In the Supreme Court of the State of California

In re: W.B., a Person Coming Under the Juvenile Court.	Case No. S181638
THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** v. **W.B., a minor,** **Defendant and Appellant.**	

Fourth Appellate District, Division Two, Case No. E047368
Riverside County Superior Court, Case No. RIJ114127
The Honorable Christian F. Thierbach, Judge

RESPONDENT'S ANSWER TO APPELLANT'S OPENING BRIEF ON THE MERITS

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
STEVE OETTING
Supervising Deputy Attorney General
MEREDITH A. STRONG
Deputy Attorney General
State Bar No. 255840
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2297
Fax: (619) 645-2271
Email: Meredith.Strong@doj.ca.gov
Attorneys for Plaintiff and Respondent

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

ISSUE PRESENTED

Appellant's Petition for Review set forth the following issue: Whether the notice requirements set forth in California's recent Indian Child Welfare legislation apply to juvenile delinquency proceedings such as the case at bar in which the child is at risk of entering foster care, even if a termination of parental rights is not involved.

INTRODUCTION

In 1978, in response to the high number of Indian children being removed from their homes by both public and private agencies, Congress passed the Indian Child Welfare Act (hereinafter "the ICWA," "the Act," or "the federal Act"). The ICWA applies to certain child custody proceedings and in such proceedings, states are required to give notice to Indian tribes where an Indian child is involved. The ICWA also provides a number of substantive rights for both Indian tribes and Indian custodians in an effort to help the tribes maintain what Congress recognized was "their most vital resource"--their children.

After committing a residential burglary, appellant was continued as a ward of the court and his care and custody were turned over to the probation officer for placement in a public or private institution. He contends a recent California statute expanded the protections of the ICWA so that it was applicable to his delinquency proceeding and the court erred in failing to give notice to the Cherokee tribe, of which appellant may be a member. Accordingly, appellant asks this Court to reverse the dispositional order and remand the case for further proceedings consistent with the provisions in the ICWA.

Appellant is mistaken because the ICWA does not apply to delinquency petitions where the placement is based upon an act which, if committed by an adult, would be a crime. Appellant misinterprets the

recent California statute as an expansion of the protections of the ICWA to custody proceedings not included in the federal act. Even assuming the ICWA was applicable to appellant's delinquency proceedings, any error in failing to give the notice was harmless. Finally, assuming this Court finds error and cannot say the error was harmless, reversal of the dispositional order is not the appropriate remedy. Rather, the appropriate remedy is a limited remand to the juvenile court to determine if, in fact, appellant is an Indian child.

STATEMENT OF THE CASE

In a prior case, on June 13, 2008, the Riverside County District Attorney filed a petition pursuant to Welfare and Institutions Code section 602 alleging appellant had committed a robbery (Pen. Code, § 211). (CT 1.) In the accompanying detention report, the probation officer checked a box indicating, "ICWA may apply," and included a note, "In the last probation officer's report, the mother reported she may have Cherokee ancestry but had not yet completed the registration papers." (CT 5.) On July 21, 2008, the court found the robbery allegation true. (CT 28.) In the probation report which followed this true finding, the probation officer indicated that "ICWA may apply," and noted, "According to probation Officer's report dated August 8, 2007, Ms. Jones reported her mother had Cherokee ancestry and the appropriate paperwork was completed." (CT 35.) On August 4, 2008, the court ordered appellant continued as a ward of the court. He was given credit for time served and placed on probation. (CT 74-75.)

On October 14, 2008, the Riverside County District Attorney filed a subsequent petition (the petition giving rise to this appeal) alleging appellant had committed a residential burglary (Pen. Code, § 459). (CT 85.) In the subsequent detention report, also filed on October 14, 2008, the probation officer checked a box indicating, "ICWA does not

apply," and noted, "[t]he Probation Officer's Report dated 8/4/08, reported ICWA does not apply." (CT 89.) However, the record contains no probation officer's report from August 4, 2008.

On December 3, 2008, the juvenile court found true the allegation that appellant had committed a residential burglary. (RT 134.) In the Probation Report filed on December 12, 2008, the probation officer checked the box again indicating, "ICWA may apply," and noting, "[a]ccording to the Probation officer's report dated August 7, 2008, Ms. Jones [minor's mother] reported her mother has Cherokee ancestry and the appropriate paperwork was completed." (CT 125.) On December 17, 2008, the minor was continued as a ward of the court pursuant to Welfare and Institutions Code section 602; his care, custody and control were placed with the Chief Probation Officer of Riverside County and the court further ordered appellant to be placed in a suitable "public or private facility." (RT 140.) His probationary placement was not to exceed eight years and eight months. (CT 174.) Upon completion of his probationary period, appellant was to be released to the custody of his mother. (CT 142.)

Appellant timely appealed this order to the Fourth District Court of Appeal, Division Two. (CT 178.)

On appeal, appellant argued that California Welfare and Institutions Code section 224.3, subdivision (a), expanded the notice requirements under the ICWA to include proceedings such as his. In affirming the judgment, the Court of Appeal determined that the ICWA was not applicable to appellant's proceeding because he had committed an act which, if committed by an adult, would be a crime. (Slip Op. at pp. 6-7.) Further, the court found that any attempt by California to expand the provisions of the ICWA to such proceedings was preempted by the federal Act's express exclusion of these proceedings. (Slip Op. at p. 9)

Appellant filed a petition for review in this Court on April 7, 2010, and this Court granted the petition on May 24, 2010.

STATEMENT OF THE FACTS[1]

On October 13, 2008, Valerie Torres was standing in her kitchen when she noticed three young men walking on the side of her yard. (RT 101-102.) Torres watched as they approached her neighbor's patio and then she heard glass breaking. (RT 102-103.) Torres called the police. (RT 103.) When police arrived, they found appellant hiding inside a crawl space of a nearby vacant house. (RT 114-115.) He was with another minor, and both were sweating and out of breath. (RT 115.) Later, Torres identified appellant as one of the three young men she saw that day. (RT 101.) In a field near the victim's house, officers found items that had been taken from inside the home. (RT 116-117.)

