

# JUDICIAL COUNCIL OF CALIFORNIA

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## INVITATION TO COMMENT SPR22-11

<b>Title</b>	<b>Action Requested</b>
Family Law: Recognition of Tribal Court Orders Relating to Division of Marital Assets	Review and submit comments by May 13, 2022
<b>Proposed Rules, Forms, Standards, or Statutes</b>	<b>Proposed Effective Date</b>
Adopt forms FL-540 and FL-541	January 1, 2023
<b>Proposed by</b>	<b>Contact</b>
Tribal Court–State Court Forum	Ann Gilmour, 415-865-4207, <a href="mailto:ann.gilmour@jud.ca.gov">ann.gilmour@jud.ca.gov</a>
Hon. Abby Abinanti, Cochair	
Hon. Suzanne N. Kingsbury, Cochair	
Family and Juvenile Law Advisory Committee	
Hon. Stephanie E. Hulsey, Cochair	
Hon. Amy M. Pellman, Cochair	

### Executive Summary and Origin

In 2020 the Legislature passed Assembly Bill 627 (Stats. 2021, ch. 58),<sup>1</sup> Judicial Council-sponsored legislation that added section 2611 to the Family Code and revised various provisions of the Tribal Court Civil Money Judgment Act found in the Code of Civil Procedure. The provisions ensure that 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). AB 627 mandated that the Judicial Council adopt forms to implement the legislation.

### Background

California is home to more people of Native American 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-

<sup>1</sup> Available at [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=202120220AB627](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB627).

governance, including the 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. When these dissolution orders include the division of pension benefits and other deferred compensation benefits governed by ERISA or a similar statute, interpretations of the law may require that the order be recognized by a state court in order to be fully effective. 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.’ ”<sup>2</sup> That guidance concluded that a tribal court order could only meet the standard for a “qualified domestic relations order” under ERISA if it was treated or recognized as such by the law of a state that could issue such an order.

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 or other deferred compensation benefits governed by ERISA, state law must recognize the order as a judgment, decree, or order made under state domestic relations law. The U.S. Department of Labor specifically approved of the model that had been incorporated into Oregon statute at Oregon Revised Statutes section 24.115(4).<sup>3</sup>

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 money judgments. Prior to the passage of AB 627, California law did not explicitly recognize judgments or orders from tribal courts (or foreign courts, for that matter) that divide pension assets as judgments or orders made under state domestic relations law as mandated by ERISA. Further, current California law had no mechanism to “recognize” a tribal court order. Therefore, in order for a party in tribal court to have an ERISA domestic relations order accepted, that party would have to “register” the order.

To remedy this problem, the Judicial Council sponsored and the Legislature enacted AB 627. AB 627 creates a simplified process for California courts to recognize domestic relations orders from tribal courts that would meet the definition of a “qualified domestic relations order” under

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<sup>2</sup> Advisory Opn. 2011-03A (Feb. 2, 2011), <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2011-03a>.

<sup>3</sup> *Ibid.* See Or. Rev. Stat. § 24.115(4), <https://www.oregonlaws.org/ors/24.115>.

ERISA and other similar statutes if they were issued by a state court. AB 627 mandates that the Judicial Council create forms to implement the statute.

## **The Proposal**

The proposal recommends the adoption of two mandatory forms to implement AB 627. Section 1733.1(a) of the Code of Civil Procedure, added by AB 627, creates a process where the parties to the underlying tribal court proceeding, when they both agree, may file a joint application for recognition of a tribal court order, and section 1733.1(b) mandates that the application be on a form adopted by the Judicial Council. Proposed new form FL-540 fulfills that mandate, for a joint application. Section 1733.1(e) contemplates the situation where one of the parties to the tribal court order does not agree to join in the application and states that the other party may proceed by having the tribal court execute a certificate in lieu of the signature of the other party. Section 1733.1(e) mandates that the Judicial Council adopt a format for that certificate. The committees concluded that it would be clearest to create a separate form for the situation where one party is not joining in the application and to include the certificate required to be executed by the tribal court in that form. Proposed new form FL-541 is for this situation.

The joint application form, FL-540 is straightforward, containing all the content required by section 1733.1(a), including the names and addresses of the joint applicants and the name and address of the tribal court, with an item stating that a certified copy of the order is attached. Although not required by the statute, the committees determined that adding the telephone number and email address for the tribal court that issued the underlying order would be useful to facilitate communication. In addition, the committees added the option of another applicant to address, for example, the situation where a child is the beneficiary of child support obligations.

