JUDICIAL COUNCIL OF CALIFORNIA

TRIBAL COURT–STATE COURT FORUM

www.courts.ca.gov/forum.htm
forum@jud.ca.gov

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TRIBAL COURT–STATE COURT FORUM

NOTICE AND AGENDA OF OPEN MEETING

Open to the Public (Cal. Rules of Court, rule 10.75(c)(1) and (e)(1))
THIS MEETING IS BEING CONDUCTED BY ELECTRONIC MEANS
THIS MEETING IS BEING RECORDED

Date:	April 14, 2022
Time:	12:15 - 1:15 p.m.
Public Call-in Number:	833 568 8864 Meeting ID: 161 745 8053 (Listen Only)

Meeting materials will be posted on the advisory body web page on the California Courts website at least three business days before the meeting.

Members of the public seeking to make an audio recording of the meeting must submit a written request at least two business days before the meeting. Requests can be e-mailed to forum@jud.ca.gov.

Agenda items are numbered for identification purposes only and will not necessarily be considered in the indicated order.

I. OPEN MEETING (CAL. RULES OF COURT, RULE 10.75(C)(1))

Call to Order and Roll Call

Approval of Minutes
Approve minutes of the February 10, 2022, Tribal Court–State Court Forum meeting.

II. PUBLIC COMMENT (CAL. RULES OF COURT, RULE 10.75(K)(1))

This meeting will be conducted by electronic means with a listen only conference line available for the public. As such, the public may submit comments for this meeting only in writing. In accordance with California Rules of Court, rule 10.75(k)(1), written comments pertaining to any agenda item of a regularly noticed open meeting can be submitted up to one complete business day before the meeting. For this specific meeting, comments should be e-mailed to forum@jud.ca.gov. Only comments received by 12:15 p.m. on April 13, 2022 will be provided to advisory body members prior to the start of the meeting.

III. Information Only Items (No Action Required)

Item 1

Cochairs Report

Item 2

Report of the Ad Hoc Working Group on Options For Recognition and Enforcement of Tribal Court Child Custody Orders
Presenters: Judge Gregory J. Elvine-Kreis, Judge of the Superior Court of California, County of Humboldt; Judge Victorio L. Shaw Chief Judge of the Shingle Springs Band of Miwok Indians Tribal Court

Item 3

Report of the Ad Hoc Working Group on Options to Create Uniform Standards for Discretionary Tribal Participation in Cases not Governed by the Indian Child Welfare Act
Presenters: Judge Ana L. España, Judge of the Superior Court of California, County of San Diego; Judge Dean T. Stout, Chief Judge of the Bishop Paiute Tribal Court

Item 4

Report of the Ad Hoc Working Group On Options to Provide for Recognition and Enforcement of Tribal Court Orders Excluding Individuals from Tribal Lands
Presenters: Judge Lawrence C. King, Chief Judge of the Morongo Band of Mission Indians Tribal Court; Judge Allen H. Sumner, Judge of the Superior Court of California, County of Sacramento

Item 5

Options to improve ICWA Inquiry Procedures
Presenter: Ann Gilmour, Attorney, Center for Families, Children and the Courts, Judicial Council of California

IV. Adjourn

Adjourn

JUDICIAL COUNCIL OF CALIFORNIA
TRIBAL COURT–STATE COURT FORUM

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TRIBAL COURT–STATE COURT FORUM

MINUTES OF OPEN MEETING

February 10, 2022
12:15-1:15 p.m.

Advisory Body Members Present:	*Hon. Abby Abinanti, Co-chair, Hon. Suzanne Kingsbury, Cochair,* Hon. April Attebury, Hon. Leonard Edwards (Ret.), Hon. Ana España, Hon. Patricia Guerrero, Mr. Christopher Haug, Hon. Lawrence King, Hon. Devon Lomayesva, Ms. Merri Lopez-Keifer, Hon. Nicholas Mazanec, Hon. Victorio Shaw, Hon. Dean Stout, Hon. Sunshine Sykes, Hon. Christine Williams, Hon. Joseph Wiseman.
Advisory Body Members Absent:	Hon. Erin Alexander, Hon. Richard Blake, Hon. Leona Colegrove, Hon. Gail Dekreon, Hon. Gregory Elvine-Kreis, Hon. Joni Hiramoto, Hon. Patricia Lenzi, Hon. Gilbert Ochoa, Hon. Michael Sachs, Hon. Delia Sharpe, Ms. Christina Snider, Hon. Allen Sumner, Hon. Juan Ulloa, Hon. Mark Vezzola.
Others Present:	Ms. Dorothy Alther, Ms. Vida Castaneda, Ms. Charli Depner, Ms. Audrey Fancy, Mr. Marshall Galvan, Ms. Ann Gilmour, Ms. Sharon Hopkins-Bright, Ms. Andi Liebenbaum, Ms. Amanda Morris, Mr. Corby Sturges.

OPEN MEETING

Call to Order and Roll Call
The co-chairs called the meeting to order at 12:18 p.m.