ARGUMENT

I. CALIFORNIA HAS NOT EXPANDED THE REACH OF THE ICWA SO THAT IT APPLIES IN CASES SUCH AS APPELLANT'S

Appellant contends that the language of California Welfare and Institutions Code section 224.3 expands the notice requirements under the ICWA to all delinquency proceedings where the minor is at risk of entering foster care. (AOB 11.) This statutory interpretation is in direct conflict with the definitions in the ICWA and in the provisions of the California statutes which define "Indian child custody proceedings" and thus, delineate the proceedings to which the ICWA is applicable. In both the federal ICWA and in California's implementation provisions, the ICWA protections only apply to child custody proceedings, and placements based on an act which, if committed by an adult, would be a crime, are expressly

---

[1] Because the facts of the underlying offense are not relevant to the issue presented in this appeal, respondent has provided a truncated version.

excluded from the definition of "child custody proceedings." Accordingly, the ICWA does not apply to any delinquency proceedings where the placement of the minor is based on an act which, if committed by an adult, would be a crime. This is consistent with the definition included in the ICWA and adopted by California.

Looking at the statutory scheme as a whole confirms this interpretation. The language that appellant argues expands the notice requirement to cases such as his is not mirrored in the additional California provisions relating to the ICWA; thus, none of the substantive rights which ordinarily accompany notice of an Indian child custody proceeding are conferred to the tribes or the Indian custodian. Consequently, the expanded notice requirement would accomplish notice alone, without any accompanying rights. It is not likely that the Legislature intended such a result.

The language of the statute in context is clear, and thus no further analysis is required. But even if the language could be misconstrued or considered ambiguous, the statutory history reveals that appellant's proposed interpretation was not intended by the Legislature.

Appellant relies in large part on a recent decision out of the Third District Court of Appeal: *R.R. v. Superior Court* (2009) 180 Cal.App.4th 185 (*R.R.*). The *R.R.* court considered the same issue now before this court and held that California's implementation provisions did expand the application of the ICWA to delinquency proceedings not covered by the federal law. However, the reasoning of the *R.R.* court's holding is flawed and, similar to appellant's argument, the *R.R.* court's analysis fails to consider the statutory scheme as a whole and the relevant legislative history.

For these reasons, the ICWA does not apply to appellant's delinquency proceeding. Even if it did apply, any error in failing to notify the Cherokee nation of appellant's delinquency proceeding was harmless.

Finally, assuming appellant's interpretation is correct and the error was not harmless, the appropriate remedy is a limited remand for a determination regarding whether or not appellant is actually an Indian child, and then for the limited purpose of complying with the ICWA.

A. Legal History

In 1978, the United States Congress passed the ICWA in response to the high number of Indian children being removed from their homes by both public and private agencies. Congress found "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." (25 U.S.C. § 1901.)

The intent of Congress in passing the ICWA was 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). The ICWA sets federal requirements that apply to certain state child custody proceedings involving an Indian child who is a member of, or eligible for, membership in a federally recognized tribe.

In a 1989 decision, the United States Supreme Court summarized the ICWA's essential purpose, as follows, "[a]t the heart of the ICWA are its

provisions concerning jurisdiction over Indian child custody proceedings." (*Mississippi Choctaw Indian Band v. Holyfield* (1989) 490 U.S. 30, 36-37 [109 S.Ct. 1597, 1602, 104 L.Ed.2d 29] (*Holyfield*).) The Court explained that the provisions of the ICWA provided tribal courts with dual jurisdiction or exclusive jurisdiction in certain child custody proceedings involving Indian children. (*Ibid.*, citing 25 U.S.C. § 1911, subds. (a) & (b).)

Beyond the jurisdictional provisions, other sections of the ICWA set procedural and substantive standards for those child custody proceedings that do take place in state court, including an ordered list of preferred placements for Indian children involved in child custody proceedings. (*Id.* at pp. 36-37, citing 25 U.S.C. § 1915, subd. (a).) Still other provisions established a program of grants to Indian tribes and organizations to aid in the establishment of child welfare programs. (See 25 U.S.C. §§ 1931-1934.)

In *Holyfield*, the Supreme Court went on to explain,

> The ICWA thus, in the words of the House Report accompanying it, "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." [Citation.] It does so by establishing "a Federal policy that, where possible, an Indian child should remain in the Indian community," [citation] and by making sure that Indian child welfare determinations are not based on "a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family."

(*Id.* at pp. 37, citing House Report, at 23-24, U.S. Code Cong. & Admin. News 1978, at p. 7546, fn. omitted.)

With respect to the provision at issue in this case, the House Report on the ICWA explained the exclusion of proceedings which result in placements based on acts which, if committed by adults, would be crimes:

> Section 4(9) defines the term 'placement.' This definition is crucial to the carrying out of the provisions of title i. We believe that custody proceedings held pursuant to a divorce decree and delinquency proceedings where the act committed would be a crime if committed by an adult should be accepted from the definition of the term 'placement'. We believe that the protections provided by this act are not needed in proceedings between parents. We also believe that the standards and preferences have no relevance in the context of a delinquency proceeding.

(H.R. Rep. No. 1386-95, 2d Sess., p. 31 (1978).)

Further, following Congress's passing of the ICWA, the Bureau of Indian Affairs (BIA) promulgated guidelines to assist the states with the implementation of the ICWA's provisions. While these guidelines do not have binding effect, as administrative interpretations of statutory terms, they are important, and a relevant consideration when ascertaining the statutory meaning. (*Batterton v. Francis* (1977) 432 U.S. 418, 424-425 [97 S.Ct. 2399, 53 L.Ed.2d 448].) In these guidelines, the BIA explains,

> The entire legislative history makes it clear that the Act is directed primarily at attempts to place someone other than the parent or Indian custodian in charge of raising an Indian child-whether on a permanent or temporary basis. Although there is some overlap, juvenile delinquency proceedings are primarily designed for other purposes. Where the child is taken out of the home for committing a crime it is usually to protect society from further offenses by the child and to punish the child in order to persuade that child and others not to commit other offenses.
>
> Placements based on status offenses (actions that are not a crime when committed by an adult), however, are usually premised on the conclusion that the present custodian of the child is not providing adequate care or supervision.

> While the Act excludes *placements* based on an act which would be a crime if committed by an adult it does cover terminations of parental rights even where they are based on an act which would be a crime if committed by an adult. Such terminations are not intended as punishment and do not prevent the child from committing further offenses. They are based on the conclusion that someone other than the present custodian of the child should be raising the child. Congress has concluded that courts shall make such judgments only on the basis of evidence that serious physical or emotional harm to the child is likely to result unless the child is removed.

(44 Fed.Reg. 67587-67588 (Nov. 26, 1979), emphasis in original.) Thus, Congress's intent to exclude delinquency proceedings such as appellant's, where the placement is based on a criminal act, was made clear throughout the legislative process.

