Filed 12/10/02

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In Re SUZANNA L., a Minor.	
ROMELIA W., Petitioner and Respondent, v. EDWARD L., Objector and Appellant; ALAN W., Respondent.	E031146 (Super.Ct.No. RA00903) **OPINION**

APPEAL from the Superior Court of San Bernardino County. Barry L. Plotkin, Judge. Reversed.

Monica Vogelmann, under appointment by the Court of Appeal, and Richard Pfeiffer for Objector and Appellant.

---

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II, III, and IV; the footnotes; and the Appendix.

Christopher R. Abernathy for Petitioner and Respondent and for Respondent.

Sharon M. Jones, under appointment by the Court of Appeal, for Minor.

Edward L. and Romelia W. are the parents of Suzanna L. When they divorced, Romelia was given sole custody. Edward was allowed monitored visitation; however, he visited only sporadically for a year or so, and then not at all. Thereafter, Romelia married Alan W. In this action, the trial court granted Romelia's petition to terminate Edward's parental rights, based on abandonment, so Alan could adopt Suzanna.

Edward contends the trial court violated the Indian Child Welfare Act (ICWA) because he, and hence Suzanna, were part Indian, yet proper notice was not given to their tribe. We agree. In the published portion of this opinion, we will hold that the ICWA's notice provisions applied, even if, under the "existing Indian family doctrine," its other provisions did not. On remand, the trial court must require proper notice. In the unpublished portion of this opinion, however, we find no other prejudicial error. Accordingly, if, after proper notice has been given, the trial court determines that the ICWA does not otherwise apply, it must reinstate its order terminating Edward's parental rights.

I

FAILURE TO GIVE NOTICE PURSUANT TO THE INDIAN CHILD WELFARE ACT

Edward contends the trial court erred by proceeding in the absence of proper notice pursuant to the ICWA.

A. *Additional Factual and Procedural Background*.

On April 12, 2000, Romelia filed a petition to free Suzanna from Edward's custody and control. (Fam. Code, § 7800 et seq.) No ICWA issue was presented until June 29, 2001, when Edward's counsel stated to the court: " . . . I just found out yesterday that my client is half Indian, half Cherokee Indian." She added: "[A]ccording to the research we've done, there should be a special Indian social worker appointed in the case." The trial court ordered Edward's counsel to file a written request for any action she wanted taken.

On July 9, 2001, Edward filed an "Objection to the [A]doption [o]f the [M]inor [B]ased on [H]is Indian Ancestry." In it, he asserted that he was "50% Indian as both of his [maternal] grandparents are full[-]blooded Indians . . . ." He added that he was "maybe 50% Cherokee or Ya[qu]i Indian." He provided copies of his mother's and his mother's sister's birth certificates, which indicated that one or both of their parents (Edward's grandparents) were Indian. He asked the court to "allow sufficient time for the Bureau of Indian Affairs to investigate the matter."

On July 10, 2001, the Department of Children's Services (the Department) advised the trial court that it was going to "send the appropriate requests to the tribes." It added that the "tribes in question" were the "Papago (four separate bands), Cherokee (three separate bands), and Yaqui (possibly one band)." It requested a continuance.

On July 13, 2001, the trial court stated: "[S]hould the child fall under the provisions, the tribe could or could not choose to intervene. [¶] [The Department is] recommending a continuance because they're going to contact the [tribes]. And they're

going to request of the tribes to see what they're going to do. [¶] So I think that we're going to have to put it over." Counsel for the W.'s replied, "I concur . . . . Continue it, let Social Services do their thing, and . . . if the tribe wants to come here and assert their rights . . . , then the [c]ourt can decide how to act at that point." Edward's counsel said, "I completely concur." The trial court set a status conference for October 19, 2001.

On October 18, 2001, the Department reported: "We are in the process of obtaining information on the Indian ancestry of the minor . . . . Our results as of this date are as follows:

"Cherokee tribe: Tahlequah, OK - Not on rol[l]

"Cherokee tribe: North Carolina - Not on rol[l]

"Papagos and Yaquis: No response" (Capitalization omitted.)

The court continued the matter to January 25, 2002.

On January 25, 2002, Edward's counsel said: "We've talked to the social worker and she had indicated she was going to be sending a request to the [c]ourt for another extension because the Yaquis had not responded, neither have the Papago . . . ." The court denied a further continuance. It ordered the matter trailed to January 28, 2002.

On January 28, 2002, Edward's counsel stated: " . . . I have an objection to this case even being ready for trial because we never got back information from the Indian tribes . . . ." The trial court ordered her to brief the issue. It set the trial for January 30, 2002.

Edward filed a brief asserting that he was a Papago Indian. He did not clearly indicate what he believed the effect of this should be. He did argue that: "[T]he [f]ederal

law has exclusive jurisdiction over this matter . . . ." He also argued that: "[S]ince the [s]tate law does not prescribe what constitutes a member of a tribe the federal government would have exclusive jurisdiction over the issue of Indian ancestry." The W.'s responded with a brief claiming that, back on July 13, 2001, when it had granted a continuance, the trial court had "denied the jurisdictional objection and ruled that the tribes could participate at their election."

When trial began, on January 30, 2002, the court said to Edward's counsel: "You raised the issue but you haven't asked me for any relief. What's your request?" Edward's counsel asked the court to "dismiss this case based on the federal jurisdiction of the federal court over the matter . . . ." Minor's counsel objected, "[O]nce they've been put on notice, . . . it is up to the tribe . . . if they want to assert that. If they don't, we proceed . . . ." The trial court then ruled: "[T]here's a fairly common, well-known procedure for invoking the jurisdiction of the Indian tribes and for obtaining a stay o[f] the proceedings so they can invoke their jurisdiction. You haven't done that. Your motion is denied."

B. *Analysis*.

1. *Statutory Background*.

"The ICWA (25 U.S.C. § 1901 et seq.) was enacted in 1978, out of an increasing concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of child welfare practices that separated large numbers of Indian children from their families and tribes, and placed them in non-Indian homes through state adoption, foster care, and parental rights termination proceedings. [Citations.] . . .

"The stated purpose of the ICWA is 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 care 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.' [Citation.]" (*In re Santos Y*. (2001) 92 Cal.App.4th 1274, 1299, fn. omitted.)

