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Indian Child Welfare Act INFORMATION SHEET

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Discretionary Tribal Participation in Juvenile Cases

When the Indian Child Welfare Act does not apply to a case in juvenile court but the child is an Indian or Native American child and the child's tribe wants to participate, the juvenile court has discretion to allow the tribe to participate.

Background

The Indian Child Welfare Act (ICWA) is federal legislation that sets certain procedural and substantive requirements for state court cases involving Indian children that could result in the foster care placement of the child or termination of parental rights to the child.¹ ICWA most often applies in juvenile dependency or delinquency cases. California has adopted detailed provisions in state law in the Welfare and Institutions Code, Family Code, and Probate Code to implement ICWA requirements. When ICWA applies to a case in state court involving an Indian child, the child's tribe has a right under state and federal law to intervene or otherwise participate in the state court case.²

When ICWA does not apply to a case in juvenile court but the child is an Indian or Native American child³ and the child's tribe wants to participate, as discussed below, the juvenile court has discretion to allow the tribe to participate.

¹ The Indian Child Welfare Act is codified at 25 U.S.C. § 1901 et seq.

² See 25 U.S.C. § 1911(c) and Welfare and Institutions Code section 224.4 regarding tribal intervention. ICWA has its own definition of "child custody proceeding" (see 25 U.S.C. § 1903(1)).

³ The term "Indian child" is used for children who meet the definition of an Indian child in ICWA. The term "Native American child" is used to describe children who identify as Native American but do not meet the definition of an Indian child in ICWA.

ICWA Information Sheet: Discretionary Tribal Participation in Juvenile Cases

Page 2 of 6

Request for Tribal Participation

A discretionary tribal request to participate in a juvenile case will usually involve one of three scenarios: (1) the child's tribe is unrecognized, meaning that it is not on the list of tribes maintained by the federal government as having a government-to-government relationship with the United States; (2) it is a juvenile justice case, meaning that the underlying reason for the juvenile case is conduct by the child that would be a crime if committed by an adult (these are generally excluded from ICWA's definition of "child custody proceeding"); or (3) it is a heritage case, meaning that although the child and the child's family are affiliated with the tribe, the child is not "a member of the tribe" or "entitled to membership and is the biological child of a member" and therefore does not meet the definition of "Indian child" under ICWA.⁴

In all these situations, California law not only provides the state court judge with discretion to allow the tribe to participate but provides strong support for the benefit of tribal participation.

Right of Indian and Native American Foster Children to Maintain Cultural and Political Connections

The "Foster Youth Bill of Rights"⁵ includes certain protections for foster children in California. All Indian and Native American children in foster care have the right to:

- Receive adequate clothing, grooming, and hygiene products that respect the child's culture and ethnicity.
- 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.)
- Participate in extracurricular, cultural, racial, ethnic, personal enrichment, and social activities.
- Attend religious services, activities, and ceremonies of the child's choice, including but not limited to engaging in traditional Native American religious practices.

⁴ 25 U.S.C. § 1903.

⁵ Assem. Bill 175 (Stats. 2019, ch. 416), codified at Welf & Inst. Code, § 16001.9.

***ICWA Information Sheet: Discretionary Tribal Participation in
Juvenile Cases***

Page 3 of 6

Indian children in foster care also have the right to:

- 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. (Welf. & Inst. Code, § 16001.9(a)(1).)
- Be provided with names and contact information for representatives of the child's Indian tribe and to communicate with these individuals privately. (Welf. & Inst. Code, § 16001.9(a)(11).)
- 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. (Welf. & Inst. Code, § 16001.9(a)(14).)
- Engage in traditional Native American religious practices. (Welf. & Inst. Code, § 16001.9(a)(15).)
- 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. (Welf. & Inst. Code, § 16001.9(a)(20).)
- 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. (Welf. & Inst. Code, § 16001.9(a)(21).)
- Have a representative of the child's Indian tribe in attendance during hearings. (Welf. & Inst. Code, § 16001.9(34).)
- 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. (Welf. & Inst. Code, § 16001.9(37).)

