



## Probate Courts Requirements Under the Indian Child Welfare Act (ICWA)\* and Senate Bill 678

- I. Determining Application and Definitions (at every hearing) (25 U.S.C. § 1903; Prob. Code, § 1459.5(b); Welf. & Inst. Code, §§ 224.2(a)(5), 224.3(a); Cal. Rules of Court, rules 7.1015(d)(2), 5.481(a))<sup>1</sup>**
- A. ICWA applies to any proceeding, including guardianships and conservatorships under the Probate Code, that grants the temporary care, custody, and control of an “Indian child” to someone other than the child’s parents or Indian custodian when the parents or Indian custodian cannot have the child returned on demand or that results in the termination of parental rights to or the adoption of an Indian child.
  - B. An “Indian child” is under the age of 18, unmarried and either (1) a member of an Indian tribe or (2) eligible for membership of an Indian tribe and the biological child of a member of a tribe.
  - C. An “Indian custodian” is any Indian person who has legal custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody, and control have been transferred by the parent of such child. *Note:* Indian custodianship does not require any formal documentation.
- II. Consent (*Note:* If the parent or Indian custodian consents to the guardianship of an Indian child, many of the procedural and substantive provisions of ICWA do not apply. However, for consent to be valid under ICWA, it must meet ALL of the requirements stated in this provision. (25 U.S.C. § 1913(a)–(b); Prob. Code, §§ 1459(b) and (d) and 1500.1))**
- A. The consent must be in writing.
  - B. The consent cannot be taken before or within 10 days after the birth of the child.
  - C. The consent must be recorded before a judge.
  - D. The judge must certify that the terms and consequences of the consent were fully explained to the parents or Indian custodian in detail. The judge must further certify either that the parents or Indian custodian fully understood the explanation in English or that it was interpreted in a language that the parents or Indian custodian understood.
  - E. The parents or the Indian custodian have the right to withdraw their consent at any time and, on such withdrawal of consent, all provisions of the Indian Child Welfare Act, including inter alia 25 U.S.C. § 1913(b), shall apply. (*Note:* 25 U.S.C. § 1913(b) provides that a parent or Indian custodian may withdraw consent to a foster care placement under state law at any time and, on such withdrawal, the child shall be returned to the parent or Indian custodian. Probate Code section 1500.1(b), on the other hand, states that consent to guardianship of an Indian child may be withdrawn for any reason at any time **before the issuance of letters of guardianship** and the child shall be returned to the parent. Probate Code section 1459(d) states that where this code, other state law, or federal law provides a higher standard of protection, the court shall apply the higher state or federal standard.)

\*All citations in this chart are to the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq.; California Probate Code, California Welfare and Institutions Code, and California Rules of Court.

<sup>1</sup> Prob. Code, § 1459(b) and Cal. Rules of Court, rule 7.1015(d)(7), incorporate various provisions of the Welf. & Inst. Code and juvenile rules of court into probate proceedings.

**III. Investigation and Inquiry (Welf. & Inst. Code, § 224.3; Prob. Code, § 1459.5(b); Cal. Rules of Court, rule 7.1015(d))**

