

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

SPR20-29

Title	Action Requested
Indian Child Welfare Act (ICWA): Consent to Temporary Custody of an Indian Child	Review and submit comments by June 9, 2020
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Amend rule 5.514 and Adopt form ICWA-101	January 1, 2021
Proposed by	Contact
Tribal Court–State Court Forum Hon. Abby Abinanti, Cochair Hon. Suzanne N. Kingsbury, Cochair Family and Juvenile Law Advisory Committee Hon. Jerilyn L. Borack, Cochair Hon. Mark A. Juhas, Cochair	Ann Gilmour, 415-865-4207 ann.gilmour@jud.ca.gov

Executive Summary and Origin

The Tribal Court–State Court Forum and the Family and Juvenile Law Advisory Committee recommend effective January 1, 2021, amending rule 5.514 and adopting a new mandatory form to be used to have a judge witness the consent of an Indian parent or custodian to the temporary custodial placement of an Indian child in accordance with section 1913 of title 25 of the United States Code, 25 Code of Federal Regulations parts 23.125–23.127, and Welfare and Institutions Code section 16507.4(b)(3).

Background

The Indian Child Welfare Act (ICWA) sets out certain requirements for the validity of an Indian parent or custodian’s consent to the foster care placement of or termination of parental rights to an Indian child.¹ Prior to the enactment of comprehensive federal ICWA regulations in 2016, it had been understood that there was no actual “foster care placement” being made for the purposes of ICWA until the court made an order granting care and custody of the child to someone other than the child’s Indian parent or custodian. Thus, the voluntary consent

¹ Set out in 25 U.S.C. § 1913.

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 It is circulated for comment purposes only.

provisions of ICWA had only been implemented in relation to the termination of parental rights in the *Parent of Indian Child Agrees to End Parental Rights* (form ADOPT-225). In 2018 the California Legislature adopted Assembly Bill 3176², which amended various provisions of the Welfare and Institutions Code to align California law with the requirements of the federal ICWA regulations. AB 3176 included various revisions to section 16507.4(b)(3) of the Welfare and Institutions Code governing voluntary out-of-home placements of a minor that have not been adjudicated by the juvenile court. In particular, AB 3176 confirmed that voluntary out-of-home placements under section 16507.4(b)(3) must comply with the consent requirements of ICWA whenever an Indian child is involved.

The Proposal

Due to the legal developments discussed above, there is a need to create a process and form for a judge to witness the consent of the parent of an Indian child to the child's temporary custody in accordance with the requirements of ICWA. Tribal advocates have indicated that the lack of a form for the consent of an Indian parent or custodian to the temporary custody of an Indian child—that could be used in guardianship proceedings under the Probate Code—is also a problem. Tribal advocates have been asked to draft forms that meet the ICWA requirements but are uncomfortable doing so as they are not always familiar with California law. A form that could be used across all case types governed by ICWA would be useful to litigants and the courts.

The proposal would amend rule 5.514(b) of the California Rules of Court, which requires courts to establish intake procedures in juvenile cases that include a program for informal supervision by requiring these procedures to include a process for a judge to witness the consent of an Indian parent or custodian consistent with the requirements of ICWA, and adopt a new form, *Parent or Custodian of Indian Child Agrees to Temporary Custody* (form ICWA-101).

Alternatives Considered

The forum and committees considered limiting the proposal only to juvenile cases governed by Welfare and Institutions Code section 16507.4(b)(3) but determined that a form applicable across all case types governed by ICWA would be useful to litigants and the courts.

Fiscal and Operational Impacts

There may be some fiscal impact in implementing the new rule and form; however, it is required to comply with the law.

² [Waldron: Stats. 2018, ch. 833](#)

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committees and forum are interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Does the proposed form cover all of the topics that should be covered?
- In the context of a juvenile case, would the completed form be retained in the agency file or by the court? Should this be clarified in the rule itself?
- If the form is retained by the court, would it be discoverable under rule 10.500?
- How can the judge certify (as required by federal law) that the form is fully understood by the parent or Indian custodian? Does an attorney need to be appointed for the parent?
- The federal law states that the judge’s certification include that the document was “executed in writing and recorded before a judge.” Is the term “recorded” appropriate in the California context, or is it sufficient that the form be executed before the judge?
- Should the specific procedures of the process for taking the consent be set out in detail in the rule, or should each court retain discretion to establish its own process?

