



JUDICIAL COUNCIL OF CALIFORNIA

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

ICWA Information Sheet: Delinquency – Child’s Indian Status – Right to Political and Cultural Connections – ICWA Requirements

Overview

The Indian Child Welfare Act (“ICWA” 25 U.S.C. §§1901 *et. seq.*) and corresponding state law are the source of significant legal rights and protections for Indian children and their tribes. Some, but not all of ICWA’s requirements apply to **all** juvenile cases, including delinquency cases. In addition, ICWA is not the **only** reason why a child’s Indian status and American Indian heritage is of importance in a delinquency case. Whether or not ICWA itself applies, children who identify as American Indian have unique legal protections and access to unique resources.

Duty of Inquiry

A juvenile probation department has an affirmative and continuing duty to inquire about a child’s Indian status, that is, whether the child is a member or eligible for membership in an Indian tribe and the child of a member of an Indian tribe. Inquiry must occur whenever the department makes contact with a child that could result in a petition under Section 601 or 602 (Welf. & Inst. Code § 224.2(a)) and whenever a child is placed in the temporary custody of the probation department pursuant to Welfare and Institutions Code § 307 (Welf. & Inst. Code § 224.2(b).) The duty to inquire begins at initial contact and the probation officer must complete this inquiry even if the child comes into contact with the probation department as a result of conduct that would be considered a crime if the child were an adult. (*In re. W.B.* (2012) 55 Cal. 4th 30, 40)

This duty of inquiry includes asking the child, parents, legal guardian, Indian custodian (if any), extended family members and others who have an interest in the child whether the child is, or may be, an Indian child and where the child, the parents, or Indian custodian is domiciled. (Welf. & Inst. Code § 224.2(b).) If this inquiry gives the probation officer “reason to believe” that the child is an Indian child, the probation officer must make further inquiry as soon as practicable. The purpose of further inquiry is to discover whether the child is a member (citizen) of a federally recognized Indian tribe and includes at a minimum:

1. Interviewing the child, parents, Indian custodian, and extended family members to gather the information required in Welf. & Inst. Code § 224.3(a)(5). (Welf. & Inst. Code § 224.2(e)(1)). Essentially this is a family tree back to great-grandparents;
2. Contacting the Bureau of Indian Affairs and California State Department of Social Services for assistance in identifying the names and contact information of the tribes the child may be a member or eligible for membership in; and
3. Contacting the tribes and any other person that may reasonably be expected to have information regarding the child's membership or citizenship status or eligibility. This contact with the tribes is distinct from sending notice on the form ICWA-030. You must make these contacts even if you are not required to send the ICWA-030 notice. This contact must include at a minimum contacting the tribe's designated agent for receipt of ICWA notice by telephone, facsimile or email and sharing information with the tribe necessary to make a membership determination. If the tribe determines the child is a member or eligible for membership you must share information about the current status of the child and the case. (Welf. & Inst. Code § 224.3(e)(3)).

If as a result of this inquiry the probation officer knows or has reason to know that the child is an Indian child, then ICWA requirements beyond inquiry may apply in certain circumstances.

When do ICWA requirements beyond inquiry apply?

All of the remaining ICWA requirements such as notice, active efforts, qualified expert witness testimony and heightened evidentiary standards apply only when a child is either in foster care or at risk of entering foster care and one of the three additional factors apply:

1. The petition under Welfare and Institutions Code section 601 or 602 alleges only status offenses and no conduct which would be criminal if the child were over age 18. (This includes allegations such as a child refuses to obey the orders of a parent or guardian, is beyond parental control, violates age-based curfew ordinances, or is truant or disobedient in school or has engaged in underage drinking or underage possession of alcohol or tobacco because even though this conduct is prohibited in the Penal Code, such conduct would not be a crime if committed by an adult.) (*In re. W.B.* at 42);
2. The court has set a hearing to terminate parental rights (regardless of whether or not there was "criminal" conduct) (*In re. W.B.* at 59); or
3. The court has placed the child in foster care, or in an adoptive or pre-adoptive placement, due to abuse or neglect in the child's home. (*In re. W.B.* at 60). In these situations, the court must make a specific finding that placement outside the home of the parent or legal guardian is based entirely on harmful conditions within the child's home. (*In re. W.B.* at 59) Without such a specific finding it is presumed that the placement is based at least in part on the child's criminal conduct. (*In re. W.B.* at 60) If there is such a finding, then ICWA requirements apply regardless of whether the conduct which brought the child before the court was criminal in nature.