Until 2006, California's implementation of the federal law was governed predominantly by the Rules of Court, and on that basis such rules had the force of law only to the extent that they did not conflict with the federal legislation. (*Iverson v. Superior Court* (1985) 167 Cal.App.3d 544, 548.) In 2006, the California Legislature adopted Senate Bill 678 ("SB 678"), codifying certain provisions of the ICWA and many provisions of the BIA Guidelines into state law in an effort to better implement the law.[2] (*In re. A.B.* (2008) 164 Cal.App.4th 832, 838.) This appeal focuses on one of the provisions added through SB 678, Welfare and Institutions Code section 224.3.

---

[2] To avoid confusion, respondent refers to these provisions as "California's implementation provisions" or "California's implementation scheme."

B. Because Appellant's Placement Was Based on an Act Which Would Be a Crime If Committed by an Adult, the ICWA Did Not Apply to His Delinquency Proceeding

The long-standing starting point for interpretation of a statute is the language of the statute itself, and its statutory context. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1216 [when interpreting a statute, courts "begin with the language of the statute, affording the words their ordinary and usual meaning and viewing them in their statutory context."].) In interpreting a statute, the Court's "fundamental task . . . is to determine the Legislature's intent so as to effectuate the law's purpose." (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) Courts "give the words of a statute their ordinary and usual meaning and construe them in the context of the statute as a whole." (*American Liberty Bail Bonds, Inc. v. Garamendi* (2006) 141 Cal.App.4th 1044, 1052; *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715.)

"If there is no ambiguity in the language of the statute, 'then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.' [Citation.] 'Where the statute is clear, courts will not "interpret away clear language in favor of an ambiguity that does not exist." [Citation.]'" (*Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268; *People v. Benson* (1998) 18 Cal.4th 24, 30)

On the other hand, if the statute is ambiguous, courts "'may consider a variety of extrinsic aids, including legislative history, the statute's purpose, and public policy.' [Citation]" (*People v. Mays* (2007) 148 Cal.App.4th 13, 29-30; *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.)

Here, the language of the statute in the context of the statutory scheme is clear and unambiguous. The ICWA applies to Indian child custody

proceedings. (See 25 U.S.C. §§ 1911, et. seq.) The ICWA defines "child custody proceedings" as follows:

> (i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;
>
> (ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;
>
> (iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and
>
> (iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.
>
> *Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime* or upon an award, in a divorce proceeding, of custody to one of the parents.

(25 U.S.C. § 1903, italics added) Thus, the federal law explicitly excludes from the ICWA any placements "based upon an act which, if committed by an adult, would be deemed a crime . . . ."

For purposes of Senate Bill 678, the California Legislature simply adopted the definition of "child custody proceeding" from the federal Act. Specifically in Welfare and Institutions Code section 224.1, subdivision (c), "Indian child custody proceeding" is defined as follows:

> "Indian child custody proceeding" means a "child custody proceeding" *within the meaning of Section*

> *1903 of the Indian Child Welfare Act*, including a proceeding for temporary or long-term foster care or guardianship placement, termination of parental rights, preadoptive placement after termination of parental rights, or adoptive placement. "Indian child custody proceeding" does not include a voluntary foster care or guardianship placement if the parent or Indian custodian retains the right to have the child returned upon demand.

(Emphasis added (hereafter sometimes referred to as "section 224.1").)

Despite the adoption by California of the federal definition of "child custody proceedings," appellant argues California's ICWA implementation provisions apply to a broader range of child custody proceedings than those dictated in the federal law. In support of his argument, appellant relies exclusively on Welfare and Institutions Code section 224.3, which was also added pursuant to Senate Bill 678, and which reads, in relevant part:

> The court, county welfare department, and the probation department have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300, 601, or 602 is to be, or has been, filed is or may be an Indian child in all dependency proceedings and in any juvenile wardship proceedings if the child is at risk of entering foster care or is in foster care.

(Welf. & Inst. Code, § 224.3, subd. (a) (hereafter sometimes referred to as "section 224.3").) The remaining subdivisions of section 224.3 establish the circumstances that may provide reason to know the child is an Indian child, (§ 224.3, subd. (b)), and what steps must be taken to confirm the child's status as an Indian child. (§ 224.3, subds. (c)-(f).)

Appellant argues that the inclusion of "section 602"[3] in the language of section 224.3, subdivision (a), evinces a clear legislative intent to expand the provisions of the ICWA to proceedings based on an act which, if committed by an adult, would be a crime, where the juvenile is at risk of entering foster care. (AOB 17, 20.) Not only is this legislative intent not reflected in the language of the statute, appellant's interpretation fails to consider the statutory scheme as a whole, the legislative history, and the purpose behind the statute.

Specifically, appellant asserts that, "[n]owhere in California's Indian Child Welfare statute does the federal statutory language excluding child custody proceedings based on 'an act which, if committed by an adult, would be deemed a crime' (25 U.S.C. § 1903(1)) ever appear. . ." (AOB 27.) He goes on to argue that this is a "curious omission if the Legislature intended to limit the application of the California statute to only those cases that already fall within the scope of the federal statute." (AOB 27.) While appellant is technically correct that the words of the federal definition do not physically appear in the California statute, they do appear by reference. (See Welf. & Inst. Code, § 224.1, subd. (c).) As noted above, California simply refers to and incorporates the definition from the federal statute. Because California adopted, whole cloth, the definition established in the federal law, the definitions are the same, and California has not expanded

---

[3] Welfare and Institutions Code section 602, subdivision (a) allows for the filing of a wardship petition where the minor has violated a law defining a crime. It reads in relevant part: "Except as provided in subdivision (b), any person who is under the age of 18 years when he or she violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court."

its definition of child custody proceedings to include juvenile court placements such as appellant's, which are based on acts which, if committed by adults, would be crimes.

The California Legislature's inclusion of section 602 petitions in the language of section 224.3 does not contradict or undermine this interpretation in any manner. Stated simply, under California law, there are certain types of section 602 proceedings which also fall under the definition of a "child custody proceeding" within the meaning of 25 United States Code section 1903, subdivision (c).

Section 602 was included in section 224.3 because petitions can arise pursuant to section 602 which would not result in placements based upon acts which, if committed by adults, are crimes. This can happen in two ways. First, as noted by the Court of Appeal in this case (see Slip Op. at p. 6.), certain status crimes would give rise to a section 602 petition, but would not be based on an act which, if committed by an adult, would be a crime.

