition, whether or not an adoption petition has been filed.

(h) If the proposed ward is or becomes the subject of an adoption petition, the court shall order the guardianship petition consolidated with the adoption petition.

(i) If the proposed ward is or may be an Indian child, the petition shall state that fact.

SEC. 23. Section 1511 of the Probate Code is amended to read:

1511. (a) Except as provided in subdivisions (f) and (g), at least 15 days before the hearing on the petition for the appointment of a guardian, notice of the time and place of the hearing shall be given as provided in subdivisions (b), (c), (d), and (e) of this section. The notice shall be accompanied by a copy of the petition. The court may not shorten the time for giving the notice of hearing under this section.

(b) Notice shall be served in the manner provided in Section 415.10 or 415.30 of the Code of Civil Procedure, or in any manner authorized by the court, on all of the following persons:

(1) The proposed ward if 12 years of age or older.

(2) Any person having legal custody of the proposed ward, or serving as guardian of the estate of the proposed ward.

(3) The parents of the proposed ward.

(4) Any person nominated as a guardian for the proposed ward under Section 1500 or 1501.

(c) Notice shall be given by mail sent to their addresses stated in the petition, or in any manner authorized by the court, to all of the following:

(1) The spouse named in the petition.

(2) The relatives named in the petition, except that if the petition is for the appointment of a guardian of the estate only the court may dispense with the giving of notice to any one or more or all of the relatives.

(3) The person having the care of the proposed ward if other than the person having legal custody of the proposed ward.

(d) If notice is required by Section 1461 or Section 1542 to be given to the Director of Mental Health or the Director of Developmental Services or the Director of Social Services, notice shall be mailed as so required.

(e) If the petition states that the proposed ward is receiving or is entitled to receive benefits from the Veterans Administration, notice shall be mailed to the office of the Veterans Administration referred to in Section 1461.5.

(f) Unless the court orders otherwise, notice shall not be given to any of the following:

(1) The parents or other relatives of a proposed ward who has been relinquished to a licensed adoption agency.

(2) The parents of a proposed ward who has been judicially declared free from their custody and control.

(g) Notice need not be given to any person if the court so orders upon a determination of either of the following:

(1) The person cannot with reasonable diligence be given the notice.

(2) The giving of the notice would be contrary to the interest of justice.

(h) Before the appointment of a guardian is made, proof shall be made to the court that each person entitled to notice under this section either:

(1) Has been given notice as required by this section.

(2) Has not been given notice as required by this section because the person cannot with reasonable diligence be given the notice or because the giving of notice to that person would be contrary to the interest of justice.

(i) If notice is required by Section 1460.2 to be given to an Indian custodian or tribe, notice shall be mailed as so required.

SEC. 24. Section 1513 of the Probate Code is amended to read:

1513. (a) Unless waived by the court, a court investigator, probation officer, or domestic relations investigator may make an investigation and file with the court a report and recommendation concerning each proposed guardianship of the person or guardianship of the estate. Investigations

where the proposed guardian is a relative shall be made by a court investigator. Investigations where the proposed guardian is a nonrelative shall be made by the county agency designated to investigate potential dependency. The report for the guardianship of the person shall include, but need not be limited to, an investigation and discussion of all of the following:

(1) A social history of the guardian.

(2) A social history of the proposed ward, including, to the extent feasible, an assessment of any identified developmental, emotional, psychological, or educational needs of the proposed ward and the capability of the petitioner to meet those needs.

(3) The relationship of the proposed ward to the guardian, including the duration and character of the relationship, where applicable, the circumstances whereby physical custody of the proposed ward was acquired by the guardian, and a statement of the proposed ward's attitude concerning the proposed guardianship, unless the statement of the attitude is affected by the proposed ward's developmental, physical, or emotional condition.

(4) The anticipated duration of the guardianship and the plans of both natural parents and the proposed guardian for the stable and permanent home for the child. The court may waive this requirement for cases involving relative guardians.

(b) The report shall be read and considered by the court prior to ruling on the petition for guardianship, and shall be reflected in the minutes of the court. The person preparing the report may be called and examined by any party to the proceeding.

(c) If the investigation finds that any party to the proposed guardianship alleges the minor's parent is unfit, as defined by Section 300 of the Welfare and Institutions Code, the case shall be referred to the county agency designated to investigate potential dependencies. Guardianship proceedings shall not be completed until the investigation required by Sections 328 and 329 of the Welfare and Institutions Code is completed and a report is provided to the court in which the guardianship proceeding is pending.

(d) The report authorized by this section is confidential and shall only be made available to persons who have been served in the proceedings or their attorneys. The clerk of the court shall make provisions for the limitation of the report exclusively to persons entitled to its receipt.

(e) For the purpose of writing the report authorized by this section, the person making the investigation and report shall have access to the proposed ward's school records, probation records, and public and private social services records, and to an oral or written summary of the proposed ward's medical records and psychological records prepared by any physician, psychologist, or psychiatrist who made or who is maintaining those records. The physician, psychologist, or psychiatrist shall be available to clarify information regarding these records pursuant to the

investigator's responsibility to gather and provide information for the court.

(f) This section does not apply to guardianships resulting from a permanency plan for a dependent child pursuant to Section 366.26 of the Welfare and Institutions Code.

(g) For purposes of this section, a "relative" means a person who is a spouse, parent, stepparent, brother, sister, stepbrother, stepsister, half-brother, half-sister, uncle, aunt, niece, nephew, first cousin, or any person denoted by the prefix "grand" or "great," or the spouse of any of these persons, even after the marriage has been terminated by death or dissolution.

(h) In an Indian child custody proceeding, the person making the investigation and report shall consult with the Indian child's tribe and include in the report information provided by the tribe.

SEC. 25. Section 1516.5 of the Probate Code is amended to read:

1516.5. (a) A proceeding to have a child declared free from the custody and control of one or both parents may be brought in the guardianship proceeding pursuant to Part 4 (commencing with Section 7800) of Division 12 of the Family Code, if all of the following requirements are satisfied:

(1) One or both parents do not have the legal custody of the child.

(2) The child has been in the physical custody of the guardian for a period of not less than two years.

(3) The court finds that the child would benefit from being adopted by his or her guardian. In making this determination, the court shall consider all factors relating to the best interest of the child, including, but not limited to, the nature and extent of the relationship between all of the following:

(A) The child and the birth parent.

(B) The child and the guardian, including family members of the guardian.

(C) The child and any siblings or half-siblings.

(b) The court shall appoint a court investigator or other qualified professional to investigate all factors enumerated in subdivision (a). The findings of the investigator or professional regarding those issues shall be included in the written report required pursuant to Section 7851 of the Family Code.

(c) The rights of the parent, including the rights to notice and counsel provided in Part 4 (commencing with Section 7800) of Division 12 of the Family Code, shall apply to actions brought pursuant to this section.

(d) This section does not apply to any child who is a dependent of the juvenile court or to any Indian child.

SEC. 26. Section 1601 of the Probate Code is amended to read:

1601. Upon petition of the guardian, a parent, the ward, or, in the case of an Indian child custody proceeding, an Indian custodian or the ward's tribe, the court may make an order terminating the guardianship if the court determines that it is in the ward's best interest to terminate the

guardianship. Notice of the hearing on the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

SEC. 27. Section 2112 of the Probate Code is repealed.

SEC. 28. Section 110 is added to the Welfare and Institutions Code, to read:

110. Nothing in this chapter shall be construed as limiting the right of an Indian tribe or Indian organization to establish or operate CASA programs independent of state funding or the discretion of the court to appoint CASAs from those programs in Indian child custody proceedings.

SEC. 29. Section 224 is added to the Welfare and Institutions Code, to read:

224. (a) The Legislature finds and declares the following:

(1) There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children, and the State of California has an interest in protecting Indian children who are members of, or are eligible for membership in, an Indian tribe. The state is committed to protecting the essential tribal relations and best interest of an Indian child by promoting practices, in accordance with the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) and other applicable law, designed to prevent the child's involuntary out-of-home placement and, whenever that placement is necessary or ordered, by placing the child, whenever possible, in a placement that reflects the unique values of the child's tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the child's tribe and tribal community.

(2) It is in the interest of an Indian child that the child's membership in the child's Indian tribe and connection to the tribal community be encouraged and protected, regardless of whether the child is in the physical custody of an Indian parent or Indian custodian at the commencement of a child custody proceeding, the parental rights of the child's parents have been terminated, or where the child has resided or been domiciled.

(b) In all Indian child custody proceedings, as defined in the federal Indian Child Welfare Act the court shall consider all of the findings contained in subdivision (a), strive to promote the stability and security of Indian tribes and families, comply with the federal Indian Child Welfare Act, and seek to protect the best interest of the child. Whenever an Indian child is removed from a foster care home or institution, guardianship, or adoptive placement for the purpose of further foster care, guardianship, or adoptive placement, placement of the child shall be in accordance with the Indian Child Welfare Act.

(c) A determination by an Indian tribe that an unmarried person, who is under the age of 18 years, is either (1) a member of an Indian tribe or (2) eligible for membership in an Indian tribe and a biological child of a member of an Indian tribe shall constitute a significant political affiliation

with the tribe and shall require the application of the federal Indian Child Welfare Act to the proceedings.

(d) In any case in which this code or other applicable state or federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child, or the Indian child's tribe, than the rights provided under the Indian Child Welfare Act, the court shall apply the higher standard.

(e) Any Indian child, the Indian child's tribe, or the parent or Indian custodian from whose custody the child has been removed, may petition the court to invalidate an action in an Indian child custody proceeding for foster care or guardianship placement or termination of parental rights if the action violated Sections 1911, 1912, and 1913 of the Indian Child Welfare Act.

SEC. 30. Section 224.1 is added to the Welfare and Institutions Code, to read:

224.1. (a) As used in this division, unless the context otherwise requires, the terms "Indian," "Indian child," "Indian child's tribe," "Indian custodian," "Indian tribe," "reservation," and "tribal court" shall be defined as provided in Section 1903 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.).

(b) As used in connection with an Indian child custody proceeding, the terms "extended family member" and "parent" shall be defined as provided in Section 1903 of the Indian Child Welfare Act.

(c) "Indian child custody proceeding" means a "child custody proceeding" within the meaning of Section 1903 of the Indian Child Welfare Act, including a proceeding for temporary or long-term foster care or guardianship placement, termination of parental rights, preadoptive placement after termination of parental rights, or adoptive placement. "Indian child custody proceeding" does not include a voluntary foster care or guardianship placement if the parent or Indian custodian retains the right to have the child returned upon demand.

(d) If an Indian child is a member of more than one tribe or is eligible for membership in more than one tribe, the court shall make a determination, in writing together with the reasons for it, as to which tribe is the Indian child's tribe for purposes of the Indian child custody proceeding. The court shall make that determination as follows:

(1) If the Indian child is or becomes a member of only one tribe, that tribe shall be designated as the Indian child's tribe, even though the child is eligible for membership in another tribe.

(2) If an Indian child is or becomes a member of more than one tribe, or is not a member of any tribe but is eligible for membership in more than one tribe, the tribe with which the child has the more significant contacts shall be designated as the Indian child's tribe. In determining which tribe the child has the more significant contacts with, the court shall consider, among other things, the following factors:

(A) The length of residence on or near the reservation of each tribe and frequency of contact with each tribe.

(B) The child's participation in activities of each tribe.

(C) The child's fluency in the language of each tribe.

(D) Whether there has been a previous adjudication with respect to the child by a court of one of the tribes.

(E) Residence on or near one of the tribes' reservations by the child parents, Indian custodian or extended family members.

(F) Tribal membership of custodial parent or Indian custodian.

(G) Interest asserted by each tribe in response to the notice specified in Section 224.2.

(H) The child's self-identification.

(3) If an Indian child becomes a member of a tribe other than the one designated by the court as the Indian child's tribe under paragraph (2), actions taken based on the court's determination prior to the child's becoming a tribal member continue to be valid.

SEC. 31. Section 224.2 is added to the Welfare and Institutions Code, to read:

224.2. (a) If the court, a social worker, or probation officer knows or has reason to know that an Indian child is involved, any notice sent in an Indian child custody proceeding under this code shall be sent to the minor's parents or legal guardian, Indian custodian, if any, and the minor's tribe and comply with all of the following requirements:

(1) Notice shall be sent by registered or certified mail with return receipt requested. Additional notice by first-class mail is recommended, but not required.

(2) Notice to the tribe shall be to the tribal chairperson, unless the tribe has designated another agent for service.

(3) Notice shall be sent to all tribes of which the child may be a member or eligible for membership, until the court makes a determination as to which tribe is the child's tribe in accordance with subdivision (d) of Section 224.1, after which notice need only be sent to the tribe determined to be the Indian child's tribe.

(4) Notice, to the extent required by federal law, shall be sent to the Secretary of the Interior's designated agent, the Sacramento Area Director, Bureau of Indian Affairs. If the identity or location of the parents, Indian custodians, or the minor's tribe is known, a copy of the notice shall also be sent directly to the Secretary of the Interior, unless the Secretary of the Interior has waived the notice in writing and the person responsible for giving notice under this section has filed proof of the waiver with the court.

(5) In addition to the information specified in other sections of this article, notice shall include all of the following information:

(A) The name, birthdate, and birthplace of the Indian child, if known.

(B) The name of the Indian tribe in which the child is a member or may be eligible for membership, if known.

(C) All names known of the Indian child's biological parents, grandparents, and great-grandparents, or Indian custodians, including maiden, married and former names or aliases, as well as their current and

former addresses, birthdates, places of birth and death, tribal enrollment numbers, and any other identifying information, if known.

(D) A copy of the petition by which the proceeding was initiated.

(E) A copy of the child's birth certificate, if available.

(F) The location, mailing address, and telephone number of the court and all parties notified pursuant to this section.

(G) A statement of the following:

(i) The absolute right of the child's parents, Indian custodians, and tribe to intervene in the proceeding.

(ii) The right of the child's parents, Indian custodians, and tribe to petition the court to transfer the proceeding to the tribal court of the Indian child's tribe, absent objection by either parent and subject to declination by the tribal court.

(iii) The right of the child's parents, Indian custodians, and tribe to, upon request, be granted up to an additional 20 days from the receipt of the notice to prepare for the proceeding.

(iv) The potential legal consequences of the proceedings on the future custodial and parental rights of the child's parents or Indian custodians.

(v) That if the parents or Indian custodians are unable to afford counsel, counsel will be appointed to represent the parents or Indian custodians pursuant to Section 1912 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.).

(vi) That the information contained in the notice, petition, pleading, and other court documents is confidential, so any person or entity notified shall maintain the confidentiality of the information contained in the notice concerning the particular proceeding and not reveal it to anyone who does not need the information in order to exercise the tribe's rights under the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.).

(b) Notice shall be sent whenever it is known or there is reason to know that an Indian child is involved, and for every hearing thereafter, including, but not limited to, the hearing at which a final adoption order is to be granted, unless it is determined that the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) does not apply to the case in accordance with Section 224.3. After a tribe acknowledges that the child is a member or eligible for membership in that tribe, or after a tribe intervenes in a proceeding, the information set out in subparagraphs (C), (D), (E), and (G) of paragraph (5) of subdivision (a) need not be included with the notice.

(c) Proof of the notice, including copies of notices sent and all return receipts and responses received, shall be filed with the court in advance of the hearing except as permitted under subdivision (d).

(d) No proceeding shall be held until at least 10 days after receipt of notice by the parent, Indian custodian, the tribe, or the Bureau of Indian Affairs, except for the detention hearing, provided that notice of the detention hearing shall be given as soon as possible after the filing of the petition initiating the proceeding and proof of the notice is filed with the court within 10 days after the filing of the petition. With the exception of the detention hearing, the parent, Indian custodian, or the tribe shall, upon

request, be granted up to 20 additional days to prepare for that proceeding. Nothing herein shall be construed as limiting the rights of the parent, Indian custodian, or tribe to more than 10 days notice when a lengthier notice period is required by statute.

(e) With respect to giving notice to Indian tribes, a party shall be subject to court sanctions if that person knowingly and willfully falsifies or conceals a material fact concerning whether the child is an Indian child, or counsels a party to do so.

(f) The inclusion of contact information of any adult or child that would otherwise be required to be included in the notification pursuant to this section, shall not be required if that person is at risk of harm as a result of domestic violence, child abuse, sexual abuse, or stalking.

SEC. 32. Section 224.3 is added to the Welfare and Institutions Code, to read:

224.3. (a) The court, county welfare department, and the probation department have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300, 601, or 602 is to be, or has been, filed is or may be an Indian child in all dependency proceedings and in any juvenile wardship proceedings if the child is at risk of entering foster care or is in foster care.

(b) The circumstances that may provide reason to know the child is an Indian child include, but are not limited to, the following:

(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 provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe.

(2) The residence or domicile of the child, the child's parents, or Indian custodian is in a predominantly Indian community.

(3) The child or the child's family has received services or benefits from a tribe or services that are available to Indians from tribes or the federal government, such as the Indian Health Service.

(c) If the court, social worker, or probation officer knows or has reason to know that an Indian child is involved, the social worker or probation officer is required to make further inquiry regarding the possible Indian status of the child, and to do so as soon as practicable, by interviewing the parents, Indian custodian, and extended family members to gather the information required in paragraph (5) of subdivision (a) of Section 224.2, contacting the Bureau of Indian Affairs and the State Department of Social Services for assistance in identifying the names and contact information of the tribes in which the child may be a member or eligible for membership in and contacting the tribes and any other person that reasonably can be expected to have information regarding the child's membership status or eligibility.

(d) If the court, social worker, or probation officer knows or has reason to know that an Indian child is involved, the social worker or probation

officer shall provide notice in accordance with paragraph (5) of subdivision (a) of Section 224.2.

(e) (1) A determination by an Indian tribe that a child is or is not a member of or eligible for membership in that tribe, or testimony attesting to that status by a person authorized by the tribe to provide that determination, shall be conclusive. Information that the child is not enrolled or eligible for enrollment in the tribe is not determinative of the child's membership status unless the tribe also confirms in writing that enrollment is a prerequisite for membership under tribal law or custom.

(2) In the absence of a contrary determination by the tribe, a determination by the Bureau of Indian Affairs that a child is or is not a member of or eligible for membership in that tribe is conclusive.

(3) If proper and adequate notice has been provided pursuant to Section 224.2, and neither a tribe nor the Bureau of Indian Affairs has provided a determinative response within 60 days after receiving that notice, the court may determine that the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) does not apply to the proceedings, provided that the court shall reverse its determination of the inapplicability of the Indian Child Welfare Act and apply the act prospectively if a tribe or the Bureau of Indian Affairs subsequently confirms that the child is an Indian child.

(f) Notwithstanding a determination that the Indian Child Welfare Act does not apply to the proceedings made in accordance with subdivision (e), if the court, social worker, or probation officer subsequently receives any information required under paragraph (5) of subdivision (a) of Section 224.2 that was not previously available or included in the notice issued under Section 224.2, the social worker or probation officer shall provide the additional information to any tribes entitled to notice under paragraph (3) of subdivision (a) of Section 224.2 and the Bureau of Indian Affairs.

SEC. 33. Section 224.4 is added to the Welfare and Institutions Code, to read:

224.4. The Indian child's tribe and Indian custodian have the right to intervene at any point in an Indian child custody proceeding.

SEC. 34. Section 224.5 is added to the Welfare and Institutions Code, to read:

224.5. In an Indian child custody proceeding, the court shall give full faith and credit to the public acts, records, judicial proceedings, and judgments of any Indian tribe applicable to the proceeding to the same extent that such entities give full faith and credit to the public acts, records, judicial proceedings, and judgments of any other entity.

SEC. 35. Section 224.6 is added to the Welfare and Institutions Code, to read:

224.6. (a) When testimony of a "qualified expert witness" is required in an Indian child custody proceeding, a "qualified expert witness" may include, but is not limited to, a social worker, sociologist, physician, psychologist, traditional tribal therapist and healer, tribal spiritual leader, tribal historian, or tribal elder, provided the individual is not an employee

of the person or agency recommending foster care placement or termination of parental rights.

(b) In considering whether to involuntarily place an Indian child in foster care or to terminate the parental rights of the parent of an Indian child, the court shall:

(1) Require that a qualified expert witness testify regarding whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(2) Consider evidence concerning the prevailing social and cultural standards of the Indian child's tribe, including that tribe's family organization and child-rearing practices.

(c) Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:

(1) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.

(2) Any expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.

(3) A professional person having substantial education and experience in the area of his or her specialty.

(d) The court or any party may request the assistance of the Indian child's tribe or Bureau of Indian Affairs agency serving the Indian child's tribe in locating persons qualified to serve as expert witnesses.

(e) The court may accept a declaration or affidavit from a qualified expert witness in lieu of testimony only if the parties have so stipulated in writing and the court is satisfied the stipulation is made knowingly, intelligently, and voluntarily.

SEC. 36. Section 290.1 of the Welfare and Institutions Code is amended to read:

290.1. If the probation officer or social worker determines that the child shall be retained in custody, he or she shall immediately file a petition pursuant to Section 332 with the clerk of the juvenile court, who shall set the matter for hearing on the detention hearing calendar. The probation officer or social worker shall serve notice as prescribed in this section.

(a) Notice shall be given to the following persons whose whereabouts are known or become known prior to the initial petition hearing:

(1) The mother.

(2) The father or fathers, presumed and alleged.

(3) The legal guardian or guardians.

(4) The child, if the child is 10 years of age or older.

(5) Any known sibling of the child who is the subject of the hearing if that sibling either is the subject of a dependency proceeding or has been adjudged to be a dependent child of the juvenile court. If the sibling is 10

years of age or older, the sibling, the sibling's caregiver, and the sibling's attorney. If the sibling is under 10 years of age, the sibling's caregiver and the sibling's attorney. However, notice is not required to be given to any sibling whose matter is calendared in the same court on the same day.

(6) If there is no parent or guardian residing in California, or if the residence is unknown, then to any adult relative residing within the county or if none, the adult relative residing nearest the court.

(7) The attorney for the parent or parents, or legal guardian or guardians.

(8) The district attorney, if the district attorney has notified the clerk of the court that he or she wishes to receive the petition, containing the time, date, and place of the hearing.

(9) The probate department of the superior court that appointed the guardian, if the child is a ward of a guardian appointed pursuant to the Probate Code.

(b) No notice is required for a parent whose parental rights have been terminated.

(c) The notice shall be given as soon as possible after the filing of the petition.

(d) The notice of the initial petition hearing shall include all of the following:

(1) The date, time, and place of the hearing.

(2) The name of the child.

(3) A copy of the petition.

(e) Service of the notice shall be written or oral. If the person being served cannot read, notice shall be given orally.

(f) If the probation officer or social worker knows or has reason to know that an Indian child is involved, notice shall be given in accordance with Section 224.2.

SEC. 37. Section 290.2 of the Welfare and Institutions Code is amended to read:

290.2. Upon the filing of a petition by a probation officer or social worker, the clerk of the juvenile court shall issue notice, to which shall be attached a copy of the petition, and he or she shall cause the same to be served as prescribed in this section.

(a) Notice shall be given to the following persons whose address is known or becomes known prior to the initial petition hearing:

(1) The mother.

(2) The father or fathers, presumed and alleged.

(3) The legal guardian or guardians.

(4) The child, if the child is 10 years of age or older.

(5) Any known sibling of the child who is the subject of the hearing if that sibling either is the subject of a dependency proceeding or has been adjudged to be a dependent child of the juvenile court. If the sibling is 10 years of age or older, the sibling, the sibling's caregiver, and the sibling's attorney. If the sibling is under 10 years of age, the sibling's caregiver and

the sibling's attorney. However, notice is not required to be given to any sibling whose matter is calendared in the same court on the same day.

(6) If there is no parent or guardian residing in California, or if the residence is unknown, to any adult relative residing within the county or if none, the adult relative residing nearest the court.

(7) Upon reasonable notification by counsel representing the child, parent, or guardian, the clerk of the court shall give notice to that counsel as soon as possible.

(8) The district attorney, if the district attorney has notified the clerk of the court that he or she wishes to receive the petition, containing the time, date, and place of the hearing.

(9) The probate department of the superior court that appointed the guardian, if the child is a ward of a guardian appointed pursuant to the Probate Code.

(b) No notice is required for a parent whose parental rights have been terminated.

(c) Notice shall be served as follows:

(1) If the child is retained in custody, the notice shall be given to the persons required to be noticed as soon as possible, and at least five days before the hearing, unless the hearing is set to be heard in less than five days in which case notice shall be given at least 24 hours prior to the hearing.

(2) If the child is not retained in custody, the notice shall be given to those persons required to be noticed at least 10 days prior to the date of the hearing. If any person who is required to be given notice is known to reside outside of the county, the clerk of the juvenile court shall mail the notice and copy of the petition by first-class mail, to that person as soon as possible after the filing of the petition and at least 10 days before the time set for hearing. Failure to respond to the notice is not cause for an arrest or detention. In the instance of a failure to appear after notice by first-class mail, the court shall direct that the notice and copy of the petition be personally served on all persons required to receive the notice and copy of the petition. For these purposes, personal service of the notice and copy of the petition outside of the county at least 10 days before the time set for hearing is equivalent to service by first-class mail. Service may be waived by any person by a voluntary appearance entered in the minutes of the court or by a written waiver of service filed with the clerk of the court at, or prior to, the hearing.

(d) The notice of the initial petition hearing shall include all of the following:

(1) The date, time, and place of the hearing.

(2) The name of the child.

(3) A copy of the petition.

(e) If the court knows or has reason to know that an Indian child is involved, notice shall be given in accordance with Section 224.2.

SEC. 38. Section 291 of the Welfare and Institutions Code is amended to read:

291. After the initial petition hearing, the clerk of the court shall cause the notice to be served in the following manner:

(a) Notice of the hearing shall be given to the following persons:

(1) The mother.

(2) The father or fathers, presumed and alleged.

(3) The legal guardian or guardians.

(4) The child, if the child is 10 years of age or older.

(5) Any known sibling of the child who is the subject of the hearing if that sibling either is the subject of a dependency proceeding or has been adjudged to be a dependent child of the juvenile court. If the sibling is 10 years of age or older, the sibling, the sibling's caregiver, and the sibling's attorney. If the sibling is under 10 years of age, the sibling's caregiver and the sibling's attorney. However, notice is not required to be given to any sibling whose matter is calendared in the same court on the same day.

(6) Each attorney of record unless counsel of record is present in court when the hearing is scheduled, then no further notice need be given.

(7) If there is no parent or guardian residing in California, or if the residence is unknown, then to any adult relative residing within the county or if none, the adult relative residing nearest the court.

(b) No notice is required for a parent whose parental rights have been terminated.

(c) Notice shall be served as follows:

(1) If the child is detained, the notice shall be given to the persons required to be noticed as soon as possible, and at least five days before the hearing, unless the hearing is set less than five days and then at least 24 hours prior to the hearing.

(2) If the child is not detained, the notice shall be given to those persons required to be noticed at least 10 days prior to the date of the hearing.

(d) The notice shall include all of the following:

(1) The name and address of the person notified.

(2) The nature of the hearing.

(3) Each section and subdivision under which the proceeding has been initiated.

(4) The date, time, and place of the hearing.

(5) The name of the child upon whose behalf the petition has been brought.

(6) A statement that:

(A) If they fail to appear, the court may proceed without them.

(B) The child, parent, guardian, Indian custodian, or adult relative to whom notice is required to be given is entitled to have an attorney present at the hearing.

(C) If the parent, guardian, Indian custodian, or adult relative is indigent and cannot afford an attorney, and desires to be represented by an attorney, the parent, guardian, Indian custodian, or adult relative shall promptly notify the clerk of the juvenile court.

(D) If an attorney is appointed to represent the parent, guardian, Indian custodian, or adult relative, the represented person shall be liable for all or a portion of the costs to the extent of his or her ability to pay.

(E) The parent, guardian, Indian custodian, or adult relative may be liable for the costs of support of the child in any out-of-home placement.

(7) A copy of the petition.

(e) Service of the notice of the hearing shall be given in the following manner:

(1) If the child is detained and the persons required to be noticed are not present at the initial petition hearing, they shall be noticed by personal service or by certified mail, return receipt requested.

(2) If the child is detained and the persons required to be noticed are present at the initial petition hearing, they shall be noticed by personal service or by first-class mail.

(3) If the child is not detained, the persons required to be noticed shall be noticed by personal service or by first-class mail, unless the person to be served is known to reside outside the county, in which case service shall be by first-class mail.

(f) Any of the notices required to be given under this section or Sections 290.1 and 290.2 may be waived by a party in person or through his or her attorney, or by a signed written waiver filed on or before the date scheduled for the hearing.

(g) If the court knows or has reason to know that an Indian child is involved, notice shall be given in accordance with Section 224.2.

SEC. 39. Section 292 of the Welfare and Institutions Code is amended to read:

292. The social worker or probation officer shall give notice of the review hearing held pursuant to Section 364 in the following manner:

(a) Notice of the hearing shall be given to the following persons:

(1) The mother.

(2) The presumed father or any father receiving services.

(3) The legal guardian or guardians.

(4) The child, if the child is 10 years of age or older.

(5) Any known sibling of the child who is the subject of the hearing if that sibling either is the subject of a dependency proceeding or has been adjudged to be a dependent child of the juvenile court. If the sibling is 10 years of age or older, the sibling, the sibling's caregiver, and the sibling's attorney. If the sibling is under 10 years of age, the sibling's caregiver and the sibling's attorney. However, notice is not required to be given to any sibling whose matter is calendared in the same court on the same day.

(6) Each attorney of record, if that attorney was not present at the time that the hearing was set by the court.

(b) No notice is required for a parent whose parental rights have been terminated.

(c) The notice of the hearing shall be served not earlier than 30 days, nor later than 15 days, before the hearing.

(d) The notice shall contain a statement regarding the nature of the hearing to be held and any change in the custody or status of the child being recommended by the supervising agency. The notice shall also include a statement that the child and the parent or parents or legal guardian or guardians have a right to be present at the hearing, to be represented by counsel at the hearing and the procedure for obtaining appointed counsel, and to present evidence regarding the proper disposition of the case. The notice shall also state that if the parent or parents or legal guardian or guardians fail to appear, the court may proceed without them.

(e) Service of the notice shall be by personal service, by first-class mail, or by certified mail, return receipt requested, addressed to the last known address of the person to be noticed.

(f) If the social worker or the probation officer knows or has reason to know that an Indian child is involved, notice shall be given in accordance with Section 224.2.

SEC. 40. Section 293 of the Welfare and Institutions Code is amended to read:

293. The social worker or probation officer shall give notice of the review hearings held pursuant to Section 366.21 or 366.22 in the following manner:

(a) Notice of the hearing shall be given to the following persons:

(1) The mother.

(2) The presumed father or any father receiving services.

(3) The legal guardian or guardians.

(4) The child, if the child is 10 years of age or older.

(5) Any known sibling of the child who is the subject of the hearing if that sibling either is the subject of a dependency proceeding or has been adjudged to be a dependent child of the juvenile court. If the sibling is 10 years of age or older, the sibling, the sibling's caregiver, and the sibling's attorney. If the sibling is under 10 years of age, the sibling's caregiver and the sibling's attorney. However, notice is not required to be given to any sibling whose matter is calendared in the same court on the same day.

(6) In the case of a child removed from the physical custody of his or her parent or legal guardian, the foster parents, relative caregivers, community care facility, or foster family agency having custody of the child. In a case in which a foster family agency is notified of the hearing pursuant to this section, and the child resides in a foster home certified by the foster family agency, the foster family agency shall provide timely notice of the hearing to the child's caregivers.

(7) Each attorney of record if that attorney was not present at the time that the hearing was set by the court.

(b) No notice is required for a parent whose parental rights have been terminated.

(c) The notice of hearing shall be served not earlier than 30 days, nor later than 15 days, before the hearing.

(d) The notice shall contain a statement regarding the nature of the hearing to be held and any change in the custody or status of the child being recommended by the supervising agency. If the notice is to the child, parent or parents, or legal guardian or guardians, the notice shall also advise them of the right to be present, the right to be represented by counsel, the right to request counsel, and the right to present evidence. The notice shall also state that if the parent or parents or legal guardian or guardians fail to appear, the court may proceed without them.

(e) Service of the notice shall be by first-class mail addressed to the last known address of the person to be noticed or by personal service on the person. Service of a copy of the notice shall be by personal service or by certified mail, return receipt requested, or any other form of notice that is equivalent to service by first-class mail.

(f) Notice to a foster parent, a relative caregiver, a certified foster parent who has been approved for adoption, or the State Department of Social Services when it is acting as an adoption agency in counties that are not served by a county adoption agency or by a licensed county adoption agency, shall indicate that the person notified may attend all hearings or may submit any information he or she deems relevant to the court in writing.

(g) If the social worker or probation officer knows or has reason to know that an Indian child is involved, notice shall be given in accordance with Section 224.2.

SEC. 41. Section 294 of the Welfare and Institutions Code is amended to read:

294. The social worker or probation officer shall give notice of a selection and implementation hearing held pursuant to Section 366.26 in the following manner:

(a) Notice of the hearing shall be given to the following persons:

(1) The mother.

(2) The fathers, presumed and alleged.

(3) The child, if the child is 10 years of age or older.

(4) Any known sibling of the child who is the subject of the hearing if that sibling either is the subject of a dependency proceeding or has been adjudged to be a dependent child of the juvenile court. If the sibling is 10 years of age or older, the sibling, the sibling's caregiver, and the sibling's attorney. If the sibling is under 10 years of age, the sibling's caregiver and the sibling's attorney. However, notice is not required to be given to any sibling whose matter is calendared in the same court on the same day.

(5) The grandparents of the child, if their address is known and if the parent's whereabouts are unknown.

(6) All counsel of record.

(7) To any unknown parent by publication, if ordered by the court pursuant to paragraph (2) of subdivision (g).

(b) The following persons shall not be notified of the hearing:

(1) A parent who has relinquished the child to the State Department of Social Services or to a licensed adoption agency for adoption, and the

relinquishment has been accepted and filed with notice as required under Section 8700 of the Family Code.

(2) An alleged father who has denied paternity and has executed a waiver of the right to notice of further proceedings.

(3) A parent whose parental rights have been terminated.

(c) (1) Service of the notice shall be completed at least 45 days before the hearing date. Service is deemed complete at the time the notice is personally delivered to the person named in the notice or 10 days after the notice has been placed in the mail, or at the expiration of the time prescribed by the order for publication.

(2) Service of notice in cases where publication is ordered shall be completed at least 30 days before the date of the hearing.

(d) Regardless of the type of notice required, or the manner in which it is served, once the court has made the initial finding that notice has properly been given to the parent, or to any person entitled to receive notice pursuant to this section, subsequent notice for any continuation of a Section 366.26 hearing may be by first-class mail to any last known address, by an order made pursuant to Section 296, or by any other means that the court determines is reasonably calculated, under any circumstance, to provide notice of the continued hearing. However, if the recommendation changes from the recommendation contained in the notice previously found to be proper, notice shall be provided to the parent, and to any person entitled to receive notice pursuant to this section, regarding that subsequent hearing.

(e) The notice shall contain the following information:

(1) The date, time, and place of the hearing.

(2) The right to appear.

(3) The parents' right to counsel.

(4) The nature of the proceedings.

(5) The recommendation of the supervising agency.

(6) A statement that, at the time of hearing, the court is required to select a permanent plan of adoption, legal guardianship, or long-term foster care for the child.

(f) Notice to the parents may be given in any one of the following manners:

(1) If the parent is present at the hearing at which the court schedules a hearing pursuant to Section 366.26, the court shall advise the parent of the date, time, and place of the proceedings, their right to counsel, the nature of the proceedings, and the requirement that at the proceedings the court shall select and implement a plan of adoption, legal guardianship, or long-term foster care for the child. The court shall direct the parent to appear for the proceedings and then direct that the parent be notified thereafter by first-class mail to the parent's usual place of residence or business only.

(2) Certified mail, return receipt requested, to the parent's last known mailing address. This notice shall be sufficient if the child welfare agency receives a return receipt signed by the parent.

(3) Personal service to the parent named in the notice.

(4) Delivery to a competent person who is at least 18 years of age at the parent's usual place of residence or business, and thereafter mailed to the parent named in the notice by first-class mail at the place where the notice was delivered.

(5) If the residence of the parent is outside the state, service may be made as described in paragraph (1), (3), or (4) or by certified mail, return receipt requested.

(6) If the recommendation of the probation officer or social worker is legal guardianship or long-term foster care, service may be made by first-class mail to the parent's usual place of residence or business.

(7) If a parent's identity is known but his or her whereabouts are unknown and the parent cannot, with reasonable diligence, be served in any manner specified in paragraphs (1) to (6), inclusive, the petitioner shall file an affidavit with the court at least 75 days before the hearing date, stating the name of the parent and describing the efforts made to locate and serve the parent.

(A) If the court determines that there has been due diligence in attempting to locate and serve the parent and the probation officer or social worker recommends adoption, service shall be to that parent's attorney of record, if any, by certified mail, return receipt requested. If the parent does not have an attorney of record, the court shall order that service be made by publication of citation requiring the parent to appear at the date, time, and place stated in the citation, and that the citation be published in a newspaper designated as most likely to give notice to the parent. Publication shall be made once a week for four consecutive weeks. Whether notice is to the attorney of record or by publication, the court shall also order that notice be given to the grandparents of the child, if their identities and addresses are known, by first-class mail.

(B) If the court determines that there has been due diligence in attempting to locate and serve the parent and the probation officer or social worker recommends legal guardianship or long-term foster care, no further notice is required to the parent, but the court shall order that notice be given to the grandparents of the child, if their identities and addresses are known, by first-class mail.

(C) In any case where the residence of the parent becomes known, notice shall immediately be served upon the parent as provided for in either paragraph (2), (3), (4), (5), or (6).

(g) (1) If the identity of one or both of the parents, or alleged parents, of the child is unknown, or if the name of one or both parents is uncertain, then that fact shall be set forth in the affidavit filed with the court at least 75 days before the hearing date and the court, consistent with the provisions of Sections 7665 and 7666 of the Family Code, shall issue an order dispensing with notice to a natural parent or possible natural parent under this section if, after inquiry and a determination that there has been due diligence in attempting to identify the unknown parent, the court is

unable to identify the natural parent or possible natural parent and no person has appeared claiming to be the natural parent.

(2) After a determination that there has been due diligence in attempting to identify an unknown parent pursuant to paragraph (1) and the probation officer or social worker recommends adoption, the court shall consider whether publication notice would be likely to lead to actual notice to the unknown parent. The court may order publication notice if, on the basis of all information before the court, the court determines that notice by publication is likely to lead to actual notice to the parent. If publication notice to an unknown parent is ordered, the court shall order the published citation to be directed to either the father or mother, or both, of the child, and to all persons claiming to be the father or mother of the child, naming and otherwise describing the child. An order of publication pursuant to this paragraph shall be based on an affidavit describing efforts made to identify the unknown parent or parents. Service made by publication pursuant to this paragraph shall require the unknown parent or parents to appear at the date, time, and place stated in the citation. Publication shall be made once a week for four consecutive weeks.

(3) If the court determines that there has been due diligence in attempting to identify one or both of the parents, or alleged parents, of the child and the probation officer or social worker recommends legal guardianship or long-term foster care, no further notice to the parent shall be required.

(h) Notice to the child and all counsel of record shall be by first-class mail.

(i) If the court knows or has reason to know that an Indian child is involved, notice shall be given in accordance with Section 224.2.

(j) Notwithstanding subdivision (a), if the attorney of record is present at the time the court schedules a hearing pursuant to Section 366.26, no further notice is required, except as required by subparagraph (A) of paragraph (7) of subdivision (f).

(k) This section shall also apply to children adjudged wards pursuant to Section 727.31.

(*l*) The court shall state the reasons on the record explaining why good cause exists for granting any continuance of a hearing held pursuant to Section 366.26 to fulfill the requirements of this section.

SEC. 42. Section 295 of the Welfare and Institutions Code is amended to read:

295. The social worker or probation officer shall give notice of review hearings held pursuant to Section 366.3 in the following manner:

(a) Notice of the hearing shall be given to the following persons:

(1) The mother.

(2) The presumed father.

(3) The legal guardian or guardians.

(4) The child, if the child is 10 years of age or older.

(5) Any known sibling of the child who is the subject of the hearing if that sibling either is the subject of a dependency proceeding or has been

adjudged to be a dependent child of the juvenile court. If the sibling is 10 years of age or older, the sibling, the sibling's caregiver, and the sibling's attorney. If the sibling is under 10 years of age, the sibling's caregiver and the sibling's attorney. However, notice is not required to be given to any sibling whose matter is calendared in the same court on the same day.

(6) The foster parents, relative caregivers, community care facility, or foster family agency having physical custody of the child in the case of a child removed from the physical custody of the parents or legal guardian.

(7) The attorney of record if that attorney of record was not present at the time that the hearing was set by the court.

(8) The alleged father or fathers, but only if the recommendation is to set a new hearing pursuant to Section 366.26.

(b) No notice is required for a parent whose parental rights have been terminated.

(c) The notice of the review hearing shall be served no earlier than 30 days, nor later than 15 days, before the hearing.

(d) The notice of the review hearing shall contain a statement regarding the nature of the hearing to be held, any recommended change in the custody or status of the child, and any recommendation that the court set a new hearing pursuant to Section 366.26 in order to select a more permanent plan.

(e) Service of notice shall be by first-class mail addressed to the last known address of the person to be provided notice.

(f) If the child is ordered into a permanent plan of legal guardianship, and subsequently a petition to terminate or modify the guardianship is filed, the probation officer or social worker shall serve notice of the petition not less than 15 court days prior to the hearing on all persons listed in subdivision (a) and on the court that established legal guardianship if it is in another county.

(g) If the social worker or probation officer knows or has reason to know that an Indian child is involved, notice shall be given in accordance with Section 224.2.

SEC. 42.5. Section 295 of the Welfare and Institutions Code is amended to read:

295. The social worker or probation officer shall give notice of review hearings held pursuant to Section 366.3 in the following manner:

(a) Notice of the hearing shall be given to the following persons:

(1) The mother.

(2) The presumed father.

(3) The legal guardian or guardians.

(4) The child, if the child is 10 years of age or older.

(5) Any known sibling of the child who is the subject of the hearing if that sibling either is the subject of a dependency proceeding or has been adjudged to be a dependent child of the juvenile court. If the sibling is 10 years of age or older, the sibling, the sibling's caregiver, and the sibling's attorney. If the sibling is under 10 years of age, the sibling's caregiver and

the sibling's attorney. However, notice is not required to be given to any sibling whose matter is calendared in the same court on the same day.

(6) The foster parents, relative caregivers, community care facility, or foster family agency having physical custody of the child if a child is removed from the physical custody of the parents or legal guardian. The person notified may attend all hearings and may submit any information he or she deems relevant to the court in writing.

(7) The attorney of record if that attorney of record was not present at the time that the hearing was set by the court.

(8) The alleged father or fathers, but only if the recommendation is to set a new hearing pursuant to Section 366.26.

(b) No notice is required for a parent whose parental rights have been terminated.

(c) The notice of the review hearing shall be served no earlier than 30 days, nor later than 15 days, before the hearing.

(d) The notice of the review hearing shall contain a statement regarding the nature of the hearing to be held, any recommended change in the custody or status of the child, and any recommendation that the court set a new hearing pursuant to Section 366.26 in order to select a more permanent plan.

(e) Service of notice shall be by first-class mail addressed to the last known address of the person to be provided notice. In the case of an Indian child, notice shall be by registered mail, return receipt requested.

(f) If the child is ordered into a permanent plan of legal guardianship, and subsequently a petition to terminate or modify the guardianship is filed, the probation officer or social worker shall serve notice of the petition not less than 15 court days prior to the hearing on all persons listed in subdivision (a) and on the court that established legal guardianship if it is in another county.

(g) If the social worker or probation officer knows or has reason to know that an Indian child is involved, notice shall be given in accordance with Section 224.2.

SEC. 43. Section 297 of the Welfare and Institutions Code is amended to read:

297. (a) Notice required for an initial petition filed pursuant to Section 300 is applicable to a subsequent petition filed pursuant to Section 342.

(b) Upon the filing of a supplemental petition pursuant to Section 387, the clerk of the juvenile court shall immediately set the matter for hearing within 30 days of the date of the filing, and the social worker or probation officer shall cause notice thereof to be served upon the persons required by, and in the manner prescribed by, Sections 290.1, 290.2, and 291.

(c) If a petition for modification has been filed pursuant to Section 388, and it appears that the best interest of the child may be promoted by the proposed change of the order, the recognition of a sibling relationship, or the termination of jurisdiction, the court shall order that a hearing be held and shall give prior notice, or cause prior notice to be given, to the social worker or probation officer and to the child's attorney of record, or if there

is no attorney of record for the child, to the child, and his or her parent or parents or legal guardian or guardians in the manner prescribed by Section 291 unless a different manner is prescribed by the court.

(d) If the court knows or has reason to know that an Indian child is involved, notice shall be given in accordance with Section 224.2.

SEC. 44. Section 305.5 of the Welfare and Institutions Code is amended to read:

305.5. (a) If an Indian child, who is a ward of a tribal court or resides or is domiciled within a reservation of an Indian tribe that has exclusive jurisdiction over child custody proceedings as recognized in Section 1911 of Title 25 of the United States Code or reassumed exclusive jurisdiction over Indian child custody proceedings pursuant to Section 1918 of Title 25 of the United States Code, has been removed by a state or local authority from the custody of his or her parents or Indian custodian, the state or local authority shall provide notice of the removal to the tribe no later than the next working day following the removal and shall provide all relevant documentation to the tribe regarding the removal and the child's identity. If the tribe determines that the child is an Indian child, the state or local authority shall transfer the child custody proceeding to the tribe within 24 hours after receipt of written notice from the tribe of that determination.

(b) In the case of an Indian child who is not domiciled or residing within a reservation of an Indian tribe or who resides or is domiciled within a reservation of an Indian tribe that does not have exclusive jurisdiction over child custody proceedings pursuant to Section 1911 or 1918 of Title 25 of the United States Code, the court shall transfer the proceeding to the jurisdiction of the child's tribe upon petition of either parent, the Indian custodian, if any, or the child's tribe, unless the court finds good cause not to transfer. The court shall dismiss the proceeding or terminate jurisdiction only after receiving proof that the tribal court has accepted the transfer of jurisdiction. At the time that the court dismisses the proceeding or terminates jurisdiction, the court shall also make an order transferring the physical custody of the child to the tribal court.

(c) (1) If a petition to transfer proceedings as described in subdivision (b) is filed, the court shall find good cause to deny the petition if one or more of the following circumstances are shown to exist:

(A) One or both of the child's parents object to the transfer.

(B) The child's tribe does not have a "tribal court" as defined in Section 1910 of Title 25 of the United States Code.

(C) The tribal court of the child's tribe declines the transfer.

(2) Good cause not to transfer the proceeding may exist if:

(A) The evidence necessary to decide the case cannot be presented in the tribal court without undue hardship to the parties or the witnesses, and the tribal court is unable to mitigate the hardship by making arrangements to receive and consider the evidence or testimony by use of remote communication, by hearing the evidence or testimony at a location convenient to the parties or witnesses, or by use of other means permitted in the tribal court's rules of evidence or discovery.

(B) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition within a reasonable time after receiving notice of the proceeding, provided the notice complied with Section 224.2. It shall not, in and of itself, be considered an unreasonable delay for a party to wait until reunification efforts have failed and reunification services have been terminated before filing a petition to transfer.

(C) The Indian child is over 12 years of age and objects to the transfer.

(D) The parents of the child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

(3) Socioeconomic conditions and the perceived adequacy of tribal social services or judicial systems may not be considered in a determination that good cause exists.

(4) The burden of establishing good cause to the contrary shall be on the party opposing the transfer. If the court believes, or any party asserts, that good cause to the contrary exists, the reasons for that belief or assertion shall be stated in writing and made available to all parties who are petitioning for the transfer, and the petitioner shall have the opportunity to provide information or evidence in rebuttal of the belief or assertion.

(5) Nothing in this section or Section 1911 or 1918 of Title 25 of the United States Code shall be construed as requiring a tribe to petition the Secretary of the Interior to reassume exclusive jurisdiction pursuant to Section 1918 of Title 25 of the United States Code prior to exercising jurisdiction over a proceeding transferred under subdivision (b).

(d) An Indian child's domicile or place of residence is determined by that of the parent, guardian, or Indian custodian with whom the child maintained his or her primary place of abode at the time the Indian child custody proceedings were initiated.

(e) If any petitioner in an Indian child custody proceeding has improperly removed the child from the custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over the petition and shall immediately return the child to his or her parent or Indian custodian, unless returning the child to the parent or Indian custodian would subject the child to a substantial and immediate danger or threat of danger.

(f) Nothing in this section shall be construed to prevent the emergency removal of an Indian child who is a ward of a tribal court or resides or is domiciled within a reservation of an Indian tribe, but is temporarily located off the reservation, from a parent or Indian custodian or the emergency placement of the child in a foster home or institution in order to prevent imminent physical damage or harm to the child. The state or local authority shall ensure that the emergency removal or placement terminates immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall

expeditiously initiate an Indian child custody proceeding, transfer the child to the jurisdiction of the Indian child's tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

SEC. 45. Section 306.6 is added to the Welfare and Institutions Code, to read:

306.6. (a) In a dependency proceeding involving a child who would otherwise be an Indian child, based on the definition contained in paragraph (4) of Section 1903 of the federal Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.), but is not an Indian child based on status of the child's tribe, as defined in paragraph (8) of Section 1903 of the federal Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.), the court may permit the tribe from which the child is descended to participate in the proceeding upon request of the tribe.

(b) If the court permits a tribe to participate in a proceeding, the tribe may do all of the following, upon consent of the court:

(1) Be present at the hearing.

(2) Address the court.

(3) Request and receive notice of hearings.

(4) Request to examine court documents relating to the proceeding.

(5) Present information to the court that is relevant to the proceeding.

(6) Submit written reports and recommendations to the court.

(7) Perform other duties and responsibilities as requested or approved by the court.

(c) If more than one tribe requests to participate in a proceeding under subdivision (a), the court may limit participation to the tribe with which the child has the most significant contacts, as determined in accordance with paragraph (2) of subdivision (d) of Section 170 of the Family Code.

(d) This section is intended to assist the court in making decisions that are in the best interest of the child by permitting a tribe in the circumstances set out in subdivision (a) to inform the court and parties to the proceeding about placement options for the child within the child's extended family or the tribal community, services and programs available to the child and the child's parents as Indians, and other unique interests the child or the child's parents may have as Indians. This section shall not be construed to make the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.), or any state law implementing the Indian Child Welfare Act, applicable to the proceedings, or to limit the court's discretion to permit other interested persons to participate in these or any other proceedings.

(e) The court shall, on a case-by-case basis, make a determination if this section is applicable and may request information from the tribe, or the entity claiming to be a tribe, from which the child is descended for the purposes of making this determination, if the child would otherwise be an Indian child pursuant to subdivision (a).

SEC. 46. Section 317 of the Welfare and Institutions Code is amended to read:

317. (a) (1) When it appears to the court that a parent or guardian of the child desires counsel but is presently financially unable to afford and

cannot for that reason employ counsel, the court may appoint counsel as provided in this section.

(2) When it appears to the court that a parent or Indian custodian in an Indian child custody proceeding desires counsel but is presently unable to afford and cannot for that reason employ counsel, the provisions of subsection (b) of Section 1912 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) and Section 23.13 of Title 25 of the Code of Federal Regulations are applicable.

(b) When it appears to the court that a parent or guardian of the child is presently financially unable to afford and cannot for that reason employ counsel, and the child has been placed in out-of-home care, or the petitioning agency is recommending that the child be placed in out-of-home care, the court shall appoint counsel, unless the court finds that the parent or guardian has made a knowing and intelligent waiver of counsel as provided in this section.

(c) Where a child is not represented by counsel, the court shall appoint counsel for the child unless the court finds that the child would not benefit from the appointment of counsel. The court shall state on the record its reasons for that finding. A primary responsibility of any counsel appointed to represent a child pursuant to this section shall be to advocate for the protection, safety, and physical and emotional well-being of the child. Counsel for the child may be a district attorney, public defender, or other member of the bar, provided that the counsel does not represent another party or county agency whose interests conflict with the child's interests. The fact that the district attorney represents the child in a proceeding pursuant to Section 300 as well as conducts a criminal investigation or files a criminal complaint or information arising from the same or reasonably related set of facts as the proceeding pursuant to Section 300 is not in and of itself a conflict of interest. The court may fix the compensation for the services of appointed counsel. The appointed counsel shall have a caseload and training that assures adequate representation of the child. The Judicial Council shall promulgate rules of court that establish caseload standards, training requirements, and guidelines for appointed counsel for children and shall adopt rules as required by Section 326.5 no later than July 1, 2001.

(d) The counsel appointed by the court shall represent the parent, guardian, or child at the detention hearing and at all subsequent proceedings before the juvenile court. Counsel shall continue to represent the parent, guardian, or child unless relieved by the court upon the substitution of other counsel or for cause. The representation shall include representing the parent, guardian, or the child in termination proceedings and in those proceedings relating to the institution or setting aside of a legal guardianship.

(e) The counsel for the child shall be charged in general with the representation of the child's interests. To that end, the counsel shall make or cause to have made any further investigations that he or she deems in good faith to be reasonably necessary to ascertain the facts, including the

interviewing of witnesses, and he or she shall examine and cross-examine witnesses in both the adjudicatory and dispositional hearings. He or she may also introduce and examine his or her own witnesses, make recommendations to the court concerning the child's welfare, and participate further in the proceedings to the degree necessary to adequately represent the child. In any case in which the child is four years of age or older, counsel shall interview the child to determine the child's wishes and to assess the child's well-being, and shall advise the court of the child's wishes. Counsel for the child shall not advocate for the return of the child if, to the best of his or her knowledge, that return conflicts with the protection and safety of the child. In addition counsel shall investigate the interests of the child beyond the scope of the juvenile proceeding and report to the court other interests of the child that may need to be protected by the institution of other administrative or judicial proceedings. The attorney representing a child in a dependency proceeding is not required to assume the responsibilities of a social worker and is not expected to provide nonlegal services to the child. The court shall take whatever appropriate action is necessary to fully protect the interests of the child.

(f) Either the child or the counsel for the child, with the informed consent of the child if the child is found by the court to be of sufficient age and maturity to so consent, may invoke the psychotherapist-client privilege, physician-patient privilege, and clergyman-penitent privilege; and if the child invokes the privilege, counsel may not waive it, but if counsel invokes the privilege, the child may waive it. Counsel shall be holder of these privileges if the child is found by the court not to be of sufficient age and maturity to so consent. For the sole purpose of fulfilling his or her obligation to provide legal representation of the child, counsel for a child shall have access to all records with regard to the child maintained by a health care facility, as defined in Section 1545 of the Penal Code, health care providers, as defined in Section 6146 of the Business and Professions Code, a physician and surgeon or other health practitioner as defined in Section 11165.8 of the Penal Code or a child care custodian, as defined in Section 11165.7 of the Penal Code. Notwithstanding any other law, counsel shall be given access to all records relevant to the case which are maintained by state or local public agencies. All information requested from a child protective agency regarding a child who is in protective custody, or from a child's guardian ad litem, shall be provided to the child's counsel within 30 days of the request.

(g) In a county of the third class, if counsel is to be provided to a child at county expense other than by counsel for the agency, the court shall first utilize the services of the public defender prior to appointing private counsel, to provide legal counsel. Nothing in this subdivision shall be construed to require the appointment of the public defender in any case in which the public defender has a conflict of interest. In the interest of justice, a court may depart from that portion of the procedure requiring appointment of the public defender after making a finding of good cause and stating the reasons therefor on the record.

(h) In a county of the third class, if counsel is to be appointed for a parent or guardian at county expense, the court shall first utilize the services of the alternate public defender, prior to appointing private counsel, to provide legal counsel. Nothing in this subdivision shall be construed to require the appointment of the alternate public defender in any case in which the public defender has a conflict of interest. In the interest of justice, a court may depart from that portion of the procedure requiring appointment of the alternate public defender after making a finding of good cause and stating the reasons therefor on the record.

SEC. 46.5. Section 317 of the Welfare and Institutions Code is amended to read:

317. (a) (1) When it appears to the court that a parent or guardian of the child desires counsel but is presently financially unable to afford and cannot for that reason employ counsel, the court may appoint counsel as provided in this section.

(2) When it appears to the court that a parent or Indian custodian in an Indian child custody proceeding desires counsel but is presently unable to afford and cannot for that reason employ counsel, the provisions of subsection (b) of Section 1912 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) and Section 23.13 of Title 25 of the Code of Federal Regulations are applicable.

(b) When it appears to the court that a parent or guardian of the child is presently financially unable to afford and cannot for that reason employ counsel, and the child has been placed in out-of-home care, or the petitioning agency is recommending that the child be placed in out-of-home care, the court shall appoint counsel for the parent or guardian, unless the court finds that the parent or guardian has made a knowing and intelligent waiver of counsel as provided in this section.

(c) If a child is not represented by counsel, the court shall appoint counsel for the child unless the court finds that the child would not benefit from the appointment of counsel. The court shall state on the record its reasons for that finding. A primary responsibility of any counsel appointed to represent a child pursuant to this section shall be to advocate for the protection, safety, and physical and emotional well-being of the child. Counsel for the child may be a district attorney, public defender, or other member of the bar, provided that the counsel does not represent another party or county agency whose interests conflict with the child's interests. The fact that the district attorney represents the child in a proceeding pursuant to Section 300 as well as conducts a criminal investigation or files a criminal complaint or information arising from the same or reasonably related set of facts as the proceeding pursuant to Section 300 is not in and of itself a conflict of interest. The court may fix the compensation for the services of appointed counsel. The appointed counsel shall have a caseload and training that ensures adequate representation of the child. The Judicial Council shall promulgate rules of court that establish caseload standards, training requirements, and guidelines for

appointed counsel for children and shall adopt rules as required by Section 326.5 no later than July 1, 2001.

(d) The counsel appointed by the court shall represent the parent, guardian, or child at the detention hearing and at all subsequent proceedings before the juvenile court. Counsel shall continue to represent the parent, guardian, or child unless relieved by the court upon the substitution of other counsel or for cause. The representation shall include representing the parent, guardian, or the child in termination proceedings and in those proceedings relating to the institution or setting aside of a legal guardianship.

(e) The counsel for the child shall be charged in general with the representation of the child's interests. To that end, the counsel shall make or cause to have made any further investigations that he or she deems in good faith to be reasonably necessary to ascertain the facts, including the interviewing of witnesses, and he or she shall examine and cross-examine witnesses in both the adjudicatory and dispositional hearings. He or she may also introduce and examine his or her own witnesses, make recommendations to the court concerning the child's welfare, and participate further in the proceedings to the degree necessary to adequately represent the child. In any case in which the child is four years of age or older, counsel shall interview the child to determine the child's wishes and to assess the child's well-being, and shall advise the court of the child's wishes. Counsel for the child shall not advocate for the return of the child if, to the best of his or her knowledge, that return conflicts with the protection and safety of the child. In addition counsel shall investigate the interests of the child beyond the scope of the juvenile proceeding and report to the court other interests of the child that may need to be protected by the institution of other administrative or judicial proceedings. The attorney representing a child in a dependency proceeding is not required to assume the responsibilities of a social worker and is not expected to provide nonlegal services to the child. The court shall take whatever appropriate action is necessary to fully protect the interests of the child.

(f) Either the child or the counsel for the child, with the informed consent of the child if the child is found by the court to be of sufficient age and maturity to so consent, which shall be presumed, subject to rebuttal by clear and convincing evidence, if the child is over 12 years of age, may invoke the psychotherapist-client privilege, physician-patient privilege, and clergyman-penitent privilege; and if the child invokes the privilege, counsel may not waive it, but if counsel invokes the privilege, the child may waive it. Counsel shall be holder of these privileges if the child is found by the court not to be of sufficient age and maturity to so consent. For the sole purpose of fulfilling his or her obligation to provide legal representation of the child, counsel for a child shall have access to all records with regard to the child maintained by a health care facility, as defined in Section 1545 of the Penal Code, health care providers, as defined in Section 6146 of the Business and Professions Code, a physician and surgeon or other health practitioner, as defined in former Section

11165.8 of the Penal Code, as that section read on January 1, 2000, or a child care custodian, as defined in former Section 11165.7 of the Penal Code, as that section read on January 1, 2000. Notwithstanding any other law, counsel shall be given access to all records relevant to the case which are maintained by state or local public agencies. All information requested from a child protective agency regarding a child who is in protective custody, or from a child's guardian ad litem, shall be provided to the child's counsel within 30 days of the request.

(g) In a county of the third class, if counsel is to be provided to a child at county expense other than by counsel for the agency, the court shall first utilize the services of the public defender prior to appointing private counsel, to provide legal counsel. Nothing in this subdivision shall be construed to require the appointment of the public defender in any case in which the public defender has a conflict of interest. In the interest of justice, a court may depart from that portion of the procedure requiring appointment of the public defender after making a finding of good cause and stating the reasons therefor on the record.

(h) In a county of the third class, if counsel is to be appointed for a parent or guardian at county expense, the court shall first utilize the services of the alternate public defender, prior to appointing private counsel, to provide legal counsel. Nothing in this subdivision shall be construed to require the appointment of the alternate public defender in any case in which the public defender has a conflict of interest. In the interest of justice, a court may depart from that portion of the procedure requiring appointment of the alternate public defender after making a finding of good cause and stating the reasons therefor on the record.

SEC. 47. Section 360.6 of the Welfare and Institutions Code is repealed.

SEC. 48. Section 361 of the Welfare and Institutions Code is amended to read:

361. (a) In all cases in which a minor is adjudged a dependent child of the court on the ground that the minor is a person described by Section 300, the court may limit the control to be exercised over the dependent child by any parent or guardian and shall by its order clearly and specifically set forth all those limitations. Any limitation on the right of the parent or guardian to make educational decisions for the child shall be specifically addressed in the court order. The limitations may not exceed those necessary to protect the child. If the court specifically limits the right of the parent or guardian to make educational decisions for the child, the court shall at the same time appoint a responsible adult to make educational decisions for the child until one of the following occurs:

(1) The minor reaches 18 years of age, unless the child chooses not to make educational decisions for himself or herself, or is deemed by the court to be incompetent.

(2) Another responsible adult is appointed to make educational decisions for the minor pursuant to this section.

(3) The right of the parent or guardian to make educational decisions for the minor is fully restored.

(4) A successor guardian or conservator is appointed.

(5) The child is placed into a planned permanent living arrangement pursuant to paragraph (3) of subdivision (g) of Section 366.21, Section 366.22, or Section 366.26, at which time the foster parent, relative caretaker, or nonrelative extended family member as defined in Section 362.7, has the right to represent the child in educational matters pursuant to Section 56055 of the Education Code.

An individual who would have a conflict of interest in representing the child may not be appointed to make educational decisions. For purposes of this section, "an individual who would have a conflict of interest," means a person having any interests that might restrict or bias his or her ability to make educational decisions, including, but not limited to, those conflicts of interest prohibited by Section 1126 of the Government Code, and the receipt of compensation or attorneys' fees for the provision of services pursuant to this section. A foster parent may not be deemed to have a conflict of interest solely because he or she receives compensation for the provision of services pursuant to this section.

If the court is unable to appoint a responsible adult to make educational decisions for the child and paragraphs (1) to (5), inclusive, do not apply, and the child has either been referred to the local educational agency for special education and related services, or has a valid individualized education program, the court shall refer the child to the local educational agency for appointment of a surrogate parent pursuant to Section 7579.5 of the Government Code.

If the court cannot identify a responsible adult to make educational decisions for the child, the appointment of a surrogate parent as defined in subdivision (a) of Section 56050 of the Education Code is not warranted, and there is no foster parent to exercise the authority granted by Section 56055 of the Education Code, the court may, with the input of any interested person, make educational decisions for the child.

All educational and school placement decisions shall seek to ensure that the child is in the least restrictive educational programs and has access to the academic resources, services, and extracurricular and enrichment activities that are available to all pupils. In all instances, educational and school placement decisions shall be based on the best interests of the child.

(b) Subdivision (a) does not limit the ability of a parent to voluntarily relinquish his or her child to the State Department of Social Services or to a licensed county adoption agency at any time while the child is a dependent child of the juvenile court, if the department or agency is willing to accept the relinquishment.

(c) A dependent child may not be taken from the physical custody of his or her parents or guardian or guardians with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence of any of the following circumstances listed in

paragraphs (1) to (5), inclusive, and, in an Indian child custody proceeding, paragraph (6):

(1) There is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's or guardian's physical custody. The fact that a minor has been adjudicated a dependent child of the court pursuant to subdivision (e) of Section 300 shall constitute prima facie evidence that the minor cannot be safely left in the physical custody of the parent or guardian with whom the minor resided at the time of injury. The court shall consider, as a reasonable means to protect the minor, the option of removing an offending parent or guardian from the home. The court shall also consider, as a reasonable means to protect the minor, allowing a nonoffending parent or guardian to retain physical custody as long as that parent or guardian presents a plan acceptable to the court demonstrating that he or she will be able to protect the child from future harm.

(2) The parent or guardian of the minor is unwilling to have physical custody of the minor, and the parent or guardian has been notified that if the minor remains out of their physical custody for the period specified in Section 366.26, the minor may be declared permanently free from their custody and control.

(3) The minor is suffering severe emotional damage, as indicated by extreme anxiety, depression, withdrawal, or untoward aggressive behavior toward himself or herself or others, and there are no reasonable means by which the minor's emotional health may be protected without removing the minor from the physical custody of his or her parent or guardian.

(4) The minor or a sibling of the minor has been sexually abused, or is deemed to be at substantial risk of being sexually abused, by a parent, guardian, or member of his or her household, or other person known to his or her parent, and there are no reasonable means by which the minor can be protected from further sexual abuse or a substantial risk of sexual abuse without removing the minor from his or her parent or guardian, or the minor does not wish to return to his or her parent or guardian.

(5) The minor has been left without any provision for his or her support, or a parent who has been incarcerated or institutionalized cannot arrange for the care of the minor, or a relative or other adult custodian with whom the child has been left by the parent is unwilling or unable to provide care or support for the child and the whereabouts of the parent is unknown and reasonable efforts to locate him or her have been unsuccessful.

(6) In an Indian child custody proceeding, continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, and that finding is supported by testimony of a "qualified expert witness" as described in Section 224.6.

(A) Stipulation by the parent, Indian custodian, or the Indian child's tribe, or failure to object, may waive the requirement of producing

evidence of the likelihood of serious damage only if the court is satisfied that the party has been fully advised of the requirements of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.), and has knowingly, intelligently, and voluntarily waived them.

(B) Failure to meet non-Indian family and child-rearing community standards, or the existence of other behavior or conditions that meet the removal standards of this section, will not support an order for placement in the absence of the finding in this paragraph.

(d) The court shall make a determination as to whether reasonable efforts were made to prevent or to eliminate the need for removal of the minor from his or her home or, if the minor is removed for one of the reasons stated in paragraph (5) of subdivision (c), whether it was reasonable under the circumstances not to make any of those efforts, or, in the case of an Indian child custody proceeding, whether active efforts as required in Section 361.7 were made and that these efforts have proved unsuccessful. The court shall state the facts on which the decision to remove the minor is based.

(e) The court shall make all of the findings required by subdivision (a) of Section 366 in either of the following circumstances:

(1) The minor has been taken from the custody of his or her parent or guardian and has been living in an out-of-home placement pursuant to Section 319.

(2) The minor has been living in a voluntary out-of-home placement pursuant to Section 16507.4.

SEC. 49. Section 361.31 is added to the Welfare and Institutions Code, to read:

361.31. (a) In any case in which an Indian child is removed from the physical custody of his or her parents or Indian custodian pursuant to Section 361, the child's placement shall comply with this section.

