

Judicial Council of California • Administrative Office of the Courts

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INVITATION TO COMMENT W13-08

Title	Action Requested
Juvenile Law: Indian Child Welfare Act in Delinquency Cases	Review and submit comments by January 25, 2013
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Amend Cal. Rules of Court, rules 5.480, 5.481, 5.482, 5.530, and 5.785	July 1, 2013
Proposed by	Contact
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Tribal Court / State Court Forum	
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Executive Summary and Origin

The California Supreme Court's decision in *In re W.B.* 55 (2012) Cal.4th 30, issued August 6, 2012, requires revisions to the California Rules of Court governing the application of the Indian Child Welfare Act (ICWA) and corresponding provisions of the Welfare and Institutions Code in juvenile wardship proceedings. As currently written, the rules require compliance with all of the substantive ICWA requirements in any juvenile wardship proceeding when the child is in foster care or at risk of entering foster care. The California Supreme Court held in *W.B.* that this application of ICWA and state law is overbroad.

Background

The Indian Child Welfare Act (25 U.S.C. §§ 1901–1963) was enacted by the federal government in 1978. It sets minimum federal standards for a variety of state court proceedings that could result in the removal of Indian children from their parents or Indian custodians or termination of parental rights. In 2006, with the passage of Senate Bill 678 (Stats. 2006, ch. 838), the Legislature incorporated ICWA's requirements into California statutory law. The primary objective of SB 678 was to increase compliance with ICWA. The bill included provisions

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specifically directed at the application of ICWA in juvenile wardship proceedings.¹ Following the bill's passage, the Judicial Council adopted rules and forms intended to implement SB 678. The report in which these rules and forms were proposed for adoption—entitled *Family, Juvenile, and Probate Law: Enactment of the Federal Indian Child Welfare Act as California Law in the Family, Probate, and Welfare and Institutions Codes*—was considered by the Judicial Council and approved as Item A27 at its October 26, 2007, meeting. That report can be found at www.courts.ca.gov/documents/102607ItemA27.pdf.

The rules adopted in that report require inquiry about a child's Indian status in all juvenile wardship proceedings in which the child is either in foster care or at risk of entering foster care. Following inquiry, if the court or probation officer has “reason to know” that an Indian child is involved,² then the rules require compliance with ICWA notice and other substantive provisions in any juvenile wardship proceedings in which the Indian child is in foster care or at risk of entering foster care. The holding in *W.B.* finds that this application of ICWA and SB 678 is overbroad. Under *W.B.*, ICWA inquiry must be made in all juvenile wardship proceedings in which the child is either in foster care or at risk of entering foster care, but notice and other substantive ICWA requirements have a much more limited application. They apply when a child, in foster care or at risk of entering foster care, is detained or adjudicated for a “status offense” involving conduct that would not be a crime if committed by an adult. But as a general matter, ICWA notice and other substantive provisions do not apply in delinquency cases that are based on conduct that would be a crime if committed by an adult. In these “criminal conduct” cases, notice and other substantive ICWA requirements are required, however, in one of two circumstances: (1) the court sets a hearing to terminate parental rights, or (2) the court makes a foster care placement or contemplates such a placement, and makes a specific finding that the placement is based entirely on conditions within the home and not even in part on the child's criminal conduct.

The Proposal

This proposal is urgently needed to conform to the holding in the *W.B.* decision. The proposal would amend:

- Rule 5.480 defining the application of the ICWA rules. As currently drafted, the rule applies all ICWA requirements to any juvenile wardship proceedings under section 601 and 602 of the Welfare and Institutions Code when the child is either in foster care or at risk of entering foster care. The rule would be amended to clarify that the ICWA requirements apply when the child is in foster care or at risk of entering foster care and either (1) the proceedings are based on conduct that would not be criminal if committed

¹ For example, see Welf. & Inst. Code, § 224.2(a), which references the duty of a probation officer to comply with ICWA notice requirements in certain circumstances, and § 224.3(a), which references the duty of the probation department to inquire about Indian status.

² The circumstances that may provide reason to know that a child is an Indian child are discussed in Welf. & Inst. Code, § 224.3(b).

