



Probation Departments Requirements — Indian Child Welfare Act and Senate Bill 678 *

I. Investigation/Intake Requirements

A. *Initial inquiry:* Whenever a petition is or has been filed for a child under WIC sections 601 or 602, the probation officer must ask the child, if at risk of entering foster care, (whether in custody or at home), parents, guardians, Indian custodians (if the child is living with an Indian person), and relatives whether the child may have Indian ancestry. (WIC, § 224.3(a); Cal. Rules of Court, rule 5.481(a).)

Practice Tip: If there is a determination that the child is at risk of entering foster care for the purposes of drawing down title IV-E funding, then the ICWA inquiry should be made.

Practice Tip: If inquiry reveals Indian ancestry, as part of your general duty to obtain services for the child and family, you should contact the child's identified Indian tribe to see if there are possible resources. You can find culturally relevant services at <http://www.courts.ca.gov/5807.htm>. You are also required to contact the child's tribe concerning placement options when foster care placement is or may be required.¹ Other ICWA requirements apply in the very limited set of circumstances described below.

ICWA's requirements other than inquiry apply only to delinquency proceedings where the child is in foster care or at risk of entering foster care AND one of the following:

1. The proceeding arises out of conduct which would not be criminal if committed by an adult;
2. The court is setting or considering setting a hearing to terminate parental rights; or
3. The court makes a specific finding that the foster care placement is based entirely on conditions within the child's home.

In these cases, and only in these cases, you must comply with all the ICWA requirements².

II. Further Inquiry

A. *Further inquiry:* If, as a result of this inquiry or from any other source, you have reason to know the child is an Indian child, then ask more questions to learn about the child's Indian heritage. Ask family members, the Bureau of Indian Affairs (BIA), and the tribe(s). Locate the tribal contact information if the tribe(s) are known. (WIC, § 224.3(c); Cal. Rules of Court, rule 5.481(a)(4).)

B. *How do I know? Tips to help figure out if you have reason to know the child is an Indian child:*

4. 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 that the child is an Indian child;
5. If the child, the child's parents, or an Indian custodian live in a predominantly Indian community; or
6. 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. (WIC, § 224.3(b); Cal. Rules of Court, rule 5.481(a)(5).)

C. *Document inquiry on Juvenile Wardship Petition (Form JV-600) and ICWA-010(A):*

1. Item 2 on form JV-600 requires you to have conducted an initial inquiry and further inquiry if it is warranted.
2. You are also responsible for documenting your investigation on ICWA-010(A) and having the parents complete the ICWA-020 forms. If the child is an Indian child, you and the court will need to take specific steps to prevent the breakup of the child's Indian family.

¹ *Welfare and Institutions Code* §727.1(a)

² See *In re W.B.* (2012) 55 Cal.4th 30.

*All citations in this chart are to the Indian Child Welfare Act (ICWA) (25 U.S.C. 1901 et seq.), California Probation Code, California Welfare and Institutions Code (WIC), and California Rules of Court.

D. *Document active efforts if child taken into custody:* If you have reason to believe the child is an Indian child AND the child is already in foster care, or you think the child is at risk of entering foster care, then you must find resources and services that are culturally specific to the Indian child's family. These resources and services are the *active efforts* that you must document to show that you are actively trying to prevent the breakup of the child's Indian family. Just as you would document *reasonable efforts* in non-ICWA cases, you must also document these *active efforts* in the detention report. You can find resources to help fulfill the active efforts requirement at <http://www.courts.ca.gov/5807.htm> (25 U.S.C. § 1912(d); WIC, §§ 361.7; 727.4(d)(5)(D); Cal. Rules of Court, rule 5.484(c).)

III. ICWA Notice Requirements

- A. You must send notice in form ICWA-030 to the child's parents or guardians, the Indian custodian (if any), the tribe(s), the Sacramento office of the BIA, and/or the Secretary of the Interior as early as possible. While you are not required to delay the detention hearing to provide such notice, early notice to and contact with the child's tribe(s) will allow a more speedy determination of the child's tribal status and early identification of tribal resources that may be available to meet the *active efforts* requirements of ICWA. (25 USC § 1912(a); WIC, §§ 224.2, 727.4(a)(2); Cal. Rules of Court, rule 5.481(b).)
- B. *What to send:* Send mandatory form ICWA-030, *Notice of Child Custody Proceeding for Indian Child*, including attachments and a copy of the petition and the report prepared for the hearing. (25 U.S.C. § 1912(c); Welf & Inst. Code § 224.2(a)(5))
- C. *Where/who to notice:* Notice must be sent to the child's parents, including the adoptive parents, the guardian(s), the Indian custodian (if any), the child's potential tribe(s), 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(s), 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://www.bia.gov/cs/groups/public/documents/text/idc012540.pdf>. [The tribal information list maintained by the California State Department of Social Services can be found at: http://www.childsworld.ca.gov/res/pdf/CDSSTribes.pdf](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. (WIC, §§ 224.2, 224.3; Cal. Rules of Court, rule 5.481(b).)
- F. If you know the child's tribe (i.e. the child is an enrolled member), 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 tribe(s) 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 USC § 1912(a); WIC, § 224.2; Cal. Rules of Court, rule 5.481(b).)
- H. *How to prove notice:* File with the court copies of all notices, with the certified mail receipts, any return receipts, and all responses from a tribe or the BIA.