(b) Any foster care or guardianship placement of an Indian child, or any emergency removal of a child who is known to be, or there is reason to know that the child is, an Indian child shall be in the least restrictive setting which most approximates a family situation and in which the child's special needs, if any, may be met. The child shall also be placed within reasonable proximity to the child's home, taking into account any special needs of the child. Preference shall be given to the child's placement with one of the following, in descending priority order:

(1) A member of the child's extended family, as defined in Section 1903 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.).

(2) A foster home licensed, approved, or specified by the child's tribe.

(3) An Indian foster home licensed or approved by an authorized 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 Indian child's needs.

(c) In any adoptive placement of an Indian child, preference shall be given to a placement with one of the following, in descending priority order:

(1) A member of the child's extended family, as defined in Section 1903 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.).

(2) Other members of the child's tribe.

(3) Another Indian family.

(d) Notwithstanding the placement preferences listed in subdivisions (b) and (c), if a different order of placement preference is established by the child's tribe, the court or agency effecting the placement shall follow the order of preference established by the tribe, so long as the placement is the least restrictive setting appropriate to the particular needs of the child as provided in subdivision (b).

(e) Where appropriate, the placement preference of the Indian child, when of sufficient age, or parent shall be considered. In applying the preferences, a consenting parent's request for anonymity shall also be given weight by the court or agency effecting the placement.

(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 child's tribe.

(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.

(h) The court may determine that good cause exists not to follow placement preferences applicable under subdivision (b), (c), or (d) in accordance with subdivision (e).

(i) When no preferred placement under subdivision (b), (c), or (d) is available, active efforts shall be made to place the child with a family committed to enabling the child to have extended family visitation and participation in the cultural and ceremonial events of the child's tribe.

(j) The burden of establishing the existence of good cause not to follow placement preferences applicable under subdivision (b), (c), or (d) shall be on the party requesting that the preferences not be followed.

(k) A record of each foster care placement or adoptive placement of an Indian child shall be maintained in perpetuity by the State Department of Social Services. The record shall document the active efforts to comply with the applicable order of preference specified in this section.

SEC. 50. Section 361.7 is added to the Welfare and Institutions Code, to read:

361.7. (a) Notwithstanding Section 361.5, a party seeking an involuntary foster care placement of, or termination of parental rights over, an Indian child shall provide evidence to the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(b) What constitutes active efforts shall be assessed on a case-by-case basis. The active efforts shall be made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe. Active efforts shall utilize the available resources of the Indian child's extended family, tribe, tribal and other Indian social service agencies, and individual Indian caregiver service providers.

(c) No foster care placement or guardianship may be ordered in the proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of a qualified expert witness, as defined in Section 224.6, 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.

SEC. 51. Section 366 of the Welfare and Institutions Code is amended to read:

366. (a) (1) The status of every dependent child in foster care shall be reviewed periodically as determined by the court but no less frequently than once every six months, as calculated from the date of the original dispositional hearing, until the hearing described in Section 366.26 is completed. The court shall consider the safety of the child and shall determine all of the following:

(A) The continuing necessity for and appropriateness of the placement.

(B) The extent of the agency's compliance with the case plan in making reasonable efforts, or, in the case of an Indian child, active efforts as described in Section 361.7, to return the child to a safe home and to complete any steps necessary to finalize the permanent placement of the child, including efforts to maintain relationships between a child who is 10 years of age or older and who has been in an out-of-home placement for six months or longer, and individuals other than the child's siblings who are important to the child, consistent with the child's best interests.

(C) Whether there should be any limitation on the right of the parent or guardian to make educational decisions for the child. That limitation shall be specifically addressed in the court order and may not exceed those necessary to protect the child. Whenever the court specifically limits the right of the parent or guardian to make educational decisions for the child, the court shall at the same time appoint a responsible adult to make educational decisions for the child pursuant to Section 361.

(D) (i) Whether the child has other siblings under the court's jurisdiction, and, if any siblings exist, all of the following:

(I) The nature of the relationship between the child and his or her siblings.

(II) The appropriateness of developing or maintaining the sibling relationships pursuant to Section 16002.

(III) If the siblings are not placed together in the same home, why the siblings are not placed together and what efforts are being made to place the siblings together, or why those efforts are not appropriate.

(IV) If the siblings are not placed together, the frequency and nature of the visits between siblings.

(V) The impact of the sibling relationships on the child's placement and planning for legal permanence.

(VI) The continuing need to suspend sibling interaction, if applicable, pursuant to subdivision (c) of Section 16002.

(ii) The factors the court may consider in making a determination regarding the nature of the child's sibling relationships may include, but are not limited to, whether the siblings were raised together in the same home, whether the siblings have shared significant common experiences or have existing close and strong bonds, whether either sibling expresses a desire to visit or live with his or her sibling, as applicable, and whether ongoing contact is in the child's best emotional interests.

(E) The extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care.

(2) The court shall project a likely date by which the child may be returned to and safely maintained in the home or placed for adoption, legal guardianship, or in another planned permanent living arrangement.

(b) Subsequent to the hearing, periodic reviews of each child in foster care shall be conducted pursuant to the requirements of Sections 366.3 and 16503.

(c) If the child has been placed out of state, each review described in subdivision (a) and any reviews conducted pursuant to Sections 366.3 and 16503 shall also address whether the out-of-state placement continues to be the most appropriate placement selection and in the best interests of the child.

(d) A child may not be placed in an out-of-state group home, or remain in an out-of-state group home, unless the group home is in compliance with Section 7911.1 of the Family Code.

(e) The implementation and operation of the amendments to subparagraph (B) of paragraph (1) of subdivision (a) enacted at the 2005–06 Regular Session shall be subject to appropriation through the budget process and by phase, as provided in Section 366.35.

SEC. 52. Section 366.26 of the Welfare and Institutions Code is amended to read:

366.26. (a) This section applies to children who are adjudged dependent children of the juvenile court pursuant to subdivision (c) of Section 360. The procedures specified herein are the exclusive procedures for conducting these hearings; Part 2 (commencing with Section 3020) of Division 8 of the Family Code is not applicable to these proceedings.

Section 8714.7 of the Family Code is applicable and available to all dependent children meeting the requirements of that section, if the postadoption contact agreement has been entered into voluntarily. For children who are adjudged dependent children of the juvenile court pursuant to subdivision (c) of Section 360, this section and Sections 8604, 8605, 8606, and 8700 of the Family Code and Chapter 5 (commencing with Section 7660) of Part 3 of Division 12 of the Family Code specify the exclusive procedures for permanently terminating parental rights with regard to, or establishing legal guardianship of, the child while the child is a dependent child of the juvenile court.

(b) At the hearing, which shall be held in juvenile court for all children who are dependents of the juvenile court, the court, in order to provide stable, permanent homes for these children, shall review the report as specified in Section 361.5, 366.21, or 366.22, shall indicate that the court has read and considered it, shall receive other evidence that the parties may present, and then shall make findings and orders in the following order of preference:

(1) Terminate the rights of the parent or parents and order that the child be placed for adoption and, upon the filing of a petition for adoption in the juvenile court, order that a hearing be set. The court shall proceed with the adoption after the appellate rights of the natural parents have been exhausted.

(2) On making a finding under paragraph (3) of subdivision (c), identify adoption as the permanent placement goal and order that efforts be made to locate an appropriate adoptive family for the child within a period not to exceed 180 days.

(3) Appoint a legal guardian for the child and order that letters of guardianship issue.

(4) Order that the child be placed in long-term foster care, subject to the periodic review of the juvenile court under Section 366.3.

In choosing among the above alternatives the court shall proceed pursuant to subdivision (c).

(c) (1) If the court determines, based on the assessment provided as ordered under subdivision (i) of Section 366.21 or subdivision (b) of Section 366.22, and any other relevant evidence, by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption. The fact that the child is not yet placed in a preadoptive home nor with a relative or foster family who is prepared to adopt the child, shall not constitute a basis for the court to conclude that it is not likely the child will be adopted. A finding under subdivision (b) or paragraph (1) of subdivision (e) of Section 361.5 that reunification services shall not be offered, under subdivision (e) of Section 366.21 that the whereabouts of a parent have been unknown for six months or that the parent has failed to visit or contact the child for six months or that the parent has been convicted of a felony indicating parental unfitness, or, under Section 366.21 or 366.22, that the court has continued to remove the child from the custody of the parent or guardian

and has terminated reunification services, shall constitute a sufficient basis for termination of parental rights unless the court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances:

(A) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.

(B) A child 12 years of age or older objects to termination of parental rights.

(C) The child is placed in a residential treatment facility, adoption is unlikely or undesirable, and continuation of parental rights will not prevent finding the child a permanent family placement if the parents cannot resume custody when residential care is no longer needed.

(D) The child is living with a relative, foster parent, or Indian custodian who is unable or unwilling to adopt the child because of exceptional circumstances, that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment and the removal of the child from the physical custody of his or her relative, foster parent, or Indian custodian would be detrimental to the emotional well-being of the child. This subparagraph does not apply to any child who is living with a nonrelative and who is either (i) under six years of age or (ii) a member of a sibling group where at least one child is under six years of age and the siblings are, or should be, permanently placed together. For purposes of an Indian child, "relative" shall include an "extended family member" as defined in the Indian Child Welfare Act (25 U.S.C. Sec. 1903(2)).

(E) There would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption.

(F) The child is an Indian child and there is a compelling reason for determining that termination of parental rights would not be in the best interest of the child, including, but not limited to:

(i) Termination of parental rights would substantially interfere with the child's connection to his or her tribal community or the child's tribal membership rights.

(ii) The child's tribe has identified guardianship, long-term foster care with a fit and willing relative, or another planned permanent living arrangement for the child.

If the court finds that termination of parental rights would be detrimental to the child pursuant to subparagraph (A), (B), (C), (D), (E), or (F), it shall state its reasons in writing or on the record.

(2) The court shall not terminate parental rights if:

(A) At each hearing at which the court was required to consider reasonable efforts or services, the court has found that reasonable efforts were not made or that reasonable services were not offered or provided.

(B) In the case of an Indian child:

(i) At the hearing terminating parental rights, the court has found that active efforts were not made as required in Section 361.7.

(ii) The court does not make a determination at the hearing terminating parental rights, supported by evidence beyond a reasonable doubt, including testimony of one or more "qualified expert witnesses" as defined in Section 224.6, that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child.

(3) If the court finds that termination of parental rights would not be detrimental to the child pursuant to paragraph (1) and that the child has a probability for adoption but is difficult to place for adoption and there is no identified or available prospective adoptive parent, the court may identify adoption as the permanent placement goal and without terminating parental rights, order that efforts be made to locate an appropriate adoptive family for the child within a period not to exceed 180 days. During this 180-day period, the public agency responsible for seeking adoptive parents for each child shall, to the extent possible, ask each child who is 10 years of age or older, to identify any individuals, other than the child's siblings, who are important to the child, in order to identify potential adoptive parents. The public agency may ask any other child to provide that information, as appropriate. During the 180-day period, the public agency shall, to the extent possible, contact other private and public adoption agencies regarding the availability of the child for adoption. During the 180-day period, the public agency shall conduct the search for adoptive parents in the same manner as prescribed for children in Sections 8708 and 8709 of the Family Code. At the expiration of this period, another hearing shall be held and the court shall proceed pursuant to paragraph (1) or (3) of subdivision (b). For purposes of this section, a child may only be found to be difficult to place for adoption if there is no identified or available prospective adoptive parent for the child because of the child's membership in a sibling group, or the presence of a diagnosed medical, physical, or mental handicap, or the child is the age of seven years or more.

(4) (A) If the court finds that adoption of the child or termination of parental rights is not in the best interest of the child, because one of the conditions in subparagraph (A), (B), (C), (D), (E), or (F) of paragraph (1) or in paragraph (2) applies, the court shall either order that the present caretakers or other appropriate persons shall become legal guardians of the child or order that the child remain in long-term foster care. Legal guardianship shall be considered before long-term foster care, if it is in the best interests of the child and if a suitable guardian can be found. A child who is 10 years of age or older, shall be asked to identify any individuals, other than the child's siblings, who are important to the child, in order to

identify potential guardians. The agency may ask any other child to provide that information, as appropriate.

(B) If the child is living with a relative or a foster parent who is willing and capable of providing a stable and permanent environment, but not willing to become a legal guardian, the child shall not be removed from the home if the court finds the removal would be seriously detrimental to the emotional well-being of the child because the child has substantial psychological ties to the relative caretaker or foster parents.

(C) The court shall also make an order for visitation with the parents or guardians unless the court finds by a preponderance of the evidence that the visitation would be detrimental to the physical or emotional well-being of the child.

(5) If the court finds that the child should not be placed for adoption, that legal guardianship shall not be established, and that there are no suitable foster parents except exclusive-use homes available to provide the child with a stable and permanent environment, the court may order the care, custody, and control of the child transferred from the county welfare department to a licensed foster family agency. The court shall consider the written recommendation of the county welfare director regarding the suitability of the transfer. The transfer shall be subject to further court orders.

The licensed foster family agency shall place the child in a suitable licensed or exclusive-use home that has been certified by the agency as meeting licensing standards. The licensed foster family agency shall be responsible for supporting the child and providing appropriate services to the child, including those services ordered by the court. Responsibility for the support of the child shall not, in and of itself, create liability on the part of the foster family agency to third persons injured by the child. Those children whose care, custody, and control are transferred to a foster family agency shall not be eligible for foster care maintenance payments or child welfare services, except for emergency response services pursuant to Section 16504.

(d) The proceeding for the appointment of a guardian for a child who is a dependent of the juvenile court shall be in the juvenile court. If the court finds pursuant to this section that legal guardianship is the appropriate permanent plan, it shall appoint the legal guardian and issue letters of guardianship. The assessment prepared pursuant to subdivision (g) of Section 361.5, subdivision (i) of Section 366.21, and subdivision (b) of Section 366.22 shall be read and considered by the court prior to the appointment, and this shall be reflected in the minutes of the court. The person preparing the assessment may be called and examined by any party to the proceeding.

(e) The proceeding for the adoption of a child who is a dependent of the juvenile court shall be in the juvenile court if the court finds pursuant to this section that adoption is the appropriate permanent plan and the petition for adoption is filed in the juvenile court. Upon the filing of a petition for adoption, the juvenile court shall order that an adoption

hearing be set. The court shall proceed with the adoption after the appellate rights of the natural parents have been exhausted. The full report required by Section 8715 of the Family Code shall be read and considered by the court prior to the adoption and this shall be reflected in the minutes of the court. The person preparing the report may be called and examined by any party to the proceeding. It is the intent of the Legislature, pursuant to this subdivision, to give potential adoptive parents the option of filing in the juvenile court the petition for the adoption of a child who is a dependent of the juvenile court. Nothing in this section is intended to prevent the filing of a petition for adoption in any other court as permitted by law, instead of in the juvenile court.

(f) At the beginning of any proceeding pursuant to this section, if the child or the parents are not being represented by previously retained or appointed counsel, the court shall proceed as follows:

(1) In accordance with subdivision (c) of Section 317, if a child before the court is without counsel, the court shall appoint counsel unless the court finds that the child would not benefit from the appointment of counsel. The court shall state on the record its reasons for that finding.

(2) If a parent appears without counsel and is unable to afford counsel, the court shall appoint counsel for the parent, unless this representation is knowingly and intelligently waived. The same counsel shall not be appointed to represent both the child and his or her parent. The public defender or private counsel may be appointed as counsel for the parent.

(3) Private counsel appointed under this section shall receive a reasonable sum for compensation and expenses, the amount of which shall be determined by the court. The amount shall be paid by the real parties in interest, other than the child, in any proportions the court deems just. However, if the court finds that any of the real parties in interest are unable to afford counsel, the amount shall be paid out of the general fund of the county.

(g) The court may continue the proceeding for a period of time not to exceed 30 days as necessary to appoint counsel, and to enable counsel to become acquainted with the case.

(h) (1) At all proceedings under this section, the court shall consider the wishes of the child and shall act in the best interests of the child.

(2) In accordance with Section 349, the child shall be present in court if the child or the child's counsel so requests or the court so orders. If the child is 10 years of age or older and is not present at a hearing held pursuant to this section, the court shall determine whether the minor was properly notified of his or her right to attend the hearing and inquire as to the reason why the child is not present.

(3) (A) The testimony of the child may be taken in chambers and outside the presence of the child's parent or parents, if the child's parent or parents are represented by counsel, the counsel is present, and any of the following circumstances exists:

(i) The court determines that testimony in chambers is necessary to ensure truthful testimony.

(ii) The child is likely to be intimidated by a formal courtroom setting.

(iii) The child is afraid to testify in front of his or her parent or parents.

(B) After testimony in chambers, the parent or parents of the child may elect to have the court reporter read back the testimony or have the testimony summarized by counsel for the parent or parents.

(C) The testimony of a child also may be taken in chambers and outside the presence of the guardian or guardians of a child under the circumstances specified in this subdivision.

(i) (1) Any order of the court permanently terminating parental rights under this section shall be conclusive and binding upon the child, upon the parent or parents and upon all other persons who have been served with citation by publication or otherwise as provided in this chapter. After making the order, the juvenile court shall have no power to set aside, change, or modify it, except as provided in paragraph (2), but nothing in this section shall be construed to limit the right to appeal the order.

(2) A child who has not been adopted after the passage of at least three years from the date the court terminated parental rights and for whom the court has determined that adoption is no longer the permanent plan may petition the juvenile court to reinstate parental rights pursuant to the procedure prescribed by Section 388. The child may file the petition prior to the expiration of this three-year period if the State Department of Social Services or licensed adoption agency that is responsible for custody and supervision of the child as described in subdivision (j) and the child stipulate that the child is no longer likely to be adopted. A child over 12 years of age shall sign the petition in the absence of a showing of good cause as to why the child could not do so. If it appears that the best interests of the child may be promoted by reinstatement of parental rights, the court shall order that a hearing be held and shall give prior notice, or cause prior notice to be given, to the social worker or probation officer and to the child's attorney of record, or, if there is no attorney of record for the child, to the child, and the child's tribe, if applicable, by means prescribed by subdivision (c) of Section 297. The court shall order the child or the social worker or probation officer to give prior notice of the hearing to the child's former parent or parents whose parental rights were terminated in the manner prescribed by subdivision (f) of Section 294 where the recommendation is adoption. The juvenile court shall grant the petition if it finds by clear and convincing evidence that the child is no longer likely to be adopted and that reinstatement of parental rights is in the child's best interest. If the court reinstates parental rights over a child who is under 12 years of age and for whom the new permanent plan will not be reunification with a parent or legal guardian, the court shall specify the factual basis for its findings that it is in the best interest of the child to reinstate parental rights. This subdivision is intended to be retroactive and applies to any child who is under the jurisdiction of the juvenile court at the time of the hearing regardless of the date parental rights were terminated.

(j) If the court, by order or judgment, declares the child free from the custody and control of both parents, or one parent if the other does not have custody and control, the court shall at the same time order the child referred to the State Department of Social Services or a licensed adoption agency for adoptive placement by the agency. However, a petition for adoption may not be granted until the appellate rights of the natural parents have been exhausted. The State Department of Social Services or licensed adoption agency shall be responsible for the custody and supervision of the child and shall be entitled to the exclusive care and control of the child at all times until a petition for adoption is granted, except as specified in subdivision (n). With the consent of the agency, the court may appoint a guardian of the child, who shall serve until the child is adopted.

(k) Notwithstanding any other provision of law, the application of any person who, as a relative caretaker or foster parent, has cared for a dependent child for whom the court has approved a permanent plan for adoption, or who has been freed for adoption, shall be given preference with respect to that child over all other applications for adoptive placement if the agency making the placement determines that the child has substantial emotional ties to the relative caretaker or foster parent and removal from the relative caretaker or foster parent would be seriously detrimental to the child's emotional well-being.

As used in this subdivision, "preference" means that the application shall be processed and, if satisfactory, the family study shall be completed before the processing of the application of any other person for the adoptive placement of the child.

(*l*) (1) An order by the court that a hearing pursuant to this section be held is not appealable at any time unless all of the following apply:

(A) A petition for extraordinary writ review was filed in a timely manner.

(B) The petition substantively addressed the specific issues to be challenged and supported that challenge by an adequate record.

(C) The petition for extraordinary writ review was summarily denied or otherwise not decided on the merits.

(2) Failure to file a petition for extraordinary writ review within the period specified by rule, to substantively address the specific issues challenged, or to support that challenge by an adequate record shall preclude subsequent review by appeal of the findings and orders made pursuant to this section.

(3) The Judicial Council shall adopt rules of court, effective January 1, 1995, to ensure all of the following:

(A) A trial court, after issuance of an order directing a hearing pursuant to this section be held, shall advise all parties of the requirement of filing a petition for extraordinary writ review as set forth in this subdivision in order to preserve any right to appeal in these issues. This notice shall be made orally to a party if the party is present at the time of the making of

the order or by first-class mail by the clerk of the court to the last known address of a party not present at the time of the making of the order.

(B) The prompt transmittal of the records from the trial court to the appellate court.

(C) That adequate time requirements for counsel and court personnel exist to implement the objective of this subdivision.

(D) That the parent or guardian, or their trial counsel or other counsel, is charged with the responsibility of filing a petition for extraordinary writ relief pursuant to this subdivision.

(4) The intent of this subdivision is to do both of the following:

(A) Make every reasonable attempt to achieve a substantive and meritorious review by the appellate court within the time specified in Sections 366.21 and 366.22 for holding a hearing pursuant to this section.

(B) Encourage the appellate court to determine all writ petitions filed pursuant to this subdivision on their merits.

(5) This subdivision shall only apply to cases in which an order to set a hearing pursuant to this section is issued on or after January 1, 1995.

(m) Except for subdivision (j), this section shall also apply to minors adjudged wards pursuant to Section 727.31.

(n) (1) Notwithstanding Section 8704 of the Family Code or any other provision of law, the court, at a hearing held pursuant to this section or anytime thereafter, may designate a current caretaker as a prospective adoptive parent if the child has lived with the caretaker for at least six months, the caretaker currently expresses a commitment to adopt the child, and the caretaker has taken at least one step to facilitate the adoption process. In determining whether to make that designation, the court may take into consideration whether the caretaker is listed in the preliminary assessment prepared by the county department in accordance with subdivision (i) of Section 366.21 as an appropriate person to be considered as an adoptive parent for the child and the recommendation of the State Department of Social Services or licensed adoption agency.

(2) For purposes of this subdivision, steps to facilitate the adoption process include, but are not limited to, the following:

(A) Applying for an adoption homestudy.

(B) Cooperating with an adoption homestudy.

(C) Being designated by the court or the licensed adoption agency as the adoptive family.

(D) Requesting de facto parent status.

(E) Signing an adoptive placement agreement.

(F) Engaging in discussions regarding a postadoption contact agreement.

(G) Working to overcome any impediments that have been identified by the State Department of Social Services and the licensed adoption agency.

(H) Attending classes required of prospective adoptive parents.

(3) Prior to a change in placement and as soon as possible after a decision is made to remove a child from the home of a designated

prospective adoptive parent, the agency shall notify the court, the designated prospective adoptive parent or the current caretaker, if that caretaker would have met the threshold criteria to be designated as a prospective adoptive parent pursuant to paragraph (1) on the date of service of this notice, the child's attorney, and the child, if the child is 10 years of age or older, of the proposal in the manner described in Section 16010.6.

(A) Within five court days or seven calendar days, whichever is longer, of the date of notification, the child, the child's attorney, or the designated prospective adoptive parent may file a petition with the court objecting to the proposal to remove the child, or the court, upon its own motion, may set a hearing regarding the proposal. The court may, for good cause, extend the filing period. A caretaker who would have met the threshold criteria to be designated as a prospective adoptive parent pursuant to paragraph (1) on the date of service of the notice of proposed removal of the child may file, together with the petition under this subparagraph, a petition for an order designating the caretaker as a prospective adoptive parent for purposes of this subdivision.

(B) A hearing ordered pursuant to this paragraph shall be held as soon as possible and not later than five court days after the petition is filed with the court or the court sets a hearing upon its own motion, unless the court for good cause is unable to set the matter for hearing five court days after the petition is filed, in which case the court shall set the matter for hearing as soon as possible. At the hearing, the court shall determine whether the caretaker has met the threshold criteria to be designated as a prospective adoptive parent pursuant to paragraph (1), and whether the proposed removal of the child from the home of the designated prospective adoptive parent is in the child's best interest, and the child may not be removed from the home of the designated prospective adoptive parent unless the court finds that removal is in the child's best interest. If the court determines that the caretaker did not meet the threshold criteria to be designated as a prospective adoptive parent on the date of service of the notice of proposed removal of the child, the petition objecting to the proposed removal filed by the caretaker shall be dismissed. If the caretaker was designated as a prospective adoptive parent prior to this hearing, the court shall inquire into any progress made by the caretaker towards the adoption of the child since the caretaker was designated as a prospective adoptive parent.

(C) A determination by the court that the caretaker is a designated prospective adoptive parent pursuant to paragraph (1) or subparagraph (B) does not make the caretaker a party to the dependency proceeding nor does it confer on the caretaker any standing to object to any other action of the department or licensed adoption agency, unless the caretaker has been declared a de facto parent by the court prior to the notice of removal served pursuant to paragraph (3).

(D) If a petition objecting to the proposal to remove the child is not filed, and the court, upon its own motion, does not set a hearing, the child

may be removed from the home of the designated prospective adoptive parent without a hearing.

(4) Notwithstanding paragraph (3), if the State Department of Social Services or a licensed adoption agency determines that the child must be removed from the home of the caretaker who is or may be a designated prospective adoptive parent immediately, due to a risk of physical or emotional harm, the agency may remove the child from that home and is not required to provide notice prior to the removal. However, as soon as possible and not longer than two court days after the removal, the agency shall notify the court, the caretaker who is or may be a designated prospective adoptive parent, the child's attorney, and the child, if the child is 10 years of age or older, of the removal. Within five court days or seven calendar days, whichever is longer, of the date of notification of the removal, the child, the child's attorney, or the caretaker who is or may be a designated prospective adoptive parent may petition for, or the court on its own motion may set, a noticed hearing pursuant to paragraph (3). The court may, for good cause, extend the filing period.

(5) Except as provided in subdivision (b) of Section 366.28, an order by the court issued after a hearing pursuant to this subdivision shall not be appealable.

(6) Nothing in this section shall preclude a county child protective services agency from fully investigating and responding to alleged abuse or neglect of a child pursuant to Section 11165.5 of the Penal Code.

(7) The Judicial Council shall prepare forms to facilitate the filing of the petitions described in this subdivision, which shall become effective on January 1, 2006.

(o) The implementation and operation of the amendments to paragraph (3) of subdivision (c) and subparagraph (A) of paragraph (4) of subdivision (c) enacted at the 2005-06 Regular Session shall be subject to appropriation through the budget process and by phase, as provided in Section 366.35.

SEC. 53. Section 727.4 of the Welfare and Institutions Code is amended to read:

727.4. (a) (1) Notice of any hearing pursuant to Section 727, 727.2, or 727.3 shall be mailed by the probation officer to the minor, the minor's parent or guardian, any adult provider of care to the minor including, but not limited to, foster parents, relative caregivers, preadoptive parents, community care facility, or foster family agency, and to the counsel of record if the counsel of record was not present at the time that the hearing was set by the court, by first-class mail addressed to the last known address of the person to be notified, or shall be personally served on those persons, not earlier than 30 days nor later than 15 days preceding the date of the hearing. The notice shall contain a statement regarding the nature of the status review or permanency planning hearing and any change in the custody or status of the minor being recommended by the probation department. The notice shall also include a statement informing the foster parents, relative caregivers, or preadoptive parents that he or she may

attend all hearings or may submit any information he or she deems relevant to the court in writing. The foster parents, relative caregiver, and preadoptive parents are entitled to notice and opportunity to be heard but need not be made parties to the proceedings. Proof of notice shall be filed with the court.

(2) If the court or probation officer knows or has reason to know that the minor is or may be an Indian child, any notice sent under this section shall comply with the requirements of Section 224.2.

(b) At least 10 calendar days prior to each status review and permanency planning hearing, after the hearing during which the court orders that the care, custody and control of the minor to be under the supervision of the probation officer for placement pursuant to subdivision (a) of Section 727, the probation officer shall file a social study report with the court, pursuant to the requirements listed in Section 706.5.

(c) The probation department shall inform the minor, the minor's parent or guardian, and all counsel of record that a copy of the social study prepared for the hearing will be available 10 days prior to the hearing and may be obtained from the probation officer.

(d) As used in Article 15 (commencing with Section 625) to Article 18 (commencing with Section 725), inclusive:

(1) "Foster care" means residential care provided in any of the settings described in Section 11402.

(2) "At risk of entering foster care" means that conditions within a minor's family may necessitate his or her entry into foster care unless those conditions are resolved.

(3) "Preadoptive parent" means a licensed foster parent who has been approved for adoption by the State Department of Social Services when it is acting as an adoption agency or by a licensed adoption agency.

(4) "Date of entry into foster care" means the date that is 60 days after the date on which the minor was removed from his or her home, unless one of the exceptions below applies:

(A) If the minor is detained pending foster care placement, and remains detained for more than 60 days, then the date of entry into foster care means the date the court adjudges the minor a ward and orders the minor placed in foster care under the supervision of the probation officer.

(B) If, before the minor is placed in foster care, the minor is committed to a ranch, camp, school, or other institution pending placement, and remains in that facility for more than 60 days, then the "date of entry into foster care" is the date the minor is physically placed in foster care.

(C) If at the time the wardship petition was filed, the minor was a dependent of the juvenile court and in out-of-home placement, then the "date of entry into foster care" is the earlier of the date the juvenile court made a finding of abuse or neglect, or 60 days after the date on which the child was removed from his or her home.

(5) "Reasonable efforts" means:

(A) Efforts made to prevent or eliminate the need for removing the minor from the minor's home.

(B) Efforts to make it possible for the minor to return home, including, but not limited to, case management, counseling, parenting training, mentoring programs, vocational training, educational services, substance abuse treatment, transportation, and therapeutic day services.

(C) Efforts to complete whatever steps are necessary to finalize a permanent plan for the minor.

(D) In child custody proceedings involving an Indian child, "reasonable efforts" shall also include "active efforts" as defined in Section 361.7.

(6) "Relative" means an adult who is related to the minor by blood, adoption, or affinity within the fifth degree of kinship including stepparents, stepsiblings, and all relatives whose status is preceded by the words "great," "great-great," "grand," or the spouse of any of these persons even if the marriage was terminated by death or dissolution. "Relative" shall also include an "extended family member" as defined in the Indian Child Welfare Act (25 U.S.C. Sec. 1903(2)).

(7) "Hearing" means a noticed proceeding with findings and orders that are made on a case-by-case basis, heard by either of the following:

(A) A judicial officer, in a courtroom, recorded by a court reporter.

(B) An administrative panel, provided that the hearing is a status review hearing and that the administrative panel meets the following conditions:

(i) The administrative review shall be open to participation by the minor and parents or legal guardians and all those persons entitled to notice under subdivision (a).

(ii) The minor and his or her parents or legal guardians receive proper notice as required in subdivision (a).

(iii) The administrative review panel is composed of persons appointed by the presiding judge of the juvenile court, the membership of which shall include at least one person who is not responsible for the case management of, or delivery of services to, the minor or the parents who are the subjects of the review.

(iv) The findings of the administrative review panel shall be submitted to the juvenile court for the court's approval and shall become part of the official court record.

SEC. 54. Section 10553.1 of the Welfare and Institutions Code is amended to read:

10553.1. (a) Notwithstanding any other provision of law, the director may enter into an agreement, in accordance with Section 1919 of Title 25 of the United States Code, with any California Indian tribe or any out-of-state Indian tribe regarding the care and custody of Indian children and jurisdiction over Indian child custody proceedings, including, but not limited to, agreements that provide for orderly transfer of jurisdiction on a case-by-case basis, for exclusive tribal or state jurisdiction, or for concurrent jurisdiction between the state and tribes.

(b) (1) An agreement under subdivision (a) regarding the care and custody of Indian children shall provide for the delegation to the tribe or tribes of the responsibility that would otherwise be the responsibility of the

county for the provision of child welfare services or assistance payments under the AFDC-FC program, or both.

(2) An agreement under subdivision (a) concerning the provision of child welfare services shall ensure that a tribe meets current service delivery standards provided for under Chapter 5 (commencing with Section 16500) of Part 4, and provides the local matching share of costs required by Section 10101.

(3) An agreement under subdivision (a) concerning assistance payments under the AFDC-FC program shall ensure that a tribe meets current foster care standards provided for under Article 5 (commencing with Section 11400) of Chapter 2 of Part 3, and provides the local matching share of costs required by Section 15200.

(c) Upon the implementation date of an agreement authorized by subdivision (b), the county that would otherwise be responsible for providing the child welfare services or AFDC-FC payments specified in the agreement as being provided by the tribe shall no longer be subject to that responsibility to children served under the agreement.

(d) Upon the effective date of an agreement authorized by subdivision (b), the tribe shall comply with fiscal reporting requirements specified by the department for federal and state reimbursement child welfare or AFDC-FC services.

(e) An Indian tribe that is a party to an agreement under subdivision (a), shall, in accordance with the agreement, be eligible to receive allocations of child welfare services funds pursuant to Section 10102.

(f) Implementation of an agreement under subdivision (a) may not be construed to impose liability upon, or to require indemnification by, the participating county or the State of California for any act or omission performed by an officer, agent, or employee of the participating tribe pursuant to this section.

SEC. 55. Section 16507.4 of the Welfare and Institutions Code is amended to read:

16507.4. (a) Notwithstanding any other provisions of this chapter, voluntary family reunification services shall be provided without fee to families who qualify, or would qualify if application had been made therefor, as recipients of public assistance under the Aid to Families with Dependent Children program. If the family is not qualified for aid, voluntary family reunification services may be utilized, provided that the county seeks reimbursement from the parent or guardian on a statewide sliding scale according to income as determined by the State Department of Social Services and approved by the Department of Finance.

(b) An out-of-home placement of a minor without adjudication by the juvenile court may occur only when all of the following conditions exist:

(1) There is a mutual decision between the child’s parent or guardian and the county welfare department in accordance with regulations promulgated by the State Department of Social Services.

(2) There is a written agreement between the county welfare department and the parent or guardian specifying the terms of the

voluntary placement. The State Department of Social Services shall develop a form for voluntary placement agreements which shall be used by all counties. The form shall indicate that foster care under the Aid to Families with Dependent Children program is available to those children.

(3) In the case of an Indian child, in accordance with Section 1913 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.), the following criteria are met:

(A) The parent or Indian custodian's consent to the voluntary out-of-home placement is executed in writing at least 10 days after the child's birth and recorded before a judge.

(B) The judge certifies that the terms and consequences of the consent were fully explained in detail in English and were fully understood by the parent or that they were interpreted into a language that the parent understood.

(C) A parent of an Indian child may withdraw his or her consent for any reason at any time and the child shall be returned to the parent.

(c) In the case of a voluntary placement pending relinquishment, a county welfare department shall have the option of delegating to a licensed private adoption agency the responsibility for placement by the county welfare department. If such a delegation occurs, the voluntary placement agreement shall be signed by the county welfare department, the child's parent or guardian, and the licensed private adoption agency.

(d) The State Department of Social Services shall amend its plan pursuant to Part E (commencing with Section 670) of Subchapter IV of Chapter 7 of Title 42 of the United States Code in order to conform to mandates of Public Law 96-272 for federal financial participation in voluntary placements.

SEC. 56. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

SEC. 57. (a) Section 42.5 of this bill incorporates amendments to Section 295 of the Welfare and Institutions Code proposed by both this bill and Senate Bill 1667. It shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2007, (2) each bill amends Section 295 of the Welfare and Institutions Code, and (3) this bill is enacted after Senate Bill 1667, in which case Section 42 of this bill shall not become operative.

(b) Section 46.5 of this bill incorporates amendments to Section 317 of the Welfare and Institutions Code proposed by both this bill and Assembly Bill 2480. It shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2007, (2) each bill amends Section 317 of the Welfare and Institutions Code, and (3) this bill is

enacted after Assembly Bill 2480, in which case Section 46 of this bill shall not become operative.

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Appendix D:

ASSEMBLY BILL 1325

(2009-2010 Reg. Sess); 2009 Cal. Stats., ch. 287

Assembly Bill No. 1325

CHAPTER 287

An act to add and repeal Section 8600.5 of the Family Code, and to amend, repeal, and add Sections 294, 358.1, 361.5, 366.21, 366.22, 366.25, 366.26, 366.3, 16120, 16508, and 16508.1 of, and to add and repeal Section 366.24 of, the Welfare and Institutions Code, relating to Indian children.

[Approved by Governor October 11, 2009. Filed with Secretary of State October 11, 2009.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1325, Cook. Tribal customary adoption.

(1) Existing law governs the removal of a child who has suffered or is at risk of suffering abuse or neglect from the home of the child's parent or guardian and the placement of that child in foster care. These provisions require the juvenile court to, among other things, conduct noticed detention, periodic status review, and dispositional hearings regarding the child, and direct the court to order, review, and receive into evidence social studies or evaluations regarding the child, including recommendations for placement. Under certain circumstances, the juvenile court may terminate parental rights and place the child for adoption or in long-term foster care, among other options for permanent placement. These provisions require county social workers to conduct the social studies or evaluations and to prepare reports and make recommendations to the court regarding temporary and long-term placement of the child, as specified.

Existing federal law, the Indian Child Welfare Act, and state law govern the placement of children who are or who may be Indian children, as specified

This bill would revise those provisions to require the juvenile court and social workers to consider and recommend tribal customary adoption, as defined, as an additional permanent placement option, without termination of parental rights, for a dependent child. The bill would provide that a tribal customary adoption order would have the same force and effect as an order of adoption. By imposing new duties on social workers, the bill would impose a state-mandated local program.

(2) Existing law governs independent and agency adoptions.

This bill would specifically exempt tribal customary adoptions from those provisions.

(3) The bill would require the Judicial Council to adopt rules of court and necessary forms to implement tribal customary adoption as a permanent plan for Indian children before July 1, 2010. The bill would also require the Judicial Council to complete a study of these provisions and report its findings to the Legislature on or before January 1, 2013.

(4) The amendments implementing tribal customary adoption would become operative on July 1, 2010, and would be repealed on January 1, 2014.

(5) This bill would permit the Department of Social Services to adopt emergency regulations to implement and administer the provisions of this bill.

(6) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

The people of the State of California do enact as follows:

SECTION 1. Section 8600.5 is added to the Family Code, to read:

8600.5. (a) Tribal customary adoption as defined in Section 366.24 of the Welfare and Institutions Code and as applied to Indian Children who are dependents of the court, does not apply to this part.

(b) This section shall remain in effect only until January 1, 2014, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2014, deletes or extends that date.

SEC. 2. Section 294 of the Welfare and Institutions Code is amended to read:

294. The social worker or probation officer shall give notice of a selection and implementation hearing held pursuant to Section 366.26 in the following manner:

(a) Notice of the hearing shall be given to the following persons:

(1) The mother.

(2) The fathers, presumed and alleged.

(3) The child, if the child is 10 years of age or older.

(4) Any known sibling of the child who is the subject of the hearing if that sibling either is the subject of a dependency proceeding or has been adjudged to be a dependent child of the juvenile court. If the sibling is 10 years of age or older, the sibling, the sibling's caregiver, and the sibling's attorney. If the sibling is under 10 years of age, the sibling's caregiver and the sibling's attorney. However, notice is not required to be given to any sibling whose matter is calendared in the same court on the same day.

(5) The grandparents of the child, if their address is known and if the parent's whereabouts are unknown.

(6) All counsel of record.

(7) To any unknown parent by publication, if ordered by the court pursuant to paragraph (2) of subdivision (g).

(8) The current caregiver of the child, including foster parents, relative caregivers, preadoptive parents, and nonrelative extended family members.

Any person notified may attend all hearings and may submit any information he or she deems relevant to the court in writing.

(b) The following persons shall not be notified of the hearing:

(1) A parent who has relinquished the child to the State Department of Social Services or to a licensed adoption agency for adoption, and the relinquishment has been accepted and filed with notice as required under Section 8700 of the Family Code.

(2) An alleged father who has denied paternity and has executed a waiver of the right to notice of further proceedings.

(3) A parent whose parental rights have been terminated.

(c) (1) Service of the notice shall be completed at least 45 days before the hearing date. Service is deemed complete at the time the notice is personally delivered to the person named in the notice or 10 days after the notice has been placed in the mail, or at the expiration of the time prescribed by the order for publication.

(2) Service of notice in cases where publication is ordered shall be completed at least 30 days before the date of the hearing.

(d) Regardless of the type of notice required, or the manner in which it is served, once the court has made the initial finding that notice has properly been given to the parent, or to any person entitled to receive notice pursuant to this section, subsequent notice for any continuation of a Section 366.26 hearing may be by first-class mail to any last known address, by an order made pursuant to Section 296, or by any other means that the court determines is reasonably calculated, under any circumstance, to provide notice of the continued hearing. However, if the recommendation changes from the recommendation contained in the notice previously found to be proper, notice shall be provided to the parent, and to any person entitled to receive notice pursuant to this section, regarding that subsequent hearing.

(e) The notice shall contain the following information:

(1) The date, time, and place of the hearing.

(2) The right to appear.

(3) The parents' right to counsel.

(4) The nature of the proceedings.

(5) The recommendation of the supervising agency.

(6) A statement that, at the time of hearing, the court is required to select a permanent plan of adoption, legal guardianship, or long-term foster care for the child.

(f) Notice to the parents may be given in any one of the following manners:

(1) If the parent is present at the hearing at which the court schedules a hearing pursuant to Section 366.26, the court shall advise the parent of the date, time, and place of the proceedings, their right to counsel, the nature of the proceedings, and the requirement that at the proceedings the court shall select and implement a plan of adoption, legal guardianship, or long-term foster care for the child. The court shall direct the parent to appear for the proceedings and then direct that the parent be notified thereafter by first-class mail to the parent's usual place of residence or business only.

(2) Certified mail, return receipt requested, to the parent's last known mailing address. This notice shall be sufficient if the child welfare agency receives a return receipt signed by the parent.

(3) Personal service to the parent named in the notice.

(4) Delivery to a competent person who is at least 18 years of age at the parent's usual place of residence or business, and thereafter mailed to the parent named in the notice by first-class mail at the place where the notice was delivered.

(5) If the residence of the parent is outside the state, service may be made as described in paragraph (1), (3), or (4) or by certified mail, return receipt requested.

(6) If the recommendation of the probation officer or social worker is legal guardianship or long-term foster care, or, in the case of an Indian child, tribal customary adoption, service may be made by first-class mail to the parent's usual place of residence or business.

(7) If a parent's identity is known but his or her whereabouts are unknown and the parent cannot, with reasonable diligence, be served in any manner specified in paragraphs (1) to (6), inclusive, the petitioner shall file an affidavit with the court at least 75 days before the hearing date, stating the name of the parent and describing the efforts made to locate and serve the parent.

(A) If the court determines that there has been due diligence in attempting to locate and serve the parent and the probation officer or social worker recommends adoption, service shall be to that parent's attorney of record, if any, by certified mail, return receipt requested. If the parent does not have an attorney of record, the court shall order that service be made by publication of citation requiring the parent to appear at the date, time, and place stated in the citation, and that the citation be published in a newspaper designated as most likely to give notice to the parent. Publication shall be made once a week for four consecutive weeks. Whether notice is to the attorney of record or by publication, the court shall also order that notice be given to the grandparents of the child, if their identities and addresses are known, by first-class mail.

(B) If the court determines that there has been due diligence in attempting to locate and serve the parent and the probation officer or social worker recommends legal guardianship or long-term foster care, no further notice is required to the parent, but the court shall order that notice be given to the grandparents of the child, if their identities and addresses are known, by first-class mail.

(C) In any case where the residence of the parent becomes known, notice shall immediately be served upon the parent as provided for in either paragraph (2), (3), (4), (5), or (6).

(g) (1) If the identity of one or both of the parents, or alleged parents, of the child is unknown, or if the name of one or both parents is uncertain, then that fact shall be set forth in the affidavit filed with the court at least 75 days before the hearing date and the court, consistent with the provisions of Sections 7665 and 7666 of the Family Code, shall issue an order

dispensing with notice to a natural parent or possible natural parent under this section if, after inquiry and a determination that there has been due diligence in attempting to identify the unknown parent, the court is unable to identify the natural parent or possible natural parent and no person has appeared claiming to be the natural parent.

(2) After a determination that there has been due diligence in attempting to identify an unknown parent pursuant to paragraph (1) and the probation officer or social worker recommends adoption, the court shall consider whether publication notice would be likely to lead to actual notice to the unknown parent. The court may order publication notice if, on the basis of all information before the court, the court determines that notice by publication is likely to lead to actual notice to the parent. If publication notice to an unknown parent is ordered, the court shall order the published citation to be directed to either the father or mother, or both, of the child, and to all persons claiming to be the father or mother of the child, naming and otherwise describing the child. An order of publication pursuant to this paragraph shall be based on an affidavit describing efforts made to identify the unknown parent or parents. Service made by publication pursuant to this paragraph shall require the unknown parent or parents to appear at the date, time, and place stated in the citation. Publication shall be made once a week for four consecutive weeks.

(3) If the court determines that there has been due diligence in attempting to identify one or both of the parents, or alleged parents, of the child and the probation officer or social worker recommends legal guardianship or long-term foster care, no further notice to the parent shall be required.

(h) Notice to the child and all counsel of record shall be by first-class mail.

(i) If the court knows or has reason to know that an Indian child is involved, notice shall be given in accordance with Section 224.2.

(j) Notwithstanding subdivision (a), if the attorney of record is present at the time the court schedules a hearing pursuant to Section 366.26, no further notice is required, except as required by subparagraph (A) of paragraph (7) of subdivision (f).

(k) This section shall also apply to children adjudged wards pursuant to Section 727.31.

(*l*) The court shall state the reasons on the record explaining why good cause exists for granting any continuance of a hearing held pursuant to Section 366.26 to fulfill the requirements of this section.

(m) This section shall remain in effect only until January 1, 2014, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2014, deletes or extends that date.

SEC. 3. Section 294 is added to the Welfare and Institutions Code, to read:

294. The social worker or probation officer shall give notice of a selection and implementation hearing held pursuant to Section 366.26 in the following manner:

(a) Notice of the hearing shall be given to the following persons:

(1) The mother.

(2) The fathers, presumed and alleged.

(3) The child, if the child is 10 years of age or older.

(4) Any known sibling of the child who is the subject of the hearing if that sibling either is the subject of a dependency proceeding or has been adjudged to be a dependent child of the juvenile court. If the sibling is 10 years of age or older, the sibling, the sibling's caregiver, and the sibling's attorney. If the sibling is under 10 years of age, the sibling's caregiver and the sibling's attorney. However, notice is not required to be given to any sibling whose matter is calendared in the same court on the same day.

(5) The grandparents of the child, if their address is known and if the parent's whereabouts are unknown.

(6) All counsel of record.

(7) To any unknown parent by publication, if ordered by the court pursuant to paragraph (2) of subdivision (g).

(8) The current caregiver of the child, including foster parents, relative caregivers, preadoptive parents, and nonrelative extended family members. Any person notified may attend all hearings and may submit any information he or she deems relevant to the court in writing.

(b) The following persons shall not be notified of the hearing:

(1) A parent who has relinquished the child to the State Department of Social Services or to a licensed adoption agency for adoption, and the relinquishment has been accepted and filed with notice as required under Section 8700 of the Family Code.

(2) An alleged father who has denied paternity and has executed a waiver of the right to notice of further proceedings.

(3) A parent whose parental rights have been terminated.

(c) (1) Service of the notice shall be completed at least 45 days before the hearing date. Service is deemed complete at the time the notice is personally delivered to the person named in the notice or 10 days after the notice has been placed in the mail, or at the expiration of the time prescribed by the order for publication.

(2) Service of notice in cases where publication is ordered shall be completed at least 30 days before the date of the hearing.

(d) Regardless of the type of notice required, or the manner in which it is served, once the court has made the initial finding that notice has properly been given to the parent, or to any person entitled to receive notice pursuant to this section, subsequent notice for any continuation of a Section 366.26 hearing may be by first-class mail to any last known address, by an order made pursuant to Section 296, or by any other means that the court determines is reasonably calculated, under any circumstance, to provide notice of the continued hearing. However, if the recommendation changes from the recommendation contained in the notice previously found to be proper, notice shall be provided to the parent, and to any person entitled to receive notice pursuant to this section, regarding that subsequent hearing.

(e) The notice shall contain the following information:

(1) The date, time, and place of the hearing.

(2) The right to appear.
(3) The parents' right to counsel.
(4) The nature of the proceedings.
(5) The recommendation of the supervising agency.
(6) A statement that, at the time of hearing, the court is required to select a permanent plan of adoption, legal guardianship, or long-term foster care for the child.

(f) Notice to the parents may be given in any one of the following manners:

(1) If the parent is present at the hearing at which the court schedules a hearing pursuant to Section 366.26, the court shall advise the parent of the date, time, and place of the proceedings, their right to counsel, the nature of the proceedings, and the requirement that at the proceedings the court shall select and implement a plan of adoption, legal guardianship, or long-term foster care for the child. The court shall direct the parent to appear for the proceedings and then direct that the parent be notified thereafter by first-class mail to the parent's usual place of residence or business only.

(2) Certified mail, return receipt requested, to the parent's last known mailing address. This notice shall be sufficient if the child welfare agency receives a return receipt signed by the parent.

(3) Personal service to the parent named in the notice.

(4) Delivery to a competent person who is at least 18 years of age at the parent's usual place of residence or business, and thereafter mailed to the parent named in the notice by first-class mail at the place where the notice was delivered.

(5) If the residence of the parent is outside the state, service may be made as described in paragraph (1), (3), or (4) or by certified mail, return receipt requested.

(6) If the recommendation of the probation officer or social worker is legal guardianship or long-term foster care, service may be made by first-class mail to the parent's usual place of residence or business.

(7) If a parent's identity is known but his or her whereabouts are unknown and the parent cannot, with reasonable diligence, be served in any manner specified in paragraphs (1) to (6), inclusive, the petitioner shall file an affidavit with the court at least 75 days before the hearing date, stating the name of the parent and describing the efforts made to locate and serve the parent.

(A) If the court determines that there has been due diligence in attempting to locate and serve the parent and the probation officer or social worker recommends adoption, service shall be to that parent's attorney of record, if any, by certified mail, return receipt requested. If the parent does not have an attorney of record, the court shall order that service be made by publication of citation requiring the parent to appear at the date, time, and place stated in the citation, and that the citation be published in a newspaper designated as most likely to give notice to the parent. Publication shall be made once a week for four consecutive weeks. Whether notice is to the attorney of record or by publication, the court shall also order that notice

be given to the grandparents of the child, if their identities and addresses are known, by first-class mail.

(B) If the court determines that there has been due diligence in attempting to locate and serve the parent and the probation officer or social worker recommends legal guardianship or long-term foster care, no further notice is required to the parent, but the court shall order that notice be given to the grandparents of the child, if their identities and addresses are known, by first-class mail.

(C) In any case where the residence of the parent becomes known, notice shall immediately be served upon the parent as provided for in either paragraph (2), (3), (4), (5), or (6).

(g) (1) If the identity of one or both of the parents, or alleged parents, of the child is unknown, or if the name of one or both parents is uncertain, then that fact shall be set forth in the affidavit filed with the court at least 75 days before the hearing date and the court, consistent with the provisions of Sections 7665 and 7666 of the Family Code, shall issue an order dispensing with notice to a natural parent or possible natural parent under this section if, after inquiry and a determination that there has been due diligence in attempting to identify the unknown parent, the court is unable to identify the natural parent or possible natural parent and no person has appeared claiming to be the natural parent.

(2) After a determination that there has been due diligence in attempting to identify an unknown parent pursuant to paragraph (1) and the probation officer or social worker recommends adoption, the court shall consider whether publication notice would be likely to lead to actual notice to the unknown parent. The court may order publication notice if, on the basis of all information before the court, the court determines that notice by publication is likely to lead to actual notice to the parent. If publication notice to an unknown parent is ordered, the court shall order the published citation to be directed to either the father or mother, or both, of the child, and to all persons claiming to be the father or mother of the child, naming and otherwise describing the child. An order of publication pursuant to this paragraph shall be based on an affidavit describing efforts made to identify the unknown parent or parents. Service made by publication pursuant to this paragraph shall require the unknown parent or parents to appear at the date, time, and place stated in the citation. Publication shall be made once a week for four consecutive weeks.

(3) If the court determines that there has been due diligence in attempting to identify one or both of the parents, or alleged parents, of the child and the probation officer or social worker recommends legal guardianship or long-term foster care, no further notice to the parent shall be required.

(h) Notice to the child and all counsel of record shall be by first-class mail.

(i) If the court knows or has reason to know that an Indian child is involved, notice shall be given in accordance with Section 224.2.

(j) Notwithstanding subdivision (a), if the attorney of record is present at the time the court schedules a hearing pursuant to Section 366.26, no

further notice is required, except as required by subparagraph (A) of paragraph (7) of subdivision (f).

(k) This section shall also apply to children adjudged wards pursuant to Section 727.31.

(*l*) The court shall state the reasons on the record explaining why good cause exists for granting any continuance of a hearing held pursuant to Section 366.26 to fulfill the requirements of this section.

(m) This section shall become operative on January 1, 2014.

SEC. 4. Section 358.1 of the Welfare and Institutions Code is amended to read:

358.1. Each social study or evaluation made by a social worker or child advocate appointed by the court, required to be received in evidence pursuant to Section 358, shall include, but not be limited to, a factual discussion of each of the following subjects:

(a) Whether the county welfare department or social worker has considered child protective services, as defined in Chapter 5 (commencing with Section 16500) of Part 4 of Division 9, as a possible solution to the problems at hand, and has offered these services to qualified parents if appropriate under the circumstances.

(b) What plan, if any, for return of the child to his or her parents and for achieving legal permanence for the child if efforts to reunify fail, is recommended to the court by the county welfare department or probation officer.

(c) Whether the best interests of the child will be served by granting reasonable visitation rights with the child to his or her grandparents, in order to maintain and strengthen the child's family relationships.

(d) (1) Whether the child has siblings under the court's jurisdiction, and, if any siblings exist, all of the following:

(A) The nature of the relationship between the child and his or her siblings.

(B) The appropriateness of developing or maintaining the sibling relationships pursuant to Section 16002.

(C) If the siblings are not placed together in the same home, why the siblings are not placed together and what efforts are being made to place the siblings together, or why those efforts are not appropriate.

(D) If the siblings are not placed together, the frequency and nature of the visits between siblings.

(E) The impact of the sibling relationships on the child's placement and planning for legal permanence.

(2) The factual discussion shall include a discussion of indicators of the nature of the child's sibling relationships, including, but not limited to, whether the siblings were raised together in the same home, whether the siblings have shared significant common experiences or have existing close and strong bonds, whether either sibling expresses a desire to visit or live with his or her sibling, as applicable, and whether ongoing contact is in the child's best emotional interest.

(e) If the parent or guardian is unwilling or unable to participate in making an educational decision for his or her child, or if other circumstances exist that compromise the ability of the parent or guardian to make educational decisions for the child, the county welfare department or social worker shall consider whether the right of the parent or guardian to make educational decisions for the child should be limited. If the study or evaluation makes that recommendation, it shall identify whether there is a responsible adult available to make educational decisions for the child pursuant to Section 361.

(f) Whether the child appears to be a person who is eligible to be considered for further court action to free the child from parental custody and control.

(g) Whether the parent has been advised of his or her option to participate in adoption planning, including the option to enter into a postadoption contact agreement as described in Section 8714.7 of the Family Code, and to voluntarily relinquish the child for adoption if an adoption agency is willing to accept the relinquishment.

(h) The appropriateness of any relative placement pursuant to Section 361.3. However, this consideration may not be cause for continuance of the dispositional hearing.

(i) Whether the caregiver desires, and is willing, to provide legal permanency for the child if reunification is unsuccessful.

(j) For an Indian child, in consultation with the Indian child's tribe, whether tribal customary adoption is an appropriate permanent plan for the child if reunification is unsuccessful.

(k) This section shall remain in effect only until January 1, 2014, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2014, deletes or extends that date.

SEC. 5. Section 358.1 is added to the Welfare and Institutions Code, to read:

358.1. Each social study or evaluation made by a social worker or child advocate appointed by the court, required to be received in evidence pursuant to Section 358, shall include, but not be limited to, a factual discussion of each of the following subjects:

(a) Whether the county welfare department or social worker has considered child protective services, as defined in Chapter 5 (commencing with Section 16500) of Part 4 of Division 9, as a possible solution to the problems at hand, and has offered these services to qualified parents if appropriate under the circumstances.

(b) What plan, if any, for return of the child to his or her parents and for achieving legal permanence for the child if efforts to reunify fail, is recommended to the court by the county welfare department or probation officer.

(c) Whether the best interests of the child will be served by granting reasonable visitation rights with the child to his or her grandparents, in order to maintain and strengthen the child's family relationships.

(d) (1) Whether the child has siblings under the court's jurisdiction, and, if any siblings exist, all of the following:

(A) The nature of the relationship between the child and his or her siblings.

(B) The appropriateness of developing or maintaining the sibling relationships pursuant to Section 16002.

(C) If the siblings are not placed together in the same home, why the siblings are not placed together and what efforts are being made to place the siblings together, or why those efforts are not appropriate.

(D) If the siblings are not placed together, the frequency and nature of the visits between siblings.

(E) The impact of the sibling relationships on the child's placement and planning for legal permanence.

(2) The factual discussion shall include a discussion of indicators of the nature of the child's sibling relationships, including, but not limited to, whether the siblings were raised together in the same home, whether the siblings have shared significant common experiences or have existing close and strong bonds, whether either sibling expresses a desire to visit or live with his or her sibling, as applicable, and whether ongoing contact is in the child's best emotional interest.

(e) If the parent or guardian is unwilling or unable to participate in making an educational decision for his or her child, or if other circumstances exist that compromise the ability of the parent or guardian to make educational decisions for the child, the county welfare department or social worker shall consider whether the right of the parent or guardian to make educational decisions for the child should be limited. If the study or evaluation makes that recommendation, it shall identify whether there is a responsible adult available to make educational decisions for the child pursuant to Section 361.

(f) Whether the child appears to be a person who is eligible to be considered for further court action to free the child from parental custody and control.

(g) Whether the parent has been advised of his or her option to participate in adoption planning, including the option to enter into a postadoption contact agreement as described in Section 8714.7 of the Family Code, and to voluntarily relinquish the child for adoption if an adoption agency is willing to accept the relinquishment.

(h) The appropriateness of any relative placement pursuant to Section 361.3. However, this consideration may not be cause for continuance of the dispositional hearing.

(i) Whether the caregiver desires, and is willing, to provide legal permanency for the child if reunification is unsuccessful.

(j) This section shall become operative on January 1, 2014.

SEC. 6. Section 361.5 of the Welfare and Institutions Code is amended to read:

361.5. (a) Except as provided in subdivision (b), or when the parent has voluntarily relinquished the child and the relinquishment has been filed with

the State Department of Social Services, or upon the establishment of an order of guardianship pursuant to Section 360, whenever a child is removed from a parent's or guardian's custody, the juvenile court shall order the social worker to provide child welfare services to the child and the child's mother and statutorily presumed father or guardians. Upon a finding and declaration of paternity by the juvenile court or proof of a prior declaration of paternity by any court of competent jurisdiction, the juvenile court may order services for the child and the biological father, if the court determines that the services will benefit the child.

(1) Family reunification services, when provided, shall be provided as follows:

(A) Except as otherwise provided in subparagraph (C), for a child who, on the date of initial removal from the physical custody of his or her parent or guardian, was three years of age or older, court-ordered services shall be provided beginning with the dispositional hearing and ending 12 months after the date the child entered foster care as defined in Section 361.49, unless the child is returned to the home of the parent or guardian.

(B) For a child who, on the date of initial removal from the physical custody of his or her parent or guardian, was under three years of age, court-ordered services shall be provided for a period of six months from the dispositional hearing as provided in subdivision (e) of Section 366.21, but no longer than 12 months from the date the child entered foster care as defined in Section 361.49 unless the child is returned to the home of the parent or guardian.

(C) For the purpose of placing and maintaining a sibling group together in a permanent home should reunification efforts fail, for a child in a sibling group whose members were removed from parental custody at the same time, and in which one member of the sibling group was under three years of age on the date of initial removal from the physical custody of his or her parent or guardian, court-ordered services for some or all of the sibling group may be limited as set forth in subparagraph (B). For the purposes of this paragraph, "a sibling group" shall mean two or more children who are related to each other as full or half siblings.

(2) Any motion to terminate court-ordered reunification services prior to the hearing set pursuant to subdivision (f) of Section 366.21 for a child described by subparagraph (A) of paragraph (1), or prior to the hearing set pursuant to subdivision (e) of Section 366.21 for a child described by subparagraph (B) or (C) of paragraph (1), shall be made pursuant to the requirements set forth in subdivision (c) of Section 388. A motion to terminate court-ordered reunification services shall not be required at the hearing set pursuant to subdivision (e) of Section 366.21 if the court finds by clear and convincing evidence one of the following:

(A) That the child was removed initially under subdivision (g) of Section 300 and the whereabouts of the parent are still unknown.

(B) That the parent has failed to contact and visit the child.

(C) That the parent has been convicted of a felony indicating parental unfitness.

(3) Notwithstanding subparagraphs (A), (B), and (C) of paragraph (1), court-ordered services may be extended up to a maximum time period not to exceed 18 months after the date the child was originally removed from physical custody of his or her parent or guardian if it can be shown, at the hearing held pursuant to subdivision (f) of Section 366.21, that the permanent plan for the child is that he or she will be returned and safely maintained in the home within the extended time period. The court shall extend the time period only if it finds that there is a substantial probability that the child will be returned to the physical custody of his or her parent or guardian within the extended time period or that reasonable services have not been provided to the parent or guardian. In determining whether court-ordered services may be extended, the court shall consider the special circumstances of an incarcerated or institutionalized parent or parents, or parent or parents court-ordered to a residential substance abuse treatment program, including, but not limited to, barriers to the parent's or guardian's access to services and ability to maintain contact with his or her child. The court shall also consider, among other factors, good faith efforts that the parent or guardian has made to maintain contact with the child. If the court extends the time period, the court shall specify the factual basis for its conclusion that there is a substantial probability that the child will be returned to the physical custody of his or her parent or guardian within the extended time period. The court also shall make findings pursuant to subdivision (a) of Section 366 and subdivision (e) of Section 358.1.

When counseling or other treatment services are ordered, the parent or guardian shall be ordered to participate in those services, unless the parent's or guardian's participation is deemed by the court to be inappropriate or potentially detrimental to the child, or unless a parent or guardian is incarcerated and the corrections facility in which he or she is incarcerated does not provide access to the treatment services ordered by the court. Physical custody of the child by the parents or guardians during the applicable time period under subparagraph (A), (B), or (C) of paragraph (1) shall not serve to interrupt the running of the period. If at the end of the applicable time period, a child cannot be safely returned to the care and custody of a parent or guardian without court supervision, but the child clearly desires contact with the parent or guardian, the court shall take the child's desire into account in devising a permanency plan.

In cases where the child was under three years of age on the date of the initial removal from the physical custody of his or her parent or guardian or is a member of a sibling group as described in subparagraph (C) of paragraph (1), the court shall inform the parent or guardian that the failure of the parent or guardian to participate regularly in any court-ordered treatment programs or to cooperate or avail himself or herself of services provided as part of the child welfare services case plan may result in a termination of efforts to reunify the family after six months. The court shall inform the parent or guardian of the factors used in subdivision (e) of Section 366.21 to determine whether to limit services to six months for some or all

members of a sibling group as described in subparagraph (C) of paragraph (1).

(4) Notwithstanding paragraph (3), court-ordered services may be extended up to a maximum time period not to exceed 24 months after the date the child was originally removed from physical custody of his or her parent or guardian if it is shown, at the hearing held pursuant to subdivision (b) of Section 366.22, that the permanent plan for the child is that he or she will be returned and safely maintained in the home within the extended time period. The court shall extend the time period only if it finds that it is in the child's best interest to have the time period extended and that there is a substantial probability that the child will be returned to the physical custody of his or her parent or guardian who is described in subdivision (b) of Section 366.22 within the extended time period, or that reasonable services have not been provided to the parent or guardian. If the court extends the time period, the court shall specify the factual basis for its conclusion that there is a substantial probability that the child will be returned to the physical custody of his or her parent or guardian within the extended time period. The court also shall make findings pursuant to subdivision (a) of Section 366 and subdivision (e) of Section 358.1.

When counseling or other treatment services are ordered, the parent or guardian shall be ordered to participate in those services, in order for substantial probability to be found. Physical custody of the child by the parents or guardians during the applicable time period under subparagraph (A), (B), or (C) of paragraph (1) shall not serve to interrupt the running of the period. If at the end of the applicable time period, the child cannot be safely returned to the care and custody of a parent or guardian without court supervision, but the child clearly desires contact with the parent or guardian, the court shall take the child's desire into account in devising a permanency plan.

Except in cases where, pursuant to subdivision (b), the court does not order reunification services, the court shall inform the parent or parents of Section 366.26 and shall specify that the parent's or parents' parental rights may be terminated.

(b) Reunification services need not be provided to a parent or guardian described in this subdivision when the court finds, by clear and convincing evidence, any of the following:

(1) That the whereabouts of the parent or guardian is unknown. A finding pursuant to this paragraph shall be supported by an affidavit or by proof that a reasonably diligent search has failed to locate the parent or guardian. The posting or publication of notices is not required in that search.

(2) That the parent or guardian is suffering from a mental disability that is described in Chapter 2 (commencing with Section 7820) of Part 4 of Division 12 of the Family Code and that renders him or her incapable of utilizing those services.

(3) That the child or a sibling of the child has been previously adjudicated a dependent pursuant to any subdivision of Section 300 as a result of physical or sexual abuse, that following that adjudication the child had been removed

from the custody of his or her parent or guardian pursuant to Section 361, that the child has been returned to the custody of the parent or guardian from whom the child had been taken originally, and that the child is being removed pursuant to Section 361, due to additional physical or sexual abuse.

(4) That the parent or guardian of the child has caused the death of another child through abuse or neglect.

(5) That the child was brought within the jurisdiction of the court under subdivision (e) of Section 300 because of the conduct of that parent or guardian.

(6) That the child has been adjudicated a dependent pursuant to any subdivision of Section 300 as a result of severe sexual abuse or the infliction of severe physical harm to the child, a sibling, or a half sibling by a parent or guardian, as defined in this subdivision, and the court makes a factual finding that it would not benefit the child to pursue reunification services with the offending parent or guardian.

A finding of severe sexual abuse, for the purposes of this subdivision, may be based on, but is not limited to, sexual intercourse, or stimulation involving genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between the parent or guardian and the child or a sibling or half sibling of the child, or between the child or a sibling or half sibling of the child and another person or animal with the actual or implied consent of the parent or guardian; or the penetration or manipulation of the child's, sibling's, or half sibling's genital organs or rectum by any animate or inanimate object for the sexual gratification of the parent or guardian, or for the sexual gratification of another person with the actual or implied consent of the parent or guardian.

A finding of the infliction of severe physical harm, for the purposes of this subdivision, may be based on, but is not limited to, deliberate and serious injury inflicted to or on a child's body or the body of a sibling or half sibling of the child by an act or omission of the parent or guardian, or of another individual or animal with the consent of the parent or guardian; deliberate and torturous confinement of the child, sibling, or half sibling in a closed space; or any other torturous act or omission that would be reasonably understood to cause serious emotional damage.

(7) That the parent is not receiving reunification services for a sibling or a half sibling of the child pursuant to paragraph (3), (5), or (6).