For example, Penal Code section 308, subdivision (b), makes it a crime for persons under age 18 to purchase, receive, or possess tobacco products. Similarly, Penal Code section 594.1, subdivision (b), makes it unlawful "for any person under the age of 18 years to purchase etching cream or an aerosol container of paint that is capable of defacing property." The possession of firearms by minors is a crime (Pen. Code, § 12101, subd. (a)). Driving with a blood alcohol level of .01 or above is only a crime for persons under the age of 21. (Veh. Code, § 23136.) Several additional statutes criminalize behavior by minors where alcohol is concerned. (See, e.g., Bus. & Prof. Code, § 25662, subd. (a) [making it a misdemeanor for any person under age 21 to possess any alcoholic beverage in public places]; § 25665 [making it a misdemeanor for anyone under age 21 to enter and remain in public premises licensed for the sale of alcoholic

beverages "without lawful business therein"]; § 25658, subd. (b) [making it a misdemeanor for any person under age 21 to purchase any alcoholic beverage, or consume any alcoholic beverage in any on-sale premises].)

Violations of these statutes by minors would give rise to a section 602 petition, but the underlying acts, while criminal for minors, are not crimes when committed by adults. Thus these specific delinquency proceedings fall within the ICWA's definition of a "child custody proceeding." In such cases, the ICWA applies to any section 602 petition arising out of the commission of a "status crime" where the offending minor is an Indian child. Thus, "section 602" in the text of section 224.3 is not surplusage and was not included by mistake. (See *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476 [A fundamental cannon of statutory interpretation requires that courts, "presume that the Legislature intended 'every word, phrase and provision . . . in a statute . . . to have meaning and to perform a useful function.'"].)

Second, a section 602 petition based on an act which would be a crime if committed by an adult can, under specific circumstances, also become an "Indian child custody proceeding" within the meaning of 25 U.S.C. section 1903. In general, the placement orders in such cases are based on the criminal act committed by the minor. This is true because the criminal act is what gives rise to the petition and the proceedings, and thus the orders issued at the conclusion of such proceedings are "based upon" the act which initially placed the minor before the Juvenile court. However, where the *petition* is based on the criminal act, but the *placement* is not, a section 602 proceeding would fall within the definition of an Indian child custody proceeding.

Under California's Welfare and Institutions Code, juvenile courts have broad discretion with respect to juveniles under their jurisdiction

because of delinquent conduct. Section 202, subdivision (b), states, in relevant part:

> Minors under the jurisdiction of the juvenile court as a consequence of delinquent conduct shall, in conformity with the interests of public safety and protection, receive care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances. This guidance *may include punishment* that is consistent with the rehabilitative objectives of this chapter.

(Emphasis added.) Thus, the court's placement orders for delinquent juveniles must take into account more than just punishment. "Section 202 now recognizes punishment as a rehabilitative tool and emphasizes the protection and safety of the public." (*In re Luisa Z.* (2000) 78 Cal.App.4th 978, 987-988, citing *In re Lorenza M.* (1989) 212 Cal.App.3d 49, 57, 260 Cal.Rptr. 258.) "The purposes of juvenile wardship proceedings are twofold: to treat and rehabilitate the delinquent minor, and to protect the public from criminal conduct." (See *In re Jose C.* (2009) 45 Cal.4th 534, 555, citing *In re Jerald C.* (1984) 36 Cal.3d 1, 8, (lead opn. of Broussard, J.), and *In re Calvin S.* (2007) 150 Cal.App.4th 443, 449.) Thus, in addition to punishment, juvenile courts must also consider rehabilitation, the minor's best interests, and public safety, among other factors. (Welf. & Inst. Code, § 202.)

Pursuant to the terms of the Welfare and Institutions Code, foster care placement cannot be ordered as "punishment." (See § 202, subd. e.) But punishment is only one *permissive* consideration for juvenile courts when ordering placements for minors under the court's jurisdiction pursuant to a section 602 petition. A foster care placement may be ordered where the juvenile court determines it is the best placement option to facilitate the minor's rehabilitation, or to best protect society. Thus, contrary to

appellant's assertion (AOB 24), the risk of entering foster care is not the determinative issue which brings a section 602 proceeding (based on an act which, if committed by an adult, would be a crime) within the reach of the ICWA. In order for such a proceeding to fit the definition established in section 224.1 (and 25 U.S.C. § 1903), the placement order by the juvenile court must not be based on the criminal act. As a result, the juvenile court would need to make a finding that the placement order for that particular minor was not connected to his criminal behavior, but was rather in the best interests of the child, or was to accomplish some other purpose.

The court in *In re Enrique O.* (2006) 137 Cal.App.4th 728 (*Enrique O.*), demonstrated an understanding of this possibility:

> [W]hile appellant argues that his placement in foster care was "primarily based, not on a criminal act, but on the best interests of the child," the record belies this assertion. While we agree the record reflects the court's obvious concerns about the general care and well-being of appellant, we are unpersuaded that his placement outside of his mother's home was "based on" anything other than the crimes he committed that landed him front of the juvenile court to begin with. . . . This is not a case where criminal activity simply highlights a situation that results in removal from the home for reasons in the home; rather, the offenses appellant committed here placed him squarely and unavoidably within the delinquency exception of the ICWA. Thus, appellant cannot avoid the fact that his placement outside the home was a result of his violation of two Penal Code sections that unquestionably were acts which, "if committed by an adult, would be deemed a crime."

(*Enrique O., supra*, 137 Cal.App.4th at p. 734.)

Accordingly, the language of the statute is clear and unambiguous. California's definition of an "Indian child custody proceeding" to which the provisions of the ICWA (and California's implementation provisions) apply is exactly the same as the federal definition included in the original Act.

Contrary to appellant's assertion, the definition has not been expanded to include delinquency proceedings where the minor is at risk of entering foster care.

Consideration of the statutory scheme further supports this interpretation. A long-recognized and fundamental cannon of statutory interpretation requires considering the statutory scheme as a whole to ascertain legislative intent. (See *People v. Canty* (2004) 32 Cal.4th 1266, 1276-1277.) Here, such consideration confirms the interpretation of California's implementation provisions laid out by respondent in the preceding paragraphs. As noted, section 224.3, subdivision (a), addresses the duty to inquire and clarifies the circumstances under which the court, county welfare department or probation officer may have a reason to know that a child is an Indian child. (§ 224.3.) The other provisions of California's implementation scheme give the Indian tribes and custodians substantive rights like a right to adequate notice of the proceedings (Welf. & Inst. Code, § 224.2), a right to intervene in the proceedings (§ 224.4), a right to full faith and credit for tribal proceedings (Welf. & Inst. Code, § 224.5), and the right to a specified qualified expert to give testimony (Welf. & Inst. Code, § 224.6). All of these provisions contain the words, "in an Indian Child Custody proceeding."[4] As already noted, that term is