- A. **Initial investigation.** Before filing a petition, the petitioner must inquire of the child (if old enough), the parents, the Indian custodian, or others whether the child is or may be an Indian child and must complete the *Indian Child Inquiry Attachment* (form ICWA-010(A)) and attach it to the petition. (Prob. Code, § 1459.5(b); Cal. Rules of Court, rule 7.1015(d)(2).)
- B. **Inquiry of parents.** The parents and/or Indian custodian or other guardian of the child must, if possible, complete the *Parental Notification of Indian Status* (form ICWA-020). If the parents are available, this can be done before the first hearing. If not done before the first hearing and these people appear at the hearing, the court should order the parents, Indian custodian, or guardian to complete form ICWA-020 at that time. If form ICWA-020 is not yet completed and the parents and/or Indian custodian or guardian do not appear at the first hearing, the court will order the petitioners to use reasonable diligence to find the parents, Indian custodian, or guardian; advise them that the court has ordered them to complete form ICWA-020; and have them complete the form.
- C. If, after the use of reasonable diligence, the petitioner is not able to have the parents, Indian custodian, or guardian complete form ICWA-020 and a court investigator is appointed, the court investigator should make every effort to have the parents, Indian custodian, or guardian complete form ICWA-020. (Welf. & Inst. Code, § 224.3; Prob. Code, § 1459.5(b); Cal. Rules of Court, rules 5.481(a)(1), 7.1015(d).)
- D. **Affirmative and continuing duty to inquire.** The court, court-connected investigator, and petitioners all have an affirmative and continuing duty to inquire whether a child is or may be an Indian child. Inquiry is not a one-time occurrence. Ongoing efforts should be made to determine the child's Indian status by asking relatives and others who may reasonably have information as they become available. (Prob. Code, § 1459.5(b); Cal. Rules of Court, rules 5.481(a)(3), 7.1015(d).)
- E. **Concealing or falsifying facts concerning Indian status and sanctions.** Any person who falsifies or conceals a material fact concerning whether the child is an Indian child or counsels a party to do so is subject to sanctions by the court. (Welf. & Inst. Code, § 224.2(e); Prob. Code, § 1460.2(f).)
- F. **Further inquiry.** If, as a result of this inquiry or from any other source, any of the persons with a duty to inquire has “reason to know” that the child is an Indian child, he or she must make further inquiry to learn about the child's Indian heritage. In particular, he or she must (1) ask family members, (2) contact the Bureau of Indian Affairs (BIA), and (3) contact the tribe and anyone else who might reasonably have information about the child's heritage. (Welf. & Inst. Code, § 224.3(c); Prob. Code, § 1459.5(b); Cal. Rules of Court, rules 5.481(a)(4), 7.1015(d)(5)–(6).)
- G. **How do I know? Tips to help figure out if you have reason to know the child is an Indian child.**
1. If the child, an Indian tribe, an Indian organization, an attorney, a public or private agency, or a member of the child's extended family says or provides information to anyone involved in the case suggesting that the child may be an Indian child;
  2. If the child, the child's parents, or an Indian custodian live in a predominantly Indian community; or
  3. The child or the child's family has received services or benefits from a tribe or services that are available to Indians from tribes or the federal government, such as the Indian Health Service. (Welf. & Inst. Code, § 224.3(b); Prob. Code, § 1459.5(b); Cal. Rules of Court, rules 5.481(a)(5), 7.1015(d)(7).)

**IV. ICWA Notice Requirements (25 U.S.C. § 1912(a); 25 C.F.R. § 23.11; Welf. & Inst. Code, §§ 224.2, 224.3; Prob. Code, §§ 1459.5(b), 1460.2; Cal. Rules of Court, rules 5.481(b), 7.1015(c))**

- A. If you have “reason to know” (as described in section III F above) that the child is an Indian child, you must complete *Notice of Child Custody Proceeding for Indian Child* (form ICWA-030) and send it to the child's parents or guardians, the Indian custodian (if any), the tribe or tribes, the Sacramento office of the BIA, and/or the Secretary of the Interior as early as possible. (25 U.S.C. § 1912(a); Prob. Code, § 1460.2; Cal. Rules of

Court, rules 5.481(b), 7.1015 (c).) It is the responsibility of the petitioner or his or her attorney to gather the necessary information and to complete form ICWA-030. (Cal. Rules of Court, rule 7.1015(c)(2).) If the petitioner is represented by an attorney, it is the attorney's responsibility to serve form ICWA-030 in the prescribed manner. (Cal. Rules of Court, rule 7.1015(c)(3).) If the petitioner is not represented by an attorney, it is the court clerk's responsibility to serve form ICWA-030. (Cal. Rules of Court, rule 7.1015(c)(4).)

- B. **What to send.** Send mandatory *Notice of Child Custody Proceeding for Indian Child* (form ICWA-030), including attachments, a copy of the petition, and the child's birth certificate if it is available.
- C. **Who to provide notice to.** Notice must be sent to the child's parents, including the adoptive parents, the guardians, the Indian custodian (if any), the child's potential tribe or tribes, and either the Sacramento area director of the BIA (if you do not know the child's tribe) or the Secretary of the Interior (if you do). (See F. below.)
- D. **How to send notice.** Notice must be sent by registered or certified mail, return receipt requested, but if a tribe intervenes in the case you may thereafter send notice to it in the same manner as to other parties.
- E. **Where to send tribal notice.** When sending notices to the child's tribe or tribes, the notices must be addressed to the tribal chair or other tribal representative designated for receipt of ICWA notice. The list of designated agents for service of ICWA notice may be found at <http://edocket.access.gpo.gov/2010/pdf/2010-11696.pdf>. The tribal information list maintained by the California Department of Social Services can be found at: <http://www.childsworld.ca.gov/res/pdf/CDSSTribes.pdf>. Send notice to 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. (Welf. & Inst. Code, §§ 224.2, 224.3; Prob. Code, §§ 1459.5(b), 1460.2; Cal. Rules of Court, rules 5.481(b), 7.1015(c).)
- F. **If you know the child's tribe.** If the child is a member of a particular identified tribe, you do not need to send notice to the regional BIA office, but you must send a copy of the notice to the Secretary of the Interior.
- G. **Purpose of notice.** The purpose of notice is to let the tribes know of the involuntary child custody proceeding potentially involving an Indian child and allow the tribes to investigate to determine whether the child is a tribal member or eligible for membership and whether or not to participate in the proceedings. Therefore, it is important that the information you provide be complete and accurate. If it is not, your notice may be held to be inadequate. (25 U.S.C. § 1912(a); Welf. & Inst. Code, § 224.2; Cal. Rules of Court, rules 5.481(b), 7.1015(c).)
- H. **How to prove notice.** You must file **with the court** all notices, the **original** certified mail receipts, the **original** return receipts, and copies of all responses from a tribe or the BIA. *Note:* It is not sufficient for you to state that proper notice was sent.
- I. **How long to send notice?** Notice should be sent for every hearing so long as you have "reason to know" the child is an Indian child. This means you do not need to keep sending ICWA notice if all potential tribes respond that the child is not a member or eligible for membership or if the court makes a determination under Welfare and Institutions Code section 224.3(e)(3) or otherwise that ICWA does not apply.

