IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

In re ABBIGAIL. A., ET AL, Persons Coming Under the Juvenile Law	**CASE NO. S220187**
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Appellant,	COURT OF APPEAL NO. C074264
v.	SACRAMENTO COUNTY JUVENILE COURT NO. JD232871-2
J. A., Defendant and Respondent.	

ON APPEAL FROM THE SUPERIOR COURT OF SACRAMENTO
HONORABLE PAUL L. SEAVE PRESIDING

RESPONDENT'S BRIEF ON THE MERITS

KONRAD S. LEE
STATE BAR NUMBER: 147130
23441 GOLDEN SPRINGS DRIVE
DIAMOND BAR, CA 91765-2030
909-333-6564

COUNSEL FOR PETITIONER
JOSEPH A.

UNDER APPOINTMENT OF THE
CALIFORNIA SUPREME COURT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

California Cases

Other Cases

STATUTES

CALIFORNIA RULES OF COURT

OTHER AUTHORITY

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

In re ABBIGAIL. A., ET AL, Persons Coming Under the Juvenile Law	)	**CASE NO. S220187**
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Appellant,	)	COURT OF APPEAL NO. C074264
v.	)	SACRAMENTO COUNTY JUVENILE COURT NO. JD232871-2
J. A., Defendant and Respondent.	)	

RESPONDENT'S BRIEF ON THE MERITS

ISSUE PRESENTED.
(Rule 8.520(b)(2)(B).)

Are California Rules of Court, rules 5.482(c) and 5.484(c)(2), consistent with the Welfare and Institutions Code,[1] section 224.1, subdivision (a) and Indian Child Welfare Act[2] definition of "Indian child," when they require a court in a child custody proceeding to treat, as if she/he were an Indian, a child who has been designated by a federally-recognized

[1] All undesignated statutory references are to the Welfare and Institutions Code.

[2] 25 U.S.C. § 1902, et seq. Hereafter, "ICWA."

tribe as eligible for tribal membership, but who is not yet formally enrolled?

Rules 5.482(c) and 5.484(c)(2) do not conflict with statute because they do not redefine "Indian child." They are narrow procedural mandates which apply only after ICWA notice reveals a tribe has already determined an unenrolled child has sufficient Indian blood quantum for membership. As such, the rules enable courts to accomplish the Legislature's goal of correcting California's 25-year history of ICWA compliance failures, while simultaneously promoting prompt resolution of child custody proceedings.

STATEMENT OF THE CASE AND FACTS.[3]

(Rule 8.204(a)(2)(c).)

The family in this case consists of respondent, Joseph A. (Joseph), Jamie S. (mother), and the minors, Abbigail A., born June 2008, and Justin A.,[4] born May 2007. (CT 1-6.)[5]

In the fall of 2012, the minors were living with mother in

---

[3] Rule 8.204(a)(2)(C); *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 522, fn. 2 ["It is impossible to ... [get] an accurate "feel" for what is really going on in most juvenile dependency cases without integrating the statement of the case with the statement of the facts"].

[4] Rule 8.401(a): "To protect the anonymity of juveniles involved in juvenile court proceedings: (1) In all documents filed by the parties in proceedings under this chapter, a juvenile must be referred to by first name and last initial; but if the first name is unusual or other circumstances would defeat the objective of anonymity, the initials of the juvenile may be used."

[5] Hereafter referred to by name, or "the minors" or "the children."

Sacramento. (CT 12.) In November 2012, mother was arrested on suspicion of unlawful possession of controlled substances and drug paraphernalia. (CT 3, 16-18.)

The Sacramento County Department of Health and Human Services (Department) was notified and, following an investigation, detained the children and temporarily placed them with the maternal grandmother. (CT 23.)

At the time, Joseph had a history of law enforcement contact, mental health problems, drug use and domestic violence. (CT 313-316.) His current whereabouts were unknown to the Department. (CT 19.)

On December 4, 2012, the Department filed a section 300 petition with the juvenile court alleging under subdivision (b) that mother's drug use placed the children at risk. (CT 1-10.) The petition made no allegations implicating Joseph in abuse or neglect. (CT 8-9.)

On January 4, 2013, Joseph appeared at a pre-jurisdictional status conference hearing. (RT 1.) There, he claimed Cherokee Indian ancestry saying: "My mother's mother is Indian. My aunt has the tree of the – all the family members" and "she collects, you know, medical and stuff like that through the tribe." (CT 90; RT 6.) Joseph provided the court with his aunt's telephone number and address. (RT 6.) Whereupon, the court ordered the

Department contact the paternal great-aunt to obtain Indian ancestry information. (RT 6-7.)

On January 9, 2013, the Department mailed ICWA-030 notices to the relevant Cherokee[6] tribes. (CT 96, 99-127; RT 20.)

On January 25, 2013, the Department filed an amended petition alleging Joseph had a history of substance abuse and domestic violence.(CT 295, 301.) The juvenile court declared Joseph a presumed father. (RT 17, 20.)

On January 29, 2013, the Cherokee Nation[7] informed the Department by letter that Abbigail and Justin were "eligible for enrollment and affiliation with Cherokee Nation by having direct lineage to an enrolled member." (CT 333; RT 20, 28-29.) The Cherokee Nation provided the Department with membership application forms for the children and requested they be completed "by the party having custody or their representative." (CT 333.) The letter stressed that the Cherokee Nation was not empowered to intervene until the applications had been approved. (CT

---

[6] There are three federally-recognized Cherokee Indian tribes: Cherokee Nation, Eastern Band of Cherokee Indians and United Keetoowah Band of Cherokee Indians in Oklahoma (77 Federal Register No. 155, August 2012, 47869, 47872.)

[7] The Cherokee Nation consists of 317,000 members and is headquartered in Tahlequah, Oklahoma. (http://cherokee.org, last visited, December 6, 2014.)

333.)

The Cherokee Nation further urged the parties to treat the children as Indians until formal enrollment was complete. (CT 333.) The tribe wrote: "Due to the tribal eligibility of the children in question, Cherokee Nation recommends applying all the protections of ICWA to this matter from the beginning of the case. Hopefully this will prevent any future delays in procedural matters if or when the parents or child/children become enrolled members meeting federal ICWA compliance." (CT 333.)

At a hearing on February 20, 2013, the court found that, in light of the children's eligibility for Cherokee Nation membership they ought to be treated as if they were Indian children until the matter was resolved by the tribe. (RT 32.) The court ordered the Department to obtain an ICWA expert for jurisdictional and dispositional purposes. (RT 32.)

On February 22, 2013, the Department argued to the court that 25 U.S.C. § 1903, subdivision (4), provided that to be an Indian child a person had to be eligible for membership and be the biological child of an enrolled parent. (RT 27, 29.) Since Joseph was not yet enrolled in the Cherokee Nation, the Department argued the children could not be Indians under ICWA. (RT 29.)

On February 27, 2013, the Cherokee Nation sent a letter to the

Department repeating its earlier request that the parties treat Abbigail and Justin as Indians to prevent delay. (CT 390.) The letter gently chided the Department for not facilitating enrollment, by stating: "We have not received a response from you as of this date." (CT 390.)

On March 1, 2013, the Department filed a motion for reconsideration asking the juvenile court to void its earlier decision applying rules 5.482(c) and 5.484(c)(2). (CT 390.)

Meanwhile, Joseph tested positive for exposure to marijuana, opiates and benzodiazepine. (CT 443.) The minors remained in the non-Indian home of the maternal grandmother, where they were doing well. (CT 360.)