The advisory committees and forum also seek 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 3 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. Cal. Rules of Court, rule 5.514, at pages 4–5
2. Form ICWA-101, at pages 6–7

Rule 5.514 of the California Rules of Court would be amended, effective January 1, 2021, to read:

1 **Rule 5.514. Intake; guidelines**

2
3 **(a) Role of juvenile court**

4
5 It is the duty of the presiding judge of the juvenile court to initiate meetings and
6 cooperate with the probation department, welfare department, prosecuting attorney,
7 law enforcement, and other persons and agencies performing an intake function.
8 The goal of the intake meetings is to establish and maintain a fair and efficient
9 intake program designed to promote swift and objective evaluation of the
10 circumstances of any referral and to pursue an appropriate course of action.

11
12 **(b) Purpose of intake program**

13
14 The intake program must be designed to:

- 15
16 (1) Provide for settlement at intake of:
- 17
18 (A) Matters over which the juvenile court has no jurisdiction;
 - 19
20 (B) Matters in which there is insufficient evidence to support a petition; and
 - 21
22 (C) Matters that are suitable for referral to a nonjudicial agency or program
23 available in the community;
- 24
25 (2) Provide for a program of informal supervision of the child under sections 301
26 and 654;
- 27
28 (3) Establish a process for a judge to witness the consent of an Indian parent or
29 custodian to a placement of an Indian child under section 16507.4(b) before a
30 judge in accordance with section 16507.4(b)(3) that ensures that the
31 placement is consistent with the federal Indian Child Welfare Act and
32 corresponding state law and that all of the rights and protections of the Indian
33 parent are respected, using *Parent or Custodian of Indian Child Agrees to*
34 *Temporary Custody* (form ICWA-101); and
- 35
36 (34) Provide for the commencement of proceedings in the juvenile court only
37 when necessary for the welfare of the child or protection of the public.

38
39 **(c) * * ***

40
41 **(d) * * ***

1 (e) * * *

DRAFT
Not approved by
the Judicial Council

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:**1** I want the child to be temporarily placed in the custody of *(name(s))*:

a. _____

b. _____

Their relationship to Indian child *(check all that apply)*: Related to child *(specify)*: _____ Member of child's tribe Indian parents None of the above**2** The placement in **1** meets does not meet the placement preference requirements of the Indian Child Welfare Act.**3** Indian child *(name)*: _____

Date of birth: _____ Age: _____

Child's tribe(s): _____

Enrollment: _____

 Check here if you do not know the enrollment number.**4** Your name: _____ Parent Indian Custodian *(Check only one. Each fills out a separate form.)*Your address *(skip this if you have a lawyer)*:

City: _____ State: _____ Zip: _____

Phone: _____ Your tribe(s): _____ Enrollment #: _____

 Check here if you do not know the enrollment number.Your lawyer *(if you have one)*: *(Name, address, phone number, and State Bar number)*:**5** I am the person in **4** and I say:a. That I am presently unable to care for the child and prefer that the child be placed with the person listed in **1**.b. I agree to the temporary custody of my child by the person(s) listed in **1**.

c. No one has threatened me, including the threat of removing the child from my custody, or made promises to me to get me to sign this form.

d. I understand that I can change my mind and that the child will be returned to me.

e. I do not give up any of my rights under the Indian Child Welfare Act by signing this form.

f. My child was at least 10 days old when I signed this form.



Case Number:

Your name: _____

- 6 At the time of signing this form, neither I nor the child live or are domiciled on an Indian reservation of a tribe that exercises exclusive jurisdiction over child custody proceedings.

Date: _____ *Type or print your name*  _____ *Signature of Indian parent or custodian*

Judge's Certification

I, Judge _____
Superior Court of California, County of _____, certify:

- This form was completed in writing and executed before me.
- I fully explained the terms and consequences to the parent including (if applicable) the terms of any written agreement under section 16507.4 of the Welfare and Institutions Code, and they had no questions I could not answer (*name of parent*): _____
- The parent fully understood the terms and consequences.
- The parent speaks English or used an interpreter at the hearing.

Certified:

Date: _____
_____ *Judge (or Judicial Officer)*