Significance of Native American & Indian Identification (regardless of ICWA application)

Services for Native American Children

Following inquiry, if a child and the child's family identify as Native American, that is, as possessing native heritage or a cultural connection with an Indian tribe, then, whether or not ICWA itself applies, as **in all cases** the family's cultural identity is important for case planning and placement purposes. Native American children and their families may be entitled to a broad range of services which should be used whenever possible when developing case plans. You can find these services in your area by looking here <http://www.courts.ca.gov/5807.htm>. Programs may have different eligibility requirements. Some services are available to all individuals who self-identify as American Indian or indigenous while others may only be available to members of federally recognized tribes.

Following inquiry, if a child is an Indian child that is or may be placed in a foster care placement, identifying the child's tribe is important and legally required under the Welfare and Institutions Code apart from ICWA itself. A child's tribe is a required member of the Child and Family Team (CFT) convened for development of the child's case plan, including provisions relating to services and placement. Collaboration with the child's tribe is required as a matter of state law and may expand options available for the child through the provision of culturally appropriate services and through application of tribal standards to assessments and placement approvals. (Welf. & Inst. Code § 16501(a)(4))

Legal Rights of All Native American and Indian Children in Foster Care (regardless of ICWA)

If the child is a member or eligible for membership in a tribe, you are required to look to tribal members when seeking a foster care placement for an Indian child (ie a child who is a member or eligible for membership in a tribe) regardless of whether ICWA applies to the case. (Welf. & Inst. Code §§ 727.1 (a); 16501.1 (c))

All children placed in foster care have rights as specified in California law, commonly known as the Foster Youth Bill of Rights. (W.I.C. §16001.9) Native American children, regardless of membership in a federally recognized tribe, enjoy the following rights:

1. To receive adequate clothing and grooming and hygiene products that respect the child's culture and ethnicity.
2. To be placed with a relative or nonrelative extended family member if an appropriate and willing individual is available. (This is also the first order of placement in the ICWA placement preferences.)
3. To participate in extracurricular, cultural, racial, ethnic, personal enrichment, and social activities.

4. To attend religious services, activities, and ceremonies of the child's choice, including, but not limited to, engaging in traditional Native American religious practices.

Indian children who are placed into foster care are entitled to all the same rights as other foster children under WIC 16001.9 and also have unique protections for their cultural and political identity as Indian children. These protections for the cultural and political rights of Indian children in foster care apply equally whether they are placed in foster care under WIC §§300, 601 or 602 (WIC 16001.9(a).) These protections include the right to:

1. a placement that upholds the prevailing social and cultural standards of the child's Indian community, including, but not limited to, family, social, and political ties; (WIC 16001.9(a)(1))
2. be provided with names and contact information for representatives of the child's Indian tribe and to communicate with these individuals privately; (WIC 16001.9(a)(11))
3. have contact with tribal members and members of the child's Indian community consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe; (WIC 16001.9(a)(14))
4. engage in traditional Native American religious practices; (WIC 16001.9(a)(15))
5. have probation personnel who have received instruction on ICWA and on cultural competency and sensitivity relating to, and best practices for, providing adequate care to Indian children in out-of-home care; (WIC 16001.9(a)(20))
6. recognition of the child's political affiliation with an Indian tribe or Alaskan village, including a determination of the child's membership or citizenship in an Indian tribe or Alaskan village; to receive assistance in becoming a member of an Indian tribe or Alaskan village in which the child is eligible for membership or citizenship; to receive all benefits and privileges that flow from membership or citizenship in an Indian tribe or Alaskan village; and to be free from discrimination based on the child's political affiliation with an Indian tribe or Alaskan village; (WIC 16001.9(a)(21))
7. have a representative of the child's Indian tribe in attendance during hearings; (WIC 16001.9(34))
8. a case plan that includes protecting the essential tribal relations and best interests of the Indian child by assisting the child in establishing, developing, and maintaining political, cultural, and social relationships with the child's Indian tribe and Indian community; (WIC 16001.9(37))

Probation and social services must ensure that all of these rights are respected, including assisting a child to become enrolled with the child's tribe when the child is eligible for membership but requires enrollment.