The ICWA defines a "child custody proceeding" so as to include any proceeding for either "'termination of parental rights[,]' which shall mean any action resulting in the termination of the parent-child relationship" or "'adoptive placement[,]' which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption." (25 U.S.C. §§ 1903(1)(ii), 1903(1)(iv).) Thus, a proceeding to terminate parental rights under Family Code section 7800 et seq. is a "child custody proceeding" within the meaning of the ICWA. (*In re Crystal K.* (1990) 226 Cal.App.3d 655, 660-666.) The ICWA defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe . . . ." (25 U.S.C. § 1903(4).)

The ICWA also "lays out a dual jurisdictional scheme. Section 1911(a) establishes exclusive jurisdiction in the tribal courts for proceedings concerning an Indian child 'who resides or is domiciled within the reservation of such tribe[]' . . . . Section 1911(b), on the other hand, creates concurrent but presumptively tribal jurisdiction in the

case of children not domiciled on the reservation: on petition of either parent or the tribe, state-court proceedings for . . . termination of parental rights are to be transferred to the tribal court, except in cases of 'good cause,' objection by either parent, or declination of jurisdiction by the tribal court." (*Mississippi Band Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 36 [109 S.Ct. 1597, 104 L.Ed.2d 29], fn. omitted.) Moreover, if a proceeding for termination of parental rights is pending in state court, "the Indian child's tribe shall have a right to intervene at any point in the proceeding." (25 U.S.C. § 1911(c).)

The ICWA provision most critical in this case -- the notice provision -- states: "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the . . . termination of parental rights to[] an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of . . . the tribe cannot be determined, such notice shall be given to the Secretary [of the Interior] in like manner, who shall have fifteen days after receipt to provide the requisite notice to . . . the tribe. No . . . termination of parental rights proceeding shall be held until at least ten days after receipt of notice by . . . the tribe or the Secretary: *Provided*, [t]hat . . . the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding." (25 U.S.C. § 1912(a); see also 25 U.S.C. 1903(11).) If parental rights are terminated without such notice, then either the child, the parent from whose custody the child was removed, or the tribe can petition to invalidate the termination. (25 U.S.C. § 1914.)

When the ICWA applies, an indigent parent has the right to appointed counsel. (25 U.S.C. § 1912(b).) Moreover, "[n]o termination of parental rights may be ordered . . . in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child." (25 U.S.C. § 1912(f).)

2. *Analysis*.

We begin by correcting several of the parties' mistaken notions regarding the ICWA. The ICWA does not give either the federal courts or the tribal courts "exclusive jurisdiction" in this kind of case. It may require that such a state-court proceeding be transferred to a tribal court, but not that it be dismissed. It does not require a trial court to continue a case indefinitely while awaiting a response from a tribe. And it never requires a "special Indian social worker."

The W.'s argue notice was not required because there was insufficient evidence that Suzanna was an "Indian child" within the meaning of the ICWA. An "Indian child" is defined as "either (a) a member of an Indian tribe or (b) . . . eligible for membership in an Indian tribe and . . . the biological child of a member of an Indian tribe . . . ." (25 U.S.C. § 1903(4).) Notice, however, is required whenever "the court knows *or has reason to know* that an Indian child is involved . . . ." (25 U.S.C. § 1912(a), italics added.)

"The determination of whether a minor is, or is not, an Indian child is made exclusively by the tribe. [Citation.] '[O]ne of the primary purposes of giving notice to

the tribe is to enable the tribe to determine whether the child involved in the proceedings is an Indian child. [Citation.]' [Citation.] 'Because the question of membership rests with each Indian tribe, when the juvenile court knows or has reason to believe the child may be an Indian child, notice must be given to the particular tribe in question or the Secretary [of the Interior].' [Citation.] Thus, the Indian status of a child need not be certain or conclusive in order to trigger the Act's notice requirements. [Citation.]" (*In re Jonathan D*. (2001) 92 Cal.App.4th 105, 110, quoting *In re Desiree F*. (2000) 83 Cal.App.4th 460, 470-471.)

Here, the evidence did not show that Suzanna was, in fact, an Indian child; i.e., it did not show that she was a member of, or eligible for membership in, an Indian tribe or that Edward was a member of an Indian tribe. However, it did show that Edward's maternal grandparents were Indian. Such evidence of Indian ancestry is sufficient "reason to know" a child is an Indian child so as to trigger the notice requirement. (*In re Samuel P*. (2002) 99 Cal.App.4th 1259, 1266-1267; *In re Jonathan D.*, *supra*, 92 Cal.App.4th at p. 111; *In re Desiree F*., *supra*, 83 Cal.App.4th at pp. 470-471.)

The trial court erred by finding that Edward had somehow been dilatory. The W.'s do not even argue otherwise. "'Notice is mandatory, regardless of how late in the proceedings a child's possible Indian heritage is uncovered. [Citations.]' [Citation.]" (*In re Jonathan D*., *supra*, 92 Cal.App.4th at p. 111, quoting *In re Kahlen W*. (1991) 233 Cal.App.3d 1414, 1424.) "The notice requirements serve the interests of the Indian tribes 'irrespective of the position of the parents' and cannot be waived by the parent. [Citation.]" (*In re Samuel P*., *supra*, 99 Cal.App.4th at p. 1267, quoting *In re Kahlen W*.,

supra, 233 Cal.App.3d at p. 1421.) Thus, "where the notice requirements of the Act were violated and the parents did not raise that claim in a timely fashion, the waiver doctrine cannot be invoked to bar consideration of the notice error on appeal." (*In re Marinna J.* (2001) 90 Cal.App.4th 731, 739.)

The W.'s do argue that the Department gave adequate notice. Technically, it was not the Department's job to give notice; the W.'s, as "the part[ies] seeking the . . . termination of parental rights to[] an Indian child," should have given notice. (25 U.S.C. § 1912(a).) Still, if the Department gave adequate notice, presumably this error would be harmless. It is far from clear, however, that the Department contacted the appropriate tribe(s). Given the uncertainty as to the tribe with which Edward's grandparents were affiliated, notice should have been given to the Bureau of Indian Affairs (the BIA), on behalf of the Secretary of the Interior. (25 U.S.C. § 1912(a); 25 C.F.R. § 23.11(c)(12); *In re Edward H.* (2002) 100 Cal.App.4th 1, 4-6.)