On March 15, 2013, the matter returned to court for hearing on the Department's motion for reconsideration of the ICWA orders. (RT 36A.) The court continued the matter for the parties to do additional research on the twin issues of 1) whether the juvenile court could continue to treat Abbigail and Justin as Indians pending their formal enrollment in the Cherokee Nation; and, 2) whether the juvenile court had authority to order the Department to assist the children in obtaining Cherokee Nation enrollment. (RT 389-40, 46.)

On March 22, 2013, the Department filed additional written argument opposing the order to enroll the children in the Cherokee Nation

on the theory the ICWA did not yet apply. (CT 415-430.) The minors aligned themselves with Joseph, arguing rules 5.482(c) and 5.848(c)(2) were consistent with the ICWA and should be followed. (CT 433-440.)

The matter was revisited in court on April 5, 2013, and Joseph was present. (RT 44.) There, following argument, the trial court stated: "The Court concludes that California Rules of Court 5.482(c) and 5.484(c)(2) require this Court to direct the Department to make reasonable efforts to secure tribal membership for the children, and further requires this Court to proceed as if the children are Indian children, meaning that we proceed under the Indian Child Welfare Act." (RT 53.)

In so finding, the court concluded that rules 5.482(c) and 5.848(c)(2) were "consistent with ... California Law" because of their intended amelioration of past state court ICWA violations. (RT 53-54.) Further the court noted that because the children were "not in a position to perfect their membership in the tribe," the social services agency should assist to ensure the children received the benefits of tribal membership. (RT 54.) The court ordered that the case would proceed, as if the children were Indians and ordered the Department to perfect enrollment for them. (RT 56.) The Department objected to the orders. (RT 46-51.)

On May 23, 2013, the matter came on calendar for a combined

jurisdictional and dispositional hearing and Joseph was present. (CT 454; RT 64.) There, the court heard from Indian expert Nanette Gledhill. (RT 72.) She testified that she had spoken to Cherokee Nation representative, Tracie Willie, who reported that Joseph's application for enrollment was incomplete and the tribe would not be "proceeding with the enrollment at this point." (RT 75.) Gledhill observed that, notwithstanding Joseph's regular visitation, continued parental care of the minors posed a risk of harm to them and that the Department had engaged in "active efforts" to prevent the break up of the family. (RT 77-78.) Gledhill reported the children's foster care home met ICWA placement preferences. (RT 77.)

Joseph testified he was participating in services and regularly visiting his children. (RT 86-104.)

Thereafter, the juvenile court sustained the allegations of the January 25, amended petition, declared the children dependents of the juvenile court, removed them from parental custody and ordered the Department to provide Joseph and mother with family reunification services. (CT 454-467; RT 125, 127-129.) The court found the children were eligible for Cherokee Nation enrollment and ordered they be considered Indians in the proceedings. (RT 125, 127-129.)

On July 11, 2013, the Department filed a notice of appeal, seeking

relief from the findings and orders of the juvenile court concerning the application of rules 5.482(c) and 5.484(c)(2). (CT 480-481.)

On June 16, 2014, the Court of Appeal, Third Appellate District in *In re Abbigail A.* (C074264) found rules 5.482(c) and 5.484(c)(2) contrary to section 224, subdivision (a) and, therefore, an unlawful expansion of ICWA's definitions of "Indian child." (Typed Opinion at pp. 12-14.)

On July 28, 2014, Joseph filed a Petition for Review, which this Court granted on September 10, 2014. This Brief on the Merits follows.

DISCUSSION.

I

CALIFORNIA RULES OF COURT, RULES 5.482(c) AND 5.484(c)(2), ARE IN HARMONY WITH THE DECLARED INTENT AND EXPRESS LANGUAGE OF BOTH THE ICWA AND CALIFORNIA LAW.

This Court is called upon to determine whether California Rules of Court, rules 5.482(c) and 5.484(c)(2), are consistent with California's version of ICWA with respect to the definition of an "Indian child." (§ 224.1, subd. (a); 25 U.S.C. § 1903(4).)

A. STANDARD OF REVIEW.

The interpretation of the interplay between California's Indian child protection legislation and related Rules of Court is a question of statutory construction. Such issues of law are reviewed *de novo*. (*Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 387.)

B. AN OVERVIEW OF THE INDIAN CHILD WELFARE ACT AND ITS INCORPORATION INTO CALIFORNIA STATUTORY LAW.

This Court is conversant with ICWA and California's incorporation of its provisions into statute, as it has recently, and extensively, treated the subject in *In re W.B., Jr.* (2012) 55 Cal.4th 30 *(W.B.)*. A summary of ICWA is provided here:

1. The Intent and Purpose of ICWA.

The purposes of ICWA have been discussed extensively by numerous courts since its 1978 enactment. (See, e.g., *Adoptive Couple v. Baby Girl* (2013) —— U.S. ——, 133 S.Ct. 2552, 2557, 186 L.Ed.2d 729 (*Adoptive Couple*); *Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 32, (*Holyfield*); *W.B., supra,* 55 Cal.4th at pp. 48-52; *In re Autumn K.* (2013) 221 Cal.App.4th 674, 700 (*Autumn K.*)

The United States Supreme Court observed that ICWA was "the product of rising concern in the mid–1970's over the consequences to Indian children, Indian families, and Indian tribes[8] of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." (*Holyfield, supra,* 490 U.S. at p. 32; see also *Adoptive Couple, supra,* 133 S.Ct. at p. 2557.)

The problem was highlighted in the United States Senate in 1978 by Calvin Isaac, tribal chief of the Mississippi Band of Choctaw Indians, who observed: "'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

---

[8] At present, there are 566 federally recognized American Indian and Alaska Native tribes and villages. (77 Federal Register No. 155, August 2012, 47863-47873.) A federally recognized tribe is an American Indian or Alaska Native tribal entity recognized as having a government-to-government relationship with the United States, with the responsibilities, powers, limitations, and obligations attached to that designation, and is eligible for funding and services from the Bureau of Indian Affairs. Furthermore, federally recognized tribes possess certain inherent rights of self-government and are entitled to receive certain federal benefits, services, and protections because of their special relationship with the United States. (http://www.bia.gov/FAQs (last visited, December 6, 2014.)

childrearing.'" (*Holyfield, supra,* at pp. 34–35, quoting the hearings on Sen. Bill No. 1214 before the Subcom. on Indian Affairs and Public Lands of the House Com. on Interior and Insular Affairs, 95th Cong., 2d Sess. (1978) at pp. 191–192.)

Prompted by this concern, Congress found: "(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; (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." (25 U.S.C. § 1901.)

Accordingly, through the passage of the ICWA, Congress declared it a national policy "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." (25 U.S.C. § 1902.)

Consistent with this national policy, ICWA establishes procedural and substantive standards governing notice, removal and placement of Indian children who are subject to child custody proceedings. (*W.B., supra,* at p. 40; *In re H.A.* (2002) 103 Cal.App.4th 1206, 1210; *In re Alicia S.* (1998) 65 Cal.App.4th 79 (*Alicia S.*).)

To assist state courts in implementing ICWA protections, one year after its enactment, the Bureau of Indian Affairs (BIA) promulgated federal guidelines. (Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed.Reg. 67584 (Nov. 26, 1979) (BIA Guidelines).) According to the BIA Guidelines, "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." (*Id.* at p. 67586.)

