

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT LEG20-03

Title

Proposal for Judicial Council–Sponsored
Legislation (Family Law): Recognition of
Tribal Court Orders Relating to the Division
of Marital Assets

Proposed Rules, Forms, Standards, or Statutes

Amend Fam. Code, § 2611; Amend Code
Civ. Proc., § 1736

Proposed by

California Tribal Court–State Court Forum
Hon. Abby Abinanti, Cochair
Hon. Suzanne M. Kingsbury, Cochair

Family and Juvenile Law Advisory
Committee

Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Action Requested

Review and submit comments by June 9,
2020.

Proposed Effective Date

January 1, 2022

Contact

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Executive Summary and Origin

As a result of comments from tribal court judges and advocates, the California Tribal Court–State Court Forum (Forum) and the Family and Juvenile Law Advisory Committee (Committee) recommend that the Judicial Council, effective January 1, 2022, sponsor legislation to add section 2611 to the Family Code and add subsection 1736(c) to the Code of Civil Procedure to ensure that valid divorce or dissolution judgments issued by tribal courts that include division of pension assets are effective and in particular are recognized as meeting the requirements of the Employee Retirement Income Security Act of 1974 (ERISA).

Background

California is home to more people of Indian ancestry than any other state in the nation. Currently there are 109 federally recognized tribes in California, second only to the number of tribes in the state of Alaska. Each tribe is sovereign, with powers of internal self-governance, including the

This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. It is circulated for comment purposes only.

authority to develop and operate a court system. At least 20 tribal courts currently operate in California, and several other courts are under development.

Tribal courts in California hear a variety of case types including child abuse and neglect cases; domestic violence protective orders; domestic relations (e.g., divorce and dissolution); contract disputes and other civil cases for money judgments; unlawful detainers, property disputes, nuisance abatements, and possession of tribal lands; name changes; and, civil harassment protective orders.

Some tribal courts in California issue domestic relations orders, including divorce and dissolution decrees. For these domestic relations orders to be thorough and effective, tribal courts must be able to address division of assets, including pension benefits governed by the federal Employee Retirement Income Security Act of 1974 (ERISA). In 2011, the U.S. Department of Labor issued guidance on when a domestic relations order issued under tribal law would be a “judgment, decree or order . . . made pursuant to a State domestic relations law within the meaning of federal law.”¹ That guidance concluded that:

In the Department’s view, a tribal court order may constitute a “judgment, decree or order . . . made pursuant to State domestic relations law” for purposes of ERISA section 206(d)(3)(B)(ii), if it is treated or recognized as such by the law of a State that could issue a valid domestic relations order with respect to the participant and alternate payee.

Section 206(d)(3)(B)(ii) or ERISA is codified as 29 U.S.C. § 1056(d)(3)(B)(ii).

The result of the guidance issued by the U.S. Department of Labor is that for a tribal court divorce or dissolution order to effectively distribute pension benefits governed by ERISA, state law must recognize the order as a judgement, decree, or order made pursuant to state domestic relations law. The Department of Labor specifically approved of the model that had been incorporated into Oregon statute at Oregon Revised Statutes section 24.115(4).²

In 2012, the Judicial Council proposed legislation that eventually became the Tribal Court Civil Money Judgment Act (Sen. Bill 406 (Evans); Stats. 2014, ch. 243). This legislation added sections 1730–1741 to the Code of Civil Procedure to clarify and simplify the process for recognition and enforcement of tribal court civil judgments consistent with the mandate set out in rule 10.60(b) of the California Rules of Court regarding recommendations concerning the recognition and enforcement of court orders that cross jurisdictional lines.

California law does not currently explicitly recognize judgments or orders from tribal courts (or foreign courts for that matter) that divide pension assets as judgements or orders made pursuant

¹ Available at <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2011-03a>.

² Available at <https://www.oregonlaws.org/ors/24.115>.

to state domestic relations law as mandated by ERISA. Further, current California law has no mechanism to simply “recognize” a tribal court order. Therefore, in order for a party in tribal court to have an ERISA Domestic Relations Order (DRO) accepted, that party would have to “register” the order. This creates a multitude of additional issues both for the litigant as well as the court.

The litigants are then required to: (1) pay for the two first-appearance fees (currently \$870); (2) pay for a certified copy (currently \$20); and (3) pay the fee for a bench officer’s signature (currently \$20).

Litigants are also required to complete the necessary registration paperwork. Once registration is complete, the California court then becomes responsible for that order, requiring court and staff time.

The Family Code contemplates recognition and enforcement of foreign custody orders under the Uniform Child Custody Jurisdiction Act (UCCJA) and foreign support orders and paternity judgments under the Uniform Interstate Family Support Act (UIFSA).³ The Foreign-Country Money Judgments Act⁴ excludes from its coverage any judgment arising from a divorce, support, or maintenance judgment rendered in connection with domestic relations. The Tribal Court Civil Money Judgment Act⁵ does not have a blanket exclusion for domestic relations judgments but does exclude judgments for which federal or state law already provides for recognition, including the Full Faith and Credit for Child Support Orders Act (28 U.S.C. § 1738B) and the Uniform Interstate Family Support Act.⁶ Registration of these orders can be inconsistent, cumbersome, and expensive, and is not required by federal law.