Moreover, the trial court was not provided with copies of the notices the Department sent or the return receipts (if any) it received. Thus, there is insufficient evidence that two of the tribes -- the tribes which failed to respond -- received actual notice. (*In re Samuel P.*, *supra*, 99 Cal.App.4th at p. 1266.) There is likewise insufficient evidence that the Department properly notified the tribes, not only of the proceeding, but also of their right to intervene. (*Ibid.*) "[S]peaking with various members of the tribe in an attempt to determine the minor's status does not satisfy the notice requirement. [Citations.]" (*In re Desiree F.*, *supra*, 83 Cal.App.4th at p. 475.)

Although two tribes did respond, their actual responses are also not in the record. The Department summarized the responses as, "Not on rol[l]." It is not clear whether this referred to Suzanna, Edward, or Edward's grandparents. In any event, "[e]nrollment is not required in order to be considered a member of a tribe; many tribes do not have written rolls. [Citation.] While enrollment can be one means of establishing membership, it is not the only means, nor is it determinative. [Citation.]" (*In re Desiree F.*, *supra*, 83 Cal.App.4th at pp. 470-471.) Moreover, the ultimate question was whether Suzanna was either a member or *eligible* for membership in a tribe. Thus, we cannot say that giving proper notice would have been fruitless.[1]

Finally, the W.'s argue that notice was not required because Suzanna was not being removed from an existing Indian family; thus, the underlying purposes of the ICWA were not implicated. They did not raise this contention below. "The issue is properly before this court, however, because the facts are undisputed and the issue merely raises a new question of law. [Citation.]" (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 642, fn. 7.)

Under the so-called "existing Indian family doctrine," the ICWA is not applied "where its purpose, the improper removal of Indian children from their Indian families,

---

[1] The W.'s also argue that notice to the tribe is not required if notice is given to the Indian parent. This whole argument seems to be based on a misquotation. According to Edward, the ICWA requires notice to "the parent or custodian *in* the Indian child's tribe . . . ." (Italics added.) Actually, it requires notice to "the parent or Indian custodian *and* the Indian child's tribe . . . ." (25 U.S.C. § 1912(a), italics added.) This means notice to the tribe *in addition to* notice to either the parent or the Indian custodian. (*In re Kahlen W.*, *supra*, 233 Cal.App.3d at p. 1421.)

would not be served." (*In re Santos Y.*, *supra*, 92 Cal.App.4th at p. 1304.) This doctrine had its genesis in *Matter of Adoption of Baby Boy L.* (1982) 231 Kan. 199 [643 P.2d 168], which involved the child of an Indian father and a non-Indian mother. (*Id*. at p. 201.) As in this case, a proceeding was brought to terminate the father's parental rights so the child could be adopted. (*Id*. at pp. 201-202.) Notice was given to the father's tribe. (*Id*. at p. 202.) The trial court, however, denied the tribe's petition to intervene and refused to transfer the case to the tribal court; it ruled that the ICWA did not apply (*Baby Boy L., supra,* at p. 203), in part because "the child has never been a part of any Indian family relationship." (*Id*. at p. 205.) It then proceeded to terminate the father's parental rights. (*Id*. at p. 203.)

The appellate court agreed that the ICWA did not apply. It based its opinion on legislative intent: "A careful study of the legislative history behind the Act and the Act itself discloses that the overriding concern of Congress and the proponents of the Act was the maintenance of the family and tribal relationships existing in Indian homes and to set minimum standards for the removal of Indian children from their existing Indian environment. It was not to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother." (*Matter of Adoption of Baby Boy L.*, *supra*, 231 Kan. at pp. 205-206.)

Some California courts which have accepted the existing Indian family doctrine derive it, as *Baby Boy L*. did, from legislative intent. (*Crystal R. v. Superior Court*

(1997) 59 Cal.App.4th 703, 718-723 [Sixth Dist.]; *In re Wanomi P*. (1989) 216 Cal.App.3d 156, 168 [Second Dist., Div. One], cert. den. *sub nom. Mic Mac Nation v. Giesler* (1990) 498 U.S. 816 [111 S.Ct. 57, 112 L.Ed.2d 33].) Others have rejected the doctrine as an unwarranted judicial gloss on the ICWA. (*In re Alicia S*. (1998) 65 Cal.App.4th 79, 83-92 [Fifth Dist.]; *In re Junious M*. (1983) 144 Cal.App.3d 786, 796 [First Dist., Div. Three]; see also *Adoption of Lindsay C.* (1991) 229 Cal.App.3d 404, 409-416 [First Dist., Div. Three].)

Recent California decisions, however, have reformulated the existing Indian family doctrine as a federal constitutional limitation on the ICWA. (*In re Santos Y*., *supra*, 92 Cal.App.4th at pp. 1306-1323 [Second Dist., Div. Two]; *In re Bridget R*. (1996) 41 Cal.App.4th 1483, 1501-1512 [Second Dist., Div. Three], cert. den. *sub nom*. *Cindy R. v. James R.* (1997) 519 U.S. 1060 [117 S.Ct. 693, 136 L.Ed.2d 616]; see also *In re Alexandria Y*. (1996) 45 Cal.App.4th 1483, 1492-1493 [Fourth Dist., Div. Three].) They reason that, if the ICWA applied to a child who does not have an existing Indian family, it would be unconstitutional in three different respects. First, it would violate substantive due process, because it would deprive the child of the fundamental right to a stable and existing relationship with his or her de facto family without serving the governmental purposes behind the ICWA. (*In re Santos Y*., *supra*, at pp. 1306-1307, 1314-1317; *In re Bridget R*., *supra*, at pp. 1502-1508.) Second, it would violate equal protection, because it would treat Indian children differently based solely on race, rather than on the child's social, cultural or political affiliation with a tribe. (*In re Santos Y*., *supra*, at pp. 1307-1308, 1317-1322; *In re Bridget R*., *supra*, at pp. 1508-1510.) Third, it

would violate the Tenth Amendment, because jurisdiction over family relationships is traditionally reserved to the states, and because there is no substantial nexus between the Congress's power under the Indian commerce clause, on the one hand, and custody proceedings involving children with no significant relationship to Indian culture, on the other. (*In re Santos Y.*, *supra*, 92 Cal.App.4th at pp. 1308-1309, 1322-1323; *In re Bridget R.*, *supra*, 41 Cal.App.4th at pp. 1510-1511.)

On the facts before us, however, we need not decide whether to accept the existing Indian family doctrine -- much less whether to accept it as a matter of legislative intent or constitutional imperative. We may assume, without deciding, that it is established law on one rationale or the other. We may further assume, without deciding, that the record before us conclusively establishes that Suzanna has no existing Indian family. Even if so, the trial court was required to give notice.