---

[4] Welfare and Institutions Code section 224.4 reads, "The Indian child's tribe and Indian custodian have the right to intervene at any point in an *Indian child custody proceeding*." (Emphasis added.) Welfare and Institutions Code section 224.5 reads, "In an *Indian child custody proceeding*, the court shall give full faith and credit to the public acts, records, judicial proceedings, and judgments of any Indian tribe applicable to the proceeding to the same extent that such entities give full faith and credit to the public acts, records, judicial proceedings, and judgments of any other entity." (Emphasis added.) Welfare and Institutions Code section 224.6 sets forth guidelines for selecting a qualified expert witness in (continued...)

defined in Welfare and Institutions Code section 224.1, subdivision (c), and is expressly limited in exactly the same manner as the federal Act. Thus, under appellant's interpretation, section 224.3 expands the definition to apply to situations not covered by the federal definition of an "Indian child custody proceeding," but none of the other provisions echoes this expansion. Accordingly, under appellant's proposed statutory construction, the court, county welfare department, and probation department have an expanded duty to inquire about whether certain children before the juvenile court are Indian children, but if the answer is "yes," none of the other rights would be conferred, as the expansion is not also included in the sections of the code which grant the substantive rights. As recognized by the Fifth District in *In re Enrique O.* (2006) 137 Cal.App.4th 728, this essentially amounts to requiring notice for notice's sake. (*Id.* at p. 735.) This was not likely the Legislature's intention.

The court in *R.R.* recognized this omission, but circumvented the inconsistency by holding that the California Legislature *impliedly* conferred the remaining rights to Indian tribes and custodians in delinquency proceedings where the minor was at risk of entering foster care. The court held,

> Section 224.3 is the only section of the California legislation implementing ICWA that expressly applies to juvenile delinquency proceedings. The duties expressly imposed under section 224.3 on the court, county welfare department, and probation department are duties of inquiry and notice. However, the notice required under section 224.3 includes notice of the right to intervene, the right to

---

(...continued)
these cases, and begins, "When testimony of a 'qualified expert witness' is required in an *Indian child custody proceeding*. . . ."

> transfer the proceeding to tribal court, and the right to counsel. Since the notice would be meaningless without the underlying substantive right, we may imply section 224.3 confers these rights in delinquency matters as well.

(*R.R. v. Superior Court* (2009) 180 Cal.App.4th 185, 200, fn. omitted.) But this interpretation essentially renders the words "Indian child custody proceeding" in those remaining sections inconsistent with the term as it is defined in section 224.1, subdivision (c). Accordingly, if the interpretation urged by appellant and upheld by the *R.R.* court were adopted, the definition of "Indian child custody proceeding" included in section 224.1, subdivision (c), would be, at best, meaningless, and, at worst, wholly inconsistent with the remaining provisions of the statutory scheme. It is not reasonable to assume the Legislature included a definition of "Indian Child custody proceeding" in section 224.1 for the sole purpose of the definitions section. Rather, more probably, it included the definitions so as to make them applicable to the remaining portions of the implementation provisions.

In response to this argument, the *R.R.* court held,

> Section 224.1 and section 224.3 are not in conflict, they merely cover different proceedings. Section 224.3 specifically applies to juvenile wardship proceedings brought under section 602, and is not limited by the section 224.1 definition of an Indian child custody proceeding. Any conflict may be reconciled by giving each statute its appropriate range of application. To conclude otherwise would require us to ignore the plain language of section 224.3, which specifically imposes upon the court, the county welfare department, and the probation department a duty of inquiry and notice in cases involving a petition under section 602 where the child is at risk of entering foster care or is in foster care.

(*R.R., supra*, 180 Cal.App.4th at p. 202.) The *R.R.* court reconciles the divergent definitions by restricting section 224.1 and section 224.3 to each provision's "appropriate range of application." But section 224.1 contains no substantive or procedural rights with respect to the ICWA; it simply defines the applicable terms for purposes of the subsequent sections (and establishes a process by which to determine which tribe is the Indian child's tribe where the child belongs or is a member of more than one tribe (see section 224.1, subd. (d).). Under *R.R.*'s reading of the statute, section 224.1, subdivision (c), is surplusage and accomplishes nothing in the legislative scheme since section 224.3 expands the notice provisions beyond "Indian child custody proceedings" (as defined by section 224.1) and by implication, expands all of the remaining substantive rights as well.

This interpretation runs contrary to several cannons of statutory interpretation. Namely, it renders a portion of the statute surplusage, which should be avoided. (See *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 799; see also *People v. Loeun* (1997) 17 Cal.4th 1, 9.) And, it creates an inherent inconsistency within the provisions of the statutory scheme as a whole. (See *People v. Pieters* (1991) 52 Cal.3d 894, 899, citing Cle*an Air Constituency v. California State Air Resources Bd.* (1974) 11 Cal.3d 801, 814 [When interpreting statutes, reviewing courts "do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.'"].)

For all of these reasons, and with all due respect, the holding in *R.R.* was incorrect. The interpretation of these statutes advanced by respondent harmonizes the federal ICWA with the California implementation provisions, it is consistent with the legislative intent and it gives meaning and purpose to all of the statutory sections. The language of the statute in context is clear and unambiguous.

To the extent the statutory language is considered ambiguous, the legislative history further clarifies the Legislature's intent. The Senate judiciary committee's briefing notes to SB 678 explain the legislative purpose behind adding section 224.3:

> This section is added to the Welf. & Inst. Code to improve compliance with the notice requirements of the Act by providing guidelines on how to comply with the duty to determine if a child is an Indian child and to provide a clear point at which the court can make a determination that ICWA does not apply. Much of this provision is drawn from the expanded requirements of paragraphs (d) and (f) of Rule 1439 of the Rule of Court, as amended effective January 1, 2005.

(Sen. Com. On Judiciary, Briefing Notes on Senate Bill 678 (2005-2006 Reg. Sess.) p. 38.) The briefing notes say nothing of a general intent to expand the reach of the ICWA and apply it to cases not covered under the federal act. Such a fundamental and important change in the law would likely have been noted in the explanation for section 224.3.

The other changes made pursuant to Senate Bill 678 offer additional support for this interpretation. The definitions included in 25 United States Code section 1903 were not only included in California's Welfare and Institutions Code, but they were also added to the California Family Code and the California Probate Code. California's codification of the ICWA pursuant to Senate Bill 678 was aimed at making the provisions of the ICWA more uniform and applying them consistently throughout ICWA proceedings, even where such proceedings arise pursuant to different codes. Thus, next to the inclusion of the definitions in the Family Code, the briefing notes on Senate Bill 678, read:

> This definition section is new and also added to the Probate Code and to the Welf. & Inst. Code in sections 19 and 30 of the bill. *It clarifies which child custody proceedings under the code are "Indian*

> *child custody proceedings" to which the ICWA applies*, and affirms that the common terms used in connection with those proceedings are as defined in the [federal] ICWA.

