



JUDICIAL COUNCIL OF CALIFORNIA

OPERATIONS AND PROGRAMS DIVISION
CENTER FOR FAMILIES, CHILDREN & THE COURTS

ICWA Information Sheet - NOTICE (DEPENDENCY)

1. Overview

State and federal law require notice under the *Indian Child Welfare Act* (ICWA) in all dependency proceedings whenever it is known or there is reason to know that an Indian child is involved (WIC 224.2 (b)). Lack of, or errors in ICWA notice is a very common reason for cases to be over turned on appeal. Although there are published cases in which appellate courts have held that notice was not required on the facts of a specific case, by far the majority of reported cases find that the juvenile court needs only a suggestion of Indian ancestry to trigger the notice requirement of the ICWA in a child dependency proceeding (see eg. *In re Christian P.*, (2012) WL 2990034). The ultimate determination of whether or not a particular child is a member of a tribe or eligible for membership is for the tribe(s) entitled to notice. (WIC 224.3 (e)(1); Complete, timely and accurate notice is essential in order for tribes to exercise their authority to make this determination, as well as exercise all of the other rights given to the tribe under ICWA. Therefore we strongly recommend that the court err on the side of ensuring that ICWA notices are sent in all cases in which there is substantive information suggesting possible tribal membership or eligibility. Although there is no bright line and ICWA notice cases are very fact specific, a good rule of thumb is that if a particular ancestor (no matter how far back) or ancestors is identified as the source of tribal affiliation and a particular tribe or tribes are identified, ICWA notice is required.

The court must exercise supervision over the ICWA noticing process to ensure that the legal requirements are met and to minimize the possibility of appeal. In California, ICWA notice must be sent on Judicial Council form ICWA-030 *Notice of Child Custody Proceeding for an Indian Child* and must comply with the requirements of WIC 224.2 and CRC 5.481 (b). The things that the court must look at to ensure compliance with the notice provisions include:

- Content – is the notice as complete and accurate as it can reasonably be given the available information?
- Distribution – did the notice go to all of the individuals, tribes and governmental entities who are required to receive the notice?

- Method – did the notice go by certified mail, return receipt requested and is the necessary documentary proof in the court file? and
- Timing – was the notice timely **received** and is there proof of this in the court file?

2. How to review a notice and assess whether it is adequate

a) Content

The required content of the ICWA notice is set out in federal regulations¹ and state law². Those requirements are reflected in mandatory Judicial Council form ICWA-030 *Notice of Child Custody Proceeding for an Indian Child*. The required content includes:

All names known of the Indian child’s biological parents, grandparents, and great-grandparents, or Indian custodians, including maiden, married and former names or aliases, as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, and any other identifying information, if known.³

Federal regulations require information concerning all lineal ancestors of the child.⁴ The court and the child welfare department have an affirmative and continuing duty to seek to obtain this information throughout the life of a case where they know or have reason to know that the child is or may be an Indian child.⁵ This includes an obligation to interview the child’s parents, extended family, relatives and other available individuals who may have the information necessary to complete the ICWA-030. Although the statute only requires that the court and agency affirmatively seek out ancestry information as far back as great-grandparents, these are **minimum federal standards** and case law holds that where relevant information is available or provided about ancestors further back than great-grandparents, that information must be included in the ICWA notice.⁶ This information can be included in item 7 d. at page 7 of the ICWA-030 *Notice of Child Custody Proceeding for an Indian Child*.

The court must be diligent in ensuring that all available information is obtained and included in the ICWA-030 and that it is as complete and accurate as possible because this information is essential to a tribe’s determination of whether the child is or may be a member or eligible for membership in the tribe. Cases have been overturned on appeal for missing middle names, misspellings, wrong birthdays and for failure to include information which could have

¹ 25 CFR 23.11

² WIC 224.2

³ WIC 224.2 (a)(5)(C).

⁴ 25 CFR 23.111(d)(3)

⁵ See WIC 224.3 and ICWA Inquiry factsheet for more information on nature and scope of duty of inquiry.