This is true under the legislative intent version of the existing Indian family doctrine. A court in Kansas, where the existing Indian family doctrine originated, has so held. In *In the Interest of H.D.* (1986) 11 Kan.App.2d 531 [729 P.2d 1234], the mother was part Cherokee. The trial court terminated parental rights without giving notice to her tribe. However, it was unclear whether the ICWA applied, because she did not become a member of the tribe until six weeks after the termination. (*In the Interest of H.D., supra,* at p. 532.)

The appellate court held: "Although we do not decide the question of the applicability of the Act, we agree that the court's failure to direct that proper notice be served upon the tribe or Secretary of the Interior renders the termination order invalid."

(*In the Interest of H.D.*, *supra*, 11 Kan.App.2d at p. 532.) It found that there were "reasonable grounds" to believe that the children were "Indian child[ren]." (*Id*. at p. 536.) It distinguished *Baby Boy L.* as follows: "Unlike the case of *In re Adoption of Baby Boy L.* . . . , we are not concerned with a determination of whether the Act applies. In this decision, we are concerned with the tribe's right to notification of involuntary proceedings where the court has reasonable grounds to believe a child subject to the proceeding is or may be an Indian child. [Citation.]" (*In the Interest of H.D., supra,* at p. 534.) The court noted that, in *Baby Boy L.*, notice had been given to the tribe; "[i]n this case, however, the Cherokee Tribe was never notified of the pendency of state court proceedings. Consequently, the tribe was denied the opportunity to be heard on the issue of whether the Act applied to the state court proceedings." (*In the Interest of H.D., supra,* at p.534.)

The same result follows under the federal constitutional version of the existing Indian family doctrine. The cases which have held the application of the ICWA to be unconstitutional did not involve the notice provisions of the ICWA. Rather, they involved provisions of the ICWA which deprived the child directly and immediately of his or her fundamental right to an established family relationship. For example, in *In re Santos Y.*, *supra*, 92 Cal.App.4th 1274, a juvenile dependency proceeding, a boy had been placed with prospective adoptive parents when he was three months old. (*Id*. at pp. 1279, 1283.) Notice was given to his mother's tribe (*id.* at pp. 1280, 1282), and eventually the tribe intervened. (*Id.* at pp. 1288-1289.) When the boy was two-and-a-half years old, the trial court, applying the placement preference of the ICWA (25 U.S.C.

§ 1915(a)), ordered the boy removed from his prospective adoptive parents and placed with a member of the tribe. (*Santos Y., supra,* at pp. 1281, 1298.) The court held this "*application* of the ICWA . . . unconstitutional . . . ." (*Id*. at p. 1282, italics added; see also *id*. at p. 1312.)

Similarly, in *In re Bridget R*., *supra*, 41 Cal.App.4th 1483, the biological parents had voluntarily relinquished their parental rights, and their twin daughters had been placed with a prospective adoptive family since birth. Two years later, the trial court ruled that the voluntary relinquishment did not comply with the voluntary termination standards of the ICWA (25 U.S.C. § 1913(a)); it therefore ordered the girls removed from their adoptive family and placed with their biological father. (*Bridget R., supra,* at pp. 1490-1491, 1493-1495.) Thus, once again, this particular application of ICWA interfered directly with the girls' fundamental right to an established family relationship.

Applying the notice requirements of the ICWA, even to a child who has no existing Indian family, does no such thing. It does not take the child out of his or her existing placement. All it does is prevent the termination of parental rights for perhaps 25 days. The tribe may respond that the child is not an Indian child. Alternatively, the tribe may not respond at all; in that case, it will be barred from subsequently invalidating the termination of parental rights based on lack of notice.

Admittedly, if the tribe responds that the child *is* an Indian child, the trial court may have to decide whether to apply other provisions of the ICWA, such as the placement preference, which *would* threaten the child's existing family relationship. That, however, would be the perfect time to invoke the existing Indian family doctrine.

Here, for example, the record before us strongly suggests that Suzanna has no existing Indian family. She was born in 1990. She has lived with her non-Indian mother, Romelia, all her life, and with Romelia's non-Indian husband, Alan, since 1993. The W.'s have four other non-Indian children, Suzanna's half-siblings, to whom she is bonded. The trial court found that Edward had "had only sporadic and infrequent contacts with Suzanna"; he has not challenged this finding. His last visit with her was in 1992. Moreover, even though Edward is genetically half Indian, he is so lacking in any Indian cultural affiliation that he is not even sure what tribe he comes from. Thus, if a tribe does claim Suzanna is an Indian child, as long as the trial court follows the "existing Indian family doctrine," it seems most likely that her placement will not change.

Giving notice, however, at least permits the tribe to be heard on the question of whether the child does have an existing Indian family. The tribe's interests are not necessarily congruent with the parents'. Thus, the tribe may have an interest in proving that the child has an existing Indian family, even when the parents do not. Under those circumstances, compliance with the notice provisions of the ICWA, even though the child does not *appear* to have an existing Indian family, does promote the federal policies underlying the ICWA.

Because the notice provisions of the ICWA promote a substantial governmental interest without impinging upon a child's existing family relationships, they do not violate due process. Moreover, because the notice provisions assist in determining whether the child has a social, cultural, or political affiliation with a tribe, they do not violate equal protection. Finally, there is a substantial nexus between the notice

provisions and Congress's constitutional power over Indian affairs. Accordingly, they do not violate the Tenth Amendment.

We conclude that the trial court erred by terminating Edward's parental rights, even though there had not been substantial compliance with the notice requirements of the ICWA. But this does not mean the trial court must go back to square one. It simply means the trial court must see to it that proper notice is given. If, after giving proper notice, it finds insufficient evidence that Suzanna is, in fact, an Indian child, it must reinstate its order terminating Edward's parental rights. (See *In re IEM* (1999) 233 Mich.App. 438, 449-450 [592 N.W.2d 751], and cases cited.)

II

FAILURE TO APPOINT COUNSEL FOR EDWARD

Edward contends the trial court erred by failing to appoint counsel for him.

A. *Additional Factual and Procedural Background*.

Edward, in propria persona, filed a declaration in response to the petition in which he said: "When [Romelia] filed for divorce . . . I could not afford legal counsel (and [I] cannot afford representation now)." He also said: "I . . . receive SSI. I am permanently disabled."