(Sen. Com. On Judiciary, Briefing Notes on Senate Bill 678 (2005-2006 Reg. Sess.) p. 1, italics added.) This note states clearly that the ICWA applies to "Indian child custody proceedings" as defined in the definition section.

The briefing notes evince a clear intent to adopt the definitions established in the federal ICWA, and to limit the ICWA's application in an identical manner as the federal statute had done. The procedures and protections included in both the federal ICWA and in California's implementation provisions apply only to Indian child custody proceedings. This specifically excludes any proceeding in which the placement of the juvenile is based upon an act which, if committed by an adult, would be a crime.

The section of the briefing notes relied upon by appellant does not change this clear legislative intent. Appellant cites the note which accompanied section 29 of Senate Bill 678, noting the changes to Welfare and Institutions Code section 224. (AOB 29-30.) There, the notes reads:

> Section 224 is a revision and renumbering of § 360.6, introduced into the Welf. & Inst. Code by AB 65 in 1999. A renumbering is needed because it moves the provision to the general provisions applicable to Indian child custody proceedings, rather than in the dependency provisions it had been in. This change will help ensure the provision is applied not only to dependency cases *but delinquency cases as well.*"

(Sen. Com. On Judiciary, Briefing Notes on Senate Bill 678 (2005-2006 Reg. Sess.) p. 33, italics added.) Appellant contends the inclusion of the italicized language supports his position that the Legislature intended to expand the coverage of the ICWA. (AOB 29-30.) However, as noted

above, certain delinquency proceedings do fall within the definition of an "Indian child custody proceeding." Thus, the Legislature's concern that the ICWA be applied in some delinquency proceedings is consistent with the legislation as written. Nothing about this note suggests the Legislature intended to expand the definition of an Indian child custody proceeding so as to include proceedings which were not covered by the federal ICWA. In other words, the federal ICWA does not exclude all delinquency proceedings, and neither does California's implementation scheme. Both the ICWA and California's provisions exclude only the delinquency proceedings which are based on acts which, if committed by adults, would be crimes. Other delinquency proceedings would be covered.

Appellant also relies in part on the Rules of Court. (AOB 21-22.) Indeed, the Rules of Court are misleading on this point. California Rule of Court 5.480 states that the ICWA, "applies to all proceedings involving Indian children that may result in an involuntary foster care placement ... including: (1) Proceedings under Welfare and Institutions Code section 300 et seq., and sections 601 and 602 et seq. in which the child is at risk of entering foster care or is in foster care. . . ." Similarly, the former version of this rule, "requir[ed] ICWA notices in all section 601 and 602 hearings, 'in which the child was at risk of entering foster care'" (Former Rule of Court 1439; *Enrique O., supra*, 137 Cal.App.4th at p. 733.) The Rules of Court appear to mirror the misinterpretation of Welfare and Institutions Code section 224.3 which appellant now advances.

Prior to the passage of the California implementation provisions, the *Enrique O.* court had limited the applicability of this Rule of Court because it was inconsistent with the then governing statute, the federal ICWA. In so holding, the *Enrique O.* court found,

> Further, we note that the interpretation appellant seeks of Rule 1439 would render the rule inconsistent

> with the federal statute on which it is based, which is an untenable result. (S*ara M. v. Superior Court* (2005) 36 Cal.4th 998, 1011 . . ; see also *Reno v. Baird* (1998) 18 Cal.4th 640, 660 . . . .) Appellant nevertheless argues that "if a state law concerning child custody proceedings provides a higher standard of protection to the rights of a parent or Indian custodian than federal law, the court may apply the higher standard." (25 U.S.C. § 1921.) We agree, however, the Judicial Council endeavors to "establish rules governing practice and procedure in the juvenile court not inconsistent with the law." (§ 265, italics added; see also *Sara M. v. Superior Court, supra*, 36 Cal.4th at p. 1011 . . , citing *In re Richard S.* (1991) 54 Cal.3d 857, 863 . . . ["The rules have the force of statute to the extent that they are not inconsistent with legislative enactments and constitutional provisions."].) Thus, we do not interpret the California Rules of Court here to expressly contradict the ICWA by ordering ICWA notices and procedures to occur in all out of home placements arising out of acts that would be deemed crimes if committed by an adult. (*Sara M. v. Superior Court, supra*, 36 Cal.4th at p. 1013-1014 . . . [discussing need for some deference to Judicial Council's interpretation of a statute]; *People v. Hall* (1994) 8 Cal.4th 950, 961. . . ["[T]he Judicial Council's authority . . . does not extend to the adoption of rules that are inconsistent with governing statutes. . . ."].)

(*Enrique O., supra*, 137 Cal.App.4th at 733.)

The court in *Enrique O.* was and is correct. To the extent that California Rule of Court 5.480 is inconsistent with the California implementation provisions and the federal ICWA, it is not binding because "the Judicial Council is simply empowered to 'adopt rules for court administration, practice and procedure, not inconsistent with statute . . . .' (Cal. Const., art. VI, § 6.)" (*In re Richard S., supra*, 54 Cal.3d at p. 863.)

In *R.R.,* the court attempted to distinguish *Enrique O.*'s holding based on the fact that it was decided before the implementation provisions had

been codified. *R.R.* holds that the passage of Senate Bill No. 678 provided the legislative authority to enforce the Rules of Court as written, and their expansion of the class of proceedings to which the ICWA was applicable:

> We acknowledge that *In re Enrique O., supra*, 137 Cal.App.4th 728 . . , held that California Rules of Court, rule 1439, the predecessor to rules 5.480 et seq., did not apply to section 602 delinquency proceedings because such an interpretation would render the rule inconsistent with the federal statute upon which it was based. (*Id.* at p. 734 . . . .) Because the Judicial Council may not establish rules that are inconsistent with the law, the court refused to interpret rule 1439 in a manner that expressly contradicted ICWA. (*Ibid.*) However, *In re Enrique O.* was decided in March 2006, prior to the passage of Senate Bill No. 678 later that year. As indicated, Senate Bill No. 678 provides the legislative authority for the Rules of Court applying ICWA to section 602 proceedings.