Consistent with ICWA's goals to protect Indian children and tribes, the BIA Guidelines allow that "states may provide greater protection for rights guaranteed by ICWA, as long as the additional protections do not deprive other parties of their rights under the act." (*Id.* at p. at 67584; see *In re Alice M.* (2008) 161 Cal.App.4th 1189, 1199 (*Alice M.*); *In re Junious M.* (1983) 144 Cal.App.3d 786, 793 (*Junious M.*)

2. The ICWA Definition of "Indian child."

An early draft of ICWA did not define "Indian child," but rather defined as Indian "any person who is a member of or who is eligible for membership in a federally recognized Indian tribe." (123 Cong. Rec. S37223 (1977); *Nielson v. Ketchum* (10th Cir. 2011) 640 F.3d 1117, 1123.)[9]

---

[9] Section 1603(c) provides for another definition of "Indian" under the ICWA. For health-related services, a qualifying "Indian" 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] is determined to be an Indian under regulations promulgated by the Secretary." (Indian Health Care Improvement Act of 1976, 25 U.S.C. § 1603(c)[emphasis added].)

Congress ultimately defined "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of a tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4).)

3. To Remedy Problems with Superior Court Application and Enforcement of ICWA in Child Custody Proceedings, the California Legislature Incorporates ICWA and BIA Guidelines Into State Law and the Rules of Court.

Notwithstanding the clear national goals for protecting Indian tribes and families, California courts were careless in following ICWA provisions for its Indian population,[10] sometimes failing to provide proper notice of dependency proceedings involving an Indian child. (*W.B., supra,* at p. 52.) As noted by the California Senate in 2005, the application of ICWA's provisions by state courts was often "inconsistent and perfunctory." (*California Judges Benchguide: The Indian Child Welfare Act* (2010) p. 7 (*Benchguide*); see also Sen. Judiciary Com. Analysis of Sen. Bill No. 678 (2005–2006 Reg. Sess.), as amended Aug. 22, 2005, p. 6. ["[A]lthough

---

[10] California has a total Indian population of 281,374, the largest of any state except Oklahoma. (Bureau of Indian Affairs, *2013 American Indian Population and Labor Force Report*, p. 11 (January 16, 2014), (http://www.bia.gov/cs/groups/public/documents/text/idc1-024782.pdf.)

ICWA was enacted more than 25 years ago, state court and county agencies in California continue to violate not only the spirit and intent of ICWA, but also its express provisions."]; § U.S.C. § 1901.)

To remedy the problem, in 2006, the Legislature adopted Senate Bill 678 (SB 678), which incorporated ICWA into statutory law, revising several provisions of the Family, Probate, and Welfare and Institutions Codes. (See Assem. Com. on Judiciary, Analysis of Sen. Bill No. 678 (2005–2006 Reg. Sess.) as amended June 14, 2006; 2006 Stats., Ch. 838, §1; *In re Autumn K., supra,* 221 Cal.App.4th at pp. 703–704.)

Among many other provisions, SB 678 added section 224 to the Welfare and Institutions Code, setting forth the following Legislative findings and declarations which mirrored ICWA: "(a)(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. §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."

The Legislature's motivating intent behind the changes was to "set forth greater protections for Indian children, their tribes and parents than ICWA [Citation]." (*In re Jack C., III* (2011) 192 Cal.App.4th 976, 977 (*Jack C.*) This intent can been seen in the Assembly Committee on the Judiciary's third reading analysis of the bill which states: "While this bill essentially codifies current federal requirements, it does broaden the interpretation of current laws." (Assem. Com. on Judiciary, 3d reading analysis of Sen. Bill No. 678 (2005–2006 Reg. Sess.) as amended, Aug. 21, 2006, p. 3; *In re Damien C.* (2009) 178 Cal.App.4th 192, 197.)

The Assembly Judiciary Committee comments show that SB 678, was designed to revise and recast "provisions of state law by codifying into state law provisions of [ICWA], [BIA] Guidelines for State Courts, and state Rules of Court." (Sen. Rules Com. Analysis of Sen. Bill No. 678 (2005–2006 Reg. Sess.) as amended Aug. 22, 2006, p. 1.) Further. SB 678 "affirms the state's interest in protecting Indian children and the child's

interest in having tribal membership and a connection to the tribal community."

Part of that revision was the enactment of section 224, subdivision (d), which expressly authorized that if a state or federal law provides a higher standard of protection of rights than ICWA, the higher standard shall prevail. That section states: "(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." (§ 224, subd. (d); see *In re J.T.* (2007) 154 Cal.App.4th 986, 993; *In re Alice M., supra,* at p. 1199.)

In 2008, consistent with the Legislature's intent to provide greater protections to Indian children and tribes, the Judicial Council promulgated rules 5.482(c) and 5.484(c)(2), which are designed to facilitate the speedy resolution of child custody proceedings and the prompt application of ICWA protections to Indian children, by ensuring enrollment of children eligible for membership in a tribe. (*Ibid.*)

Rule 5.482(2) provides: "If after notice has been provided as required by federal and state law a tribe responds indicating that the child is eligible for membership if certain steps are followed, the court must

proceed as if the child is an Indian child and direct the appropriate individual or agency to provide active efforts under rule 5.484(c) to secure tribal membership for the child."

Rule 5.484(c)(2) was also developed to allow a juvenile court to direct the appropriate individual or agency to provide active efforts to secure tribal membership for the child. The exact language of the provision directs 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, as well as attempts to use the available resources of extended family members, the tribe, tribal and other Indian social service agencies, and individual Indian caregivers."

As to who is an "Indian child," California law employs the ICWA definition. (§ 224.1, subd. (a).) The express language of the code reads: "(a) As used in this division, unless the context requires otherwise, the term[] ..."Indian child," ... shall be defined as provided in Section 1903 of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.)."[11]

---

[11] California's definition of "Indian child" is slightly different from ICWA in that it provides that "unless the context requires otherwise," the term "Indian child" is defined as provided in § 1903 of ICWA. (§ 224.1, subd. (a).) (*Jack C., supra,* at p. 977.)

4. Appellate Court Decisions Disagree on the Applicability of the Rules 5.482(c) and 5.484(c)(2) Requirement That an Unenrolled, But Tribe Eligible Child, Be Treated As If an "Indian Child" in Child Custody Proceedings.

In the years following ICWA incorporation into statute, California's appellate courts disagreed on the validity of rules 5.482(c) and 5.484(c)(2).[12]

In 2010, the Sixth Appellate District in *In re C.D.* (2010) 190 Cal.App.4th 102, addressed ICWA's application to children who were eligible for membership, but not yet enrolled in a tribe. That case involved a parent's claim a social services agency failed to make efforts to enroll eligible minors with a tribe. (*Id.* at p. 134-135, fn 11.) The court questioned whether rules 5.482(c) and 5.484(c)(2) were consistent with section 224.1, subdivision (a), but decided the case on other grounds without reaching the issue. (*Ibid.*)

The next year, Division One of the Fourth Appellate District, decided *Jack C., supra,* 192 Cal.App.4th 967. In that case, the parents

---

[12] Prior to the promulgation of rules 5.482(c) and 5.484(c)(2), the Fifth Appellate District in *In re Jose C.* (2007) 155 Cal.App.4th 844, 849, found that beyond requiring notice, ICWA did not apply to children eligible for membership, but not yet members of a tribe. It noted the Legislature had not, at that time, given authority to a juvenile court to enroll an eligible child in a tribe. (*Ibid;* see also, *In re L.B.* (2003) 110 Cal.App.4th 1420, 1427 [Until a child is shown to be an Indian child, only the notice provisions of ICWA apply].)

claimed the trial court ignored rule 5.482(c) when it decided not to transfer the case to a Bois Forte Band of Minnesota Chippewa Band tribal court because the children were eligible, but not yet members of the tribe. (*Id.* at p. 980.) On review the court found rule 5.482(c) was not preempted by ICWA or section 224, subdivision (a) because it was consistent with the goals and purposes of those statutes. (*Ibid.*) It declared the children in that case were "Indian children" on the theory the Legislature intended California's Indian protection statutes to be broader than those found in ICWA. (*Ibid.*)

Finally, on June 16, 2014, the Third District decided the present case, in which it expressly disagreed with *Jack C.* and concluded rules 5.482(c) and 5.484(c)(2) conflicted with the federal and state definition of "Indian child." (Typed Opinion at 13-14.)