At the first hearing in the case, on May 24, 2000, attorney William A. Hinz appeared for Edward. Hinz represented that he was "substituting into this case . . . ." The trial court ordered a social worker's report and set a further hearing.

At the next hearing, on August 17, 2000, Edward was present; Hinz was not. Edward said: "My attorney's not here and I want to ask for a continuance." He

explained that Hinz "was on vacation," and "had an emergency," to boot. The trial court continued the matter.

On October 2, 2000, neither Edward nor his attorney appeared. The trial court continued the matter.

On December 4, 2000, attorney Michael Martin, "for the Law Office of Gloria Juarez," appeared for Edward. Edward was also personally present. Because the W.'s counsel did not appear, the trial court dismissed the petition without prejudice.

The W.'s promptly filed a motion to vacate the dismissal. Their motion was heard on January 17, 2001. Neither Edward nor his attorney appeared. The trial court granted the motion and set a further hearing.

On January 24, 2001, Edward filed a substitution of attorney, purporting to substitute attorney Gloria Juarez in place of himself. She continued to represent him for the duration of the proceedings.

B. *Analysis*.

Edward argues that the trial court had a duty to appoint counsel for him because it was on notice that he was indigent. He relies on Family Code section 7862, which provides that: "If a parent appears without counsel and is unable to afford counsel, the court shall appoint counsel for the parent, unless that representation is knowingly and intelligently waived."

Edward, however, never appeared without counsel. At the very first hearing in the case, attorney Hinz appeared for him. Edward claims this was merely a special appearance. Hinz, however, never said so. To the contrary, he represented that he would

be "substituting into th[e] case . . . ." Moreover, at the next hearing, Edward called Hinz "my attorney," implied that Hinz would have appeared but for a vacation and/or emergency, and requested a continuance. In any event, as we have previously had occasion to explain, an attorney who makes a "special appearance" thereby becomes either the client's attorney of record or else associated with the attorney of record; otherwise, the specially appearing attorney could not be heard. (*Streit v. Covington & Crowe* (2000) 82 Cal.App.4th 441, 445; accord, *Price v. Dames & Moore* (2001) 92 Cal.App.4th 355, 360.)

Admittedly, Hinz never followed through on his promise to file a substitution. A substitution of attorney, however, is necessary only when one attorney steps in for another; it is not necessary when an attorney steps in for a party who has previously appeared in propria persona. (See Code Civ. Proc., §§ 284, subd. (1), 285.) Moreover, even when a written notice of substitution is required, "such notice is for the protection of the adverse party and may be waived by him. [Citation.] The party effecting the change cannot object to his own failure to give notice." (*Anderson v. City Ry. Co.* (1935) 9 Cal.App.2d 205, 207.) "Where the actual authority of the new or different attorney appears, courts regularly excuse the absence of record of a formal substitution and validate the attorney's acts, particularly where the adverse party has not been misled or otherwise prejudiced. [Citations.]" (*Baker v. Boxx* (1991) 226 Cal.App.3d 1303, 1309.) Here, the court was entitled to accept Hinz's representation that he was Edward's attorney regardless of whether a formal substitution was ever filed. (*Casey v. Overhead*

Door Corp. (1999) 74 Cal.App.4th 112, 121-122 [Fourth Dist., Div. Two]; *Alliance Bank v. Murray* (1984) 161 Cal.App.3d 1, 7, fn. 1.)

Edward did not appear at the third hearing, either in person or through counsel. The trial court therefore had no reason to think he was without counsel. Then, at the fourth hearing, attorney Martin, of the Law Office of Gloria Juarez, appeared for Edward. Like Hinz, Martin did not indicate that he was making only a special appearance. And, once again, Edward cannot take advantage of his attorneys' failure to file a substitution of attorney; the trial court, although not required to do so, could properly recognize Juarez and Martin as his attorneys of record. We also note that, about two months later, Juarez filed a formal substitution of attorney. By signing it, Edward ratified Martin's previous appearance. (See *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 852 ["[t]he failure to discharge an agent or employee may be evidence of ratification"]; see generally *Rakestraw v. Rodrigues* (1972) 8 Cal.3d 67, 73.)

In sum, at every relevant time, Edward had -- or at least appeared to have -- retained counsel. The trial court had no reason to suppose there was any need to appoint counsel for him. Accordingly, it did not err by failing to appoint counsel.

III

FAILURE TO PROVIDE EDWARD'S COUNSEL

WITH A COPY OF THE SOCIAL WORKER'S REPORT

Edward contends the trial court erred by admitting the social worker's report and going forward with the trial even though his attorney had not received a copy of the report.

A. *Additional Factual and Procedural Background*.

1. *Hearing on June 29, 2001*.

The social worker's report was filed on May 2, 2001. The record does not indicate that it was served on any of the parties.

At a hearing on June 29, 2001, before Judge Peter H. Norell, Edward's counsel said: " . . . I haven't received an actual copy of the report from the social worker, but I just found out yesterday that my client is half Indian, half Cherokee Indian." The trial court pointed out:

"THE COURT: It's available in the court file.

"[EDWARD'S COUNSEL]: I did review it, your Honor --

"THE COURT: Okay.

"[EDWARD'S COUNSEL]: -- like I said. And there's no mention in that report about my client being half Indian."

2. *Trial-Setting Conference on January 28, 2002*.

On January 28, 2002, the case was called for trial before Judge Barry L. Plotkin. During a discussion of the report, Edward's counsel said:

"[EDWARD'S COUNSEL]: We haven't seen a copy of it.

"THE COURT: You don't have that report . . . ?

"[EDWARD'S COUNSEL]: No, your Honor.

"THE COURT: Well, it will be available for you.

"[EDWARD'S COUNSEL]: I read the one that was in the court's file, but I never got one."

At the trial court's request, counsel for both sides proceeded to list the witnesses they intended to call. Later, minor's counsel said she would send Edward's counsel a copy of the social worker's report.

3. *Trial on January 30, 2002*.

At the beginning of trial, Edward's counsel objected to the admission of the social worker's report:

"[EDWARD'S COUNSEL]: . . . I still don't have a copy. [Minor's counsel] promised to fax me a copy. . . . I've been asking for one all along.

"THE COURT: That doesn't have anything to do with the admissibility of it. Okay. Certainly, you should have a copy of it, but what's the issue you have about the admissibility of it?

"[EDWARD'S COUNSEL]: Well, it denies due process. It denies my client due process.

"THE COURT: It's been in the court file. It's been in the court file for months. Have you looked at the court file?