(*R.R., supra*, 180 Cal.App. at pp. 205-206.) The flaw in the *R.R.* court's analysis is that it fails to account for the fact that nothing in Senate Bill No. 678 indicates the Legislature intended such an expansion despite the Legislature's presumed knowledge of the *Enrique O.* holding.

The decision in *Enrique O.* was issued on March 13, 2006. (*In re Enrique O., supra*, 137 Cal.App.4th at p. 728.) Senate Bill 678 was passed and chaptered on September 30, 2006.[5] Senate Bill 678 was first introduced in August of 2005, and it was before the Senate and the Assembly both before and after the decision in *Enrique O.* was issued. The Legislature is presumed to know about existing case law at the time it enacts a statute. (See *People v. Green* (1996) 50 Cal.App.4th 1076, 1090;

---

[5] See Bill Documents for Senate Bill 678 (2005-2006 Reg. Sess.) at http://www.leginfo.ca.gov.

Arthur Andersen v. Superior Court (1998) 67 Cal.App.4th 1481, 1500; *Yoffie v. Marin Hospital Dist.* (1987) 193 Cal.App.3d 743, 748.) Despite its presumed knowledge of the decision in *Enrique O.*, which limited the reach of the Rule of Court, the Legislature was silent on the issue. Instead, the Legislature adopted, in total, the definition of "child custody proceedings" as established in the federal Act. (§ 224.1, subd. (c).)

The relevant dates add force to this interpretation. The decision in *Enrique O.* was not issued decades before the Legislature's contemplation of statutes that may have been affected by the court's opinion; rather, the *Enrique O.* decision was issued *while* the Legislature was amending and actively considering the pertinent statutes. During the amendment process, the Legislature had additional incentive to be keenly aware of the court decisions that were being issued on the ICWA. Because we can presume the Legislature's knowledge about the Enrique O. decision, in the midst of the passage of the relevant statutes, it is fair to conclude that had the Legislature actually intended to expand the reach of the ICWA in exactly the manner *Enrique O.* said conflicted with the federal law, there would have been a clear and unambiguous signal that this was its intention. Instead, as noted above, the legislative history suggests just the opposite.

For all of the reasons stated above, section 224.3, subdivision (a), does not expand the definition of "Indian child custody proceedings" to include all proceedings pursuant to a section 602 petition where the juvenile is at risk of entering foster care. Instead, section 224.3 implicitly applies to the same child custody proceedings as the remaining provisions of the ICWA. The definition included in the federal ICWA and adopted by California in section 224.1, subdivision (c), delineates which child custody proceedings are subject to the ICWA, and thus which child custody proceedings are subject to the requirements established in section 224.3, subdivision (a).

Appellant committed an act which if committed by an adult, would be a crime. Specifically, the court found true the allegation that appellant had committed a residential burglary (Pen. Code, § 459) and the court ordered he be placed in a suitable public or private institution. Nothing in the record indicates that the resulting placement was not "based upon" appellant's criminal act. Accordingly, assuming appellant is an Indian child, the provisions and protections of the ICWA were inapplicable to these proceedings because they were not "Indian child custody proceedings."

II. EVEN IF APPLICABLE TO DELINQUENCY PROCEEDINGS GENERALLY, THE ICWA WAS NOT APPLICABLE TO APPELLANT BECAUSE HE WAS NOT AT RISK OF ENTERING FOSTER CARE

Even assuming appellant's interpretation of the statute were correct, the ICWA is still inapplicable to this case because appellant was not "at risk of entering foster care."

The definition for "at risk of entering foster care" is provided in section 727.4, subdivision (d)(2): "'At risk of entering foster care' means that conditions within a minor's family may necessitate his or her entry into foster care unless those conditions are resolved."

Initially, at the August 4, 2008 disposition hearing on his previous robbery case, in front of the same juvenile court judge, the court warned appellant about his next placement, should he appear before the court on a subsequent petition. There the court said,

> Winston, good luck to you. I sincerely mean that. I hope I don't see you again. Because if I do, I'm afraid the next stop is placement outside the home. And a young man of your age, you're looking at Twin Pines Ranch or even potentially the Youth Offender Program.

(RT 96.)

In the instant case, there was no discussion of a foster care placement and conditions of appellant's family were never discussed. Nothing in the record indicates that the court was considering foster care placement. The court ordered he be placed in a "suitable public or private facility." (RT 140.) Appellant cites two portions of the record to support his argument that he was "at risk of entering foster care." (AOB 35.) First, appellant cites the Probation Officer's recommendations which, under recommendation two, recommended placement as follows: "Minor(s) placed in suitable licensed foster home, group home, relative home, county or private facility. . ." (CT 140.) However, the court did not adopt recommendation two pertaining to placement, but adopted only recommendations three through nine. (RT 142.) Appellant also cites the Minute Order which similarly indicates minor was to be "placed in suitable licensed foster home, group home, relative home, county or private facility, suitable to meet specific needs." (CT 167) But the minute order is inconsistent with the oral pronouncement of judgment, which said nothing of foster care, and where such is the case, the oral pronouncement of judgment governs. (*People v. Mesa* (1975) 14 Cal.3d 466, 471.)

Accordingly, even under appellant's interpretation of the statute, the ICWA is still inapplicable to these proceedings because appellant was not at risk of entering foster care.

III. ANY ERROR IN FAILING TO GIVE ICWA NOTICE WAS HARMLESS

Even were this Court to interpret section 224.3 to extend the ICWA protections to appellant's delinquency proceeding, appellant cannot demonstrate that he was prejudiced by the juvenile court's failure to notify the Cherokee tribe of his possible placement in foster care.

In *Enrique O.* the court held "[a]ny rule created in excess of ICWA's requirements would be a statutory right" subject to review under *People v.*

Watson (1956) 46 Cal.2d 818. (*Enrique O., supra*, 137 Cal.App.4th at p. 735.) Thus, appellant must demonstrate how the juvenile court's failure to provide the Cherokee tribe notice of his placement prejudiced him. (*Ibid.*) As the *Enrique O.* court noted, no such prejudice can be established in delinquency proceedings:

> Generally an Indian child who commits a crime will be subject to the same punishment and rehabilitation as a non Indian child, and invoking the extensive noticing scheme of the ICWA in such cases would do nothing to change that. The tribe, while now on notice, would still have no power or authority to usurp the powers of the juvenile court in rehabilitating and/or punishing the minor.