(8) That the child was conceived by means of the commission of an offense listed in Section 288 or 288.5 of the Penal Code, or by an act committed outside of this state that, if committed in this state, would constitute one of those offenses. This paragraph only applies to the parent who committed the offense or act.

(9) That the child has been found to be a child described in subdivision (g) of Section 300, that the parent or guardian of the child willfully abandoned the child, and the court finds that the abandonment itself constituted a serious danger to the child; or that the parent or other person having custody of the child voluntarily surrendered physical custody of the child pursuant to Section 1255.7 of the Health and Safety Code. For the

purposes of this paragraph, "serious danger" means that without the intervention of another person or agency, the child would have sustained severe or permanent disability, injury, illness, or death. For purposes of this paragraph, "willful abandonment" shall not be construed as actions taken in good faith by the parent without the intent of placing the child in serious danger.

(10) That the court ordered termination of reunification services for any siblings or half siblings of the child because the parent or guardian failed to reunify with the sibling or half sibling after the sibling or half sibling had been removed from that parent or guardian pursuant to Section 361 and that parent or guardian is the same parent or guardian described in subdivision (a) and that, according to the findings of the court, this parent or guardian has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from that parent or guardian.

(11) That the parental rights of a parent over any sibling or half sibling of the child had been permanently severed, and this parent is the same parent described in subdivision (a), and that, according to the findings of the court, this parent has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from the parent.

(12) That the parent or guardian of the child has been convicted of a violent felony, as defined in subdivision (c) of Section 667.5 of the Penal Code.

(13) That the parent or guardian of the child has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court's attention, or has failed or refused to comply with a program of drug or alcohol treatment described in the case plan required by Section 358.1 on at least two prior occasions, even though the programs identified were available and accessible.

(14) That the parent or guardian of the child has advised the court that he or she is not interested in receiving family maintenance or family reunification services or having the child returned to or placed in his or her custody and does not wish to receive family maintenance or reunification services.

The parent or guardian shall be represented by counsel and shall execute a waiver of services form to be adopted by the Judicial Council. The court shall advise the parent or guardian of any right to services and of the possible consequences of a waiver of services, including the termination of parental rights and placement of the child for adoption. The court shall not accept the waiver of services unless it states on the record its finding that the parent or guardian has knowingly and intelligently waived the right to services.

(15) That the parent or guardian has on one or more occasions willfully abducted the child or child's sibling or half sibling from his or her placement and refused to disclose the child's or child's sibling's or half sibling's

whereabouts, refused to return physical custody of the child or child's sibling or half sibling to his or her placement, or refused to return physical custody of the child or child's sibling or half sibling to the social worker.

(c) In deciding whether to order reunification in any case in which this section applies, the court shall hold a dispositional hearing. The social worker shall prepare a report that discusses whether reunification services shall be provided. When it is alleged, pursuant to paragraph (2) of subdivision (b), that the parent is incapable of utilizing services due to mental disability, the court shall order reunification services unless competent evidence from mental health professionals establishes that, even with the provision of services, the parent is unlikely to be capable of adequately caring for the child within the time limits specified in subdivision (a).

The court shall not order reunification for a parent or guardian described in paragraph (3), (4), (6), (7), (8), (9), (10), (11), (12), (13), (14), or (15) of subdivision (b) unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child.

In addition, the court shall not order reunification in any situation described in paragraph (5) of subdivision (b) unless it finds that, based on competent testimony, those services are likely to prevent reabuse or continued neglect of the child or that failure to try reunification will be detrimental to the child because the child is closely and positively attached to that parent. The social worker shall investigate the circumstances leading to the removal of the child and advise the court whether there are circumstances that indicate that reunification is likely to be successful or unsuccessful and whether failure to order reunification is likely to be detrimental to the child.

The failure of the parent to respond to previous services, the fact that the child was abused while the parent was under the influence of drugs or alcohol, a past history of violent behavior, or testimony by a competent professional that the parent's behavior is unlikely to be changed by services are among the factors indicating that reunification services are unlikely to be successful. The fact that a parent or guardian is no longer living with an individual who severely abused the child may be considered in deciding that reunification services are likely to be successful, provided that the court shall consider any pattern of behavior on the part of the parent that has exposed the child to repeated abuse.

(d) If reunification services are not ordered pursuant to paragraph (1) of subdivision (b) and the whereabouts of a parent become known within six months of the out-of-home placement of the child, the court shall order the social worker to provide family reunification services in accordance with this subdivision.

(e) (1) If the parent or guardian is incarcerated or institutionalized, the court shall order reasonable services unless the court determines, by clear and convincing evidence, those services would be detrimental to the child. In determining detriment, the court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, the length and

nature of the treatment, the nature of the crime or illness, the degree of detriment to the child if services are not offered and, for children 10 years of age or older, the child's attitude toward the implementation of family reunification services, the likelihood of the parent's discharge from incarceration or institutionalization within the reunification time limitations described in subdivision (a), and any other appropriate factors. In determining the content of reasonable services, the court shall consider the particular barriers to an incarcerated or otherwise institutionalized parent's access to those court-mandated services and ability to maintain contact with his or her child, and shall document this information in the child's case plan. Reunification services are subject to the applicable time limitations imposed in subdivision (a). Services may include, but shall not be limited to, all of the following:

(A) Maintaining contact between the parent and child through collect telephone calls.

(B) Transportation services, where appropriate.

(C) Visitation services, where appropriate.

(D) Reasonable services to extended family members or foster parents providing care for the child if the services are not detrimental to the child.

An incarcerated parent may be required to attend counseling, parenting classes, or vocational training programs as part of the reunification service plan if actual access to these services is provided. The social worker shall document in the child's case plan the particular barriers to an incarcerated or institutionalized parent's access to those court-mandated services and ability to maintain contact with his or her child.

(2) The presiding judge of the juvenile court of each county may convene representatives of the county welfare department, the sheriff's department, and other appropriate entities for the purpose of developing and entering into protocols for ensuring the notification, transportation, and presence of an incarcerated or institutionalized parent at all court hearings involving proceedings affecting the child pursuant to Section 2625 of the Penal Code. The county welfare department shall utilize the prisoner locator system developed by the Department of Corrections and Rehabilitation to facilitate timely and effective notice of hearings for incarcerated parents.

(3) Notwithstanding any other provision of law, if the incarcerated parent is a woman seeking to participate in the community treatment program operated by the Department of Corrections and Rehabilitation pursuant to Chapter 4.8 (commencing with Section 1174) of Title 7 of Part 2 of, Chapter 4 (commencing with Section 3410) of Title 2 of Part 3 of, the Penal Code, the court shall determine whether the parent's participation in a program is in the child's best interest and whether it is suitable to meet the needs of the parent and child.

(f) If the court, pursuant to paragraph (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), or (15) of subdivision (b) or paragraph (1) of subdivision (e), does not order reunification services, it shall, at the dispositional hearing, that shall include a permanency hearing, determine if a hearing under Section 366.26 shall be set in order to determine whether

adoption, guardianship, or long-term foster care, or in the case of an Indian child, in consultation with the child's tribe, tribal customary adoption, is the most appropriate plan for the child, and shall consider in-state and out-of-state placement options. If the court so determines, it shall conduct the hearing pursuant to Section 366.26 within 120 days after the dispositional hearing. However, the court shall not schedule a hearing so long as the other parent is being provided reunification services pursuant to subdivision (a). The court may continue to permit the parent to visit the child unless it finds that visitation would be detrimental to the child.

(g) (1) Whenever a court orders that a hearing shall be held pursuant to Section 366.26, including, when, in consultation with the child's tribe, tribal customary adoption is recommended, it shall direct the agency supervising the child and the licensed county adoption agency, or the State Department of Social Services when it is acting as an adoption agency in counties that are not served by a county adoption agency, to prepare an assessment that shall include:

(A) Current search efforts for an absent parent or parents.

(B) A review of the amount of and nature of any contact between the child and his or her parents and other members of his or her extended family since the time of placement. Although the extended family of each child shall be reviewed on a case-by-case basis, "extended family" for the purpose of this subparagraph shall include, but not be limited to, the child's siblings, grandparents, aunts, and uncles.

(C) An evaluation of the child's medical, developmental, scholastic, mental, and emotional status.

(D) A preliminary assessment of the eligibility and commitment of any identified prospective adoptive parent or guardian, including a prospective tribal customary adoptive parent, particularly the caretaker, to include a social history including screening for criminal records and prior referrals for child abuse or neglect, the capability to meet the child's needs, and the understanding of the legal and financial rights and responsibilities of adoption and guardianship. If a proposed guardian is a relative of the minor, and the relative was assessed for foster care placement of the minor prior to January 1, 1998, the assessment shall also consider, but need not be limited to, all of the factors specified in subdivision (a) of Section 361.3. As used in this subparagraph, "relative" means an adult who is related to the minor by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words "great," "great-great," or "grand," or the spouse of any of those persons even if the marriage was terminated by death or dissolution.

(E) The relationship of the child to any identified prospective adoptive parent or guardian, including a prospective tribal customary parent, the duration and character of the relationship, the motivation for seeking adoption or guardianship, and a statement from the child concerning placement and the adoption or guardianship, unless the child's age or physical, emotional, or other condition precludes his or her meaningful response, and if so, a description of the condition.

(F) An analysis of the likelihood that the child will be adopted if parental rights are terminated.

(G) In the case of an Indian child, in addition to subparagraphs (A) to (F), inclusive, an assessment of the likelihood that the child will be adopted, when, in consultation with the child's tribe, a customary tribal adoption, as defined in Section 366.24, is recommended. If tribal customary adoption is recommended, the assessment shall include an analysis of both of the following:

(i) Whether tribal customary adoption would or would not be detrimental to the Indian child and the reasons for reaching that conclusion.

(ii) Whether the Indian child cannot or should not be returned to the home of the Indian parent or Indian custodian and the reasons for reaching that conclusion.

(2) (A) A relative caregiver's preference for legal guardianship over adoption, if it is due to circumstances that do not include an unwillingness to accept legal or financial responsibility for the child, shall not constitute the sole basis for recommending removal of the child from the relative caregiver for purposes of adoptive placement.

(B) A relative caregiver shall be given information regarding the permanency options of guardianship and adoption, including the long-term benefits and consequences of each option, prior to establishing legal guardianship or pursuing adoption.

(h) In determining whether reunification services will benefit the child pursuant to paragraph (6) or (7) of subdivision (b), the court shall consider any information it deems relevant, including the following factors:

(1) The specific act or omission comprising the severe sexual abuse or the severe physical harm inflicted on the child or the child's sibling or half sibling.

(2) The circumstances under which the abuse or harm was inflicted on the child or the child's sibling or half sibling.

(3) The severity of the emotional trauma suffered by the child or the child's sibling or half sibling.

(4) Any history of abuse of other children by the offending parent or guardian.

(5) The likelihood that the child may be safely returned to the care of the offending parent or guardian within 12 months with no continuing supervision.

(6) Whether or not the child desires to be reunified with the offending parent or guardian.

(i) The court shall read into the record the basis for a finding of severe sexual abuse or the infliction of severe physical harm under paragraph (6) of subdivision (b), and shall also specify the factual findings used to determine that the provision of reunification services to the offending parent or guardian would not benefit the child.

(j) This section shall remain in effect only until January 1, 2014, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2014, deletes or extends that date.

SEC. 7. Section 361.5 is added to the Welfare and Institutions Code, to read:

361.5. (a) Except as provided in subdivision (b), or when the parent has voluntarily relinquished the child and the relinquishment has been filed with the State Department of Social Services, or upon the establishment of an order of guardianship pursuant to Section 360, whenever a child is removed from a parent's or guardian's custody, the juvenile court shall order the social worker to provide child welfare services to the child and the child's mother and statutorily presumed father or guardians. Upon a finding and declaration of paternity by the juvenile court or proof of a prior declaration of paternity by any court of competent jurisdiction, the juvenile court may order services for the child and the biological father, if the court determines that the services will benefit the child.

(1) Family reunification services, when provided, shall be provided as follows:

(A) Except as otherwise provided in subparagraph (C), for a child who, on the date of initial removal from the physical custody of his or her parent or guardian, was three years of age or older, court-ordered services shall be provided beginning with the dispositional hearing and ending 12 months after the date the child entered foster care as defined in Section 361.49, unless the child is returned to the home of the parent or guardian.

(B) For a child who, on the date of initial removal from the physical custody of his or her parent or guardian, was under three years of age, court-ordered services shall be provided for a period of six months from the dispositional hearing as provided in subdivision (e) of Section 366.21, but no longer than 12 months from the date the child entered foster care as defined in Section 361.49 unless the child is returned to the home of the parent or guardian.

(C) For the purpose of placing and maintaining a sibling group together in a permanent home should reunification efforts fail, for a child in a sibling group whose members were removed from parental custody at the same time, and in which one member of the sibling group was under three years of age on the date of initial removal from the physical custody of his or her parent or guardian, court-ordered services for some or all of the sibling group may be limited as set forth in subparagraph (B). For the purposes of this paragraph, "a sibling group" shall mean two or more children who are related to each other as full or half siblings.

(2) Any motion to terminate court-ordered reunification services prior to the hearing set pursuant to subdivision (f) of Section 366.21 for a child described by subparagraph (A) of paragraph (1), or prior to the hearing set pursuant to subdivision (e) of Section 366.21 for a child described by subparagraph (B) or (C) of paragraph (1), shall be made pursuant to the requirements set forth in subdivision (c) of Section 388. A motion to terminate court-ordered reunification services shall not be required at the hearing set pursuant to subdivision (e) of Section 366.21 if the court finds by clear and convincing evidence one of the following:

(A) That the child was removed initially under subdivision (g) of Section 300 and the whereabouts of the parent are still unknown.

(B) That the parent has failed to contact and visit the child.

(C) That the parent has been convicted of a felony indicating parental unfitness.

(3) Notwithstanding subparagraphs (A), (B), and (C) of paragraph (1), court-ordered services may be extended up to a maximum time period not to exceed 18 months after the date the child was originally removed from physical custody of his or her parent or guardian if it can be shown, at the hearing held pursuant to subdivision (f) of Section 366.21, that the permanent plan for the child is that he or she will be returned and safely maintained in the home within the extended time period. The court shall extend the time period only if it finds that there is a substantial probability that the child will be returned to the physical custody of his or her parent or guardian within the extended time period or that reasonable services have not been provided to the parent or guardian. In determining whether court-ordered services may be extended, the court shall consider the special circumstances of an incarcerated or institutionalized parent or parents, or parent or parents court-ordered to a residential substance abuse treatment program, including, but not limited to, barriers to the parent's or guardian's access to services and ability to maintain contact with his or her child. The court shall also consider, among other factors, good faith efforts that the parent or guardian has made to maintain contact with the child. If the court extends the time period, the court shall specify the factual basis for its conclusion that there is a substantial probability that the child will be returned to the physical custody of his or her parent or guardian within the extended time period. The court also shall make findings pursuant to subdivision (a) of Section 366 and subdivision (e) of Section 358.1.

When counseling or other treatment services are ordered, the parent or guardian shall be ordered to participate in those services, unless the parent's or guardian's participation is deemed by the court to be inappropriate or potentially detrimental to the child, or unless a parent or guardian is incarcerated and the corrections facility in which he or she is incarcerated does not provide access to the treatment services ordered by the court. Physical custody of the child by the parents or guardians during the applicable time period under subparagraph (A), (B), or (C) of paragraph (1) shall not serve to interrupt the running of the period. If at the end of the applicable time period, a child cannot be safely returned to the care and custody of a parent or guardian without court supervision, but the child clearly desires contact with the parent or guardian, the court shall take the child's desire into account in devising a permanency plan.

In cases where the child was under three years of age on the date of the initial removal from the physical custody of his or her parent or guardian or is a member of a sibling group as described in subparagraph (C) of paragraph (1), the court shall inform the parent or guardian that the failure of the parent or guardian to participate regularly in any court-ordered treatment programs or to cooperate or avail himself or herself of services

provided as part of the child welfare services case plan may result in a termination of efforts to reunify the family after six months. The court shall inform the parent or guardian of the factors used in subdivision (e) of Section 366.21 to determine whether to limit services to six months for some or all members of a sibling group as described in subparagraph (C) of paragraph (1).

(4) Notwithstanding paragraph (3), court-ordered services may be extended up to a maximum time period not to exceed 24 months after the date the child was originally removed from physical custody of his or her parent or guardian if it is shown, at the hearing held pursuant to subdivision (b) of Section 366.22, that the permanent plan for the child is that he or she will be returned and safely maintained in the home within the extended time period. The court shall extend the time period only if it finds that it is in the child's best interest to have the time period extended and that there is a substantial probability that the child will be returned to the physical custody of his or her parent or guardian who is described in subdivision (b) of Section 366.22 within the extended time period, or that reasonable services have not been provided to the parent or guardian. If the court extends the time period, the court shall specify the factual basis for its conclusion that there is a substantial probability that the child will be returned to the physical custody of his or her parent or guardian within the extended time period. The court also shall make findings pursuant to subdivision (a) of Section 366 and subdivision (e) of Section 358.1.

When counseling or other treatment services are ordered, the parent or guardian shall be ordered to participate in those services, in order for substantial probability to be found. Physical custody of the child by the parents or guardians during the applicable time period under subparagraph (A), (B), or (C) of paragraph (1) shall not serve to interrupt the running of the period. If at the end of the applicable time period, the child cannot be safely returned to the care and custody of a parent or guardian without court supervision, but the child clearly desires contact with the parent or guardian, the court shall take the child's desire into account in devising a permanency plan.

Except in cases where, pursuant to subdivision (b), the court does not order reunification services, the court shall inform the parent or parents of Section 366.26 and shall specify that the parent's or parents' parental rights may be terminated.

(b) Reunification services need not be provided to a parent or guardian described in this subdivision when the court finds, by clear and convincing evidence, any of the following:

(1) That the whereabouts of the parent or guardian is unknown. A finding pursuant to this paragraph shall be supported by an affidavit or by proof that a reasonably diligent search has failed to locate the parent or guardian. The posting or publication of notices is not required in that search.

(2) That the parent or guardian is suffering from a mental disability that is described in Chapter 2 (commencing with Section 7820) of Part 4 of

Division 12 of the Family Code and that renders him or her incapable of utilizing those services.

(3) That the child or a sibling of the child has been previously adjudicated a dependent pursuant to any subdivision of Section 300 as a result of physical or sexual abuse, that following that adjudication the child had been removed from the custody of his or her parent or guardian pursuant to Section 361, that the child has been returned to the custody of the parent or guardian from whom the child had been taken originally, and that the child is being removed pursuant to Section 361, due to additional physical or sexual abuse.

(4) That the parent or guardian of the child has caused the death of another child through abuse or neglect.

(5) That the child was brought within the jurisdiction of the court under subdivision (e) of Section 300 because of the conduct of that parent or guardian.

(6) That the child has been adjudicated a dependent pursuant to any subdivision of Section 300 as a result of severe sexual abuse or the infliction of severe physical harm to the child, a sibling, or a half sibling by a parent or guardian, as defined in this subdivision, and the court makes a factual finding that it would not benefit the child to pursue reunification services with the offending parent or guardian.

A finding of severe sexual abuse, for the purposes of this subdivision, may be based on, but is not limited to, sexual intercourse, or stimulation involving genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between the parent or guardian and the child or a sibling or half sibling of the child, or between the child or a sibling or half sibling of the child and another person or animal with the actual or implied consent of the parent or guardian; or the penetration or manipulation of the child's, sibling's, or half sibling's genital organs or rectum by any animate or inanimate object for the sexual gratification of the parent or guardian, or for the sexual gratification of another person with the actual or implied consent of the parent or guardian.

A finding of the infliction of severe physical harm, for the purposes of this subdivision, may be based on, but is not limited to, deliberate and serious injury inflicted to or on a child's body or the body of a sibling or half sibling of the child by an act or omission of the parent or guardian, or of another individual or animal with the consent of the parent or guardian; deliberate and torturous confinement of the child, sibling, or half sibling in a closed space; or any other torturous act or omission that would be reasonably understood to cause serious emotional damage.

(7) That the parent is not receiving reunification services for a sibling or a half sibling of the child pursuant to paragraph (3), (5), or (6).

(8) That the child was conceived by means of the commission of an offense listed in Section 288 or 288.5 of the Penal Code, or by an act committed outside of this state that, if committed in this state, would constitute one of those offenses. This paragraph only applies to the parent who committed the offense or act.

(9) That the child has been found to be a child described in subdivision (g) of Section 300, that the parent or guardian of the child willfully abandoned the child, and the court finds that the abandonment itself constituted a serious danger to the child; or that the parent or other person having custody of the child voluntarily surrendered physical custody of the child pursuant to Section 1255.7 of the Health and Safety Code. For the purposes of this paragraph, "serious danger" means that without the intervention of another person or agency, the child would have sustained severe or permanent disability, injury, illness, or death. For purposes of this paragraph, "willful abandonment" shall not be construed as actions taken in good faith by the parent without the intent of placing the child in serious danger.

(10) That the court ordered termination of reunification services for any siblings or half siblings of the child because the parent or guardian failed to reunify with the sibling or half sibling after the sibling or half sibling had been removed from that parent or guardian pursuant to Section 361 and that parent or guardian is the same parent or guardian described in subdivision (a) and that, according to the findings of the court, this parent or guardian has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from that parent or guardian.

(11) That the parental rights of a parent over any sibling or half sibling of the child had been permanently severed, and this parent is the same parent described in subdivision (a), and that, according to the findings of the court, this parent has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from the parent.

(12) That the parent or guardian of the child has been convicted of a violent felony, as defined in subdivision (c) of Section 667.5 of the Penal Code.

(13) That the parent or guardian of the child has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court's attention, or has failed or refused to comply with a program of drug or alcohol treatment described in the case plan required by Section 358.1 on at least two prior occasions, even though the programs identified were available and accessible.

(14) That the parent or guardian of the child has advised the court that he or she is not interested in receiving family maintenance or family reunification services or having the child returned to or placed in his or her custody and does not wish to receive family maintenance or reunification services.

The parent or guardian shall be represented by counsel and shall execute a waiver of services form to be adopted by the Judicial Council. The court shall advise the parent or guardian of any right to services and of the possible consequences of a waiver of services, including the termination of parental

rights and placement of the child for adoption. The court shall not accept the waiver of services unless it states on the record its finding that the parent or guardian has knowingly and intelligently waived the right to services.

(15) That the parent or guardian has on one or more occasions willfully abducted the child or child's sibling or half sibling from his or her placement and refused to disclose the child's or child's sibling's or half sibling's whereabouts, refused to return physical custody of the child or child's sibling or half sibling to his or her placement, or refused to return physical custody of the child or child's sibling or half sibling to the social worker.

(c) In deciding whether to order reunification in any case in which this section applies, the court shall hold a dispositional hearing. The social worker shall prepare a report that discusses whether reunification services shall be provided. When it is alleged, pursuant to paragraph (2) of subdivision (b), that the parent is incapable of utilizing services due to mental disability, the court shall order reunification services unless competent evidence from mental health professionals establishes that, even with the provision of services, the parent is unlikely to be capable of adequately caring for the child within the time limits specified in subdivision (a).

The court shall not order reunification for a parent or guardian described in paragraph (3), (4), (6), (7), (8), (9), (10), (11), (12), (13), (14), or (15) of subdivision (b) unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child.

In addition, the court shall not order reunification in any situation described in paragraph (5) of subdivision (b) unless it finds that, based on competent testimony, those services are likely to prevent reabuse or continued neglect of the child or that failure to try reunification will be detrimental to the child because the child is closely and positively attached to that parent. The social worker shall investigate the circumstances leading to the removal of the child and advise the court whether there are circumstances that indicate that reunification is likely to be successful or unsuccessful and whether failure to order reunification is likely to be detrimental to the child.

The failure of the parent to respond to previous services, the fact that the child was abused while the parent was under the influence of drugs or alcohol, a past history of violent behavior, or testimony by a competent professional that the parent's behavior is unlikely to be changed by services are among the factors indicating that reunification services are unlikely to be successful. The fact that a parent or guardian is no longer living with an individual who severely abused the child may be considered in deciding that reunification services are likely to be successful, provided that the court shall consider any pattern of behavior on the part of the parent that has exposed the child to repeated abuse.

(d) If reunification services are not ordered pursuant to paragraph (1) of subdivision (b) and the whereabouts of a parent become known within six months of the out-of-home placement of the child, the court shall order the

social worker to provide family reunification services in accordance with this subdivision.

(e) (1) If the parent or guardian is incarcerated or institutionalized, the court shall order reasonable services unless the court determines, by clear and convincing evidence, those services would be detrimental to the child. In determining detriment, the court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, the length and nature of the treatment, the nature of the crime or illness, the degree of detriment to the child if services are not offered and, for children 10 years of age or older, the child's attitude toward the implementation of family reunification services, the likelihood of the parent's discharge from incarceration or institutionalization within the reunification time limitations described in subdivision (a), and any other appropriate factors. In determining the content of reasonable services, the court shall consider the particular barriers to an incarcerated or otherwise institutionalized parent's access to those court-mandated services and ability to maintain contact with his or her child, and shall document this information in the child's case plan. Reunification services are subject to the applicable time limitations imposed in subdivision (a). Services may include, but shall not be limited to, all of the following:

(A) Maintaining contact between the parent and child through collect telephone calls.

(B) Transportation services, where appropriate.

(C) Visitation services, where appropriate.

(D) Reasonable services to extended family members or foster parents providing care for the child if the services are not detrimental to the child.

An incarcerated parent may be required to attend counseling, parenting classes, or vocational training programs as part of the reunification service plan if actual access to these services is provided. The social worker shall document in the child's case plan the particular barriers to an incarcerated or institutionalized parent's access to those court-mandated services and ability to maintain contact with his or her child.

(2) The presiding judge of the juvenile court of each county may convene representatives of the county welfare department, the sheriff's department, and other appropriate entities for the purpose of developing and entering into protocols for ensuring the notification, transportation, and presence of an incarcerated or institutionalized parent at all court hearings involving proceedings affecting the child pursuant to Section 2625 of the Penal Code. The county welfare department shall utilize the prisoner locator system developed by the Department of Corrections and Rehabilitation to facilitate timely and effective notice of hearings for incarcerated parents.

(3) Notwithstanding any other provision of law, if the incarcerated parent is a woman seeking to participate in the community treatment program operated by the Department of Corrections and Rehabilitation pursuant to Chapter 4.8 (commencing with Section 1174) of Title 7 of Part 2 of, Chapter 4 (commencing with Section 3410) of Title 2 of Part 3 of, the Penal Code, the court shall determine whether the parent's participation in a program is

in the child's best interest and whether it is suitable to meet the needs of the parent and child.

(f) If the court, pursuant to paragraph (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), or (15) of subdivision (b) or paragraph (1) of subdivision (e), does not order reunification services, it shall, at the dispositional hearing, that shall include a permanency hearing, determine if a hearing under Section 366.26 shall be set in order to determine whether adoption, guardianship, or long-term foster care is the most appropriate plan for the child, and shall consider in-state and out-of-state placement options. If the court so determines, it shall conduct the hearing pursuant to Section 366.26 within 120 days after the dispositional hearing. However, the court shall not schedule a hearing so long as the other parent is being provided reunification services pursuant to subdivision (a). The court may continue to permit the parent to visit the child unless it finds that visitation would be detrimental to the child.

(g) (1) Whenever a court orders that a hearing shall be held pursuant to Section 366.26, it shall direct the agency supervising the child and the licensed county adoption agency, or the State Department of Social Services when it is acting as an adoption agency in counties that are not served by a county adoption agency, to prepare an assessment that shall include:

(A) Current search efforts for an absent parent or parents.

(B) A review of the amount of and nature of any contact between the child and his or her parents and other members of his or her extended family since the time of placement. Although the extended family of each child shall be reviewed on a case-by-case basis, "extended family" for the purpose of this subparagraph shall include, but not be limited to, the child's siblings, grandparents, aunts, and uncles.

(C) An evaluation of the child's medical, developmental, scholastic, mental, and emotional status.

(D) A preliminary assessment of the eligibility and commitment of any identified prospective adoptive parent or guardian, particularly the caretaker, to include a social history including screening for criminal records and prior referrals for child abuse or neglect, the capability to meet the child's needs, and the understanding of the legal and financial rights and responsibilities of adoption and guardianship. If a proposed guardian is a relative of the minor, and the relative was assessed for foster care placement of the minor prior to January 1, 1998, the assessment shall also consider, but need not be limited to, all of the factors specified in subdivision (a) of Section 361.3. As used in this subparagraph, "relative" means an adult who is related to the minor by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words "great," "great-great," or "grand," or the spouse of any of those persons even if the marriage was terminated by death or dissolution.

(E) The relationship of the child to any identified prospective adoptive parent or guardian, the duration and character of the relationship, the motivation for seeking adoption or guardianship, and a statement from the child concerning placement and the adoption or guardianship, unless the

child's age or physical, emotional, or other condition precludes his or her meaningful response, and if so, a description of the condition.

(F) An analysis of the likelihood that the child will be adopted if parental rights are terminated.

(2) (A) A relative caregiver's preference for legal guardianship over adoption, if it is due to circumstances that do not include an unwillingness to accept legal or financial responsibility for the child, shall not constitute the sole basis for recommending removal of the child from the relative caregiver for purposes of adoptive placement.

(B) A relative caregiver shall be given information regarding the permanency options of guardianship and adoption, including the long-term benefits and consequences of each option, prior to establishing legal guardianship or pursuing adoption.

(h) In determining whether reunification services will benefit the child pursuant to paragraph (6) or (7) of subdivision (b), the court shall consider any information it deems relevant, including the following factors:

(1) The specific act or omission comprising the severe sexual abuse or the severe physical harm inflicted on the child or the child's sibling or half sibling.

(2) The circumstances under which the abuse or harm was inflicted on the child or the child's sibling or half sibling.

(3) The severity of the emotional trauma suffered by the child or the child's sibling or half sibling.

(4) Any history of abuse of other children by the offending parent or guardian.

(5) The likelihood that the child may be safely returned to the care of the offending parent or guardian within 12 months with no continuing supervision.

(6) Whether or not the child desires to be reunified with the offending parent or guardian.

(i) The court shall read into the record the basis for a finding of severe sexual abuse or the infliction of severe physical harm under paragraph (6) of subdivision (b), and shall also specify the factual findings used to determine that the provision of reunification services to the offending parent or guardian would not benefit the child.

(j) This section shall become operative on January 1, 2014.

SEC. 8. Section 366.21 of the Welfare and Institutions Code is amended to read:

366.21. (a) Every hearing conducted by the juvenile court reviewing the status of a dependent child shall be placed on the appearance calendar. The court shall advise all persons present at the hearing of the date of the future hearing and of their right to be present and represented by counsel.

(b) Except as provided in Sections 294 and 295, notice of the hearing shall be provided pursuant to Section 293.

(c) At least 10 calendar days prior to the hearing, the social worker shall file a supplemental report with the court regarding the services provided or offered to the parent or legal guardian to enable him or her to assume custody

and the efforts made to achieve legal permanence for the child if efforts to reunify fail, including, but not limited to, efforts to maintain relationships between a child who is 10 years of age or older and has been in out-of-home placement for six months or longer and individuals who are important to the child, consistent with the child's best interests; the progress made; and, where relevant, the prognosis for return of the child to the physical custody of his or her parent or legal guardian; and shall make his or her recommendation for disposition. If the child is a member of a sibling group described in subparagraph (C) of paragraph (1) of subdivision (a) of Section 361.5, the report and recommendation may also take into account those factors described in subdivision (e) relating to the child's sibling group. If the recommendation is not to return the child to a parent or legal guardian, the report shall specify why the return of the child would be detrimental to the child. The social worker shall provide the parent or legal guardian, counsel for the child, and any court-appointed child advocate with a copy of the report, including his or her recommendation for disposition, at least 10 calendar days prior to the hearing. In the case of a child removed from the physical custody of his or her parent or legal guardian, the social worker shall, at least 10 calendar days prior to the hearing, provide a summary of his or her recommendation for disposition to any foster parents, relative caregivers, and certified foster parents who have been approved for adoption by the State Department of Social Services when it is acting as an adoption agency in counties that are not served by a county adoption agency or by a licensed county adoption agency, community care facility, or foster family agency having the physical custody of the child. The social worker shall include a copy of the Judicial Council Caregiver Information Form (JV-290) with the summary of recommendations to the child's foster parents, relative caregivers, or foster parents approved for adoption, in the caregiver's primary language when available, along with information on how to file the form with the court.

(d) Prior to any hearing involving a child in the physical custody of a community care facility or a foster family agency that may result in the return of the child to the physical custody of his or her parent or legal guardian, or in adoption or the creation of a legal guardianship, or in the case of an Indian child, in consultation with the child's tribe, tribal customary adoption, the facility or agency shall file with the court a report, or a Judicial Council Caregiver Information Form (JV-290), containing its recommendation for disposition. Prior to the hearing involving a child in the physical custody of a foster parent, a relative caregiver, or a certified foster parent who has been approved for adoption by the State Department of Social Services when it is acting as an adoption agency or by a licensed adoption agency, the foster parent, relative caregiver, or the certified foster parent who has been approved for adoption by the State Department of Social Services when it is acting as an adoption agency in counties that are not served by a county adoption agency or by a licensed county adoption agency, may file with the court a report containing his or her recommendation for disposition. The court shall consider the report and

recommendation filed pursuant to this subdivision prior to determining any disposition.

(e) At the review hearing held six months after the initial dispositional hearing, but no later than 12 months after the date the child entered foster care as determined in Section 361.49, whichever occurs earlier, the court shall order the return of the child to the physical custody of his or her parent or legal guardian unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. The social worker shall have the burden of establishing that detriment. At the hearing, the court shall consider the criminal history, obtained pursuant to paragraph (1) of subdivision (f) of Section 16504.5, of the parent or legal guardian subsequent to the child's removal to the extent that the criminal record is substantially related to the welfare of the child or the parent's or guardian's ability to exercise custody and control regarding his or her child, provided the parent or legal guardian agreed to submit fingerprint images to obtain criminal history information as part of the case plan. The failure of the parent or legal guardian to participate regularly and make substantive progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental. In making its determination, the court shall review and consider the social worker's report and recommendations and the report and recommendations of any child advocate appointed pursuant to Section 356.5; and shall consider the efforts or progress, or both, demonstrated by the parent or legal guardian and the extent to which he or she availed himself or herself to services provided, taking into account the particular barriers to an incarcerated or institutionalized parent or legal guardian's access to those court-mandated services and ability to maintain contact with his or her child.

Regardless of whether the child is returned to a parent or legal guardian, the court shall specify the factual basis for its conclusion that the return would be detrimental or would not be detrimental. The court also shall make appropriate findings pursuant to subdivision (a) of Section 366; and, where relevant, shall order any additional services reasonably believed to facilitate the return of the child to the custody of his or her parent or legal guardian. The court shall also inform the parent or legal guardian that if the child cannot be returned home by the 12-month permanency hearing, a proceeding pursuant to Section 366.26 may be instituted. This section does not apply in a case where, pursuant to Section 361.5, the court has ordered that reunification services shall not be provided.

If the child was under three years of age on the date of the initial removal, or is a member of a sibling group described in subparagraph (C) of paragraph (1) of subdivision (a) of Section 361.5, and the court finds by clear and convincing evidence that the parent failed to participate regularly and make substantive progress in a court-ordered treatment plan, the court may schedule a hearing pursuant to Section 366.26 within 120 days. If, however, the court finds there is a substantial probability that the child, who was under

three years of age on the date of initial removal or is a member of a sibling group described in subparagraph (C) of paragraph (1) of subdivision (a) of Section 361.5, may be returned to his or her parent or legal guardian within six months or that reasonable services have not been provided, the court shall continue the case to the 12-month permanency hearing.

For the purpose of placing and maintaining a sibling group together in a permanent home, the court, in making its determination to schedule a hearing pursuant to Section 366.26 for some or all members of a sibling group, as described in subparagraph (C) of paragraph (1) of subdivision (a) of Section 361.5, shall review and consider the social worker's report and recommendations. Factors the report shall address, and the court shall consider, may include, but need not be limited to, whether the sibling group was removed from parental care as a group, the closeness and strength of the sibling bond, the ages of the siblings, the appropriateness of maintaining the sibling group together, the detriment to the child if sibling ties are not maintained, the likelihood of finding a permanent home for the sibling group, whether the sibling group is currently placed together in a preadoptive home or has a concurrent plan goal of legal permanency in the same home, the wishes of each child whose age and physical and emotional condition permits a meaningful response, and the best interest of each child in the sibling group. The court shall specify the factual basis for its finding that it is in the best interest of each child to schedule a hearing pursuant to Section 366.26 in 120 days for some or all of the members of the sibling group.

If the child was removed initially under subdivision (g) of Section 300 and the court finds by clear and convincing evidence that the whereabouts of the parent are still unknown, or the parent has failed to contact and visit the child, the court may schedule a hearing pursuant to Section 366.26 within 120 days. The court shall take into account any particular barriers to a parent's ability to maintain contact with his or her child due to the parent's incarceration or institutionalization. If the court finds by clear and convincing evidence that the parent has been convicted of a felony indicating parental unfitness, the court may schedule a hearing pursuant to Section 366.26 within 120 days.

If the child had been placed under court supervision with a previously noncustodial parent pursuant to Section 361.2, the court shall determine whether supervision is still necessary. The court may terminate supervision and transfer permanent custody to that parent, as provided for by paragraph (1) of subdivision (b) of Section 361.2.

In all other cases, the court shall direct that any reunification services previously ordered shall continue to be offered to the parent or legal guardian pursuant to the time periods set forth in subdivision (a) of Section 361.5, provided that the court may modify the terms and conditions of those services.

If the child is not returned to his or her parent or legal guardian, the court shall determine whether reasonable services that were designed to aid the parent or legal guardian in overcoming the problems that led to the initial removal and the continued custody of the child have been provided or offered

to the parent or legal guardian. The court shall order that those services be initiated, continued, or terminated.

(f) The permanency hearing shall be held no later than 12 months after the date the child entered foster care, as that date is determined pursuant to Section 361.49. At the permanency hearing, the court shall determine the permanent plan for the child, which shall include a determination of whether the child will be returned to the child's home and, if so, when, within the time limits of subdivision (a) of Section 361.5. The court shall order the return of the child to the physical custody of his or her parent or legal guardian unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. The social worker shall have the burden of establishing that detriment. At the permanency hearing, the court shall consider the criminal history, obtained pursuant to paragraph (1) of subdivision (f) of Section 16504.5, of the parent or legal guardian subsequent to the child's removal to the extent that the criminal record is substantially related to the welfare of the child or the parent or legal guardian's ability to exercise custody and control regarding his or her child, provided that the parent or legal guardian agreed to submit fingerprint images to obtain criminal history information as part of the case plan. The court shall also determine whether reasonable services that were designed to aid the parent or legal guardian to overcome the problems that led to the initial removal and continued custody of the child have been provided or offered to the parent or legal guardian. For each youth 16 years of age and older, the court shall also determine whether services have been made available to assist him or her in making the transition from foster care to independent living. The failure of the parent or legal guardian to participate regularly and make substantive progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental. In making its determination, the court shall review and consider the social worker's report and recommendations and the report and recommendations of any child advocate appointed pursuant to Section 356.5, shall consider the efforts or progress, or both, demonstrated by the parent or legal guardian and the extent to which he or she availed himself or herself of services provided, taking into account the particular barriers to an incarcerated or institutionalized parent or legal guardian's access to those court-mandated services and ability to maintain contact with his or her child and shall make appropriate findings pursuant to subdivision (a) of Section 366.

Regardless of whether the child is returned to his or her parent or legal guardian, the court shall specify the factual basis for its decision. If the child is not returned to a parent or legal guardian, the court shall specify the factual basis for its conclusion that the return would be detrimental. The court also shall make a finding pursuant to subdivision (a) of Section 366. If the child is not returned to his or her parent or legal guardian, the court shall consider, and state for the record, in-state and out-of-state placement options. If the child is placed out of the state, the court shall make a determination whether

the out-of-state placement continues to be appropriate and in the best interests of the child.

(g) If the time period in which the court-ordered services were provided has met or exceeded the time period set forth in subparagraph (A), (B), or (C) of paragraph (1) of subdivision (a) of Section 361.5, as appropriate, and a child is not returned to the custody of a parent or legal guardian at the permanency hearing held pursuant to subdivision (f), the court shall do one of the following:

(1) Continue the case for up to six months for a permanency review hearing, provided that the hearing shall occur within 18 months of the date the child was originally taken from the physical custody of his or her parent or legal guardian. The court shall continue the case only if it finds that there is a substantial probability that the child will be returned to the physical custody of his or her parent or legal guardian and safely maintained in the home within the extended period of time or that reasonable services have not been provided to the parent or legal guardian. For the purposes of this section, in order to find a substantial probability that the child will be returned to the physical custody of his or her parent or legal guardian and safely maintained in the home within the extended period of time, the court shall be required to find all of the following:

(A) That the parent or legal guardian has consistently and regularly contacted and visited with the child.

(B) That the parent or legal guardian has made significant progress in resolving problems that led to the child's removal from the home.

(C) The parent or legal guardian has demonstrated the capacity and ability both to complete the objectives of his or her treatment plan and to provide for the child's safety, protection, physical and emotional well-being, and special needs.

For purposes of this subdivision, the court's decision to continue the case based on a finding or substantial probability that the child will be returned to the physical custody of his or her parent or legal guardian is a compelling reason for determining that a hearing held pursuant to Section 366.26 is not in the best interests of the child.

The court shall inform the parent or legal guardian that if the child cannot be returned home by the next permanency review hearing, a proceeding pursuant to Section 366.26 may be instituted. The court may not order that a hearing pursuant to Section 366.26 be held unless there is clear and convincing evidence that reasonable services have been provided or offered to the parent or legal guardian.

(2) Order that a hearing be held within 120 days, pursuant to Section 366.26, but only if the court does not continue the case to the permanency planning review hearing and there is clear and convincing evidence that reasonable services have been provided or offered to the parents or legal guardians.

(3) Order that the child remain in long-term foster care, but only if the court finds by clear and convincing evidence, based upon the evidence already presented to it, including a recommendation by the State Department

of Social Services when it is acting as an adoption agency in counties that are not served by a county adoption agency or by a licensed county adoption agency, that there is a compelling reason for determining that a hearing held pursuant to Section 366.26 is not in the best interest of the child because the child is not a proper subject for adoption and has no one willing to accept legal guardianship. For purposes of this section, a recommendation by the State Department of Social Services when it is acting as an adoption agency in counties that are not served by a county adoption agency or by a licensed county adoption agency that adoption is not in the best interest of the child shall constitute a compelling reason for the court's determination. That recommendation shall be based on the present circumstances of the child and may not preclude a different recommendation at a later date if the child's circumstances change.

If the court orders that a child who is 10 years of age or older remain in long-term foster care, the court shall determine whether the agency has made reasonable efforts to maintain the child's relationships with individuals other than the child's siblings who are important to the child, consistent with the child's best interests, and may make any appropriate order to ensure that those relationships are maintained.

If the child is not returned to his or her parent or legal guardian, the court shall consider, and state for the record, in-state and out-of-state options for permanent placement. If the child is placed out of the state, the court shall make a determination whether the out-of-state placement continues to be appropriate and in the best interests of the child.

(h) In any case in which the court orders that a hearing pursuant to Section 366.26 shall be held, it shall also order the termination of reunification services to the parent or legal guardian. The court shall continue to permit the parent or legal guardian to visit the child pending the hearing unless it finds that visitation would be detrimental to the child. The court shall make any other appropriate orders to enable the child to maintain relationships with individuals, other than the child's siblings, who are important to the child, consistent with the child's best interests.

(i) (1) Whenever a court orders that a hearing pursuant to Section 366.26, including, when, in consultation with the child's tribe, tribal customary adoption is recommended, shall be held, it shall direct the agency supervising the child and the licensed county adoption agency, or the State Department of Social Services when it is acting as an adoption agency in counties that are not served by a county adoption agency, to prepare an assessment that shall include:

(A) Current search efforts for an absent parent or parents or legal guardians.

(B) A review of the amount of and nature of any contact between the child and his or her parents or legal guardians and other members of his or her extended family since the time of placement. Although the extended family of each child shall be reviewed on a case-by-case basis, "extended family" for the purpose of this subparagraph shall include, but not be limited to, the child's siblings, grandparents, aunts, and uncles.

(C) An evaluation of the child's medical, developmental, scholastic, mental, and emotional status.

(D) A preliminary assessment of the eligibility and commitment of any identified prospective adoptive parent or legal guardian, including the prospective tribal customary adoptive parent, particularly the caretaker, to include a social history including screening for criminal records and prior referrals for child abuse or neglect, the capability to meet the child's needs, and the understanding of the legal and financial rights and responsibilities of adoption and guardianship. If a proposed guardian is a relative of the minor, and the relative was assessed for foster care placement of the minor prior to January 1, 1998, the assessment shall also consider, but need not be limited to, all of the factors specified in subdivision (a) of Section 361.3.

(E) The relationship of the child to any identified prospective adoptive parent or legal guardian, the duration and character of the relationship, the motivation for seeking adoption or guardianship, and a statement from the child concerning placement and the adoption or guardianship, unless the child's age or physical, emotional, or other condition precludes his or her meaningful response, and if so, a description of the condition.

(F) A description of efforts to be made to identify a prospective adoptive parent or legal guardian, including, but not limited to, child-specific recruitment and listing on an adoption exchange within the state or out of the state.

(G) An analysis of the likelihood that the child will be adopted if parental rights are terminated.

(H) In the case of an Indian child, in addition to subparagraphs (A) to (G), inclusive, an assessment of the likelihood that the child will be adopted, when, in consultation with the child's tribe, a customary tribal adoption, as defined in Section 366.24, is recommended. If tribal customary adoption is recommended, the assessment shall include an analysis of both of the following:

(i) Whether tribal customary adoption would or would not be detrimental to the Indian child and the reasons for reaching that conclusion.

(ii) Whether the Indian child cannot or should not be returned to the home of the Indian parent or Indian custodian and the reasons for reaching that conclusion.

(2) (A) A relative caregiver's preference for legal guardianship over adoption, if it is due to circumstances that do not include an unwillingness to accept legal or financial responsibility for the child, shall not constitute the sole basis for recommending removal of the child from the relative caregiver for purposes of adoptive placement.

(B) A relative caregiver shall be given information regarding the permanency options of guardianship and adoption, including the long-term benefits and consequences of each option, prior to establishing legal guardianship or pursuing adoption.

(j) If, at any hearing held pursuant to Section 366.26, a guardianship is established for the minor with a relative, and juvenile court dependency is subsequently dismissed, the relative shall be eligible for aid under the

Kin-GAP Program, as provided for in Article 4.5 (commencing with Section 11360) of Chapter 2 of Part 3 of Division 9.

(k) As used in this section, "relative" means an adult who is related to the minor by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words "great," "great-great," or "grand," or the spouse of any of those persons even if the marriage was terminated by death or dissolution.

(*l*) For purposes of this section, evidence of any of the following circumstances may not, in and of itself, be deemed a failure to provide or offer reasonable services:

(1) The child has been placed with a foster family that is eligible to adopt a child, or has been placed in a preadoptive home.

(2) The case plan includes services to make and finalize a permanent placement for the child if efforts to reunify fail.

(3) Services to make and finalize a permanent placement for the child, if efforts to reunify fail, are provided concurrently with services to reunify the family.

(m) The implementation and operation of the amendments to subdivisions (c) and (g) enacted at the 2005–06 Regular Session shall be subject to appropriation through the budget process and by phase, as provided in Section 366.35.

(n) This section shall remain in effect only until January 1, 2014, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2014, deletes or extends that date.

SEC. 9. Section 366.21 is added to the Welfare and Institutions Code, to read:

366.21. (a) Every hearing conducted by the juvenile court reviewing the status of a dependent child shall be placed on the appearance calendar. The court shall advise all persons present at the hearing of the date of the future hearing and of their right to be present and represented by counsel.

(b) Except as provided in Sections 294 and 295, notice of the hearing shall be provided pursuant to Section 293.

(c) At least 10 calendar days prior to the hearing, the social worker shall file a supplemental report with the court regarding the services provided or offered to the parent or legal guardian to enable him or her to assume custody and the efforts made to achieve legal permanence for the child if efforts to reunify fail, including, but not limited to, efforts to maintain relationships between a child who is 10 years of age or older and has been in out-of-home placement for six months or longer and individuals who are important to the child, consistent with the child's best interests; the progress made; and, where relevant, the prognosis for return of the child to the physical custody of his or her parent or legal guardian; and shall make his or her recommendation for disposition. If the child is a member of a sibling group described in subparagraph (C) of paragraph (1) of subdivision (a) of Section 361.5, the report and recommendation may also take into account those factors described in subdivision (e) relating to the child's sibling group. If the recommendation is not to return the child to a parent or legal guardian,

the report shall specify why the return of the child would be detrimental to the child. The social worker shall provide the parent or legal guardian, counsel for the child, and any court-appointed child advocate with a copy of the report, including his or her recommendation for disposition, at least 10 calendar days prior to the hearing. In the case of a child removed from the physical custody of his or her parent or legal guardian, the social worker shall, at least 10 calendar days prior to the hearing, provide a summary of his or her recommendation for disposition to any foster parents, relative caregivers, and certified foster parents who have been approved for adoption by the State Department of Social Services when it is acting as an adoption agency in counties that are not served by a county adoption agency or by a licensed county adoption agency, community care facility, or foster family agency having the physical custody of the child. The social worker shall include a copy of the Judicial Council Caregiver Information Form (JV-290) with the summary of recommendations to the child's foster parents, relative caregivers, or foster parents approved for adoption, in the caregiver's primary language when available, along with information on how to file the form with the court.

(d) Prior to any hearing involving a child in the physical custody of a community care facility or a foster family agency that may result in the return of the child to the physical custody of his or her parent or legal guardian, or in adoption or the creation of a legal guardianship, the facility or agency shall file with the court a report, or a Judicial Council Caregiver Information Form (JV-290), containing its recommendation for disposition. Prior to the hearing involving a child in the physical custody of a foster parent, a relative caregiver, or a certified foster parent who has been approved for adoption by the State Department of Social Services when it is acting as an adoption agency or by a licensed adoption agency, the foster parent, relative caregiver, or the certified foster parent who has been approved for adoption by the State Department of Social Services when it is acting as an adoption agency in counties that are not served by a county adoption agency or by a licensed county adoption agency, may file with the court a report containing his or her recommendation for disposition. The court shall consider the report and recommendation filed pursuant to this subdivision prior to determining any disposition.

(e) At the review hearing held six months after the initial dispositional hearing, but no later than 12 months after the date the child entered foster care as determined in Section 361.49, whichever occurs earlier, the court shall order the return of the child to the physical custody of his or her parent or legal guardian unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. The social worker shall have the burden of establishing that detriment. At the hearing, the court shall consider the criminal history, obtained pursuant to paragraph (1) of subdivision (f) of Section 16504.5, of the parent or legal guardian subsequent to the child's removal to the extent that the criminal record is substantially related to the

welfare of the child or the parent's or guardian's ability to exercise custody and control regarding his or her child, provided the parent or legal guardian agreed to submit fingerprint images to obtain criminal history information as part of the case plan. The failure of the parent or legal guardian to participate regularly and make substantive progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental. In making its determination, the court shall review and consider the social worker's report and recommendations and the report and recommendations of any child advocate appointed pursuant to Section 356.5; and shall consider the efforts or progress, or both, demonstrated by the parent or legal guardian and the extent to which he or she availed himself or herself to services provided, taking into account the particular barriers to an incarcerated or institutionalized parent or legal guardian's access to those court-mandated services and ability to maintain contact with his or her child.

Regardless of whether the child is returned to a parent or legal guardian, the court shall specify the factual basis for its conclusion that the return would be detrimental or would not be detrimental. The court also shall make appropriate findings pursuant to subdivision (a) of Section 366; and, where relevant, shall order any additional services reasonably believed to facilitate the return of the child to the custody of his or her parent or legal guardian. The court shall also inform the parent or legal guardian that if the child cannot be returned home by the 12-month permanency hearing, a proceeding pursuant to Section 366.26 may be instituted. This section does not apply in a case where, pursuant to Section 361.5, the court has ordered that reunification services shall not be provided.

If the child was under three years of age on the date of the initial removal, or is a member of a sibling group described in subparagraph (C) of paragraph (1) of subdivision (a) of Section 361.5, and the court finds by clear and convincing evidence that the parent failed to participate regularly and make substantive progress in a court-ordered treatment plan, the court may schedule a hearing pursuant to Section 366.26 within 120 days. If, however, the court finds there is a substantial probability that the child, who was under three years of age on the date of initial removal or is a member of a sibling group described in subparagraph (C) of paragraph (1) of subdivision (a) of Section 361.5, may be returned to his or her parent or legal guardian within six months or that reasonable services have not been provided, the court shall continue the case to the 12-month permanency hearing.

For the purpose of placing and maintaining a sibling group together in a permanent home, the court, in making its determination to schedule a hearing pursuant to Section 366.26 for some or all members of a sibling group, as described in subparagraph (C) of paragraph (1) of subdivision (a) of Section 361.5, shall review and consider the social worker's report and recommendations. Factors the report shall address, and the court shall consider, may include, but need not be limited to, whether the sibling group was removed from parental care as a group, the closeness and strength of the sibling bond, the ages of the siblings, the appropriateness of maintaining

the sibling group together, the detriment to the child if sibling ties are not maintained, the likelihood of finding a permanent home for the sibling group, whether the sibling group is currently placed together in a preadoptive home or has a concurrent plan goal of legal permanency in the same home, the wishes of each child whose age and physical and emotional condition permits a meaningful response, and the best interest of each child in the sibling group. The court shall specify the factual basis for its finding that it is in the best interest of each child to schedule a hearing pursuant to Section 366.26 in 120 days for some or all of the members of the sibling group.

If the child was removed initially under subdivision (g) of Section 300 and the court finds by clear and convincing evidence that the whereabouts of the parent are still unknown, or the parent has failed to contact and visit the child, the court may schedule a hearing pursuant to Section 366.26 within 120 days. The court shall take into account any particular barriers to a parent's ability to maintain contact with his or her child due to the parent's incarceration or institutionalization. If the court finds by clear and convincing evidence that the parent has been convicted of a felony indicating parental unfitness, the court may schedule a hearing pursuant to Section 366.26 within 120 days.

If the child had been placed under court supervision with a previously noncustodial parent pursuant to Section 361.2, the court shall determine whether supervision is still necessary. The court may terminate supervision and transfer permanent custody to that parent, as provided for by paragraph (1) of subdivision (b) of Section 361.2.

In all other cases, the court shall direct that any reunification services previously ordered shall continue to be offered to the parent or legal guardian pursuant to the time periods set forth in subdivision (a) of Section 361.5, provided that the court may modify the terms and conditions of those services.

If the child is not returned to his or her parent or legal guardian, the court shall determine whether reasonable services that were designed to aid the parent or legal guardian in overcoming the problems that led to the initial removal and the continued custody of the child have been provided or offered to the parent or legal guardian. The court shall order that those services be initiated, continued, or terminated.

(f) The permanency hearing shall be held no later than 12 months after the date the child entered foster care, as that date is determined pursuant to Section 361.49. At the permanency hearing, the court shall determine the permanent plan for the child, which shall include a determination of whether the child will be returned to the child's home and, if so, when, within the time limits of subdivision (a) of Section 361.5. The court shall order the return of the child to the physical custody of his or her parent or legal guardian unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. The social worker shall have the burden of establishing that detriment. At the permanency hearing, the court shall

consider the criminal history, obtained pursuant to paragraph (1) of subdivision (f) of Section 16504.5, of the parent or legal guardian subsequent to the child's removal to the extent that the criminal record is substantially related to the welfare of the child or the parent or legal guardian's ability to exercise custody and control regarding his or her child, provided that the parent or legal guardian agreed to submit fingerprint images to obtain criminal history information as part of the case plan. The court shall also determine whether reasonable services that were designed to aid the parent or legal guardian to overcome the problems that led to the initial removal and continued custody of the child have been provided or offered to the parent or legal guardian. For each youth 16 years of age and older, the court shall also determine whether services have been made available to assist him or her in making the transition from foster care to independent living. The failure of the parent or legal guardian to participate regularly and make substantive progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental. In making its determination, the court shall review and consider the social worker's report and recommendations and the report and recommendations of any child advocate appointed pursuant to Section 356.5, shall consider the efforts or progress, or both, demonstrated by the parent or legal guardian and the extent to which he or she availed himself or herself of services provided, taking into account the particular barriers to an incarcerated or institutionalized parent or legal guardian's access to those court-mandated services and ability to maintain contact with his or her child and shall make appropriate findings pursuant to subdivision (a) of Section 366.

Regardless of whether the child is returned to his or her parent or legal guardian, the court shall specify the factual basis for its decision. If the child is not returned to a parent or legal guardian, the court shall specify the factual basis for its conclusion that the return would be detrimental. The court also shall make a finding pursuant to subdivision (a) of Section 366. If the child is not returned to his or her parent or legal guardian, the court shall consider, and state for the record, in-state and out-of-state placement options. If the child is placed out of the state, the court shall make a determination whether the out-of-state placement continues to be appropriate and in the best interests of the child.

(g) If the time period in which the court-ordered services were provided has met or exceeded the time period set forth in subparagraph (A), (B), or (C) of paragraph (1) of subdivision (a) of Section 361.5, as appropriate, and a child is not returned to the custody of a parent or legal guardian at the permanency hearing held pursuant to subdivision (f), the court shall do one of the following:

(1) Continue the case for up to six months for a permanency review hearing, provided that the hearing shall occur within 18 months of the date the child was originally taken from the physical custody of his or her parent or legal guardian. The court shall continue the case only if it finds that there is a substantial probability that the child will be returned to the physical custody of his or her parent or legal guardian and safely maintained in the

home within the extended period of time or that reasonable services have not been provided to the parent or legal guardian. For the purposes of this section, in order to find a substantial probability that the child will be returned to the physical custody of his or her parent or legal guardian and safely maintained in the home within the extended period of time, the court shall be required to find all of the following:

(A) That the parent or legal guardian has consistently and regularly contacted and visited with the child.

(B) That the parent or legal guardian has made significant progress in resolving problems that led to the child's removal from the home.

(C) The parent or legal guardian has demonstrated the capacity and ability both to complete the objectives of his or her treatment plan and to provide for the child's safety, protection, physical and emotional well-being, and special needs.

For purposes of this subdivision, the court's decision to continue the case based on a finding or substantial probability that the child will be returned to the physical custody of his or her parent or legal guardian is a compelling reason for determining that a hearing held pursuant to Section 366.26 is not in the best interests of the child.

The court shall inform the parent or legal guardian that if the child cannot be returned home by the next permanency review hearing, a proceeding pursuant to Section 366.26 may be instituted. The court may not order that a hearing pursuant to Section 366.26 be held unless there is clear and convincing evidence that reasonable services have been provided or offered to the parent or legal guardian.

(2) Order that a hearing be held within 120 days, pursuant to Section 366.26, but only if the court does not continue the case to the permanency planning review hearing and there is clear and convincing evidence that reasonable services have been provided or offered to the parents or legal guardians.

(3) Order that the child remain in long-term foster care, but only if the court finds by clear and convincing evidence, based upon the evidence already presented to it, including a recommendation by the State Department of Social Services when it is acting as an adoption agency in counties that are not served by a county adoption agency or by a licensed county adoption agency, that there is a compelling reason for determining that a hearing held pursuant to Section 366.26 is not in the best interest of the child because the child is not a proper subject for adoption and has no one willing to accept legal guardianship. For purposes of this section, a recommendation by the State Department of Social Services when it is acting as an adoption agency in counties that are not served by a county adoption agency or by a licensed county adoption agency that adoption is not in the best interest of the child shall constitute a compelling reason for the court's determination. That recommendation shall be based on the present circumstances of the child and may not preclude a different recommendation at a later date if the child's circumstances change.

If the court orders that a child who is 10 years of age or older remain in long-term foster care, the court shall determine whether the agency has made reasonable efforts to maintain the child's relationships with individuals other than the child's siblings who are important to the child, consistent with the child's best interests, and may make any appropriate order to ensure that those relationships are maintained.

If the child is not returned to his or her parent or legal guardian, the court shall consider, and state for the record, in-state and out-of-state options for permanent placement. If the child is placed out of the state, the court shall make a determination whether the out-of-state placement continues to be appropriate and in the best interests of the child.

(h) In any case in which the court orders that a hearing pursuant to Section 366.26 shall be held, it shall also order the termination of reunification services to the parent or legal guardian. The court shall continue to permit the parent or legal guardian to visit the child pending the hearing unless it finds that visitation would be detrimental to the child. The court shall make any other appropriate orders to enable the child to maintain relationships with individuals, other than the child's siblings, who are important to the child, consistent with the child's best interests.

(i) (1) Whenever a court orders that a hearing pursuant to Section 366.26 shall be held, it shall direct the agency supervising the child and the licensed county adoption agency, or the State Department of Social Services when it is acting as an adoption agency in counties that are not served by a county adoption agency, to prepare an assessment that shall include:

(A) Current search efforts for an absent parent or parents or legal guardians.

(B) A review of the amount of and nature of any contact between the child and his or her parents or legal guardians and other members of his or her extended family since the time of placement. Although the extended family of each child shall be reviewed on a case-by-case basis, "extended family" for the purpose of this subparagraph shall include, but not be limited to, the child's siblings, grandparents, aunts, and uncles.

(C) An evaluation of the child's medical, developmental, scholastic, mental, and emotional status.

(D) A preliminary assessment of the eligibility and commitment of any identified prospective adoptive parent or legal guardian, particularly the caretaker, to include a social history including screening for criminal records and prior referrals for child abuse or neglect, the capability to meet the child's needs, and the understanding of the legal and financial rights and responsibilities of adoption and guardianship. If a proposed guardian is a relative of the minor, and the relative was assessed for foster care placement of the minor prior to January 1, 1998, the assessment shall also consider, but need not be limited to, all of the factors specified in subdivision (a) of Section 361.3.

(E) The relationship of the child to any identified prospective adoptive parent or legal guardian, the duration and character of the relationship, the motivation for seeking adoption or guardianship, and a statement from the

child concerning placement and the adoption or guardianship, unless the child's age or physical, emotional, or other condition precludes his or her meaningful response, and if so, a description of the condition.

(F) A description of efforts to be made to identify a prospective adoptive parent or legal guardian, including, but not limited to, child-specific recruitment and listing on an adoption exchange within the state or out of the state.

(G) An analysis of the likelihood that the child will be adopted if parental rights are terminated.

(2) (A) A relative caregiver's preference for legal guardianship over adoption, if it is due to circumstances that do not include an unwillingness to accept legal or financial responsibility for the child, shall not constitute the sole basis for recommending removal of the child from the relative caregiver for purposes of adoptive placement.

(B) A relative caregiver shall be given information regarding the permanency options of guardianship and adoption, including the long-term benefits and consequences of each option, prior to establishing legal guardianship or pursuing adoption.

(j) If, at any hearing held pursuant to Section 366.26, a guardianship is established for the minor with a relative, and juvenile court dependency is subsequently dismissed, the relative shall be eligible for aid under the Kin-GAP Program, as provided for in Article 4.5 (commencing with Section 11360) of Chapter 2 of Part 3 of Division 9.

(k) As used in this section, "relative" means an adult who is related to the minor by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words "great," "great-great," or "grand," or the spouse of any of those persons even if the marriage was terminated by death or dissolution.

(*l*) For purposes of this section, evidence of any of the following circumstances may not, in and of itself, be deemed a failure to provide or offer reasonable services:

(1) The child has been placed with a foster family that is eligible to adopt a child, or has been placed in a preadoptive home.

(2) The case plan includes services to make and finalize a permanent placement for the child if efforts to reunify fail.

(3) Services to make and finalize a permanent placement for the child, if efforts to reunify fail, are provided concurrently with services to reunify the family.

(m) The implementation and operation of the amendments to subdivisions (c) and (g) enacted at the 2005–06 Regular Session shall be subject to appropriation through the budget process and by phase, as provided in Section 366.35.

(n) This section shall become operative on January 1, 2014.

SEC. 10. Section 366.22 of the Welfare and Institutions Code is amended to read:

366.22. (a) When a case has been continued pursuant to paragraph (1) of subdivision (g) of Section 366.21, the permanency review hearing shall

occur within 18 months after the date the child was originally removed from the physical custody of his or her parent or legal guardian. The court shall order the return of the child to the physical custody of his or her parent or legal guardian unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. The social worker shall have the burden of establishing that detriment. At the permanency review hearing, the court shall consider the criminal history, obtained pursuant to paragraph (1) of subdivision (f) of Section 16504.5, of the parent or legal guardian subsequent to the child's removal, to the extent that the criminal record is substantially related to the welfare of the child or the parent's or legal guardian's ability to exercise custody and control regarding his or her child, provided that the parent or legal guardian agreed to submit fingerprint images to obtain criminal history information as part of the case plan. The failure of the parent or legal guardian to participate regularly and make substantive progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental. In making its determination, the court shall review and consider the social worker's report and recommendations and the report and recommendations of any child advocate appointed pursuant to Section 356.5; shall consider the efforts or progress, or both, demonstrated by the parent or legal guardian and the extent to which he or she availed himself or herself of services provided, taking into account the particular barriers of an incarcerated or institutionalized parent or legal guardian's access to those court-mandated services and ability to maintain contact with his or her child; and shall make appropriate findings pursuant to subdivision (a) of Section 366.

Whether or not the child is returned to his or her parent or legal guardian, the court shall specify the factual basis for its decision. If the child is not returned to a parent or legal guardian, the court shall specify the factual basis for its conclusion that return would be detrimental. If the child is not returned to his or her parent or legal guardian, the court shall consider, and state for the record, in-state and out-of-state options for the child's permanent placement. If the child is placed out of the state, the court shall make a determination whether the out-of-state placement continues to be appropriate and in the best interests of the child.

Unless the conditions in subdivision (b) are met and the child is not returned to a parent or legal guardian at the permanency review hearing, the court shall order that a hearing be held pursuant to Section 366.26 in order to determine whether adoption, or, in the case of an Indian child, in consultation with the child's tribe, tribal customary adoption, guardianship, or long-term foster care is the most appropriate plan for the child. However, if the court finds by clear and convincing evidence, based on the evidence already presented to it, including a recommendation by the State Department of Social Services when it is acting as an adoption agency in counties that are not served by a county adoption agency or by a licensed county adoption agency, that there is a compelling reason, as described in paragraph (3) of

subdivision (g) of Section 366.21, for determining that a hearing held under Section 366.26 is not in the best interest of the child because the child is not a proper subject for adoption and has no one willing to accept legal guardianship, then the court may, only under these circumstances, order that the child remain in foster care. If the court orders that a child who is 10 years of age or older remain in long-term foster care, the court shall determine whether the agency has made reasonable efforts to maintain the child's relationships with individuals other than the child's siblings who are important to the child, consistent with the child's best interests, and may make any appropriate order to ensure that those relationships are maintained. The hearing shall be held no later than 120 days from the date of the permanency review hearing. The court shall also order termination of reunification services to the parent or legal guardian. The court shall continue to permit the parent or legal guardian to visit the child unless it finds that visitation would be detrimental to the child. The court shall determine whether reasonable services have been offered or provided to the parent or legal guardian. For purposes of this subdivision, evidence of any of the following circumstances shall not, in and of themselves, be deemed a failure to provide or offer reasonable services:

(1) The child has been placed with a foster family that is eligible to adopt a child, or has been placed in a preadoptive home.

(2) The case plan includes services to make and finalize a permanent placement for the child if efforts to reunify fail.

(3) Services to make and finalize a permanent placement for the child, if efforts to reunify fail, are provided concurrently with services to reunify the family.