"[EDWARD'S COUNSEL]: Yes, I have, your Honor. And I've looked at it briefly. Unfortunately, it was not --

"THE COURT: We'll provide you with a copy of it. And we'll provide you with it before the hearing is over."

After a discussion of other matters, the trial court returned to the subject:

"THE COURT: [¶] . . . [¶] You're claiming that at this date you still have never seen [the social worker's report]?

"[EDWARD'S COUNSEL]: That's correct, your Honor.

"THE COURT: Did you look at the file this morning?

"[EDWARD'S COUNSEL]: I tried to except your clerk said you were needing it.

"THE COURT: Okay.

"[EDWARD'S COUNSEL]: I got a brief look at it."

The trial court said it would provide Edward's counsel with a copy of the report and it would not admit the report until she had had an opportunity to read it. It then added:

"THE COURT: . . . But, counsel, I must confess, you've acted with less than diligence in attempting to obtain a copy. It's been in the file since May the 2nd from last year. [¶] . . . [¶]

"[EDWARD'S COUNSEL]: I raised it every time, your Honor. Every time I came to court, I raised it. [¶] . . . [¶]

"THE COURT: But you certainly have a right to see it. And all you had to do was ask Judge Norell and he would have given it to you.

"[EDWARD'S COUNSEL]: I did. And the last time I went to court and went to review it, the clerk pulled out the report so I couldn't read it.

"THE COURT: This case was before Judge Norell for more than a year. The report was in the file for more than seven months. A proper request to the judge would have resulted in it being provided to you.

"[EDWARD'S COUNSEL]: It was.

"THE COURT: You never made such a request.

"[EDWARD'S COUNSEL]: We don't have a transcript before us, but I did."

At the close of the trial, the trial court noted, for the record, that Edward's counsel had at last received a copy of the report. It asked whether she still objected to admitting it. She responded:

"[EDWARD'S COUNSEL]: Yes, your Honor. I would have . . . liked to have called the social worker as a witness, being the fact that there's been discrepancies with what the birth mother supposedly says in this report and . . . wh[at] she's testified to. For example, 1992, she said that he saw his daughter six times between October and November. And in the social worker's report says that the visitation terminated July, 1992. . . .

"THE COURT: I'm not reading the report for the purpose of determining what the facts are with regard to visitation. As far as I'm concerned, that is largely hearsay. And I think we probably have a more reliable record here. So I'm not considering what the social worker said. . . . I don't think you're disadvantaged by not calling the social worker on that issue. I'm more interested in what the social worker has to say with regard to the interview by the parties. [¶] . . . [¶]

"All right. Anything further on the social worker's report?

"[EDWARD'S COUNSEL]: No, your Honor. Just an objection for the record, that I only received a copy at this hearing this morning."

The trial court then admitted the report.

B. *Analysis*.

When a freedom-from-custody-and-control petition is filed, an appropriate agency -- in this case, the Department -- must "investigate the circumstances of the child" (Fam. Code, § 7850) and "render to the court a written report of the investigation with a recommendation to the court of the proper disposition to be made in the proceeding in the best interest of the child." (Fam. Code, § 7851, subd. (a).) The court must receive the report in evidence and must read and consider it. (Fam. Code, § 7851, subd. (d).)

"Due process is a flexible concept, and must be tailored to the requirements of each particular situation. '"The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."' [Citation.]" (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 654, quoting *Endler v. Schutzbank* (1968) 68 Cal.2d 162, 170, quoting *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy* (1961) 367 U.S. 886, 895 [81 S.Ct. 1743, 6 L.Ed.2d 1230].)

It has been said that "'[d]ue process of law requires that each party (a) receive a copy of the report, (b) be given an opportunity to cross-examine the investigative officer and to subpoena and examine persons whose hearsay statements are contained in the report, and (c) be permitted to introduce evidence by way of rebuttal.'" (*In re George G.* (1977) 68 Cal.App.3d 146, 156-157, italics omitted, quoting *Long v. Long* (1967) 251 Cal.App.2d 732, 736; accord, *In re Malinda S.* (1990) 51 Cal.3d 368, 382-383.) But "[t]he essence of due process is simply notice and the opportunity to be heard. [Citations.]" (*San Bernardino Community Hospital v. Workers' Comp. Appeals Bd.* (1999) 74 Cal.App.4th 928, 936 [Fourth Dist., Div. Two].) Thus, we do not believe due

process requires, in every case, that the parties to a proceeding like this must receive *a copy of* the report. All it requires is that they receive *sufficient notice of the contents* of the report to enable them to cross-examine the sources of the report and to introduce rebuttal evidence.

The W.'s assert that: "When the report first became available, [the trial court] gave counsel for Mr. and Mrs. W[.], as well as Edward's trial counsel[,] a copy of the report." This assertion has no support in the record. (See Cal. Rules of Court, rule 14(a)(1)(C).) Moreover, if it is true, it is hard to understand why the W.'s counsel did not say so below.

However, Edward's counsel not only knew the report was available -- she actually read the original, in the court file. She was sufficiently familiar with its contents to tell the court that it did *not* mention her client's Indian heritage. We are at a loss to know why she did not make a copy of it there and then. *Seven months later*, when the case was called for trial, she still did not have a physical copy. Nevertheless, she knew what witnesses she intended to call at trial; at the trial court's request, she listed them, without any objection or reservation.

At the close of trial, Edward's counsel claimed that the failure to provide her with a copy of the report was prejudicial because, if she had had it, she would have called the social worker to testify to Romelia's statements regarding visitation. The trial court, however, promised to rely on Romelia's statements at trial, rather than her statements in the report. This seemed to satisfy Edward's counsel. Moreover, if all she meant was that she wanted to impeach Romelia with her prior inconsistent statements, she did not need

to call the social worker; those prior inconsistent statements were in the report itself, which could be used for impeachment.

We conclude that Edward's counsel received sufficient notice of the contents of the report to permit her to cross-examine the sources of the report and to introduce rebuttal evidence. Accordingly, there was no due process violation.

IV

REFUSAL TO LET EDWARD CALL SUZANNA TO TESTIFY

Defendant contends the trial court erred by refusing to let him call Suzanna as a witness.

A. *Additional Factual and Procedural Background*.

The social worker reported: "The minor does not wish to make a statement at this time, but is happy about the adoption and wants Mr. W[.] to adopt her. The minor was informed of her right to attend the . . . hearing."