⁶ *In re S.E.* (2013) 217 Cal. App. 4th 610.

(reasonably) been obtained from available individuals. (see ICWA-030 review checklist for review steps and suggestions).

The court should discourage the practice of leaving fields blank and instead ask the agency to indicate (where appropriate) that the information was not known by any of the available sources. Beware of notices where the parents or other available relatives birth dates and place of birth are left blank despite the parents or relatives participation in the proceedings.

Because an individual may have been enrolled with a tribe at any time during their life, be careful to ensure that birth names, maiden names, and all other former names are included as well as an individual's current name.

b) Distribution

The ICWA notice must be sent to:

- The child's parents or legal guardian;
- The child's Indian custodian (if there is one); and
- All tribes of which the child may be a member or eligible for membership, until the court makes a determination as to which tribe is the child's tribe after which notice need only be sent to that tribe.⁷

Many ICWA notice appeals arise from a failure to provide notice to all the tribes that should be noticed, or to provide notice to the correct address for service for one or more tribes.

(a) How do you know which tribe's must be given notice?

The tribe or tribes that must be noticed depends upon the information obtained during inquiry and further inquiry and recorded on the ICWA-030. Review the information on the ICWA-030 and in particular the information in 5 (a) through (f), pages 2 through 6. For each individual look at the information in the box "Tribe or band, and location:"

The information contained here is generally of three kinds: (1) name of a specific tribe which may be federally recognized or may be an unrecognized tribe; (2) name of a larger historical tribal nation which may contain a number of different tribes or bands which may be federally recognized or unrecognized⁸; or (3) location (ie. a state).

⁷ See WIC 224.2 (a).

⁸ For a discussion of some of the issues around tribal identification refer to *Understanding ICWA Noticing Issues in California* <http://www.courts.ca.gov/documents/ICWANoticingIssues.pdf>

If the information contains the name of a specific tribe the court should ensure that the agency has:

- Consulted the list of *Indian Entities Recognized and Eligible to Receive Services from the United State Bureau of Indian Affairs* published by the Department of the Interior: <http://www.bia.gov/cs/groups/xraca/documents/text/idc1-033010.pdf> Bureau of Indian Affairs and located on the BIA website at to determine if the tribe is listed there; and
- Contacted the appropriate Bureau of Indian Affairs office to determine whether there are federally recognized tribes associated with that name or a similar name.

TIP - Beware of variations of spelling or incorrect spelling that the parents or other individuals involved in the case may have provided. Cases have been overturned on appeal where the information provided during inquiry misspelled the tribal name and the agency neglected to send notice to tribe with very similar phonetic name. WIC 224.3(c) specifically requires the agency to contact "...the Bureau of Indian Affairs and State Department of Social Services for assistance in identifying the names and contact information of the tribes in which the child may be a member or eligible for membership." The Bureau of Indian Affairs in Sacramento has a regional social worker who can be reached by telephone at (916) 978-6000 and by fax at (916) 978-6099. The California Department of Social Services has an Office of Tribal Affairs. Contact information for that unit is available at <http://www.cdss.ca.gov/inforesources/Tribal-Affairs>.

- If the information provided contains the name of a larger historical tribal entity (in California such as Pomo or Cahuilla outside of California such as Cherokee) which a number of tribes or bands may identify with, ensure that in addition to consulting the list of Indian Entities referenced above, the agency has consulted and cross-referenced the tribal government list maintained by the federal government at *Indian Child Welfare Act; Designated Tribal Agents for Service of Notice - Listing of Tribes by Historical Affiliation*, available [here](#). These lists include the historical tribal information and lists the federally recognized tribes associated with those historical tribal nations.
- If the information provided contains only location (ie. ancestor born on a reservation in Oklahoma or member of a tribe in Arizona), ensure that the agency has consulted both the Bureau of Indian Affairs regional office responsible for that state, and the index of tribal entities by state found in the tribal leader's directory and map published by the Bureau of Indian Affairs and available [here](#)

Once all steps have been taken to identify the tribes which must be noticed, ensure that notices are sent to all tribes at the address for service listed on the *Indian Child Welfare Act; Designated Tribal Agents for Service of Notice* published by the Bureau of Indian Affairs and

available [here](#). Ensure that for each tribe the notice is addressed to the correct individual and the exact address as shown on this list.