(b) If the child is not returned to a parent or legal guardian at the permanency review hearing and the court determines by clear and convincing evidence that the best interests of the child would be met by the provision of additional reunification services to a parent or legal guardian who is making significant and consistent progress in a substance abuse treatment program, or a parent recently discharged from incarceration or institutionalization and making significant and consistent progress in establishing a safe home for the child's return, the court may continue the case for up to six months for a subsequent permanency review hearing, provided that the hearing shall occur within 24 months of the date the child was originally taken from the physical custody of his or her parent or legal guardian. The court shall continue the case only if it finds that there is a substantial probability that the child will be returned to the physical custody of his or her parent or legal guardian and safely maintained in the home within the extended period of time or that reasonable services have not been provided to the parent or legal guardian. For the purposes of this section, in order to find a substantial probability that the child will be returned to the physical custody of his or her parent or legal guardian and safely maintained in the home within the extended period of time, the court shall be required to find all of the following:

(1) That the parent or legal guardian has consistently and regularly contacted and visited with the child.

(2) That the parent or legal guardian has made significant and consistent progress in the prior 18 months in resolving problems that led to the child's removal from the home.

(3) The parent or legal guardian has demonstrated the capacity and ability both to complete the objectives of his or her substance abuse treatment plan as evidenced by reports from a substance abuse provider as applicable, or complete a treatment plan postdischarge from incarceration or institutionalization, and to provide for the child's safety, protection, physical and emotional well-being, and special needs.

For purposes of this subdivision, the court's decision to continue the case based on a finding or substantial probability that the child will be returned to the physical custody of his or her parent or legal guardian is a compelling reason for determining that a hearing held pursuant to Section 366.26 is not in the best interests of the child.

The court shall inform the parent or legal guardian that if the child cannot be returned home by the subsequent permanency review hearing, a proceeding pursuant to Section 366.26 may be instituted. The court may not order that a hearing pursuant to Section 366.26 be held unless there is clear and convincing evidence that reasonable services have been provided or offered to the parent or legal guardian.

(c) (1) Whenever a court orders that a hearing pursuant to Section 366.26, including when a tribal customary adoption is recommended, shall be held, it shall direct the agency supervising the child and the licensed county adoption agency, or the State Department of Social Services when it is acting as an adoption agency in counties that are not served by a county adoption agency, to prepare an assessment that shall include:

(A) Current search efforts for an absent parent or parents.

(B) A review of the amount of and nature of any contact between the child and his or her parents and other members of his or her extended family since the time of placement. Although the extended family of each child shall be reviewed on a case-by-case basis, "extended family" for the purposes of this subparagraph shall include, but not be limited to, the child's siblings, grandparents, aunts, and uncles.

(C) An evaluation of the child's medical, developmental, scholastic, mental, and emotional status.

(D) A preliminary assessment of the eligibility and commitment of any identified prospective adoptive parent or legal guardian, particularly the caretaker, to include a social history including screening for criminal records and prior referrals for child abuse or neglect, the capability to meet the child's needs, and the understanding of the legal and financial rights and responsibilities of adoption and guardianship. If a proposed legal guardian is a relative of the minor, and the relative was assessed for foster care placement of the minor prior to January 1, 1998, the assessment shall also consider, but need not be limited to, all of the factors specified in subdivision (a) of Section 361.3.

(E) The relationship of the child to any identified prospective adoptive parent or legal guardian, the duration and character of the relationship, the motivation for seeking adoption or legal guardianship, and a statement from the child concerning placement and the adoption or legal guardianship, unless the child's age or physical, emotional, or other condition precludes his or her meaningful response, and if so, a description of the condition.

(F) An analysis of the likelihood that the child will be adopted if parental rights are terminated.

(G) In the case of an Indian child, in addition to subparagraphs (A) to (F), inclusive, an assessment of the likelihood that the child will be adopted, when, in consultation with the child's tribe, a customary tribal adoption, as defined in Section 366.24, is recommended. If tribal customary adoption is recommended, the assessment shall include an analysis of both of the following:

(i) Whether tribal customary adoption would or would not be detrimental to the Indian child and the reasons for reaching that conclusion.

(ii) Whether the Indian child cannot or should not be returned to the home of the Indian parent or Indian custodian and the reasons for reaching that conclusion.

(2) (A) A relative caregiver's preference for legal guardianship over adoption, if it is due to circumstances that do not include an unwillingness to accept legal or financial responsibility for the child, shall not constitute the sole basis for recommending removal of the child from the relative caregiver for purposes of adoptive placement.

(B) A relative caregiver shall be given information regarding the permanency options of guardianship and adoption, including the long-term benefits and consequences of each option, prior to establishing legal guardianship or pursuing adoption.

(d) This section shall become operative January 1, 1999. If at any hearing held pursuant to Section 366.26, a legal guardianship is established for the minor with a relative, and juvenile court dependency is subsequently dismissed, the relative shall be eligible for aid under the Kin-GAP Program, as provided for in Article 4.5 (commencing with Section 11360) of Chapter 2 of Part 3 of Division 9.

(e) As used in this section, "relative" means an adult who is related to the child by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words "great," "great-great," or "grand," or the spouse of any of those persons even if the marriage was terminated by death or dissolution.

(f) The implementation and operation of the amendments to subdivision (a) enacted at the 2005–06 Regular Session shall be subject to appropriation through the budget process and by phase, as provided in Section 366.35.

(g) This section shall remain in effect only until January 1, 2014, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2014, deletes or extends that date.

SEC. 11. Section 366.22 is added to the Welfare and Institutions Code, to read:

366.22. (a) When a case has been continued pursuant to paragraph (1) of subdivision (g) of Section 366.21, the permanency review hearing shall occur within 18 months after the date the child was originally removed from the physical custody of his or her parent or legal guardian. The court shall order the return of the child to the physical custody of his or her parent or legal guardian unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. The social worker shall have the burden of establishing that detriment. At the permanency review hearing, the court shall consider the criminal history, obtained pursuant to paragraph (1) of subdivision (f) of Section 16504.5, of the parent or legal guardian subsequent to the child's removal, to the extent that the criminal record is substantially related to the welfare of the child or the parent's or legal guardian's ability to exercise custody and control regarding his or her child, provided that the parent or legal guardian agreed to submit fingerprint images to obtain criminal history information as part of the case plan. The failure of the parent or legal guardian to participate regularly and make substantive progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental. In making its determination, the court shall review and consider the social worker's report and recommendations and the report and recommendations of any child advocate appointed pursuant to Section 356.5; shall consider the efforts or progress, or both, demonstrated by the parent or legal guardian and the extent to which he or she availed himself or herself of services provided, taking into account the particular barriers of an incarcerated or institutionalized parent or legal guardian's access to those court-mandated services and ability to maintain contact with his or her child; and shall make appropriate findings pursuant to subdivision (a) of Section 366.

Whether or not the child is returned to his or her parent or legal guardian, the court shall specify the factual basis for its decision. If the child is not returned to a parent or legal guardian, the court shall specify the factual basis for its conclusion that return would be detrimental. If the child is not returned to his or her parent or legal guardian, the court shall consider, and state for the record, in-state and out-of-state options for the child's permanent placement. If the child is placed out of the state, the court shall make a determination whether the out-of-state placement continues to be appropriate and in the best interests of the child.

Unless the conditions in subdivision (b) are met and the child is not returned to a parent or legal guardian at the permanency review hearing, the court shall order that a hearing be held pursuant to Section 366.26 in order to determine whether adoption, guardianship, or long-term foster care is the most appropriate plan for the child. However, if the court finds by clear and convincing evidence, based on the evidence already presented to it, including a recommendation by the State Department of Social Services when it is acting as an adoption agency in counties that are not served by a county adoption agency or by a licensed county adoption agency, that there

is a compelling reason, as described in paragraph (3) of subdivision (g) of Section 366.21, for determining that a hearing held under Section 366.26 is not in the best interest of the child because the child is not a proper subject for adoption and has no one willing to accept legal guardianship, then the court may, only under these circumstances, order that the child remain in foster care. If the court orders that a child who is 10 years of age or older remain in long-term foster care, the court shall determine whether the agency has made reasonable efforts to maintain the child's relationships with individuals other than the child's siblings who are important to the child, consistent with the child's best interests, and may make any appropriate order to ensure that those relationships are maintained. The hearing shall be held no later than 120 days from the date of the permanency review hearing. The court shall also order termination of reunification services to the parent or legal guardian. The court shall continue to permit the parent or legal guardian to visit the child unless it finds that visitation would be detrimental to the child. The court shall determine whether reasonable services have been offered or provided to the parent or legal guardian. For purposes of this subdivision, evidence of any of the following circumstances shall not, in and of themselves, be deemed a failure to provide or offer reasonable services:

(1) The child has been placed with a foster family that is eligible to adopt a child, or has been placed in a preadoptive home.

(2) The case plan includes services to make and finalize a permanent placement for the child if efforts to reunify fail.

(3) Services to make and finalize a permanent placement for the child, if efforts to reunify fail, are provided concurrently with services to reunify the family.

(b) If the child is not returned to a parent or legal guardian at the permanency review hearing and the court determines by clear and convincing evidence that the best interests of the child would be met by the provision of additional reunification services to a parent or legal guardian who is making significant and consistent progress in a substance abuse treatment program, or a parent recently discharged from incarceration or institutionalization and making significant and consistent progress in establishing a safe home for the child's return, the court may continue the case for up to six months for a subsequent permanency review hearing, provided that the hearing shall occur within 24 months of the date the child was originally taken from the physical custody of his or her parent or legal guardian. The court shall continue the case only if it finds that there is a substantial probability that the child will be returned to the physical custody of his or her parent or legal guardian and safely maintained in the home within the extended period of time or that reasonable services have not been provided to the parent or legal guardian. For the purposes of this section, in order to find a substantial probability that the child will be returned to the physical custody of his or her parent or legal guardian and safely maintained in the home within the extended period of time, the court shall be required to find all of the following:

(1) That the parent or legal guardian has consistently and regularly contacted and visited with the child.

(2) That the parent or legal guardian has made significant and consistent progress in the prior 18 months in resolving problems that led to the child's removal from the home.

(3) The parent or legal guardian has demonstrated the capacity and ability both to complete the objectives of his or her substance abuse treatment plan as evidenced by reports from a substance abuse provider as applicable, or complete a treatment plan postdischarge from incarceration or institutionalization, and to provide for the child's safety, protection, physical and emotional well-being, and special needs.

For purposes of this subdivision, the court's decision to continue the case based on a finding or substantial probability that the child will be returned to the physical custody of his or her parent or legal guardian is a compelling reason for determining that a hearing held pursuant to Section 366.26 is not in the best interests of the child.

The court shall inform the parent or legal guardian that if the child cannot be returned home by the subsequent permanency review hearing, a proceeding pursuant to Section 366.26 may be instituted. The court may not order that a hearing pursuant to Section 366.26 be held unless there is clear and convincing evidence that reasonable services have been provided or offered to the parent or legal guardian.

(c) (1) Whenever a court orders that a hearing pursuant to Section 366.26 shall be held, it shall direct the agency supervising the child and the licensed county adoption agency, or the State Department of Social Services when it is acting as an adoption agency in counties that are not served by a county adoption agency, to prepare an assessment that shall include:

(A) Current search efforts for an absent parent or parents.

(B) A review of the amount of and nature of any contact between the child and his or her parents and other members of his or her extended family since the time of placement. Although the extended family of each child shall be reviewed on a case-by-case basis, "extended family" for the purposes of this subparagraph shall include, but not be limited to, the child's siblings, grandparents, aunts, and uncles.

(C) An evaluation of the child's medical, developmental, scholastic, mental, and emotional status.

(D) A preliminary assessment of the eligibility and commitment of any identified prospective adoptive parent or legal guardian, particularly the caretaker, to include a social history including screening for criminal records and prior referrals for child abuse or neglect, the capability to meet the child's needs, and the understanding of the legal and financial rights and responsibilities of adoption and guardianship. If a proposed legal guardian is a relative of the minor, and the relative was assessed for foster care placement of the minor prior to January 1, 1998, the assessment shall also consider, but need not be limited to, all of the factors specified in subdivision (a) of Section 361.3.

(E) The relationship of the child to any identified prospective adoptive parent or legal guardian, the duration and character of the relationship, the motivation for seeking adoption or legal guardianship, and a statement from the child concerning placement and the adoption or legal guardianship, unless the child's age or physical, emotional, or other condition precludes his or her meaningful response, and if so, a description of the condition.

(F) An analysis of the likelihood that the child will be adopted if parental rights are terminated.

(2) (A) A relative caregiver's preference for legal guardianship over adoption, if it is due to circumstances that do not include an unwillingness to accept legal or financial responsibility for the child, shall not constitute the sole basis for recommending removal of the child from the relative caregiver for purposes of adoptive placement.

(B) A relative caregiver shall be given information regarding the permanency options of guardianship and adoption, including the long-term benefits and consequences of each option, prior to establishing legal guardianship or pursuing adoption.

(d) This section shall become operative January 1, 1999. If at any hearing held pursuant to Section 366.26, a legal guardianship is established for the minor with a relative, and juvenile court dependency is subsequently dismissed, the relative shall be eligible for aid under the Kin-GAP Program, as provided for in Article 4.5 (commencing with Section 11360) of Chapter 2 of Part 3 of Division 9.

(e) As used in this section, "relative" means an adult who is related to the child by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words "great," "great-great," or "grand," or the spouse of any of those persons even if the marriage was terminated by death or dissolution.

(f) The implementation and operation of the amendments to subdivision (a) enacted at the 2005–06 Regular Session shall be subject to appropriation through the budget process and by phase, as provided in Section 366.35.

(g) This section shall become operative on January 1, 2014.

SEC. 12. Section 366.24 is added to the Welfare and Institutions Code, to read:

366.24. (a) For purposes of this section, "tribal customary adoption" means adoption by and through the tribal custom, traditions, or law of an Indian child's tribe. Termination of parental rights is not required to effect the tribal customary adoption.

(b) Whenever an assessment is ordered pursuant to Section 361.5, 366.21, 366.22, 366.25, or 366.26 for Indian children, the assessment shall address the option of tribal customary adoption.

(c) For purposes of Section 366.26, in the case of tribal customary adoptions, all of the following apply:

(1) The child's tribe or the tribe's designee shall conduct a tribal customary adoptive home study prior to final approval of the tribal customary adoptive placement.

(A) Where a tribal designee is conducting the home study, the designee shall do so in consultation with the Indian child's tribe. The designee may include a licensed county adoption agency, the State Department of Social Services when it is acting as an adoption agency in counties not served by a county adoption agency, or a California licensed adoption agency. Any tribal designee must be an entity authorized to request a search of the Child Abuse Central Index and, if necessary, a check of any other state's child abuse and neglect registry and authorized to request a search for state or federal level criminal offender records information through the Department of Justice.

(B) The standard for the evaluation of the prospective adoptive parents' home shall be the prevailing social and cultural standard of the child's tribe. The home study shall include an evaluation of the background, safety and health information of the adoptive home, including the biological, psychological and social factors of the prospective adoptive parent or parents and an assessment of the commitment, capability and suitability of the prospective adoptive parent or parents to meet the child's needs.

(2) In all cases, an in-state check of the Child Abuse Central Index and, if necessary, a check of any other state's child abuse and neglect registry shall be conducted. If the tribe chooses a designee to conduct the home study, the designee shall perform a check of the Child Abuse Central Index pursuant to Section 1522.1 of the Health and Safety Code as it applies to prospective adoptive parents and persons over 18 years of age residing in their household. If the tribe conducts its own home study, the agency that has the placement and care responsibility of the child shall perform the check.

(3) In all cases prior to final approval of the tribal customary adoptive placement, a state and federal criminal background check through the Department of Justice shall be conducted on the prospective tribal customary adoptive parents and of persons over 18 years of age residing in their household. If the tribe chooses a designee to conduct the home study, the designee shall perform the state and federal criminal background checks. If the tribe conducts its own home study, the agency that has the placement and care responsibility of the child, shall perform the state and federal criminal background check. An individual who is the subject of the check may be provided, by the entity performing the background check, a copy of his or her state or federal level criminal offender record information search response as provided to that entity by the Department of Justice if the entity has denied a criminal background clearance based on this information and the individual makes a written request to the entity for a copy specifying an address to which it is to be sent. The state or federal level criminal offender record information search response shall not be modified or altered from its form or content as provided by the Department of Justice and shall be provided to the address specified by the individual in his or her written request. The entity shall retain a copy of the individual's written request and the response and date provided.

(4) If federal or state law provides that tribes may conduct all required background checks for prospective adoptive parents, the tribally administered background checks shall satisfy the requirements of this section, so long as the standards for the background checks are the same as those applied to all other prospective adoptive parents in the State of California.

(5) Under no circumstances shall final approval be granted for an adoptive placement in any home if the prospective adoptive parent or any adult living in the prospective tribal customary adoptive home has any of the following:

(A) A felony conviction for child abuse or neglect, spousal abuse, crimes against a child, including child pornography, or a crime involving violence, including rape, sexual assault, or homicide, but not including other physical assault and battery. For purposes of this subdivision, crimes involving violence means those violent crimes contained in clause (i) of subparagraph (A) and subparagraph (B), or paragraph (1) of, subdivision (g) of Section 1522 of the Health and Safety Code.

(B) A felony conviction that occurred within the last five years for physical assault, battery, or a drug-related offense.

(6) If the tribe identifies tribal customary adoption as the permanent placement plan for the Indian child, the court may continue the selection and implementation hearing governed by Section 366.26 for a period not to exceed 120 days to permit the tribe to complete the process for tribal customary adoption and file with the court a tribal customary adoption order evidencing that a tribal customary adoption has been completed. The tribe shall file with the court the tribal customary adoption order no less than 20 days prior to the date set by the court for the continued selection and implementation hearing. The department shall file with the court the addendum selection and implementation hearing court report no less than seven days prior to the date set by the court for the continued selection and implementation hearing. The court shall have discretion to grant an additional continuance to the tribe for filing a tribal customary adoption order up to, but not exceeding, 60 days. If the child's tribe does not file the tribal customary adoption order within the designated time period, the court shall make new findings and orders pursuant to subdivision (b) of Section 366.26 and this subdivision to determine the best permanent plan for the child.

(7) The child, birth parents, or Indian custodian and the tribal customary adoptive parents and their counsel, if applicable, may present evidence to the tribe regarding the tribal customary adoption and the child's best interest.

(8) Upon the court affording full faith and credit to the tribal customary adoption order and the tribe's approval of the home study, the child shall be eligible for tribal customary adoptive placement. The agency that has placement and care responsibility of the child shall be authorized to make a tribal customary adoptive placement and sign a tribal customary adoptive placement agreement and, thereafter, shall sign the adoption assistance agreement pursuant to subdivision (g) of Section 16120. The prospective adoptive parent or parents desiring to adopt the child may then file the petition for adoption. The agency shall supervise the adoptive placement

for a period of six months unless either of the following circumstances exists:

(A) The child to be adopted is a foster child of the prospective adoptive parents whose foster care placement has been supervised by an agency before the signing of the adoptive placement agreement in which case the supervisory period may be shortened by one month for each full month that the child has been in foster care with the family.

(B) The child to be adopted is placed with a relative with whom they have an established relationship.

(9) All licensed public adoption agencies shall cooperate with and assist the department in devising a plan that will effectuate the effective and discreet transmission to tribal customary adoptees or prospective tribal customary adoptive parents of pertinent medical information reported to the department or the licensed public adoption agency, upon the request of the person reporting the medical information.

(A) A licensed public adoption agency may not place a child for tribal customary adoption unless a written report on the child's medical background and, if available, the medical background on the child's biological parents, so far as ascertainable, has been submitted to the prospective tribal customary adoptive parents and they have acknowledged in writing the receipt of the report.

(B) The report on the child's background shall contain all known diagnostic information, including current medical reports on the child, psychological evaluations, and scholastic information, as well as all known information regarding the child's developmental history.

(10) The tribal customary adoption order shall include, but not be limited to, a description of (A) the modification of the legal relationship of the birth parents or Indian custodian and the child, including contact, if any, between the child and the birth parents or Indian custodian, responsibilities of the birth parents or Indian custodian, and the rights of inheritance of the child and (B) the child's legal relationship with the tribe. The order shall not include any child support obligation from the birth parents or Indian custodian. There shall be a conclusive presumption that any parental rights or obligations not specified in the tribal customary adoption order shall vest in the tribal customary adoptive parents.

(11) Prior consent to a permanent plan of tribal customary adoption of an Indian child shall not be required of an Indian parent or Indian custodian whose parental relationship to the child will be modified by the tribal customary adoption.

(12) After the prospective adoptive parent or parents desiring to adopt the child have filed the adoption petition, the agency that has placement, care and responsibility for the child shall submit to the court, a full and final report of the facts of the proposed tribal customary adoption. The requisite elements of the final court report shall be those specified for court reports in the department's regulations governing agency adoptions.

(13) Notwithstanding any other provision of law, after the tribal customary adoption order has been issued and afforded full faith and credit

by the state court, the tribal customary adoptive parents shall have all of the rights and privileges afforded to, and are subject to all the duties of, any other adoptive parent or parents pursuant to the laws of this state.

(14) Consistent with Section 366.3, after the tribal customary adoption has been afforded full faith and credit and a final adoption decree has been issued, the court shall terminate its jurisdiction over the Indian child.

(15) Nothing in this section is intended to prevent the transfer of those proceedings to a tribal court where transfer is otherwise permitted under applicable law.

(d) The following disclosure provisions shall apply to tribal customary adoptions:

(1) The petition, agreement, order, report to the court from any investigating agency, and any power of attorney filed in a tribal customary adoption proceeding is not open to inspection by any person other than the parties to the proceeding and their attorneys and the department, except upon the written authority of the judge of the juvenile court. A judge may not authorize anyone to inspect the petition, agreement, order, report to the court from any investigating agency, and any power of attorney except in exceptional circumstances and for good cause approaching the necessitous.

(2) Except as otherwise permitted or required by statute, neither the department nor any licensed adoption agency shall release information that would identify persons who receive, or have received, tribal customary adoption services. However, employees of the department and licensed adoption agencies shall release to the State Department of Social Services any requested information, including identifying information, for the purpose of recordkeeping and monitoring, evaluation, and regulation of the provision of tribal customary adoption services.

(3) The department and any licensed adoption agency may, upon written authorization for the release of specified information by the subject of that information, share information regarding a prospective tribal customary adoptive parent or birth parent with other social service agencies, including the department and other licensed adoption agencies, or providers of health care as defined in Section 56.05 of the Civil Code.

(4) Notwithstanding any other law, the department and any other licensed adoption agency may furnish information relating to a tribal customary adoption petition or to a child in the custody of the department or any licensed public adoption agency to the juvenile court, county welfare department, public welfare agency, private welfare agency licensed by the department, provider of foster care services, potential adoptive parents, or provider of health care as defined in Section 56.05 of the Civil Code, if it is believed the child's welfare will be promoted thereby.

(5) The department and any licensed adoption agency may make tribal customary adoption case records, including identifying information, available for research purposes, provided that the research will not result in the disclosure of the identity of the child or the parties to the tribal customary adoption to anyone other than the entity conducting the research.

(e) This section shall remain operative only to the extent that compliance with its provisions does not conflict with federal law as a condition of receiving funding under Title IV-E or the federal Social Security Act (42 U.S.C. Sec. 670 et seq.).

(f) The Judicial Council shall adopt rules of court and necessary forms required to implement tribal customary adoption as a permanent plan for dependent Indian children. The Judicial Council shall study California's tribal customary adoption provisions and their affects on children, birth parents, adoptive parents, Indian custodians, tribes, and the court, and shall report all of its findings to the Legislature on or before January 1, 2013. The report shall include, but not be limited to, the following:

(1) The number of families served and the number of completed tribal customary adoptions.

(2) The length of time it takes to complete a tribal customary adoption.

(3) The challenges faced by social workers, court, and tribes in completing tribal customary adoptions.

(4) The benefits or detriments to Indian children from a tribal customary adoption.

(g) This section shall remain in effect only until January 1, 2014, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2014, deletes or extends that date.

SEC. 13. Section 366.25 of the Welfare and Institutions Code is amended to read:

366.25. (a) (1) When a case has been continued pursuant to subdivision (b) of Section 366.22, the subsequent permanency review hearing shall occur within 24 months after the date the child was originally removed from the physical custody of his or her parent or legal guardian. The court shall order the return of the child to the physical custody of his or her parent or legal guardian unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. The social worker shall have the burden of establishing that detriment. At the subsequent permanency review hearing, the court shall consider the criminal history, obtained pursuant to paragraph (1) of subdivision (f) of Section 16504.5, of the parent or legal guardian subsequent to the child's removal to the extent that the criminal record is substantially related to the welfare of the child or parent or legal guardian's ability to exercise custody and control regarding his or her child provided that the parent or legal guardian agreed to submit fingerprint images to obtain criminal history information as part of the case plan. The failure of the parent or legal guardian to participate regularly and make substantive progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental. In making its determination, the court shall review and consider the social worker's report and recommendations and the report and recommendations of any child advocate appointed pursuant to Section 356.5; shall consider the efforts or progress, or both, demonstrated by the parent or legal guardian and the extent to which he or she availed

himself or herself of services provided; and shall make appropriate findings pursuant to subdivision (a) of Section 366.

(2) Whether or not the child is returned to his or her parent or legal guardian, the court shall specify the factual basis for its decision. If the child is not returned to a parent or legal guardian, the court shall specify the factual basis for its conclusion that return would be detrimental. If the child is not returned to his or her parents or legal guardian, the court shall consider and state for the record, in-state and out-of-state options for the child's permanent placement. If the child is placed out of the state, the court shall make a determination whether the out-of-state placement continues to be appropriate and in best interests of the child.

(3) If the child is not returned to a parent or legal guardian at the subsequent permanency review hearing, the court shall order that a hearing be held pursuant to Section 366.26 in order to determine whether adoption, or, in the case of an Indian child, tribal customary adoption, guardianship, or long-term foster care is the most appropriate plan for the child. However, if the court finds by clear and convincing evidence, based on the evidence already presented to it, including a recommendation by the State Department of Social Services when it is acting as an adoption agency in counties that are not served by a county adoption agency or by a licensed county adoption agency, that there is a compelling reason, as described in paragraph (3) of subdivision (g) of Section 366.21, for determining that a hearing held under Section 366.26 is not in the best interest of the child because the child is not a proper subject for adoption or, in the case of an Indian child, tribal customary adoption, and has no one willing to accept legal guardianship, then the court may, only under these circumstances, order that the child remain in foster care. If the court orders that a child who is 10 years of age or older remain in long-term foster care, the court shall determine whether the agency has made reasonable efforts to maintain the child's relationships with individuals other than the child's siblings who are important to the child, consistent with the child's best interests, and may make any appropriate order to ensure that those relationships are maintained. The hearing shall be held no later than 120 days from the date of the subsequent permanency review hearing. The court shall also order termination of reunification services to the parent or legal guardian. The court shall continue to permit the parent or legal guardian to visit the child unless it finds that visitation would be detrimental to the child. The court shall determine whether reasonable services have been offered or provided to the parent or legal guardian. For purposes of this subdivision, evidence of any of the following circumstances shall not, in and of themselves, be deemed a failure to provide or offer reasonable services:

(A) The child has been placed with a foster family that is eligible to adopt a child, or has been placed in a preadoptive home.

(B) The case plan includes services to make and finalize a permanent placement for the child if efforts to reunify fail.

(C) Services to make and finalize a permanent placement for the child, if efforts to reunify fail, are provided concurrently with services to reunify the family.

(b) (1) Whenever a court orders that a hearing pursuant to Section 366.26 shall be held, it shall direct the agency supervising the child and the licensed county adoption agency, or the State Department of Social Services when it is acting as an adoption agency in counties that are not served by a county adoption agency, to prepare an assessment that shall include:

(A) Current search efforts for an absent parent or parents.

(B) A review of the amount of, and nature of, any contact between the child and his or her parents and other members of his or her extended family since the time of placement. Although the extended family of each child shall be reviewed on a case-by-case basis, "extended family" for the purposes of this paragraph shall include, but not be limited to, the child's siblings, grandparents, aunts, and uncles.

(C) An evaluation of the child's medical, developmental, scholastic, mental, and emotional status.

(D) A preliminary assessment of the eligibility and commitment of any identified prospective adoptive parent or legal guardian, including a prospective tribal customary adoptive parent, particularly the caretaker, to include a social history including screening for criminal records and prior referrals for child abuse or neglect, the capability to meet the child's needs, and the understanding of the legal and financial rights and responsibilities of adoption and guardianship. If a proposed legal guardian is a relative of the minor, and the relative was assessed for foster care placement of the minor prior to January 1, 1998, the assessment shall also consider, but need not be limited to, all of the factors specified in subdivision (a) of Section 361.3.

(E) The relationship of the child to any identified prospective adoptive parent or legal guardian, including a prospective tribal customary adoptive parent, the duration and character of the relationship, the motivation for seeking adoption or legal guardianship, and a statement from the child concerning placement and the adoption or legal guardianship, unless the child's age or physical, emotional, or other condition precludes his or her meaningful response, and if so, a description of the condition.

(F) An analysis of the likelihood that the child will be adopted if parental rights are terminated.

(G) In the case of an Indian child, in addition to subparagraphs (A) to (F), inclusive, an assessment of the likelihood that the child will be adopted, when, in consultation with the child's tribe, a customary tribal adoption, as defined in Section 366.24, is recommended. If tribal customary adoption is recommended, the assessment shall include an analysis of both of the following:

(i) Whether tribal customary adoption would or would not be detrimental to the Indian child and the reasons for reaching that conclusion.

(ii) Whether the Indian child cannot or should not be returned to the home of the Indian parent or Indian custodian and the reasons for reaching that conclusion.

(2) (A) A relative caregiver's preference for legal guardianship over adoption, if it is due to circumstances that do not include an unwillingness to accept legal or financial responsibility for the child, shall not constitute the sole basis for recommending removal of the child from the relative caregiver for purposes of adoptive placement.

(B) A relative caregiver shall be given information regarding the permanency options of guardianship and adoption, including the long-term benefits and consequences of each option, prior to establishing legal guardianship or pursuing adoption.

(c) If, at any hearing held pursuant to Section 366.26, a guardianship is established for the minor with a relative, and juvenile court dependency is subsequently dismissed, the relative shall be eligible for aid under the Kin-GAP Program, as provided for in Article 4.5 (commencing with Section 11360) of Chapter 2 of Part 3 of Division 9.

(d) As used in this section, "relative" means an adult who is related to the minor by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words "great," "great-great," or "grand," or the spouse of any of those persons even if the marriage was terminated by death or dissolution.

(e) The implementation and operation of subdivision (a) enacted at the 2005–06 Regular Session shall be subject to appropriation through the budget process and by phase, as provided in Section 366.35.

(f) This section shall remain in effect only until January 1, 2014, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2014, deletes or extends that date.

SEC. 14. Section 366.25 is added to the Welfare and Institutions Code, to read:

366.25. (a) (1) When a case has been continued pursuant to subdivision (b) of Section 366.22, the subsequent permanency review hearing shall occur within 24 months after the date the child was originally removed from the physical custody of his or her parent or legal guardian. The court shall order the return of the child to the physical custody of his or her parent or legal guardian unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. The social worker shall have the burden of establishing that detriment. At the subsequent permanency review hearing, the court shall consider the criminal history, obtained pursuant to paragraph (1) of subdivision (f) of Section 16504.5, of the parent or legal guardian subsequent to the child's removal to the extent that the criminal record is substantially related to the welfare of the child or parent or legal guardian's ability to exercise custody and control regarding his or her child provided that the parent or legal guardian agreed to submit fingerprint images to obtain criminal history information as part of the case plan. The failure of

the parent or legal guardian to participate regularly and make substantive progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental. In making its determination, the court shall review and consider the social worker's report and recommendations and the report and recommendations of any child advocate appointed pursuant to Section 356.5; shall consider the efforts or progress, or both, demonstrated by the parent or legal guardian and the extent to which he or she availed himself or herself of services provided; and shall make appropriate findings pursuant to subdivision (a) of Section 366.

(2) Whether or not the child is returned to his or her parent or legal guardian, the court shall specify the factual basis for its decision. If the child is not returned to a parent or legal guardian, the court shall specify the factual basis for its conclusion that return would be detrimental. If the child is not returned to his or her parents or legal guardian, the court shall consider and state for the record, in-state and out-of-state options for the child's permanent placement. If the child is placed out of the state, the court shall make a determination whether the out-of-state placement continues to be appropriate and in best interests of the child.

(3) If the child is not returned to a parent or legal guardian at the subsequent permanency review hearing, the court shall order that a hearing be held pursuant to Section 366.26 in order to determine whether adoption, guardianship, or long-term foster care is the most appropriate plan for the child. However, if the court finds by clear and convincing evidence, based on the evidence already presented to it, including a recommendation by the State Department of Social Services when it is acting as an adoption agency in counties that are not served by a county adoption agency or by a licensed county adoption agency, that there is a compelling reason, as described in paragraph (3) of subdivision (g) of Section 366.21, for determining that a hearing held under Section 366.26 is not in the best interest of the child because the child is not a proper subject for adoption and has no one willing to accept legal guardianship, then the court may, only under these circumstances, order that the child remain in foster care. If the court orders that a child who is 10 years of age or older remain in long-term foster care, the court shall determine whether the agency has made reasonable efforts to maintain the child's relationships with individuals other than the child's siblings who are important to the child, consistent with the child's best interests, and may make any appropriate order to ensure that those relationships are maintained. The hearing shall be held no later than 120 days from the date of the subsequent permanency review hearing. The court shall also order termination of reunification services to the parent or legal guardian. The court shall continue to permit the parent or legal guardian to visit the child unless it finds that visitation would be detrimental to the child. The court shall determine whether reasonable services have been offered or provided to the parent or legal guardian. For purposes of this subdivision, evidence of any of the following circumstances shall not, in and of themselves, be deemed a failure to provide or offer reasonable services:

(A) The child has been placed with a foster family that is eligible to adopt a child, or has been placed in a preadoptive home.

(B) The case plan includes services to make and finalize a permanent placement for the child if efforts to reunify fail.

(C) Services to make and finalize a permanent placement for the child, if efforts to reunify fail, are provided concurrently with services to reunify the family.

(b) (1) Whenever a court orders that a hearing pursuant to Section 366.26 shall be held, it shall direct the agency supervising the child and the licensed county adoption agency, or the State Department of Social Services when it is acting as an adoption agency in counties that are not served by a county adoption agency, to prepare an assessment that shall include:

(A) Current search efforts for an absent parent or parents.

(B) A review of the amount of, and nature of, any contact between the child and his or her parents and other members of his or her extended family since the time of placement. Although the extended family of each child shall be reviewed on a case-by-case basis, "extended family" for the purposes of this paragraph shall include, but not be limited to, the child's siblings, grandparents, aunts, and uncles.

(C) An evaluation of the child's medical, developmental, scholastic, mental, and emotional status.

(D) A preliminary assessment of the eligibility and commitment of any identified prospective adoptive parent or legal guardian, particularly the caretaker, to include a social history including screening for criminal records and prior referrals for child abuse or neglect, the capability to meet the child's needs, and the understanding of the legal and financial rights and responsibilities of adoption and guardianship. If a proposed legal guardian is a relative of the minor, and the relative was assessed for foster care placement of the minor prior to January 1, 1998, the assessment shall also consider, but need not be limited to, all of the factors specified in subdivision (a) of Section 361.3.

(E) The relationship of the child to any identified prospective adoptive parent or legal guardian, the duration and character of the relationship, the motivation for seeking adoption or legal guardianship, and a statement from the child concerning placement and the adoption or legal guardianship, unless the child's age or physical, emotional, or other condition precludes his or her meaningful response, and if so, a description of the condition.

(F) An analysis of the likelihood that the child will be adopted if parental rights are terminated.

(2) (A) A relative caregiver's preference for legal guardianship over adoption, if it is due to circumstances that do not include an unwillingness to accept legal or financial responsibility for the child, shall not constitute the sole basis for recommending removal of the child from the relative caregiver for purposes of adoptive placement.

(B) A relative caregiver shall be given information regarding the permanency options of guardianship and adoption, including the long-term

benefits and consequences of each option, prior to establishing legal guardianship or pursuing adoption.

(c) If, at any hearing held pursuant to Section 366.26, a guardianship is established for the minor with a relative, and juvenile court dependency is subsequently dismissed, the relative shall be eligible for aid under the Kin-GAP Program, as provided for in Article 4.5 (commencing with Section 11360) of Chapter 2 of Part 3 of Division 9.

(d) As used in this section, "relative" means an adult who is related to the minor by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words "great," "great-great," or "grand," or the spouse of any of those persons even if the marriage was terminated by death or dissolution.

(e) The implementation and operation of subdivision (a) enacted at the 2005–06 Regular Session shall be subject to appropriation through the budget process and by phase, as provided in Section 366.35.

(f) This section shall become operative on January 1, 2014.

SEC. 15. Section 366.26 of the Welfare and Institutions Code is amended to read:

366.26. (a) This section applies to children who are adjudged dependent children of the juvenile court pursuant to subdivision (d) of Section 360. The procedures specified herein are the exclusive procedures for conducting these hearings; Part 2 (commencing with Section 3020) of Division 8 of the Family Code is not applicable to these proceedings. Section 8616.5 of the Family Code is applicable and available to all dependent children meeting the requirements of that section, if the postadoption contact agreement has been entered into voluntarily. For children who are adjudged dependent children of the juvenile court pursuant to subdivision (d) of Section 360, this section and Sections 8604, 8605, 8606, and 8700 of the Family Code and Chapter 5 (commencing with Section 7660) of Part 3 of Division 12 of the Family Code specify the exclusive procedures for permanently terminating parental rights with regard to, or establishing legal guardianship of, the child while the child is a dependent child of the juvenile court.

(b) At the hearing, which shall be held in juvenile court for all children who are dependents of the juvenile court, the court, in order to provide stable, permanent homes for these children, shall review the report as specified in Section 361.5, 366.21, 366.22, or 366.25, shall indicate that the court has read and considered it, shall receive other evidence that the parties may present, and then shall make findings and orders in the following order of preference:

(1) Terminate the rights of the parent or parents and order that the child be placed for adoption and, upon the filing of a petition for adoption in the juvenile court, order that a hearing be set. The court shall proceed with the adoption after the appellate rights of the natural parents have been exhausted.

(2) Order, without termination of parental rights, the plan of tribal customary adoption, as described in Section 366.24, through tribal custom, traditions, or law of the Indian child's tribe, and upon the court affording the tribal customary adoption order full faith and credit at the continued

selection and implementation hearing, order that a hearing be set pursuant to paragraph (2) of subdivision (e).

(3) Appoint a relative or relatives with whom the child is currently residing as legal guardian or guardians for the child, and order that letters of guardianship issue.

(4) On making a finding under paragraph (3) of subdivision (c), identify adoption or tribal customary adoption as the permanent placement goal and order that efforts be made to locate an appropriate adoptive family for the child within a period not to exceed 180 days.

(5) Appoint a nonrelative legal guardian for the child and order that letters of guardianship issue.

(6) Order that the child be placed in long-term foster care, subject to the periodic review of the juvenile court under Section 366.3.

In choosing among the above alternatives the court shall proceed pursuant to subdivision (c).

(c) (1) If the court determines, based on the assessment provided as ordered under subdivision (i) of Section 366.21, subdivision (b) of Section 366.22, or subdivision (b) of Section 366.25, and any other relevant evidence, by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption. The fact that the child is not yet placed in a preadoptive home nor with a relative or foster family who is prepared to adopt the child, shall not constitute a basis for the court to conclude that it is not likely the child will be adopted. A finding under subdivision (b) or paragraph (1) of subdivision (e) of Section 361.5 that reunification services shall not be offered, under subdivision (e) of Section 366.21 that the whereabouts of a parent have been unknown for six months or that the parent has failed to visit or contact the child for six months, or that the parent has been convicted of a felony indicating parental unfitness, or, under Section 366.21 or 366.22, that the court has continued to remove the child from the custody of the parent or guardian and has terminated reunification services, shall constitute a sufficient basis for termination of parental rights. Under these circumstances, the court shall terminate parental rights unless either of the following applies:

(A) The child is living with a relative who is unable or unwilling to adopt the child because of circumstances that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment through legal guardianship, and the removal of the child from the custody of his or her relative would be detrimental to the emotional well-being of the child. For purposes of an Indian child, “relative” shall include an “extended family member,” as defined in the federal Indian Child Welfare Act (25 U.S.C. Sec. 1903(2)).

(B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances:

(i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.

(ii) A child 12 years of age or older objects to termination of parental rights.

(iii) The child is placed in a residential treatment facility, adoption is unlikely or undesirable, and continuation of parental rights will not prevent finding the child a permanent family placement if the parents cannot resume custody when residential care is no longer needed.

(iv) The child is living with a foster parent or Indian custodian who is unable or unwilling to adopt the child because of exceptional circumstances, that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment and the removal of the child from the physical custody of his or her foster parent or Indian custodian would be detrimental to the emotional well-being of the child. This clause does not apply to any child who is either (I) under six years of age or (II) a member of a sibling group where at least one child is under six years of age and the siblings are, or should be, permanently placed together.

(v) There would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption.

(vi) The child is an Indian child and there is a compelling reason for determining that termination of parental rights would not be in the best interest of the child, including, but not limited to:

(I) Termination of parental rights would substantially interfere with the child's connection to his or her tribal community or the child's tribal membership rights.

(II) The child's tribe has identified guardianship, long-term foster care with a fit and willing relative, tribal customary adoption, or another planned permanent living arrangement for the child.

(C) For purposes of subparagraph (B), in the case of tribal customary adoptions, Section 366.24 shall apply.

(D) If the court finds that termination of parental rights would be detrimental to the child pursuant to clause (i), (ii), (iii), (iv), (v), or (vi), it shall state its reasons in writing or on the record.

(2) The court shall not terminate parental rights if:

(A) At each hearing at which the court was required to consider reasonable efforts or services, the court has found that reasonable efforts were not made or that reasonable services were not offered or provided.

(B) In the case of an Indian child:

(i) At the hearing terminating parental rights, the court has found that active efforts were not made as required in Section 361.7.

(ii) The court does not make a determination at the hearing terminating parental rights, supported by evidence beyond a reasonable doubt, including

testimony of one or more "qualified expert witnesses" as defined in Section 224.6, that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child.

(iii) The court has ordered tribal customary adoption pursuant to Section 366.24.

(3) If the court finds that termination of parental rights would not be detrimental to the child pursuant to paragraph (1) and that the child has a probability for adoption but is difficult to place for adoption and there is no identified or available prospective adoptive parent, the court may identify adoption as the permanent placement goal and without terminating parental rights, order that efforts be made to locate an appropriate adoptive family for the child, within the state or out of the state, within a period not to exceed 180 days. During this 180-day period, the public agency responsible for seeking adoptive parents for each child shall, to the extent possible, ask each child who is 10 years of age or older, to identify any individuals, other than the child's siblings, who are important to the child, in order to identify potential adoptive parents. The public agency may ask any other child to provide that information, as appropriate. During the 180-day period, the public agency shall, to the extent possible, contact other private and public adoption agencies regarding the availability of the child for adoption. During the 180-day period, the public agency shall conduct the search for adoptive parents in the same manner as prescribed for children in Sections 8708 and 8709 of the Family Code. At the expiration of this period, another hearing shall be held and the court shall proceed pursuant to paragraph (1), (2), (3), (5), or (6) of subdivision (b). For purposes of this section, a child may only be found to be difficult to place for adoption if there is no identified or available prospective adoptive parent for the child because of the child's membership in a sibling group, or the presence of a diagnosed medical, physical, or mental handicap, or the child is seven years of age or more.

(4) (A) If the court finds that adoption of the child or termination of parental rights is not in the best interest of the child, because one of the conditions in clause (i), (ii), (iii), (iv), (v), or (vi) of subparagraph (B) of paragraph (1) or in paragraph (2) applies, the court shall either order that the present caretakers or other appropriate persons shall become legal guardians of the child order that the child remain in long-term foster care, or, in the case of an Indian child, consider a tribal customary adoption pursuant to Section 366.24. Legal guardianship shall be considered before long-term foster care, if it is in the best interests of the child and if a suitable guardian can be found. A child who is 10 years of age or older, shall be asked to identify any individuals, other than the child's siblings, who are important to the child, in order to identify potential guardians or, in the case of an Indian child, prospective tribal customary adoptive parents. The agency may ask any other child to provide that information, as appropriate.

(B) If the child is living with a relative or a foster parent who is willing and capable of providing a stable and permanent environment, but not willing to become a legal guardian, the child shall not be removed from the home if the court finds the removal would be seriously detrimental to the emotional

well-being of the child because the child has substantial psychological ties to the relative caretaker or foster parents.

(C) The court shall also make an order for visitation with the parents or guardians unless the court finds by a preponderance of the evidence that the visitation would be detrimental to the physical or emotional well-being of the child.

(5) If the court finds that the child should not be placed for adoption, that legal guardianship shall not be established, and that there are no suitable foster parents except exclusive-use homes available to provide the child with a stable and permanent environment, the court may order the care, custody, and control of the child transferred from the county welfare department to a licensed foster family agency. The court shall consider the written recommendation of the county welfare director regarding the suitability of the transfer. The transfer shall be subject to further court orders.

The licensed foster family agency shall place the child in a suitable licensed or exclusive-use home that has been certified by the agency as meeting licensing standards. The licensed foster family agency shall be responsible for supporting the child and providing appropriate services to the child, including those services ordered by the court. Responsibility for the support of the child shall not, in and of itself, create liability on the part of the foster family agency to third persons injured by the child. Those children whose care, custody, and control are transferred to a foster family agency shall not be eligible for foster care maintenance payments or child welfare services, except for emergency response services pursuant to Section 16504.

(d) The proceeding for the appointment of a guardian for a child who is a dependent of the juvenile court shall be in the juvenile court. If the court finds pursuant to this section that legal guardianship is the appropriate permanent plan, it shall appoint the legal guardian and issue letters of guardianship. The assessment prepared pursuant to subdivision (g) of Section 361.5, subdivision (i) of Section 366.21, subdivision (b) of Section 366.22, and subdivision (b) of Section 366.25 shall be read and considered by the court prior to the appointment, and this shall be reflected in the minutes of the court. The person preparing the assessment may be called and examined by any party to the proceeding.

(e) (1) The proceeding for the adoption of a child who is a dependent of the juvenile court shall be in the juvenile court if the court finds pursuant to this section that adoption is the appropriate permanent plan and the petition for adoption is filed in the juvenile court. Upon the filing of a petition for adoption, the juvenile court shall order that an adoption hearing be set. The court shall proceed with the adoption after the appellate rights of the natural parents have been exhausted. The full report required by Section 8715 of the Family Code shall be read and considered by the court prior to the adoption and this shall be reflected in the minutes of the court. The person preparing the report may be called and examined by any party to the proceeding. It is the intent of the Legislature, pursuant to this subdivision, to give potential adoptive parents the option of filing in the juvenile court

the petition for the adoption of a child who is a dependent of the juvenile court. Nothing in this section is intended to prevent the filing of a petition for adoption in any other court as permitted by law, instead of in the juvenile court.

(2) In the case of an Indian child, if the Indian child's tribe has elected a permanent plan of tribal customary adoption, the court, upon receiving the tribal customary adoption order will afford the tribal customary adoption order full faith and credit to the same extent that the court would afford full faith and credit to the public acts, records, judicial proceedings, and judgments of any other entity. Upon a determination that the tribal customary adoption order may be afforded full faith and credit, consistent with Section 224.5, the court shall thereafter order a hearing to finalize the adoption be set upon the filing of the adoption petition. The prospective tribal customary adoptive parents and the child who is the subject of the tribal customary adoption petition shall appear before the court for the finalization hearing. The court shall thereafter issue an order of adoption pursuant to Section 366.24.

(3) If a child who is the subject of a finalized tribal customary adoption shows evidence of a developmental disability or mental illness as a result of conditions existing before the tribal customary adoption to the extent that the child cannot be relinquished to a licensed adoption agency on the grounds that the child is considered unadoptable, and of which condition the tribal customary adoptive parent or parents had no knowledge or notice before the entry of the tribal customary adoption order, a petition setting forth those facts may be filed by the tribal customary adoptive parent or parents with the juvenile court that granted the tribal customary adoption petition. If these facts are proved to the satisfaction of the juvenile court, it may make an order setting aside the tribal customary adoption order. The set aside petition shall be filed within five years of the issuance of the tribal customary adoption order. The court clerk shall immediately notify the child's tribe and the department in Sacramento of the petition within 60 days after the notice of filing of the petition. The department shall file a full report with the court and shall appear before the court for the purpose of representing the child. Whenever a final decree of tribal customary adoption has been vacated or set aside, the child shall be returned to the custody of the county in which the proceeding for tribal customary adoption was finalized. The biological parent or parents of the child may petition for return of custody. The disposition of the child after the court has entered an order to set aside a tribal customary adoption shall include consultation with the child's tribe.

(f) At the beginning of any proceeding pursuant to this section, if the child or the parents are not being represented by previously retained or appointed counsel, the court shall proceed as follows:

(1) In accordance with subdivision (c) of Section 317, if a child before the court is without counsel, the court shall appoint counsel unless the court finds that the child would not benefit from the appointment of counsel. The court shall state on the record its reasons for that finding.

(2) If a parent appears without counsel and is unable to afford counsel, the court shall appoint counsel for the parent, unless this representation is knowingly and intelligently waived. The same counsel shall not be appointed to represent both the child and his or her parent. The public defender or private counsel may be appointed as counsel for the parent.

(3) Private counsel appointed under this section shall receive a reasonable sum for compensation and expenses, the amount of which shall be determined by the court. The amount shall be paid by the real parties in interest, other than the child, in any proportions the court deems just. However, if the court finds that any of the real parties in interest are unable to afford counsel, the amount shall be paid out of the general fund of the county.

(g) The court may continue the proceeding for a period of time not to exceed 30 days as necessary to appoint counsel, and to enable counsel to become acquainted with the case.

(h) (1) At all proceedings under this section, the court shall consider the wishes of the child and shall act in the best interests of the child.

(2) In accordance with Section 349, the child shall be present in court if the child or the child's counsel so requests or the court so orders. If the child is 10 years of age or older and is not present at a hearing held pursuant to this section, the court shall determine whether the minor was properly notified of his or her right to attend the hearing and inquire as to the reason why the child is not present.

(3) (A) The testimony of the child may be taken in chambers and outside the presence of the child's parent or parents, if the child's parent or parents are represented by counsel, the counsel is present, and any of the following circumstances exists:

(i) The court determines that testimony in chambers is necessary to ensure truthful testimony.

(ii) The child is likely to be intimidated by a formal courtroom setting.

(iii) The child is afraid to testify in front of his or her parent or parents.

(B) After testimony in chambers, the parent or parents of the child may elect to have the court reporter read back the testimony or have the testimony summarized by counsel for the parent or parents.

(C) The testimony of a child also may be taken in chambers and outside the presence of the guardian or guardians of a child under the circumstances specified in this subdivision.

(i) (1) Any order of the court permanently terminating parental rights under this section shall be conclusive and binding upon the child, upon the parent or parents and upon all other persons who have been served with citation by publication or otherwise as provided in this chapter. After making the order, the juvenile court shall have no power to set aside, change, or modify it, except as provided in paragraph (2), but nothing in this section shall be construed to limit the right to appeal the order.

(2) A tribal customary adoption order evidencing that the Indian child has been the subject of a tribal customary adoption shall be afforded full faith and credit and shall have the same force and effect as an order of

adoption authorized by this section. The rights and obligations of the parties as to the matters determined by the Indian child's tribe shall be binding on all parties. A court shall not order compliance with the order absent a finding that the party seeking the enforcement participated, or attempted to participate, in good faith, in family mediation services of the court or dispute resolution through the tribe regarding the conflict, prior to the filing of the enforcement action.

(3) A child who has not been adopted after the passage of at least three years from the date the court terminated parental rights and for whom the court has determined that adoption is no longer the permanent plan may petition the juvenile court to reinstate parental rights pursuant to the procedure prescribed by Section 388. The child may file the petition prior to the expiration of this three-year period if the State Department of Social Services or licensed adoption agency that is responsible for custody and supervision of the child as described in subdivision (j) and the child stipulate that the child is no longer likely to be adopted. A child over 12 years of age shall sign the petition in the absence of a showing of good cause as to why the child could not do so. If it appears that the best interests of the child may be promoted by reinstatement of parental rights, the court shall order that a hearing be held and shall give prior notice, or cause prior notice to be given, to the social worker or probation officer and to the child's attorney of record, or, if there is no attorney of record for the child, to the child, and the child's tribe, if applicable, by means prescribed by subdivision (c) of Section 297. The court shall order the child or the social worker or probation officer to give prior notice of the hearing to the child's former parent or parents whose parental rights were terminated in the manner prescribed by subdivision (f) of Section 294 where the recommendation is adoption. The juvenile court shall grant the petition if it finds by clear and convincing evidence that the child is no longer likely to be adopted and that reinstatement of parental rights is in the child's best interest. If the court reinstates parental rights over a child who is under 12 years of age and for whom the new permanent plan will not be reunification with a parent or legal guardian, the court shall specify the factual basis for its findings that it is in the best interest of the child to reinstate parental rights. This subdivision is intended to be retroactive and applies to any child who is under the jurisdiction of the juvenile court at the time of the hearing regardless of the date parental rights were terminated.

(j) If the court, by order or judgment, declares the child free from the custody and control of both parents, or one parent if the other does not have custody and control, or declares the child eligible for tribal customary adoption, the court shall at the same time order the child referred to the State Department of Social Services or a licensed adoption agency for adoptive placement by the agency. However, except in the case of a tribal customary adoption where there is no termination of parental rights, a petition for adoption may not be granted until the appellate rights of the natural parents have been exhausted. The State Department of Social Services or licensed adoption agency shall be responsible for the custody and supervision of the

child and shall be entitled to the exclusive care and control of the child at all times until a petition for adoption or tribal customary adoption is granted, except as specified in subdivision (n). With the consent of the agency, the court may appoint a guardian of the child, who shall serve until the child is adopted.

(k) Notwithstanding any other provision of law, the application of any person who, as a relative caretaker or foster parent, has cared for a dependent child for whom the court has approved a permanent plan for adoption, or who has been freed for adoption, shall be given preference with respect to that child over all other applications for adoptive placement if the agency making the placement determines that the child has substantial emotional ties to the relative caretaker or foster parent and removal from the relative caretaker or foster parent would be seriously detrimental to the child's emotional well-being.

As used in this subdivision, "preference" means that the application shall be processed and, if satisfactory, the family study shall be completed before the processing of the application of any other person for the adoptive placement of the child.

(*l*) (1) An order by the court that a hearing pursuant to this section be held is not appealable at any time unless all of the following apply:

(A) A petition for extraordinary writ review was filed in a timely manner.

(B) The petition substantively addressed the specific issues to be challenged and supported that challenge by an adequate record.

(C) The petition for extraordinary writ review was summarily denied or otherwise not decided on the merits.

(2) Failure to file a petition for extraordinary writ review within the period specified by rule, to substantively address the specific issues challenged, or to support that challenge by an adequate record shall preclude subsequent review by appeal of the findings and orders made pursuant to this section.

(3) The Judicial Council shall adopt rules of court, effective January 1, 1995, to ensure all of the following:

(A) A trial court, after issuance of an order directing a hearing pursuant to this section be held, shall advise all parties of the requirement of filing a petition for extraordinary writ review as set forth in this subdivision in order to preserve any right to appeal in these issues. This notice shall be made orally to a party if the party is present at the time of the making of the order or by first-class mail by the clerk of the court to the last known address of a party not present at the time of the making of the order.

(B) The prompt transmittal of the records from the trial court to the appellate court.

(C) That adequate time requirements for counsel and court personnel exist to implement the objective of this subdivision.

(D) That the parent or guardian, or their trial counsel or other counsel, is charged with the responsibility of filing a petition for extraordinary writ relief pursuant to this subdivision.

(4) The intent of this subdivision is to do both of the following:

(A) Make every reasonable attempt to achieve a substantive and meritorious review by the appellate court within the time specified in Sections 366.21, 366.22, and 366.25 for holding a hearing pursuant to this section.

(B) Encourage the appellate court to determine all writ petitions filed pursuant to this subdivision on their merits.

(5) This subdivision shall only apply to cases in which an order to set a hearing pursuant to this section is issued on or after January 1, 1995.

(m) Except for subdivision (j), this section shall also apply to minors adjudged wards pursuant to Section 727.31.

(n) (1) Notwithstanding Section 8704 of the Family Code or any other provision of law, the court, at a hearing held pursuant to this section or anytime thereafter, may designate a current caretaker as a prospective adoptive parent if the child has lived with the caretaker for at least six months, the caretaker currently expresses a commitment to adopt the child, and the caretaker has taken at least one step to facilitate the adoption process. In determining whether to make that designation, the court may take into consideration whether the caretaker is listed in the preliminary assessment prepared by the county department in accordance with subdivision (i) of Section 366.21 as an appropriate person to be considered as an adoptive parent for the child and the recommendation of the State Department of Social Services or licensed adoption agency.

(2) For purposes of this subdivision, steps to facilitate the adoption process include, but are not limited to, the following:

(A) Applying for an adoption home study.

(B) Cooperating with an adoption home study.

(C) Being designated by the court or the licensed adoption agency as the adoptive family.

(D) Requesting de facto parent status.

(E) Signing an adoptive placement agreement.

(F) Engaging in discussions regarding a postadoption contact agreement.

(G) Working to overcome any impediments that have been identified by the State Department of Social Services and the licensed adoption agency.

(H) Attending classes required of prospective adoptive parents.

(3) Prior to a change in placement and as soon as possible after a decision is made to remove a child from the home of a designated prospective adoptive parent, the agency shall notify the court, the designated prospective adoptive parent or the current caretaker, if that caretaker would have met the threshold criteria to be designated as a prospective adoptive parent pursuant to paragraph (1) on the date of service of this notice, the child's attorney, and the child, if the child is 10 years of age or older, of the proposal in the manner described in Section 16010.6.

(A) Within five court days or seven calendar days, whichever is longer, of the date of notification, the child, the child's attorney, or the designated prospective adoptive parent may file a petition with the court objecting to the proposal to remove the child, or the court, upon its own motion, may set a hearing regarding the proposal. The court may, for good cause, extend

the filing period. A caretaker who would have met the threshold criteria to be designated as a prospective adoptive parent pursuant to paragraph (1) on the date of service of the notice of proposed removal of the child may file, together with the petition under this subparagraph, a petition for an order designating the caretaker as a prospective adoptive parent for purposes of this subdivision.

(B) A hearing ordered pursuant to this paragraph shall be held as soon as possible and not later than five court days after the petition is filed with the court or the court sets a hearing upon its own motion, unless the court for good cause is unable to set the matter for hearing five court days after the petition is filed, in which case the court shall set the matter for hearing as soon as possible. At the hearing, the court shall determine whether the caretaker has met the threshold criteria to be designated as a prospective adoptive parent pursuant to paragraph (1), and whether the proposed removal of the child from the home of the designated prospective adoptive parent is in the child's best interest, and the child may not be removed from the home of the designated prospective adoptive parent unless the court finds that removal is in the child's best interest. If the court determines that the caretaker did not meet the threshold criteria to be designated as a prospective adoptive parent on the date of service of the notice of proposed removal of the child, the petition objecting to the proposed removal filed by the caretaker shall be dismissed. If the caretaker was designated as a prospective adoptive parent prior to this hearing, the court shall inquire into any progress made by the caretaker towards the adoption of the child since the caretaker was designated as a prospective adoptive parent.

(C) A determination by the court that the caretaker is a designated prospective adoptive parent pursuant to paragraph (1) or subparagraph (B) does not make the caretaker a party to the dependency proceeding nor does it confer on the caretaker any standing to object to any other action of the department or licensed adoption agency, unless the caretaker has been declared a de facto parent by the court prior to the notice of removal served pursuant to paragraph (3).

(D) If a petition objecting to the proposal to remove the child is not filed, and the court, upon its own motion, does not set a hearing, the child may be removed from the home of the designated prospective adoptive parent without a hearing.

(4) Notwithstanding paragraph (3), if the State Department of Social Services or a licensed adoption agency determines that the child must be removed from the home of the caretaker who is or may be a designated prospective adoptive parent immediately, due to a risk of physical or emotional harm, the agency may remove the child from that home and is not required to provide notice prior to the removal. However, as soon as possible and not longer than two court days after the removal, the agency shall notify the court, the caretaker who is or may be a designated prospective adoptive parent, the child's attorney, and the child, if the child is 10 years of age or older, of the removal. Within five court days or seven calendar days, whichever is longer, of the date of notification of the removal, the

child, the child's attorney, or the caretaker who is or may be a designated prospective adoptive parent may petition for, or the court on its own motion may set, a noticed hearing pursuant to paragraph (3). The court may, for good cause, extend the filing period.

(5) Except as provided in subdivision (b) of Section 366.28, an order by the court issued after a hearing pursuant to this subdivision shall not be appealable.

(6) Nothing in this section shall preclude a county child protective services agency from fully investigating and responding to alleged abuse or neglect of a child pursuant to Section 11165.5 of the Penal Code.

(7) The Judicial Council shall prepare forms to facilitate the filing of the petitions described in this subdivision, which shall become effective on January 1, 2006.

(o) The implementation and operation of the amendments to paragraph (3) of subdivision (c) and subparagraph (A) of paragraph (4) of subdivision (c) enacted at the 2005–06 Regular Session shall be subject to appropriation through the budget process and by phase, as provided in Section 366.35.

(p) This section shall remain in effect only until January 1, 2014, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2014, deletes or extends that date.

SEC. 16. Section 366.26 is added to the Welfare and Institutions Code, to read:

366.26. (a) This section applies to children who are adjudged dependent children of the juvenile court pursuant to subdivision (d) of Section 360. The procedures specified herein are the exclusive procedures for conducting these hearings; Part 2 (commencing with Section 3020) of Division 8 of the Family Code is not applicable to these proceedings. Section 8616.5 of the Family Code is applicable and available to all dependent children meeting the requirements of that section, if the postadoption contact agreement has been entered into voluntarily. For children who are adjudged dependent children of the juvenile court pursuant to subdivision (d) of Section 360, this section and Sections 8604, 8605, 8606, and 8700 of the Family Code and Chapter 5 (commencing with Section 7660) of Part 3 of Division 12 of the Family Code specify the exclusive procedures for permanently terminating parental rights with regard to, or establishing legal guardianship of, the child while the child is a dependent child of the juvenile court.

(b) At the hearing, which shall be held in juvenile court for all children who are dependents of the juvenile court, the court, in order to provide stable, permanent homes for these children, shall review the report as specified in Section 361.5, 366.21, 366.22, or 366.25, shall indicate that the court has read and considered it, shall receive other evidence that the parties may present, and then shall make findings and orders in the following order of preference:

(1) Terminate the rights of the parent or parents and order that the child be placed for adoption and, upon the filing of a petition for adoption in the juvenile court, order that a hearing be set. The court shall proceed with the adoption after the appellate rights of the natural parents have been exhausted.

(2) Appoint a relative or relatives with whom the child is currently residing as legal guardian or guardians for the child, and order that letters of guardianship issue.

(3) On making a finding under paragraph (3) of subdivision (c), identify adoption as the permanent placement goal and order that efforts be made to locate an appropriate adoptive family for the child within a period not to exceed 180 days.

(4) Appoint a nonrelative legal guardian for the child and order that letters of guardianship issue.

(5) Order that the child be placed in long-term foster care, subject to the periodic review of the juvenile court under Section 366.3.

In choosing among the above alternatives the court shall proceed pursuant to subdivision (c).

(c) (1) If the court determines, based on the assessment provided as ordered under subdivision (i) of Section 366.21, subdivision (b) of Section 366.22, or subdivision (b) of Section 366.25, and any other relevant evidence, by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption. The fact that the child is not yet placed in a preadoptive home nor with a relative or foster family who is prepared to adopt the child, shall not constitute a basis for the court to conclude that it is not likely the child will be adopted. A finding under subdivision (b) or paragraph (1) of subdivision (e) of Section 361.5 that reunification services shall not be offered, under subdivision (e) of Section 366.21 that the whereabouts of a parent have been unknown for six months or that the parent has failed to visit or contact the child for six months, or that the parent has been convicted of a felony indicating parental unfitness, or, under Section 366.21 or 366.22, that the court has continued to remove the child from the custody of the parent or guardian and has terminated reunification services, shall constitute a sufficient basis for termination of parental rights. Under these circumstances, the court shall terminate parental rights unless either of the following applies:

(A) The child is living with a relative who is unable or unwilling to adopt the child because of circumstances that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment through legal guardianship, and the removal of the child from the custody of his or her relative would be detrimental to the emotional well-being of the child. For purposes of an Indian child, “relative” shall include an “extended family member,” as defined in the federal Indian Child Welfare Act (25 U.S.C. Sec. 1903(2)).

(B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances:

(i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.

(ii) A child 12 years of age or older objects to termination of parental rights.

(iii) The child is placed in a residential treatment facility, adoption is unlikely or undesirable, and continuation of parental rights will not prevent finding the child a permanent family placement if the parents cannot resume custody when residential care is no longer needed.

(iv) The child is living with a foster parent or Indian custodian who is unable or unwilling to adopt the child because of exceptional circumstances, that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment and the removal of the child from the physical custody of his or her foster parent or Indian custodian would be detrimental to the emotional well-being of the child. This clause does not apply to any child who is either (I) under six years of age or (II) a member of a sibling group where at least one child is under six years of age and the siblings are, or should be, permanently placed together.

(v) There would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption.

(vi) The child is an Indian child and there is a compelling reason for determining that termination of parental rights would not be in the best interest of the child, including, but not limited to:

(I) Termination of parental rights would substantially interfere with the child's connection to his or her tribal community or the child's tribal membership rights.

(II) The child's tribe has identified guardianship, long-term foster care with a fit and willing relative, or another planned permanent living arrangement for the child.

If the court finds that termination of parental rights would be detrimental to the child pursuant to clause (i), (ii), (iii), (iv), (v), or (vi), it shall state its reasons in writing or on the record.

(2) The court shall not terminate parental rights if:

(A) At each hearing at which the court was required to consider reasonable efforts or services, the court has found that reasonable efforts were not made or that reasonable services were not offered or provided.

(B) In the case of an Indian child:

(i) At the hearing terminating parental rights, the court has found that active efforts were not made as required in Section 361.7.

(ii) The court does not make a determination at the hearing terminating parental rights, supported by evidence beyond a reasonable doubt, including testimony of one or more "qualified expert witnesses" as defined in Section 224.6, that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child.

(3) If the court finds that termination of parental rights would not be detrimental to the child pursuant to paragraph (1) and that the child has a probability for adoption but is difficult to place for adoption and there is no identified or available prospective adoptive parent, the court may identify adoption as the permanent placement goal and without terminating parental rights, order that efforts be made to locate an appropriate adoptive family for the child, within the state or out of the state, within a period not to exceed 180 days. During this 180-day period, the public agency responsible for seeking adoptive parents for each child shall, to the extent possible, ask each child who is 10 years of age or older, to identify any individuals, other than the child's siblings, who are important to the child, in order to identify potential adoptive parents. The public agency may ask any other child to provide that information, as appropriate. During the 180-day period, the public agency shall, to the extent possible, contact other private and public adoption agencies regarding the availability of the child for adoption. During the 180-day period, the public agency shall conduct the search for adoptive parents in the same manner as prescribed for children in Sections 8708 and 8709 of the Family Code. At the expiration of this period, another hearing shall be held and the court shall proceed pursuant to paragraph (1) or (4) of subdivision (b). For purposes of this section, a child may only be found to be difficult to place for adoption if there is no identified or available prospective adoptive parent for the child because of the child's membership in a sibling group, or the presence of a diagnosed medical, physical, or mental handicap, or the child is seven years of age or more.