In Edward's trial brief, he asserted: "[D]ue process requires [that Edward] be allowed to call the child as a witness."

At the beginning of trial, Edward's counsel said:

"[EDWARD'S COUNSEL]: . . . [M]y client has actually made several efforts here to try to avoid this entire trial. All he's been asking for is an interview with his child. A right to see his child and ask her what her wishes are with respect to the adoption. I've gotten absolutely no cooperation from anybody n this case, except perhaps a social worker who indicated she had been trying to contact the W[.'s] to see if

they can arrange that. She was not able to reach them. Again, my client is denied due process by not having the child here so that we can interview her.

"THE COURT: You have a motion?

"[EDWARD'S COUNSEL]: I'm making a verbal motion now, your Honor.

"THE COURT: What is the motion?

"[EDWARD'S COUNSEL]: That [the] child be brought forward so we can interview her. That my client's due process right[s], as far as a parent, are at stake. And there's a case[,] In [r]e Amy[,] that provides that he does have that right. [¶] . . . [¶]

"[MINOR'S COUNSEL]: . . . The purpose for appointing an attorney for the minor is . . . just for these kinds of cases, so that we don't put the child in the position of having to come into court and having to testify or speak with parties. . . . I have no problem with [Edward's counsel] wanting to take a few minutes and we can talk. And I can reassure her of my client's position. I've seen her as recently as yesterday and had a lengthy conversation with her. [¶] . . . [¶]

"THE COURT: . . . As I recall there's a Family . . . Code [s]ection directly on point as to how the child's wishes are made known to the [c]ourt. And [it] gives the [c]ourt a number of options to protect the child from undue embarrassment and invasion of their right to privacy. I don't recall the code section. But one of the -- certainly, you're correct. One of the ways that the [c]ourt can learn the wishes of the child is through minor's counsel. But I'm going to deny the request. It's simply untimely."

B. *Analysis*.

Despite the trial court's attempt to pin Edward's counsel down, it still is not entirely clear just what Edward was seeking. Some of counsel's remarks suggested that Edward wanted to interview Suzanna, off the record, to promote settlement and/or to prepare for trial. Edward's trial brief and his counsel's citation of *In re Amy M.*, however, suggested that he wanted to call Suzanna as a witness. In this appeal, Edward argues only that the trial court erred by not allowing him "to call Suzanna as a witness . . . ." Accordingly, we consider only this claim.

The trial court denied Edward's motion as untimely. Edward never argues that it was, in fact, timely. Thus, he has waived any challenge to it. "It is the appellant's burden to demonstrate the existence of reversible error. [Citation.]" (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 766 [Fourth Dist., Div. Two].) "An appellant whose [parental] rights have been terminated has the burden . . . to identify and argue points of error to try to overturn a presumptively valid judgment. [Citation.]" (*In re Bryce C.* (1995) 12 Cal.4th 226, 232.) We would sustain the denial for this reason alone.

Separately and alternatively, however, we conclude that the motion *was* untimely. If one wants a witness to appear at trial, one must take certain steps ahead of time. Ordinarily, one serves a subpoena on the witness. (Code Civ. Proc., §§ 1985, subd. (a), 1987, subd. (a).) If, however, the witness is a party to the action, one may, alternatively, serve a notice on his or her attorney. (Code Civ. Proc., § 1987, subds. (b), (c).) And, of course, one may work out an agreement with the witness. But one does *not* just show up

at the trial and make a motion -- particularly not when, as in this case, the parties' time estimate for the whole trial is four hours.

In a freedom-from-custody-and-control proceeding, if the child is 10 or older, the trial court must interview the child in chambers. (Fam. Code, § 7891, subd. (a).) We may assume, without deciding, that this gives the trial court some duty, sua sponte, to compel the child to attend the interview. (See *Adoption of Jacob C.* (1994) 25 Cal.App.4th 617, 626.) "However, counsel for the child may waive the hearing in chambers by the court." (Fam. Code, § 7891, subd. (b).) Here, minor's counsel plainly wanted to waive the hearing in chambers. Accordingly, the trial court had no duty to arrange any such interview.

Edward also seems to be complaining that the trial court treated minor's counsel's closing argument as evidence. As already noted, the trial court commented that: "One of the ways that the [c]ourt can learn the wishes of the child is through minor's counsel." Shortly before closing argument, the trial court also commented: "[W]e're going to hear from minor's counsel because, significantly, the minor did not wish to make a statement to the social worker."

When minor's counsel gave her closing argument, she stated: "[I]n my contact with Suzanna, this is an extremely shy, brittle little girl. And she's very introverted. [S]he doesn't really even understand what this person is trying to do. She has a dad. She just doesn't know why her last name isn't like everybody else's, W[.] . . . But she doesn't know why all of a sudden this is happening. And the only effect it's having, it's a negative effect. . . . She just wants it all taken care of. And so that she can go on. . . .

And suddenly for the first time in her life, the rug is being pulled out from under her and she's been shaken and maybe the foundation that she's lived doesn't really exist because someone is jeopardizing that." No evidence of Suzanna's feelings had been presented at trial.

In its written decision, the trial court said: "[T]he social worker's report . . . indicates that Suzanna was advised of her right to appear in court and make a statement to the [c]ourt. Suzanna's counsel indicates that she did not wish to exercise that right. . . . Minor's counsel speaks strongly in favor of granting the petition."

Edward argues that the trial court must have been relying on Family Code section 3151, which provides that: "The child's counsel appointed under this chapter is charged with the representation of the child's best interests. The role of the child's counsel is to gather facts that bear on the best interests of the child, and present those facts to the court, including the child's wishes when counsel deems it appropriate for consideration by the court . . . ." (Fam. Code, § 3151, subd. (a).) It further provides that: "At the court's request, counsel may orally state the wishes of the child . . . for consideration by the court . . . ." (Fam. Code, § 3151, subd. (b).)

Edward asserts that Family Code section 3151 applies only when minor's counsel is "appointed under this chapter," i.e., in a custody or visitation dispute. (See Fam. Code, §§ 3021, 3150, subd. (a); but see Fam. Code, § 7807.) But even if so, minor's counsel could appropriately state how Suzanna felt. Any attorney can make factual representations. Although a court is not required to accept them, it has discretion to do so, at least when they are uncontroverted. "'[A]ttorneys are officers of the court and

"'when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.'" . . . ' [Citation.]" (*Aceves v. Superior Court* (1996) 51 Cal.App.4th 584, 594, quoting *Holloway v. Arkansas* (1978) 435 U.S. 475, 486 [98 S.Ct. 1173, 55 L.Ed.2d 426]; accord, *People v. Wolozon* (1982) 138 Cal.App.3d 456, 460, fn. 4.)