C. RULES 5.482(c) AND 5.484(c)(2) ARE "NOT INCONSISTENT" WITH STATE STATUTES WHICH PROVIDE FOR ICWA PROTECTION TO CHILDREN WHO ARE ELIGIBLE FOR TRIBAL ENROLLMENT.

Rules 5.482(c) or 5.484(c)(2) are "not inconsistent with statute." (§ 265 ["The Judicial Council shall establish rules governing practice and procedure in the juvenile court not inconsistent with law."].)

1. The Analysis Required For Determining When a Rule of Court is "Not Inconsistent with Statute."

The California Constitution gives the Judicial Council authority to "adopt rules for court administration, practice and procedure." (Cal. Const., art. VI, §§ 6, 265; *In re Alonzo J.* (2014) 58 Cal.4th 924, 1135; *W.B., supra,* at p. 40; *California Court Reporters Assn. v. Judicial Council of California* (1995) 39 Cal.App.4th 15, 22 (*Court Reporters*.)

The Legislature has specifically directed the Judicial Council to "establish rules governing practice and procedure in the juvenile court not inconsistent with law." (§ 265; *Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1013 (*Sara M.*).)

The Judicial Council has great expertise as its membership consists of appellate and trial judges, as well as seasoned legal practitioners, so it "is uniquely situated to implement ... legislative policy." (*Sara M, supra,* 36 Cal.4th at p. 1013; *People v. Wright* (1982) 30 Cal.3d 705, 713.)

Whenever a proposed rule is other than a minor or technical change the Judicial Council's policies provide for internal review, notice to the public and a public comment period. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12.) The Judicial Council also has standing advisory committees which consider proposed rules in areas of each committee's expertise. (*Ibid.*) These standing committees are directed

to "act in the best interests of the public and the entire court system." (*Ibid.*) Among the standing advisory committees is one on family and juvenile law, which is required to have members with a wide variety of experience and perspectives. (*Ibid.*) Its rulemaking power is limited by existing law as enacted by the Legislature, thus making the legislative branch an inherently higher authority than the Judicial Council itself. (See *Court Reporters, supra*, at p. 22.)

Rule 5.501(c) provides that when rules of court "are substantially the same as existing statutory provisions relating to the same subject matter, these rules must be construed as restatements of those statutes. But when the rules "add to existing statutory provisions relating to the same subject matter, these rules must be construed so as to implement the purposes of the juvenile court law." (See *Court Reporters, supra*, at p. 22.)

Section 265, provides that a rule will be found inconsistent with a statute if it conflicts with either the statute's express language or its underlying legislative intent. (*In re Robin M.* (1978) 21 Cal.3d 337, 346.) When, the Rules of Court are "not inconsistent with legislative enactments and constitutional provisions" they have the force of statute. (*In re Richard S.* (1991) 54 Cal.3d 857, 863.) Therefore, they are afforded "great weight" unless "clearly erroneous or unauthorized." (*Zenker–Felt*

Imports v. Malloy (1981) 115 Cal.App.3d 713, 720.)

Ultimately, however, the interpretation of a statute and its intent is a legal question for the courts to decide. (*Reno v. Baird* (1998) 18 Cal.4th 640, 660; (*Roger Cleveland Golf Company, Inc. v. Krane & Smith, APC* (2014) 225 Cal.App.4th 660, 667.)

A statute to which a rule is linked must be given it's a plain and commonsense meaning. (*Ibid.; Los Angeles County Metropolitan Transportation Authority v. Alameda Produce Market, LLC* (2011) 52 Cal.4th 1100, 1106–1107*(Alameda Produce Market.*) If the statutory language is unambiguous, then the plain meaning controls. (*Id.* at p. 1107.) When a statute is susceptible of more than one interpretation, it may be interpreted by a *rule of court* which is "reasonably contemporaneous with its adoption." (*W.B., supra,* at p. 54; *Sara M., supra,* 36 Cal.4th at pp. 1011-1012, citing *Robinson v. Fair Employment & Housing Com.* (1992) 2 Cal.4th 226, 234; *Imperial Merchant Services, Inc. v. Hunt, supra,* 47 Cal.4th at p. 388.)

When evaluating whether a rule of court is "not inconsistent with statute" within the meaning of the California Constitution, a court must determine the Legislature's intent behind the statutory scheme that the rule was intended to implement and measure the rule's consistency with that

intent. (See *Court Reporters, supra,* at p. 25.)

Rules 5.482(c) and 5.484(c)(2) are to designed to "implement the purposes of the juvenile court law by promoting uniformity in practice and procedure and by providing guidance to judicial officers, attorneys, social workers, probation officers, and others participating in the juvenile court." (Rule 5.501(b).) As will be shown below, rules 5.482(c) and 5.484(c)(2) do not violate the intent of ICWA or California's Indian child protections.

2. Rules 5.482(c) and 5.484(c)(2) Are "Not Inconsistent" With California Statutes Designed to Promptly Resolve Child Custody Cases and Ensure Compliance with the ICWA.

a. ICWA and California Statutes Are Designed to Protect Children Eligible for Membership in an Indian Tribe in Child Custody Cases and Rules 5.482(c) and 5.484(c)(2) Accomplish That Purpose.

As shown above, California Indian protection statutes, and the related rules of court, are the product of the Legislature's intent to provide the most protection possible to Indian tribes, Indian families and children who are eligible for membership, in a federally-recognized tribe. (*In re Damien C. supra,* 178 Cal.App.4th at p. 197 [SB 678 is designed to "broaden the interpretation of current laws"].)

Indeed, when the Legislature adopted the federal ICWA provisions

into state law in 2006, it enacted section 224, which mirrors the Congressional declaration of findings and purpose for ICWA. That section specifically provides that California's version of Indian child law protect both Indian children, and children "eligible for membership in an Indian tribe." (§ 224, subd. (a).) It further provides that in child custody proceedings, "other applicable law" could inform the protections designed to prevent an Indian child's involuntary out-of-home placement. (*Ibid.* [emphasis added].) This "other applicable law" presumably would include the California Rules of Court and the BIA Guidelines. (*In re Richard S., supra,* 54 Cal.3d at p. 863 [valid rules of court have the force of statute].)

That the Legislative intent to broaden the statute is further manifested in subdivision (d) of section 224, which provides that "[i]n 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."

The Legislature was well within its privileges to adopt its own version of ICWA protections as the BIA Guidelines authorize each state to adopt *rules* implementing ICWA and provide that state law interpretation is to be "liberally construed to favor a result that is consistent with the

preferences" and that "[a]ny ambiguity in any of such statutes, regulations, *rules* or guidelines [adopted by states] shall be resolved in favor of the result most consistent with these preferences." (BIA Guidelines, 44 Fed.Reg. 67584 (Nov. 26, 1979).) [emphasis added].)

BIA Guidelines, also provide that "states may provide greater protection for rights guaranteed by ICWA, *as long as the additional protections do not deprive other parties of their rights under the act.*" (*Id.* at p. 67584; *In re Alice M., supra,* at p. 119; *In re Junious M, supra,* at 144 Cal.App.3d at p. 793.) While not binding, the BIA Guidelines are entitled to "great weight" because they are the production of an "executive department charged with [the law's] administration...." (*In re Brandon T.* (2008) 164 Cal.App.4th 1400, 1412; *Junious M., supra,* 144 Cal.App.3d at p. 792, fn. 7.)