Although two separate forms were not required by statute, the committees concluded that a separate form that included the tribal court certification contemplated by section 1733.1(e) would be the clearest way to provide an option for the situation where one of the parties to the underlying tribal court action is unwilling or unable to sign onto a joint application. Proposed form FL-541 is to be used for an application where one of the parties to the tribal court action is unwilling or unable to sign a joint application. The committees chose to use applicant and respondent terminology to provide wording that is familiar to state court practitioners. The form includes the same basic identifying information required by proposed form FL-540, and in addition the certificate contemplated by section 1733.1(e) of the Code of Civil Procedure is set out in the final portion of the FL-541 form. It includes the name and capacity of the person signing the certificate, the name of the tribal court, an affirmation that the order was made in compliance with the tribal court's rules and procedures and that the order is final and there is no pending appeal or stay of enforcement of the order.

The committees have not proposed any form of order to be issued by the state court because, according to section 2611 of the Family Code, the filing of the tribal court order is all that is required for it to be recognized as an order made pursuant to the domestic relations laws of this

state, and the filing does not confer any jurisdiction on the state court to modify or enforce the tribal court order.

### **Alternatives Considered**

The committees considered taking no action but, because the new statute requires that the application be made on a Judicial Council form and mandates that the Judicial Council develop a format for a tribal court certificate, the committees concluded that action was warranted.

The committees considered whether to create only a single form for use in both a joint and separate applications. Because a sole application requires the tribal certification and a joint application does not, the committees thought that two separate forms would be easier for litigants to understand.

### **Fiscal and Operational Impacts**

Courts may have to develop processes for recognizing these orders, such as revising their case management systems to allow for filing the new forms and attached orders and educating court staff, but that is a cost resulting from the underlying legislation. Ultimately the proposal should reduce state court costs by facilitating the process for implementing AB 627.

## **Request for Specific Comments**

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

- Does the proposal appropriately address the stated purpose?
- Is it clearer to have two application forms, one for joint applications and one for single-party applications, or should there be a single application form that could be used for either a joint or solo application?
- Do commenters suggest any additions or changes to the proposed tribal certificate in n proposed form FL-541?
- Would rules describing the process for recognizing and filing these tribal court orders be useful and of assistance to the courts and justice partners?

The advisory committees 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. Forms FL-540 and FL-541, at pages 6–9

ATTORNEY OR PARTY WITHOUT ATTORNEY NAME: FIRM NAME: STREET ADDRESS: CITY: TELEPHONE NO.: EMAIL ADDRESS: ATTORNEY FOR ( <i>name</i> ):	STATE BAR NUMBER: STATE: ZIP CODE: FAX NO.:	<b>FOR COURT USE ONLY</b>
<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF</b> STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:		<b>DRAFT</b> <b>Not approved by</b> <b>the Judicial Council</b>
APPLICANT 1: APPLICANT 2: OTHER APPLICANT (if any):		
<b>JOINT APPLICATION FOR RECOGNITION OF TRIBAL COURT ORDER DIVIDING RETIREMENT PLAN OR OTHER DEFERRED COMPENSATION</b>		CASE NUMBER:

Use this form to ask the court to recognize a tribal court order that assigns all or part of the following types of benefits to an alternative payee: child support payments; spousal support payments; or marital property rights for a spouse, former spouse, child, or other dependent of a participant in a retirement plan or other plan of deferred compensation. You can make this application in the superior court of the county in which any applicant resides. **You must attach a certified copy of the tribal court order.**

If the one party to the tribal court action has not agreed to or is unable to proceed with the filing of a joint application for recognition, use *Application for Recognition of Tribal Court Order Dividing Retirement Plan or Other Deferred Compensation* (form FL-541)

Note: Recognition of this tribal court order based on this application does not give a court of this state jurisdiction to modify or enforce the tribal court order.