The Proposal

This proposal seeks to address an ongoing gap in the law by creating a simplified process to file in California state court an otherwise valid order of a tribal court—dividing pension assets—so as to have that order recognized for ERISA purposes.

The proposal, effective January 1, 2022, would (1) add subsection (c) to section 1736 of the Code of Civil Procedure establishing a simplified process for the filing of a tribal court order that relates to the provision of child support, spousal support payments, or marital property rights to a spouse, former spouse, or child, or other dependent from a pension plan covered by ERISA; and, (2) add section 2611 to the Family Code specifying that an order so filed and recognized is a

³ The Uniform Child Custody and Jurisdiction Act is incorporated into the Family Code at sections 3400 et seq. The Uniform Interstate Family Support Act is found at sections 5700.101 et seq.

⁴ Code Civ. Proc., §§ 1713–1725.

⁵ For a very helpful overview of these issues, see “Making Foreign Divorce Judgments, Orders, and Decrees Valid and Enforceable California Court Orders,” Divorcesource.com, Peter M. Walzer, Esq., available at <https://www.divorcesource.com/ds/california/making-foreign-divorce-judgments-orders-and-decrees-valid-and-enforceable-california-court-orders-4276.shtml>.

⁶ Part 6 (commencing with § 5700.101), Fam. Code, Div. 9.

domestic relations order made pursuant to the domestic relations laws of this state for the purposes of ERISA.

The Judicial Council will be required to create rules and forms to implement the legislation. Consistent with the legislation, these rules and forms would require the filing of a joint petition that would avoid the problem of a potential collateral attack on the orders.

Alternatives Considered

The Forum and Committee initially considered simply adding language to the Tribal Court Civil Money Judgment Act similar to that found in Oregon Revised Statute 24.115(4), referenced by the U.S. Department of Labor in advisory opinion 2011-03A.⁷ After much discussion, the Forum and Committee concluded that registration of the order under the Tribal Court Civil Money Judgment Act was unnecessarily cumbersome and expensive to achieve the goal of having the tribal court orders recognized under ERISA and that a simplified filing process was a better way of achieving this goal with less expense on litigants and less burden on the state courts.

Fiscal and Operational Impacts

No implementation costs are anticipated. It is expected that the proposal will improve efficiencies by ensuring that parties can effectively resolve dissolution issues in tribal court and not have to take pension issues to a different venue. While the simplified filing process contemplates that there will be no filing fee and may require adjustments to court processes, it should avoid the state court having to engage in protracted hearings and enforcement of the orders, and thus ultimately reduce the burdens on the state courts.

⁷ Oregon Revised Statute 24.115(4) is available at: <https://www.oregonlaws.org/ors/24.115>.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Is the proposal broad enough to encompass all kinds of pensions?
- Should the proposal be broader to encompass different kinds of pension plans such as those in the CalPERS system?
- Should the proposal be broader to encompass orders from foreign countries or sister states?
- Is it a problem if the orders can only be recognized through a joint petition? Do we need to have a process for recognition if one party refuses to join the petition?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would 6 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Code Civ. Proc., § 1736, at page 6
2. Fam. Code, § 2611, at page 7

Part 5 of Division 7 of the Family Code would be amended, effective January 1, 2022, to read:

1 **2610. * * ***

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3 **2611. (a) A final order of a tribal court that relates to the provision of child support,**
4 **spousal support payments, or marital property rights to a spouse, former spouse, child, or**
5 **other dependent of a participant in a pension plan covered by 29 U.S.C. § 1056 that is**
6 **filed in accordance with section 1736(c) of the California Code of Civil Procedure and**
7 **that otherwise complies with the requirements of 29 U.S.C. § 1056 is a domestic relations**
8 **order made pursuant to the domestic relations laws of this state for the purposes of 29**
9 **U.S.C. § 1056.**

10

11 **(b) The filing of the tribal court order does not confer any jurisdiction on a court of this**
12 **state to modify or enforce the tribal court order.**

Section 1736 of Chapter 3 of Title 11 of Part 3 of the Code of Civil Procedure would be amended, effective January 1, 2022, to read:

1 **1730–1735 * * ***

2

3 **1736. (a)–(b) * * ***

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5 **1736. (c) A proceeding for the recognition of a tribal court order that relates to the**
6 **provision of child support, spousal support payments, or marital property rights to a**
7 **spouse, former spouse, child, or other dependent of a participant of a pension plan**
8 **covered by 29 U.S.C. § 1056 shall be commenced by a filing a joint petition in a form to**
9 **be prescribed by the Judicial Council signed under oath by both parties to the proceeding.**
10 **The petition shall include a certified copy of the order to be recognized, the name and**
11 **current address of each party, and the issuing tribal court’s name and mailing address.**

12

13 **1737–1741 * * ***