In addition to statutory law, the Legislature's goal was to "revise and recast" into state law provisions of the "state Rules of Court." (Sen. Rules Com. Analysis of Sen. Bill No. 678 (2005–2006 Reg. Sess.) as amended Aug. 22, 2006, p. 1.) That "revise and recast" effort was, according to the Legislative Counsel's summary, intended to make various provisions of statute and the rules of court "apply to certain children who do not come within the definition of an Indian child [under ICWA]." (Legis. Counsel's

Dig. Sen Bill No. 678, 6 Stats. 2006 (2005-2006 Reg. Sess.), Summary Dig., at p. 465 [emphasis added]; *In re Damian C., supra,* 178 Cal.App.4th at p. 197.)

The foregoing shows the Legislature's intent that "certain children," like those identified in rules 5.482(c) and 5.484(c)(2), could qualify for ICWA protections.

Numerous appellate cases have affirmed the Legislature's intent by upholding the notion California law affords higher protections than ICWA. (*Jack C., supra,* at p. 977; *Damien C., supra,* 178 App.4th at p. 198 [legislative purpose was to broaden the interpretation of current laws]; *In re Cheyenne F.* (2008) 164 Cal.App.4th 571, 578 [higher standards authorized but no requirement tribal notices be more detailed than ICWA]; *Alice M., supra,* at p. 1199 [greater scope of inquiry into possible Indian heritage]; *In re J.T., supra,* 154 Cal.App.4th at p. 993 [higher standards require ICWA notice be sent to all possible tribes].)

Consequently, section 224, subdivision (d) and the rules interpreting it, are not merely a "broad pronouncement" as the Third District concluded. (Typed Opinion at p. 10-11). Instead, they constitute an express statement by the Legislature that California law is designed to protect children who are *eligible* for tribal membership because of a sufficient blood quantum of

Indian descent. Notwithstanding the "Indian child" defining language of section 224.1, subdivision (a), the Legislature would not have included in section 224, subdivision (a), that eligible children were also protected, if it did not mean it. (*Alameda Produce Market, supra,* 52 Cal.4th at pp. 1106–1107.)

b. Rules 5.482(c) and 5.484(c)(2) Apply ICWA Protections to Eligible Children Only to the Extent Required to Achieve the Legislature's Twin Goals of Expeditiously Concluding Child Custody Hearings and Promoting the Interests of Indian Families in Remaining Together.

Rules 5.482(c) and 5.484(c)(2) do not conflict with the meaning and intent of 224.1, subdivision (a) as they do not expand the reach of ICWA to a child who could never be an "Indian child." Instead, they encompass the recognition by the Judicial Council that the Legislature intended children who are certain to become registered tribe members, *because they have already been found by a tribe to have sufficient blood quantum to qualify for membership* to have ICWA protections. The California rules are grounded in, and even compelled by, two expressly articulated legislative goals: 1) to correct California court's 25-year ICWA compliance failure; and, 2) to promote prompt resolution of custody proceedings.

i. Rules 5.482(c) and 5.484(c)(2) are designed to implement the Legislature's goal to correct California's lack of compliance with ICWA.

Rules 5.482(c) and 5.484(c)(2) are designed to remedy the 25-year failure of California trial courts and social services agencies to comply with ICWA in child custody proceedings. (*In re A.G.* (2012) 204 Cal.App.4th 1390, 1396–1397; *In re Jullian B.* (2000) 82 Cal.App.4th 1337, 1349–1351.) Additionally, the are intended to remedy the "abusive child welfare practices" which gave rise to ICWA's enactment. (*Holyfield, supra,* 490 U.S. at p. 32; see also *Adoptive Couple, supra,* 133 S.Ct. at p. 2557.)

One of the ways the rules remedy California's failures to apply ICWA is by ensuring eligible children are enrolled in tribes for which they qualify. Rules 5.482(c) and 5.484(c)(2) direct the social services agency to engage in "active efforts" to assist a child with a qualifying quantum Indian blood level to enroll. Without those rules of court, the burden for perfecting tribal enrollment falls upon both the child and the parent and this has proved a failure at protecting Indian interests in child custody proceedings.

A child in a child custody proceeding does not have the ability, time or resources to effectuate enrollment. Moreover, that task is outside minor's appointed counsel's statutory responsibilities. Section 317, allowing for the appointment of minor's counsel, expressly prevents a

minor's attorney from assuming "the responsibilities of a social worker" and providing "nonlegal services to the child." (§ 317, subd. (e)(3).) The trial court recognized this reality when it stated "because the children are not in a position to perfect their membership in the tribe," the social services agency should assist to ensure the children received the benefits of tribal membership. (RT 54.) Since of the goals of the adoption of ICWA into California law was to protect "the interests of the child" without the subject rules requiring enrollment efforts in place, the Legislative intent would fail. (Sen. Rules Com. Analysis of Sen. Bill No. 678 (2005-2006 Reg. Sess.) as amended August 22, 2006, p. 1 [one goal is to protect "the child's interests"].)

Also, parents often do not have the time, resources and ability to ensure a child is enrolled. In a dependency case, for example, the Indian-eligible child is before the juvenile court due to errant parental behavior. (§ 300, subds. (a)-(j).) Rule 5.484(c)(2) recognizes it is unrealistic to expect that a parent, who is attempting to complete numerous family reunification case plan tasks, to have the time, skills and resources necessary to promptly secure tribal enrollment for a child. (See, §§ 361.5, subd. (a); 362. subd. (c); *In re Luke L.* (1996) 44 Cal.App.4th 670, 678.)

Indeed, that was the situation in the present case. Abbigail and

Justin's eligibility for Cherokee Nation membership had been established five months before the dispositional hearing, and yet Joseph had not yet been able to enroll the children by then. (CT 90, 454; RT 6, 125, 127-129.) For his part, Joseph, who had drug and financial problems, was having difficulty with the process and expense associated with obtaining birth and death certificates required for Cherokee Nation enrollment. (RT 66-67.)

Rule 5.484(c)(2) remedies this problem, by providing that the social services agency, which stands in the shoes of the parent in custody proceedings, accomplish tribal enrollment for a child in its care. (See, *In re Sade C.* (1996) 13 Cal.4th 952, 989 [after a minor has been adjudged a dependent, the court acts as *parens patriae* and its authority to make decisions on behalf of the minor is unquestionably broad].)

This burden is not unreasonable, as enrollment services are nominal and wholly consistent with the varied services regularly provided dependent children by social services agencies. (*In re Ricardo L.* (1991) 109 Cal.App.4th 552, 557 [social services agencies provide foster care, school enrollment, education services, substance abuse treatment, mental health services, counseling, etc.].)

Moreover, Division One of the Fourth Appellate District noted, *when eligibility has already been determined,* assigning the supervising social

services agency the task of enrolling a dependent child actually accelerates the dependency process. (*Jack C., supra,* at p. 981 [emphasis added].)

Additionally, rules 5.482(c) and 5.484(c)(2) also promote enrollment, even when a parent, Indian or otherwise, is not interested in protecting a child's Indian membership rights. For example, if the eligible child is living with a nonIndian relative, a parent may not want to risk tribal intervention which could lead to the child's replacement to an Indian home. In such cases, because the child and the tribe's interests must also be protected, rules 5.482(c) and 5.484(c)(2) give power to the courts to direct the social services agency to ensure enrollment, independent of the position of parents. (See, Sen. Rules Com. Analysis of Sen Bill No. 678 (2005-2006 Reg. Sess.) as amended August 22, 2006, p. 1 [one of the goals of the overhaul is to protect "the child's interests"].)