**V. Timelines and Continuances (25 U.S.C. § 1912(a); Prob. Code, § 1459.5(b); Welf. & Inst. Code, § 224.2(d); Cal. Rules of Court, rules 5.482(a), 7.1015(b))**

- A. No hearing can be held until at least 10 days after receipt of notice by the child's parents, Indian custodian, and tribe or tribes.
- B. On request, the parents, Indian custodian, and tribe or tribes are entitled to up to 20 additional days to prepare for a hearing.

**VI. Intervention and Tribal Participation (25 U.S.C. § 1911(c); Prob. Code, § 1459.5(b); Welf. & Inst. Code, § 224.4; Cal. Rules of Court, rules 5.482(e), 5.534(i), and 7.1015(b))**

- A. The child's parents, Indian custodian, and tribe may intervene at any point in the proceedings.
- B. The tribe may be represented by an attorney or may designate a nonattorney to act as tribal representative for the state court proceedings. In any case, the intervening tribe is entitled to all the rights of a party.

C. If the tribe does not formally intervene as a party, it may still seek permission to exercise those rights listed in rule 5.534(i)(2) of the California Rules of Court.

**(Note: If the child is an Indian child, ICWA applies whether or not a tribe takes any formal steps in the proceedings.)**

**VII. Transfer to a Tribal Court (25 U.S.C. § 1911(b); Prob. Code, § 1459.5(b); Welf. & Inst. Code, § 305.5; Cal. Rules of Court, rules 5.483, 7.1015(b))**

- A. **Exclusive tribal jurisdiction and mandatory transfer.** If the child is already a ward of a tribal court or is domiciled or resides on a reservation of a tribe that exercises exclusive jurisdiction over child welfare proceedings, then the state court has no jurisdiction and the matter must be transferred to the tribal court. Currently there is only one tribe in California—the Washoe Tribe of California and Nevada—that exercises exclusive jurisdiction over child welfare proceedings. However many children in California are members of out-of-state tribes that may exercise exclusive jurisdiction. There are at least 10 tribal courts currently operating in California (and many more outside of California); therefore, Indian children in California may already be wards of tribal courts. It is important to determine the residence or domicile of an Indian child and determine whether or not the child is already a ward of a tribal court.
- B. **Concurrent Jurisdiction.** If a tribal court does not have exclusive jurisdiction, it may have concurrent jurisdiction, in which case the child’s parents, Indian custodian, or tribe may request that the matter be transferred to the tribal court. When such a request is made, the state court **must** transfer jurisdiction unless there is “good cause” not to transfer. What constitutes “good cause” and what factors the court is entitled and not entitled to consider is stated in rules 5.483(d) and 7.1015(b) of the California Rules of Court.

**VIII. Right to Counsel (25 U.S.C. § 1912(b); Prob. Code, §1474)**

- A. **Appointment of counsel.** Indigent parents and Indian custodians are entitled to court-appointed counsel in any involuntary child custody proceeding that could interfere with their custody of the Indian child.

**IX. Duties of a Court investigator (Prob. Code, § 1513(h); Cal. Rules of Court, rules 5.481(a), 7.1015(d))**

- A. **Inquiry.** Court-connected investigators share the affirmative and continuing duty to inquire whether a child subject to guardianship or conservatorship proceedings is or may be an Indian child.
- B. **Consultation with the child’s tribe.** In cases involving Indian children, the person making the investigation and report under Probate Code section 1513 is required to consult with the child’s tribe and include in the report the information provided by the tribe.

