

CHILDREN'S SERVICES
HANDBOOK

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I. OVERVIEW

In 1978 Congress passed the Indian Child Welfare Act (ICWA). ICWA is intended to protect American and Alaska Native families and children from removal from their tribes and to assure that tribes are given the opportunity to raise Native American children in a manner which reflects the unique values of native culture.

ICWA sets specific requirements to be met whenever an American Indian child is removed from his or her home in order to promote the stability and security of Indian tribes and families. It also establishes standards with higher evidentiary requirements when an Indian child is the subject of a child custody proceeding. Tribal membership is determined by each tribe and membership does not necessarily depend on the child's racial origins.

Improper, inadequate or poorly documented ICWA inquiry and notice can lead to reversals and ultimately effect permanency needs of children. Therefore, it is imperative that ICWA requirements be met with upmost consideration.

The ICWA applies to federally recognized tribes. However, 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, as long as the child meets the definition of an Indian child under the ICWA except that his or her tribe is not federally recognized. (W & I Code § 306.6; Fam. Code § 185.)

There are five provisions of ICWA and each one will be covered in this policy:

- Inquiry & *Noticing
- Active Efforts
- Placement
- Customary Tribal Adoption
- Qualified Expert Witness

***Note:** ICWA Noticing Procedures is not provided in this policy. Please reference- *Procedures For Application of the Indian Child Welfare Act*, [DM 31-609](#)

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II. POLICY

It is the policy of Contra Costa County Children and Family Services that every child who comes to the attention of the Department be evaluated to determine if he/she is of American Indian/Eskimo heritage. Furthermore, CFS Staff will evaluate a child's native ancestry throughout the life of the case and will comply with all the provisions of ICWA.

III. DEFINITIONS

- A. Indian:** 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 1606 of title 43.
- B. Indian child:** Any unmarried person who is under age eighteen and is either a member of a federally recognized Indian tribe or is eligible for membership in a federally recognized Indian tribe and is the biological child of a member of an Indian tribe.
- C. Indian child's tribe:** The Indian tribe in which an Indian child is a member or eligible for membership or, 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.
- D. Indian custodian:** 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.
- E. Membership in a tribe:** Each tribe determines for itself the eligibility criteria for membership. The identified tribe needs to be contacted for confirmation regarding eligibility/membership.
- F. Enrolled member:** A person who has a tribal enrollment card or enrollment number. Each tribe sets its own criteria for enrollment.
- G. Reason to Know**
The circumstances that trigger ICWA noticing requirement under which a juvenile court has reason to believe that a child is an Indian child include, but are not limited to, the following:

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- 1) Any party to the case (parent, guardian), Indian tribe, Indian organization or public or private agency informs the court that the child is an Indian child.
- 2) 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.
- 3) The child who is the subject of the proceeding gives the court reason to believe he or she is an Indian child.
- 4) The residence or 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.
- 5) An officer of the court involved in the proceeding has knowledge that the child may be an Indian child.

IV. INQUIRY

A. What Constitutes an Inquiry

An ICWA inquiry must be made on any case in which a dependency petition is filed, or will be filed, concerning any child who is the subject of a dependency petition. California imposes an affirmative and continuing duty to inquire whether the child is or maybe an Indian child.

Note-This includes cases, which may result in an in-home placement, such as a court-ordered Family Maintenance

B. Whom Should The Inquiry Be Made

Inquiries will be conducted with every identified parent, alleged parent, guardian, **child if old enough (age 10 or older)**, and any maternal and paternal relatives and other person(s) that reasonably can be expected to have information regarding the child's tribal membership, status, or eligibility.

Inquiries, must also include, other family members as parent(s)/guardian(s) may be unwilling or unable to provide ancestral information. Inquiries must also include an investigation of the biological parent(s) of an adopted child.

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V. NOTICE

A. Notice Requirement

ICWA establishes that in any involuntary proceeding in a State court where the court knows or has reason to know that an Indian child is involved, and where the identity and location of the child's parent or Indian custodian or Tribe is known, the party seeking the foster-care placement of, or termination of parental rights to, an Indian child must directly notify the parents, the Indian custodians, and the child's Tribe by registered or certified mail with return receipt requested, of the pending child-custody proceedings and their right of intervention.

Note- Prompt notice per law of a child-custody proceeding is vitally important because it gives the parent, Indian custodian, and Tribe the opportunity to respond to any allegations in the case, to intervene, or to seek transfer jurisdiction to the Tribe. In addition, prompt notice facilitates the early identification of preferred placements as well as the provision of Tribal services to the family.

B. Method of Notice

Notice must be sent by registered or certified mail with return receipt requested. Notice may also be sent via personal service or electronically, but such alternative methods do not replace the requirement for notice to be sent by registered or certified mail with return receipt requested.

C. Time Limits for Notice

Time limitations ensure that parents, Indian custodians, and the Tribe have time to determine whether a child is an Indian child and respond to and prepare for the proceeding.