ICWA Information Sheet: Discretionary Tribal Participation in Juvenile Cases

Page 4 of 6

Common Situations Giving Rise to Request for Discretionary Tribal Participation

Non-federally recognized tribes

Acknowledging the large number of unrecognized tribes in the state, California law specifically addresses tribes termed “unrecognized” or “non-federally recognized.” Welfare and Institutions Code section 306.6(a) provides:

In a dependency proceeding involving a child who would otherwise be an Indian child, based on the definition contained in paragraph (4) of Section 1903 of the federal Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.), but is not an Indian child based on status of the child’s tribe, as defined in paragraph (8) of Section 1903 of the federal Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.), the court may permit the tribe from which the child is descended to participate in the proceeding upon request of the tribe.⁶

Juvenile justice cases

Section 676 of the Welfare and Institutions Code provides discretion for the juvenile court in a juvenile justice case to allow anyone with a “direct and legitimate interest” in a case to be admitted to a juvenile court hearing.⁷ As discussed above, the Foster Care Bill of Rights protects the relationship between tribes and their Indian and Native American children in foster care regardless of whether they come into foster care under the provisions of sections 300 et seq. (the juvenile dependency provisions) or 600 et seq. (the juvenile justice provisions) of the Welfare and Institutions Code.

Heritage cases

Sometimes a child’s parents are members of a tribe, but the child is not a member or eligible for membership because the tribe’s membership rolls are closed or the child does not meet one or more of the tribe’s specific membership criteria. These children may still live on tribal lands, be eligible for tribal services, and be considered part of the tribal community. As with section 676 of the Welfare and

⁶ Section 306.6 is available at https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=WIC§ionNum=306.6.

⁷ Section 676 is available at https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=WIC§ionNum=676.

ICWA Information Sheet: Discretionary Tribal Participation in Juvenile Cases

Page 5 of 6

Institutions Code, section 346 allows the juvenile court in a dependency case to allow anyone with a “direct and legitimate interest” in a case to be admitted to a juvenile court hearing.⁸

Under Welfare and Institutions Code section 16001.9, these children have the same rights as described above for children from unrecognized tribes to maintain their cultural and political connections to the tribe.

The participation of the tribe with which the child and family are affiliated further protects these rights.

Rule of Court Governing Discretionary Tribal Participation

California Rules of Court, rule 5.530(g)⁹ creates a presumption that even when a juvenile case is not covered by ICWA, the court should grant a tribe’s request to participate in a juvenile case involving a tribal child unless the court finds that the tribe’s participation would not assist the court in making decisions in the best interest of the child. Subdivision (g) provides:

(1) The tribe of a child may request to participate in a case, using *Request for Tribal Participation* (form ICWA-042). The court should exercise its discretion as follows:

(A) In a proceeding involving an Indian child, the child’s tribe may request permission to participate in the proceedings under section 346 or 676. Consistent with sections 224 and 16001.9, there is a presumption that the tribe has a direct and legitimate interest in the proceedings under section 346 or 676 and the request should be approved absent a finding by the court that the tribe’s participation would not assist the court in making decisions that are in the best interest of the child.

(B) In a proceeding involving a child described by section 306.6, the tribe from which the child is descended may request permission to participate in the proceedings. Consistent with sections 224 and 16001.9, the request should be approved absent a finding by the court that the tribe’s participation would not assist the court in making decisions that are in the best interest of the child.

⁸ Section 346 is available at https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=346.&lawCode=WIC.

⁹ Available at www.courts.ca.gov/cms/rules/index.cfm?title=five&linkid=rule5_530.

**ICWA Information Sheet: Discretionary Tribal Participation in
Juvenile Cases**

Page 6 of 6

(C) When a child does not meet the definition of an Indian child but either of the child's parents is a member of a tribe and the tribe wishes to participate in juvenile proceedings involving the child, the parent's tribe may request permission to participate in the proceedings under section 346 or 676. Consistent with sections 224 and 16001.9, there is a presumption that the tribe has a direct and legitimate interest in the proceedings under section 346 or 676 and the request should be approved absent a finding by the court that the tribe's participation would not assist the court in making decisions that are in the best interest of the child.

(2) Upon approval of a request, the court must instruct the tribe as to the confidentiality of the proceedings and, although the tribe does not become a party unless the court orders otherwise, the tribe is authorized to:

(A) Be present at the hearing;

(B) Address the court;

(C) Request and receive notices of hearings;

(D) Request to examine court documents relating to the proceeding consistent with section 827;

(E) Present information to the court that is relevant to the proceeding;

(F) Submit written reports and recommendations to the court; and

(G) Perform other duties and responsibilities as requested or approved by the court.

A tribe wanting to participate in a juvenile case not covered by ICWA may make a request using *Request for Tribal Participation* (form ICWA-042), available on the California Courts website at www.courts.ca.gov/documents/icwa042.

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