As the United States Supreme Court affirmed in *Holyfield*, tribes have an interest in eligible Indian children "that is distinct from a parent." (*Holyfield, supra,* at p. 49; see, *In re Dakota H.* (2005) 132 Cal.App.4th 212, 223; *In re Nikki R.* (2003) 106 Cal.App.4th 844, 848.)

In *Holyfield*, a case involving an Indian parent's attempt to avoid tribal jurisdiction by giving birth to twin Indian children off the reservation, the Supreme Court's discussed the relative interests of the parents, the child

and the tribe in the application of ICWA. In rejecting the notion that ICWA could be avoided by parents who had "voluntarily surrendered" the children to a family off the reservation, the *Holyfield* court stated that tribal jurisdiction was not meant to be defeated by the actions of individual tribe members or parents, "for Congress was concerned not solely about the interests of Indian children and families, *but also about the impact on the tribes themselves of the large number of Indian children adopted by non-Indians.*" (*Id.* at 49 [emphasis added], citing 25 U.S.C. § 1901(3).).

Parental *inaction* to enroll an eligible child in a tribe in a California child custody case is akin to the parental *action* to avoid tribal jurisdiction disapproved of in *Holyfield*. The intended result is the same: no enrollment. In other words, irrespective of the parents' or the children's interests, a tribe has a congressionally-recognized interest in the enrollment of eligible children so that it may exercise its rights of intervention to preserve the tribe. Without such a rule, the purposes of ICWA would be frustrated.

ii. Rule 5.482(c) and 5.484(c)(2) promote the Legislature's goal of prompt resolution of child custody cases involving Indian children.

Rules 5.482(c) and 5.484(c)(2) are crafted to accomplish the Legislature's long-standing goal of promoting the prompt resolution of child custody proceedings. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 306-

307.) Section 352, subdivision (a) requires a juvenile court to "give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor from prolonged temporary placements." (*Ibid.*; *In re Alonzo J., supra,* 58 Cal.4th at p. 1135.)

To achieve section 352's purposes, rules 5.482(c) and 5.484(c)(2) demand juvenile courts uniformly expedite ICWA compliance in child custody proceedings. (rule 5.501(a) [The rules "implement the purpose of the juvenile court law by promoting uniformity of practice and procedure and providing guidance to judicial officers, attorneys, social workers, probation officers, and others participating in the juvenile court"].)

If the rules were not in place excessive delays could occur. For example, when ICWA notice to a tribe reveals a potential Indian child is involved in a Welfare and Institutions section 300 case, the juvenile court would not be required to take any further action, *even if imminent tribal enrollment is a virtual certainty.*[13] Indeed, the consideration of ICWA's

---

[13] Tribal membership in this case was a near certainty. Joseph reported that his "mother's mother is Indian." (RT 6, 9.) He noted his aunt was a currently enrolled member of the Cherokee Nation and the tribe determined the children "eligible for enrollment and affiliation with Cherokee Nation by having direct lineage to an enrolled member." (CT 333; RT 6-7, 20, 28-29.) Since the Cherokee Nation citizenship does not require a specific blood quantum, Abbigail and Justin's membership is a virtual

application to the case would end until the tribe, the parent or the child took action and perfected the child's tribal membership. (*In re Jose C.,supra,* 155 Cal.App.4th at p. 849 [only the *notice* provisions of ICWA apply to children eligible for membership, but not yet members of a tribe]; *In re L.B., supra,* 110 Cal.App.4th at p. 1427.)

Meanwhile, the strict time lines of the dependency case would continue to run, with the possibility of review hearings occurring at six month intervals for a maximum time of eighteen months, and with the further possibility of a section 366.26 permanent planning hearing occurring another four months after that 18-month review. (§ § 366.21, subd. (e); 366.21, subd. (f); 366.22, subd. (a); (*In re Marilyn H., supra,* 5 Cal.4th at pp. 306-307.

Sometimes, many months, even years, have passed before the parent has secured tribal enrollment.[14] As the tribe has the right to intervene at any

---

certainty once proper birth or death certificates are produced. (http://www.cherokee.org/Services/TribalCitizenship/Citizenship.aspx, (lasted visited December 6, 2014).)

[14] While it involved a notice failure not applicable here, the case of *Junious M.* illustrates the kind of delay which can occur. There, ICWA issues were not addressed until some five years after the case first entered the dependency system and at a permanency planning hearing held under former section 232, where termination of parental rights was being considered. (*Junious M., supra,* at p. 788.)

time, the resultant precipitous application of ICWA placement preferences in an ongoing dependency proceeding, even as late as the eve of a section 366.26 permanency planning hearing where termination of parental rights is contemplated, would cause unnecessary delay, as the juvenile court, the social services agency, the parents and the tribe grapple with the implications of ICWA compliance. This is especially true in cases where the tribe intervenes and seeks to replace a child to an Indian home, moves to shift the case to a tribal court, or challenges non-ICWA compliant child removal and placement findings and orders. (*In re Alicia S., supra,* 65 Cal.App.4th at p. 82 [the ICWA permits a tribe to intervene at any point in state court child custody proceedings].) This delay violates section 352, subdivision (a) and rules 5.482(c) and 5.484(c)(2) prevent that.

The juvenile court here recognized this problem when it observed: "Well, you know, ... because I want to avoid having to return to disposition it would really seem to be in everyone's interest to treat this case what it's likely to become. I think it's just a matter of trying to avoid issues, getting the children the benefits of something that they ultimately will it would appear get the benefit of and not have to redo something and make this dependency matter two or three times as long as anyone would want it to be." (RT 33.)

Like the trial court, the Cherokee Nation was also concerned that lack of compliance to ICWA would have a detrimental effect delay would have on the children and the tribe's interests, while membership status was pending. On January 29, 2013, the Cherokee Nation wrote to the Department: "Due to the tribal eligibility of the children in question, Cherokee Nation recommends applying all the protections of ICWA to this matter from the beginning of the case. Hopefully this will prevent any future delays in procedural matters if or when the parents or child/children become enrolled members meeting federal ICWA compliance." (CT 333.)

Additionally, the Indian tribe's interests are severely injured when enrollment is accomplished late. During the time a dependency proceedings rolls along, an eligible child has usually lived outside of parental care for many months and with a family which may not conform to ICWA placement preferences. At some point, the child's interests in stability and security must eventually outweigh the interests of the tribe in implementing ICWA, even when the child is finally declared a tribe member. (*In re Arturo A.* (1992) 8 Cal.App.4th 229, 241, fn.6.)

In other words, as a result of delay in obtaining formal enrollment for an Indian-eligible child, the placement preferences of ICWA will undoubtedly give way to the child's bonded relationships to a nonIndian

caretaker. (*In re A.A.* (2008) 167 Cal.App.4th 1292 [affirming a good cause finding based on expert testimony that minors suffered from reactive attachment disorder and changing placement would be detrimental]; *Alicia S., supra,* 65 Cal.App.4th at pp. 91-92 [removal from a foster home is not a foregone conclusion if the ICWA applies, because "good cause" exception may permit a different result].)

Even if the tribe's interests do not "give way" entirely, the practical effect of delay is a dilution of ICWA protections because a tribe may have never established the right to intervene and may never have been able to assert any tribal preferences.[15] Delay in providing for ICWA's protections to the tribe, the potential Indian child, and the Indian family is equivalent to not offering them at all. (*Holyfield, supra,* at pp. 34–35 [tribe has rights at least on par with Indian parents].) Rules 5.482(c) and 5.484(c)(2) are a prophylactic measure against this problem, by requiring the eligible child be treated *as an Indian child* from the beginning of the case. They ensure that when enrollment is ultimately perfected, the removal, placement and active efforts requirements of the ICWA will have been already accomplished.