1. **Minimum Time Limit:** As the rule states, no foster-care-placement or termination-of-parental-rights proceeding may be held until at least **10 days after receipt of the notice** by the parent (or Indian custodian) and by the Tribe (or the Secretary).

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2. Extensions: The parent, Indian custodian, and Indian child's Tribe are entitled to one extension of up to 20 days for each proceeding. Any extension beyond the initial extension up to 20 days is subject to the State court's rules and discretion.

D. Contents of Notice

Notice must be in clear and understandable language and include the following:

1. The child's name, birthdate, and birthplace.
2. All names known (including maiden, married, and former names or aliases) of the parents, the parents' birthdates and birthplaces, and Tribal enrollment numbers if known.
3. If known, the names, birthdates, birthplaces, and Tribal enrollment information of other direct lineal ancestors of the child, such as grandparents.
4. The name of each Indian Tribe in which the child is a member (or may be eligible for membership if a biological parent is a member).
5. A copy of the petition, complaint, or other document by which the child custody proceeding was initiated and, if a hearing has been scheduled, information on the date, time, and location of the hearing.

VI. ACTIVE EFFORTS

A. Definition

Active efforts are; affirmative, thorough, and timely efforts intended to maintain or reunite an Indian child with his or her family. They are more than reasonable efforts; active is the key word. Should be provided to the maximum extent possible in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe.

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B. Process

They should be conducted at onset of the first child welfare investigation and throughout the life of the case and well documented in CWS/CMS case notes and court reports, memos. They should be developed in partnership with the Indian child, the child's parents, extended family, Indian custodians (if any), and the Tribe.

Note- "Active efforts" means not just an identification of the challenges a family faces and providing solutions. It also requires a Social Worker make efforts to **actively assist a family in making** the changes necessary to keep a child safely in their home, or to make the changes necessary for a child to return safely and reunify with family.

Example:

Reasonable Efforts-referral for services

Active Efforts- Arranging services, aiding in transportation, helping families engage in service

VII. PLACEMENT

A. Licensing

Tribal approved homes, with the exception of background clearances requirements, are **not** subject to state licensing approval standards 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. Tribes have the independent authority to approve foster homes using their own socially and culturally appropriate standards.

To confirm that a tribe has approved a home, the Social Worker 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.

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Note-The ICWA 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. 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.

B. Court

The court may not order placement of an Indian child unless it finds by clear and convincing evidence that continued custody with the parent or Indian custodian is likely to cause the Indian child serious emotional or physical damage and it considers evidence regarding prevailing social and cultural standards of the child's tribe, including expert testimony that tribe's family organization and child-rearing practices.

Prior to placement or termination of parent rights, the Department must demonstrate 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. Please see Active Efforts provision, section VI, for further details on documentation of active efforts.

When termination of parental rights is sought evidence including expert testimony, must establish beyond a reasonable doubt that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

C. Preferences

Any foster care or guardianship placement of 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.

The Court may adopt a different placement preference established by the child's tribe, as long as the placement provides the child with the least restrictive setting as defined in the preceding paragraph.

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The Department must use the services of the Indian child's tribe, whenever available through the tribe, in seeking to secure placement within the order of placement preferences.

ICWA's placement preferences, require that Indian children, once removed, be placed in homes that reflect their unique traditional values.

To this end, ICWA requires that **when an Indian child is placed in foster care**, the child must be placed in order of preference, with a:

- Member of the Indian child's extended family (including non-Indian family members).
- Foster home licensed, approved or specified by the child's tribe.
- Indian foster home licensed or approved by a non-Indian agency or authority.
- Institution for children that has the approval of an Indian tribe or an Indian organization with a program suitable to meet the Indian child's needs.

When an Indian child is placed into a permanent placement, the child's placement preferences are:

- Member of the Indian child's extended family (including non-Indian family members).
- Tribal member.
- Other Indian family.

Note- There is no fourth item in the order of preference that allows for adoption of Indian children by non-Indians.

D. Emergency Removal

If removal is essential to protect the child from serious physical or emotional damage, then ICWA placement preferences are not mandatory. However, it is policy of Contra Costa County to make every attempt to place any child with a suitable relative.

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Furthermore, 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.

VIII. TRIBAL CUSTOMARY ADOPTION

A. Background

Tribal Customary Adoption (TCA) is the transfer of custody of a child to adoptive parents without terminating the rights of the birth parents. The passage of AB 1325 in 2010, 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. The law also provides that when the juvenile court finds that full faith and credit will 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 benefits.

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.

Note- As specified in W&IC section 361.31, the agency shall use the placement preference requirements when selecting prospective adoptive parents for an ICWA child.