**X. Active Efforts (25 U.S.C. § 1912(d); Prob. Code, § 1459.5(b) (incorporating Welf. & Inst. Code, § 361.7); Cal. Rules of Court, rules 5.484(c), 7.1015(b))**

- A. In any involuntary proceeding involving an Indian child, the party seeking the order must provide evidence that “active efforts” have been made to provide remedial and rehabilitative programs and services to prevent the breakup of the Indian family and that these efforts have proven unsuccessful.
- B. Active efforts must be made in a manner consistent with the prevailing social and cultural conditions and way of life of the child’s tribe and must use the available resources of the extended family, the tribe, and other Indian services. This requirement applies to private individuals seeking guardianship of Indian children. Examples of activities that may constitute active efforts are lending money, offering housing, helping to find programs and services, driving to appointments, etc.
- C. Active efforts must include steps necessary to secure tribal membership for a child if the child is eligible for membership in a tribe. (Cal. Rules of Court, rules 5.484(c), 7.1015(b).)

**XI. Evidentiary Requirements (25 USC § 1912(e); Prob. Code, § 1459.5(b); Welf & Inst. Code, §§ 361, 361.31, 361.7(c); Cal. Rules of Court, rules 5.484(a), 7.1015(b))**

- A. Before an order is made for the involuntary “foster-care placement”<sup>2</sup> of an Indian child, there must be clear and convincing evidence,<sup>3</sup> including the testimony of at least one qualified expert witness (QEW), that, taking into account the prevailing social and cultural standards of the child’s tribe, continued custody of the child with his or her parent or Indian custodian is likely to result in serious emotional or physical damage to the child. (25 U.S.C. § 1912(e); Welf. & Inst. Code, §§ 361, 361.31, 361.7(c); Prob. Code, § 1459.5(b); Cal. Rules of Court, rules 5.484(a), 7.1015(b).)
- B. **Who can serve as a qualified expert witness?** A person knowledgeable in the prevailing social and cultural standards of the Indian child’s tribe, including that tribe’s family organization and child-rearing practices, can serve as a QEW. Likely persons include a member of the child’s tribe, an expert with substantial experience in the delivery of services to Indians (i.e., a social worker, sociologist, physician, psychologist, traditional tribal therapist and healer, tribal spiritual leader, historian, or elder), or another professional. (25 U.S.C. § 1912(e); Welf. & Inst. Code, § 224.6; Prob. Code, § 1459.5(b); Cal. Rules of Court, rules 5.484(a), 7.1015(b).)

**XII. Placement Preferences (25 U.S.C. § 1915; Prob. Code, § 1459.5(b); Welf. & Inst. Code, § 361.31; Cal. Rules of Court, rules 5.484(b), 7.1015(b))**

- A. **Foster-care placement preferences.** ICWA establishes a hierarchy of preferences for involuntary foster-care placement. Placements must be in the least restrictive setting that most approximates a family in which the child’s special needs, if any, may be met and which is in reasonable proximity to his or her home. In any foster-care placement, preference shall be given, in descending order, to (1) a member of the Indian child’s extended family; (2) a foster home licensed, approved, or specified by the Indian child’s tribe; (3) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (4) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child’s needs.
- B. **Tribe may alter order of placement.** The child’s tribe may by resolution adopt another order of preference. (25 U.S.C. § 1915(c); Welf. & Inst. Code, § 361.31; Prob. Code, § 1459.5(b); Cal. Rules of Court, rules 5.484(b)(4), 7.1015(b).)
- C. **Must consult with tribe on placement.** Any person involved in the placement of an Indian child must consult with the child’s tribe to secure a placement that complies with ICWA placement preferences. (Cal. Rules of Court, rules 5.482(g), 7.1015(b).)
- D. **Good cause to deviate.** Good cause may include the following considerations: the request of the parent or Indian custodian, the request of the Indian child when of sufficient age, the extraordinary physical or emotional needs of the Indian child as established by a QEW, or the unavailability of suitable families based on a documented diligent effort. The burden of establishing good cause to deviate is on the party requesting the deviation. (Prob. Code, § 1459.5(b); Welf. & Inst. Code, § 361.31; Cal. Rules of Court, rules 5.484 (b), 7.1015(b).)

<sup>2</sup> ICWA defines such placement as any action removing an Indian child from a parent or Indian custodian for placement with another, when the parent or Indian custodian cannot have the child returned on demand but when parental rights have not been terminated. (25 U.S.C. § 1903(1)(i).)

<sup>3</sup> Note that ICWA and Senate Bill 678 mandate evidence “beyond a reasonable doubt” before an order terminating parental rights. This does not apply, however, in Probate Code proceedings because Prob. Code, § 1516.5(d) prohibits a proceeding to have a child declared free from the custody and control of one or both parents in a guardianship proceeding involving an Indian child.