TIP – At some time preferably prior to disposition the Court should ask all parties for their position on whether or not the content of the notice is complete and accurate and whether or not it has been sent to all of the correct tribes that are entitled to notice. Be sure that parents’ counsel have reviewed the content of the notice with their clients and that their clients have no corrections and no further information which should be contained in the notices.

c) Method

Federal and state law require that ICWA notice be provided by certified or registered mail, return receipt requested.⁹ California law specifically requires that “proof of the notice, including copies of notices sent and all return receipts and responses received, shall be filed with the court in advance of the hearing...”¹⁰ The agency may have less formal communications with a tribe or tribal representative in relation to a case. Such communications are encouraged in order to ensure that ICWA issues may be promptly and appropriately addressed. However, such informal communications do not take the place of the formal notice required by law.

TIP – While informal contacts between the agency and identified tribes is encouraged in order to provide information and assist with tribal engagement, these information contacts do not take the place of formal notice required under state and federal law. Beware of accepting representations from the agency as to what a tribal representative said about eligibility or membership. You must ensure that adequate and complete notice was provided as required by the law.

d) Timing

Generally, federal and state law require that ICWA notice **BE RECEIVED** at least 10 days before a hearing can take place.¹¹ California law makes an exception for the detention hearing, but requires that notice of the hearing be given as soon as possible after the filing of the petition initiating the proceeding and also requires that proof of the notice be filed with the court within 10 days after the filing of the petition.¹² Note that federal law governing the timing of notice does not make such a distinction between hearing types, although 25 U.S.C. § 1922 does say that

⁹ The federal statute (25 U.S.C. § 1912 (a)) states that notice must be sent “...by registered mail with return receipt requested...”. Implementing federal regulations (25 CFR § 23.11) state that notice must be sent “...by certified mail with return receipt requested...” California law (WIC § 224.2(a)(1)) states “notice shall be sent by registered or certified mail with return receipt requested. Additional notice by first-class mail is recommended, but not required.”

¹⁰ WIC 224.2(c).

¹¹ 25 U.S.C. §1912 (a); WIC § 224.2 (d).

¹² WIC § 224.2 (d).

the provisions of the subchapter do not “...prevent the emergency removal of an Indian child...” to prevent imminent physical damage or harm to the child.



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Judicial ICWA (Indian Child Welfare Act) Checklist - Evaluating sufficiency of ICWA Notice

1. Has a copy of the ICWA notice been filed with the court? yes no
2. Was ICWA notice provided using mandatory Judicial Council form ICWA-030 *Notice of Child Custody Proceeding for an Indian Child*? yes no
3. Does the ICWA notice contain all of the information obtained during “initial inquiry” and “further inquiry” (see requirements in Inquiry Checklists)?
 yes no
4. For any fields left blank, does the record support a finding that the Agency took all reasonable steps to obtain the information? yes no
5. For any fields left blank, have you asked the parent(s) whether they are able to provide the information or whether there are other available individuals who can provide the information? yes no
6. Does the service list starting at page 10 of the form, and continuing onto ICWA-030(A) if necessary, include all of the tribes which were identified during Inquiry and Further Inquiry as entitled to notice? yes no
7. Has proof of mailing by certified or registered mail return receipt requested to all of the parties (including all tribes) entitled to notice been filed with the court? yes no

8. Has proof that the notices were received by all of the parties (including all tribes) entitled to notice at least 10 days prior to the hearing been filed with the court? yes no

9. If the agency says that it has received response(s) from tribe(s), have copies of the response(s) been filed with the court? yes no

10. Has any tribe requested further information? yes no

11. If yes, is there evidence to support a finding that the agency made all reasonable efforts to provide this information? yes no