NOTE: It is not sufficient for you to state on the report that notice was sent.

IV. Detention Report Requirements for Indian Child in case when ICWA requirements apply (25 U.S.C. § 1912(d); WIC, §§ 361.7, 636(c)(2); Cal. Rules of Court, rule 5.484(c).)

- A. Documentation to support your inquiry as to possible Indian ancestry and results of inquiry; and
- B. Documentation to support the required court findings regarding *reasonable efforts* and *active efforts* to prevent removal.

V. Disposition Report Requirements If an Indian Child Is Involved and It Is Probable the Child Will Be Entering Foster Care or Is Already in Foster Care

- A. Document any further inquiry efforts you have made to determine if an Indian child is involved by completing and attaching ICWA-010(A) to the disposition report;
- B. Prepare a case plan within 60 days of removal or by the date of the dispositional hearing, whichever occurs first, that includes resources and services that are remedial, rehabilitative, and culturally specific to the Indian child's family and designed to prevent the breakup of the Indian family. (25 USC § 1912(d); WIC, § 361.7; Cal. Rules of Court, rule 5.484(c).) In preparing the case plan, you must solicit and integrate the input of the child's identified Indian tribe. (Cal. Rules of Court, Rule 5.785(c)(2));

- C. Comply with ICWA notice requirements discussed in section III above;
- D. Obtain a qualified expert witness (QEW) meeting the requirements of section VI(B) below to testify at the hearing;
- E. Make efforts to obtain a placement that complies with the ICWA placement preferences set out in section VI(D) and (E) below and document those efforts in your dispositional report; and
- F. Document in the report your active efforts and reasonable efforts and make recommended legal findings for the court to adopt. (25 U.S.C. § 1912(d); WIC, §§ 361.7, 706, 706.5(a) and (b), 706.6.)

VI. Placement Requirements

- A. *ICWA preferences*: The foster care placement of an Indian child requires placement in accordance with the ICWA preferences.
- B. *Evidentiary standard*: The standard is proof by clear and convincing evidence, including the testimony of at least one qualified expert witness, 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); WIC, §§ 361, 361.31, 361.7(c); Cal. Rules of Court, rule 5.484(a).)
- C. *Who can serve as a QEW?*: 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, a sociologist, a physician, a psychologist, a traditional tribal therapist and healer, a tribal spiritual leader, a historian, or an elder), or other professional. NOTE that an employee of your probation department cannot serve as a QEW. (25 USC §1912 (e); WIC, § 224.6; Cal. Rules of Court, rule 5.484(a).)
- D. *Placement Preferences*: As with any child, the placement should be the least restrictive setting that best approximates a family and where the child’s special needs, if any, may be met. Unless the child’s tribe has by resolution specified a different preference, preference must be given in order of priority to placement with (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. If no placement is available that meets these preferences, efforts must be made to place the child with a family committed to preserving the child’s family ties and tribal relations. (25 USC § 1915(b); WIC, § 361.31; Cal. Rules of Court, rule 5.484(b).)
- E. *Documentation of efforts regarding placement*: Because the court must make a finding that the placement accords with ICWA, you must document in your report the efforts made to find a placement that meets the preferences of ICWA. These efforts would include contacts with members of the child’s extended family, contacts with the child’s tribe(s) seeking input and resources for placement, and contacts with other relevant Indian organizations. (See IID for resources.) These efforts should be made and documented each time there is a change in the Indian child’s placement. (WIC, § 361.31; Cal. Rules of Court, rule 5.482(f).)

VII. Status Review, Permanency Planning, and Postpermanency Planning Hearing Requirements

- A. Document further inquiry efforts you have made to determine if an Indian child is involved by completing and attaching ICWA-010(A) to the disposition report;
- B. Provide notice in accordance with section III above; and
- C. Prepare and file a report with recommended legal findings and orders supported by evidence of continued compliance with:
 - 1. Reasonable and active efforts requirement discussed in IID above; and
 - 2. Efforts to find a placement that complies with ICWA preferences as discussed in VID above.

VIII. Termination of Parental Rights Requirements (WIC, § 727.31)

- A. Provide evidence supported by the testimony of at least one QEW **beyond a reasonable doubt** that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
- B. Prepare and file a report with recommended legal findings and orders supported by evidence of continued compliance with:
 - 1. *Reasonable efforts* and *active efforts* requirements discussed in IID above (25 USC § 1912(d); WIC, §§ 361.7, 366.26(c)(2)(B); Cal. Rules of Court, rule 5.485(a)); and
 - 2. Adoptive preferences.
 Absent good cause to the contrary, for any adoptive placement of an Indian child preference of placement shall be given in priority order to (1) a member of the child’s extended family, (2) other members of the Indian child’s tribe or (3) other Indian families. (25 USC § 1915(a); WIC, § 727.3.)

C. *Good cause not to terminate parental rights:* State law now recognizes that many tribal cultures do not believe in the termination of parental rights. Accordingly, it is good cause not to terminate parental rights if the termination would interfere with a connection to tribal community or membership or the child's tribe has identified guardianship, long-term foster care, or another permanent plan as the preferred plan for the child. (WIC, § 366.26(c)(1)(B)(vi); Cal. Rules of Court, rule 5.725.(2)(vi).)