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by an adult, or (2) although the proceedings are based on conduct that would be criminal if committed by an adult, the court has set a hearing to terminate parental rights or is considering a foster care placement based entirely on conditions within the home and not on the child's criminal conduct;

- Rule 5.481(b)(2) addressing ICWA notice in delinquency cases. Currently the rule requires notice to be sent in all juvenile wardship proceedings where the child is either in foster care or at risk of entering foster care and it is known or there is reason to know that an Indian child is involved. The rule would be revised to provide that notice need only be sent in juvenile wardship proceedings where the child is in foster care or at risk of entering foster care, it is known or there is reason to know that an Indian child is involved, and (1) the court's jurisdiction is based on conduct that would not be a crime if the child were 18 years of age or older, (2) the court is setting a hearing to terminate parental rights, or (3) although the child was detained or adjudicated for criminal conduct, the court is considering placement outside the family home based entirely on harmful conditions within the child's home;
- Rule 5.482 concerning proceedings after ICWA notice. As currently written, the rule allows for continuances of certain hearings in accordance with ICWA and applies to all juvenile wardship proceedings in which the child is in foster care or is at risk of entering foster care. The rule would be amended to apply only to those cases that fall within rule 5.480 as amended. Further, section (g) of the rule currently provides that any person or court involved in the placement of an Indian child must use the services of the Indian child's tribe to secure placement. This provision would be amended to apply only to proceedings described in rule 5.480 as amended;
- Rule 5.530 concerning who may be present at juvenile proceedings. Rule 5.530(b)(7) states that "[a] representative of the Indian child's tribe" is entitled to be present. The rule would be amended to apply only to proceedings falling under rule 5.480 as amended in the proposal; and
- Rule 5.785(c) addressing case plans in delinquency proceedings in which the probation officer is recommending placement in foster care or in which the child is already in foster care placement. As currently written, the court is required to consider whether the probation officer has solicited and integrated into the case plan inter alia the input of "...the child's identified Indian tribe...." The rule would be amended to apply only to proceedings falling under rule 5.480 as amended.

Alternatives considered

The Supreme Court's decision specifically stated that the rules concerning ICWA were overbroad.³ Therefore, the committee and forum believed that amendment of the rules was

³ See footnote 17 at page 862 of the decision or page 26 of the attached link.

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required to comply with the Supreme Court’s holding. The committee and forum considered different forms of rule revisions. Specifically, they considered revisions that did not include an Advisory Committee Comment. In the end, the committee and forum decided to include an Advisory Committee Comment to encourage continued use of culturally appropriate services and placements, even in proceedings where ICWA does not apply.

Implementation Requirements, Costs, and Operational Impacts

The committee does not believe that any costs will be associated with the proposal. In fact, cost savings may result as ICWA notice and other substantive requirements will now be required in more limited circumstances.

Implementation of the changes may require some training, which can be accomplished by existing AOC staff with existing resources.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee and forum are interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Does the proposal as drafted correctly identify when inquiry as to Indian status must take place in those juvenile wardship proceedings that are based on conduct that would be criminal if committed by an adult? As currently drafted, inquiry in these “criminal conduct” cases would have to take place when the child is either in foster care or at risk of entering foster care, even though ICWA notice and other substantive requirements might not be required.
- Does the proposal as drafted correctly deal with “dual status” cases under Welfare and Institutions Code 241.1? As drafted ICWA notice and other substantive requirements would be required only in dual status cases grounded in criminal conduct if the court makes a specific finding that a foster care placement is based solely on conditions within the minor’s home and not at all on the need for rehabilitation.

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so please quantify.
- What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management system, or modifying case management system.

Attachments and Links

1. Rules 5.480, 5.481, 5.482, 5.530, and 5.785, at pages 5–9
2. *In re W.B.* at www.courts.ca.gov/opinions/documents/S181638.PDF.

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1 **Rule 5.480. Application (Fam. Code, §§ 170, 177, 3041; Prob. Code, § 1459.5;**
2 **Welf. & Inst. Code, §§ 224, 224.1)**
3

4 This chapter addressing the Indian Child Welfare Act (25 United States Code
5 section 1901 et seq.) as codified in various sections of the California Family,
6 Probate, and Welfare and Institutions Codes, applies to all proceedings involving
7 Indian children that may result in an involuntary foster care placement;
8 guardianship or conservatorship placement; custody placement under Family Code
9 section 3041; declaration freeing a child from the custody and control of one or
10 both parents; termination of parental rights; or adoptive placement. ~~including:~~ In
11 juvenile wardship proceedings under section 601 and 602 of the Welfare and
12 Institutions Code, the Indian Child Welfare Act applies only as stated in
13 subsection (2) below. The proceedings to which this chapter applies include:

- 14
- 15 (1) Proceedings under Welfare and Institutions Code section 300 et seq.; ~~and~~
16 ~~sections 601 and 602 et seq. in which the child is at risk of entering foster~~
17 ~~care or is in foster care, including detention hearings, jurisdiction hearings,~~
18 ~~disposition hearings, review hearings, hearings under section 366.26, and~~
19 ~~subsequent hearings affecting the status of the Indian child~~
20
- 21 (2) In proceedings under Welfare and Institutions Code sections 601 and 602 et
22 seq., inquiry in accordance with Rule 5.481 (a) must be done whenever the
23 child is either in foster care or at risk of entering foster care for any reason.
24 The other requirements in this chapter apply to these proceedings only if the
25 child is either in foster care or at risk of entering foster care and:
26
- 27 (A) The court’s jurisdiction is based on conduct that would not be criminal
28 if the child was 18 years of age or over;
29
- 30 (B) Although the child was initially detained or adjudicated for conduct
31 that would be criminal if the child were 18 years of age or over, the
32 court has found that the placement outside the home of the parent or
33 legal guardian is based entirely on harmful conditions within the child’s
34 home; or
35
- 36 (C) The court is setting a hearing to terminate parental rights of the child’s
37 parents.
38
- 39 ~~(2)~~(3) Proceedings under Family Code section 3041;
40

1 ~~(3)~~(4) Proceedings under the Family Code resulting in adoption or
2 termination of parental rights; and

3
4 ~~(4)~~(5) Proceedings listed in Probate Code section 1459.5 and rule 7.1015.
5

6 This chapter does not apply to voluntary foster care and guardianship placements
7 where the child can be returned to the parent or Indian custodian on demand.
8

9 **Rule 5.481. Inquiry and notice (Fam. Code, §§ 177(a), 180; Prob. Code,**
10 **§§ 1459.5(b), 1460.2; Welf. & Inst. Code, §§ 224.2, 224.3)**

11
12 (a) * * *

13
14 (b) **Notice (Fam. Code, § 180; Prob. Code, § 1460.2; Welf. & Inst. Code,**
15 **§ 224.2)**

16
17 (1) * * *

18
19 (2) If it is known or there is reason to know that an Indian child is involved
20 in a wardship proceeding under Welfare and Institutions Code sections
21 601 and 602 et seq., ~~and the probation officer has assessed that it is~~
22 ~~probable the child will be entering foster care, or if the child is already~~
23 ~~in foster care,~~ the probation officer must send *Notice of Child Custody*
24 *Proceeding for Indian Child* (form ICWA-030) to the parent or legal
25 guardian, Indian custodian, if any, and the child’s tribe, in accordance
26 with Welfare and Institutions Code section 727.4(a)(2) in any case
27 described by rule 5.480(2)(A)–(C).
28

29 (3)–(4) * * *

30
31 **Advisory Committee Comment**
32

33 Except for purposes of inquiry, the requirements of the Indian Child Welfare Act (ICWA) and
34 related provisions of state law do not apply to most cases adjudicated under section 602 of the
35 Welfare and Institutions Code for conduct that would be criminal if committed by an adult (see *In*
36 *re W.B.* (2012) 55 Cal.4th 30). But in those cases where ICWA does not apply, following inquiry
37 and receipt of information about Indian ancestry, the court is encouraged to communicate with
38 the Indian child’s tribe regarding resources and services to benefit the Indian child and his or her
39 family. The California Legislature has stated: “[i]t is in the interest of an Indian child that the
40 child’s membership in the child’s Indian tribe and connection to the tribal community be
41 encouraged and protected....” (See Welf. & Inst. Code, §§ 224(a)(2) & 306.6.) Further, Welfare
42 and Institutions Code section 727.1(a) mandates that in selecting a placement for a child under the
43 supervision of a probation officer, the court “shall consider, in order of priority, placement with

1 relatives, tribal members, and foster family....” (Emphasis added.) This mandate applies even if
2 the case is not governed by ICWA.

3
4 As a matter of policy and best practice, culturally appropriate placements and services provide
5 psychological benefit for the Indian child and family. By engaging the Indian child’s tribe, tribal
6 members, Indian Health Services, or other agencies and organizations providing services to
7 Native Americans, additional resources and culturally appropriate services are often identified to
8 assist in case planning. (See Welf. & Inst. Code, §§ 727.4(d)(5), 727.4(d)(6), and 16501.1(c)(1)
9 for information on services and case planning for children adjudicated under section 602.)
10 Outreach to these entities is also an important part of family finding and engagement efforts for
11 Indian children and of finding appropriate placements. By contacting the child’s tribe, placement
12 options and services such as substance abuse treatment, counseling, and other services may be
13 available to Indian children and their families. A list of available services can be found on the
14 California Courts website at the Judicial Council, Administrative Office of the Courts, Center for
15 Families, Children & the Courts, Tribal/State Programs web page, at
16 www.courts.ca.gov/5807.htm.