Approval of Minutes
The Forum approved the December 9, 2021 meeting minutes. Motion to approve by Judge Sunshine Sykes and seconded by Judge Lawrence King.

DISCUSSION AND ACTION ITEMS (ITEMS 1-5)

Item 1

Cochairs Report

Judge Abinanti informed the Forum about upcoming events of interest to the members.

Item 2

Rules and Forms - Implementation of AB 627

Presenter: Ann Gilmour, Attorney, Center for Families, Children & the Courts, Judicial Council of California

The Forum reviewed forms created in to implement AB 627 which created a specific process to recognize tribal court divorce or dissolution orders dividing pension or other deferred compensation assets. There were several revisions to the forms from the last time the committee reviewed due to comments from the family and juvenile law advisory committee. Forms were changed from the civil series to the family series and slight adjustments to language were made. Motion to approve forms, modified as suggested by Ann Gilmour, to move forward to circulation and comment by Judge Ana España and seconded by Judge Lawrence King.

Info 3

Public Safety and Enforcement of Tribal Exclusion Orders

Presenter: Hon. Lawrence King, Chief Judge of the Morongo Tribal Court

Judge Lawrence King opened a discussion with the forum members regarding what changes can be made for state courts to recognize tribal court exclusion orders. Members discussed past instances of exclusion orders not enforced or prosecuted on tribal property and the public safety issues that can arise as a result. A working group was formed to address this issue.

Info 4

Discretionary Tribal Participation in Non-ICWA Juvenile Cases

Presenters: Hon. Dean Stout, Chief Judge of the Bishop Paiute Tribal Court; Ann Gilmour, Attorney, Center for Families, Children & the Courts, Judicial Council of California

Forum members discussed potential legislation or rule of court to address issues of disparity across county courts in permitting tribal representatives to participate in court cases that involve tribal children, but where ICWA may not apply. Under WIC 306.6 and other statutory authority judges have discretion to allow participation, but currently there is no guidance on how tribes can make this application and what principles the court should apply in exercising their discretion. Members leaned in favor of a new rule of court to be created to address this issue. Emphasis was made that state courts and tribal courts should have a partnership to bring the most resources for the best interest tribal children. Ann Gilmour will reach out to the Family and Juvenile Law Advisory Committee to address this issue in a future meeting.

Info 5

Procedures for Recognition of Tribal Court Child Custody Orders

Presenters: Hon. Victorio Shaw, Chief Judge of the Shingle Springs Rancheria Tribal Court; Ann Gilmour, Attorney, CFCC

Judge Victorio Shaw opened a discussion with forum members about dangerous situations tribal children are subject to when counties do not recognize tribal court child custody orders. It was identified that form FL-580 has contradictory language that leaves gaps in enforceability and puts burdens on tribal members to file that should be shared with the tribal court. It was decided that this reoccurring issue should be brought to the Family and Juvenile Law Advisory Committee for further discussions on how to fix this issue.

ADJOURNMENT

There being no further business, the meeting was adjourned at 1:18 p.m.

Pending approval by the advisory body on April 14, 2022.

Rule 5.482. Proceedings after notice

(a) Timing of proceedings

(1) If it is known or there is reason to know a child is an Indian child, a court hearing that may result in a foster care placement, termination of parental rights, preadoptive placement, or adoptive placement must not proceed until at least 10 days after the parent, Indian custodian, the tribe, or the Bureau of Indian Affairs has received notice, except as stated in sections (a)(2) and (3).

(2) The detention hearing in dependency cases and in delinquency cases in which the probation officer has assessed that the child is in foster care or it is probable the child will be entering foster care described by rule 5.480(2)(A)–(C) may proceed without delay, provided that:

(A) Notice of the detention hearing must be given as soon as possible after the filing of the petition initiating the proceeding; and

(B) Proof of notice must be filed with the court within 10 days after the filing of the petition.

(3) The parent, Indian custodian, or tribe must be granted a continuance, if requested, of up to 20 days to prepare for the proceeding, except for specified hearings in the following circumstances:

(A) The detention hearing in dependency cases and in delinquency cases described by rule 5.480(2)(A)–(C);

(B) The jurisdiction hearing in a delinquency case described by rule 5.480(2)(A)–(C) in which the court finds the continuance would not conform to speedy trial considerations under Welfare and Institutions Code section 657; and

(C) The disposition hearing in a delinquency case described by rule 5.480(2)(A)–(C) in which the court finds good cause to deny the continuance under Welfare and Institutions Code section 682. A good cause reason includes when probation is recommending the release of a detained child to his or her parent or to a less restrictive placement. The court must follow the placement preferences under rule 5.485 when holding the disposition hearing.

(b) Proof of notice

Proof of notice in accordance with this rule must be filed with the court in advance of the hearing, except for those excluded by (a)(2) and (3), and must include *Notice of Child Custody Proceeding for Indian Child* (form ICWA-030), return receipts, and any responses received from the Bureau of Indian Affairs and tribes.