(4) (A) If the court finds that adoption of the child or termination of parental rights is not in the best interest of the child, because one of the conditions in clause (i), (ii), (iii), (iv), (v), or (vi) of subparagraph (B) of paragraph (1) or in paragraph (2) applies, the court shall either order that the present caretakers or other appropriate persons shall become legal guardians of the child or order that the child remain in long-term foster care. Legal guardianship shall be considered before long-term foster care, if it is in the best interests of the child and if a suitable guardian can be found. A child who is 10 years of age or older, shall be asked to identify any individuals, other than the child's siblings, who are important to the child, in order to identify potential guardians. The agency may ask any other child to provide that information, as appropriate.

(B) If the child is living with a relative or a foster parent who is willing and capable of providing a stable and permanent environment, but not willing to become a legal guardian, the child shall not be removed from the home if the court finds the removal would be seriously detrimental to the emotional well-being of the child because the child has substantial psychological ties to the relative caretaker or foster parents.

(C) The court shall also make an order for visitation with the parents or guardians unless the court finds by a preponderance of the evidence that the visitation would be detrimental to the physical or emotional well-being of the child.

(5) If the court finds that the child should not be placed for adoption, that legal guardianship shall not be established, and that there are no suitable foster parents except exclusive-use homes available to provide the child with a stable and permanent environment, the court may order the care, custody, and control of the child transferred from the county welfare department to a licensed foster family agency. The court shall consider the written recommendation of the county welfare director regarding the suitability of the transfer. The transfer shall be subject to further court orders.

The licensed foster family agency shall place the child in a suitable licensed or exclusive-use home that has been certified by the agency as meeting licensing standards. The licensed foster family agency shall be responsible for supporting the child and providing appropriate services to the child, including those services ordered by the court. Responsibility for the support of the child shall not, in and of itself, create liability on the part of the foster family agency to third persons injured by the child. Those children whose care, custody, and control are transferred to a foster family agency shall not be eligible for foster care maintenance payments or child welfare services, except for emergency response services pursuant to Section 16504.

(d) The proceeding for the appointment of a guardian for a child who is a dependent of the juvenile court shall be in the juvenile court. If the court finds pursuant to this section that legal guardianship is the appropriate permanent plan, it shall appoint the legal guardian and issue letters of guardianship. The assessment prepared pursuant to subdivision (g) of Section 361.5, subdivision (i) of Section 366.21, subdivision (b) of Section 366.22, and subdivision (b) of Section 366.25 shall be read and considered by the court prior to the appointment, and this shall be reflected in the minutes of the court. The person preparing the assessment may be called and examined by any party to the proceeding.

(e) The proceeding for the adoption of a child who is a dependent of the juvenile court shall be in the juvenile court if the court finds pursuant to this section that adoption is the appropriate permanent plan and the petition for adoption is filed in the juvenile court. Upon the filing of a petition for adoption, the juvenile court shall order that an adoption hearing be set. The court shall proceed with the adoption after the appellate rights of the natural parents have been exhausted. The full report required by Section 8715 of the Family Code shall be read and considered by the court prior to the adoption and this shall be reflected in the minutes of the court. The person preparing the report may be called and examined by any party to the proceeding. It is the intent of the Legislature, pursuant to this subdivision, to give potential adoptive parents the option of filing in the juvenile court the petition for the adoption of a child who is a dependent of the juvenile court. Nothing in this section is intended to prevent the filing of a petition for adoption in any other court as permitted by law, instead of in the juvenile court.

(f) At the beginning of any proceeding pursuant to this section, if the child or the parents are not being represented by previously retained or appointed counsel, the court shall proceed as follows:

(1) In accordance with subdivision (c) of Section 317, if a child before the court is without counsel, the court shall appoint counsel unless the court finds that the child would not benefit from the appointment of counsel. The court shall state on the record its reasons for that finding.

(2) If a parent appears without counsel and is unable to afford counsel, the court shall appoint counsel for the parent, unless this representation is knowingly and intelligently waived. The same counsel shall not be appointed to represent both the child and his or her parent. The public defender or private counsel may be appointed as counsel for the parent.

(3) Private counsel appointed under this section shall receive a reasonable sum for compensation and expenses, the amount of which shall be determined by the court. The amount shall be paid by the real parties in interest, other than the child, in any proportions the court deems just. However, if the court finds that any of the real parties in interest are unable to afford counsel, the amount shall be paid out of the general fund of the county.

(g) The court may continue the proceeding for a period of time not to exceed 30 days as necessary to appoint counsel, and to enable counsel to become acquainted with the case.

(h) (1) At all proceedings under this section, the court shall consider the wishes of the child and shall act in the best interests of the child.

(2) In accordance with Section 349, the child shall be present in court if the child or the child's counsel so requests or the court so orders. If the child is 10 years of age or older and is not present at a hearing held pursuant to this section, the court shall determine whether the minor was properly notified of his or her right to attend the hearing and inquire as to the reason why the child is not present.

(3) (A) The testimony of the child may be taken in chambers and outside the presence of the child's parent or parents, if the child's parent or parents are represented by counsel, the counsel is present, and any of the following circumstances exists:

(i) The court determines that testimony in chambers is necessary to ensure truthful testimony.

(ii) The child is likely to be intimidated by a formal courtroom setting.

(iii) The child is afraid to testify in front of his or her parent or parents.

(B) After testimony in chambers, the parent or parents of the child may elect to have the court reporter read back the testimony or have the testimony summarized by counsel for the parent or parents.

(C) The testimony of a child also may be taken in chambers and outside the presence of the guardian or guardians of a child under the circumstances specified in this subdivision.

(i) (1) Any order of the court permanently terminating parental rights under this section shall be conclusive and binding upon the child, upon the parent or parents and upon all other persons who have been served with

citation by publication or otherwise as provided in this chapter. After making the order, the juvenile court shall have no power to set aside, change, or modify it, except as provided in paragraph (2), but nothing in this section shall be construed to limit the right to appeal the order.

(2) A child who has not been adopted after the passage of at least three years from the date the court terminated parental rights and for whom the court has determined that adoption is no longer the permanent plan may petition the juvenile court to reinstate parental rights pursuant to the procedure prescribed by Section 388. The child may file the petition prior to the expiration of this three-year period if the State Department of Social Services or licensed adoption agency that is responsible for custody and supervision of the child as described in subdivision (j) and the child stipulate that the child is no longer likely to be adopted. A child over 12 years of age shall sign the petition in the absence of a showing of good cause as to why the child could not do so. If it appears that the best interests of the child may be promoted by reinstatement of parental rights, the court shall order that a hearing be held and shall give prior notice, or cause prior notice to be given, to the social worker or probation officer and to the child's attorney of record, or, if there is no attorney of record for the child, to the child, and the child's tribe, if applicable, by means prescribed by subdivision (c) of Section 297. The court shall order the child or the social worker or probation officer to give prior notice of the hearing to the child's former parent or parents whose parental rights were terminated in the manner prescribed by subdivision (f) of Section 294 where the recommendation is adoption. The juvenile court shall grant the petition if it finds by clear and convincing evidence that the child is no longer likely to be adopted and that reinstatement of parental rights is in the child's best interest. If the court reinstates parental rights over a child who is under 12 years of age and for whom the new permanent plan will not be reunification with a parent or legal guardian, the court shall specify the factual basis for its findings that it is in the best interest of the child to reinstate parental rights. This subdivision is intended to be retroactive and applies to any child who is under the jurisdiction of the juvenile court at the time of the hearing regardless of the date parental rights were terminated.

(j) If the court, by order or judgment, declares the child free from the custody and control of both parents, or one parent if the other does not have custody and control, the court shall at the same time order the child referred to the State Department of Social Services or a licensed adoption agency for adoptive placement by the agency. However, a petition for adoption may not be granted until the appellate rights of the natural parents have been exhausted. The State Department of Social Services or licensed adoption agency shall be responsible for the custody and supervision of the child and shall be entitled to the exclusive care and control of the child at all times until a petition for adoption is granted, except as specified in subdivision (n). With the consent of the agency, the court may appoint a guardian of the child, who shall serve until the child is adopted.

(k) Notwithstanding any other provision of law, the application of any person who, as a relative caretaker or foster parent, has cared for a dependent child for whom the court has approved a permanent plan for adoption, or who has been freed for adoption, shall be given preference with respect to that child over all other applications for adoptive placement if the agency making the placement determines that the child has substantial emotional ties to the relative caretaker or foster parent and removal from the relative caretaker or foster parent would be seriously detrimental to the child's emotional well-being.

As used in this subdivision, "preference" means that the application shall be processed and, if satisfactory, the family study shall be completed before the processing of the application of any other person for the adoptive placement of the child.

(*l*) (1) An order by the court that a hearing pursuant to this section be held is not appealable at any time unless all of the following apply:

(A) A petition for extraordinary writ review was filed in a timely manner.

(B) The petition substantively addressed the specific issues to be challenged and supported that challenge by an adequate record.

(C) The petition for extraordinary writ review was summarily denied or otherwise not decided on the merits.

(2) Failure to file a petition for extraordinary writ review within the period specified by rule, to substantively address the specific issues challenged, or to support that challenge by an adequate record shall preclude subsequent review by appeal of the findings and orders made pursuant to this section.

(3) The Judicial Council shall adopt rules of court, effective January 1, 1995, to ensure all of the following:

(A) A trial court, after issuance of an order directing a hearing pursuant to this section be held, shall advise all parties of the requirement of filing a petition for extraordinary writ review as set forth in this subdivision in order to preserve any right to appeal in these issues. This notice shall be made orally to a party if the party is present at the time of the making of the order or by first-class mail by the clerk of the court to the last known address of a party not present at the time of the making of the order.

(B) The prompt transmittal of the records from the trial court to the appellate court.

(C) That adequate time requirements for counsel and court personnel exist to implement the objective of this subdivision.

(D) That the parent or guardian, or their trial counsel or other counsel, is charged with the responsibility of filing a petition for extraordinary writ relief pursuant to this subdivision.

(4) The intent of this subdivision is to do both of the following:

(A) Make every reasonable attempt to achieve a substantive and meritorious review by the appellate court within the time specified in Sections 366.21, 366.22, and 366.25 for holding a hearing pursuant to this section.

(B) Encourage the appellate court to determine all writ petitions filed pursuant to this subdivision on their merits.

(5) This subdivision shall only apply to cases in which an order to set a hearing pursuant to this section is issued on or after January 1, 1995.

(m) Except for subdivision (j), this section shall also apply to minors adjudged wards pursuant to Section 727.31.

(n) (1) Notwithstanding Section 8704 of the Family Code or any other provision of law, the court, at a hearing held pursuant to this section or anytime thereafter, may designate a current caretaker as a prospective adoptive parent if the child has lived with the caretaker for at least six months, the caretaker currently expresses a commitment to adopt the child, and the caretaker has taken at least one step to facilitate the adoption process. In determining whether to make that designation, the court may take into consideration whether the caretaker is listed in the preliminary assessment prepared by the county department in accordance with subdivision (i) of Section 366.21 as an appropriate person to be considered as an adoptive parent for the child and the recommendation of the State Department of Social Services or licensed adoption agency.

(2) For purposes of this subdivision, steps to facilitate the adoption process include, but are not limited to, the following:

(A) Applying for an adoption home study.

(B) Cooperating with an adoption home study.

(C) Being designated by the court or the licensed adoption agency as the adoptive family.

(D) Requesting de facto parent status.

(E) Signing an adoptive placement agreement.

(F) Engaging in discussions regarding a postadoption contact agreement.

(G) Working to overcome any impediments that have been identified by the State Department of Social Services and the licensed adoption agency.

(H) Attending classes required of prospective adoptive parents.

(3) Prior to a change in placement and as soon as possible after a decision is made to remove a child from the home of a designated prospective adoptive parent, the agency shall notify the court, the designated prospective adoptive parent or the current caretaker, if that caretaker would have met the threshold criteria to be designated as a prospective adoptive parent pursuant to paragraph (1) on the date of service of this notice, the child's attorney, and the child, if the child is 10 years of age or older, of the proposal in the manner described in Section 16010.6.

(A) Within five court days or seven calendar days, whichever is longer, of the date of notification, the child, the child's attorney, or the designated prospective adoptive parent may file a petition with the court objecting to the proposal to remove the child, or the court, upon its own motion, may set a hearing regarding the proposal. The court may, for good cause, extend the filing period. A caretaker who would have met the threshold criteria to be designated as a prospective adoptive parent pursuant to paragraph (1) on the date of service of the notice of proposed removal of the child may file, together with the petition under this subparagraph, a petition for an order

designating the caretaker as a prospective adoptive parent for purposes of this subdivision.

(B) A hearing ordered pursuant to this paragraph shall be held as soon as possible and not later than five court days after the petition is filed with the court or the court sets a hearing upon its own motion, unless the court for good cause is unable to set the matter for hearing five court days after the petition is filed, in which case the court shall set the matter for hearing as soon as possible. At the hearing, the court shall determine whether the caretaker has met the threshold criteria to be designated as a prospective adoptive parent pursuant to paragraph (1), and whether the proposed removal of the child from the home of the designated prospective adoptive parent is in the child's best interest, and the child may not be removed from the home of the designated prospective adoptive parent unless the court finds that removal is in the child's best interest. If the court determines that the caretaker did not meet the threshold criteria to be designated as a prospective adoptive parent on the date of service of the notice of proposed removal of the child, the petition objecting to the proposed removal filed by the caretaker shall be dismissed. If the caretaker was designated as a prospective adoptive parent prior to this hearing, the court shall inquire into any progress made by the caretaker towards the adoption of the child since the caretaker was designated as a prospective adoptive parent.

(C) A determination by the court that the caretaker is a designated prospective adoptive parent pursuant to paragraph (1) or subparagraph (B) does not make the caretaker a party to the dependency proceeding nor does it confer on the caretaker any standing to object to any other action of the department or licensed adoption agency, unless the caretaker has been declared a de facto parent by the court prior to the notice of removal served pursuant to paragraph (3).

(D) If a petition objecting to the proposal to remove the child is not filed, and the court, upon its own motion, does not set a hearing, the child may be removed from the home of the designated prospective adoptive parent without a hearing.

(4) Notwithstanding paragraph (3), if the State Department of Social Services or a licensed adoption agency determines that the child must be removed from the home of the caretaker who is or may be a designated prospective adoptive parent immediately, due to a risk of physical or emotional harm, the agency may remove the child from that home and is not required to provide notice prior to the removal. However, as soon as possible and not longer than two court days after the removal, the agency shall notify the court, the caretaker who is or may be a designated prospective adoptive parent, the child's attorney, and the child, if the child is 10 years of age or older, of the removal. Within five court days or seven calendar days, whichever is longer, of the date of notification of the removal, the child, the child's attorney, or the caretaker who is or may be a designated prospective adoptive parent may petition for, or the court on its own motion may set, a noticed hearing pursuant to paragraph (3). The court may, for good cause, extend the filing period.

(5) Except as provided in subdivision (b) of Section 366.28, an order by the court issued after a hearing pursuant to this subdivision shall not be appealable.

(6) Nothing in this section shall preclude a county child protective services agency from fully investigating and responding to alleged abuse or neglect of a child pursuant to Section 11165.5 of the Penal Code.

(7) The Judicial Council shall prepare forms to facilitate the filing of the petitions described in this subdivision, which shall become effective on January 1, 2006.

(o) The implementation and operation of the amendments to paragraph (3) of subdivision (c) and subparagraph (A) of paragraph (4) of subdivision (c) enacted at the 2005–06 Regular Session shall be subject to appropriation through the budget process and by phase, as provided in Section 366.35.

(p) This section shall become operative on January 1, 2014.

SEC. 17. Section 366.3 of the Welfare and Institutions Code is amended to read:

366.3. (a) If a juvenile court orders a permanent plan of adoption, tribal customary adoption, or legal guardianship pursuant to Section 360 or 366.26, the court shall retain jurisdiction over the child until the child is adopted or the legal guardianship is established, except as provided for in Section 366.29. The status of the child shall be reviewed every six months to ensure that the adoption or legal guardianship is completed as expeditiously as possible. When the adoption of the child has been granted, or in the case of a tribal customary adoption, when the tribal customary adoption order has been afforded full faith and credit and the petition for adoption has been granted, the court shall terminate its jurisdiction over the child. Following establishment of a legal guardianship, the court may continue jurisdiction over the child as a dependent child of the juvenile court or may terminate its dependency jurisdiction and retain jurisdiction over the child as a ward of the legal guardianship, as authorized by Section 366.4. If, however, a relative of the child is appointed the legal guardian of the child and the child has been placed with the relative for at least 12 months, the court shall, except if the relative guardian objects, or upon a finding of exceptional circumstances, terminate its dependency jurisdiction and retain jurisdiction over the child as a ward of the guardianship, as authorized by Section 366.4. Following a termination of parental rights, the parent or parents shall not be a party to, or receive notice of, any subsequent proceedings regarding the child.

(b) If the court has dismissed dependency jurisdiction following the establishment of a legal guardianship, or no dependency jurisdiction attached because of the granting of a legal guardianship pursuant to Section 360, and the legal guardianship is subsequently revoked or otherwise terminated, the county department of social services or welfare department shall notify the juvenile court of this fact. The court may vacate its previous order dismissing dependency jurisdiction over the child.

Notwithstanding Section 1601 of the Probate Code, the proceedings to terminate a legal guardianship that has been granted pursuant to Section

360 or 366.26 shall be held either in the juvenile court that retains jurisdiction over the guardianship as authorized by Section 366.4 or the juvenile court in the county where the guardian and child currently reside, based on the best interests of the child, unless the termination is due to the emancipation or adoption of the child. The juvenile court having jurisdiction over the guardianship shall receive notice from the court in which the petition is filed within five calendar days of the filing. Prior to the hearing on a petition to terminate legal guardianship pursuant to this subdivision, the court shall order the county department of social services or welfare department having jurisdiction or jointly with the county department where the guardian and child currently reside to prepare a report, for the court's consideration, that shall include an evaluation of whether the child could safely remain in, or be returned to, the legal guardian's home, without terminating the legal guardianship, if services were provided to the child or legal guardian. If applicable, the report shall also identify recommended family maintenance or reunification services to maintain the legal guardianship and set forth a plan for providing those services. If the petition to terminate legal guardianship is granted, either juvenile court may resume dependency jurisdiction over the child, and may order the county department of social services or welfare department to develop a new permanent plan, which shall be presented to the court within 60 days of the termination. If no dependency jurisdiction has attached, the social worker shall make any investigation he or she deems necessary to determine whether the child may be within the jurisdiction of the juvenile court, as provided in Section 328.

Unless the parental rights of the child's parent or parents have been terminated, they shall be notified that the legal guardianship has been revoked or terminated and shall be entitled to participate in the new permanency planning hearing. The court shall try to place the child in another permanent placement. At the hearing, the parents may be considered as custodians but the child shall not be returned to the parent or parents unless they prove, by a preponderance of the evidence, that reunification is the best alternative for the child. The court may, if it is in the best interests of the child, order that reunification services again be provided to the parent or parents.

(c) If, following the establishment of a legal guardianship, the county welfare department becomes aware of changed circumstances that indicate adoption or, for an Indian child, tribal customary adoption, may be an appropriate plan for the child, the department shall so notify the court. The court may vacate its previous order dismissing dependency jurisdiction over the child and order that a hearing be held pursuant to Section 366.26 to determine whether adoption or continued legal guardianship is the most appropriate plan for the child. The hearing shall be held no later than 120 days from the date of the order. If the court orders that a hearing shall be held pursuant to Section 366.26, the court shall direct the agency supervising the child and the licensed county adoption agency, or the State Department of Social Services if it is acting as an adoption agency in counties that are

not served by a county adoption agency, to prepare an assessment under subdivision (b) of Section 366.22.

(d) If the child is in a placement other than the home of a legal guardian and jurisdiction has not been dismissed, the status of the child shall be reviewed at least every six months. The review of the status of a child for whom the court has ordered parental rights terminated and who has been ordered placed for adoption shall be conducted by the court. The review of the status of a child for whom the court has not ordered parental rights terminated and who has not been ordered placed for adoption may be conducted by the court or an appropriate local agency. The court shall conduct the review under the following circumstances:

(1) Upon the request of the child's parents or legal guardians.

(2) Upon the request of the child.

(3) It has been 12 months since a hearing held pursuant to Section 366.26 or an order that the child remain in long-term foster care pursuant to Section 366.21, 366.22, 366.25, 366.26, or subdivision (h).

(4) It has been 12 months since a review was conducted by the court.

The court shall determine whether or not reasonable efforts to make and finalize a permanent placement for the child have been made.

(e) Except as provided in subdivision (g), at the review held every six months pursuant to subdivision (d), the reviewing body shall inquire about the progress being made to provide a permanent home for the child, shall consider the safety of the child, and shall determine all of the following:

(1) The continuing necessity for, and appropriateness of, the placement.

(2) Identification of individuals other than the child's siblings who are important to a child who is 10 years of age or older and has been in out-of-home placement for six months or longer, and actions necessary to maintain the child's relationship with those individuals, provided that those relationships are in the best interest of the child. The social worker shall ask every child who is 10 years of age or older and who has been in out-of-home placement for six months or longer to identify individuals other than the child's siblings who are important to the child, and may ask any other child to provide that information, as appropriate. The social worker shall make efforts to identify other individuals who are important to the child, consistent with the child's best interests.

(3) The continuing appropriateness and extent of compliance with the permanent plan for the child, including efforts to maintain relationships between a child who is 10 years of age or older and who has been in out-of-home placement for six months or longer and individuals who are important to the child and efforts to identify a prospective adoptive parent or legal guardian, including, but not limited to, child-specific recruitment efforts and listing on an adoption exchange.

(4) The extent of the agency's compliance with the child welfare services case plan in making reasonable efforts either to return the child to the safe home of the parent or to complete whatever steps are necessary to finalize the permanent placement of the child. If the reviewing body determines that a second period of reunification services is in the child's best interests, and

that there is a significant likelihood of the child's return to a safe home due to changed circumstances of the parent, pursuant to subdivision (f), the specific reunification services required to effect the child's return to a safe home shall be described.

(5) Whether there should be any limitation on the right of the parent or guardian to make educational decisions for the child. That limitation shall be specifically addressed in the court order and may not exceed what is necessary to protect the child. If the court specifically limits the right of the parent or guardian to make educational decisions for the child, the court shall at the same time appoint a responsible adult to make educational decisions for the child pursuant to Section 361.

(6) The adequacy of services provided to the child. The court shall consider the progress in providing the information and documents to the child, as described in Section 391. The court shall also consider the need for, and progress in providing, the assistance and services described in paragraphs (3) and (4) of subdivision (b) of Section 391.

(7) The extent of progress the parents or legal guardians have made toward alleviating or mitigating the causes necessitating placement in foster care.

(8) The likely date by which the child may be returned to, and safely maintained in, the home, placed for adoption, legal guardianship, in another planned permanent living arrangement, or, for an Indian child, in consultation with the child's tribe, placed for tribal customary adoption.

(9) Whether the child has any siblings under the court's jurisdiction, and, if any siblings exist, all of the following:

(A) The nature of the relationship between the child and his or her siblings.

(B) The appropriateness of developing or maintaining the sibling relationships pursuant to Section 16002.

(C) If the siblings are not placed together in the same home, why the siblings are not placed together and what efforts are being made to place the siblings together, or why those efforts are not appropriate.

(D) If the siblings are not placed together, the frequency and nature of the visits between siblings.

(E) The impact of the sibling relationships on the child's placement and planning for legal permanence.

The factors the court may consider as indicators of the nature of the child's sibling relationships include, but are not limited to, whether the siblings were raised together in the same home, whether the siblings have shared significant common experiences or have existing close and strong bonds, whether either sibling expresses a desire to visit or live with his or her sibling, as applicable, and whether ongoing contact is in the child's best emotional interests.

(10) For a child who is 16 years of age or older, the services needed to assist the child to make the transition from foster care to independent living.

The reviewing body shall determine whether or not reasonable efforts to make and finalize a permanent placement for the child have been made.

Each licensed foster family agency shall submit reports for each child in its care, custody, and control to the court concerning the continuing appropriateness and extent of compliance with the child's permanent plan, the extent of compliance with the case plan, and the type and adequacy of services provided to the child.

(f) Unless their parental rights have been permanently terminated, the parent or parents of the child are entitled to receive notice of, and participate in, those hearings. It shall be presumed that continued care is in the best interests of the child, unless the parent or parents prove, by a preponderance of the evidence, that further efforts at reunification are the best alternative for the child. In those cases, the court may order that further reunification services to return the child to a safe home environment be provided to the parent or parents up to a period of six months, and family maintenance services, as needed for an additional six months in order to return the child to a safe home environment.

(g) At the review conducted by the court and held at least every six months, regarding a child for whom the court has ordered parental rights terminated and who has been ordered placed for adoption, or, for an Indian child for whom parental rights are not being terminated and a tribal customary adoption is being considered, the county welfare department shall prepare and present to the court a report describing the following:

(1) The child's present placement.

(2) The child's current physical, mental, emotional, and educational status.

(3) If the child has not been placed with a prospective adoptive parent or guardian, identification of individuals, other than the child's siblings, who are important to the child and actions necessary to maintain the child's relationship with those individuals, provided that those relationships are in the best interest of the child. The agency shall ask every child who is 10 years of age or older to identify any individuals who are important to him or her, consistent with the child's best interest, and may ask any child who is younger than 10 years of age to provide that information as appropriate. The agency shall make efforts to identify other individuals who are important to the child.

(4) Whether the child has been placed with a prospective adoptive parent or parents.

(5) Whether an adoptive placement agreement has been signed and filed.

(6) If the child has not been placed with a prospective adoptive parent or parents, the efforts made to identify an appropriate prospective adoptive parent or legal guardian, including, but not limited to, child-specific recruitment efforts and listing on an adoption exchange.

(7) Whether the final adoption order should include provisions for postadoptive sibling contact pursuant to Section 366.29.

(8) The progress of the search for an adoptive placement if one has not been identified.

(9) Any impediments to the adoption or the adoptive placement.

(10) The anticipated date by which the child will be adopted or placed in an adoptive home.

(11) The anticipated date by which an adoptive placement agreement will be signed.

(12) Recommendations for court orders that will assist in the placement of the child for adoption or in the finalization of the adoption.

The court shall determine whether or not reasonable efforts to make and finalize a permanent placement for the child have been made.

The court shall make appropriate orders to protect the stability of the child and to facilitate and expedite the permanent placement and adoption of the child.

(h) At the review held pursuant to subdivision (d) for a child in long-term foster care, the court shall consider all permanency planning options for the child including whether the child should be returned to the home of the parent, placed for adoption, or, for an Indian child, in consultation with the child's tribe, placed for tribal customary adoption, or appointed a legal guardian, or, if compelling reasons exist for finding that none of the foregoing options are in the best interest of the child, whether the child should be placed in another planned permanent living arrangement. The court shall order that a hearing be held pursuant to Section 366.26, unless it determines by clear and convincing evidence that there is a compelling reason for determining that a hearing held pursuant to Section 366.26 is not in the best interest of the child because the child is being returned to the home of the parent, the child is not a proper subject for adoption, or no one is willing to accept legal guardianship. If the licensed county adoption agency, or the department when it is acting as an adoption agency in counties that are not served by a county adoption agency, has determined it is unlikely that the child will be adopted or one of the conditions described in paragraph (1) of subdivision (c) of Section 366.26 applies, that fact shall constitute a compelling reason for purposes of this subdivision. Only upon that determination may the court order that the child remain in foster care, without holding a hearing pursuant to Section 366.26.

(i) If, as authorized by subdivision (h), the court orders a hearing pursuant to Section 366.26, the court shall direct the agency supervising the child and the licensed county adoption agency, or the State Department of Social Services when it is acting as an adoption agency in counties that are not served by a county adoption agency, to prepare an assessment as provided for in subdivision (i) of Section 366.21 or subdivision (b) of Section 366.22. A hearing held pursuant to Section 366.26 shall be held no later than 120 days from the date of the 12-month review at which it is ordered, and at that hearing the court shall determine whether adoption, tribal customary adoption, legal guardianship, or long-term foster care is the most appropriate plan for the child.

(j) The implementation and operation of the amendments to subdivision (e) enacted at the 2005–06 Regular Session shall be subject to appropriation through the budget process and by phase, as provided in Section 366.35.

(k) The reviews conducted pursuant to subdivision (a) or (d) may be conducted earlier than every six months if the court determines that an earlier review is in the best interests of the child or as court rules prescribe.

(*l*) This section shall remain in effect only until January 1, 2014, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2014, deletes or extends that date.

SEC. 18. Section 366.3 is added to the Welfare and Institutions Code, to read:

366.3. (a) If a juvenile court orders a permanent plan of adoption or legal guardianship pursuant to Section 360 or 366.26, the court shall retain jurisdiction over the child until the child is adopted or the legal guardianship is established, except as provided for in Section 366.29. The status of the child shall be reviewed every six months to ensure that the adoption or legal guardianship is completed as expeditiously as possible. When the adoption of the child has been granted, the court shall terminate its jurisdiction over the child. Following establishment of a legal guardianship, the court may continue jurisdiction over the child as a dependent child of the juvenile court or may terminate its dependency jurisdiction and retain jurisdiction over the child as a ward of the legal guardianship, as authorized by Section 366.4. If, however, a relative of the child is appointed the legal guardian of the child and the child has been placed with the relative for at least 12 months, the court shall, except if the relative guardian objects, or upon a finding of exceptional circumstances, terminate its dependency jurisdiction and retain jurisdiction over the child as a ward of the guardianship, as authorized by Section 366.4. Following a termination of parental rights, the parent or parents shall not be a party to, or receive notice of, any subsequent proceedings regarding the child.

(b) If the court has dismissed dependency jurisdiction following the establishment of a legal guardianship, or no dependency jurisdiction attached because of the granting of a legal guardianship pursuant to Section 360, and the legal guardianship is subsequently revoked or otherwise terminated, the county department of social services or welfare department shall notify the juvenile court of this fact. The court may vacate its previous order dismissing dependency jurisdiction over the child.

Notwithstanding Section 1601 of the Probate Code, the proceedings to terminate a legal guardianship that has been granted pursuant to Section 360 or 366.26 shall be held either in the juvenile court that retains jurisdiction over the guardianship as authorized by Section 366.4 or the juvenile court in the county where the guardian and child currently reside, based on the best interests of the child, unless the termination is due to the emancipation or adoption of the child. The juvenile court having jurisdiction over the guardianship shall receive notice from the court in which the petition is filed within five calendar days of the filing. Prior to the hearing on a petition to terminate legal guardianship pursuant to this subdivision, the court shall order the county department of social services or welfare department having jurisdiction or jointly with the county department where the guardian and child currently reside to prepare a report, for the court's consideration, that

shall include an evaluation of whether the child could safely remain in, or be returned to, the legal guardian's home, without terminating the legal guardianship, if services were provided to the child or legal guardian. If applicable, the report shall also identify recommended family maintenance or reunification services to maintain the legal guardianship and set forth a plan for providing those services. If the petition to terminate legal guardianship is granted, either juvenile court may resume dependency jurisdiction over the child, and may order the county department of social services or welfare department to develop a new permanent plan, which shall be presented to the court within 60 days of the termination. If no dependency jurisdiction has attached, the social worker shall make any investigation he or she deems necessary to determine whether the child may be within the jurisdiction of the juvenile court, as provided in Section 328.

Unless the parental rights of the child's parent or parents have been terminated, they shall be notified that the legal guardianship has been revoked or terminated and shall be entitled to participate in the new permanency planning hearing. The court shall try to place the child in another permanent placement. At the hearing, the parents may be considered as custodians but the child shall not be returned to the parent or parents unless they prove, by a preponderance of the evidence, that reunification is the best alternative for the child. The court may, if it is in the best interests of the child, order that reunification services again be provided to the parent or parents.

(c) If, following the establishment of a legal guardianship, the county welfare department becomes aware of changed circumstances that indicate adoption may be an appropriate plan for the child, the department shall so notify the court. The court may vacate its previous order dismissing dependency jurisdiction over the child and order that a hearing be held pursuant to Section 366.26 to determine whether adoption or continued legal guardianship is the most appropriate plan for the child. The hearing shall be held no later than 120 days from the date of the order. If the court orders that a hearing shall be held pursuant to Section 366.26, the court shall direct the agency supervising the child and the licensed county adoption agency, or the State Department of Social Services if it is acting as an adoption agency in counties that are not served by a county adoption agency, to prepare an assessment under subdivision (b) of Section 366.22.

(d) If the child is in a placement other than the home of a legal guardian and jurisdiction has not been dismissed, the status of the child shall be reviewed at least every six months. The review of the status of a child for whom the court has ordered parental rights terminated and who has been ordered placed for adoption shall be conducted by the court. The review of the status of a child for whom the court has not ordered parental rights terminated and who has not been ordered placed for adoption may be conducted by the court or an appropriate local agency. The court shall conduct the review under the following circumstances:

(1) Upon the request of the child's parents or legal guardians.

(2) Upon the request of the child.

(3) It has been 12 months since a hearing held pursuant to Section 366.26 or an order that the child remain in long-term foster care pursuant to Section 366.21, 366.22, 366.25, 366.26, or subdivision (h).

(4) It has been 12 months since a review was conducted by the court.

The court shall determine whether or not reasonable efforts to make and finalize a permanent placement for the child have been made.

(e) Except as provided in subdivision (g), at the review held every six months pursuant to subdivision (d), the reviewing body shall inquire about the progress being made to provide a permanent home for the child, shall consider the safety of the child, and shall determine all of the following:

(1) The continuing necessity for, and appropriateness of, the placement.

(2) Identification of individuals other than the child's siblings who are important to a child who is 10 years of age or older and has been in out-of-home placement for six months or longer, and actions necessary to maintain the child's relationship with those individuals, provided that those relationships are in the best interest of the child. The social worker shall ask every child who is 10 years of age or older and who has been in out-of-home placement for six months or longer to identify individuals other than the child's siblings who are important to the child, and may ask any other child to provide that information, as appropriate. The social worker shall make efforts to identify other individuals who are important to the child, consistent with the child's best interests.

(3) The continuing appropriateness and extent of compliance with the permanent plan for the child, including efforts to maintain relationships between a child who is 10 years of age or older and who has been in out-of-home placement for six months or longer and individuals who are important to the child and efforts to identify a prospective adoptive parent or legal guardian, including, but not limited to, child-specific recruitment efforts and listing on an adoption exchange.

(4) The extent of the agency's compliance with the child welfare services case plan in making reasonable efforts either to return the child to the safe home of the parent or to complete whatever steps are necessary to finalize the permanent placement of the child. If the reviewing body determines that a second period of reunification services is in the child's best interests, and that there is a significant likelihood of the child's return to a safe home due to changed circumstances of the parent, pursuant to subdivision (f), the specific reunification services required to effect the child's return to a safe home shall be described.

(5) Whether there should be any limitation on the right of the parent or guardian to make educational decisions for the child. That limitation shall be specifically addressed in the court order and may not exceed what is necessary to protect the child. If the court specifically limits the right of the parent or guardian to make educational decisions for the child, the court shall at the same time appoint a responsible adult to make educational decisions for the child pursuant to Section 361.

(6) The adequacy of services provided to the child. The court shall consider the progress in providing the information and documents to the

child, as described in Section 391. The court shall also consider the need for, and progress in providing, the assistance and services described in paragraphs (3) and (4) of subdivision (b) of Section 391.

(7) The extent of progress the parents or legal guardians have made toward alleviating or mitigating the causes necessitating placement in foster care.

(8) The likely date by which the child may be returned to, and safely maintained in, the home, placed for adoption, legal guardianship, or in another planned permanent living arrangement.

(9) Whether the child has any siblings under the court's jurisdiction, and, if any siblings exist, all of the following:

(A) The nature of the relationship between the child and his or her siblings.

(B) The appropriateness of developing or maintaining the sibling relationships pursuant to Section 16002.

(C) If the siblings are not placed together in the same home, why the siblings are not placed together and what efforts are being made to place the siblings together, or why those efforts are not appropriate.

(D) If the siblings are not placed together, the frequency and nature of the visits between siblings.

(E) The impact of the sibling relationships on the child's placement and planning for legal permanence.

The factors the court may consider as indicators of the nature of the child's sibling relationships include, but are not limited to, whether the siblings were raised together in the same home, whether the siblings have shared significant common experiences or have existing close and strong bonds, whether either sibling expresses a desire to visit or live with his or her sibling, as applicable, and whether ongoing contact is in the child's best emotional interests.

(10) For a child who is 16 years of age or older, the services needed to assist the child to make the transition from foster care to independent living.

The reviewing body shall determine whether or not reasonable efforts to make and finalize a permanent placement for the child have been made.

Each licensed foster family agency shall submit reports for each child in its care, custody, and control to the court concerning the continuing appropriateness and extent of compliance with the child's permanent plan, the extent of compliance with the case plan, and the type and adequacy of services provided to the child.

(f) Unless their parental rights have been permanently terminated, the parent or parents of the child are entitled to receive notice of, and participate in, those hearings. It shall be presumed that continued care is in the best interests of the child, unless the parent or parents prove, by a preponderance of the evidence, that further efforts at reunification are the best alternative for the child. In those cases, the court may order that further reunification services to return the child to a safe home environment be provided to the parent or parents up to a period of six months, and family maintenance

services, as needed for an additional six months in order to return the child to a safe home environment.

(g) At the review conducted by the court and held at least every six months, regarding a child for whom the court has ordered parental rights terminated and who has been ordered placed for adoption, the county welfare department shall prepare and present to the court a report describing the following:

(1) The child's present placement.

(2) The child's current physical, mental, emotional, and educational status.

(3) If the child has not been placed with a prospective adoptive parent or guardian, identification of individuals, other than the child's siblings, who are important to the child and actions necessary to maintain the child's relationship with those individuals, provided that those relationships are in the best interest of the child. The agency shall ask every child who is 10 years of age or older to identify any individuals who are important to him or her, consistent with the child's best interest, and may ask any child who is younger than 10 years of age to provide that information as appropriate. The agency shall make efforts to identify other individuals who are important to the child.

(4) Whether the child has been placed with a prospective adoptive parent or parents.

(5) Whether an adoptive placement agreement has been signed and filed.

(6) If the child has not been placed with a prospective adoptive parent or parents, the efforts made to identify an appropriate prospective adoptive parent or legal guardian, including, but not limited to, child-specific recruitment efforts and listing on an adoption exchange.

(7) Whether the final adoption order should include provisions for postadoptive sibling contact pursuant to Section 366.29.

(8) The progress of the search for an adoptive placement if one has not been identified.

(9) Any impediments to the adoption or the adoptive placement.

(10) The anticipated date by which the child will be adopted or placed in an adoptive home.

(11) The anticipated date by which an adoptive placement agreement will be signed.

(12) Recommendations for court orders that will assist in the placement of the child for adoption or in the finalization of the adoption.

The court shall determine whether or not reasonable efforts to make and finalize a permanent placement for the child have been made.

The court shall make appropriate orders to protect the stability of the child and to facilitate and expedite the permanent placement and adoption of the child.

(h) At the review held pursuant to subdivision (d) for a child in long-term foster care, the court shall consider all permanency planning options for the child including whether the child should be returned to the home of the parent, placed for adoption, or appointed a legal guardian, or, if compelling

reasons exist for finding that none of the foregoing options are in the best interest of the child, whether the child should be placed in another planned permanent living arrangement. The court shall order that a hearing be held pursuant to Section 366.26, unless it determines by clear and convincing evidence that there is a compelling reason for determining that a hearing held pursuant to Section 366.26 is not in the best interest of the child because the child is being returned to the home of the parent, the child is not a proper subject for adoption, or no one is willing to accept legal guardianship. If the licensed county adoption agency, or the department when it is acting as an adoption agency in counties that are not served by a county adoption agency, has determined it is unlikely that the child will be adopted or one of the conditions described in paragraph (1) of subdivision (c) of Section 366.26 applies, that fact shall constitute a compelling reason for purposes of this subdivision. Only upon that determination may the court order that the child remain in foster care, without holding a hearing pursuant to Section 366.26.

(i) If, as authorized by subdivision (h), the court orders a hearing pursuant to Section 366.26, the court shall direct the agency supervising the child and the licensed county adoption agency, or the State Department of Social Services when it is acting as an adoption agency in counties that are not served by a county adoption agency, to prepare an assessment as provided for in subdivision (i) of Section 366.21 or subdivision (b) of Section 366.22. A hearing held pursuant to Section 366.26 shall be held no later than 120 days from the date of the 12-month review at which it is ordered, and at that hearing the court shall determine whether adoption, legal guardianship, or long-term foster care is the most appropriate plan for the child.

(j) The implementation and operation of the amendments to subdivision (e) enacted at the 2005–06 Regular Session shall be subject to appropriation through the budget process and by phase, as provided in Section 366.35.

(k) The reviews conducted pursuant to subdivision (a) or (d) may be conducted earlier than every six months if the court determines that an earlier review is in the best interests of the child or as court rules prescribe.

(*l*) This section shall become operative on January 1, 2014.

SEC. 19. Section 16120 of the Welfare and Institutions Code is amended to read:

16120. A child shall be eligible for Adoption Assistance Program benefits if all of the conditions specified in subdivisions (a) to (*l*), inclusive, are met or if the conditions specified in subdivision (m) are met.

(a) It has been determined that the child cannot or should not be returned to the home of his or her parents as evidenced by a petition for termination of parental rights, a court order terminating parental rights, or a signed relinquishment, or, in the case of a tribal customary adoption, if the court has given full faith and credit to a tribal customary adoption order as provided for pursuant to paragraph (2) of subdivision (e) of Section 366.26.

(b) The child has at least one of the following characteristics that are barriers to his or her adoption:

(1) Adoptive placement without financial assistance is unlikely because of membership in a sibling group that should remain intact or by virtue of race, ethnicity, color, language, three years of age or older, or parental background of a medical or behavioral nature that can be determined to adversely affect the development of the child.

(2) Adoptive placement without financial assistance is unlikely because the child has a mental, physical, emotional, or medical disability that has been certified by a licensed professional competent to make an assessment and operating within the scope of his or her profession. This paragraph shall also apply to children with a developmental disability, as defined in subdivision (a) of Section 4512, including those determined to require out-of-home nonmedical care, as described in Section 11464.

(c) The need for adoption subsidy is evidenced by an unsuccessful search for an adoptive home to take the child without financial assistance, as documented in the case file of the prospective adoptive child. The requirement for this search shall be waived when it would be against the best interest of the child because of the existence of significant emotional ties with prospective adoptive parents while in the care of these persons as a foster child.

(d) The child is under 18 years of age, or under 21 years of age and has a mental or physical handicap that warrants the continuation of assistance.

(e) The adoptive family is responsible for the child pursuant to the terms of an adoptive placement agreement or a final decree of adoption and has signed an adoption assistance agreement.

(f) The adoptive family is legally responsible for the support of the child and the child is receiving support from the adoptive parent.

(g) The department or the county responsible for determining the child's Adoption Assistance Program eligibility status and for providing financial aid, and the prospective adoptive parent, prior to or at the time the adoption decree is issued by the court, have signed an adoption assistance agreement that stipulates the need for, and the amount of, Adoption Assistance Program benefits.

(h) The prospective adoptive parent or any adult living in the prospective adoptive home has completed the criminal background check requirements pursuant to Section 671(a)(20)(A) and (C) of Title 42 of the United States Code.

(i) To be eligible for state funding, the child is the subject of an agency adoption, as defined in Section 8506 of the Family Code and was any of the following:

(1) Under the supervision of a county welfare department as the subject of a legal guardianship or juvenile court dependency.

(2) Relinquished for adoption to a licensed California private or public adoption agency, or another public agency operating a Title IV-E program on behalf of the state, and would have otherwise been at risk of dependency as certified by the responsible public child welfare agency.

(3) Committed to the care of the department pursuant to Section 8805 or 8918 of the Family Code.

(4) The child is an Indian child and the subject of an order of adoption based on tribal customary adoption of an Indian child, as described in Section 366.24. Notwithstanding Section 8600.5 of the Family Code, for purposes of this subdivision a tribal customary adoption shall be considered an agency adoption.

(j) To be eligible for federal funding, in the case of a child who is not an applicable child for the federal fiscal year as defined in subdivision (n), the child meets any of the following criteria:

(1) Prior to the finalization of an agency adoption, as defined in Section 8506 of the Family Code, or an independent adoption, as defined in Section 8524 of the Family Code, is filed, the child has met the requirements to receive federal supplemental security income benefits pursuant to Subchapter 16 (commencing with Section 1381) of Chapter 7 of Title 42 of the United States Code, as determined and documented by the federal Social Security Administration.

(2) The child was removed from the home of a specified relative and the child would have been AFDC-eligible in the home of removal according to Section 606(a) or 607 of Title 42 of the United States Code, as those sections were in effect on July 16, 1996, in the month of the voluntary placement agreement or in the month court proceedings are initiated to remove the child, resulting in a judicial determination that continuation in the home would be contrary to the child's welfare. The child must have been living with the specified relative from whom he or she was removed within six months of the month the voluntary placement agreement was signed or the petition to remove was filed.

(3) The child was voluntarily relinquished to a licensed public or private adoption agency, or another public agency operating a Title IV-E program on behalf of the state, and there is a petition to the court to remove the child from the home within six months of the time the child lived with a specified relative and a subsequent judicial determination that remaining in the home would be contrary to the child's welfare.

(4) Title IV-E foster care maintenance was paid on behalf of the child's minor parent and covered the cost of the minor parent's child while the child was in the foster family home or child care institution with the minor parent.

(5) The child is an Indian child and the subject of an order of adoption based on tribal customary adoption of an Indian child, as described in Section 366.24.

(k) To be eligible for federal funding, in the case of a child who is an applicable child for the federal fiscal year, as defined in subdivision (n), the child meets any of the following criteria:

(1) At the time of initiation of adoptive proceedings was in the care of a public or licensed private child placement agency or Indian tribal organization pursuant to either of the following:

(A) An involuntary removal of the child from the home in accordance with a judicial determination to the effect that continuation in the home would be contrary to the welfare of the child.

(B) A voluntary placement agreement or a voluntary relinquishment.

(2) He or she meets all medical or disability requirements of Title XVI with respect to eligibility for supplemental security income benefits.

(3) He or she was residing in a foster family home or a child care institution with the child's minor parent, and the child's minor parent was in the foster family home or child care institution pursuant to either of the following:

(A) An involuntary removal of the child from the home in accordance with a judicial determination to the effect that continuation in the home would be contrary to the welfare of the child.

(B) A voluntary placement agreement or voluntary relinquishment.

(4) The child is an Indian child and the subject of an order of adoption based on tribal customary adoption of an Indian child, as described in Section 366.24.

(*l*) The child is a citizen of the United States or a qualified alien as defined in Section 1641 of Title 8 of the United States Code. If the child is a qualified alien who entered the United States on or after August 22, 1996, and is placed with an unqualified alien, the child must meet the five-year residency requirement pursuant to Section 673(a)(2)(B) of Title 42 of the United States Code, unless the child is a member of one of the excepted groups pursuant to Section 1612(b) of Title 8 of the United States Code.

(m) A child shall be eligible for Adoption Assistance Program benefits if the following conditions are met:

(1) The child received Adoption Assistance Program benefits with respect to a prior adoption and the child is again available for adoption because the prior adoption was dissolved and the parental rights of the adoptive parents were terminated or because the child's adoptive parents died and the child meets the special needs criteria described in subdivisions (a) to (c), inclusive.

(2) To receive federal funding, the citizenship requirements in subdivision (*l*).

(n) (1) Except as provided in this subdivision, "applicable child" means a child for whom an adoption assistance agreement is entered into under this section during any federal fiscal year described in this subdivision if the child attained the applicable age for that federal fiscal year before the end of that federal fiscal year.

(A) For federal fiscal year 2010, the applicable age is 16 years.

(B) For federal fiscal year 2011, the applicable age is 14 years.

(C) For federal fiscal year 2012, the applicable age is 12 years.

(D) For federal fiscal year 2013, the applicable age is 10 years.

(E) For federal fiscal year 2014, the applicable age is 8 years.

(F) For federal fiscal year 2015, the applicable age is 6 years.

(G) For federal fiscal year 2016, the applicable age is 4 years.

(H) For federal fiscal year 2017, the applicable age is 2 years.

(I) For federal fiscal year 2018 and thereafter, any age.

(2) Beginning with the 2010 federal fiscal year, the term "applicable child" shall include a child of any age on the date on which an adoption assistance agreement is entered into on behalf of the child under this section if the child meets both of the following criteria:

(A) He or she has been in foster care under the responsibility of the state for at least 60 consecutive months.

(B) He or she meets the requirements of subdivision (k).

(3) Beginning with the 2010 federal fiscal year, an applicable child shall include a child of any age on the date that an adoption assistance agreement is entered into on behalf of the child under this section, without regard to whether the child is described in paragraph (2), if the child meets all of the following criteria:

(A) He or she is a sibling of a child who is an applicable child for the federal fiscal year, under subdivision (n) or paragraph (2).

(B) He or she is to be placed in the same adoption placement as an "applicable child" for the federal fiscal year who is their sibling.

(C) He or she meets the requirements of subdivision (k).

(o) This section shall remain in effect only until January 1, 2014, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2014, deletes or extends that date.

SEC. 20. Section 16120 is added to the Welfare and Institutions Code, to read:

16120. A child shall be eligible for Adoption Assistance Program benefits if all of the conditions specified in subdivisions (a) to (*l*), inclusive, are met or if the conditions specified in subdivision (m) are met.

(a) It has been determined that the child cannot or should not be returned to the home of his or her parents as evidenced by a petition for termination of parental rights, a court order terminating parental rights, or a signed relinquishment.

(b) The child has at least one of the following characteristics that are barriers to his or her adoption:

(1) Adoptive placement without financial assistance is unlikely because of membership in a sibling group that should remain intact or by virtue of race, ethnicity, color, language, three years of age or older, or parental background of a medical or behavioral nature that can be determined to adversely affect the development of the child.

(2) Adoptive placement without financial assistance is unlikely because the child has a mental, physical, emotional, or medical disability that has been certified by a licensed professional competent to make an assessment and operating within the scope of his or her profession. This paragraph shall also apply to children with a developmental disability, as defined in subdivision (a) of Section 4512, including those determined to require out-of-home nonmedical care, as described in Section 11464.

(c) The need for adoption subsidy is evidenced by an unsuccessful search for an adoptive home to take the child without financial assistance, as documented in the case file of the prospective adoptive child. The requirement for this search shall be waived when it would be against the best interest of the child because of the existence of significant emotional ties with prospective adoptive parents while in the care of these persons as a foster child.

(d) The child is under 18 years of age, or under 21 years of age and has a mental or physical handicap that warrants the continuation of assistance.

(e) The adoptive family is responsible for the child pursuant to the terms of an adoptive placement agreement or a final decree of adoption and has signed an adoption assistance agreement.

(f) The adoptive family is legally responsible for the support of the child and the child is receiving support from the adoptive parent.

(g) The department or the county responsible for determining the child's Adoption Assistance Program eligibility status and for providing financial aid, and the prospective adoptive parent, prior to or at the time the adoption decree is issued by the court, have signed an adoption assistance agreement that stipulates the need for, and the amount of, Adoption Assistance Program benefits.

(h) The prospective adoptive parent or any adult living in the prospective adoptive home has completed the criminal background check requirements pursuant to Section 671(a)(20)(A) and (C) of Title 42 of the United States Code.

(i) To be eligible for state funding, the child is the subject of an agency adoption, as defined in Section 8506 of the Family Code and was any of the following:

(1) Under the supervision of a county welfare department as the subject of a legal guardianship or juvenile court dependency.

(2) Relinquished for adoption to a licensed California private or public adoption agency, or another public agency operating a Title IV-E program on behalf of the state, and would have otherwise been at risk of dependency as certified by the responsible public child welfare agency.

(3) Committed to the care of the department pursuant to Section 8805 or 8918 of the Family Code.

(j) To be eligible for federal funding, in the case of a child who is not an applicable child for the federal fiscal year as defined in subdivision (n), the child meets any of the following criteria:

(1) Prior to the finalization of an agency adoption, as defined in Section 8506 of the Family Code, or an independent adoption, as defined in Section 8524 of the Family Code, is filed, the child has met the requirements to receive federal supplemental security income benefits pursuant to Subchapter 16 (commencing with Section 1381) of Chapter 7 of Title 42 of the United States Code, as determined and documented by the federal Social Security Administration.

(2) The child was removed from the home of a specified relative and the child would have been AFDC-eligible in the home of removal according to Section 606(a) or 607 of Title 42 of the United States Code, as those sections were in effect on July 16, 1996, in the month of the voluntary placement agreement or in the month court proceedings are initiated to remove the child, resulting in a judicial determination that continuation in the home would be contrary to the child's welfare. The child must have been living with the specified relative from whom he or she was removed within six

months of the month the voluntary placement agreement was signed or the petition to remove was filed.

(3) The child was voluntarily relinquished to a licensed public or private adoption agency, or another public agency operating a Title IV-E program on behalf of the state, and there is a petition to the court to remove the child from the home within six months of the time the child lived with a specified relative and a subsequent judicial determination that remaining in the home would be contrary to the child's welfare.

(4) Title IV-E foster care maintenance was paid on behalf of the child's minor parent and covered the cost of the minor parent's child while the child was in the foster family home or child care institution with the minor parent.

(k) To be eligible for federal funding, in the case of a child who is an applicable child for the federal fiscal year, as defined in subdivision (n), the child meets any of the following criteria:

(1) At the time of initiation of adoptive proceedings was in the care of a public or licensed private child placement agency or Indian tribal organization pursuant to either of the following:

(A) An involuntary removal of the child from the home in accordance with a judicial determination to the effect that continuation in the home would be contrary to the welfare of the child.

(B) A voluntary placement agreement or a voluntary relinquishment.

(2) He or she meets all medical or disability requirements of Title XVI with respect to eligibility for supplemental security income benefits.

(3) He or she was residing in a foster family home or a child care institution with the child's minor parent, and the child's minor parent was in the foster family home or child care institution pursuant to either of the following:

(A) An involuntary removal of the child from the home in accordance with a judicial determination to the effect that continuation in the home would be contrary to the welfare of the child.

(B) A voluntary placement agreement or voluntary relinquishment.

(*l*) The child is a citizen of the United States or a qualified alien as defined in Section 1641 of Title 8 of the United States Code. If the child is a qualified alien who entered the United States on or after August 22, 1996, and is placed with an unqualified alien, the child must meet the five-year residency requirement pursuant to Section 673(a)(2)(B) of Title 42 of the United States Code, unless the child is a member of one of the excepted groups pursuant to Section 1612(b) of Title 8 of the United States Code.

(m) A child shall be eligible for Adoption Assistance Program benefits if the following conditions are met:

(1) The child received Adoption Assistance Program benefits with respect to a prior adoption and the child is again available for adoption because the prior adoption was dissolved and the parental rights of the adoptive parents were terminated or because the child's adoptive parents died and the child meets the special needs criteria described in subdivisions (a) to (c), inclusive.

(2) To receive federal funding, the citizenship requirements in subdivision (*l*).

(n) (1) Except as provided in this subdivision, "applicable child" means a child for whom an adoption assistance agreement is entered into under this section during any federal fiscal year described in this subdivision if the child attained the applicable age for that federal fiscal year before the end of that federal fiscal year.

(A) For federal fiscal year 2010, the applicable age is 16 years.

(B) For federal fiscal year 2011, the applicable age is 14 years.

(C) For federal fiscal year 2012, the applicable age is 12 years.

(D) For federal fiscal year 2013, the applicable age is 10 years.

(E) For federal fiscal year 2014, the applicable age is 8 years.

(F) For federal fiscal year 2015, the applicable age is 6 years.

(G) For federal fiscal year 2016, the applicable age is 4 years.

(H) For federal fiscal year 2017, the applicable age is 2 years.

(I) For federal fiscal year 2018 and thereafter, any age.

(2) Beginning with the 2010 federal fiscal year, the term "applicable child" shall include a child of any age on the date on which an adoption assistance agreement is entered into on behalf of the child under this section if the child meets both of the following criteria:

(A) He or she has been in foster care under the responsibility of the state for at least 60 consecutive months.

(B) He or she meets the requirements of subdivision (k).

(3) Beginning with the 2010 federal fiscal year, an applicable child shall include a child of any age on the date that an adoption assistance agreement is entered into on behalf of the child under this section, without regard to whether the child is described in paragraph (2), if the child meets all of the following criteria:

(A) He or she is a sibling of a child who is an applicable child for the federal fiscal year, under subdivision (n) or paragraph (2).

(B) He or she is to be placed in the same adoption placement as an applicable child for the federal fiscal year who is his or her sibling.

(C) He or she meets the requirements of subdivision (k).

(o) This section shall become operative on January 1, 2014.

SEC. 21. Section 16508 of the Welfare and Institutions Code is amended to read:

16508. Permanent placement services shall be provided or arranged for by county welfare department staff for children who cannot safely live with their parents and are not likely to return to their own homes. Permanent placement services shall be available without regard to income to the following children:

(a) Children judged dependent under Section 300 where a review has determined that reunification, adoption, tribal customary adoption, or guardianship is inappropriate.

(b) Recipients of public assistance under nonfederally funded Aid to Families with Dependent Children programs who are wards of a legal guardian where a review has determined that reunification or adoption is inappropriate.

(c) This section shall remain in effect only until January 1, 2014, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2014, deletes or extends that date.

SEC. 22. Section 16508 is added to the Welfare and Institutions Code, to read:

16508. Permanent placement services shall be provided or arranged for by county welfare department staff for children who cannot safely live with their parents and are not likely to return to their own homes. Permanent placement services shall be available without regard to income to the following children:

(a) Children judged dependent under Section 300 where a review has determined that reunification, adoption, or guardianship is inappropriate.

(b) Recipients of public assistance under nonfederally funded Aid to Families with Dependent Children programs who are wards of a legal guardian where a review has determined that reunification or adoption is inappropriate.

(c) This section shall become operative on January 1, 2014.

SEC. 23. Section 16508.1 of the Welfare and Institutions Code is amended to read:

16508.1. (a) For every child who is in foster care, or who enters foster care, on or after January 1, 1999, and has been in foster care for 15 of the most recent 22 months, the social worker shall submit to the court a recommendation that the court set a hearing pursuant to Section 366.26 for the purpose of terminating parental rights. The social worker shall concurrently initiate and describe a plan to identify, recruit, process and approve a qualified family for adoption of the child.

(b) The social worker is not required to submit the recommendation as described in subdivision (a) if any of the following applies:

(1) The case plan for the child has documented a compelling reason or reasons why it is unlikely that the child will be adopted, as determined by the department when it is acting as an adoption agency or by the licensed adoption agency, and therefore termination of parental rights would not be in the best interest of the child or that one of the conditions set forth in paragraph (1) of subdivision (c) of Section 366.26 applies.

(2) A hearing under Section 366.26 is already set.

(3) The court has found at the previous hearing under Section 366.21 that there is a substantial probability that the child will be returned to the child's home within the extended period of time permitted.

(4) The court has found at the previous hearing under Section 366.21 that reasonable reunification services have not been offered or provided.

(5) The court has found at each and every hearing at which the court was required to consider reasonable efforts or services that reasonable efforts were not made or that reasonable services were not offered or provided.

(6) The incarceration or institutionalization of the parent or parents, or the court-ordered participation of the parent or parents in a residential substance abuse treatment program, constitutes a significant factor in the child's placement in foster care for a period of 15 of the most recent 22

months, and termination of parental rights is not in the child's best interests, considering factors such as the age of the child, the degree of parent and child bonding, the length of the sentence, and the nature of the treatment and the nature of the crime or illness.

(7) Tribal customary adoption is recommended.

(c) A recommendation to the court pursuant to subdivision (a) shall not be made if the social worker documents in the case record a compelling reason why a hearing pursuant to Section 366.26 is not in the best interest of the child, or that reasonable efforts to safely return the child home are continuing consistent with the time period provided for in paragraph (1) of subdivision (g) of Section 366.21.

(d) Beginning January 1, 1999, the county welfare department shall implement a procedure for reviewing the application of this section to the case plans of all children who have been in foster care for 15 out of the most recent 22 months. The review shall proceed within the following timeframes:

(1) By July 1, 1999, one-third of the children shall have been reviewed, giving priority to children who have been in foster care the greatest length of time.

(2) By January 1, 2000, at least two-thirds of the children shall have been reviewed.

(3) By July 1, 2000, all children shall have been reviewed.

(e) For purposes of this section, a child shall be considered to have entered foster care on the earlier of the date of the jurisdictional hearing held pursuant to Section 356 or the date that is 60 days after the date on which the child was initially removed from the home of his or her parent or guardian.

(f) This section shall remain in effect only until January 1, 2014, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1,2014, deletes or extends that date.

SEC. 24. Section 16508.1 is added to the Welfare and Institutions Code, to read:

16508.1. (a) For every child who is in foster care, or who enters foster care, on or after January 1, 1999, and has been in foster care for 15 of the most recent 22 months, the social worker shall submit to the court a recommendation that the court set a hearing pursuant to Section 366.26 for the purpose of terminating parental rights. The social worker shall concurrently initiate and describe a plan to identify, recruit, process and approve a qualified family for adoption of the child.

(b) The social worker is not required to submit the recommendation as described in subdivision (a) if any of the following applies:

(1) The case plan for the child has documented a compelling reason or reasons why it is unlikely that the child will be adopted, as determined by the department when it is acting as an adoption agency or by the licensed adoption agency, and therefore termination of parental rights would not be in the best interest of the child or that one of the conditions set forth in paragraph (1) of subdivision (c) of Section 366.26 applies.

(2) A hearing under Section 366.26 is already set.

(3) The court has found at the previous hearing under Section 366.21 that there is a substantial probability that the child will be returned to the child's home within the extended period of time permitted.

(4) The court has found at the previous hearing under Section 366.21 that reasonable reunification services have not been offered or provided.

(5) The court has found at each and every hearing at which the court was required to consider reasonable efforts or services that reasonable efforts were not made or that reasonable services were not offered or provided.

(6) The incarceration or institutionalization of the parent or parents, or the court-ordered participation of the parent or parents in a residential substance abuse treatment program, constitutes a significant factor in the child's placement in foster care for a period of 15 of the most recent 22 months, and termination of parental rights is not in the child's best interests, considering factors such as the age of the child, the degree of parent and child bonding, the length of the sentence, and the nature of the treatment and the nature of the crime or illness.

(c) A recommendation to the court pursuant to subdivision (a) shall not be made if the social worker documents in the case record a compelling reason why a hearing pursuant to Section 366.26 is not in the best interest of the child, or that reasonable efforts to safely return the child home are continuing consistent with the time period provided for in paragraph (1) of subdivision (g) of Section 366.21.

(d) Beginning January 1, 1999, the county welfare department shall implement a procedure for reviewing the application of this section to the case plans of all children who have been in foster care for 15 out of the most recent 22 months. The review shall proceed within the following timeframes:

(1) By July 1, 1999, one-third of the children shall have been reviewed, giving priority to children who have been in foster care the greatest length of time.

(2) By January 1, 2000, at least two-thirds of the children shall have been reviewed.

(3) By July 1, 2000, all children shall have been reviewed.

(e) For purposes of this section, a child shall be considered to have entered foster care on the earlier of the date of the jurisdictional hearing held pursuant to Section 356 or the date that is 60 days after the date on which the child was initially removed from the home of his or her parent or guardian.

(f) This section shall become operative on January 1, 2014.

SEC. 25. (a) Sections 1, 2, 4, 6, 8, 10, 12, 13, 15, 17, 19, 21, and 23 of this act shall become operative on July 1, 2010.

(b) The Judicial Council shall adopt rules of court and necessary forms required to implement tribal customary adoption as a permanent plan for dependent Indian children before July 1, 2010.

SEC. 26. Notwithstanding the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code), the Department of Social Services may implement and administer the applicable provisions of this act through all-county letters or similar instruction from

the director until such time as regulations are adopted. The director may adopt emergency regulations implementing this act. The department may readopt any emergency regulation authorized by this section that is the same or substantially equivalent to an emergency regulation previously adopted by this section. The adoption of emergency regulations implementing this section shall be deemed necessary for the immediate preservation of the public peace, health, safety, or general welfare. The emergency regulations and any readoption of emergency regulations authorized by this section shall be exempt from review by the Office of Administrative Law. The emergency regulations and any readoption of emergency regulations authorized by this section shall be submitted to the Office of Administrative Law for filing with the Secretary of State and each shall remain in effect for no more than 180 days by which time final regulations shall be adopted.

SEC. 27. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

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Appendix E:

ALL COUNTY LETTERS & ALL COUNTY INFORMATION NOTICES

ACL No. 10-47 (10/27/10)
Implementation of Tribal Customary Adoption
(AB 1325)

CDSS
JOHN A. WAGNER
DIRECTOR

STATE OF CALIFORNIA—HEALTH AND HUMAN SERVICES AGENCY
DEPARTMENT OF SOCIAL SERVICES
744 P Street • Sacramento, CA 95814 • *www.cdss.ca.gov*

ARNOLD SCHWARZENEGGER
GOVERNOR

REASON FOR THIS TRANSMITTAL

[X] State Law Change
[ ] Federal Law or Regulation Change
[ ] Court Order
[ ] Clarification Requested by One or More Counties
[ ] Initiated by CDSS

October 27, 2010

ALL COUNTY LETTER NO. 10-47

TO: ALL COUNTY WELFARE DIRECTORS
ALL CHIEF PROBATION OFFICERS
ALL CDSS ADOPTION DISTRICT OFFICES
LICENSED PUBLIC AND PRIVATE ADOPTION AGENCIES
ALL CHILD WELFARE SERVICES PROGRAM MANAGERS
ADOPTION SERVICE PROVIDERS
TITLE IV-E AGREEMENT TRIBES

SUBJECT: IMPLEMENTATION OF TRIBAL CUSTOMARY ADOPTION - ASSEMBLY BILL 1325 (CHAPTER 287, STATUTES OF 2009)

REFERENCE: ASSEMBLY BILL 1325 (CHAPTER 287, STATUTES OF 2009); ALL COUNTY LETTER NO. 10-17; ALL COUNTY INFORMATION NOTICE I-86-08; AND CALIFORNIA CODE OF REGULATIONS FOR ADOPTION PROGRAMS (TITLE 22, DIVISION 2) AND CHILD WELFARE SERVICES (DIVISION 31).

In March 2010, the California Department of Social Services (CDSS) published All County Letter (ACL) No. 10-17 to provide introductory information regarding the passage of Assembly Bill (AB) 1325 (Chapter 287, Statutes of 2009) and the basic guidelines of tribal customary adoption (TCA) which became effective **July 1, 2010**. Prior to reading this ACL, please review ACL 10-17 located on the CDSS website at: http://www.dss.cahwnet.gov/lettersnotices/entres/getinfo/acl/2010/10-17.pdf.

The purpose of this ACL is to provide comprehensive information and direction to counties, adoption agencies, tribes and other individuals/organizations responsible for the statewide implementation of TCA. Additionally, this ACL will serve to administer the provisions of AB 1325 and should be used to implement TCA until regulations have

been adopted.[1] Currently, regulations at Title 22, Division 2 of the California Code of Regulations (CCR) and Division 31 of the Manuals of Policies and Procedures (MPP) are being reviewed for modifications to include TCA. Since TCA is considered an agency adoption, until Title 22 and Division 31 are updated, current regulations should be used to administer child welfare and adoption services. This ACL will incorporate the current regulations as well as provide the additional requisite elements for implementing TCA.