Accordingly, since preventing delay and promoting tribal enrollment

---

[15] A case addressing concerns about delay in ICWA proceedings was granted review in *In re Isaiah W.* (2014) 228 Cal.App.4th 981, review granted, October 29, 2014, S221263.

of eligible Indian children are both manifest intentions of the Legislature and Congress, it is impossible to see how rules 5.482(c) and 5.484(c)(2) are "inconsistent with statute." Moreover, the rules do not contradict the definition of "Indian child" adopted by our state Legislature as they do not provide ICWA protections to a class of persons never intended to be covered by the statute. (*Jack C., supra,* at pp. 977, 981.) In sum, the rules do no violence to the principles of ICWA or section 224.1, subdivision (a) in their reading of "Indian child."

The Third District opinion finding otherwise, makes no attempt to explain how the positive procedural effects of 5.482(c) and 5.484(c)(2) violate ICWA or California statute. Instead, the court takes the position that ICWA may only apply to Indian children as strictly defined by section 1903(4) and that the "minimum Federal standards" verbiage of 25 U.S.C. § 1902 authorizing the "greater protections" language of both the BIA Guidelines and section 224, subdivision (d), applies only to *removal* and *placement* of Indian children and not to eligible Indians waiting for enrollment. (Typed Opinion at pp. 8-9.) However, it is *because of* rules 5.482(c) and 5.484(c)(2), that trial courts in California have the facility to employ the removal and preference placements of ICWA promptly. It is because of the rules that children are not left in a tribal "eligibility limbo"

where they are merely quasi-Indians, not yet covered by ICWA protections. It is difficult to contemplate how the Third District's reading of the law satisfies the intent of ICWA or the remedial purposes of section 244, subdivision (a).

c. Rules 5.482(c) and 5.484(c)(2) Do Not Violate a Uniform National Standard for ICWA Application Because Definitions of Membership and Eligibility are Determined Exclusively by the Tribe.

The Third District concludes, in effect, that rules 5.482(c) and 5.484(c)(2) violate a Congressional intent to apply a national standard of the definition of an "Indian child." (Typed Opinion at p. 8.) However, because ICWA does not constrain how tribal "membership" or "eligibility" is to be defined, there is no national standard for establishing who is an "Indian child." In fact, the rules governing a grant of tribal membership may be as varied as the tribes which create them. (*Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 72, fn. 32 [the determination whether the child is an Indian child within the meaning of ICWA depends in large part on an individual tribe's membership criteria]; *In re Desiree F.* (2000) 83 Cal.App.4th 460, 469 [enrollment is not required in order to be considered a member of a tribe; many tribes do not have written rolls]; *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1425 [a roll number is not crucial to a

determination of the child's [Indian] status]; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 254 [a child may qualify as an Indian child even if neither parent is enrolled in the tribe].)

Additionally, section 224.3, provides that, "[i]nformation 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." (§ 224.3, subd. (e)(1); *Jack C., supra,* at p. 981.)

Therefore, ICWA provides national uniformity for its notice procedures, but not for how tribes determine *membership* or *eligibility*. Therefore, the conferral of "Indian child" status by a tribe may be accomplished in a multitude of different ways. As the court in *In re Jack C.* noted: "Because of differences in tribal membership criteria and enrollment procedures, whether a child is an Indian child is dependent on the singular facts of each case [Citation]." (*Ibid.*) Contrary to the assumption of the Third District, there is no uniformity of standard in the application of tribal membership, and hence the term, "Indian child," actually has no clear uniform definition with which rules 5.482(c) and 5.484(c)(2) could conflict.

d. The Authority Relied Upon by the Third District Fails to Show How Rules 5.482(c) and 5.484(c)(2) Conflict with the Intent of Congress or the Legislature.

When it rejected the validity of rules 5.482(c) and 5.484(c)(2) as being contrary to state law, and therefore, ICWA, the Third District found, in sum, that section 224.1 subdivision (a) provides an immutable definition of "Indian child." For support, the Third District relied on two cases outside of California. Neither case is helpful to show rules 5.482(c) and 5.484(c)(2) violate California statutes.

First, the Third District relied on the state of Oregon intermediate appellate court decision of *State ex rel. State Office For Services to Children and Families. v. Klamath Tribe* (2001) 170 Or.App. 106 (*State v. Klamath*). (Typed Opinion at p. 9.) In that case, the Klamath tribe and the Oregon state social services agency (SCF) entered into an agreement authorizing the tribe to participate in child custody hearings, when a "Klamath child" was taken into custody. (*Id.* at pp. 110-111.) The language of the agreement replaced the ICWA definition of "Indian child" with the tribe's definition allowing a person to be a "Klamath child," even if the child was not a tribe member, was not eligible for membership, and could never be eligible for membership. due to having less than a one quarter Klamath blood quantum. (*Ibid.*)

Eight children who were not eligible to ever become Indians, but who held some Klamath ancestry, sought appellate review regarding the validity of the agreement between SCF and the tribe. (*Id.* at p. 109) The Oregon Court of Appeal, concluded that ICWA was never intended to apply to non-Indian children and that neither the SCF nor the Klamath tribe had authority to expand ICWA's definition of Indian child. (*Id.* at p. 114.)

The Oregon court's decision was correct as the ICWA was never envisioned as applying to non-Indian children *who could never qualify as Indians.* Moreover, the decision was right to conclude ICWA did not give social services agencies and tribes the privilege of entering into agreements to determine who is an "Indian child." But the ruling does not apply here as none of the children in *State v. Klamath* was even *eligible* for membership in a tribe and the appellate court did not address that issue. (*Id.* at p. 110-114.)

The Third District also relied on the Tenth Circuit case of *Nielson v. Ketchum, supra,* 640 F.3d at 1123, for the notion that any rules expanding on the definition of "Indian child" was outside the scope and purposes of the ICWA.

There, a 17-year old mother, who was an unenrolled Cherokee, sought to invalidate a voluntarily relinquishment of her newborn child on

the basis the child was Indian and a Utah adoption proceedings violated ICWA. (*Id.* at p. 1120.) At the time, the Cherokee Nation Citizenship Act provided that children born to persons, whether tribal members or not, descended from original enrollees on Dawes Commission Rolls[16] were temporarily Cherokee Nation members for 240 days following birth. (*Ibid.*) No formal enrollment application process was required, but if the child failed to seek membership within allowed time, the temporary tribal membership expired. (*Ibid.*)

On review, the Tenth Circuit reversed a lower court ruling by finding the Cherokee Nation had no authority to "expand the reach of a federal statute by a tribal provision that extends automatic citizenship to the child

---

[16] The Dawes Commission was established in 1896 to, *inter alia*, create membership rolls for the Cherokee Nation. See *Vann v. Kempthorne*, (D.C. Cir. 2008) 534 F.3d 741, 744, (citing Act of June 10, 1896, ch. 398, 29 Stat. 321, 339). As the Cherokee Nation website provides, qualification for citizenship requires "at least one direct Cherokee ancestor [be] listed on the Dawes Final Rolls, a federal census of those living in the Cherokee Nation that was used to allot Cherokee land to individual citizens in preparation for Oklahoma statehood. [¶] To be eligible for a federal Certificate Degree of Indian Blood and Cherokee Nation tribal citizenship, you must be able to provide documents that connect you to a direct ancestor listed on the Dawes Final Rolls of Citizens of the Cherokee Nation with a blood degree. This roll was taken between 1899-1906 of Citizens and Freedmen residing in Indian Territory (northeastern Oklahoma) prior to Oklahoma statehood."
(http://www.cherokee.org/Services/TribalCitizenship/Citizenship.aspx, (lasted visited December 6, 2014).)

of a nonmember of the tribe." (*Id.* at p. 1124.)[17]

Nielson v. Ketchum involved the *tribe's* automatic extension of citizenship to a child of a nonmember. Rules 5.482(c) and 5.484(c)(2) do not have the same effect. They do not: 1) extend any authority to a tribe to expand its tribal membership definition; 2) confer tribal citizenship status to an eligible child; 3) empower a tribe to intervene in state child custody proceedings involving non-Indians; 4) prescribe how any particular tribe should determine membership; or 5) endow the eligible child with any other rights related to tribal membership.

