



## Probation Departments Requirements Indian Child Welfare Act, Federal ICWA Regulations & Guidelines, California Statutes & Rules of Court \*

### I. Investigation/Intake Requirements

A. *Initial inquiry:* A juvenile probation department has a continuing duty to inquire about the 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 ask the child, parents, guardians, Indian custodians (if the child is living with an Indian person), and available extended family and relatives whether the child may be an Indian child. (WIC, § 224.2(a); California Rules of Court, rule (hereafter "CRC") 5.481(a).)

**Practice Tip:** If you are making a "reasonable efforts" finding to support the possibility the child may enter foster care for the purposes of drawing down title IV-E funding, then it is essential the ICWA inquiry be made.

### II. Further Inquiry

A. *Further inquiry:* If, as a result of this inquiry or from any other source, you have reason to believe the child is an Indian child, then ask more questions to learn about the child's Indian status. You must (1) interview the child, parents, and available extended family members to gather family background information; (2) contact the Bureau of Indian Affairs (BIA) and the California Department of Social Services (CDSS) for assistance with contact information and in determining the tribes to contact if the information available identifies only possible ancestral tribal groups rather than federally recognized tribes; and (3) contact the tribe(s) the child is potentially affiliated with by fax, phone and email to determine the child's status. (WIC, § 224.2(e); CRC 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:*

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 that the child is an Indian child;
2. If the child, the child's parents, or an Indian custodian reside or are domiciled on an Indian reservation; or
3. The child or parent possess an identification card indicating membership in a tribe 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, § 224.2(d); CRC 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 or there is reason to believe 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.

D. *Document active efforts if child taken into custody:* If you know or 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); CRC 5.484(c).)

\*All citations in this chart are to the Indian Child Welfare Act (ICWA) (25 U.S.C. 1901 et seq.), Federal ICWA Regulations found at 25 C.F.R. Part 23, Federal Guidelines for Implementing the Indian Child Welfare Act available at <https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf>, California Welfare and Institutions Code (WIC), and California Rules of Court (CRC) effective as of January 1, 2020.

## II. Rights of all Indian Children in foster care

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))

An Indian child's tribe is a required member of the child's Child and Family Team required to be consulted on development of the child's case plan and must be contacted concerning placement options when foster care placement is or may be required. (WIC §§ 16501a)(4); 727.1(a).)

You can find culturally relevant services at <http://www.courts.ca.gov/5807.htm>.

## III. ICWA's requirements other than inquiry apply only to 602 cases 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 substantive ICWA requirements<sup>1</sup> in addition to the duties of inquiry, further inquiry and protection of legal rights of all Indian children in foster care discussed above.

## IV. ICWA Notice Requirements

- A. You must send notice in form ICWA-030 to the child's parents or guardians, the Indian custodian (if any), and the tribe(s) that the child may be a member or eligible for membership in (identified following inquiry and further inquiry), for any hearing that could result in a foster-care placement, termination of parental rights, pre-adoptive placement or adoptive placement. For all other hearings, once the child's tribe has been identified the tribe is entitled to the same notices as other parties. Because the detention hearing is considered an emergency proceeding, you are not required to delay the detention hearing to provide such notice (WIC § 224.1 (1).) However early notice to and contact with the child's tribe(s) is required for the report that must be submitted to the court and will allow a speedy determination of the child's tribal status and early identification of tribal resources that may be available to meet the child's needs, meet the requirements set out in section II above, and the *active efforts* requirements of ICWA. (25 USC § 1912(a); WIC, §§ 224.3, 319 (b); 727.4(a)(2); CRC 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); WIC § 224.3(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 in some cases the Sacramento area director of the BIA or the Secretary of the Interior. (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.

<sup>1</sup> See *In re W.B.* (2012) 55 Cal.4th 30.

- 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. You can find a link to the most current list of agents for service of ICWA notice on the BIA website here: <https://www.bia.gov/bia/ois/dhs/icwa>. Send notice to all tribes of which the child may be a member or eligible for membership until the court confirms the child's tribe or if there is more than one tribe, the court determines which tribe is the child's tribe, after which notice need only be sent to that tribe. (WIC, §§ 224.2, 224.3; CRC 5.481(b).)
- 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, § 224.3; CRC 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.

**V. Detention Report Requirements for Indian Child in case when ICWA requirements apply** (25 U.S.C. § 1912(d); WIC, §§ 361.7, 636(c)(2); CRC 5.485(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.

**VI. 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 in collaboration with the CFT 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; CRC 5.485(c).) In preparing the case plan, you must solicit and integrate the input of the child's identified Indian tribe. (CRC 5.785(c)(2));
- C. Comply with ICWA notice requirements discussed in section IV above;
- D. Obtain a qualified expert witness (QEW) meeting the requirements of section VII(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 VII(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, 706.5(a) and (b), 706.6.)

**VII. Placement Requirements**

- A. *ICWA preferences:* Where ICWA applies, the foster care placement of an Indian child requires placement in accordance with the ICWA preferences as further discussed in D below.
- B. *Evidentiary standard:* Where ICWA applies, the standard to support foster care placement 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); CRC 5.485(a).)
- C. *Qualified Expert Witness Testimony:* A QEW must be knowledgeable in the prevailing social and cultural standards of the Indian child's tribe, including that tribe's family organization and child-rearing practices. Persons most likely to meet the requirements are: 1) a person designated by the tribe as having the necessary expertise; 2) a member or citizen of the tribe recognized by the tribal community as having the necessary expertise; 3) another expert having substantial experience in the delivery of child and family services to Indians, AND with extensive knowledge of the prevailing social and cultural standards and child-rearing practices of the Indian child's tribe. NOTE that an employee of your probation department cannot serve as a QEW. (25 USC §1912 (e); WIC, § 224.6; CRC 5.485(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; CRC 5.485(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 and the good cause for deviating from priority placements. 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; CRC 5.482(f).)

#### **VIII. 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 IV 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 VIID above.

#### **IX. Termination of Parental Rights Requirements** (WIC, §§ 366.26; 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); CRC 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); CRC 5.725.(2)(vi).)