Following the passage of AB 1325, a workgroup comprised of representatives from counties, state adoption district offices (DO), private adoption agencies and tribes convened to discuss the requisite tenets necessary to implement TCA. As a result, many participants submitted questions to CDSS which addressed statutes, regulations, policy and procedures regarding the provision of TCA services. To provide the most efficient guidance, this ACL is organized via topic using a question and answer format which will include the following topics:

[1] The relevant provisions of Section 26 of AB 1325 (Chapter 287, Statutes of 2009) reads, "...the Department of Social Services may implement and administer the applicable provisions of this act through all-county letters or similar instruction from the director until such time as the regulations are adopted."

1.0 Tribal Customary Adoption

1.1 What is it? How is it different from a conventional adoption?

Tribal customary adoption is considered an agency adoption. However, TCA is an adoption which may occur for an Indian child who is a dependent of the California court, under the customs, laws or traditions of an Indian child's tribe, but where termination of parental rights (TPR) is not required. While tribal customary adoption is unique, it is intended to be a seamless integration into the current process of conventional adoption. From the disposition of a dependency case, to the date the TCA is finalized, agencies should be able to utilize many of their current conventional adoption procedures to facilitate a TCA.

The key differences between TCA and a conventional adoption are:

1. TCA allows a dependent Indian child to be adopted utilizing the state court without TPR. The current TPR procedures and corresponding forms and documents such as the AD 4333 are not required to finalize a TCA;

2. The plan of TCA cannot be recommended, selected, facilitated or finalized without the consultation (involvement) of the Indian child's tribe. Only the tribe can select TCA as an option for the Indian child; and

3. Per Family Code section 8600.5, TCA is excluded from Part Two of the Family Code, "Adoption of Unmarried Minors." The primary procedures and standards applicable to TCA are contained in Welfare and Institutions Code (W&IC) section 366.24.

1.2 To whom does TCA apply?

TCA is only available as a permanency option for those dependents that are Indian children under the Indian Child Welfare Act (ICWA). Further, it is only applicable where the Indian child's tribe has elected TCA as the permanent plan. TCA is not applicable to independent or intercountry adoption, an Indian child

who is a probation ward or has been voluntarily relinquished to an agency by his or her parents.

1.3 When does the TCA become effective? When does it end? Is this a pilot?

AB 1325, which adds TCA to state law, became operative on **July 1, 2010,** and sunsets on January 1, 2014. Although this statute includes a three year end date and report to the Legislature on its outcomes, TCA is not a pilot.

1.4 Does TCA apply to dependent Indian children who became dependents prior to the implementation of TCA (July 1, 2010)?

Yes. As long as the dependency case is still open and parental rights have not been terminated, TCA may be a permanency option for any dependent Indian child, regardless of the date the Indian child became a dependent.

1.5 At what stage in the case does TCA become relevant?

Once a federally recognized tribe has responded to an ICWA notice affirming that the child is a member or eligible for membership in the tribe, TCA will become a permanency option for a court dependent Indian child. Per W&IC section 358.1, this may begin as early as the dispositional stage of a dependency case. Aligned with the state's existing concurrent planning policies, when applicable, at any point following the disposition of the dependency case, the Indian child's tribe may elect for TCA to be included as an alternative permanent plan to family reunification.

Please note: As specified in W&IC section 361.31 (ICWA standards), the agency shall use the placement preference requirements when selecting prospective adoptive parents for an ICWA child.

1.6 What are the stages of a TCA?

a. Dispositional hearing – Per W&IC section 358.1, the social worker in consultation with the Indian child's tribe reports to the court if TCA is an appropriate permanent plan.

b. Recommend permanent plan of TCA - Per W&IC section 361.5, if reunification services are not offered or terminated and a permanency hearing pursuant to W&IC section 366.26 is ordered, the social worker or adoption worker, in consultation with the child's tribe, shall indicate in the report to the court that the tribe has selected TCA as the permanent plan.

c. Early concurrent permanency planning – If reunification services are offered and the Indian child's tribe selected TCA as the alternate permanent plan for the dependent Indian child, the social worker or adoption worker works with the child, child's tribe and prospective TCA adoptive family to facilitate the alternative permanent plan of TCA. These services may include, but are not limited to:

   1. Assessing the child's likelihood of being adopted and including the assessment in the review hearing reports pursuant to W&IC sections 360(A), 366.21, 366.22, and 366.25.

   2. Conducting a TCA Home study as a tribal designee pursuant to W&IC section 366.24.

   3. Performing criminal/child abuse and neglect checks pursuant to W&IC section 366.24.

d. Establish permanent plan of TCA – Once a hearing is set pursuant to W&IC Section 366.26 and the Indian child's tribe recommends TCA, the court will review the report as specified in W&IC sections 361.5, 366.21, 366.22 or 366.25 and other evidence and order, **without TPR**, the plan of TCA. The report must include an assessment regarding the Indian child's likelihood of being adopted in the court report for every review hearing. This report should also include if TCA would or would not be detrimental to the Indian child and whether the Indian child should be returned home to the Indian parent or Indian custodian.

e. Case referred to Indian child's tribe – Once TCA is ordered as the permanent plan, the case is referred to the tribe to conduct their part of the W&IC section 366.24 process, and the W&IC 366.26 hearing is continued for 120 days. The court can grant a continuance, but no more than an additional 60 days. This process includes:

   1. **TCA home study (refer to section five of this ACL for more information on the TCA home study)** is completed (if not previously completed) by the Indian child's tribe or tribal designee and either approved or denied by the Indian child's tribe;

   2. **Review of criminal/child abuse and neglect background (refer to section seven of this ACL for more information on review of criminal/child abuse and neglect background)** are completed (if not previously completed) by the tribal designee, public adoption agency

otherwise authorized to perform adoption specific checks when tribe is unable to, or Indian child's tribe (if authorized to conduct them). Subsequently, the adoptive applicant's record is cleared or considered detrimental to the adoptive placement of the child. Additionally, their record may be denied pursuant to the federal Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act);

3. **Tribal Customary Adoption Order (TCAO) (refer to section eight of this ACL for more information on TCAO)** - The TCAO is completed and filed within 20 days of the continued W&IC section 366.26 hearing by the Indian child's tribe with the court; and

    i. The child, birth parent, or Indian custodian and the prospective tribal customary adoptive parents and their counsel, if applicable, may present evidence to the Tribe regarding the TCAO and the child's best interest.

4. **Addendum to the continued W&IC section 366.26 report (refer to section nine of this ACL for more information regarding this addendum)** is completed by the Indian child's social worker or adoption worker and submitted to the court within seven days of the continued W&IC section 366.26 hearing.

f. Continued W&IC section 366.26 hearing – Once the TCAO is filed by the Indian child's tribe and the addendum to the W&IC section 366.26 report is received by the court, the court affords full faith and credit to the TCAO; the court orders the finalization hearing be set upon the filing of the adoption petition. If the court does not receive the TCAO within the allotted time, the court has the discretion to order a new permanent plan.

g. Tribal customary adoptive placement and placement agreement **(refer to section 11 of this ACL for more information on adoptive placement)** – Pursuant to W&IC section 366.24(c)(8), once the court affords full faith and credit to the TCAO and the Indian child's tribe approves the adoptive applicant's TCA home study and the applicant's criminal and child abuse and neglect checks are cleared, the Indian child is eligible for tribal customary adoptive placement. The public adoption agency that has placement and care responsibility of the Indian child is responsible for ensuring the process is completed. This process is analogous to the conventional adoption process which determines the placement agreement between the public adoption agency and the adoptive parent(s).

h. Adoption assistance agreement **(refer to section 13 of this ACL for more information on AAP)** - Pursuant to W&IC section 16120, similar to the conventional adoption process, once the tribal customary adoptive placement paperwork is signed the public adoption agency that has placement and care responsibility of the Indian child is responsible for facilitating this agreement between the public adoption agency and the adoptive parent(s).

i. Adoption petition - Once the TCA home study is approved, the TCAO is afforded full faith and credit, and all the necessary documents are signed, the prospective adoptive parent(s) desiring to adopt the Indian child must file an adoption petition with the court presiding over the adoption. A copy of this petition will continue to be sent to CDSS.

j. Supervision of Adoptive Placement **(refer to section 12 of this ACL for more information on supervision)** – Once adoptive placement of the Indian child has been made, pursuant to W&IC section 366.24(c)(8), the public agency that has placement and care responsibility of the Indian child will be responsible for ensuring the supervision of the adoptive placement.

k. Finalization **(refer to section 15 of this ACL for more information on finalizing a TCA)** - Once the adoption petition is filed with the court, and a finalization hearing is set, the public adoption agency that has placement and care responsibility of the Indian child is responsible for ensuring a final report regarding the proposed TCA is submitted to the court.

1.7 If the tribe has questions the social worker or adoption worker cannot answer, to where should the worker refer the tribe?

Tribes may find information on the Tribal Successful Transition for Adult Readiness (STAR) website located at http://theacademy.sdsu.edu/TribalSTAR/index.htm or contact the sponsors of AB 1325. Their information is as follows:

Nancy Currie
Director of Social Services
Soboba Tribal Social Services
(951) 487-0283

Kimberly Cluff, Attorney
Forman & Associates
4340 Redwood Hwy Ste F228
San Rafael, CA 94903
Phone (415) 491-2310

2.0 Consultation with the Indian Child's Tribe

2.1 What does this mean?

Consultation means more than the agency making decisions and "checking in" with the Indian child's tribe to approve them. It is an ongoing partnership with the tribe that requires their inclusion and, on many occasions, approval on decisions made regarding the TCA process. The Indian child's tribe is a necessary part of the TCA process for a dependent Indian child for two main reasons: A TCA cannot commence unless the child's tribe selects TCA as the permanent plan; and only the tribe can provide information regarding its tribal customs, traditions or laws.

2.2 When should the agency begin consulting the tribe?

The partnership between the agency and the child's tribe is expected to begin as soon as the child is declared an ICWA eligible child and the concurrent planning process commences. As part of the concurrent planning process, the social worker must inform the tribe that TCA is a permanency option. When that option is selected by the tribe, the tribe may inform the agency either in a verbal or written format. Either way, the agency is responsible for including that information into all necessary reports to the court, the foster care and adoption case record and the case notes section in the Child Welfare Services/Case Management System (CWS/CMS). **(Refer to section 19 of this ACL for more information on inputting information into CWS/CMS).**

2.3 How should the agency consult with the tribe?

Consultation with the Indian child's tribe includes, but is not limited to:

- Verbal and written communication;
    - Via telephone, regular or electronic mail, or facsimile
- In person meetings;
- Team Decision Making (TDM) Meetings; or
- Family Group Decision Making (FGDM) Meetings.

Please note: All information received, provided to or discussed with the Indian child's tribe should be documented in the foster care and adoption case record.

2.4 What type of information should the agency discuss with the tribe?

The agency shall obtain all information from the child's tribe, that the tribe considers relevant and any information which will assist the agency in clarifying particular issues for the child or adoptive applicant(s). Examples may include, but are not limited to the following:

- Tribal Customs;
- Laws;
- Traditions;
- Ceremonies/Events;
- Geography; or
- Significant history.

Please note: Each tribe maintains the authority and discretion to determine what information it will share regarding its tribal customs, laws, traditions or significant history to the agency.

2.5 What does consulting with tribe include?

Consultation with the tribe may vary at any of the different stages of a dependency action but should include the same basic elements of communication and collaboration. In a dependency case, once a tribe has confirmed the Indian child is its child, the social worker must inform the tribe that TCA is available to the child as a permanency option. At any point in the dependency case, even as early as the dispositional hearing, the tribe may communicate its election of TCA. It is expected that the tribe and other affected individuals will have many questions regarding the TCA process and the social worker should be responsive. Interaction with the tribe's representative will be required throughout. Where the tribe has formally intervened in the action the tribe's representative would be identified in the tribe's "Notice of Designation of Tribal Representative" (ICWA - 40). Where the tribe has not formally intervened, it may be advisable to request a formal designation of a representative for purposes of the TCA process from the Tribe's chairperson in order to facilitate the consultation process.

If the agency with placement and care responsibility is informed **prior to the dispositional hearing** of the tribe's election of TCA, the agency is responsible for discussing the case with the tribe through it representative and obtaining information needed for the report to the court on the appropriateness of TCA as a plan for the child if reunification is unsuccessful.

If informed during the **concurrent planning process** (e.g. during review hearings held pursuant to W&IC sections 361.5, 366.21.366.25), the agency is responsible for communicating with the tribe through its representative, to obtain any relevant information needed to update the court regarding the likelihood the child will be adopted and if TCA continues to be the appropriate permanent plan for the child. During this stage it is possible that the **TCA home study process,** required by W&IC 366.24, will be commenced by the tribe and the tribe will communicate an interest in seeking designation of an agency to do its TCA home study. If the tribe is interested in designating an agency, the tribe is responsible for providing a written request to that agency asking the agency to be a designee. Throughout this process collaboration will be important between the different entities involved in the TCA home study process.

If reunification services are not offered or have been terminated and the W&IC section 366.26 hearing is set to order a permanent plan for the child, the agency with placement and care responsibility is responsible for completing a written assessment of the child's suitability for adoption and including TCA information in the report to the court. This will require requesting, if not yet received, written statement from the tribe of its decision to pursue TCA for that child that including whether the tribe will be conducting its own TCA home study or procuring a tribal designee. Once the statement is received, the agency is responsible for consulting with the child's tribe to obtain information to complete the written assessment of the child. **For information on the written assessment of the child, refer to section four this ACL.**

Once the case is **formally referred to the procedures required by W&IC section 366.24**, the agency will be responsible for assisting in ensuring the criminal record and child abuse background checks are conducted. If there is a designee, the designee will be responsible for the background check. If there is no designee, then the responsibility remains with the agency with placement and care responsibility of the child.

At the **adoptive placement and finalization stage**, the agency must consult with the tribe while facilitating and supervising the adoptive placement and finalization.

2.6 What if the child has more than one tribe to which it is associated?

If an Indian child is a member of more than one tribe or is eligible for membership in more than one tribe, it is preferable that the tribes determine among themselves which is the tribe that will serve as the primary tribe in the Indian child's case. Generally where it is confirmed in writing that a child is a member

(e.g. enrolled) in one of the tribes, we will accept that tribe as the child's tribe. However, where it is not clear, and if the tribes cannot reach an accord on the issue, then pursuant to W&IC section 224.1(d) the state court judge has the authority to determine which tribe has the most significant contacts with the child and will serve as the child's tribe in the proceeding. Once the primary tribe is established they become the Indian child's tribe responsible for recommending TCA as the permanency plan for the Indian child.

Please note: Until a primary tribe is established, the agency is responsible for consulting with all tribes associated with the Indian child to obtain information regarding the Indian child's case.

2.7 What about dependency cases involving a child from an out of state tribe?

As with any ICWA eligible child from an out of state tribe, communication becomes more challenging. Regardless, in all cases the tribe should be informed of, and provided information about, California's option of a TCA for the child.

3.0 Dependency Process

3.1 How is TCA included in the dependency process?

TCA is included as an additional permanency option for a dependent Indian child. This plan may be recommended by the Indian child's tribe at any point in the dependency process (as early as the dispositional hearing). When reunification services are offered, and the tribe recommends TCA, it will serve as the Indian child's concurrent permanent plan until reunification services are no longer offered. Once TCA becomes the concurrent plan, the agency, with placement and care responsibility of the Indian child, must consult with the Indian child's tribe to facilitate TCA.

TCA is intended to be seamlessly integrated into the current dependency process. There are minimal modifications to the current assessment, case planning and service delivery process for a dependent Indian child with a permanent plan of TCA. These modifications include, but are not limited to:

1. Consultation with the Indian child's tribe is required.

2. TPR is not required for adoptive placement to occur.

3. No voluntary or involuntary relinquishment paperwork or forms required.

4. Consent from Indian parent is not needed to recommend TCA at the W&IC section 366.26 hearing.

5. Since TPR is not required in a TCA, adoption finalization hearings will no longer be delayed for the time period currently allotted for birth parents to appeal a termination of their parental rights.

6. Post-adoption contact agreements are not applicable to TCA. Post adoption contact between the birth parents or Indian custodians and the child will be addressed in the TCAO. If applicable, the TCAO could also address contact between the Indian child and the child's siblings.

3.2 Does an Indian parent or Indian custodian have to consent to the TCA?

No. Prior consent to a permanent plan of TCA of an Indian child is not required of an Indian parent or Indian custodian whose parental relationship to the child will be modified by the TCA. (See W&IC section 366.24(11))

3.3 Does a child age 12 or older need to consent to the TCA?

No. The consent of a child age 12 or older is not required for a TCA. However, while the consent of the child age 12 or older is not required for a TCA, the wishes of a child are still an important and appropriate factor for the court to consider when determining whether TCA is the appropriate permanent plan for an Indian child. (See W&IC section 361.31(e))

3.4 Does a tribe need to formally intervene in a case in order for TCA to be considered as a placement option?

No. TCA is a permanency option for any "Indian Child" (as defined in ICWA) whose tribe wants to pursue TCA as a permanency option. Under ICWA, and the state laws implementing ICWA, an Indian child's tribe does not need to formally intervene in a case in order to be entitled to make representations to the agency and the court as to the appropriate permanent plan for that child. (See the California Rules of Court, Rule 5.534 (i)(2)).

3.5 How does TCA affect the judicial process?

For modifications in the judicial process, see the Judicial Council's modified rules of court located on the Judicial Council's website located at:
http://www.courtinfo.ca.gov/rules/documents/pdfFiles/title_5.pdf

3.6 Does a tribe have to choose TCA as the permanent plan for a dependent Indian child?

No. TCA is an optional plan. A tribe is not required to choose TCA as the permanent plan. All permanency options are available to tribes and the exceptions to TPR in the W&IC section 366.26(c)(1)(B)(vi) still apply. If TCA is not chosen, the agency with placement and care responsibility of the child would carry out the alternative permanent plan using the current standards and procedures regulating that process.

3.7 If the state court granted a permanent plan of legal guardianship for a dependent Indian child and TPR did not occur, can TCA become the new permanent plan?

Yes. Pursuant to W&IC section 366.3(c), if following the establishment of a legal guardianship for a dependent Indian child, the county, in consultation with the Indian child's tribe, becomes aware of changed circumstances that indicate TCA may be an appropriate plan for the child, the court may vacate its previous order dismissing dependency jurisdiction over the child and order that a new hearing be set to determine whether TCA or continued legal guardianship is the most appropriate plan for the child.

3.8 If a dependent Indian child has a plan of "conventional" adoption and TPR has occurred, but the adoption has not been finalized, can the tribe recommend the permanent plan be changed to TCA?

It depends. A TCA does not apply to a case where TPR has occurred. Pursuant to W&IC section 366.26 (i)(2), the state court would have the discretion to reinstate parental rights and order a new hearing to determine if TCA is the most appropriate permanent plan for the child. The agency would need to work closely with the tribe to ensure this information was submitted in the W&IC section 366.26 report.

3.9 Is a social worker required to recommend TPR for a dependent Indian child who has been in foster care 15 of the most recent 22 months?

No. Pursuant to W&IC section 16508.1(b)(7), a social worker is not required to recommend TPR if TCA has been recommended.

3.10 Is testimony of a qualified witness required for a TCA to be ordered as the permanent plan for an Indian child?

No. The testimony of a qualified witness, currently required by W&IC section 224.1, is not required for a TCA to be ordered (at the W&IC section 366.26 hearing), because the termination of parental rights is not required for a TCA. However, this testimony is still required when the dependency case of the Indian child is initiated.

3.11 Does TCA add any noticing requirements?

Pursuant to W&IC section 294(f)(6), TCA is added as a permanency option when noticing parents regarding a selection and implementation hearing as specified in W&IC section 366.26. Current noticing standards for this hearing will be applied for a TCA.

3.12 Does TCA add or amend the process for any hearings required in a dependency case?

No. TCA did not create a new hearing. However, the statute governing TCA requires the W&IC section 366.26 hearing be continued to afford the tribe time to complete the TCAO and file it with the court. After the filing of the TCAO and the social worker's addendum report, the court will have time to review the TCA and determine if full faith and credit should be afforded to the tribe's TCAO.

3.13 Does TCA require additional court reports or is any information required to be included in existing court reports?

Yes. The social worker must provide the tribe with information regarding TCA at every step throughout the case as part of concurrent planning. This must be documented in the court report, the foster care and adoption case record, and/ or in the case notes section of CWS/CMS. Once TCA is recommended, the agency must continue to provide a report to the court at each hearing thereafter as relevant to the individual case: prior to the dispositional hearing (W&IC section 358.1), the hearing to determine child welfare services (W&IC section 361.5), all status review hearings (W&IC sections 366.21, 366.22, 366.25, and 366.3), and the hearing to select a permanent plan for the child (W&IC section 366.26). Refer to those sections and W&IC section 366.24 for information required to be included in each court report.

TCA requires the social worker to prepare the addendum to the continued 366.26 report. At a W&IC section 366.26 hearing when the court orders TCA as the

permanent plan, it is continued and referred to the tribe to complete and file the TCAO. Prior to the continued W&IC section 366.26 hearing, the child's agency is now required to submit an addendum to the continued 366.26 report.

4.0 Written Assessment of the Child's Suitability for TCA

4.1 Does TCA affect the current regulatory standards for assessing a child's suitability for a conventional adoption?

Yes. Currently, prior to the initial W&IC Section 366.26 hearing, a report including a written assessment of the child's suitability for adoption must be submitted. The required standards for this assessment are located in Title 22, Division 2, CCR sections 35127.1-35127.3. TCA includes and excludes certain requirements specified in those sections. Modifications for this assessment include the following:

Additions to current standards

1. A written assessment of the child's suitability for adoption, as specified in Title 22, Division 2, CCR section 35127.1 (a), should include:

   a. The Indian child's relationship to/with the Indian child's tribe.

2. Identifying information, as specified in Title 22, Division 2, CCR section 35127.1(b)(1) should include:

   a. The Indian child's tribal membership or tribal affiliation; and
   b. Any siblings with tribal membership or tribal affiliation.

3. A review of the amount of and nature of any contact between the Indian child and his or her birth parents or other members of his or her extended family since the time of placement in out-of-home care, as specified in Title 22, Division 2, CCR section 35127.1(b)(3) should include:

   a. Family defined consistent with the tribe's culture when reviewing whether the child would benefit from contact with members of his or her extended family once the TCA is finalized.

4. Consistent with the stated religious and or cultural background preference from the birth parent, as specified in Title 22, Division 2, CCR section 35127.1(b)(6), this assessment should include:

a. A stated religious or cultural background preference indicated by the tribe or tribes and the Indian child, unless the Indian child's age or physical, emotional or other conditions precludes his or her meaningful response.

5. Documents the agency shall obtain, as specified in Title 22, Division 2, CCR section 35127.2(a)(1), should include:

   a. A written statement from the Indian child's tribe intention to pursue TCA for the Indian child.

      1. This statement should include whether the tribe or the tribe's designee will conduct the home study.

6. Services for children accepted for adoption planning, as specified in Title 22, Division 2, CCR section 35127.3(a), should include:

   a. Collaboration with the Indian child's tribe to provide these services.

Exclusions of current standards

1. An analysis of the likelihood that the child will be adopted, as specified in Title 22, Division 2, CCR section 35127.1(a)(8), should exclude:

   a. If parental rights are terminated.

2. An assessment of the need for a psychological evaluation, as specified in Title 22, Division 2, CCR section 35127.1(b)(9)(A)(2), should exclude the list of abnormal and symptomatic illnesses used to determine if a child's behavior warrants this evaluation. The agency is expected to consult with the child's tribe and base the need of psychological evaluation on the child's behavior relative to the prevailing cultural and social standard of the child's tribe.

5.0 TCA Home Study

5.1 What is it? How is it different than a conventional adoption home study?

Similar to a conventional adoption home study, a TCA home study is an evaluation of the background, safety and health information of the adoptive applicant's home, including the biological, psychological and social factors of the adoptive applicant and an assessment of the commitment, capability and

suitability of the applicant to meet the child's needs. A TCA home study completed by a designee may be a full, abbreviated, or updated home study.

The key differences between a TCA and a conventional adoption home study are:

1. A TCA home study may be conducted by the Indian child's tribe or the tribe's designee.

2. A TCA home study must be completed by the designee in consultation with the Indian child's tribe using the tribe's prevailing social and cultural standard.

When the tribe conducts its own home study

5.2 What standards are the tribes required to use when conducting the home study?

Tribes must complete the TCA home study using the prevailing social and cultural standard of the child's tribe. Pursuant to W&IC section 366.24(c)(1)(B), the home study shall include an evaluation of the background, safety and health information of the adoptive home, including biological, psychological and social factors of the prospective adoptive parent(s) and assessment of the commitment, capability and suitability of the prospective parent(s) to meet the child's needs.

5.3 Does the agency with placement and care responsibility need a copy of the TCA home study if it is completed by the tribe?

Yes. The agency needs a copy of the approved or denied TCA home study from the tribe, **whether completed by the tribe or the tribal designee**, to be able to submit to the court all pertinent information addressing the TCA in the continued W&IC section 366.26 hearing report. The applicant would need to sign a release of information form allowing another entity, other than the one completing the TCA home study, to view it.

The agency should request a copy of the approved home study from the tribe. Where a tribe has formally intervened, the request should be sent to the tribal representative as identified in the "Notice of Designation of Tribal Representative and Notice of Intervention" (ICWA-40). Where the tribe has not formally intervened, and if a formal representative with authority to respond on behalf of the tribe has not already been identified by the tribe, the request should be sent to the Tribal Chair.

If the TCA home study is not received by the allotted time provided for the agency to submit the addendum to the continued W&IC section 366.26 report to the court (seven days), the agency must include that information in this addendum report and inform the court that it cannot recommend approval of the applicant until it has time to review the TCA home study.

When a tribe designates an agency to conduct the home study

5.4 What are the additional requisite elements of a full, abbreviated and updated home study TCA home study?

In addition to the information required for a conventional adoption as specified in Title 22, Division 2, CCR sections 35179 - 35183.1, when a TCA is completed by a designee, it must be done in consultation with the Indian child's tribe using the tribe's prevailing social and cultural standard. The information currently required to provide to, and obtain from, the adoptive applicant and information used to base a determination to approve or deny an adoptive applicant for TCA must include:

1. A designation of the agency by the child's tribe before accepting an application to adopt and begin the TCA home study;

2. On the adoption application, an indication that the home study is for the purposes of a TCA;

3. Identifying information about the applicant's tribal membership or affiliation, if applicable;

4. Determination of the applicant's commitment and capability to meet the needs of an Indian child which shall include the willingness to learn and incorporate the prevailing social and cultural standards of the Indian child's tribe into family life;

5. The applicant's understanding of the TCA process, including, but not limited to: the explanation of the agency as a designee, consultation with the Indian child's tribe; and the written approval process;

6. The applicants understanding of the concept of a TCAO, including, but not limited to the modification of the child's relationship to the adoptive parents and the birth parents and Indian custodian; and

7. The applicant's cultural competence of the child's tribe, especially customs, traditions and laws relevant to the child's development.

5.5 What are the additional eligibility requirements for a designated agency completing an abbreviated or updated TCA home study?

For an abbreviated TCA home study – In addition to the eligibility requirements to conduct an abbreviated conventional home study as specified in Title 22, Division 2, CCR section 35183, if the adoptive applicant has completed a tribal customary, conventional agency, independent, or intercountry adoption within the last five years, that applicant may be eligible to receive an abbreviated TCA home study.

For updating a TCA home study – There are no additional requirements for updating a TCA home study.

5.6 What happens to a conventional home study completed prior to the implementation of TCA (July 1, 2010), where the adoption has not been finalized and the applicant becomes interested in TCA?

Where the tribe has selected TCA, when the applicant has completed a full conventional adoption home study as specified by Title 22, Division 2, CCR section 35181 and the applicant is interested in pursuing an adoption of a dependent Indian child who is eligible for tribal customary adoption, the designated agency should update the assessment by incorporating all requisite elements of an updated TCA home study (see section 5.2)

5.7 Home Study Approval: Who has ultimate authority to decide approval of the TCA home study?

When an agency is designated to complete the TCA home study, the agency shall make a recommendation to the tribe regarding approval or disapproval of the adoptive applicant's TCA home study. The tribe has discretion to issue final approval or disapproval of the home study except however, that no home study shall be approved by the tribe where the applicant's criminal record and child abuse report has not been cleared pursuant to the W&IC section 366.24(c) (Adam Walsh Act).

5.8 What if the designated agency and the tribe disagree over a prospective adoptive family?

The tribe has the ultimate authority to approve or deny an adoptive applicant for TCA. If the agency's recommendation does not correspond to the tribe's decision, the agency, tribe and any other pertinent individuals should discuss the recommendation and issues of the applicant's case.

If the agency recommends approval of an applicant and the tribe disagrees, TCA with that applicant can no longer be the permanent plan, as the tribe cannot be forced to do a TCA. However, if the agency recommends denial and the tribe approves the applicant, the tribe may continue the preparation of a TCAO. When this occurs, if the agency believes the child would be at risk if placed with this applicant, the agency should include the facts that led to the agency not recommending approval of the applicant in the addendum to the continued W&IC section 366.26 report.

Please note: The TCA process does not prevent a mandated reporter from reporting any suspected child abuse or neglect or an agency with placement care and responsibility from investigating a report of child abuse or neglect.

5.9 Is an adoptive applicant still eligible to request a grievance review hearing if their TCA home study is denied?

Designated Agency
When a designated agency recommends a denial of an adoptive applicant's TCA home study, regardless of the tribe's final decision, the adoptive applicant will retain the right to request a grievance review hearing as specified in Title 22, Division 2, CCR section 35215.

Indian Child's Tribe
When a tribe denies a TCA home study completed by a designated agency, the tribe may, pursuant to its own laws or customs provide a grievance procedure similar to or above and beyond the one the agency must provide, but is not required.

6.0 Tribal Designee

6.1 What entities can be designated by Indian child's tribe?

The Indian child's tribe's designee may include a licensed county adoption agency, CDSS when it is acting as an adoption agency, or a California licensed adoption agency. Tribal designees **do not include** agencies the tribe may use when the tribe conducts its own home study.

6.2 How is an entity designated by the Indian child's tribe?

It is the tribe's decision to determine whether it will conduct the TCA home study itself or seek a designee. If the tribe chooses to seek a designee, it is responsible for providing the agency with a written request for that agency to be the designee and conduct the assessment of the TCA adoptive applicant. The request should come from a tribal representative with authority to make a request on behalf of the tribe. Where the tribe has formally intervened in the action, the tribe's representative would be identified in the tribe's "Notice of Designation of Tribal Representative and Notice of Intervention" (ICWA - 40). Where the Tribe has not formally intervened it may be advisable to request a formal designation of a representative for purposes of the TCA process from the Tribe's Chairperson.

6.3 What are the responsibilities of the tribal designees?

Tribal designees will be responsible for the following:

1. Working with the Indian child's tribe;

2. Completing the TCA home study using the prevailing social and cultural standards of the child's tribe. This includes, but is not limited to: accepting the adoption application and providing all required information to the applicant;

3. Recommending approval or denial of the adoptive applicant to the tribe;

4. Conducting California (CA) Department of Justice (DOJ) and Federal Bureau of Investigations (FBI) criminal background checks; and

5. Conducting Child Abuse Central Index (CACI) and out-of-state child abuse and neglect registry checks.

<u>Additional responsibilities may include, but not be limited to:</u>

1. Supervision of the adoptive placement;

2. Termination of the adoptive placement;

3. Completing the final court report; or

4. The immediate filing of the final court report.

6.4 Is an agency obligated to be a designee?

No.

6.5 What are the benefits of being designated to complete the TCA home study?

Facilitating a tribal customary adoption for a dependent Indian child supports the child's well-being, timeliness to permanence and placement stability. A designee will be afforded the opportunity to promote these objectives which are vital to some of California's most vulnerable children, who have either been abused or neglected at one time in their lives.

7.0 Review of Criminal and Child Abuse and Neglect Background

7.1 Who is responsible for completing the criminal background and child abuse and neglect checks?

When a TCA home study is initiated, the agency with placement and care responsibility over the child will have the ultimate responsibility to ensure any necessary checks of the adoptive applicant's criminal background and child abuse and neglect report history are completed. Pursuant to W&IC section 366.24(c)(3), no final approval by the tribe to the adoption may be granted without these checks.

If the tribe chooses a designee to conduct the home study, the designee shall perform a state and federal criminal background check and a check of CACI pursuant to section 1522.1 of the Health and Safety Code through DOJ on the prospective adoptive parents and any persons over 18 years of age residing in the household.

Any tribal designee must be an entity authorized to request a search of CACI and, if necessary, a check of any other state's child abuse and neglect registry and authorized to request a search for state or federal level criminal offender records information through DOJ.

If the tribe conducts its own home study, the public agency otherwise authorized to obtain criminal background and child abuse and neglect report information for the purpose of adoption shall perform the state and federal criminal background and child abuse and neglect report history check. If the public agency approves or denies the applicant's criminal background clearance,

they are responsible for informing the child's tribe, conducting the home study, of this decision in writing.

Pursuant to W&IC section 366.24(c), if the public agency denies the applicant a criminal background clearance, that applicant may make a written request to that public agency for a copy of his or her state or federal level criminal offender record information search response.

7.2 Is the child's tribe authorized to conduct its own background checks?

It depends. If the tribe has entered into a Title IV-E agreement with CDSS, currently only the Karuk and Yurok tribes, it would be authorized to conduct its own adoption specific background checks. Aside from the Karuk and Yurok, all other tribes would not have access to the CA DOJ criminal offender and/or child abuse index information. The background check will therefore have to be done by an entity with legal authority to access the CA DOJ information. If a designee is doing the home study, because the statute limits designees to entities with CA DOJ access, the designee will be able to do the checks. If the tribe does its own home study, the TCA statute requires the entity with placement and care responsibility do the background checks.

7.3 What standard will be applicable for the background checks in a TCA?

The standard currently used for prospective adoptive parents should be used for TCA. This means that a full state and FBI criminal background check as well as the CACI and out-of-state child abuse and neglect registries, if necessary, should be checked. This also means that a home study where the applicant, or an adult residing in the applicant's home, has a conviction located in Health & Safety Code section 1522(g)(1)(A)(i), 1522(g)(1)(B), or for physical assault, battery, or a drug-related offense within the last five years, cannot be approved.

8.0 The TCAO

8.1 What is TCAO?

The TCAO is an order completed by the Indian child's tribe that will represent the legal framework of the modified relationships of the child. It will establish the legal relationship, responsibilities and privileges between the Indian child and the adoptive family and the modified legal relationship between the Indian child and the birth parents after TCA is finalized.

Please note: The child's tribe is responsible for preparing the TCAO and is not required to disclose the tribal customs or ceremonies used during this process.

Pursuant to W&IC section 366.24(c)(10), the TCAO is required to address the following issues:

1. The modification of the legal relationship of the birth parents or Indian custodian and the child after TCA is finalized;

2. Contact between the birth parents or Indian custodians and the child;

3. Responsibilities of the birth parents or Indian custodians;

4. The child's legal relationship with the tribe; and

5. The rights of inheritance of the child.

Additionally, the tribe will be able to specify anything else it deems appropriate per its laws and customs except that the order shall not include any orders pertaining to the child support obligation of the birth parents or Indian custodian. There shall be a conclusive presumption that any parental rights or obligations not specified in the TCAO shall vest with the tribal customary adoptive parents. (See W&IC section 366.24(10))

8.2 Is the agency responsible for facilitating the TCAO?

No. The agency with placement and care responsibility for the Indian child or a tribal designee is not involved in completing the TCAO. The Indian child's tribe is responsible for facilitating the TCAO and is not required to disclose the tribal customs or ceremonies used during this process. To support effective case management, the agency may request updates of the completion of the TCAO from the tribe.
Once the W&IC section 366.26 hearing is continued, the dependency case is referred to the tribe to complete the TCAO. Pursuant to W&IC section 366.26(c)(6), the tribe has 120 days from the initial W&IC section 366.26 hearing to file the TCAO with the court. The court has the discretion to grant an additional continuance to the tribe for filing a TCAO up to, but no more than 60 days.

Note: If the tribe does not file the TCAO within the time allotted, the court has the discretion to make new orders to determine the best permanent plan for the child. This permanent plan could include any permanency plan options available

to a dependent child. In that case, the agency would use the current standards and procedures governing the permanency planning process.

8.3 Will the agency need a copy of the TCAO?

Yes. The agency should request a copy from the tribe. The public information required in the TCAO addressing the legal relationships of the child is pertinent to the case. This information should be documented in the case file and case notes in CWS/CMS.

Where a tribe has formally intervened, the request should be sent to the tribal representative as identified in the "Notice of Designation of Tribal Representative and Notice of Intervention" (ICWA-40). Where the tribe has not formally intervened, and if a formal representative with authority to respond on behalf of the tribe has not already been identified by the tribe, the request should be sent to the Tribal Chairperson.

8.4 Since the rights of the birth parents are not terminated, will they still have legal rights to the child?

The tribe is responsible for modifying the parental rights and obligations and specifying them in the TCAO.

8.5 What if rights of the birth parents are not specified in the TCAO?

Where any rights are not specified in the TCAO, the rights and obligations will presume to be with the tribal customary adoptive parents.

8.6 What will happen to the child support obligations of the birth parents?

Although the birth parents rights are not terminated in a TCA, they are modified by the tribe and through the TCAO. Pursuant to W&IC Section 366.24(c)(10), the TCAO is **not** to include child support obligations from the birth parents or Indian custodian. If the birth parent had an existing child support case prior to the TCAO, their case may remain open and arrears owed may still be enforced by the Local Child Support Agency (LCSA)[2]. For more information regarding child support, contact the California Department of Child Supportive Services.

[2] Information regarding child support's applicability to TCA can be found at: http://www.childsup.ca.gov/Portals/0/resources/docs/policy/eblast/2010/eblast10-03.pdf

8.7 If there is a problem with visitation or other aspects of the TCAO is there a way to address the issues?

Yes, there is. Pursuant to W&IC section 366.26(i)(2), the parties must show evidence of good faith efforts to resolve the dispute prior to seeking judicial relief. They may use either tribal or other dispute resolution services to address the problem, but failure to comply with the TCAO does not undo the TCA. The parties may return to court to address the issues if the dispute resolution fails.

9.0 Addendum to the Selection and Implementation (W&IC section 366.26) Hearing Court Report

9.1 What is the "addendum selection and implementation hearing (W&IC section 366.26) court report"?

This addendum provides the agency the opportunity to express its opinion about the prospective tribal customary adoption including providing a recommendation to the court on whether it is or is not in support of the adoption. It is an additional section in the **continued W&IC section 366.26** report and should address the following:

1. Continued suitability of TCA being the appropriate plan for the child;

2. The recommendation for the approval or denial of the prospective tribal customary adoptive applicant(s). This is contingent on the completion of the home study. If the home study is not complete, the agency is responsible for including that information in this report. The agency is not expected to recommend an approval of an applicant when the home study is not complete or the agency has not reviewed the home study when completed by the Indian child's tribe;

3. The results of the full state and federal level adoption specific background checks;

4. Any pertinent information gathered during the W&IC Section 366.24 process, including the TCAO;

5. Any updates regarding TCA the agency deems necessary to report to the court; and

6. Any concerns the agency may have with the TCAO.
The agency will be responsible for modifying this report to include this section.

9.2 Who is responsible for writing the "addendum to the selection and implementation hearing court report"?

This report is written by the agency with placement and care responsibility of the child and submitted to the court no less than seven (7) days prior to the continued W&IC 366.26 hearing.

10.0 Full Faith and Credit

10.1 What does full faith and credit mean?

Full faith and credit is a legal concept regarding when and how different sovereigns recognize and enforce each other's court orders. For full faith and credit to tribal proceedings and records in California, see W&IC, Section 224.5.

10.2 How is full faith and credit used in a TCA?

At the continued W&IC 366.26 hearing, the state court may afford full faith and credit to the tribe's TCAO. This means the state court would enforce the tribe's TCAO and the Indian child would be eligible for adoptive placement and ultimate finalization. This **does not** mean the state court has finalized a TCA because a TCA adoption finalization hearing must still be held.

10.3 What occurs after full faith and credit is given by the dependency court?

After the state court affords full faith and credit to the TCAO, the following occurs:

1. The Indian child becomes eligible for adoptive placement.
2. The tribal customary adoptive placement agreement is executed and signed.
3. The AAP agreement is executed and signed.
4. Supervision of tribal customary adoptive placement begins.
5. The TCA prospective adoptive parents file the petition for adoption (TCA).
6. Once the petition is filed, the court sets a hearing to finalize the adoption.

7. The court issues a final decree of adoption.

8. The court orders dependency terminated.

10.4 Why would a court not afford full faith and credit to the tribe's TCAO?

If an order from the Indian child's tribe (sovereign #1) violates a generally accepted public policy of California (sovereign #2), then the state court of California may not enforce the tribe's order. Other reasons may include: fraud, the entity issuing the order had no authority to do so, due process not provided or the order offends a strongly held public policy.

10.5 What happens if full faith and credit is not given by the dependency court?

The tribe and other parties must address the issue. If the issues cannot be resolved and the plan of TCA may no longer be the appropriate permanent plan for the Indian child, the state court has the discretion to order a hearing to determine the most appropriate permanent plan for the Indian child.

11.0 Tribal Customary Adoptive Placement

11.1 When does tribal customary adoptive placement occur?

A tribal customary adoptive placement occurs after the dependency court has afforded full faith and credit to the TCAO. Unlike the conventional adoption process, it can be initiated without the termination of parental rights. A system change request is being created in CWS/CMS to allow this change, although this change will not be immediate.

11.2 What will be included in the tribal customary adoptive placement?

Until emergency regulations are modified to include TCA into the agency adoption process, refer to the following: Title 22, Division 2, CCR sections 35195 – 35207.1 to guide the practice of tribal customary adoptive placement:

Section 35195 - Child's Medical and Psychological Information

Section 35197 - Adoptive Placement Requirements

Section 35201 - Adoptive Placement Agreement

Section 35207 - Termination of Adoptive Placement

Section 35207.1 - Reporting Suspected Child Abuse

Similar to the conventional adoptive placement process found in Title 22, Division 2, CCR section 35195, pursuant to W&IC section 366.24(9) the following information is required to complete the tribal customary adoptive placement:

1. A written report, using form **AD 512**, on the Indian child's medical, and if available, the medical background on the child's biological parents, given to the prospective tribal customary adoptive parents and an acknowledgement they have received it.
    a. The report on the Indian child's background must contain all known diagnostic information, including the following:
        i. Current medical reports on the Indian child;
        ii. Psychological evaluations;
        iii. Scholastic information; and
        iv. Developmental history.

11.3 When can the tribal customary adoptive placement agreement be signed?

Similar to the conventional adoption process, an adoptive placement agreement can be prepared and executed during the tribal customary adoptive placement process, after full faith and credit has been afforded to the TCAO and the home study has been completed and approved by the tribe.

11.4 Since the Indian child will essentially have two sets of legal parents, will the birth certificate need to include both names?

No, two sets of parents will not appear on the birth certificate. Subject to the terms of the tribally issued TCAO, TCA parents will be afforded the same opportunity as any current adoptive parent to maintain the Indian child's original birth certificate or have it amended.

Agencies should continue to use form VS-44. Regulations governing form VS-44 is located in Title 22, Division 2, CCR section 35211(d)(9).

11.5 Can a tribal customary adoptive placement be terminated?

Yes. Similar to a conventional adoptive placement, if an agency, in consultation with the child's tribe, has any reason to remove the child, the placement may be terminated. Please refer to Title 22, Division 2, CCR section 35207 to guide termination of a tribal customary adoptive placement.

12.0 Supervision of Tribal Customary Adoptive Placement

12.1 What will be included in the supervision of a tribal customary adoptive placement?

Pursuant to W&IC section 366.24(c)(8)(A) and (B), the agency with care and placement responsibility shall be responsible for ensuring the supervision of the tribal customary adoptive placement. Until emergency regulations are modified to include TCA into the agency adoption process, refer to the following Title 22, Division 2, CCR section 35203, to guide the practice of supervising a tribal customary adoptive placement:

Please note: Supervision of tribal customary adoptive placement is subject to compliance with federal Public Law 109-288 in regards to monthly case worker visits as long as the child is a court dependent and under the care and supervision of the county child welfare agency.

13.0 Adoption Assistance Program (AAP) Benefits

13.1 Will the child be eligible for Adoption Assistance Program?

Yes, pursuant to W&IC section 16120, access to AAP benefits are made available when a dependent Indian child is the subject of an order of the tribal customary adoption.

13.2 How will non-recurring expenses be handled in a TCA case?

The current process of using and tracking non-recurring expenses for conventional adoptions will be used for TCA.

14.0 Private Adoption Assistance Reimbursement Program (PAARP)

14.1 Will a designated licensed private adoption agency be able to claim PAARP?

Yes. Since TCA involves an Indian child who is a dependent of the court, effective July 1, 2010, licensed private adoption agencies can claim PAARP reimbursement for tribal customary adoptions. The same process and forms used for a conventional adoption of a child in foster care are used to complete the claiming process. AD PAARP Form 4348 has been modified to include TCA.

14.2 If a tribe conducts its own home study and chooses a tribal agency that is not licensed as a California adoption agency, is that tribal agency eligible to claim PAARP?

No. Pursuant to W&IC section 16122, only licensed private adoption agencies may claim PAARP. More information on PAARP is located on the internet at: http://www.childsworld.ca.gov/PG1885.htm.

15.0 Finalization

15.1 What duties are required of the agency with placement and care responsibility of the child for finalization?

Pursuant to W&IC section 366.24(c)(12), after the prospective adoptive parent(s) desiring to adopt the child has filed the adoption petition, the agency that has placement, care and responsibility for the child is responsible for ensuring a full and final report of the facts of the proposed tribal customary adoption is submitted to the court. The report must include the documents and information required in section 35211(d) of Title 22, Division 2 CCR regulations with the exception of:

- Documentation that the child is legally freed to finalize an adoption.

15.2 What happens to the rights of the biological parents?

The rights of the parents are modified during the TCAO process by the Indian child's tribe.

15.3 What are the rights of the adoptive parents?

Subject only to the terms of the TCAO, Tribal customary adoptive parents will be afforded the same rights and privileges, and are subject to all the duties of any other adoptive parent consistent with the TCAO.

16.0 Disclosure and Confidentiality

16.1 What disclosure and confidentiality standards will apply to a TCA?

TCA will apply where a tribe has acknowledged a child as a member or eligible for membership as defined by ICWA. Where the tribe has formally intervened in the matter, it will be entitled to more information pertaining to the case.

When the case is referred to the tribe for development of the TCAO, there will be a need to continue to collaborate with the tribe on the information relevant to the Indian child's case and in particular with respect to information on the prospective adoptive family.

Further, a designee doing the TCA home study will need to collaborate with the tribe because it will be required to conduct the home study "in consultation with" the tribe. Sharing of information will be necessary if not inevitable. The primary limitation would be in connection with sharing criminal record or child abuse registry information. The statute, however, provides that if the subject of the background check gives consent, then background check information can be released to the tribe.

Statute further specifies disclosure provisions applicable to children that are the subject of a TCA at W&IC section 366.24(d). In sum they are afforded the same protections as any other child that has been adopted.

17.0 Set Aside

17.1 What is a set aside?

Once an adoption is finalized, if a child shows evidence of a developmental disability or mental illness as a result of conditions existing before the adoption, to the extent that the child cannot be adopted and of which condition the adoptive parent had no knowledge or notice before the adoption was finalized, the adoptive family may file a (set aside) petition pursuant to W&IC section 366.26(e)(3) setting forth those facts with the juvenile court that granted the adoption petition in an attempt to set aside or dissolve the existing adoption order.

17.2 Will a TCA be able to be set aside?

Yes. Pursuant to W&IC section 366.26(e)(3), a finalized TCA will be able to be set aside within five years of the date of finalization.

17.3 Do the same standards currently used to set aside a conventional adoption apply to a TCA?

Most of the same standards currently used to set aside a conventional adoption apply to a TCA with the following exception:

1. As part of the investigative set aside report, the Adoption Worker conducting the investigation needs to consult with the child's tribe to develop a plan for the child. This recommended plan will be part of the report to the court.

18.0 ICPC

18.1 Can a tribal child from an out of state tribe be the subject of a TCA?

Yes. If the child is a California dependent, and the tribe elects a permanent plan of TCA, that tribe does not have to be a California tribe.

18. 2 Does ICPC apply to TCA?

Yes. The TCA statutes do not alter ICPC obligations that apply if a California dependent child is placed with prospective adoptive parents residing out of state. The sending agency would have to consider and comply with the ICPC protocols and may be working with both the receiving state and the tribe to complete the ICPC requirements. See ACL 08-26 for additional information on the ICPC home study process, including the requirements of the federal Safe and Timely Interstate Placement of Foster Children Act. Because most out-of-state courts do not provide a process for finalizing an adoption without termination of parental rights, agencies will have to work to finalize the adoption in California or in the other state, as appropriate depending on the circumstances of the particular case. For questions on ICPC requirements you may contact the Out-of-State Placement Policy Unit at 916-651-8100 or ICPC@dss.ca.gov.

19.0 Data Reporting on TCA

The AB1325 requires the completion of a study and a report to the Legislature by January 1, 2013. The report must include the following information:

1. The number of families served and the number of completed tribal customary adoptions.
2. The length of time it takes to complete a completed tribal customary adoption.
3. The challenges faced by social workers, courts and tribes in completing a TCA.
4. The benefits or detriments to Indian children from a tribal customary adoption.

Being able to track an ICWA eligible child who may be the subject of a completed tribal customary adoption will provide valuable information as to the safety,

permanency and well-being of these children. Additionally, there is a need to gather as much data as possible on these cases to see in what ways the law was successful, to identify barriers that social workers, families, tribes and judges, etc. encountered, and to be able to write the report and make recommendations on whether or not tribal customary adoptions should continue beyond the January 1, 2014, sunset date, or should continue with modifications, etc.

19.1 How can information regarding TCA be entered into CWS/CMS?

The TCA Special Projects Code shall be selected on the Special Project tab of a case in CWS/CMS to indicate a child is being considered for tribal customary adoption. Any case in which TCA is considered as a permanency option (regardless of whether or not TCA was actually selected as the permanency plan), must be identified with this TCA Special Projects Code in CWS/CMS. The Special Projects Code should be selected at the time TCA is considered. Once a case is identified with the TCA special projects code, the code should remain selected regardless of the case/permanency outcome. The Special Projects Code will assist in tracking cases for data collection to include in the study and report to Legislature, as aforementioned.

In order to identify a case in which TCA has been considered, use the following steps in CWS/CMS:

Step 1: In the Case Folder of the CWS/CMS, go to the, "Special Projects" tab. Select the Special Projects page tab and then the (+) button in the grid to enter a new Special Project for the focus child. Click the down (+) button to display the available list of Special Projects.

Step 2: Select the following code:

> **"S-Tribal Customary Adoption"**
> The child is in out-of-home care, and reunification services have been ordered. The child has been determined to be ICWA eligible and tribal customary adoption is an option to be discussed with the tribe as a concurrent plan option should reunification be unsuccessful.

19.2 To enter adoptive placement information in CWS/CMS, a TPR date is currently required. Since TCA does not require TPR, which date do I enter to allow CWS/CMS to complete adoptive placement?

Until further notice directing you otherwise, enter the date the court afforded full faith and credit to the TCAO and note that in the case notes.

19.3 Since the case plan of TCA is not currently available, which case plan should be selected?

Until further notice directing you otherwise, select ADOPTION or ADOPTION WITH SIBLING(S).

20.0 Forms

20.1 What Judicial Council forms have been modified to include TCA?

The Judicial Council of California modified the following mandatory dependency and adoption forms to include TCA in the dependency and adoption process. They are located on the Judicial Council's website at: http://www.courtinfo.ca.gov/forms/

1. JV – 300: Notice of Hearing on Selection of a Permanent Plan
2. JV – 320: Orders Under W&IC §§ 366.24, 366.26, 727.3, 727.31
3. JV – 321: Request for Prospective Adoptive Parent Designation
4. JV – 327: Prospective Adoptive Parent Designation Order
5. ADOPT – 050: How to Adopt a Child in California
6. ADOPT – 200: Adoption Request
7. ADOPT – 210: Adoption Agreement
8. ADOPT – 215: Adoption Order
9. ADOPT – 220: Adoption of Indian Child

The Judicial Council of California is in the process of modifying the following optional dependency forms to include TCA in the dependency process. Once approved they will be located on the Judicial Council's website at: http://www.courtinfo.ca.gov/forms/

1. JV – 405: Continuance-Detention Hearing
2. JV – 406: Continuance-General
3. JV – 410: Findings and Orders After Detention Hearing (W&IC § 319)
4. JV – 412: Findings and Orders After Jurisdictional Hearing (W&IC § 356)
5. JV – 415: Findings and Orders After Dispositional Hearing (W&IC § 361et Seq.)
6. JV – 420: Dispositional Attachment: Removal From Custodial Parent-Placement with Previously Noncustodial Parent (W&IC §§ 361, 361.2)

7. JV – 421: Dispositional Attachment: Removal From Custodial Parent-Placement with Non-parent (W&IC §§ 361, 361.2)
8. JV – 425: Findings and Orders After In-Home Status Review Hearing (W&IC § 364)
9. JV – 426: Findings and Orders After In-Home Status Review Hearing-Child Placed with Previously Non-custodial Parent (W&IC §§364,366.21)
10. JV – 430: Findings and Orders After Six-Month Pre-permanency Hearing (W&IC § 366.21(e))
11. JV – 432: Six-Month Pre-permanency Attachment: Reunification Services Continued (W&IC § 366.21(e))
12. JV – 435: Findings and Orders After 12-Month Permanency Hearing (W&IC § 366.21 (f))
13. JV – 437: Twelve-Month Permanency Attachment: Reunification Services Continued (W&IC § 366.21 (f))
14. JV – 440: Findings and Orders After Eighteen-Month Permanency Hearing (W&IC §366.22)
15. JV – 445: Findings and Orders After Post-permanency Hearing-Parental Rights Terminated; Permanent Plan of Adoption (W&IC §366.3 (f))
16. JV – 446: Findings and Orders After Post-permanency Hearing—Permanent Plan Other Than Adoption (W&IC §366.3)

20.2 What CDSS forms have been modified to include TCA?

The CDSS modified the following adoption forms to include TCA in the adoption process. They are located on the CDSS website at: http://www.cdss.ca.gov/cdssweb/PG164.htm.

1. AD 558: Notice of Placement (Adoptive)
2. AD 580: Notice of Removal of Child from Adoptive Home
3. AD 824: Adoption Petition - Consent and Joinder
4. AD 907: Adoptive Placement Agreement
5. AD 4348: PAARP

The CDSS is in the process of modifying the following adoption form to include TCA in the adoption process. Once approved, it will be located on the CDSS website at: http://www.cdss.ca.gov/cdssweb/PG164.htm.

1. AAP 4: Eligibility Certification – Adoption Assistance Program

20.3 My agency uses additional forms located on the CDSS website other than the ones listed. Are there any additional CDSS forms necessary to implement TCA that have not been modified?

Due to limited resources, many adoption forms currently located on the CDSS website were not modified. Most of the forms are templates that incorporate requested information required by statutes or regulations. Although the agency is required to retrieve certain information, the form itself may not be mandatory. Therefore, counties, DOs and adoption agencies will be responsible for modifying their own adoption forms to include TCA and ensure the required information is being documented. If this legislation is extended past 2014, CDSS will reassess its resources to determine if additional forms can be modified.

Should you have any questions regarding this letter you may contact me at (916) 657-2614 or the Permanency Policy Bureau at (916) 657-1858. Any questions regarding input to CWS/CMS should be directed to the County Single Point of Contact (SPOC). The SPOCs needing assistance should contact their System Support Consultant at the CWS/CMS Project.

Sincerely,

Original Document Signed By:

GREGORY E. ROSE
Deputy Director
Children and Family Services Division

ACIN No. I-40-10 (4/29/10)

Requirement of the Use of an Expert Witness by the Indian Child Welfare Act (ICWA)

CDSS
JOHN A. WAGNER
DIRECTOR

STATE OF CALIFORNIA—HEALTH AND HUMAN SERVICES AGENCY
DEPARTMENT OF SOCIAL SERVICES
744 P Street • Sacramento, CA 95814 • *www.cdss.ca.gov*

ARNOLD SCHWARZENEGGER
GOVERNOR

April 29, 2010

REASON FOR THIS TRANSMITTAL

[ ] State Law Change
[ ] Federal Law or Regulation Change
[ ] Court Order
[X] Clarification Requested by One or More Counties
[X] Initiated by CDSS

ALL COUNTY INFORMATION NOTICE NO. I-40-10

TO: ALL COUNTY WELFARE DIRECTORS
ALL CHILD WELFARE PROGRAM MANAGERS
ALL CHIEF PROBATION OFFICERS
ALL ADOPTION DISTRICT OFFICES
ALL TRIBES WITH TITLE IV-E AGREEMENTS

SUBJECT: REQUIREMENT OF THE USE OF AN EXPERT WITNESS BY THE INDIAN CHILD WELFARE ACT (ICWA)

REFERENCE: THE FEDERAL INDIAN CHILD WELFARE ACT (ICWA) OF 1978 CODIFIED AT 25 U.S.C. SECTION 1901 ET SEQ; SENATE BILL (SB) 678, CHAPTER 838, STATUTES OF 2006; WELFARE AND INSTITUTIONS CODE (W&IC) SECTIONS 224.6, 361.7, 366.26; FAMILY CODE SECTIONS 177, 7892.5; PROBATE CODE SECTION 1459.5; ALL COUNTY LETTER NO. 08-02

The purpose of this All County Information Notice (ACIN) is to provide information to counties, adoption agencies, tribes and other interested individuals and organizations regarding the use of qualified expert witnesses, as required by the federal Indian Child Welfare Act (ICWA).

The expert witness requirement has been codified in California's W&IC, Family Code (FC) and in Probate Code (PC). However, many people working in California proceedings where ICWA is applicable do not understand the purpose of ICWA expert witnesses or how they are to be used, and have expressed a desire for clarifying information. The purpose of this notice is to increase the understanding of the requirement of qualified expert witness testimony as applicable to Indian children. It is hoped that a better understanding of this requirement will lead to increased compliance with the ICWA and ultimately improved outcomes for Native American children in California who are the subject of an Indian child custody proceeding.

BACKGROUND

At the foundation of the ICWA is the federal policy that it is in the best interest of the Indian child to retain tribal ties and cultural heritage; and in the interest of the tribe to preserve its future generations. It establishes standards with higher evidentiary requirements when an Indian child is the subject of a child custody proceeding. The ICWA requires expert witness testimony before the state court can order an involuntary foster care placement of a child or the termination of parental rights. Specifically the ICWA requires that the expert witness testify on whether 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." In addition, the standards for the removal of an Indian child and the termination of parental rights for an Indian child require that the court consider evidence concerning the prevailing social and cultural standards of the Indian child's tribe, including that tribe's family organization and child-rearing practices. (25 USC § 1912; W&IC § 361.7(c); W&IC § 366.26(c)(2)(B)(ii); PC § 1459.5(b); FC § 7892.5(a) & (b).)

Historically, Indian children were being removed from their tribal homes and placed in non-Indian foster and adoptive homes and institutions at rates disproportionally higher than federal and state averages (ICWA, 25 USC § 1901). For example, in the late1970s, California Indian children were eight times more likely to be removed from their families than non-Indian children, and more than 90 percent were placed in non-Indian homes. Indian children were being removed at disproportionally higher rates as compared to other groups, to the detriment of Indian children who were cut off from their tribes and heritage. Such practices were detrimental to tribes as their stability was jeopardized by the high removal rate and its impact on their membership and governmental structure. To address this situation, the federal ICWA was passed in 1978.

While the situation has improved since the ICWA was passed in 1978, Native American children continue to be removed from their homes at a proportionally higher rate than other children in California. Additionally, a large number of Indian children placed in out-of-home care are placed in non-relative, non-Indian homes, further aggravating the loss of ties to the child's tribe and heritage. Therefore, it is critical that the requirement of qualified expert witness testimony is met in every case involving an Indian child. It is not only required by law, but is essential in helping the California courts and child welfare agencies ensure that every effort has been made to assess the safety of the child in the context of the prevailing cultural and child rearing practices within the child's tribe.

Further specifics and recommendations follow to clarify the ICWA expert witness requirements and California Department of Social Services (CDSS) recommendations,

which were developed after consultation with the CDSS ICWA Workgroup, including tribal advocates and county representatives.

USE OF EXPERT WITNESS TESTIMONY

The ICWA itself defines the issue to which the qualified expert witness must testify: whether "...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." The federal Bureau of Indian Affairs guidelines further refine the issues to be addressed by the expert witness:

"Basically two questions are involved: 1) Is it likely that the conduct of the parents will result in serious physical or emotional harm to the child? 2) If such conduct is likely to cause such harm, can the parents be persuaded to modify their conduct?" It is important that the expert's testimony address both of these issues.

In addition, California has specified that when the court is considering whether to involuntarily place an Indian child in foster care, or terminate parental rights, the court shall require the expert's testimony and also consider evidence of the prevailing social and cultural standards of the child's tribe, including the "...the tribe's family organization and child rearing practices." (W&IC § 224.6(b).)

These requirements are designed to assist the judge by providing specific information pertinent to the case of a particular Indian child, as well as to counter the removal of Indian children that might be based on cultural bias.

We recommend counties have the proposed expert witness contact the child's family and tribe prior to court hearings, especially if the proposed expert is not from the child's tribe. This contact will provide valuable insight to the expert who is charged with evaluating the child's circumstances, on whether continued custody of the child by the parent or Indian custodian is likely to cause the child serious emotional or physical damage. Additional information on this topic is contained in the following section.

In the Case of the Removal of an Indian Child

No removal of an Indian child from the custody of his or her parents or placement in out-of-home care may be ordered in the absence of a determination, supported by "clear and convincing evidence," including the testimony of a qualified expert witness, 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. Therefore, in the case of a child who is ICWA eligible, the testimony of an expert witness is required at the dispositional hearing.

In the Case of a Termination of Parental Rights

In a case involving the termination of parental rights, the evidentiary burden is higher. Parental rights may not be terminated in the absence of a determination, supported by evidence "beyond a reasonable doubt", including the testimony of a qualified expert witness, that the continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. Therefore, in the case of a child who is ICWA eligible, the testimony of an expert witness is required at the hearing that terminates parental rights as described in W&IC § 366.26.

In Addressing Active Efforts

The qualified expert witness may also be used to provide information on the separate ICWA requirement to engage in active efforts designed to prevent the breakup of the Indian family. What constitutes active efforts is assessed on a case by case basis. However, active efforts are to be conducted in a manner that takes into account the "prevailing social and cultural values and way of life of the Indian child's tribe." Active efforts must use the available resources of the extended family, the tribe, tribal and other Indian social service agencies and individual Indian caregiver service providers.

Evidence of the active efforts engaged in must be provided to the court by the county agency. A tribal expert could be effective in providing testimony on available tribal resources, among other areas, for the purposes of addressing whether or not active efforts have been made in a particular case.

NATURE OF EXPERT WITNESS TESTIMONY

While the ICWA and related statutes and guidelines do not specifically discuss what an expert witness should do to prepare to testify in an ICWA case, there are rules and guidelines which relate to testimony of experts and, in particular, professionals testifying in court cases generally, and specifically in child welfare cases.

California Evidence Code § 801 states that:

If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at

> or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

The American Psychological Association (APA) has issued Guidelines for Psychological Evaluations in Child Protection Matters and is generally instructive on the use of experts in child protection. These guidelines may be found on the APAs web site at www.apa.org/practice/childprotection.html. The guidelines stress that in evaluating parental capacity to care for a particular child or the child-parent interaction, professionals should make efforts to observe the child together with the parent when this is possible and appropriate, and may also interview extended family members and others. "If information gathered from a third party is used as a basis for conclusions, ...attempt to corroborate it from at least one other source whenever possible."

It would be difficult for the expert witness to develop an informed opinion about appropriateness of removing the child, or terminating parental rights in the absence of meeting with or assessing the parent(s) or Indian custodian, without reviewing the case information, observing the parent-child interaction whenever possible, and meeting with tribal representatives and extended family members. For that reason, the practice of having qualified expert witness testimony based solely on a review of the social worker's reports typically would not be considered in accord with these standards. There are exceptions, however some examples of exceptions to this standard would be in the case of an out-of-state tribe who provides an expert witness who hasn't had an opportunity to observe the parent and child together; or in cases that involve extreme physical abuse, where the focus of the testimony is on the continuing danger to the child and the need for immediate removal from the home.

QUALIFICATIONS OF THE ICWA EXPERT WITNESS

Generally, in judicial proceedings, a person is qualified to be an expert witness if he or she has a special knowledge, or skill, to be able to provide opinion on a subject beyond the knowledge of the judge. The expert can gain the knowledge or skill by education, experience or a combination of both. Parties in a case may differ on whether or not a specific individual is a qualified expert. It is the court that will ultimately make the determination whether a person proposed to be used as an expert can be declared a qualified expert in a proceeding.

The ICWA itself does not specify the qualifications for an expert witness. However, the federal guidelines issued by the Bureau of Indian Affairs outline desired qualifications, stressing the need for knowledge of the tribal customs of the child's tribe, particularly related to family organization and childrearing practices, and the prevailing social and

cultural standards and childrearing practices within the Indian child's tribe. The Bureau of Indian Affairs (BIA) guidelines on ICWA expert witnesses state, "...knowledge of tribal culture and childrearing practices will frequently be very valuable to the court. Determining the likelihood of future harm frequently involves predicting future behavior-which is influenced to a large degree by culture. Specific behavior patterns will often need to be placed in the context of the total culture to determine whether they are likely to cause serious emotional harm."

Qualifications of the witness may include cultural competency in addition to the ability to address the issue of a specific child's endangerment. A tribal member from the child's tribe is most likely to be able to provide appropriate evidence on the cultural issues. We would note that Native American cultures, family organization and child-rearing practices vary greatly from tribe to tribe. It cannot be assumed that merely because a person is Native American, he or she would necessarily be knowledgeable of, and able to speak to the specific culture, family organization, and child-rearing practices of the specific child's tribe. At the same time, a Native American familiar with issues affecting an Indian child involved in a child custody proceeding may be better qualified than a non-Indian who is not involved in such issues.

Under California law in W&IC § 224.6(a), the qualified expert witness in an ICWA case cannot be an employee of the person or agency seeking the order, such as the child welfare or probation agency social worker or probation officer. While there is otherwise nothing that prevents, for example, a social worker from being a qualified expert witness, the expert witness should be shown to possess expertise beyond merely possessing the educational qualifications of a social worker. It must also be established how the person's background, experience and qualifications can aid the court with such key findings as whether continued custody by the parent or custodian would be likely, or unlikely, to cause serious emotional or physical harm to the Indian child. It must also be established how the person's background and experience can provide the court with relevant information on the child's tribe, culture and childrearing practices.

The above are all appropriate considerations when a social worker is trying to assist in the identification of an ICWA expert witness. Who would qualify as an expert witness and what exact qualifications they would need may vary, depending upon the facts of the case. The standards and focus of evidence may be very different in an emergency removal situation than in a non-emergency case as previously noted. In cases of extreme physical abuse, the focus will be more on the issues of child endangerment and less on cultural competency. (See In re Krystle D. 30 Cal.App.4th 1778, 37 Cal.Rptr.2d 132, Cal. App. 6 Dist., 1994.)

SELECTION OF THE QUALIFIED EXPERT WITNESS

It is the responsibility of the party seeking the order for the placement of the child in foster care or for the termination of parental right to ensure that the qualified expert witness requirement is fulfilled. In practice this means that it is the agency or county counsel who is responsible for locating a qualified expert witness. Best practice would indicate that someone look first to the tribe involved in the child custody proceeding. The federal BIA guidelines state that a court or any party may request the assistance of the Indian child's tribe in locating persons qualified to serve as an expert witnesses. The tribe will generally have the personnel or know of tribal members who can speak to the endangerment issue and of tribal-specific social and cultural norms and practices, including family organization and tribal childrearing practices pertinent to the proceeding.