Moreover, a holding from the Tenth Circuit is not controlling authority in a California case. Consequently, *Nielsen v. Ketchum* is confined to its unique facts and, therefore, fails to inform the present interpretation of rules 5.482.(c) and 5.484(c)(2).

II
FEDERAL LAW DOES NOT PREEMPT RULES 5.482(c) AND 5.484(c)(2).

The federal preemption doctrine is inapplicable to California's Indian law and rules 5.482(c) and 5.484(c)(2). (See *In re*

---

[17] The Cherokee Nation's petition for writ of certiorari was denied on May 2, 2013. (*Nielson v. Ketchum* (2012) 132 S.Ct. 2429, 182 L.Ed.2d 1061.)

Brandon M., supra, 54 Cal.App.4th at p. 1393; *In re Pedro N.* (1995) 35 Cal.App.4th 183, 190; *Slone v. Inyo County Juvenile Court* (1991) 230 Cal.App.3d 263, 266–268.)

There are "three ways federal law may be found to preempt state law: (1) by virtue of an express preemption clause in the federal law; (2) by 'implied preemption,' otherwise sometimes referred to as the 'occupation of the field' by the federal government; or (3) by virtue of a conflict between the provisions of federal and state law." (*In re Brandon M., supra,* at p. 1393; see also, *Smiley v. Citibank* (1995) 11 Cal.4th 138, 147.)

ICWA contains nothing at all by way of an express preemption provision. (*In re Brandon M., supra,* 54 Cal.App.4th at pp. 1393-1394.) In fact, the BIA Guidelines authorize states to enact their own provisions to implement ICWA. (*Ibid.*)

Additionally, in no way does ICWA 'occupy the field' of child custody or adoption, even as to Indian children, as it provides no specific provisions prescribing how children are removed from parents, the nature of reasonable reunification services and the constellation of hearings which must be attended the proceedings. (*Ibid.*)

Accordingly, federal preemption may only lie in this case if rules 5.482(c) and 5.484(c)(2) "conflict" with one or more provisions of the

ICWA. However, jurisdiction over legal matters in family relations is traditionally reserved to the states. (*Lehman v. Lycoming County Children's Services* (1982) 458 U.S. 502, 511–512.) It is evident that, while states have no authority to regulate tribes, they may exercise control over Indian, or tribe-eligible children. (*Washington v. Confederated Bands & Tribes of the Yakima Indian Nation* (1979) 439 U.S. 463, 500-501.)

The United States Supreme Court has held that: "Both theory and the precedents of the Court teach us solicitude for state interests, particularly in the field of family [...] arrangements. They should be overridden by the federal courts only where clear substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." (*United States v. Yazell* (1966) 382 U.S. 341, 352.)

Thus, where it is contended that a federal law must override state law on a matter relating to family relations, it must be shown that application of the state law in question would do "'major damage' to 'clear and substantial federal interests.' [Citations]." (*Rose v. Rose* (1987) 481 U.S. 619, 625.)

As has been pointed out numerous times in this brief, there is simply no "major damage" done to either ICWA or Indian tribal law, custom, status or rights, from the application of rules 5.482(2) and 5.484(c)(2).

As noted earlier, "the Congress clearly intended that its 1978 statute exist side-by-side with the child custody laws of the 50 states and necessarily understood that the courts of those *states would and should attempt to harmonize, not presume conflicts between, the two.*" (*In re Brandon M., supra,* at p. 1397 [emphasis added].)

CONCLUSION.

Marrying rules 5.482(c) and 5.484(c)(2) to section 224.1, subdivision (a) and the ICWA "Indian child" definition, means, and means only, that the scope of the persons covered by the ICWA in California child custody proceedings is expanded to a very small group of children whose eventual tribal membership is nearly certain, but not yet perfected. That is not a conflict with statute.

The Third District opinion, finding the subject rules inimical, offers no explanation of how the procedural benefits of the rules prejudice the tribe, the subject children, or the integrity of child custody hearings in California. The decision of the Third District should be reversed.

Dated: 8 December 2014.

Respectfully submitted,

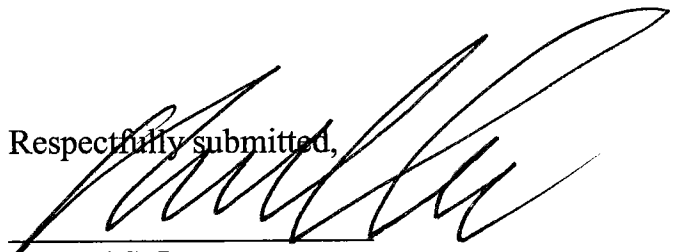
Konrad S. Lee

CERTIFICATE OF NUMBER OF WORDS
(California Rules of Court, rules 8.204(c)(1), 8.360(b), & 8.412(a).)

I, Konrad S. Lee, counsel for appellant, verify pursuant to the California Rules of Court, that the word count for this document is 11,280 words, excluding the tables, this certificate, and any attachment permitted under rule 8.204(d). This document was prepared in Wordperfect, and this is the word count generated by the program for this document. I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: 8 December 2014.

Respectfully submitted,



Konrad S. Lee

S220187

PROOF OF SERVICE
(Rule 8.25(a)(1) & (2).)
(By Mail)

I, the undersigned, say that I am over the age of 18 years and not a party to the within action or proceeding; that my business address is 23441 Golden Spring Drive, Diamond Bar, California, 91765. That on 8 December 2014, I personally served a copy of the papers to which this proof of service is attached, namely:

BRIEF ON THE MERITS

by mailing a copy thereof, by depositing said copy enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box addressed as follows:

JOSEPH A. (Petitioner) Address of Record.

THIRD DISTRICT COURT OF APPEAL,
621 Capital Mall, 10th Floor, Sacramento, CA 95814

CENTRAL CALIFORNIA APPELLATE PROGRAM
2407 J Street, Suite 301, Sacramento, CA 95816.

SACRAMENTO COUNTY COUNSEL
3331 Power Inn Road, Suite 350, Sacramento, CA 95826.

SACRAMENTO JUVENILE COURT
3341 Power Inn Road, Third Floor, Sacramento, CA 95826.

RUTHI ROBERTS (Appellant's Trial Attorney)
2001 21st Street, Suite 205, Sacramento, CA 95818.

REGINA QUAYNOR (Minors' Attorney)
8950 Cal Center Drive, Suite 301B, Sacramento, CA 95826.

ELIZABETH HANDY (Respondent Mother)
1286 University Avenue, San Diego, CA 92103.

CHEROKEE NATION OF OKLAHOMA (Tribe)
ATTENTION INDIAN CHILD WELFARE ACT, P. O. Box 948, Tahlequah, OK 74465.

Executed 8 December 2014, I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Konrad S. Lee