1. Applicant One (Petitioner in the Tribal Court Action) (*name*):

Mailing Address:

Telephone Number:

Email Address:

2. Applicant 2 (Respondent in the Tribal Court Action) (*name*):

Mailing Address:

Telephone Number:

Email Address:

3. Other Applicant (if any) (*name*):

Relationship to parties in tribal court action:

Mailing Address:

Telephone Number:

Email Address:

4. Tribal court that issued the order (*name*):

Mailing Address:

Telephone Number:

Email Address:

APPLICANT 1: APPLICANT 2:	CASE NUMBER:
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5. The applicants are parties to the underlying action, or in the case of another applicant a beneficiary of the order, in tribal court, ask the court to recognize of the order from the tribal court (*name of court*) issued on  
*(date filed with tribal court)* \_\_\_\_\_ under Code of Civil Procedure section 1733.1.
6. A certified copy of the tribal court order to be recognized is attached to this form.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: \_\_\_\_\_

(TYPE OR PRINT NAME)

► (SIGNATURE OF APPLICANT 1)

Date: \_\_\_\_\_

(TYPE OR PRINT NAME)

► (SIGNATURE OF APPLICANT 2)

Date: \_\_\_\_\_

(TYPE OR PRINT NAME)

► (SIGNATURE OF OTHER APPLICANT (if any))

Date: \_\_\_\_\_

(TYPE OR PRINT NAME)

► (SIGNATURE OF ATTORNEY)

ATTORNEY OR PARTY WITHOUT ATTORNEY NAME: FIRM NAME: STREET ADDRESS: CITY: TELEPHONE NO.: EMAIL ADDRESS: ATTORNEY FOR (name):	STATE BAR NUMBER: STATE: ZIP CODE: FAX NO.:	FOR COURT USE ONLY
<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF</b> STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:		<b>DRAFT</b> <b>Not approved by</b> <b>the Judicial Council</b>
APPLICANT: RESPONDENT:		
<b>APPLICATION FOR RECOGNITION OF TRIBAL COURT ORDER DIVIDING RETIREMENT PLAN OR OTHER DEFERRED COMPENSATION</b>		CASE NUMBER:

This form is for use by an applicant when the other party to the tribal court action has not agreed to or is unable to proceed with the filing of a joint application for recognition. If both parties to the tribal court action agree to the application, use the Joint Application for Recognition of a Tribal Court Order Dividing Retirement Plan or Other Deferred Compensation (form FL-540).

Use this form to ask the court to recognize a tribal court order that establishes a right to child support payments, spousal support payments, or marital property rights for a spouse, former spouse, child, or other dependent of a participant in a retirement plan or other plan of deferred compensation, and assigns all or part of the benefits to an alternative payee.

You can make this application in the superior court of the county in which either party to the tribal court action resides. (Code Civ. Proc., § 1733.1(c).) **You must attach a certified copy of the tribal court order.**

Note: Recognition of this tribal court order based on this application does not give a court of this state jurisdiction to modify or enforce the tribal court order.

1. Applicant (name):  
Mailing Address:  
Telephone Number:  
Email Address:
2. Respondent (Non-Applicant) (name):  
Mailing Address:  
Telephone Number:  
Email Address:
3. Tribal court that issued the order (name):  
Mailing Address:  
Telephone Number:  
Email Address:
4. Applicant states that
  - a.   applicant and respondent are parties to the underlying action in, or  applicant is a beneficiary of the order made against the respondent by the tribal court on (date).
  - b.  applicant has tried to have the respondent to agree to the filing of a joint application under Code of Civil Procedure section 1733.1(a), but the respondent has not agreed or is unwilling or unable to proceed.
  - c. A certified copy of the tribal court order to be recognized is attached to this form.

APPLICANT:	CASE NUMBER:
RESPONDENT:	

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: \_\_\_\_\_

(TYPE OR PRINT NAME)



(SIGNATURE OF APPLICANT)

Date: \_\_\_\_\_

(TYPE OR PRINT NAME)



(SIGNATURE OF ATTORNEY FOR APPLICANT (if any))

#### CERTIFICATION OF TRIBAL COURT REPRESENTATIVE

5. I am a representative of the (*name of tribal court*) tribal court and hold the position of (*insert title of position*). In that capacity I am authorized to and hereby certify that the attached is a copy of the order issued by the (*name of tribal court*) tribal court on (*date*). The order was made in compliance with the tribal court's rules and procedures. The order is final.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: \_\_\_\_\_

(TYPE OR PRINT NAME)



(SIGNATURE OF AUTHORIZED TRIBAL COURT REPRESENTATIVE)