As set forth in the W&IC, persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings: 1) a member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices; 2) any expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe; and 3) a professional person having substantial education and experience in the area of his or her specialty. (W&IC § 224.6(c).)

Ideally the ICWA expert witness is someone whose qualifications and appropriateness are agreed to by all parties. Having all parties agree to the expert witness helps to ensure the ability of the witness to give his or her independent assessment of the safety of the child and the needs of the child. However, if the parties do not agree, there is nothing to prevent any of the parties from offering the court a proposed expert witness. Ultimately, the judge in the proceeding will be the one to declare any proposed expert(s) as being a qualified ICWA expert that can provide information that will aid the court.

PAYMENT AND CONTRACTING

As with any other expert witness, counties should develop a standard procedure for payment of individuals serving as a qualified expert witness in ICWA cases. While the court or any party may request the tribe involved in the child custody proceeding to assist in locating a qualified expert witness, the tribe is under no obligation to supply an expert witness for the county. However, frequently it may be in the best interests of all parties if the tribe is willing to assist. If a tribal member or tribal social worker agrees to serve as a qualified expert witness, this person should be paid and reimbursed as any other expert witness would be. As with other experts being used in a proceeding,

however, this is not to preclude the use of individuals or organizations that are willing to provide their services as an expert witness at no cost.

Further, as with any other expert witness, payment should not be contingent upon the individual agreeing with the county's assessment of the case. The goal is to reach the appropriate outcome for the child. For example, if upon review of the file and other relevant evidence, the qualified expert witness concludes that there are insufficient grounds to support termination of parental rights, this would not be a basis for the county to refuse to pay that individual.

WAIVER OF THE QUALIFIED EXPERT WITNESS REQUIREMENT

The requirement of qualified expert witness testimony may be waived, but only under the following conditions:

- W&IC § 224.6(e) provides that the court may accept a declaration or affidavit from a qualified expert witness in lieu of testimony only if all the parties have so stipulated in writing and the court is satisfied the stipulation is made knowingly, intelligently, and voluntarily.

- California Rules of Court, Rule 5.484 (a) states "...(1) Testimony by a "qualified expert witness," as defined in W&IC section 224.6, Family Code section 177(a), and Probate Code section 1459.5(b), is required before a court orders a child placed in foster care or terminates parental rights. (2) Stipulation by the parent, Indian custodian, or tribe, or failure to object, may waive the requirement of producing evidence of the likelihood of serious damage only if the court is satisfied that the person or tribe has been fully advised of the requirements of the Indian Child Welfare Act and has knowingly, intelligently, and voluntarily waived them. Any such stipulation must be agreed to in writing..."

EXPERT WITNESS LIST

Finally, the CDSS has been asked if it will maintain a list of qualified expert witnesses for ICWA cases. It would be best for county child welfare agencies and probation departments to work with local tribes and/or tribal organizations to identify qualified ICWA expert witnesses, or ask the specific tribe involved in the child custody proceeding for a potential expert witness.

In an effort to assist interested parties, the Judicial Council of California - Administrative Office of the Courts (AOC) has posted a list as a resource for those seeking an expert witness in an ICWA proceeding. However, neither the AOC nor the Department endorse nor guarantee any of the individuals included on this ICWA expert witness list.

The agency or individual seeking to use anyone on this list has the responsibility to screen that person for appropriateness for the specific case. Further, it is not required that an individual be included on the list in order to be considered a qualified ICWA expert.

The list can be found on the AOC's web site at:
http://www.courtinfo.ca.gov/programs/cfcc/programs/description/jrta-ICWAExpertWitness.htm.

Any questions regarding the expert witness resource list should be directed to the AOC. You may contact Vida Castaneda, Court Services Analyst at (415) 865-7739 or at vida.castaneda@jud.ca.gov.

Should you have any questions regarding this letter, please contact Lee Ann Kelly, Acting Bureau Chief of the Office of Child Abuse Prevention at lkelly@dss.ca.gov, or at (916) 651-6960.

Sincerely,

Original Document Signed By:

LINNÉ STOUT, Chief
Child Protection and Family Support Branch

ACL No. 10-17 (3/24/10)

Assembly Bill 1325, Chapter 287, Statutes of 2009 Tribal Customary Adoption

CDSS
JOHN A. WAGNER
DIRECTOR

STATE OF CALIFORNIA—HEALTH AND HUMAN SERVICES AGENCY
DEPARTMENT OF SOCIAL SERVICES
744 P Street • Sacramento, CA 95814 • *www.cdss.ca.gov*

ARNOLD SCHWARZENEGGER
GOVERNOR

REASON FOR THIS TRANSMITTAL

[X] State Law Change
[ ] Federal Law or Regulation Change
[ ] Court Order
[ ] Clarification Requested by One or More Counties
[ ] Initiated by CDSS

March 24, 2010

ALL COUNTY LETTER NO. 10-17

TO: ALL COUNTY WELFARE DIRECTORS
ALL CHIEF PROBATION OFFICERS
ALL CDSS ADOPTION DISTRICT OFFICES
LICENSED PUBLIC AND PRIVATE ADOPTION AGENCIES
ALL CHILD WELFARE SERVICES PROGRAM MANAGERS
ADOPTION SERVICE PROVIDERS
TITLE IV-E AGREEMENT TRIBES
ACADEMY OF CALIFORNIA ADOPTION LAWYERS

SUBJECT: ASSEMBLY BILL 1325, CHAPTER 287, STATUTES OF 2009
TRIBAL CUSTOMARY ADOPTION

REFERENCE: ASSEMBLY BILL 1325, CHAPTER 287, STATUTES OF 2009;
WELFARE AND INSTITUTIONS CODE 366.24, AND 366.26

The purpose of this All County Letter (ACL) is to provide introductory information to counties, adoption agencies, tribes and other interested individuals/organizations regarding the passage of Assembly Bill (AB) 1325, Chapter 287, Statutes of 2009. A more detailed ACL regarding implementing the provisions of AB 1325 statewide will be circulated in June 2010.

In an effort to meet the permanency needs of dependent Indian children, consistent with tribal culture, California enacted AB 1325. Effective **July 1, 2010**, this statute adds to state law "tribal customary adoption" as a permanency option for a child who is a dependent of the juvenile court and eligible under the Indian Child Welfare Act (ICWA). It defines tribal customary adoption as an adoption which occurs under the customs, laws or traditions of child's tribe. Termination of parental rights (TPR) is not required to effect the tribal customary adoption. While tribal customary adoption is unique, it is intended to be a seamless integration into the current process of conventional adoption. Aligned with the state's existing concurrent planning policies, when applicable, it allows, at the tribe's option, for tribal customary adoption to be included as an alternative permanent plan to family reunification throughout the dependency case.

This statute provides the Indian child's tribe the authority to recommend tribal customary adoption as the permanency option for the Indian child. Further, it provides that where the juvenile court finds that full faith and credit shall be extended to the tribe's tribal customary adoption order, the juvenile court will issue a state court order of adoption. It also permits an Indian child who is the subject of a tribal customary adoption to be eligible for Adoption Assistance Program (AAP) benefits.

This statute only applies to a dependent Indian child who is eligible under ICWA whose parents' rights were not terminated. It will not apply to independent or intercountry adoption, an Indian child who is a probation ward or has been voluntarily relinquished to an agency by his or her parents.

The AB 1325 becomes operative on July 1, 2010, and sunsets on January 1, 2014. This statute authorizes California Department of Social Services (CDSS) to develop emergency regulations and requires the Judicial Council's Administrative Office of the Courts to adopt rules of court and necessary forms to implement tribal customary adoption before July 1, 2010. The Judicial Council will publish forms with instructions on their website. The statute also requires the Judicial Council to complete a study of these provisions and to report its findings to the legislature on or before January 1, 2013.

BACKGROUND

The AB 1325 was the result of a gap between tribal cultural norms and existing state law, which did not include a culturally-appropriate means of achieving adoption for dependent Indian children. This statute originated from the CDSS ICWA Workgroup which includes representatives from tribes, counties and other stakeholders in Indian child welfare. It is consistent with CDSS' goal to sustain and enhance permanency for all court-dependent youth. In addition to a conventional adoption, AB 1325 gives an Indian child another permanency option by allowing the child to be adopted without the requirement of TPR, which conflicts with many tribal teachings and cultural values because it severs the child's tribal family systems, connections to extended family members, and to the tribe. Furthermore, TPR and severing family ties may also cause an Indian child to lose benefits afforded only to a member of the tribe. This statute allows Indian children and families to achieve permanency and adoption assistance benefits without TPR.

According to the National Indian Child Welfare Association, "Historically and traditionally, adoption has been practiced in most tribal communities through custom and ceremony. In general, tribes do not practice termination of parental rights. In a customary adoption, tribes are allowed to meet the permanency needs of their children while honoring their own tribal values and beliefs."

HOW THE BILL WORKS

The option of a tribal customary adoption is to be considered in all stages of the dependency case. The primary procedures and standards applicable to tribal customary adoptions are contained in the new section, 366.24, of the Welfare and Institutions Code (W&IC). They include the following:

- Provides the tribe to choose the option of tribal customary adoption as a permanency option for dependent Indian children eligible under ICWA in cases involving federally recognized tribes.
- Defines "tribal customary adoption" as an adoption which occurs under the customs, laws or traditions of an Indian child's tribe, but where TPR is not required.
- Excludes tribal customary adoption from the Family Code.
- Excludes probation wards, independent or intercountry adoptions, and Indian children that have been voluntarily relinquished by their parents from tribal customary adoption.
- Includes tribal customary adoption as a permanency option when noticing parents regarding a selection and implementation hearing.
- Affords tribal customary adoptive parents the same rights and privileges as any other adoptive parents.
- Requires the dependency social worker and the adoptions worker, in consultation with the child's tribe, to address in the court report for each review hearing, whether the tribal customary adoption is an appropriate permanent plan for the child if reunification is unsuccessful.
- Provides that when family reunification is unsuccessful, and a hearing is ordered to determine the appropriate permanent plan for a dependent Indian child, if the child's tribe recommends tribal customary adoption, the juvenile court may order, without termination of parental rights, tribal customary adoption as the permanent plan for that child.
- Provides requirements for cases in which tribal customary adoption is determined as the child's permanent plan, including:
  - The completion of an adoptive home study by either the Indian child's tribe or the tribe's designee;
    - If the tribe designates an agency to complete the home study, the agency must conduct the tribal customary adoption home study in consultation with the child's tribe.
    - The tribe's designee may include a licensed county adoption agency, CDSS when it is acting as an adoption agency, or a licensed adoption agency.

- The tribe may choose to complete the tribal customary adoption home study. In that case the agency with placement and care responsibility for the child will complete the criminal and child abuse registry background checks.

  - The completion, by the child's tribe, of a Tribal Customary Adoption Order (TCAO) that includes a description of the modification of the legal relationship of the birth parents or Indian custodian and the child, and a description of the child's legal relationship with the tribe;
  - The filing of the TCAO evidencing that tribal customary adoption had been completed by the child's tribe within 120 days of the original 366.26 hearing with a court option to grant a continuance of up to 60 additional days;
  - Court discretion, if the child's tribe does not file the tribal customary adoption order within the timeframes specified for completion of the order, to alter the original order of tribal customary adoption as the child's permanency option.
  - The filing of an addendum to the continued W &IC 366.26 report by the licensed county adoption agency, or CDSS when it is acting as an adoption agency, to the court;
  - An opportunity for the child, birth parents, Indian custodian, tribal customary adoptive parents, and their counsel, to present evidence regarding the child's best interest.

- Provides that once the juvenile court affords full faith and credit to the TCAO received from the child's tribal court or council to the extent it would afford full faith and credit to the public acts, records, judicial proceedings and judgments of any other entity, the Indian child shall be eligible for tribal customary adoptive placement.
  - The completion of a tribal customary adoptive placement is contingent on the approval of the tribal customary adoption home study.
- Provides that once an adoption petition is filed, supervision is complete and the final report by the supervising agency is submitted, the court issues an order of adoption pursuant to section 366.24.
- Provides that once the adoption order is granted dependency is terminated.

<u>Private Adoption Agency Reimbursement Program (PAARP)</u>

The PAARP was enacted as an incentive for licensed private adoption agencies to recruit adoptive families for children who would otherwise remain in foster care. The PAARP is governed by W&IC section 16122, which requires CDSS to reimburse licensed private adoption agencies for otherwise unreimbursed costs incurred, for completing the adoptions of children who are eligible for the AAP benefits because of age, membership in a sibling group, medical or psychological problems, adverse parental background or other circumstances that will make placement of the youth(s)

especially difficult. With the passage of Senate Bill 84 the maximum PAARP rate, effective February 1, 2008, was increased to $10,000.

Effective July 1, 2010, licensed private adoption agencies can claim PAARP reimbursement for tribal customary adoptions. Some private adoption agencies have expressed concern as to whether PAARP eligibility would be impacted should any part of the TCA process be initiated prior to July 1, 2010. These cases will be eligible for PAARP reimbursement provided the tribal customary adoptive placement occurs on or after July 1, 2010.

Although AB 1325 was passed October 11, 2009, its provisions do not become law until July 1, 2010. Therefore, tribal customary adoption will not be recognized as a permanent plan until July 1, 2010. Should you have any questions regarding this letter, please contact the Permanency Policy Bureau at (916) 657-1858, or me at (916) 657-2614.

Sincerely,

Original Document Signed By:

GREGORY E. ROSE
Deputy Director
Children and Family Services Division

ACL No. 09-28 (6/4/09)
ICWA and Adoptions – Forms, Processes and Standards

STATE OF CALIFORNIA—HEALTH AND HUMAN SERVICES AGENCY
DEPARTMENT OF SOCIAL SERVICES
744 P Street • Sacramento, CA 95814 • *www.cdss.ca.gov*

CDSS

JOHN A. WAGNER
DIRECTOR

ARNOLD SCHWARZENEGGER
GOVERNOR

June 4, 2009

ALL COUNTY LETTER NO. 09-28

REASON FOR THIS TRANSMITTAL

[ ] State Law Change
[ ] Federal Law or Regulation Change
[ ] Court Order
[ ] Clarification Requested by One or More Counties
[X] Initiated by CDSS

TO: ALL COUNTY WELFARE DIRECTORS
ALL CHILD WELFARE SERVICES PROGRAM MANAGERS
CHIEF PROBATION OFFICERS
CDSS ADOPTION DISTRICT OFFICES
LICENSED PUBLIC AND PRIVATE ADOPTION AGENCIES
ADOPTION SERVICE PROVIDERS (ASP)
TITLE IV-E AGREEMENT TRIBES
ACADEMY OF CALIFORNIA ADOPTION LAWYERS

SUBJECT: INDIAN CHILD WELFARE ACT AND ADOPTIONS - FORMS, PROCESSES, AND STANDARDS

REFERENCE: All County Letter (ACL) No. 08-02 (Senate Bill (SB) 678, Chapter 838, Statues of 2006 Indian Child Welfare Changes in State Law); All County Information Notice (ACIN) No. I-86-08 (Tribally Approved Foster Homes); California Rules of the Court, Rules 5.481-5.482; Family Code (FC) Sections 170, 177, 180, 185, 3041, 7892.5, 8606.5, 8616.5, 8620, 8801.3, 9208 and 9209; Probate Code 1459.5; Welfare & Institutions Code (W&IC) 224.2, 224.3, 300 et seq., and 16507.4; The Federal Indian Child Welfare Act of 1978 Codified at 25 U.S.C. Section 1901 et seq.

This letter rescinds ACL No. 06-05 (dated May 12, 2006) "Use of ADOPT-226, Notice of Voluntary Adoption Proceedings for an Indian Child" and ACIN No. I-87-04 (dated January 18, 2005), "Notice of Involuntary Child Custody Proceedings for an Indian Child (JV-135)." The Judicial Council has revoked the forms ADOPT-226 and JV-135.

This ACL clarifies how the Indian Child Welfare Act (ICWA) requirements and the new Judicial Council forms, ICWA-010(A), ICWA-020, ICWA-030, and ICWA-030(A), impact adoption proceedings.

Background

Senate Bill (SB) 678 sets forth explicit provisions on noticing and compliance with other requirements of ICWA. The goal of SB 678 is uniform application of ICWA in California. The focus of this ACL is to clarify how ICWA applies to adoption proceedings, and explain the use of Judicial Council rules and forms in the context of ICWA. An Indian child, the child's tribe, a parent, or Indian custodian from whose custody the child has been removed, may petition to have a proceeding for adoption, guardianship, or termination of parental rights (TPR), invalidated for failure to comply with ICWA requirements. These requirements include notice provisions, evidentiary standards, and filing mandated forms with the court. (25 U.S.C. 1914 and W&IC 224(e)).

The ICWA rules must be followed and forms must be used to document all available and relevant information regarding a child's Indian ancestry in cases of an agency or independent adoption. They must also be used exclusively to request confirmation of the child's Indian status from the child's tribe and to provide notice of a hearing or proceeding to the birth parent(s), any custodian of the child, and to the child's tribe. The recipients are thereby informed of the various rights they have under ICWA, including the right to formally intervene in the child custody proceeding.

Family Code (FC) Section 8620 (g) and (h) provide for civil penalties if a person other than a birth parent of a child knowingly and willfully falsifies, conceals or covers up whether the child or his parent is an Indian or assists another to do so.

Rules and Forms

As of January 1, 2008, there are new ICWA rules and mandatory Judicial Council forms for use in compliance with ICWA noticing requirements. Forms ADOPT-226 and JV-135, have been revoked and replaced with the ICWA-010(A), ICWA-020, and ICWA-030 (attached):

Old Form Number and Title	Current Form Number and Title	Description
ADOPT-226 Adoption Proceedings for a Possible Indian Child	ICWA-010(A) Indian Child Inquiry Attachment	This form is **mandatory** for ALL children in the adoption process and is used as part of the initial inquiry. The social worker, adoptions specialist, probation officer, and/or adoption service provider (ASP) completes this form after obtaining information from the child (when appropriate), parents (birth mother, presumed and alleged fathers), Indian custodian, grandparents, other extended family relatives, regarding the child's Indian ancestry. This form should be filled out with the assistance of the California Department of Social Services (CDSS), ASP or licensed adoption agency.

Old Form Number and Title	Current Form Number and Title	Description
		If the case originated in the dependency court and there is proof that inquiry occurred, then inquiry does not need to occur again unless there is new information that provides a reason to know the child is or may be an Indian child.
	ICWA-020 Parental Notification of Indian Status	This form is **mandatory** for ALL children in the adoption process and is used as part of the initial inquiry. This is completed by the parents (birth mother, presumed and alleged fathers), Indian custodian, or legal guardian. This form should be filled out with the assistance of the CDSS, ASP or licensed adoption agency and is signed under penalty of perjury and filed with the court. If the case originated in the dependency court and there is proof that inquiry occurred, then inquiry does not need to occur again unless there is new information that provides a reason to know the child is or may be an Indian child.
ADOPT-226 Adoption Proceedings for a Possible Indian Child JV-135 Notice of Involuntary Child Custody Proceedings for an Indian Child (Juvenile Court)	ICWA-030 Notice of Child Custody Proceeding for Indian Child	This form is **mandatory** when the initial inquiry provides a reason to know that the child is or may be an Indian child. The social worker, adoptions specialist, probation officer, or ASP interviews the parents (birth mother, presumed and alleged fathers), Indian custodian, and extended family members to obtain information to complete this form. This form must also be used to continue to notify the birth parent, Indian custodians, Indian legal guardian, and tribe(s) of all hearings regarding the child.
	ICWA-030(A) Attachment to Notice of Child Custody Proceeding for Indian Child	This form provides extra space for the ICWA-030 (if needed) to show additional tribes or bands served with the notice.
	ICWA-040 Notice of Designation of Tribal Representative and Notice of Intervention in a Court Proceeding Involving an Indian Child	**This form is optional**. It may be used by tribes when identifying a child as a tribe member or potential member. It is also used to designate an individual as the tribe's representative and notify the court that the tribe is intervening in the case. *Any questions regarding this form should be addressed to the Judicial Council.*

Old Form Number and Title	Current Form Number and Title	Description
	ICWA-050 Notice of Petition and Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction	**This form is optional.** It may be used by the tribe, parent, Indian custodian, or attorney to request the case be transferred to tribal jurisdiction. *Any questions regarding this form should be addressed to the Judicial Council.*
	ICWA-060 Order on Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction	The court uses this form to order transfer of the case to tribal jurisdiction. *Any questions regarding this form should be addressed to the Judicial Council.*

These forms are available on the Internet at http://www.courtinfo.ca.gov/cgi-bin/forms.cgi.

ICWA-010(A) - Indian Child Inquiry Attachment

*There is an **affirmative and continuing duty to inquire** whether a child, who is the subject of a child custody proceeding is or may be an Indian child. The inquiry is documented through the use of ICWA-010(A) and ICWA-020. These forms are mandatory for all children being adopted.* Accordingly, before taking a relinquishment, executing a consent/adoptive placement agreement or witnessing a waiver of right to further notice of adoption planning, the CDSS, licensed adoption agency, or ASP must inquire whether the child is or may be an Indian child. This information is recorded on the ICWA-010(A), which must be attached to every adoption petition.

In an independent adoption, the duty to inquire falls on the ASP, unless the petitioner(s) are relatives and an ASP is not needed, in which case the responsibility would fall on the CDSS or delegated county adoption agency. The ASP is also responsible for sending a copy of the ICWA-010(A) to the petitioners, their attorney, and the CDSS or delegated adoption agency.

Information may be obtained from the child, child's parents (birth mother, presumed and alleged fathers), Indian custodian, legal guardians, grandparents, great-grandparents, and any of the child's other relatives or extended family members. If during your inquiry you receive information suggesting that the child is a member of a tribe or eligible for membership in a tribe, or that any of the child's parents (birth mother, presumed and alleged fathers), grand-parents or great-grandparents are, or were members of a tribe you have "reason to know" that the child is, or may be an Indian child. Information obtained is documented on the ICWA-010(A). *Please note that other circumstances may provide reason to know the child is an Indian child, such as*

residence on tribal land, receipt of services from a tribe or receipt of Indian Health Service. This form must be signed by the person conducting the inquiry. This form is filed with the court and becomes part of the adoption case file, regardless of whether the child has Indian ancestry.

The *Indian Child Welfare Act Inquiry Interview* (attached) has suggested questions to assist in determining a child's Indian ancestry. This form is available on the Judicial Council Administrative Office of the Courts' website:

http://www.courtinfo.ca.gov/programs/cfcc/programs/description/jrta-ICWA-JobAids.htm.

ICWA-020 - Parental Notification of Indian Status

This form is mandatory for all children being adopted as part of the initial inquiry on Indian status.

The form must be signed by the parent, Indian custodian, or guardian who completes the form. This form is filed with the court and becomes part of the adoption case file in all cases, regardless of whether the child has Indian ancestry.

Situation	Party Responsible for Completing the ICWA-020
Dependency Cases	The court orders the parent, Indian custodian, or guardian to complete the form at the first hearing. If the parent, Indian custodian or guardian is not present at the hearing, then the Court must order the agency, to use reasonable diligence to find and inform the parent, Indian custodian or guardian that the court has ordered them to complete the form.
Relinquishments (Non-dependent Cases)	The licensed adoption agency or CDSS will assist the parent, Indian custodian or guardian in completing this form prior to accepting a relinquishment or a waiver of right to further notice.
Independent Adoptions	The CDSS, delegated county adoption agency, or ASP will assist the parent, Indian custodian, or guardian in completing this form prior to accepting the adoptive placement agreement, waiver of right to further notice and/or any consent.

ICWA-030 - Notice of Child Custody Proceeding for Indian Child

The ICWA-010(A) and the ICWA-020 are assessed by the CDSS, licensed adoption agency, or ASP along with any other relevant information, to determine whether there is "reason to know" the child is or may be an Indian child. This determination includes an alleged father's Indian ancestry. If yes, then completion of the ICWA-030 is required. The CDSS, licensed adoption agency or ASP must:

- Interview the parents (birth mother, presumed and alleged fathers), Indian custodian, extended family members and any other person reasonably expected to have information regarding the child's membership status or eligibility, to gather the information required to complete ICWA-030. (The ICWA-030(A) is used in addition to the ICWA-030, if additional space is needed.)

  Questions 5 through 8 from this form should be used to interview the birth parents, extended family members, and/or other sources.

- Obtain the names and mailing addresses of the federally-recognized tribe or tribes with which the child may be associated:

  - The ICWA provides that notice is to be sent to the tribal chairperson unless the tribe has designated another agent for service of ICWA notices. If the notice is going to be sent to the Tribal Chair, it is recommended the notice be addressed to "Tribal Chairperson, _____ Tribe". The Designated Tribal Agent for Service of ICWA Notices, if there is one, can be found on the Bureau of Indian Affairs (BIA) Internet website at: http://www.doi.gov/bia/TLD-Final.pdf. **Always notice the name of the designated agent on the BIA list, if there is one identified on the list.** Private licensed adoption agencies and ASPs should address the notice exactly as indicated on the BIA Internet website.

  - You should also notice the contact for the tribe identified in the California CDSS of Social Services (CDSS) Tribal Government Listing located on the CDSS ICWA information page. The CDSS list is more current and can help the tribe receive quicker notice of the proceeding. This list is also located in Child Welfare Services/Case Management System (CWS/CMS). Do not use **the CDSS Tribal Government Listing in lieu of the official BIA List** of ICWA Designated Agents for Noticing, **but in conjunction with the BIA list.** By sending to both addresses, if they differ, you secure meeting legal noticing requirements as well as making effective contact with the tribe.

  - The CDSS and public licensed agencies shall address the notices as listed in CWS/CMS, if available. If not listed, refer to the instructions above for private licensed agencies and ASPs. You may look up the tribal list on the (CWS/CMS), which contains both the BIA designated agent for ICWA service, as well as more current contact information.[1]

[1] For county adoption offices only.

- The *Declaration* on page 8 should be signed by the ASP, CDSS representative or licensed adoption agency completing the form.

- The *Declaration of Mailing – Adoption, Family Law, and Probate Proceedings* should be signed by the ASP, CDSS representative or licensed adoption agency mailing the form.

- Send the ICWA-030 to the child's parents, legal guardian, Indian custodian, and tribe(s) with which the child may be affiliated as soon as there is reason to know that the child is an Indian child.

- The ICWA expressly excludes from the definition of "parent" an "unwed father where paternity has not been acknowledged or established." *Accordingly, alleged fathers do not fall within the ICWA definition of a parent entitled to ICWA noticing.* However, establishment of paternity will trigger ICWA noticing to the alleged father because paternity would change the status of an alleged father to that of a parent as defined under ICWA.

- In addition, where the child's parents or legal guardian, Indian custodian, and child's tribe is known, a copy of the ICWA-030 must be sent to the Secretary of the Interior at the following address:

  The Secretary of the Interior
  1849 C Street, N.W.
  Washington, D.C. 20240

  Note that the inclusion of contact information provided on the ICWA-030 is not required if any person listed on the ICWA-030 is at risk of harm as a result of domestic violence, child abuse, sexual abuse, or stalking. In this situation, redact the information from copies sent to the child's parents, Indian custodian and/or legal guardian. (W&IC 224.2(f))

  If the identity or location of the parents, Indian custodian, or child's tribe cannot be determined or located, send the ICWA-030 to the Secretary of the Interior's designated agency, the BIA, Sacramento Area Director at:

  Sacramento Area Director, BIA
  2800 Cottage Way
  Sacramento, CA 95825

- Send the ICWA-030(s) and attachments by registered or certified mail with return receipt requested.

- Attach to the ICWA-030 a copy of the child's birth certificate, if available, and a copy of the petition by which the proceeding was initiated.

- Ensure the ICWA-030 lists the location, mailing address, and telephone number of the court and all parties notified pursuant to this section.

- If the addresses for the same tribe/band on the various lists are different, send the ICWA-030 to all the listed addresses. Notice must be sent to all bands within a tribe even if the parent or information gathered shows a specific tribe.

Note: Once a tribe has acknowledged a child or intervened, subsequent notices do not need to include the ancestral information, a copy of the petition in the proceeding, a copy of the child's birth certificate, or the statement of rights.

Executing a Consent, Relinquishment or Adoptive Placement Agreement

A relinquishment, adoptive placement agreement, waiver of right to further notice of adoption planning, and/or consent may not be signed until all tribes noticed have responded to the notice or until 60 days have passed and the court determines that ICWA does not apply.

In cases where an Indian child has an alleged father, the alleged father does not need to sign in the presence of a Superior Court Judge even if the Indian ancestry is inherited from the alleged father, unless the alleged father establishes his paternity. However, the birth mother and/or any presumed father would be required to sign in the presence of a Superior Court judge.

In an independent adoption where an Adoption Placement Agreement must be attached to the petition and there is reason to believe the child may fall under ICWA, either of the following processes may be followed:

- Have the birth parent(s) sign the Adoption Placement Agreement for an Indian child in front of a Superior Court Judge. If it is later determined the child falls under ICWA, the form is valid with no further delay in process.

- Have the birth parent(s) sign the regular Adoption Placement Agreement. However, if it is later determined that the child falls under ICWA the form will be invalid and the Adoption Placement Agreement will need to be signed in front of a Superior Court Judge.

The parent of an Indian child may consent to adoption as long as the following requirements are met:

- Consent is given at least 10 days after birth of the child;
- Consent is given in writing;
- Consent is recorded before a court of competent jurisdiction;
- The judge certifies that the terms and consequences of consent were fully explained in detail; and
- The judge certifies that the parent or Indian custodian fully understood the explanation in English or that it was interpreted in a language the parent or Indian custodian understood. (FC 8606.5)

The parent may withdraw consent at any time before the final decree of adoption has been entered in court. The Indian child must be returned to the parent or Indian custodian when consent has been withdrawn. After the final decree is entered in a state court, consent may only be withdrawn if there is evidence that consent was obtained through fraud or duress. (25 U.S.C. 1913; W&IC 16507.4; FC 8606.5 and 8620(b))

Filing the Relinquishment with the CDSS

The CDSS will not accept a relinquishment for filing until initial inquiry has been made. Therefore, all relinquishment documents must be accompanied with the ICWA-010(A) and ICWA-020 to document that the initial inquiry was made. If the initial inquiry shows that the child may have Indian ancestry or may be eligible for membership in a tribe, the CDSS will not accept a relinquishment until the following occurs:

- All recipients have responded that the child is not a member of a tribe or eligible for membership and a biological child of a member of the tribe. Attach all ICWA forms and the responses from the tribes.
- Sixty (60) days have lapsed and the court has determined that ICWA does not apply. Attach all ICWA forms, copy of mailing certification and court determination to the relinquishment.
- Sixty (60) days have lapsed, not all recipients have responded, and the court has not made a determination that ICWA does not apply, then:
    - Continue to obtain all clearances; or
    - Sign all necessary relinquishment documents in front of a Judge and continue sending notices; or

- File a motion requesting the court make a determination that ICWA does not apply.

- All parties have responded and the child has been identified as a member of a tribe or eligible for membership. Attach all ICWA forms and the response from the tribe to the ICWA relinquishment.

The licensed adoption agency filing the relinquishment with the CDSS must submit a copy of the ICWA-010(A), ICWA-020 and ICWA-030 (if applicable), and a copy of all letters of confirmation received from any of the Indian tribes listed on the ICWA-030.

Proceeding With a Case 60 Days After the Date the Notice was Received By All Notice Recipients

If proper and adequate notice has been provided pursuant to W&IC 224.2, and neither the tribe nor the BIA provides a determinative response on the child, the court may determine that ICWA no longer applies to the case. A motion to the court triggers this determination.

Unless and until the court determines ICWA no longer applies, notices (ICWA-030) of each hearing shall continue to be sent and necessary relinquishments, waivers and consents executed in front of a judge in compliance with ICWA.

If the court determines that ICWA no longer applies to the proceeding, then notices are no longer required, unless new information is received based on the petition or other information. Where a court has determined that ICWA does not apply to the proceeding, it shall reverse itself if a tribe or the BIA subsequently confirms the child is an Indian child as defined by ICWA (a member or eligible for membership and biological child of a member). At that point, the court will apply ICWA prospectively.

The court must receive copies of all notices, responses from the tribes or BIA, certified mail receipts and return cards. In cases where an ASP is involved in an independent adoption, the ASP should also send copies of notices to the CDSS or delegated county adoption agency.

No hearing shall be held until at least 10 days after receipt of notice by the parent, Indian custodian, or the tribe. The parents, Indian custodian (if any), and tribe are entitled to an additional 20 days to prepare for the hearing on request.

If more than one tribe determines that an Indian child is a member or eligible for membership as defined in ICWA, the court is to make a determination in writing, with its reasons, as to which tribe is the child's tribe for purposes of the child custody proceeding. Until that determination is made, notices must be sent to all tribes of which the child is affiliated or potentially affiliated.

Duties After Tribe Has Confirmed a Child Is a Tribal Member or Eligible for Membership

The ICWA obligations do not end with noticing. Where a child has been recognized by its tribe, as a member or eligible for membership and biological child of a member, ICWA provides standards applicable only to such Indian children. The following are applicable regardless of whether or not a tribe formally intervenes in the proceeding:

- **Placement preferences** - Placement must be made in accordance with the ICWA designated preferences, unless there is good cause to deviate from the order. The standards to be applied in meeting the preference requirements of the ICWA are the prevailing social and cultural standards of the Indian community in which the child's parent or extended family resides, or with which the parent or extended family maintains social and cultural ties. Thus, the ICWA requires that states defer to Indian social and cultural standards in placement and treatment assessments. The tribe's prevailing social and cultural standards can be established through the use of a qualified expert. (25 U.S.C. 1915(d))

  Adoptive placement preferences are: (1) with a member of the child's extended family; (2) with other members of the Indian child's tribe; (3) with other Indian families. (25 U.S.C. 1915; W&IC 361.31; and FC 177(a))

  A different order of placement may be established by the child's tribe and the court or agency effecting the placement shall follow the order so long as it is in the least restrictive setting appropriate for the child. It is also appropriate to consider the parent's preference or the child's preference where the child is of sufficient age to express the preference.

- **Qualified Expert Witness Testimony -** The removal of an Indian child may only occur if there is **clear and convincing evidence** that is supported by the testimony of an expert witness that continued custody by the parent is likely to result in serious emotional or physical damage**.** The purpose for the use of the qualified expert witness is to provide testimony on the issue of detriment to the child. Qualified expert witness testimony is required before a court orders the child be placed out of the custody of his or her parents or terminates parental rights. (25 U.S.C. 1912(e); W&IC 361.7(c); and FC 7892.5(b))

- *Parental rights may not be terminated* in the absence of a determination, supported by evidence **"beyond a reasonable doubt"** including testimony of a qualified expert witness that the continued custody 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); W&IC 366.26(c)(2)(B)(ii); and FC 7892.5(b))

- **Active efforts** are required to prevent breakup of the Indian family. Evidence of the active efforts must be provided to the court. What constitutes active efforts is assessed on *a case by case basis.* However, active efforts are to be conducted in a manner that takes into account the "*prevailing social and cultural values and way of life of the Indian child's tribe.*" Active efforts must use the available resources of extended family, the tribe, tribal and other Indian social service agencies and individual Indian caregiver service providers. (W&IC 361.7; FC 177(a), and 3041(e))

For further discussion on these standards, refer back to ACL 08-02 (January 28, 2008). In addition, there are many resources available from the Judicial Council Administrative Office of the Courts.

Waiver of Right to Further Notice of Adoption Planning

If a presumed father of an Indian child chooses to sign the Waiver of Right to Further Notice of Adoption Planning form (AD 590A), he must sign this form in front of a judge. Once a waiver is signed no further noticing is required.

Independent Adoptions – Finalization Hearings

In an independent adoption, the petitioners or their attorney have the responsibility to notice the tribes, child's parents, legal guardian or legal custodian. Notice must be given at least 10 days prior to the hearing unless an additional 20 days has been requested by the tribe, child's parents, legal guardian or legal custodian. Notice shall be sent by registered or certified mail, with copies to the CDSS or delegated county adoption agency and the court.

The final court report filed by the CDSS or delegated county adoption agency should notify the court of ICWA compliance in the proposed adoption and report to the court any missing ICWA forms, notices or any facts disclosed during the course of the investigation that may be relevant to the court's determination of the best interest of the child.

Agency Adoptions – Finalization Hearings

In an agency adoption, the CDSS or licensed adoption agency has the responsibility to notice the tribes, child's parents, legal guardian or legal custodian. Notice must be given by registered or certified mail at least 10 days prior to the hearing unless an additional 20 days has been requested by the tribe, child's parents, legal guardian or legal custodian.

Post Adoption Contact Agreements

Prior to issuance of a decree of adoption, the court may require mediation for the purpose of reaching a post-adoption contact agreement when the child is an Indian child and the adoptive parent agrees to negotiate post adoption contact. If the court finds lack of good faith, it may modify existing orders or issue new orders to ensure the best interest of the Indian child including ordering further mediation initiating guardianship in lieu of adoption, or authorizing a change of the adoptive placement. Failure to reach an agreement does not in and of itself constitute evidence of lack of good faith. (FC 8616.5 and 8620(f))

Terms of a post-adoption agreement may include the following:

- Visitation between child and birth parent, birth relatives, and the child's tribe;
- Future contact between birth parents, birth relatives, and the child, and/or child's adoptive parent, and the tribe;
- Future sharing of information about the child. (FC 8616.5 and 8620(f))

Final Orders of Adoption

Upon entering the final order of adoption, the clerk will provide a copy to the Secretary of the Interior within 30 days of the date of the order, including any of the following information:

- The name and tribal affiliation of the child;
- The names and addresses of the biological parents;
- The names and addresses of the adoptive parents;
- The identity of any agency having files or information relating to that adoptive placement and
- If the court records contain an affidavit of the biological parent(s) that their identity remains confidential, the court shall include that affidavit with the other information.

Upon reaching the age of 18, the adopted Indian child may petition the court for information about his/her biological parents, tribal membership rights, eligibility for federal or tribal programs or services available to Indians. (FC 9208 and 9209)

Right of Intervention

The Indian child's tribe, parents, and Indian custodian have the right to intervene at any point in the adoption proceedings until finalization. They may intervene orally, in writing, or by submitting an ICWA-040 to the court. Once a tribe has formally intervened, it is a "party" to the proceedings. Status as a party gives the tribe more participatory rights in the proceedings, including the right to the record of the proceedings.

A tribe need not intervene to be entitled to participate in an Indian child custody proceeding. Tribal participation is relevant to determine placement or adoptive preferences, including tribally approving a home (See ACIN I-86-08 (November 20, 2008)). Tribes may also help identify qualified expert witnesses, Indian services and programs.

Transfer Issues

A tribe, parent, or Indian custodian may petition the court to transfer an Indian child's adoption proceeding to tribal jurisdiction. The court must transfer the case unless there is good cause not to do so. The court shall dismiss the proceeding, or terminate jurisdiction, only after receiving proof that the tribal court has accepted the transfer of jurisdiction. Please refer back to ACL 08-02 (January 28, 2008) for further discussion.

If you have any questions regarding this ACL please contact the Permanency Policy Bureau for questions pertaining to agency adoptions at (916) 657-1858 or the Adoptions Services Bureau for questions pertaining to independent adoptions at (916) 651-8089. For general ICWA questions, contact the ICWA Specialist in the Office of Child Abuse Prevention at (916) 651-6960.

Sincerely,

Original Document Signed By:

GREGORY E. ROSE
Deputy Director
Children and Family Services Division

Attachments

ATTACHMENT A: INDIAN CHILD INQUIRY
ICWA 010 http://www.courtinfo.ca.gov/forms/documents/icwa010a.pdf

ATTACHMENT B: PARENTAL NOTIFICATION OF INDIAN STATUS
ICWA 020 http://www.courtinfo.ca.gov/forms/documents/icwa020.pdf

ATTACHMENT C: NOTICE OF CHILD CUSTODY PROCEEDING FOR INDIAN CHILD
ICWA 030 http://www.courtinfo.ca.gov/forms/documents/icwa030.pdf

ACIN No. 1-06-09 (1/23/09)

Administrative Office of the Courts
Indian Child Welfare Act (ICWA) Initiative

CDSS
JOHN A. WAGNER
DIRECTOR

STATE OF CALIFORNIA—HEALTH AND HUMAN SERVICES AGENCY
DEPARTMENT OF SOCIAL SERVICES
744 P Street • Sacramento, CA 95814 • *www.cdss.ca.gov*

ARNOLD SCHWARZENEGGER
GOVERNOR

January 23, 2009

REASON FOR THIS TRANSMITTAL
[ ] State Law Change
[ ] Federal Law or Regulation Change
[ ] Court Order
[ ] Clarification Requested by One or More Counties
[X] Initiated by CDSS

ALL COUNTY INFORMATION NOTICE NO. 1-06-09

TO: ALL COUNTY WELFARE DIRECTORS
ALL CHILD WELFARE PROGRAM MANAGERS
ALL CHIEF PROBATION OFFICERS

SUBJECT: ADMINISTRATIVE OFFICE OF THE COURTS
INDIAN CHILD WELFARE ACT (ICWA) INITIATIVE

The purpose of this All County Information Notice (ACIN) is to provide information to counties, tribes and other interested individuals/organizations, concerning an invaluable resource that is available regarding the Indian Child Welfare Act (ICWA).

Since 2002 the California Department of Social Services (CDSS) has contracted with the Administrative Office of the Courts (AOC), Center for Families, Children and the Courts to develop statewide training materials and provide training and technical assistance to local courts and court personnel to help improve compliance with the requirements of the ICWA. The project is known as the ICWA initiative.

The ICWA Initiative Project came to be after discussions with the state's ICWA Workgroup, which indicated a great need to promote full compliance by county social workers and probation officers. A description of the program and staff contact information can be found at:
http://www.courtinfo.ca.gov/programs/cfcc/programs/description/jrta-IndianChild.htm

Over the past several years, the project has developed a number of resources which are available on line, including:

- Answers To Frequently Asked Questions About the ICWA
  http://www.courtinfo.ca.gov/programs/cfcc/faq/#icwa

- A comprehensive list of services and resources for Indian children and families, organized by region. This list is updated regularly, and can be accessed at: http://www.courtinfo.ca.gov/programs/cfcc/programs/description/ICWA/

- A list of individuals who may be able to serve as a "qualified expert witness" in an ICWA case. This list is not endorsed by the CDSS nor the AOC, but rather is provided as a resource for identifying and screening potential expert witnesses. This list is updated regularly, and can be accessed at: http://www.courtinfo.ca.gov/programs/cfcc/programs/description/jrta-ICWAExpertWitness.htm

- Materials and resources on the background to and context for the ICWA. These include a power-point presentation prepared by Justice Thorne of the Utah Court of Appeal, a powerful video presentation by Justice Thorne regarding the history of the ICWA from a tribal perspective, and two video presentations, entitled "ICWA 101: Fundamentals of the Indian Child Welfare Act" and "Advanced ICWA: Detailed Provisions of the Indian Child Welfare Act." They can be found at:

  - http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/JRTA-ICWA-Symposia/IA.pdf

  - http://www.courtinfo.ca.gov/programs/cfcc/programs/description/jrta-ICWAHistory.htm

- Links to relevant legislation and regulations can be found at: http://www.courtinfo.ca.gov/programs/cfcc/programs/description/jrta-ICWALaws.htm. Here you will find the Indian Child Welfare Act itself, the Federal Guidelines for State Courts, the Federal Regulations concerning the ICWA as well as relevant portions of the California Welfare and Institutions Code, Family Code and Probate Code, and California Rules of Court and Court forms concerning the ICWA.

- The Judges Bench Handbook for the ICWA can be found at: http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/ICWAHandbook2008.pdf

- A variety of charts and resources for practitioners can be found at: http://www.courtinfo.ca.gov/programs/cfcc/programs/description/jrta-ICWA-JobAids.htm. These include:

- "Indian Child Welfare Act Requirements" - a concise reference of the key substantive provisions of the ICWA and corresponding California state law provisions.

- "Juvenile Courts: Recommended Legal Findings and Orders for Cases Involving the Indian Child Welfare Act" – a guide to what issues need to be considered and ruled upon at each stage of a juvenile dependency/delinquency proceeding.

- "Social Service Departments: Requirements – Indian Child Welfare Act and Senate Bill 678"- a guide for social workers in dependency cases as to what their responsibilities are under the ICWA at each stage of the proceedings.

- "Probation Department Requirements – Indian Child Welfare Act and Senate Bill 678"- a guide for probation officers in delinquency cases as to what their responsibilities are under the ICWA as each stage of the proceedings.

- "Family Courts: Requirements Under the Indian Child Welfare Act and Senate Bill 678" – a reference chart tailored to the ICWA in proceedings under the California Family Code.

- "Probate Courts Recommended Legal Findings and Orders for the Indian Child Welfare Act" – a reference chart tailored to the application of the ICWA in proceedings under the California Probate Code.

- "Understanding ICWA Noticing Issues in California" - an outline of some of the historical factors that complicate the application of ICWA in California and make ICWA noticing so important and challenging.

- "Indian Child Welfare Act Interview Tool" – a checklist for interviewing individuals to gather the information required to complete ICWA notice.

In addition to these specific resources, project staff is available to give training and technical assistance to local courts and county personnel on a wide variety of ICWA issues. The project has a supervising attorney, a full-time staff attorney, a part-time social worker, who is a former Children Protective Services worker, and an administrative assistant. They can be reached at:

- Jennifer Walter, Supervising Attorney, jennifer.walter@jud.ca.gov or (415) 865-7687

- Ann Gilmour, Attorney, ann.gilmour@jud.ca.gov or (415) 865-4207
- Vida Castaneda, Court Services Analyst, vida.castaneda@jud.ca.gov or (415) 865-7874
- Kristi Bergen, Administrative Coordinator, kristi.bergen@jud.ca.gov or (415) 865-8836

Should you have any questions regarding this ACIN, please feel free to contact Teresa Contreras, Chief, Office of Child Abuse Prevention at (916) 651-6960.

Sincerely,

Original Document Signed By:

LINNÉ STOUT, Acting Branch Chief
Child Protection and Family Support Branch

ACIN No. I-86-08 (11/20/08)
Tribally Approved Foster Homes

CDSS
JOHN A. WAGNER
DIRECTOR

STATE OF CALIFORNIA—HEALTH AND HUMAN SERVICES AGENCY
DEPARTMENT OF SOCIAL SERVICES
744 P Street • Sacramento, CA 95814 • *www.cdss.ca.gov*

ARNOLD SCHWARZENEGGER
GOVERNOR

November 20, 2008

ALL COUNTY INFORMATION NOTICE NO. I-86-08

REASON FOR THIS TRANSMITTAL

[ ] State Law Change
[ ] Federal Law or Regulation Change
[ ] Court Order
[ ] Clarification Requested by One or More Counties
[X] Initiated by CDSS

TO: ALL COUNTY WELFARE DIRECTORS
ALL CHILD WELFARE SERVICES PROGRAM MANAGERS
CHIEF PROBATION OFFICERS
TITLE IV-E AGREEMENT TRIBES

SUBJECT: TRIBALLY APPROVED FOSTER HOMES

REFERENCE: THE FEDERAL INDIAN CHILD WELFARE ACT (ICWA) OF 1978 CODIFIED AT 25 U.S.C. SECTION 1901 ET SEQ; ALL COUNTY INFORMATION NOTICE I-43-04; ALL COUNTY INFORMATION NOTICE I-94-06; ALL COUNTY LETTER NO. 08-02; SENATE BILL (SB) 678, CHAPTER 838, STATUTES OF 2006; WELFARE AND INSTITUTIONS CODE (W&IC) SECTIONS 361.31, 727.1; 45 CODE OF FEDERAL REGULATIONS (CFR) 1355.20; HEALTH AND SAFETY CODE SECTION 1505

The purpose of this notice is to provide information and clarification regarding the use of tribally approved homes as placement options for Indian children under county jurisdiction.

The ICWA at section 25 U.S.C. § 1915 (b), allows federally recognized tribes to establish their own licensing/approval standards and to approve homes for the purpose of foster placement or pre-adoptive placement of an Indian child. County social workers and probation officers are authorized to consider tribally approved homes for the potential placement into foster care of an Indian child under county jurisdiction. When an Indian child is involved in a dependency action, or a delinquency action where the child is at risk of entering foster care, the option of a tribally approved home should be considered. As will be explained further, licensing/approval requirements (e.g., the size of the home, whether more than two children are sharing a bedroom, etc.) cannot be used as rationale for not placing an Indian child in a tribally-approved home.

Additionally, tribes are not required to have a Title IV-E agreement in order for counties to be authorized to use tribally approved homes for the placement of children under county care.

Home Approval Standards

It is important for county social workers and probation officers to be aware that, with the exception of background clearance requirements, tribally approved homes are not subject to state licensing approval standards. Tribes have the independent authority to approve foster homes using their own socially and culturally appropriate standards pursuant to the ICWA, at 25 U.S.C. § 1931, which provides that tribally approved homes are deemed equivalent to licensing or approval by a state.

The Federal Administration for Children and Families states: "*The definition of 'foster family home' at 45 CFR 1355.20 gives tribal licensing or approval authorities the jurisdiction to license or approve homes that are on or near Indian reservations. This is consistent with the ICWA; at section 1931(b), which states that for purposes of qualifying for funds under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe is equivalent to licensing or approval by a State. The authority to license or approve includes the authority to set standards.*"

California has further affirmed in state law that a tribally approved home is not subject to state licensing requirements when the child involved is eligible under the ICWA, and the placement is with a relative or extended family member of the child, or in a home licensed, approved, or specified by the Indian child's tribe. (Health and Safety Code § 1505).

To confirm that a tribe has approved a home, the county social worker or probation officer should request written confirmation from the tribe. Depending on tribal practice, this may include a tribal council resolution or letter from the tribe identifying the prospective foster or adoptive parents and confirming that the tribe has approved the home.

Background Checks

Prior to placing a child in a tribally approved home, the county social worker must complete a criminal record and child abuse registry background check on **all** individuals residing in the home who are over age eighteen. Tribally approved or certified homes are not exempt from clearance requirements, which also includes federal requirements as mandated by Public Law 109-248, known as the Adam Walsh Child Protection and Safety Act of 2006, (the Adam Walsh Act). Each adult in the home must complete an *Out of State Disclosure and Criminal Record Statement* (LIC 508D) indicating whether

or not they have lived out of state within the last five (5) years. If an individual has lived out of state within the last five (5) years, the child welfare agency must check the child abuse registry in the other state, provided that state maintains a registry. This information must be clearly documented within the child's case record. A current list of registries and a template form for requesting information from another state is available on line at http://ccld.ca.gov/PG561.htm.

Tribes do not have access to the required California Department of Justice (DOJ) information to conduct background checks. The only exceptions are those with a Title IV-E Agreement with the California Department of Social Services (CDSS), with approved access from the DOJ[1]. For cases under county jurisdiction the criminal background check must therefore be completed by the counties, just as for any other relative/Non-Related Extended Family Members (NREFM) placement. All clearances requirements, including the Child Abuse Central Index (CACI) clearance requirements must also be conducted as part of the safety considerations of the home.

In the event that an individual who has been approved or licensed by a tribe has a criminal record, the county social worker must follow the same guidelines and apply the same standards for criminal record exemptions as they would with any other relative/NREFM home.

Placement Preferences

The use of tribally approved homes is consistent with federal and state preferences for placement of children with relatives, and within the objective of placing children so that they retain ties to their communities. As soon as an Indian child is identified as having connections to a specific tribe, it is appropriate to explore the potential placement options with that tribe even though the formal noticing to the tribe has not been completed. Tribes are commonly composed of close knit communities of extended families. Even when individuals are not biologically related, they likely are eligible for consideration as NREFMs because of the pre-existing familial and advisor relationships that commonly exist through tribal cultural connections and customs.

When you know the child's tribe, you must consult with the tribe and when available make use of tribal services when formulating your placement recommendation. The ICWA specifies that placement of Indian children shall be in the least restrictive setting within reasonable proximity to the Indian child's home and meet the child's special needs. [W&IC § 361.31(g)] Placement must be made in accordance with the ICWA

Pursuant to SB 703, (Chapter 838, Statutes of 2007) tribes with Title IV-E Agreements are authorized to secure fingerprint access via the CA Department of Justice. At this time only the Karuk Tribe has such an agreement. Tribes must apply and secure approval for access from the Department of Justice. Questions arising regarding IV-E Tribes should be directed to the ICWA Specialist.

designated preferences, unless the court finds there is good cause to deviate from the order. [See also W&IC § 361.31(b)]

Foster care placement preference for Indian children must be given in the following order:

(1) a member of the 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; and (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.

Adoptive placement preferences are:

(1) With a member of the child's extended family; (2) with other members of the Indian child's tribe; and (3) with another Indian family. [W&IC § 361.31(c)]

In lieu of the placement preferences as stated above, any tribe may, by tribal resolution, choose another placement preference order. [W&IC § 361.31(d)]

Under the ICWA, cultural considerations and concern for tribal heritage are relevant to child custody proceedings. The standards applied in meeting the preference requirements of the ICWA are the prevailing social and cultural standards of the Indian community in which the child's parent or extended family resides, or with which the parent or extended family maintains social and cultural ties. Thus, the ICWA requires that states defer to Indian social and cultural standards in placement and treatment assessments. [25 U.S.C. § 1915(d)]

Tribally approved homes are preferred to non-Indian foster homes under the ICWA. Local county child welfare agencies and probation departments should work with tribes to develop an understanding of tribal practice, to find tribally approved homes and utilize these homes unless good cause to the contrary exists.

Non-Federally Recognized Tribes

Because the ICWA does not apply to non-federally recognized tribes, in the case where a non-federally recognized tribe requests that their placement recommendations be considered, such recommendations may be considered by the county but the placement would still be subject to county licensing and/or relative approval standards. In addition, a court may permit a non-federally recognized tribe from which the child is descended, to participate as a formal party in child welfare proceedings. Formal participation by the

non-federally recognized tribe will inform the court on placement options and services available for the child within the child's extended family or the tribal community. [W&IC § 306.6; Fam. Code § 185] The purpose of allowing non-federally recognized tribes to participate in child welfare proceedings is that they can assist the court in making decisions that are in the best interest of the child by informing the court about placement options, identification of relative or non related extended family members and in the identification of Indian specific services and programs available to the child. Taking into consideration recommendations from the child's tribe will facilitate decisions that are best suited to the Indian child notwithstanding the tribe's technical status.

Urban Indian Children

Counties in urban areas commonly encounter Indian children from out of state or out of area tribes. The ICWA placement preferences (25 U.S.C. §1915(d), W&IC §361.31), and noticing requirements are clearly applicable in these cases. Additionally, the placement preferences specified in W&IC § 361.3, which directs counties to identify and consider relatives for the placement of the child, must be utilized. At the same time, counties should immediately contact the child's tribe to seek assistance in the identification of a home that meets the tribe's placement preferences, even though the formal noticing process may not yet be complete. Further, counties are encouraged to work with local Indian organizations (some which exist specifically to serve Urban Indians) to promote identification of culturally appropriate resources for Indian children and families, and to promote an understanding of the history of Native Americans in urban settings, their separation from their Tribe, and the implications to their relationships.

Interstate Placements

California adopted the Interstate Compact on Placement of Children (ICPC) thus enacting agreed upon requirements and standards between receiving and sending states when there are out of state placements of children. [Family Code §7900 et. seq.] Accordingly when a county is retaining the care and placement responsibility of a child, the county must follow the ICPC protocols, except as specified below.

A. Transfer to a Tribal Court

As it relates to Indian children the only exception in state code to application of the ICPC for an out of state placement of an Indian child is when the child is being transferred to a tribal court's jurisdiction. The SB 678 specified in Family Code §7907.3 that the ICPC does not apply to a transfer of jurisdiction to a tribal court.

B. County and Tribally Approved Home in Another State

Tribes located in other states have the authority under the ICWA to approve homes within their tribal standards. However, California does not provide an exception to applicability of the ICPC when the county court continues to retain jurisdiction of the Indian child and seeks to place in an out of state tribally approved home. Counties therefore need to continue to follow ICPC requirements, and thus defer to the out of state ICPC administrator to assure that the potential placement is a tribally approved home per the ICWA, and that the placement meets criminal record and other requirements set forth through ICPC protocols.

Title IV-E Funding

Placements in tribally approved homes under the jurisdiction of a county dependency or juvenile court and supervised by the child welfare agency or probation department, continue to qualify for Title IV-E foster care maintenance payments or adoption assistance benefits as long as the home is on or near an Indian reservation. Federal Code Regulation (45 CFR 1355.20) states *"Foster family home means, for the purpose of Title IV-E eligibility, the home of an individual or family licensed or approved as meeting the standards established by the state licensing or approval authority(ies) (or with respect to foster family homes on or near Indian reservations, by the tribal licensing or approval authority(ies), that provides 24-hour out-of-home care for children."*

In the case of a tribe with a Title IV-E Agreement and where the tribe has accepted jurisdiction of the case, the county court would dismiss the action and transfer the case to the Title IV-E tribe. The Title IV-E funding would follow the Indian child, if Title IV-E eligible.

Placement Responsibility

In all situations, the responsibility for determining the appropriateness of a placement for a child, including an Indian child, continues to rest with the county social worker. If there is reason to believe that the placement would not be a safe one, the county placement worker should discuss the concern with the tribe and allow for possible correction of the issue of concern. Ultimately, the final placement decision and responsibility for that placement is with the county child welfare services agency.

Collaboration with Tribes

Based on feedback obtained from both county and tribal representatives, it is essential that the counties and the tribes work collaboratively from the start to successfully and efficiently identify an appropriate placement for the Indian child. From initial contact with

the child and family, the social worker has an affirmative and continuing duty to ask about any possible Indian heritage. [W&IC § 224.3(a)] If the child's tribe is identified, it is appropriate to seek the cooperation of the Indian child's tribe by contacting the tribe's ICWA worker. Additionally, tribes may have resources to provide necessary services and supports through tribal programs that may not be available via the county. Some tribes with Tribal Temporary Assistance for Needy Families (TANF) programs are utilizing the services available to Indian families to address issues that brought them to the attention of the child welfare services agency.

There are various models of cooperation that encourage and strengthen collaboration between tribes and county child welfare services agencies throughout California. One example of this is the use of ICWA roundtables which involve representatives from multiple agencies such as the dependency court, the county child welfare services agency, tribes and others, to facilitate communication prior to the removal of children, for placement decisions and for ongoing proceedings. The incorporation of tribal social workers in multidisciplinary team approaches such as Wraparound, Family to Family and Differential Response approaches are other options that are being used to improve communication and services for Indian children and families. The use of memorandums of understandings that outline protocols for county and tribal communications in emergency situations that might require the removal and protective placement of Indian children, can also be used.

Administrative Office of the Courts (AOC) ICWA Initiative

In an effort to promote and facilitate the ICWA compliance, the CDSS has entered into an agreement with the AOC, Center for Children and Families to carry out an ICWA Initiative. This invaluable partnership provides a wealth of resources for technical assistance to county child welfare agencies, probation departments and court officers. Information about this project may be found at:
http://www.courtinfo.ca.gov/programs/cfcc/programs/description/jrta-IndianChild.htm

If you have any questions about this notice, or need technical assistance, please contact Teresa Contreras, Chief, or Lee Ann Kelly, Assistant Chief, Office of Child Abuse Prevention, at (916) 651-6960.

Sincerely,

Original Signed Document Signed By:

LINNÉ STOUT, Acting Chief
Children Protection and Family Support Branch

ACL 08-02 (1/30/08)

Senate Bill 678
Indian Child Welfare Changes in State Law

DEPARTMENT OF SOCIAL SERVICES
744 P Street, Sacramento, California 95814

January 30, 2008

ALL COUNTY LETTER NO. 08-02

REASON FOR THIS TRANSMITTAL

[ ] State Law Change
[ ] Federal Law or Regulation Change
[ ] Court Order
[ ] Clarification Requested by One or More Counties
[X] Initiated by CDSS

TO: ALL COUNTY WELFARE DIRECTORS
ALL CHILD WELFARE SERVICES PROGRAM MANAGERS
CHIEF PROBATION OFFICERS
CDSS ADOPTION DISTRICT OFFICES
COUNTY AND PRIVATE LICENSED ADOPTION AGENCIES
ADOPTION SERVICE PROVIDERS
TITLE IV-E AGREEMENT TRIBES

SUBJECT: SENATE BILL (SB) 678, Chapter 838, Statutes Of 2006
INDIAN CHILD WELFARE CHANGES IN STATE LAW

REFERENCE: The Federal Indian Child Welfare Act of 1978 Codified At 25 U.S.C. Section 1901 et seq.; All County Information Notice I-3-04 (The Indian Child Welfare Act/Frequently Asked Questions); California Rules of Court, Rules 5.480-5.487, 5.664, and 7.1015; Welfare & Institutions Code 300 et seq.; and 602 et seq.; WIC 601, Family Code 3041, and Probate Code 1459.5.

The purpose of this All County Letter (ACL) is to provide information and resources on SB 678 (Chapter 838, Statutes of 2006). This legislation is a comprehensive bill that focuses on child custody proceedings for Indian children. The goal of SB 678 is the uniform application of the federal Indian Child Welfare Act (ICWA) in California. The underlying purpose of the ICWA is to protect the best interests of Indian children, including having tribal membership and connection to their tribal community, and to promote the stability and security of Indian tribes and their families.

For the most part, this legislation does not create new requirements but rather incorporates the federal ICWA into California law. SB 678 places those requirements in the Family, Probate and Welfare and Institutions (W & I) Code provisions governing juvenile court proceedings, as well as some child custody matters in family law, probate guardianships, certain probate conservatorships, and the relinquishment of a child by a parent.

This ACL and the relevant California Rules of Court found at http://www.courtinfo.ca.gov/courtadmin/aoc/ are intended to help with the ICWA compliance and implement SB 678. Additionally, the California Department of Social Services (CDSS) and the Administrative Office of the Courts (AOC), Center for Children and Families, through an Interagency Agreement with CDSS have invaluable information. These resources can be accessed on line. (See http://childsworld.ca.gov and http://www.courtinfo.ca.gov/programs/cfcc/programs/description/jrta-IndianChild.htm.).

This ACL references the ICWA as addressed in SB 678. However, readers are encouraged to read the federal ICWA (25 U.S.C. § 1901 et seq.), the federal regulations (25 C.F.R. § 23.1 et seq.) and the federal guidelines on the ICWA (Federal Register/vol.44, No228/November 26, 1979/Notices 87584).

BACKGROUND

In 1978 the U.S. Congress enacted the ICWA, (25 U.S.C. § 1901 et seq.) partially in response to the demonstrated high rate of Indian children being removed from their tribes, to the detriment of the children who lost ties to their tribes, and of the tribes whose composition and actual survival was threatened by how states handled the removal, placement and adoption of Indian children. The ICWA was intended as a federal mandate to those involved in the child custody system to work collaboratively with tribes to prevent the break up of Indian families and tribes, and to redress past wrongs of the American child custody system. At that time, in California, Indian children were eight times more likely to be removed from their families than non-Indian children and more than 90 percent were placed in non-Indian homes. The ICWA established minimum federal standards that must be followed when removal of Indian children from their families becomes necessary. Since then, states throughout the country, including California, have enacted statutes and regulations in response to the requirements of the ICWA.

The ICWA applies to federally recognized tribes. In California, there are 104 federally recognized tribes, and at least 33 non-federally recognized tribes. California's Indian population now exceeds that of any other state, including Alaska. Recent data indicates that a large number of Indian children in the California child welfare system are still being placed in non-Indian homes. Data further indicates that over 50 percent of Indian children in California are placed with non-relative, non-Indian substitute caregivers. This reflects placement determinations made notwithstanding expressed congressional preferences in the ICWA on placement of Indian children in Indian homes. Further, these issues and others have been verbally expressed by tribal members as part of California's recently completed Children and Family Services Review Statewide Self-Assessment.

Compliance with the ICWA is of significant importance in California. Congress included a provision in the ICWA that allows states to establish higher standards of protection if they choose and that these higher standards must be applied. (25 U.S.C. § 1921.) SB 678 extends the ICWA requirements in several areas. SB 678 uses the definition of "tribe" contained in the ICWA as to which tribes it applies, namely federally recognized tribes. SB 678 has also made it clear that at the court's discretion a non-federally recognized tribe may participate in dependency child custody proceedings and in certain proceedings under the Family Code. As set forth in SB 678, this new provision is not to be construed to make the provisions of the ICWA, or of any state law implementing the ICWA, applicable to the proceedings beyond those specified in the new provision. What is allowed is addressed in part II of this ACL.

I. CLARIFICATIONS TO THE ICWA REQUIREMENTS

Many, if not most, of the provisions that have been codified into state law by SB 678 were pre-existing law emanating from the federal ICWA statute and accompanying federal regulations, which were to some extent already contained in the W & I Code, and in former California Rules of Court Rule 1439 (replaced with comprehensive new Rules 5.480-5.487, 5.664, and 7.1015.) By placing the ICWA provisions more comprehensively into California codes, it is expected that compliance will be facilitated. In addition, the Judicial Council issued new rules effective January 1, 2008, further implementing SB 678.

A. Application of the Act

SB 678 clarifies that the ICWA applies to the following child custody proceedings:

1. Proceedings under W & I Code section 300 et seq., and under W & I Code sections 601 and 602 et seq. in which the child is at risk of entering foster care or is in foster care, including detention hearings, jurisdiction hearings, disposition hearings, review hearings, hearings under W & I Code section 366.26, and subsequent hearings affecting the status of the Indian child;
2. Proceedings under Family Code section 3041 pertaining to the award of custody to a non-biological parent;
3. Proceedings under the Family Code resulting in adoption or termination of parental rights; and
4. Proceedings listed in Probate Code section 1459.5 pertaining to guardianships or conservatorships.

B. Initial Requirement: Inquiry/Notice

There are duties associated with the stage of a child custody proceeding where it has not yet been confirmed by a tribe that a child, as set forth in the ICWA, is a member or eligible for membership in a tribe and a biological child of a member of a tribe.

Duty to Inquire

The duty to issue notice to tribes required by the ICWA implies a duty to inquire whether a child is an Indian child at the first contact. SB 678 makes explicit that in the above specified child custody proceedings, there is an affirmative and ongoing duty to inquire whether a child involved in W & I Code sections 300, 601 or 602 proceedings is or may be an Indian child and in juvenile wardship, if the child is at risk of entering foster care, is in foster care, or whose parent is considering placement for adoption. If the court, social worker, probation officer, adoption agency, adoption service provider, or the court investigator or petitioner in a proceeding under the Family Code or Probate Codes listed above, knows or has reason to know that an Indian child is or may be involved, then further inquiry regarding the possible Indian status of the child must be made. (W & I Code, § 224.3; Prob. Code, § 1459.5(b); Fam. Code, § 177(a).)

The child, the child's parents or legal guardians, the child's Indian custodians if the child is living with an Indian caregiver, should be asked as soon as possible, whether the child is an Indian child. If one learns of relatives having information about the child's Indian ancestry then they should also be asked.

Circumstances that may give rise to a further duty to inquire are specified and include, but are not limited to the following: (1) information is provided by the child, an officer of the court, a tribe, Indian organization, a public or private agency, or an extended family member suggesting the child is a member or eligible for membership in a tribe or one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe; (2) the residence or domicile of the child, or the child's parents, or Indian custodian is in a predominantly Indian community; or (3) the child or the child's family has received services or benefits available to Indians from a tribe or from the federal government, such as Indian Health Service. (W & I Code § 224.3(b); Prob. Code §§ 1459.5(b), 1513(h); Fam. Code § 177(a).)