17
18
19 **Rule 5.482. Proceedings after notice (Fam. Code, §§ 177(a), 180(d), (e); Prob.**
20 **Code, §§ 1459.5(b), 1460.2(d), (e); Welf. & Inst. Code, §§ 224.2(c), (d);**
21 **25 U.S.C. § 1916(b))**

22
23 **(a) Timing of proceedings (Fam. Code, § 180(d), (e); Prob. Code,**
24 **§ 1460.2(d), (e); Welf. & Inst. Code, § 224.2(c), (d))**

25
26 (1) * * *

27
28 (2) The detention hearing in dependency cases and in delinquency cases in
29 which the probation officer has assessed that the child is in foster care
30 or it is probable the child will be entering foster care as described in
31 rule 5.480(2)(A)–(C) may proceed without delay, provided that:

32
33 (A)–(B) * * *

34
35 (3) The parent, Indian custodian, or tribe must be granted a continuance, if
36 requested, of up to 20 days to prepare for the proceeding, except for
37 specified hearings in the following circumstances:

38
39 (A) The detention hearing in dependency cases and in delinquency
40 cases ~~in which the probation officer has assessed that the child is~~
41 ~~in foster care or it is probable the child will be entering foster care~~
42 described by rule 5.480(2)(A)–(C);

43
44 (B) The jurisdiction hearing in a delinquency case described in rule
45 5.480(2)(A)–(C) in which the court finds the continuance would

1 not conform to speedy trial considerations under Welfare and
2 Institutions Code section 657; and

3
4 (C) The disposition hearing in a delinquency case described in rule
5 5.480(2)(A)–(C) in which the court finds good cause to deny the
6 continuance under Welfare and Institutions Code section 682. A
7 good cause reason includes when probation is recommending the
8 release of a detained child to his or her parent or to a less
9 restrictive placement. The court must follow the placement
10 preferences under rule 5.484 when holding the disposition
11 hearing.

12
13 (b)–(f) * * *

14
15 (g) **Consultation with tribe**

16
17 Any person or court involved in the placement of an Indian child in a
18 proceeding described in rule 5.480 must use the services of the Indian child’s
19 tribe, whenever available through the tribe, in seeking to secure placement
20 within the order of placement preference specified in rule 5.484.

21
22
23 **Rule 5.530. Persons present**

24
25 (a) ***

26
27 (b) **Persons present (§§ 280, 290.1, 290.2, 332, 347, 349, 353, 656, 658, 677,**
28 **679, 681, 700; 25 U.S.C. §§ 1911, 1931–1934)**

29
30 The following persons are entitled to be present:

31
32 (1)–(6) * * *

33
34 (7) In a proceeding described in rule 5.480, a representative of the Indian
35 child’s tribe;

36
37 (8)–(11) * * *

38
39 (c)–(f) * * *

40

1 **Rule 5.785. General conduct of hearing**

2
3 (a)–(b) * * *

4
5 (c) **Case plan (§§ 636.1, 706.6, 16501.1)**

6
7 When a child is detained and is at risk of entering foster care placement, the
8 probation officer must prepare a case plan.

9
10 (1) * * *

11
12 (2) The court must consider the case plan and must find as follows:

13
14 (A) The probation officer solicited and integrated into the case plan
15 the input of the child, the child’s family, other interested parties,
16 and in a case described in rule 5.480(2)(A)–(C) the child’s
17 identified Indian tribe; or

18
19 (B) The probation officer did not solicit and integrate into the case
20 plan the input of the child, the child’s family, other interested
21 parties, and in a case described in rule 5.480(2)(A)–(C) the child’s
22 identified Indian tribe. If the court finds that the probation officer
23 did not solicit and integrate into the case plan the input of the
24 child, the child’s family, the child’s identified Indian tribe, and
25 other interested parties, the court must order that the probation
26 officer solicit and integrate into the case plan the input of the
27 child, the child’s family, other interested parties, and in a case
28 described in rule 5.480(2)(A)–(C) the child’s identified Indian
29 tribe, and other interested parties, unless the court finds that each
30 of these participants was unable, unavailable, or unwilling to
31 participate.
32

33 (3)–(5) * * *