B. Key Points under TCA mandates:

1. The Indian child's tribe has the authority to recommend TCA as the permanency option for the Indian child.

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2. An Indian child who is the subject of a TCA is eligible for AAP benefits.
3. TCA is aligned with the state's existing concurrent planning policies, so that when applicable, it allows, at the tribe's option, for TCA to be included as an alternative permanent plan to family reunification throughout the dependency case.
4. The law 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.
5. The law also 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 TCA, the juvenile court may order, without termination of parental rights, TCA as the permanent plan for that child.
6. It provides requirements for cases in which TCA is determined as the child's permanent plan, including:
 - a. The completion of an adoptive home study by either the Indian child's tribe or the tribe's designee;
 - b. The completion, by the child's tribe, of a Tribal Customary Adoption Order
 - c. The filing of an addendum to the continued 366.26 report by the licensed county adoption agency, or CDSS when it is acting as an adoption agency, to the court;
 - d. 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.

C. Differences between TCA and a conventional adoption are:

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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 WIC 366.24

IX. QUALIFIED EXPERT WITNESS

A. Purpose

The qualified expert witness provides testimony to the court as to whether or not recommending foster care placement or termination of parental rights in an Indian child custody proceeding is likely to result in serious physical or emotional damage to the child.

A qualified expert witness is used when:

- there is involuntary removal from the parent or Indian custodian
- placement out of the home
- termination of parental rights

A qualified expert witness can meet two evidentiary burdens dependent on if the testimony is at the removal of the child or termination of parental right proceeding. For removal of the child the court must find by clear and convincing evidence, including the testimony of a qualified expert witness that not removing will likely result in serious detriment to the child. For termination of parental rights the burden of proof must be beyond a reasonable doubt.

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B. Qualifications of an Expert Witness

Provided the individual is not an employee of the CFS 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.

The California Department of Social Services (CDSS) recommends that the qualified expert witness contact the child's family and tribe prior to the court hearing to determine the emotional and physical effect of continued custody.

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 child rearing 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 child rearing practices within the Indian child's tribe; and, a professional person having substantial education and experience in the area of his or her specialty. (W&IC § 224.6(c).)

C. Location of an Expert Witness

It is the responsibility of the Department to ensure that the qualified expert witness requirement is fulfilled. When locating the expert witness, best practice may be to first ask the involved tribe for assistance in locating persons qualified to serve as an expert witness. The tribe may 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 child rearing practices pertinent to the proceeding.

Note: County Counsel holds a list of ICWA Qualified Expert Witnesses that can be referenced by the Social Worker as needed.

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Please call (925) 335-1830 and ask to speak to an attorney about locating a qualified expert witness for an ICWA matter.

X. RESOURCES

A. Forms

The following are the ICWA forms to be used in all ICWA cases if applicable. They are located either online at courts.ca.gov or within CWS:

- ICWA 010(A) - file with petition
- ICWA 020 - to be completed by the parent.
- ICWA 030 - notice form for the tribe, and others.
- ICWA 040 - notice of designation of tribal representative
- ICWA 050 - tribe requests case transfer of tribal jurisdiction
- ICWA 060 - order to transfer the case to tribal jurisdiction

The following forms are in the CWS/CMS application and will auto populate:

- Petition-page 4-ICWA-010(A) - Indian Child Inquiry Attachment,
- ICWA-020 - Parent Notification of Indian Status
- ICWA-030 - Notice of Child Custody Proceeding for Indian Child and ICWA-030(A)-Attachment for the Notice of Child Custody Proceeding for Indian Child

B. Desk Guides

There are several companion desk guides that accompany this policy.

- [ICWA "The Why and The How"](#) Provides an overview of ICWA as well as in-the-field resources/tools to assist staff when implementing ICWA.
- [ICWA Social Worker Procedures](#) Provides detailed instruction by program for the staff responsible for ICWA implementation.
- [ICWA Clerical Procedures](#) (in STARS under Documents) Provides detailed instruction for clerical on completing the noticing requirements and inputting ICWA into CWS/CMS.

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- [ICWA 030 Process](#) Provides detailed instruction on completion of the Notice of Child Custody Proceeding for Indian Child (ICWA 030) for social work staff.

XI. REFERENCES

Placement preferences: [W&I 361.31](#).

ACTIVE EFFORTS: (to prevent the break-up of an Indian family) W&I [361.7](#), FC 177(a), and 3041(e)

NOTICE REQUIREMENTS: W&I 224.2, 224.3, ACL 09-28

TERMINATION OF PARENTAL RIGHTS: [366.26\(c\)\(2\)\(B\)](#), 25 U.S.C. § 1912(e); W & I Code § 361.7(c); Prob. Code § 1459.5(b); Fam. Code § 7892.5(a.)

PETITION TO INVALIDATE ORDERS: W&I [224\(e\)](#)

ADOPTION RECORD KEEPING: CA rule [5.487](#)

All County Letters 08-02, 09-28, 14-15

ACIN 86-08, 40-10

California Appellate Decision: 176 Cal. App. 4th 773

CONTACT PERSON: Persons with questions concerning this department manual section may contact the Court Program Analyst.

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