If new information is obtained regarding the child's Indian heritage, notice with the new information must be sent to tribes of which the child may be a member or eligible for membership. (W & I Code § 224.3(f).)

Note: The agency, social worker, probation officer, or petitioner in a probate or family case may get information that suggests the child is affiliated with more than one tribe. This will necessitate further inquiry into information about said tribes and will necessitate notice to all tribes with which the child is potentially affiliated.

Notice Requirements

SB 678 sets forth explicit provisions on how noticing must occur when Indian children may be involved. The state codes now incorporate the provisions that were already in the federal ICWA regulations and guidelines. Special note should be made of these provisions. A significant portion of appellate cases have involved challenges to how the ICWA noticing was carried out. Improper or insufficient notice may invalidate child custody proceedings where the ICWA is applicable. An Indian child, the child's tribe, a parent, or Indian custodian from whose custody the child has been removed, may petition to have a child custody proceeding for foster care, guardianship, or termination of parental rights, invalidated for failure to comply with certain specified ICWA requirements including notice provisions. (W & I Code § 224(e).)

To Whom Notices Should Be Sent

Notice shall be sent to the Indian child's parents or legal guardian, Indian custodian[1] and the tribe or tribes with whom the child is potentially affiliated. (25 U.S.C. § 1912(a); 25 C.F.R. § 23.11(a); W & I Code §§ 224.2(a), 727.4(a)(2); Prob. Code § 1460.2; Fam. Code § 180.)

SB 678 specifies notice is to be sent to the tribal chairperson unless the tribe has designated another agent for service. (W & I Code §224.2(a)(2).) The federal regulations on the ICWA provide that a tribe may designate an agent, other than the tribal chairperson, for service of the ICWA notices. The Bureau of Indian Affairs (BIA) develops a list that is published in the Federal Register as the official document that lists the designated Tribal agents for service of notices and the addresses for the tribes. The most recent list, dated August 2, 2006, is located at: (http://www.doi.gov/bia/ICWA%20Tribal%20Agents%2008-02.pdf). Currently, the BIA is preparing a new list that is anticipated to be completed by early 2008. It will be posted at www.doi.gov/bia.

Note: CDSS attempts to keep a current roster of federally recognized tribes and their addresses on the Child Welfare Services/Case Management System

1 An Indian custodian means "any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child". (25 U.S.C. § 1903(6).)

(CWS/CMS) to facilitate noticing of tribes. However, CWS/CMS cannot be used as the sole contact list for purposes of sending the ICWA notices. Some courts have taken a strict view that only the agent for service designated and posted in the Federal Register is the appropriate contact. CDSS is therefore assessing potential modifications to the CWS/CMS list so that the BIA most recent list of designated agents for service is included, in addition to the most recent contact information gathered by CDSS. It is recommended that notice be sent to the individuals in the list of designated agents for service developed by the BIA, as well as the contact person and address from CDSS, to ensure that legally sufficient notice is achieved.

If a tribal affiliation name has any numbering or serial lettering at the end of the name, this indicates that a multiple listing for the same tribal affiliation exists within CWS/CMS. The CWS/CMS user **must also** check the websites noted above, for any and all noticing addresses associated with the Tribe(s). This precaution is necessary since there may be numerous name variations for tribal affiliations.

Method of Notice

1. Notice shall be sent by registered or certified mail with return receipt requested. Additional notice by first-class mail is recommended but not required.
2. Notice to the tribe shall be to the tribal Chairperson unless the tribe has designated another agent for service in the BIA list of designated agents.
3. Because tribal leadership frequently changes, unless the name of the current tribal chair person is known, we recommend the notice be addressed to "Tribal Chair Person, _____ Tribe."
4. Notice shall be sent to all tribes with which the child is potentially affiliated.
5. When a child's parents, Indian custodian or tribe cannot be determined or located, notice shall be made to the Secretary of the Interiors designated agent, the BIA, Sacramento Area Director.
6. If the identity or location of the parents, Indian custodian and the child's tribe is known, a copy of the notice shall also be sent directly to the Secretary of the Interior unless this requirement is waived in writing by the Secretary and the waiver has been filed with the court.

(25 C.F.R. § 23.11(a) & (b); W & I Code § 224.2.)

Note: The Secretary of the Interior is currently in the process of seeking revision of federal regulations pertaining to the ICWA noticing. If there is a change in federal regulations, CDSS will provide further information in a subsequent All County Information Notice.

Contents

It should be noted that because the ICWA calls for registered mail, (25 U.S.C. § 1912(a)) and the BIA ICWA noticing regulations allow for certified mail (25 C.F.R. § 23.11(a)), SB 678 clarified that under California law either registered or certified mail is acceptable as long as return receipt is requested.

SB 678 specified information required, most of which was already included on the prior noticing form (JV-135). The only two items that were not on JV-135 that are required by SB 678 were: (1) a copy of the child's birth certificate, if available, and (2) the location, mailing address and telephone number of all parties that are noticed. (W & I Code § 224.2(a)(5).) Effective January 1, 2008, new Judicial Council form ICWA 030 contains all of the requirements.

Note: Once a tribe has acknowledged a child or intervened, subsequent notices do not need to include the ancestral information, a copy of the petition in the proceeding, a copy of the child's birth certificate, or the statement of rights.

When Notice Is to Be Sent

Notice is to be sent as soon as it is known or there is reason to know the child is an Indian child. Notice must be sent to all federally recognized tribes of which the child may be a member or eligible for membership, and shall continue to be sent for all hearings until the court makes a determination as to which tribe is the child's tribe or determines that the ICWA does not apply. (W & I Code §§ 224.2 (a)(3), 224.3(e)(3).)

Once a tribe has confirmed the child is a member or eligible for membership and a biological child of a member, then notices shall be sent to the tribe determined to be the Indian child's tribe and notices are to be sent for every hearing thereafter to that tribe. (W & I Code § 224.2(a)(3).)

If proper notice has been provided and neither a tribe nor the BIA has provided a determinative response within 60 days after receiving the notice, the court may determine that the ICWA does not apply to the proceeding, except that it shall reverse itself if subsequently a tribe or the BIA confirms the child is an Indian

child. At that point the court shall apply the act prospectively. Once a court determines that the ICWA does not apply, then notices shall no longer be required unless new information is received based on the petition or other information. Unless and until this determination is made, notices of each hearing should continue. (W & I Code §§ 224.3(e)(3), 224.3(f).)

Evidence of Notice

Proof of the notices sent, including copies of notices sent and all return receipts and responses received, shall be filed with the court prior to the hearing. (W & I Code § 224.2(c).)

Hearing Timing

No hearing, except for the detention hearing, shall be held until at least 10 days after receipt of notice by the parent, Indian custodian, the tribe, or the BIA. Upon request, the parent, Indian custodian, or the tribe shall be granted an additional 20 days to prepare for the proceeding. (W & I Code §§ 224.2, 727.4(a)(2); Prob. Code § 1460.2; Fam. Code § 180.)

Note: New Judicial Council Rule 5.482.(a) sets out exceptions for proceeding without delay, subject to specified conditions, for the detention hearing in dependency cases and in delinquency cases in which the probation officer has assessed that the child is in foster care or it is probable the child will be entering foster care. It is recommended that social workers and probation officers familiarize themselves with this rule.

Sanctions for Falsifying or Concealing That the Child Is Indian

Any person whose duty it is to give notice to Indian tribes shall be subject to court sanctions if that person knowingly and willfully falsifies or conceals a material fact concerning whether the child is an Indian child, or counsels a party to do so. (W & I Code § 224.2(e).)

C. Duties After Tribe Has Confirmed a Child Is a Tribal Member

There are specified rights and standards that get triggered once a federally recognized tribe has confirmed that the child is a member or eligible for membership and a biological child of a member per the ICWA. The ICWA sets forth applicable standards such as foster care or adoptive placement preferences, use of a qualified expert witness, active efforts to prevent breakup

of the Indian family, and evidentiary standards. These standards apply regardless of whether a tribe formally intervenes in a proceeding.

Right of Intervention

The Indian child's tribe and Indian custodian have the right to intervene at any point in the child custody proceedings noted in section I. A. above. Once a tribe has formally intervened it is a "party" to the proceeding. Status as a party gives the tribe more participatory rights in the proceeding. Depending on the type of proceeding, (family, probate, dependency, delinquency) the tribe or Indian custodian could call and examine witnesses, cross-examine opposing witnesses, provide evidence pertaining to prevailing social and cultural standards in the tribe, introduce documentary exhibits and other evidence. Under the ICWA they have the right to the records of the proceeding as well. (25 U.S.C. §§ 1911, 1912, 1915; W & I Code § 224.4; Prob. Code § 1459(b); Fam. Code §§ 175(e), 177(a).)

Role of Non-Intervening Tribe

The Indian child's tribe and/or Indian custodian are <u>not required to formally intervene</u> in order to participate in an Indian child custody proceeding.

Whether identified as a formal party or not, the tribe can express placement or adoptive preferences, assist in identification of a qualified expert witness, facilitate identification of placement options, assist by identifying/tribally approving a home, and even identifying available Indian services and programs. These roles are premised on the otherwise existing standards and requirements of the ICWA. (25 U.S.C. § 1912(a), W & I Code §§ 224, 224.4; Prob. Code § 1459(a); Fam. Code §§ 175(e), 177(a).)

When More Than One Tribe Is Involved

If more than one tribe makes the determination that an Indian child is a member or eligible for membership as defined in the ICWA, the court is to make a determination in writing, with its reasons, as to which tribe is the child's tribe for purposes of the child custody proceeding. The court's determination is to include consideration of which tribe the child has more significant contacts, e.g. the child's length of residence on or near the tribe's reservation, participation in a tribe's activities, fluency in the tribe's language, previous cases with one of the tribes, residence on or near the tribe's reservation by the child's parents, Indian custodian, and the child's self-identification. (25 U.S.C. § 1903(5)(b); W & I Code § 224.2(b); Prob. Code § 1449(d); Fam. Code § 170.)

Appointment of Counsel

The parent, and Indian custodian, if indigent, has the right to counsel. (W & I Code § 317(a)(2), Prob. Code § 1474; Fam. Code § 180(b)(5)(G)(v).)

Tribal CASA Programs

Tribal Court Appointed Special Advocates (CASA) programs may be established independent of state funding. State courts have the discretion to appoint CASA representatives from such tribal programs in Indian child custody proceedings. (W & I Code § 110.)

Access to Court Documents and Records If the Tribe Intervenes

When a tribe formally intervenes in a child custody action, it becomes a party to the proceeding. As a party it is entitled to be treated in the same manner as counsel. The tribe's rights as a party include the right to examine all reports and documents filed with the court. (25 U.S.C. § 1912(c); Prob. Code § 1459.5(b); Fam. Code § 177(a); Rule of Court 5.664(h).)

If the tribe does not intervene but sends a tribal representative to appear in the case, that tribal representative does not have an automatic right to access court documents and records; it is up to the court to decide whether to give the tribal representative access.

Active Efforts

The ICWA requires active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. SB 678 has codified this provision, explicitly placed it in the Family and Probate Codes and provided further guidance on what constitutes active efforts. (25 U.S.C. § 1912(d), W & I Code § 361.7; Prob. Code § 1459.5; Fam. Code §§ 177(a), 3041(e).)

Normally involuntary foster care placements require only that **reasonable efforts** be made to prevent or eliminate the need for removal of the child from his or her home and whether there are available services that would prevent the need for further detention. (W & I Code § 319.) However, when an Indian child is involved, **active efforts** designed to prevent the breakup of the Indian family must also be made. Active efforts are now also explicitly codified in the Family and Probate Codes and required in the child custody proceedings listed above in section I. A.

In dependency and delinquency cases, the court must make both reasonable efforts and active efforts findings on the record.

In these cases, the petitioner *must provide evidence to the court* that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these *efforts were unsuccessful.* What constitutes active efforts is assessed on *a case by case basis.* However, active efforts are to be conducted in a manner that takes into account the "*prevailing social and cultural values and way of life of the Indian child's tribe.*" Active efforts must use the available resources of extended family, the tribe, tribal and other Indian social service agencies and individual Indian caregiver service providers. (W & I Code § 361.7; Prob. Code § 1459.5(b); Fam. Code §§ 177(a), 3041(e).)

Burden of Proof

No removal of an Indian child from the custody of his or her parents or placement out of the home may be ordered in the absence of a determination, supported by **clear and convincing evidence**, including testimony of a qualified expert witness 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(e); W & I Code § 361.7(c); Prob. Code § 1459.5(b): Fam. Code § 7892.5(a).)

In a termination of parental rights case the evidentiary burden is higher. Parental rights may not be terminated in the absence of a determination, supported by evidence **"beyond a reasonable doubt"** including testimony of a qualified expert witness that the continued custody 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); W & I Code § 366.26(c)(2)(B)(ii); Fam. Code § 7892.5(b).)

Qualified Expert Witness Testimony

The removal of an Indian child may only occur if there is clear and convincing evidence that is supported by the testimony of an expert witness that continued custody by the parent is likely to result in serious emotional or physical damage. The purpose for the use of the qualified expert witness is to provide testimony on the issue of detriment to the child. Qualified expert witness testimony is required before a court orders the child be placed out of the custody of his or her parents or terminates parental rights. (25 U.S.C. § 1912(e); W & I Code § 361.7(c); Prob. Code § 1459.5(b): Fam. Code § 7892.5(b).)

SB 678 has specified that, provided the individual is not an employee of the person or agency recommending foster care placement or termination of parental rights, a qualified expert witness may include, but is not limited to, a social worker, sociologist, physician, psychologist, traditional tribal therapist and healer, tribal spiritual leader, tribal historian, or tribal elder. County social workers will thus be disqualified as an expert witness in the same county where the worker is employed. (W & I Code § 224.6(a); Prob. Code § 1459.5; Fam. Code § 177(a).)

Testimony from an expert witness may be by declaration or affidavit only if all of the parties have agreed in writing. However, we recommend the use of testimony rather than declarations, as testimony may provide more information to a judge on issues that may not have been anticipated when a declaration was written. (W & I Code § 224.6(e); Prob. Code § 1459.5(b); Fam. Code §§ 177(a), 3041(e).)

In addition, we recommend counties consider having the proposed expert witness contact the child, the child's family and tribe prior to court hearings; such contact may provide valuable insight on whether continued custody of the child by the parent or Indian custodian is likely to cause the child serious emotional or physical damage.

Note: The AOC's Center for Children and Families, has posted a list of individuals who are identified as qualified experts for the ICWA purposes. The AOC and the Department do not endorse or guarantee any of the individuals on the list. The list is noted here as a resource. Any agency or individual seeking to use an individual on the list has the responsibility to independently evaluate that individual for suitability for an ICWA proceeding.
http://www.courtinfo.ca.gov/programs/cfcc/programs/description/jrta-

Consideration of Prevailing Social and Cultural Standards

In a court's determination on whether to remove a child or to terminate parental rights, the court is required to consider evidence concerning the prevailing social and cultural standards of the Indian child's tribe, including that tribe's family organization and child-rearing practices. Counties must therefore consider how information is to be provided to the court about the tribe's prevailing social and cultural standards. The tribe of the child would be able to identify individuals who can speak to the tribe's social and cultural standards. In addition, as suggested above, a qualified expert can facilitate the presentation of this evidence when there is contact between the expert and the child, the child's family and the child's tribe. (W & I Code § 224.6(b)(2); Prob. Code § 1459.5(b); Fam. Code §§ 177(a), 3041(e).)

Placement Preferences

Under the ICWA, cultural considerations and concern for tribal heritage are relevant to child custody proceedings. The standards to be applied in meeting the preference requirements of the ICWA are the prevailing social and cultural standards of the Indian community in which the child's parent or extended family resides, or with which the parent or extended family maintains social and cultural ties. Thus, the ICWA requires that states defer to Indian social and cultural standards in placement and treatment assessments. (25 U.S.C. § 1915(d).)

The ICWA specifies, and SB 678 reiterates, that placement of Indian children shall be in the least restrictive setting within reasonable proximity to the Indian child's home and meets the child's special needs. Placement must be made in accordance with the ICWA designated preferences, unless there is good cause to deviate from the order. Placement preference must be given in the following order: (1) a member of the child's extended family; (2) a foster home licensed, approved or specified by the Indian child's tribe; (3) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; (4) an institution 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. Adoptive placement preferences are: (1) with a member of the child's extended family; (2) with other members of the Indian child's tribe; (3) with other Indian families. (25 U.S.C. § 1915; W & I Code § 361.31, Prob. Code § 1459.5(b); Fam. Code § 177(a).)

Placement preference order may be altered in conjunction with requests by the Indian child's biological parents or the child when the child is of sufficient age, or the tribe via tribal resolution. The CWS agency or court making the placement must follow this order, as long as the placement is the least restrictive setting appropriate for the child.

Additionally, pursuant to existing foster care policies every effort should be made to place siblings together.

Tribally Approved Homes As A Placement Option

Pursuant to the ICWA at section 25 U.S.C. § 1915(b), all federally recognized tribes are authorized to approve a tribally approved home for the purpose of foster care placement or pre-adoptive placement of an Indian child. Tribally approved homes are preferred to non-Indian foster homes under the ICWA, and local child welfare departments and probation departments should work with

tribes to find out about Indian families whose homes have been tribally approved and utilize these homes unless good cause to the contrary exists.

Tribally approved homes are equivalent to licensed or county approved homes and are exempt from licensing requirements under the California Health and Safety Code.[2]

However, tribes are not exempt from criminal record clearance requirements for all potential caregivers and all adults living in the tribally approved home. For a child who falls under county court jurisdiction, the county still has the responsibility to conduct the criminal record clearances as this is a Title IV-E requirement.[3] In addition, the Child Abuse Central Index (CACI) clearance requirements must also be conducted as part of the safety considerations of the home.

When an Indian child under the jurisdiction of the county is placed in a tribally approved home, claiming for Title IV-E foster care funding is authorized. The Federal Title IV-E regulations specify that for purposes of Title IV-E funding, a foster family home includes a tribally approved home that is "on or near Indian reservations".[4] This is consistent with the ICWA as section 25 U.S.C. section 1931(b) states that for purposes of qualifying for assistance, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a state.[5] (25 U.S.C. §§ 1915(b), 1931(b); 45 C.F.R. § 1355.20; Health and Safety Code § 1505(o).)

Further clarification about use of tribally approved homes will be provided in a subsequent All County Information Notice.

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[2] H&S Code § 1501(o) exempts from licensing requirements, "Any facility in which only Indian children who are eligible under the federal Indian Child Welfare Act, Chapter 21 (commencing with Section 1901) of Title 25 of the United States Code are placed and that is one of the following: (1) An extended family member of the Indian child, as defined in Section 1903 of Title 25 of the United States Code. (2) A foster home that is licensed, approved, or specified by the Indian child's tribe pursuant to Section 1915 of Title 25 of the United States Code."

[3] 25 U.S.C. § 1931 "For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive home or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a state."

[4] 42 U.S.C. § 671 (a)(20);45 C.F.R. § 1356.30

[5] 45 C.F.R. § 1355.20 "Foster family home means, for the purpose of Title IV-E eligibility, the home of an individual or family licensed or approved as meeting the standards established by the State licensing or approval authority(ies) (or with respect to foster family homes on or near Indian reservations, by the tribal licensing or approval authority(ies)), that provides 24-hour out-of-home care for children."

Note: Pursuant to W & I Code section 361.4(f), a tribe has the option to request that CDSS conduct a criminal record clearance exemption request for the purpose of consideration of an individual as a foster care parent in a case under county jurisdiction. This section provides an additional avenue for tribes to facilitate approval of a potential foster parent for placement of an Indian child under county court jurisdiction. For purpose of processing a tribal exemption request CDSS will request copies of county documentation regarding the individual to whom the exemption request pertains.

D. Termination of Parental Rights and Relinquishments, and Adoptive Placement Agreement

Circumstances When Parental Rights May Not Be Terminated

SB 678 expanded the exceptions to termination of parental rights specific to Indian children. W & I Code Section 366.26 identifies when termination of parental rights would not be in the child's best interest. SB 678 adds two new exceptions to section 366.26(c) pertaining to Indian children.

Section 366.26(c)(1)(F) provides that the compelling reasons for determining that termination of parental rights would not be in the best interest of an Indian child, include, but are not limited to:

"(i) termination of parental rights would substantially interfere with the child's connection to his or her tribal community or the child's tribal membership rights; and,

(ii) the child's tribe has identified guardianship, long-term foster care with a fit and willing relative, or another planned permanent living arrangement for the child."

SB 678 adds to the exception provision for Indian custodians who while unable or unwilling to adopt the child, are nevertheless capable of providing a stable and permanent environment, and where removal would be detrimental to the child. (25 U.S.C. § 1913, W & I Code §§ 361.7, 366.26(c)(1)(D) and (F).)

These new provisions may alter permanency plans for Indian children. In the case of an Indian child in a relative placement or a Non Related Extended Family Member placement, the county and court should consider if there may be compelling reasons not to terminate parental rights of an Indian parent.

Voluntary Termination of Parental Rights

The parent of an Indian child may voluntarily consent to termination of parental rights as long as the following requirements are met:

1. Consent is given at least 10 days after birth of child; and
2. Consent is given in writing; and
3. Consent is recorded before a court of competent jurisdiction; and
4. The judge certifies that the terms and consequences of consent were fully explained in detail; and
5. The judge certifies that the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language the parent or Indian custodian understood.

Adoption agencies, adoption service providers, and adoption attorneys must be aware that there is a duty to inquire about Indian status when an Indian child is involved in a consent to or relinquishment for adoption, adoption placement agreement, or in a voluntary out-of-home placement/provision of voluntary family reunification services. (Fam. Code §§ 8606.5, 8620, 8801.3.)

Withdrawal of Consent

The parent may withdraw consent at any time before the final decree of adoption has been entered in court. The Indian child must be returned to the parent or Indian custodian when consent has been withdrawn.

After the final decree is entered in a state court, consent may only be withdrawn if there is evidence that consent was obtained through fraud or duress. (25 U.S.C. § 1913(b); W & I Code § 16507.4; Prob. Code § 1500.1; Fam. Code §§ 8620(b), 8606.5.)

E. Clarifications/Modifications In Adoption Proceedings

CWS/adoption staff should consider cultural practices of the tribe for achieving permanency for an Indian child. Adoption is still contrary to customary practices for many tribes. However, like the state and counties, tribes are committed to finding suitable permanency options for their Indian children. CWS/adoption staff is encouraged to discuss the traditional preferred permanency options for their children. The CDSS ICWA Workgroup (which includes county representatives), will be exploring such options and will, in the near future, release guidance regarding permanency planning for Indian children and youth.

Abandonment of Indian Children

Under Family Code section 7822, a Petition for Freedom from Parental Custody and Control can be brought for the purpose of an adoption where there are circumstances indicating the parent or parents have abandoned the child. Per Family Code section 7808, section 7822 applies only to non-dependent children. These proceedings are distinct from proceedings in which parental rights to court-dependent children are terminated.

SB 678 amended Family Code section 7822 to add conditions before an Indian child can be considered abandoned when an Indian child has been transferred to the care and custody of an Indian custodian. The intention to abandon the child can be established only if the Indian parent does not resume custody when requested by the Indian custodian, or the Indian parent does not keep the custodian apprised of his/her whereabouts to receive the request for resumption of the child, or the parent fails to substantially comply with agreements made between the Indian parent and the Indian custodian despite the objections to the noncompliance. Family Code section 7822(e) applies only when custody of an Indian child is transferred to an Indian custodian. In other abandonment cases regarding non-dependent Indian children, subdivisions (a) through (d) of Family Code section 7822 would be applicable.

Post-adoption Contact Agreements

The Family Code now expresses a legislative finding that adoptive children may benefit from contact with their birth relatives, and in the case of an Indian child, their tribe. Nothing is to be construed to prevent post-adoption agreements if found by the court to be voluntary and in the best interest of the child. However, after a decree of adoption has been issued, a failure to comply with the terms of a post-adoption contact agreement is not grounds to set aside the decree, rescind a relinquishment or modify a termination of parental rights.

The new provisions on post-adoption agreements now provide courts with recourse relative to stalled or unsuccessful post-adoption contact agreements for Indian children. Prior to the entry of the adoption order, if the prospective adoptive parent fails to negotiate in good faith, after having agreed to enter into negotiations, the birth parent, birth relative or Indian tribe may petition the court to order the parties to engage in family mediation services to reach a post-adoption contact agreement. If after mediation, the parties fail to negotiate in good faith to enter into an agreement, the court has the following options:

1. Order further mediation; or
2. Initiate guardianship proceedings in lieu of adoption; or
3. Authorize a change of adoptive placement for the Indian child.

The court has significant authority prior to issuance of a decree of adoption, to require mediation of the parties for the purpose of reaching a post-adoption contact agreement when the child is an Indian child and when the adoptive parent had agreed to enter into negotiations for the purposes of post adoption contact. If the court finds that there is a lack of good faith mediation, the court may, modify prior orders, or issue new orders to ensure the best interest of the Indian child, including ordering further mediation initiating guardianship in lieu of adoption, or authorizing a change of the adoptive placement. Failure to reach an agreement does not in and of itself constitute evidence of lack of good faith. (Fam. Code §§ 8616.5, 8620(f).)

Terms of Post-Adoption Agreements

Terms of a post-adoption agreement shall be limited to, but need not include all, of the following:

1. Visitation between child and birth parent, birth relatives, and the child's tribe;
2. Future contact between birth parents, birth relatives, and the child, and/or child's adoptive parent, and the tribe;
3. Future sharing of information about the child.
   (Fam. Code §§ 8616.5 and 8620(f).)

Modification or Termination of Post-Adoption Agreement

The court issuing the decree of adoption retains jurisdiction to issue a modification or termination of a post-adoption agreement under two circumstances. The first is where all parties, including the child, (if 12 years of age or older) have signed the modified agreement, and it is filed with the court. The second is where the court finds all of the following: the modification/termination is necessary to serve the best interest of the child, there has been a substantial change of circumstances since the original agreement, and the party seeking the modification/termination has participated in good faith mediation or other dispute resolution prior to coming to the court.

An evidentiary hearing is not required. Documentary evidence may serve as the basis for the decision to terminate or modify the post-adoption agreement. The court is not to order further investigation or evaluation by a public or private

agency, unless there is a finding by clear and convincing evidence that the best interest of the child may be protected or advanced only by the inquiry and that the inquiry will not disturb the stability of the child's home to the detriment of the child. (Fam. Code § 8616.5 (h).)

Failed Adoptions

Whenever there is a failed adoption of an Indian child by either set aside or a voluntary termination of parental rights by the adoptive parent, a biological parent and/or prior Indian custodian may petition for return of custody and it will be granted unless return is not in the best interest of the child. (Fam. Code § 8619.5.)

Normally when a court is exercising jurisdiction over adoption matters, it may not exercise such jurisdiction if at the time of filing of the petition, a court of another state has a proceeding concerning the custody or adoption of the minor and/or if a court of another state has issued a decree or order concerning the minor. SB 678 amends Family Code section 9210 to specify that "a court of another state" includes, in the case of an Indian child, a tribal court having and exercising jurisdiction over a custody proceeding involving the Indian child. (Fam. Code § 9210(d).)

F. Documentation of Active Efforts To Comply With Placement Preferences

The ICWA requires that a record of each foster or adoptive placement of an Indian child be kept, and that the record must provide evidence of the efforts to comply with the order of placement preferences. Such record is to be made available to the Indian child's tribe and/or to the Secretary of the Interior. SB 678 has added that the record is to document "active" efforts taken to comply with the order of placement preference and that the record is to be kept in "perpetuity". (25 U.S.C. § 1915(e); W & I Code § 361.31(k).)

The CWS/CMS is maintained indefinitely; therefore, any information requested by a tribe or by the Secretary pursuant to this section, will be retrievable from CWS/CMS. Accordingly, to comply with this requirement, counties must document their active efforts to comply with the placement preferences now specified in W & I Code Section 361.31.

This documentation shall be entered into CWS/CMS in the Narrative Section of the Contact Information Page found in the Client Services Notebook. It must also

be entered in the Comments Section of the Non-Foster Care Page found in the Placement Notebook. The detailed documentation of active efforts in both Notebooks records the active effort for both **placement** and **case management**. This provision does not otherwise modify retention or release of record requirements.

G. Transfer Issues

A tribe, parent, or Indian custodian may petition the court to transfer Indian child custody proceedings to a tribal jurisdiction. SB 678 has codified ICWA requirements for the transfer of these cases including that the court must transfer the case unless there is good cause not to do so. (W & I Code, § 305.5(b); Prob. Code § 1459.5(b); Fam. Code § 177(a); see also Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584 (Nov. 26, 1979)).

In addition, when a social worker takes an Indian child into protective custody, SB 678 specifies short timeframes for notification and transfer of child custody proceedings where the child is a ward of a tribal court of an exclusive jurisdiction tribe or resides or is domiciled on such a tribe's land.[6] Notice of the removal is to be provided to the tribe no later than the next working day. The county must provide all relevant documentation to the tribe regarding the removal and the child's identity. Upon written determination from the tribe confirming the child is an Indian child within its jurisdiction, the county is to transfer the child custody proceeding within 24 hours of receipt of the determination. (W & I Code §3 05.5 (a), Prob. Code § 1459.5 (b), Fam. Code § 177(a).)

Transfer questions will also arise when a social worker takes an Indian child into protective custody and finds out that the Indian child is already a ward of a non-exclusive jurisdiction tribal court.

In all of the above situations is it important that the social worker work closely with county counsel as issues that affect court jurisdiction should be left to the county counsel and the court. These provisions do not negate the obligation of county social workers to continue with their statutory duty to file a petition if the child has not been released from custody within 48 hours.

[6] A tribe in a PL 280 state such as California has exclusive jurisdiction over Indian child custody matters where the tribe has petitioned to reassume exclusive jurisdiction pursuant to ICWA at 25 U.S.C section 1918. In California only the Washoe Tribe has formally reassumed exclusive jurisdiction. Note tribes from non-PL 280 states will be exclusive jurisdiction tribes as well.

Transfers to Out-of-State Tribes and the Interstate Compact on Placement of Children (ICPC)

SB 678 clarified that transfer of jurisdiction pursuant to the ICWA section 1911, of an Indian child custody proceeding to the tribal court of an out-of-state tribe, does not trigger application of the Interstate Compact on Placement of Children (ICPC). (25 U.S.C. § 1911; Fam. Code § 7907.3.)

H. Application of ICWA In Probate Court

The Probate Code now includes language regarding the ICWA definitions and the legislative intent of the ICWA. Petitions for guardianship must include if a proposed ward is or may be an Indian, and identify the Indian custodian and or Indian child's tribe. The parent, Indian custodian or Indian guardian, if indigent, shall have the right to appoint counsel. (Prob. Code §§ 1449, 1459, 1474, 1510.)

Probate Code section 1459.5 incorporates the ICWA requirements specified in W & I Code sections 224.3 through 224.6, (inquiry, notice, intervention, full faith and credit, qualified expert testimony) inclusive, section 305.5 (transfer), 361.31 (placement preferences), and 361.7 (active efforts).

Because no state entity is involved in these proceedings, it will be the responsibility of the parties and their attorneys, if they are represented, and the court presiding over the cases to comply with these ICWA requirements. The court clerk has a role in noticing in in pro per guardianship proceedings.

II. PARTICIPATION BY NON-FEDERALLY RECOGNIZED TRIBES

The requirements specified by the ICWA apply to tribes that are recognized by the federal Department of the Interior, BIA. Tribes that are not federally recognized have not been allowed to have a role in child welfare proceedings for their children. In the 1950's the United States went through a period of actively terminating recognition of tribes. In California 30 to 40 tribes were terminated. Today many of these tribes continue to exist although without the benefits and rights associated with federal recognition.

SB 678 has provided that California will now allow a court to permit a non-federally recognized tribe to participate in child welfare proceedings when an Indian child is involved that otherwise meets the definition of an Indian child under the ICWA except that his or her tribe is not federally recognized. The court may permit the tribe from which the child is descended to participate in the proceeding upon request of the tribe. (W & I Code § 306.6; Fam. Code § 185.)

If the court permits a tribe to participate in a proceeding, the tribe may do all of the following:

1. Be present at the hearing.
2. Address the court.
3. Request and receive notice of hearings.
4. Request to examine court documents relating to the proceeding.
5. Present information to the court that is relevant to the proceeding.
6. Submit written reports and recommendations to the court.
7. Perform other duties and responsibilities as requested or approved by the court.

If more than one tribe requests to participate in a proceeding, the court may limit participation to the tribe with which the child has the most significant contacts, as determined in accordance with W&I Code section 224.1(d)(2). (Fam. Code § 170.)

This section is intended to assist the court in making decisions that are in the best interest of the child by allowing a tribe to inform the court and parties about placement options for the child within the child's extended family or the tribal community, services and programs available to the child and the child's parents as Indians, and other unique interests the child or the child's parents may have as Indians.

This provision of SB 678 is consistent with existing and acknowledged laws and best practices in child welfare practice. It is consistent with preferences for placement of children with relatives and within the objective of placing children so that they retain ties to their communities. Tribes are composed of close knit communities of extended families. Even when individuals are not biologically related, they would likely be eligible for consideration as Non-Related Extended Family Members because of the cultural connections and tribal lifestyle. Placement of Indian children with their families and in their tribal communities is consistent with the objectives of strategies recently adopted and implemented in many counties, such as Family to Family, relative placements, wrap around programs, etc. In addition, even though these tribes might not be federally recognized, members and their descendants may nevertheless qualify for programs and services for Indian families, such as Indian health or mental health services. Such programs and potential services are valuable resources in a well crafted case plan for the Indian child.

When a county knows non-federally recognized tribes exist within its county borders, it is good practice to informally contact local tribes and inform them of the opportunity to appear before the court to request permission to participate in child welfare proceedings involving tribal members or potential members. Contact can be further facilitated through ongoing local ICWA round table or workgroup discussions. It is therefore appropriate to inform a tribe when one of their children has been taken into custody. Collaboration with these tribes is strongly encouraged, to facilitate the provision of

additional supports for Indian children, as well as the identification of culturally-appropriate placement opportunities.

These provisions are not to be construed to make the requirements of the ICWA or any state law implementing the ICWA, applicable to the proceedings beyond those specified.

Note: These provisions are not in the Probate Code.

CDSS ICWA Contacts

CDSS has designated staff assigned to provide technical assistance regarding the ICWA. Ana Bolanos-Kellison is the CDSS ICWA Specialist and can be reached at (916) 651-6031. Diana Orcino is the ICWA Analyst assigned to assist with the ICWA matters and can be reached at (916) 657-1730.

Questions regarding this ACL should be addressed to me at (916) 657-2614 or Teresa Contreras, Chief, Office of Child Abuse Prevention, at (916) 651-6960.

Sincerely,

Origional Document Signed By:

GREGORY E. ROSE
Acting Deputy Director
Children and Family Services Division

c: CWDA
CPOC

ACIN No. I-94-06 (12/28/06)
Tribal/State Intergovernmental Agreements

DEPARTMENT OF SOCIAL SERVICES
744 P Street, Sacramento, California 95814

December 28, 2006

REASON FOR THIS TRANSMITTAL

[ ] State Law Change
[ ] Federal Law or Regulation Change
[ ] Court Order
[ ] Clarification Requested by One or More Counties
[X] Initiated by CDSS

ALL COUNTY INFORMATION NOTICE I-94-06

TO: ALL COUNTY WELFARE DIRECTORS
ALL CHILD WELFARE SERVICES PROGRAM MANAGERS
CHIEF PROBATION OFFICERS

SUBJECT: TRIBAL/STATE INTERGOVERNMENTAL AGREEMENTS

The purpose of this All County Information Notice is to provide information relative to Tribal/State Intergovernmental Agreements (Agreements). The Social Security Act and the Indian Child Welfare Act (ICWA) allows for states and Indian tribes to enter into agreements with each other regarding care and custody of Indian children and jurisdiction over child custody proceedings (25 U.S.C. Section 1919).

In an effort to recognize and support the sovereign right of Indian nations to provide for the welfare of their Indian children, California enacted Assembly Bill 1525 (Chapter 724, Statutes of 1995). This legislation allows the California Department of Social Services (CDSS) and California Indian tribes to negotiate and enter into Agreements concerning the provision of child welfare services to Indian children by their respective tribes and allows tribes' access to Title IV-E funding for provision of these services. While these laws have been in place for many years, it is only recently that tribes have begun to approach CDSS with proposals that present viable programs. The interest among California tribes is increasing as more tribes develop their own infrastructures including tribal courts, children's codes and child welfare programs.

Direct funding under Title IV-E is not available to tribes. In order to access Title IV-E funds, federal legislation requires tribes to enter into cooperative agreements with their respective states. States can then provide, at a minimum, pass through of Title IV-E dollars (and State General Fund dollars at the State's discretion) to eligible children under tribal jurisdiction. As of June 2001, 14 states and 75 American Indian tribal governments, have Agreements in place nationally. The CDSS is committed to promoting the intent of the ICWA in developing effective Tribal/State agreements and will provide support and technical assistance to tribes and counties in achieving successful implementation.

Under California law, an Agreement will provide for delegation to the tribe or tribes in some instances consortiums of tribes the responsibility that would otherwise be the responsibility of the county or counties for child welfare services and/or assistance payments under the foster care program.

Unless otherwise approved by the Administration for Children and Families, tribes will be held to the same service delivery and foster care standards and fiscal reporting requirements as the counties.

What this means and how an Agreement is actually implemented locally will depend on what program options a tribe chooses to provide. A tribe is eligible to provide all options that are funded by Title IV-E funds as well as provide services funded with State General Fund dollars. Depending on the capacity of the tribal court and child welfare agency, a tribe may choose to provide only a few of the program options. For example, a tribe may be interested in having their child custody proceedings adjudicated in tribal court and, if placement in foster care is the plan, have the IV-E funds available to pay for these placements. In this case, the county child welfare agency would be responsible for all other services and would receive the funding to support this. Another tribe and county may develop a local protocol where both entities conduct joint emergency response visits. Another tribe may have a greater capacity and will want to implement all of the program options and receive funding to do so. These details will be part of the negotiations with CDSS, each tribe or tribes, and the county or counties that will be impacted by the Agreement.

When Agreements are achieved, a tribe will be eligible to be reimbursed in accordance with allocation formulas currently in place for counties. Allocation methodologies for tribes entering into Agreements will be developed in consultation with, and agreed to by, CDSS, the affected county or counties, and the affected tribe or tribes. For ease of identification, tribes that achieve a Tribal/State Agreement will be known as "Title IV-E" tribes (however funding may include State General Fund dollars).

Although the Agreements are between the State and the tribes, we recognize that the counties must be involved to allow for the successful implementation of these Agreements. Successful implementation will require a cooperative relationship in the ongoing provision of services to and protection of Indian children and will allow for the smooth transition of cases from the counties to the tribes.

We have attached a Tribal Agreement Flow Chart that describes the process CDSS will follow once a tribe approaches us to begin negotiations of an Agreement. Any affected county will be notified by CDSS and will be provided a Tool Kit that will provide resource information that will assist in development of an Agreement. Negotiations take into consideration interests and conditions that are specific to each particular tribe. We anticipate that in order to achieve the goals of tribal provision of child welfare services and successful implementation of such Agreements, it will be necessary for tribes and counties to enter into Memorandums of Understanding (MOUs) that detail the responsibilities of both parties. Guidelines for the content of a MOU will be included in the Tool Kit.

We intend to provide support and guidance to all that are affected. We recognize that we are embarking on a new and complex program. We will be looking for your support and input as we move toward implementation. We will be communicating with affected counties and tribes, and will be very interested in knowing how things are working.

Please feel free to contact us should you have questions or need additional information. You may contact Teresa Contreras, Chief, Child Welfare Policy and Program Development Bureau, at (916) 651-6160 or teresa.contreras@dss.ca.gov, or Anne Smith, Indian Child Welfare Act Specialist at (916) 651- 6130 or anne.smith@dss.ca.gov.

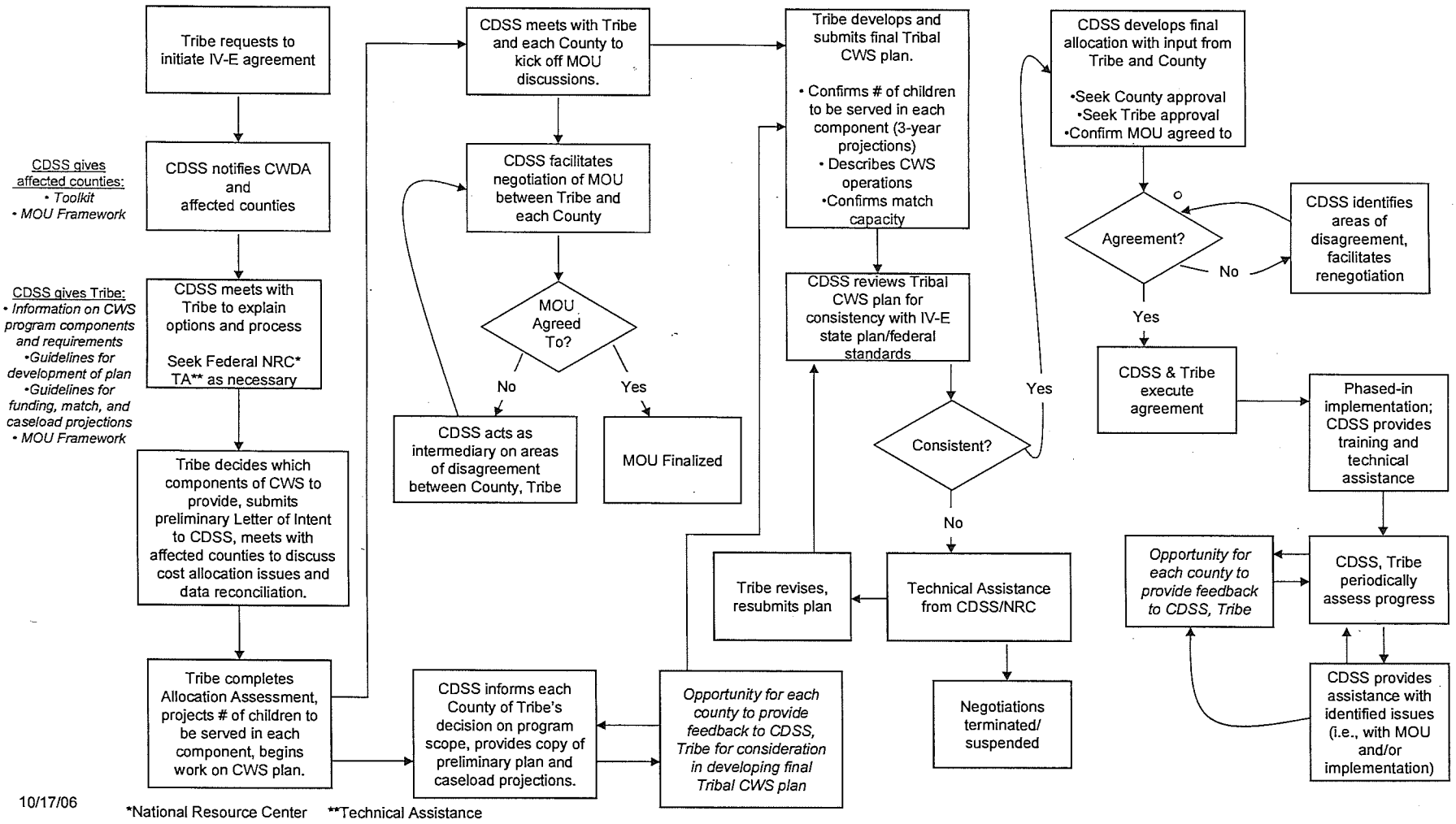
Sincerely,

Original Document Signed By:

MARY L. AULT
Deputy Director
Children and Family Services

Attachment

TRIBAL AGREEMENT FLOW CHART



10/17/06

*National Resource Center **Technical Assistance

ACIN No. I-43-04 (9/7/04)
The Indian Child Welfare Act
Frequently Asked Questions

DEPARTMENT OF SOCIAL SERVICES
744 P Street, Sacramento, California 95814

September 7, 2004

ALL COUNTY INFORMATION NOTICE NO: I-43-04

REASON FOR THIS TRANSMITTAL
[ ] State Law Change
[ ] Federal Law or Regulation Change
[ ] Court Order
[ ] Clarification Requested by One or More Counties
[x] Initiated by CDSS

TO: ALL COUNTY WELFARE DIRECTORS
ALL CHILD WELFARE SERVICES PROGRAM MANAGERS
CHIEF PROBATION OFFICERS
CALIFORNIA INDIAN TRIBES

SUBJECT: THE INDIAN CHILD WELFARE ACT/FREQUENTLY ASKED QUESTIONS

REFERENCE: All County Letters 01-85 (dated December 14, 2001) and 95-07 (dated February 9, 1995)

The purpose of this All County Information Notice is to provide clarification regarding the requirements of the Indian Child Welfare Act (ICWA) [Public Law 95-608, November 8, 1978 (25 U.S.C. section 1901 et. seq.)] and the importance of compliance with the Act. The proper implementation of the ICWA is paramount in maintaining Indian children safely within their community and preventing the breakup of Indian families. Additionally, this Notice responds to frequently asked questions received by the California Department of Social Services (Department) regarding the ICWA.

PURPOSE

The ICWA was created to stem the disproportionate number of Indian children placed and adopted out of their Indian communities without input from their tribe with resulting emotional injury and cultural loss to the child and damage to the integrity of tribal survival. The ICWA, as official United States federal law, sets forth two purposes: to promote the best interest of Indian children and the stability and security of Indian tribes and families. The policy embodied in the Act is that it is in the best interest of an American Indian child that the role of the tribal community in the child's life be protected.

MINIMUM STANDARDS

ICWA imposes minimum federal standards for state child custody court proceedings, which include voluntary and involuntary foster care placements, termination of parental rights, and pre-adoptive and adoptive placements involving Indian children. Key elements of these standards include:

- An Indian child, for purposes of the ICWA, means any unmarried person who is under age eighteen and is either (a) a member of a federally recognized Indian tribe or (b) is eligible for membership in a federally recognized Indian tribe and is the biological child of a member of a federally recognized Indian tribe.

- The Indian child's parent(s), Indian custodian **and** the child's tribe must be properly notified of pending custody proceedings. Child custody proceedings cannot proceed to hearing until at least ten court days after receipt of the notice by the parent(s), Indian custodian, and the tribe.
- Proper notice shall be written in clear and understandable language and include the following information: (1) the child's name, birthdate and birthplace; (2) the name of the Indian tribe(s) in which the child is a member or may be eligible for membership; (3) the names, if known, and current and former addresses of the child's mother, father, maternal and paternal grandparents and great grandparents or Indian custodians, including maiden, married and former names or aliases, birthdates, places of birth and death, tribal enrollment numbers, and/or other identifying information; (4) a copy of the petition, complaint, or other document initiating the proceeding; (5) a statement of the right of the parents, Indian custodian, and tribe to intervene in the proceeding; (6) a statement that counsel will be appointed for parents or Indian custodians who cannot afford one; (7) a statement of the right of the parents, Indian custodian and tribe to receive, on request, an additional twenty days to prepare for the proceedings; (8) the location, mailing address and telephone number of the court; (9) a statement of the right of the parents, Indian custodian, and tribe to petition the court to transfer the proceeding to tribal court; (10) the potential legal consequences of the proceedings on the future custodial and parental rights of the parents or Indian custodians; and (11) a statement that all parties notified should keep confidential the information in the notice.
- Notice to a child's tribe should be sent to the tribe's chairperson or its designated agent for service of process. The Bureau of Indian Affairs (BIA) publishes in the Federal Register a listing of tribal leaders as well as tribal designated agents for ICWA notice. However, these lists are current only when published and often information is outdated. (See enclosed letter from the BIA.) Therefore, current tribal contact information can be found in CWS/CMS. For those who do not have access to the system, tribal information can be found on the Department's ICWA web page (www.childsworld.ca.gov – Quick Links, ICWA, Links, Tribe Listing) or by contacting the Department's ICWA Specialists. Notice must be sent via registered or certified mail with return receipt requested.
- If the identity or location of an Indian child's tribe cannot be determined, then notice shall be given to the BIA in like manner. Diligent efforts should be continued to obtain additional information regarding the child's tribal affiliation. If new information is obtained, appropriate notice is to be provided to that tribe(s).
- Clear and convincing evidence with testimony from an expert witness, is required for removal of an Indian child from his or her parent(s) or Indian custodian. Before removing Indian children from their homes, attempts must first be made to prevent the breakup of Indian families through active efforts to provide

rehabilitation and remedial services. A higher standard of proof, beyond a reasonable doubt and testimony of an expert witness, is required for termination of parental rights for an Indian child.

- ICWA specifies placement preferences that are to be followed for foster care, pre-adoptive and adoptive placements.
- Unless there is good cause to the contrary or the child's tribe establishes a different order of preference by resolution, foster care or preadoptive placement preferences shall be: 1) with 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 by an authorized non-Indian licensing authority, 4) or an institution for children approved by an Indian tribe or operated by an Indian organization with a program suitable to meet the Indian child's needs.
- Unless there is good cause to the contrary or the child's tribe establishes a different order of preference by resolution, the adoptive placement preference shall be with: 1) a member of the child's extended family, 2) other members of the child's tribe, or (3) other Indian families.
- The removal of Indian children from their families and the placement of these children in foster and adoptive homes shall be consistent with the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or maintains social and cultural ties.

FREQUENTLY ASKED QUESTIONS

Who is considered an American Indian?

No single federal or tribal criterion establishes a person's status as an Indian. Government agencies use differing criteria to determine whether an Indian is eligible to participate in their programs. Each tribe establishes a protocol it uses when determining membership. To identify tribal membership, the tribe must be contacted directly. If a tribe recognizes an individual as a member, this determination is final.

Who is an Indian child as defined by ICWA?

An Indian child is any unmarried person who is under age eighteen and is either:

(a) a member of a federally recognized Indian tribe, or

(b) is eligible for membership in a federally recognized tribe and is the biological child of a member of a federally recognized tribe.

What is a federally recognized Indian tribe?

Federally recognized Indian tribes have a special legal and political relationship with the United States government as defined by the United States Constitution, Supreme Court decisions, as well as federal treaties and statutes. This relationship is referred to as a government to government relationship. This relationship is characterized as a political one between two nations; not a relationship based on a racial/ethnic classification of Native American. Congress has enacted laws that seek to carry out the government to government relationship and to ensure the sovereignty of tribes. There are more than 550 federally recognized tribes in the United States including 223 village groups in Alaska. In California there are 107 recognized tribes. California is also home to approximately 40 unrecognized tribes, and 10 tribes terminated in the 1950s and 1960s that are eligible for restoration.

How can one determine if a tribe is federally recognized?

The BIA is required to publish a list of federally recognized tribes once every three years. Because of recent litigation, accessing information directly from the BIA has been problematic. The Department maintains current tribal information in CWS/CMS and on its ICWA web page (www.childsworld.ca.gov – Quick Links, ICWA, Links, and Tribe Listing). Questions regarding current tribal information can be directed to the Department's ICWA Specialists.

Does a child have to be "enrolled" or "registered" with a tribe to be considered a member of that tribe? Who makes the determination of tribal membership?

The determination of tribal membership or eligibility for membership is made solely by the tribe. California Rules of Court Rule 1439(g) (1) states, "A tribe's determination that the child is or is not a member of or eligible for membership in the tribe is conclusive." Enrollment or registration is not necessarily required for the child to be considered a member. Each tribe may have different procedures and/or criteria for determining membership, and may change these criteria if the tribe chooses to do so. Tribal membership or eligibility may not necessarily be based on blood quantum. If a tribe indicates it recognizes a child as a member no further inquiry should be made and ICWA must be applied.

Does a child have to have an enrollment or registration number to be considered a member of a tribe?

Each tribe determines its own membership process. This process may mirror previously used methods that incorporated the use of enrollment and/or registration numbers. However, many tribes no longer utilize that method and the use of lineal descent is observed.

Should the county social worker attempt to enroll an Indian child?

If the parent(s), Indian custodian(s) or tribe requests assistance, best practice dictates that the county social worker will work in cooperation with these parties to ensure the Indian child's rights, including membership, are protected.

What kinds of cases are covered by ICWA?

A two-pronged test is used to initially review any case for ICWA applicability: 1) is the proceeding a "child custody proceeding," and 2) is the child involved an Indian child. The ICWA defines child custody proceedings as those involving foster care placements, termination of parental rights, pre-adoptive placements, and adoptive placements. It covers both voluntary and involuntary proceedings, although different sections of ICWA may apply to each.

Does ICWA apply to a custody dispute?

ICWA does not apply where the parents are involved in a custody dispute as long as custody is granted to one of the parents. If custody is awarded to any person, other than the parent, the Act will apply. If probate guardianship is being considered, ICWA may apply. Should there be an effort to terminate the parental rights of one of the parents (e.g., stepparent adoption) then ICWA would be triggered if the child falls within the definition of an ICWA child.

Does ICWA apply to delinquency cases and county probation officers?

ICWA states that it does not apply to "placements based on an act which, if committed by an adult, would be deemed a crime." Cases adjudicated pursuant to Welfare and Institutions (W&I) Code section 602 (delinquency cases) would not be subject to ICWA when placement is based on a criminal act. However, not all California delinquency cases involve removals based on criminal acts. If a ward is placed in a foster care placement (relatives, foster care, group home, or treatment facility), ICWA will apply because placement in foster care is based on the needs of the child and not based on the crime he or she committed. These placements fall within the federal definition of child custody proceedings covered by ICWA.

To the extent the policy underlying juvenile law in California remains treatment and rehabilitation of the child, the policy underlying the ICWA strongly supports tribal involvement in 602 proceedings. Accordingly, many tribes actively pursue involvement in 602 cases and make an effort to provide services and locate appropriate placements, which could include culturally appropriate treatment in an Indian foster home or services such as Indian health services.

When is notice of court proceedings provided and to whom?

ICWA requires any party to an involuntary child custody proceeding involving an Indian child to give notice to the child's parents, Indian custodian (if one exists), and tribe at the commencement of the proceeding. Notice is triggered by any suggestion ("knows or has reason to know") that the child is an Indian child. Any tribe with possible affiliation must be given notice. In many cases, more than one tribe must be given notice because of differing tribal affiliations among parents or separate bands or clans of a tribe. The notice requirements arise even where the child's Indian status is not certain. Whenever there is reason to believe that an Indian child may be involved, verification of the child's membership status must be sought first from the child's tribe. Notice to the BIA is required when the identity or location of the Indian tribe is unknown.

California Rules of Court require that notice of each hearing must be sent whenever there is reason to believe the child may be Indian, until such time as it is determined the child is not Indian.

When may a tribe intervene in a case?

ICWA states "In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding" (25 U.S.C. sections 1911(c)). An intervening tribe may fully participate as a party to a proceeding. A tribe may also intervene by filing a petition before a court to invalidate a proceeding conducted in violation of designated provisions of ICWA. Even when parental rights have been terminated, ICWA still applies and requires compliance with placement preferences.

Is tribal intervention necessary to require compliance with ICWA?

If an Indian child, as defined by ICWA, is involved in a proceeding, ICWA applies and must be complied with whether or not the child's tribe chooses to formally intervene. A tribe may choose to participate in the court proceeding in several capacities. A tribe may, without intervening, exercise rights granted under ICWA to alter the minimum federal standards that the state court must then follow, e.g., defining extended family, altering placement preferences by tribal resolution. A tribe may provide evidence and testimony.

What are "active efforts" and when must they be provided?

Under ICWA any party seeking to make a foster care placement of, or terminate parental rights to, an Indian child must demonstrate that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family" (25 U.S.C. section 1912(d)) and that such efforts have failed. This is different than state law, which only requires that a party seeking foster care placement of, or termination of parental rights to, a non-Indian child must demonstrate reasonable services to reunify the family. In order to meet the active effort requirement, the remedial and rehabilitative programs must take into account the prevailing social and cultural conditions and way of life of the child's tribe. All available resources should be used, including the extended family, the tribe, Indian social services agencies, Indian caregivers, and medicine people.

What is an expert witness and when must they be used?

No involuntary placement of an Indian child, outside his or her home, may be ordered until the party seeking **removal** establishes by **clear and convincing** evidence, supported by the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child (25 U.S.C. section 1912(e)). Additionally, no **termination of parental rights** may be ordered until a determination is made, supported by evidence **beyond a reasonable doubt**, including expert witness testimony, that the continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child (25 U.S.C. section 1912(f)). The expert witness must be qualified to speak specifically to the issue of whether continued custody will place the child at risk. A qualified expert witness may be:

- a member of the child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child rearing practices;
- a lay expert with substantial experience in the delivery of Indian child and family services and extensive knowledge of prevailing social and cultural standards and child rearing practices of tribes, specifically the child's tribe, if possible;
- a professional person with substantial education and experience in the area of his or her specialty; or
- a professional person with substantial education and experience working with Indian families and familiar with Indian social and cultural standards, particularly those of the child's tribe (added by California Rule of Court 1439(a) (10) (C)).

Do tribes have the authority to license or approve homes for placement of Indian children?

The ICWA authorizes Indian tribes and tribal organizations to establish and operate child and family services programs "on or near reservations," including a system for licensing or otherwise regulating Indian foster and adoptive homes.

Upon removal, what is county social worker's responsibility for placement?

In foster care placements, the preferences identified in ICWA - 1) with a member of the child's extended family; 2) with a foster home licensed, approved or specified by the Indian child's tribe; 3) with an Indian foster home licensed or approved by an authorized non-Indian licensing authority; 4) with 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; or 5) as determined by the child's tribe - must be adhered to unless good cause exists not to do so.

The responsibility for determining the appropriateness of a placement for a child, including an Indian child, rests with the county social worker. If there is reason to believe that the placement would not be a safe one, the county placement worker should discuss the concern with the tribe and allow for possible correction of the issue of concern. Ultimately, the final decision and responsibility is with the county child welfare services agency. However, licensing/approval requirements (e.g., the size of the home, the number of individuals residing in the home, whether more than two children are sharing a bedroom) are **not** to be used as rationale for not placing an Indian child into a tribally-approved home.

Instances that may cause concern for the county placement worker are those that potentially place the child(ren) in situations that are dangerous or do not provide adequate protection. For example, if a child is removed from the parent's home due to substance abuse by the parent(s) that causes his or her inability to protect the child, and the tribe has indicated that it intends to place the child back with the parent(s), this would not be a safe placement for the child.

Are tribes required to use the same standards to license or approve homes as homes licensed by the State or counties? Are tribes required to use the same standards for approving relative or non-related extended family member homes as specified in the Adoption and Safe Families Act (ASFA) and Assembly Bill (AB) 1695?

ICWA states that for purposes of qualifying for funds under a federally-assisted program, tribal licensing or approval of foster or adoptive homes, which can include relative or non-related extended family members' homes, or institutions is equivalent to licensing or approval by a State (25 U.S.C. section 1931(b)). The authority to license or approve includes the authority to set standards. The relative or non-related

extended family member approval standards required by ASFA and AB 1695 are not to be applied to tribally approved homes. The only exception to this is the requirement for criminal records checks (see next question).

Are adults residing in homes licensed or approved by a tribe, including relatives or non-related extended family members, subject to a criminal records check?

Prior to a county social worker or probation officer placing a child in a tribally licensed or approved foster home a criminal records check must be completed on all individuals residing in the home over age eighteen. Tribes do not have access to the required Department of Justice (DOJ) information to conduct criminal records checks therefore these checks shall be completed by the counties. The criminal records check is to include a fingerprint clearance from the DOJ. This can be initiated by using fingerprint Live Scan technology, if available, or submission of fingerprint cards to DOJ. A check of the Child Abuse Index from DOJ will also need to be completed. A second set of fingerprints is to be submitted to DOJ for the purpose of searching the criminal records of the Federal Bureau of Investigation (FBI). If the response from the FBI is the only information that has not been received and the individual has signed and submitted a statement that he or she has not been convicted of a crime other than a minor traffic violation, the child may be placed.

To assist in the placement of Indian children with relatives or non-related extended family members a county can conduct a criminal records check through the California Law Enforcement Telecommunications System (CLETS). Within five judicial days following the CLETS check, the social worker shall ensure that a complete criminal records check, as described above, is initiated.

If the criminal records check indicates that an individual has been convicted of a crime, a child may not be placed in the home, unless a criminal records exemption is granted. The county may issue a criminal records exemption only if that county has been granted permission by the Director of the Department, pursuant to W&I Code section 361.4. To allow placement into a home licensed or approved by a tribe, the tribe may request either the county with jurisdiction over the child or the Department to evaluate the criminal exemption information and make a determination to grant or deny the request. Once a tribe has elected to have the exemption request reviewed by either the Department or the county, the exemption decision may only be made by that entity.

Can counties claim state and federal AFDC-FC on behalf of an eligible Indian child in a foster care placement made pursuant to the ICWA?

Counties may pay foster care and claim State and federal AFDC-FC for eligible Indian children in placement. These placements may include a state licensed or approved facility and any home of a relative or non-related extended family member located on or off the reservation, which is licensed, approved or specified by the Indian child's tribe and a criminal records check has been completed.

Where can I find the applicable legal references related to ICWA or tribal rights and responsibilities in child welfare proceedings?

1) 25 United States Code section 1901 et seq.
2) Welfare and Institutions Code sections 215, 272, 290.1 through 295, 297, 305.5, 306, 360.6, 361.4(f), and 10553.1
3) California Rules of Court, Rule 1410(b), 1411(i) and 1439
4) Manual of Policies and Procedures, Division 31

If you have questions or need further information, please contact Anne Smith, ICWA Specialist, at (916) 651-6031.

Sincerely,

Original signed by Patricia Aguiar

PATRICIA AGUIAR, Chief
Child and Youth Permanency Branch

Attachment

IN REPLY REFER TO:

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Pacific Regional Office
2800 Cottage Way
Sacramento, California 95825
September 26, 2003

Anne Smith, Program Specialist
California Department of Social Services
744 P Street MS – 19 – 87
Sacramento, CA 95814

Dear Ms. Smith:

The Federal Register listing of Tribal Entities that are eligible for government services is published annually and the listing of Tribal Designated Agents of Notice for purposes of Indian Child Welfare custody proceedings is published semi-annually. However, these lists are current only when published and tribal addresses and phone numbers can and do change without public notice.

Therefore, please be advised that these lists cannot be relied on to provide up to date addresses or phone numbers for Federally Recognized Tribes in all instances.

Sincerely,

Regional Social Worker

ACIN No. I-122-00 (12/19/00)
Indian Child Welfare Act and
the “Existing Indian Family” Doctrine

DEPARTMENT OF SOCIAL SERVICES
744 P Street, Sacramento, California 95814

December 19, 2000

REASON FOR THIS TRANSMITTAL

[ ] State Law Change
[ ] Federal Law or Regulation Change
[ ] Court Order
[ ] Clarification Requested by One or More Counties
[ ] Initiated by CDSS

ALL-COUNTY INFORMATION NOTICE NO. I-122

TO: ALL COUNTY WELFARE DIRECTORS
ALL COUNTY PROBATION OFFICERS

SUBJECT: INDIAN CHILD WELFARE ACT AND "EXISTING FAMILY DOCTRINE"

The purpose of this information notice is to remind counties that social workers and probation officers are to apply the Indian Child Welfare Act (ICWA) in child custody cases involving Indian children and ***not*** to apply what is known as the "Existing Family Doctrine." (The Existing Family Doctrine requires that an Indian child's parents have maintained sufficient social, cultural, and/or political contact with their tribe to qualify as an Indian family, even if the parents are tribal members.)

Assembly Bill (AB) 65, Chapter 275, Statutes of 1999, added Section 7810 to the Family Code as well as Section 360.6 to the Welfare and Institutions Code. These statutes declare that the Legislature's intent that ICWA is to be applied in Indian child custody cases as defined in the federal law and that a determination by an Indian tribe that a child is either a member of, or eligible for membership in, an Indian tribe shall constitute a signficiant political affiliation with the tribe and shall require the application of ICWA. The Existing Family Doctrine is no longer to be applied in Indian child custody proceedings and therefore cannot be the basis for a recommendation to the court regarding placement by a county social worker or probation officer.

The Department will be working with the Judicial Council of California to ensure the language for Court Rules is consistent with the law, and in enlisting the aid of juvenile court judges to ensure ICWA is applied appropriately in all cases.

If you have any questions regarding ICWA and the elimination of Existing Family Doctrine criteria, you may contact Anne Smith, of the Foster Care Policy Bureau, at (916) 322-0725.

Sincerely,

Original Document Signed By

SYLVIA PIZZINI
Deputy Director
Children and Family Services Division

ACL 95-07 (2/9/95)

Aid to Families with Dependent Child – Foster Care Program Eligible Facility Requirements

DEPARTMENT OF SOCIAL SERVICES
744 P Street, Sacramento, CA 95814

February 9, 1995

ALL-COUNTY LETTER NO. 95-07

TO: ALL COUNTY WELFARE DIRECTORS

REASON FOR THIS TRANSMITTAL

[ ] State Law Change
[ ] Federal Law or Regulation Change
[ ] Court Order or Settlement Agreement
[ ] Clarification Requested by One or More Counties
[X] Initiated by CDSS

SUBJECT: AID TO FAMILIES WITH DEPENDENT CHILDREN-FOSTER CARE (AFDC-FC) PROGRAM ELIGIBLE FACILITY REQUIREMENTS

REFERENCE: Welfare and Institution Code (WIC) section 11401(e) and Eligibility and Assistance Standards (EAS) sections 45-202.5 and 45-203.4

The purpose of this All-County Letter is to inform the counties of a change in policy concerning AFDC-FC eligible facility requirements in the case of Indian children placed in out-of-home care pursuant to the Indian Child Welfare Act (ICWA).

Effective the date of this letter, counties may claim state and federal AFDC-FC on behalf of an eligible Indian child in a foster care placement made pursuant to the ICWA. These placements may include a state licensed or approved facility and any home of a relative or nonrelative located on or off the reservation which is licensed, approved or specified by the Indian child's tribe. The change in policy provides more placement options for Indian children, but does not make changes in any other areas of AFDC-FC program administration.

The change in policy is based on regulatory changes initiated by the California Department of Social Services (CDSS) in EAS sections 45-202.5 and 45-203.4 which provide that federal and state AFDC-FC respectively, may be claimed on behalf of an eligible Indian child placed in a home designated by the child's tribe. The CDSS will submit a Title IV-E State Plan amendment to the federal Department of Health and Human Services (DHHS), Administration for Children and Families, requesting formal approval to claim federal AFDC-FC for these placements. Additionally, the CDSS requested that the DHSS grant preliminary approval for the proposed amendment to the Title IV-E State Plan, and permission to implement the expanded funding options pending formal approval of both the regulatory changes and the State Plan amendment. The CDSS obtained written approval from the DHSS which granted both requests on December 14, 1994.

The policy and regulatory changes are supported by both federal and state statutes (ICWA 25 USC Section 1915 and WIC section 11401[e]). The ICWA was passed by Congress in 1978 to establish minimum federal standards for the removal

of Indian children from their homes. Specifically, the ICWA requires, in the absence of good cause to the contrary, that the preferred placement of an Indian child in foster care be the home of the Indian child's extended family or a foster home licensed, approved or specified by the Indian child's tribe. These ICWA provisions apply to all Indian children in foster care who are unmarried and less than 18 years of age and at a minimum have one parent who is a member of an Indian tribe recognized as eligible for the services provided to Indians by the Secretary of the Interior.

The CDSS encourages counties to work with tribes to establish mutually acceptable criteria for determining appropriate homes for the placement of Indian children. Please contact the Foster Care Policy Bureau at (916) 445-0813 if you have any questions regarding the implementation of this letter or any other issue related to AFDC-FC program administration.

Sincerely,

MARJORIE KELLY
Deputy Director
Children and Family Services Division