(*Enrique O., supra*, 137 Cal.App.4th at p. 735.) The court noted the minor in *Enrique O.* was "essentially demanding we order notice for notice's sake, which we will not do." (*Ibid.*)

In addition, the court ordered he be placed in a "suitable public or private facility." (RT 140.) Appellant was not placed in foster care and thus, even if the court erred in failing to notify the tribe of appellant's risk of entering foster care, the fact that that risk was never realized renders any error harmless. The tribe can only assert its ICWA rights in foster care placements, adoptive placements, and guardianships. (See 25 U.S.C. § 1903; section 224.1, subd. (c).) Nothing in the ICWA would be relevant to a placement in a public or private facility.

Additionally, appellant turned 18 on April 8, 2010, and as such, he is no longer an Indian Child within the meaning of the ICWA. (See § 224.1, subd. (a), incorporating 25 U.S.C. § 1903, subd. (4).)[6] It is unclear what, if

---

[6] Respondent notes, for the Court, that the Legislature has recently amended the definition of an "Indian child." (See Assem. Bill No. 2418 (2009-2010 Reg. Sess.) § 1.) This bill added subdivision (b) to Welfare and institutions Code section 224.1. The new subdivision (b) reads, in total:

(continued...)

anything, ICWA notice could accomplish at this point in the proceedings. Appellant is no longer a minor to which the provisions of ICWA even

---

(...continued)

> As used in connection with an Indian child custody proceeding, the term "Indian child" also means an unmarried person who is 18 years of age or over, but under 21 years of age, who is a member of an Indian tribe or eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe, and who is under the jurisdiction of the dependency court, unless that person or his or her attorney elects not to be considered an Indian child for purposes of the Indian child custody proceeding. All Indian child custody proceedings involving persons 18 years of age and older shall be conducted in a manner that respects the person's status as a legal adult.

(Assem. Bill No. 2418 (2009-2010 Reg. Sess.) § 1.) This definition, as amended, is inapplicable to appellant for three reasons. First, it was not the statute in effect at the time of appellant's proceedings, and there is nothing to indicate the Legislature intended it to have retroactive effect. (See *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1209 [Holding, "in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application."]; and see *Stenger v. Anderson* (1967) 66 Cal.2d 970, 977 & fn. 13 [applying the general rule of prospective application of a statute to the Welfare and Institutions Code].) Second, by its terms, the amendment applies only to juveniles within the jurisdiction of the *dependency* court, not the *delinquency* court. Finally, according to the probation reports, appellant is not the biological child of a member of an Indian tribe. In all of the probation reports, appellant's mother indicated that the ICWA may be applicable because her mother (appellant's grandmother) may have Cherokee heritage. Thus, appellant's mother was not a member of the Cherokee nation, or likely would have included this fact in the probation reports. The amendment only applies to the biological children of tribe members. Accordingly, appellant does not fall within the broadened definition of an "Indian child."

could apply. Ordering remand at this point, would simply be a waste of judicial resources.

As in *Enrique O.*, appellant cannot establish he was prejudiced in any way by the juvenile court's failure to inquire whether he is Indian and, assuming he is Indian, to notify his tribe that the probation department would be placing him in a private or public facility.

Accordingly, any error by the trial court was harmless.

IV. REVERSAL OF THE DISPOSITIONAL ORDER IS NOT THE APPROPRIATE REMEDY

Even assuming this court adopts appellant's interpretation of the California implementation scheme and concludes that the court's failure to issue notice pursuant to section 224.3 was not harmless, reversal of the dispositional order is not the appropriate remedy. First, the juvenile court must determine if, in fact, appellant is an Indian child.

The record is clear that the only indication that appellant is an Indian child came from his mother's conversations with the probation officers. In each of these incidents, she indicated that "ICWA may apply" because her mother may have Cherokee heritage. (See CT 5, 35, 125.) Before reversing the dispositional order, the case should be remanded for a limited evidentiary hearing to determine whether or not appellant even qualifies as an Indian child.

Following that, assuming appellant does qualify, the juvenile court can comply with the provisions of the ICWA without needing to reverse its dispositional order. This approach is routinely employed in dependency proceedings. (*Justin L. v. Superior Court* (2008) 165 Cal.App.4th 1406, 1410; *In re Alice M.* (2008) 161 Cal.App.4th 1189, 1203; *In re J.T.* (2007) 154 Cal.App.4th 986, 994; *In re Francisco W.* (2006) 139 Cal.App.4th 695, 705-706; *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1268 .) There is no reason why a different approach should apply to delinquency proceedings.

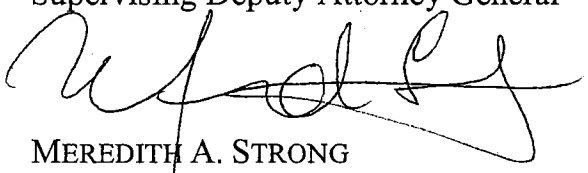
CONCLUSION

For the reasons set forth above, respondent respectfully requests that this Court affirm the opinion issued by the Fourth District Court of Appeal.

Dated: December 17, 2010

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
STEVE OETTING
Supervising Deputy Attorney General



MEREDITH A. STRONG
Deputy Attorney General
Attorneys for Plaintiff and Respondent

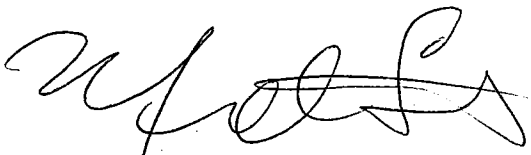
MAS/odc
SD2010701654
70405065.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S ANSWER TO APPELLANT'S OPENING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 9,237 words.

Dated: December 17, 2010

EDMUND G. BROWN JR.
Attorney General of California



MEREDITH A. STRONG
Deputy Attorney General
Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **PEOPLE v. IN RE W. B., a minor** No.: **S181638**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On December 17, 2010, I served the attached **RESPONDENT'S ANSWER TO APPELLANT'S OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Jonathan E. Demson, Esq.
1158 26th Street, #291
Santa Monica, CA 90403
(Attorney for Defendant W.B.)
[2 copies]

Hon. Christian F. Thierbach
c/o Clerk of the Court
Juvenile Court
9991 County Farm Rd.
Riverside, CA 92501-3526

Hon. Rod Pacheco
Riverside County District Attorney
3960 Orange Street
Riverside, CA 92501

Court of Appeal
Fourth Appellate District
Division Two
3389 Twelfth Street
Riverside, CA 92501

and furthermore declare, I electronically served a copy of the above document from the Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on December 17, 2010, to Appellate Defender's, Inc's electronic notification address, eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 17, 2010, at San Diego, California.

Olivia de la Cruz
Declarant

Olivia de la Cruz
Signature

SD2010701654
70405550.doc