It could be argued that closing argument was not an appropriate time to advert to facts outside the record. Edward's counsel, however, failed to object to minor's counsel's closing argument; thus, Edward has waived any claim of attorney misconduct. (*Whitfield v. Roth* (1974) 10 Cal.3d 874, 892; *Horn v. Atchison, Topeka and Santa Fe Railway Co.* (1964) 61 Cal.2d 602, 610.)

Finally, Edward cannot show that the trial court did, in fact, treat minor's counsel's remarks as evidence. The trial court could properly infer, simply from the fact that Suzanna's counsel was in favor of the petition, that Suzanna was, too. Otherwise, its written decision did not refer to any of the facts outside the record which minor's counsel had mentioned.

We conclude that the trial court did not err by refusing to require Suzanna to testify at trial.

V

DISPOSITION

The order terminating Edward's parental rights is reversed. On remand, the trial court must require the W.'s to give notice to the BIA, in accordance with the ICWA and its implementing regulations. (25 U.S.C. § 1912(a); 25 C.F.R. § 23.11.) If there is no

timely response, or if the response raises no substantial question as to whether Suzanna is an Indian child, the trial court must reinstate its original order. If, however, the response does raise a substantial question as to whether Suzanna is an Indian child, the trial court must hold further proceedings consistent with the ICWA. Even then, if it determines, in the course of such proceedings, that the ICWA does not otherwise apply, it must reinstate its original order.

Costs on appeal are not awardable in this proceeding. (Cal. Rules of Court, rules 26(a)(1), 39(a).)

CERTIFIED FOR PARTIAL PUBLICATION

RICHLI
J.

We concur:

McKINSTER
Acting P.J.

GAUT
J.

APPENDIX

For the assistance of the parties and the trial court, we reproduce here the relevant provisions of the federal regulation implementing the notice provisions of the ICWA:

"25 C.F.R. § 23.11 Notice.

"(a) In any involuntary proceeding in a state court where the court knows or has reason to know that an Indian child is involved, and where the identity and location of the child's Indian parents or custodians or tribe is known, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall directly notify the Indian parents, Indian custodians, and the child's tribe by certified mail with return receipt requested, of the pending proceedings and of their right of intervention. Notice shall include requisite information identified at paragraphs (d)(1) through (4) and (e)(1) through (6) of this section, consistent with the confidentiality requirement in paragraph (e)(7) of this section. Copies of these notices shall be sent to the Secretary and the appropriate Area Director listed in paragraphs (c)(1) through (12) of this section.

"(b) If the identity or location of the Indian parents, Indian custodians or the child's tribe cannot be determined, notice of the pendency of any involuntary child custody proceeding involving an Indian child in a state court shall be sent by certified mail with return receipt requested to the appropriate Area Director listed in paragraphs (c)(1) through (12) of this section. In order to establish tribal identity, it is necessary to provide as much information as is known on the Indian child's direct lineal ancestors including, but not limited to, the information delineated at paragraph (d)(1) through (4) of this section.

"(c) [¶] . . . [¶]

"(12) For proceedings in California or Hawaii, notices shall be sent to the following address: Sacramento Area Director, Bureau of Indian Affairs, Federal Office Building, 2800 Cottage Way, Sacramento, California 95825.

"(d) Notice to the appropriate Area Director pursuant to paragraph (b) of this section may be sent by certified mail with return receipt requested or by personal service and shall include the following information, if known:

"(1) Name of the Indian child, the child's birthdate and birthplace.

"(2) Name of Indian tribe(s) in which the child is enrolled or may be eligible for enrollment.

"(3) All names known, and current and former addresses of the Indian child's biological mother, biological father, maternal and paternal grandparents and great grandparents or Indian custodians, including maiden, married and former names or aliases; birthdates; places of birth and death; tribal enrollment numbers, and/or other identifying information.

"(4) A copy of the petition, complaint or other document by which the proceeding was initiated.

"(e) In addition, notice provided to the appropriate Area Director pursuant to paragraph (b) of this section shall include the following:

"(1) A statement of the absolute right of the biological Indian parents, the child's Indian custodians and the child's tribe to intervene in the proceedings.

"(2) A statement that if the Indian parent(s) or Indian custodian(s) is (are) unable to afford counsel, and where a state court determines indigency, counsel will be appointed to represent the Indian parent or Indian custodian where authorized by state law.

"(3) A statement of the right of the Indian parents, Indian custodians and child's tribe to be granted, upon request, up to 20 additional days to prepare for the proceedings.

"(4) The location, mailing address, and telephone number of the court and all parties notified pursuant to this section.

"(5) A statement of the right of the Indian parents, Indian custodians and the child's tribe to petition the court for transfer of the proceeding to the child's tribal court pursuant to 25 U.S.C. 1911, absent objection by either parent: Provided, that such transfer shall be subject to declination by the tribal court of said tribe.

"(6) A statement of the potential legal consequences of the proceedings on the future custodial and parental rights of the Indian parents or Indian custodians.

"(7) A statement that, since child custody proceedings are conducted on a confidential basis, all parties notified shall keep confidential the information contained in the notice concerning the particular proceeding. The notices shall not be handled by anyone not needing the information contained in the notices in order to exercise the tribe's rights under the Act.

"(f) Upon receipt of the notice, the Secretary or his/her designee shall make reasonable documented efforts to locate and notify the child's tribe and the child's Indian

parents or Indian custodians. The Secretary or his/her designee shall have 15 days, after receipt of the notice from the persons initiating the proceedings, to notify the child's tribe and Indian parents or Indian custodians and send a copy of the notice to the court. If within the 15-day time period the Secretary or his/her designee is unable to verify that the child meets the criteria of an Indian child as defined in 25 U.S.C. 1903, or is unable to locate the Indian parents or Indian custodians, the Secretary or his/her designee shall so inform the court prior to initiation of the proceedings and state how much more time, if any, will be needed to complete the search. The Secretary or his/her designee shall complete all research efforts, even if those efforts cannot be completed before the child custody proceeding begins.

"(g) Upon request from a party to an Indian child custody proceeding, the Secretary or his/her designee shall make a reasonable attempt to identify and locate the child's tribe, Indian parents or Indian custodians to assist the party seeking the information."