(c) Determination of applicability of the Indian Child Welfare Act

(1) If the court finds that proper and adequate inquiry, further inquiry, and due diligence were conducted under Welfare and Institutions Code section 224.2 and, if applicable, notice provided under Welfare and Institutions Code section 224.3, and the court determines there is no reason to know the child is an Indian child, the court may make a finding that the Indian Child Welfare Act does not apply to the proceedings.

(2) The determination of the court that the Indian Child Welfare Act does not apply in (c)(1) is subject to reversal based on sufficiency of the evidence. The court must reverse its determination if it subsequently receives information providing reason to believe that the child is an Indian child and order the social worker or probation officer to conduct further inquiry under Welfare and Institutions Code section 224.3.

(d) Intervention and tribal participation

(1) When the Indian Child Welfare Act applies, ~~T~~the Indian child's tribe and Indian custodian are entitled to intervene, orally or in writing, at any point in the proceedings. The tribe may, but is not required to, file with the court the *Notice of Designation of Tribal Representative in a Court Proceeding Involving an Indian Child* (form ICWA-040) to give notice of its intent to intervene.

(2) When the Indian Child Welfare Act may not apply, but the child or the child's parent is a member of tribe, such as where the child has committed an act that would be crime if committed by an adult, or the child is not currently eligible for membership in the tribe, the tribe may request permission to participate in the proceedings under section 346 or 676 of the Welfare and Institutions Code using the *Tribal Request to Participate in Proceedings Involving Tribal Child* (form ICWA-042). Consistent with sections 224 and section 16001.9 of the Welfare and Institutions Code, the request shall 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. Upon approval, the tribe shall have the right to participate as described by section 306.6 and access to the juvenile case file consistent with Welfare and Institutions Code section 827(a)(5) and (f), including the right to have copies of documents.

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(3) When a child is described by section 306.6 of the Welfare and Institutions Code, the tribe from which the is descended may request permission to participate in the proceedings using the *Tribal Request to Participate in Proceedings Involving Tribal Child* (form ICWA-042). The request shall be approved absent an objection by the child or the child's parents or 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 notwithstanding the legislative findings in section 224 of the Welfare and Institutions Code and the child's rights under section 16001.9 of the Welfare and Institutions Code.

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(e) Posthearing actions

Whenever an Indian child is removed from a guardian, conservator, other custodian, foster home, or institution for placement with a different guardian, conservator, custodian, foster home, institution, or preadoptive or adoptive home, the placement must comply with the placement preferences and standards specified in Welfare and Institutions Code section 361.31.

(f) Consultation with tribe

Any person or court involved in the placement of an Indian child in a proceeding described by rule 5.480 must use the services of the Indian child's tribe, whenever available through the tribe, in seeking to secure placement within the order of placement preference specified in rule 5.485.

Rule 5.530. Persons present

(a) Separate session; restriction on persons present (§§ 345, 675)

All juvenile court proceedings must be heard at a special or separate session of the court, and no other matter may be heard at that session. No person on trial, awaiting trial, or accused of a crime, other than a parent, de facto parent, guardian, or relative of the child, may be present at the hearing, except while testifying as a witness.

(b) Persons present

The following persons are entitled to be present:

(1) The child or nonminor dependent;

(2) All parents, de facto parents, Indian custodians, and guardians of the child or, if no parent or guardian resides within the state or their places of residence are not known, any adult relative residing within the county or, if none, the adult relative residing nearest the court;

(3) Counsel representing the child or the parent, de facto parent, guardian, adult relative, or Indian custodian or the tribe of an Indian child;

(4) The probation officer or social worker;

(5) The prosecuting attorney, as provided in (c) and (d);

(6) Any CASA volunteer;

(7) In a proceeding described by rule 5.480, a representative of the Indian child's tribe;

(8) The court clerk;

(9) The official court reporter, as provided in rule 5.532;

(10) At the court's discretion, a bailiff; and

(11) Any other persons entitled to notice of the hearing under sections 290.1 and 290.2.

(c) Presence of prosecuting attorney—section 601–602 proceedings (§ 681)

In proceedings brought under section 602, the prosecuting attorney must appear on behalf of the people of the State of California. In proceedings brought under section 601, the prosecuting attorney may appear to assist in ascertaining and presenting the evidence if:

(1) The child is represented by counsel; and

(2) The court consents to or requests the prosecuting attorney's presence, or the probation officer requests and the court consents to the prosecuting attorney's presence.

(d) Presence of petitioner's attorney—section 300 proceedings (§ 317)

In proceedings brought under section 300, the county counsel or district attorney must appear and represent the petitioner if the parent or guardian is represented by counsel and the juvenile court requests the attorney's presence.

(e) Others who may be admitted (§§ 346, 676, 676.5)

Except as provided below, the public must not be admitted to a juvenile court hearing. The court may admit those whom the court deems to have a direct and legitimate interest in the case or in the work of the court.

(1) If requested by a parent or guardian in a hearing under section 300, and consented to or requested by the child, the court may permit others to be present.

(2) In a hearing under section 602:

(A) If requested by the child and a parent or guardian who is present, the court may admit others.

(B) Up to two family members of a prosecuting witness may attend to support the witness, as authorized by Penal Code section 868.5.

(C) Except as provided in section 676(b), members of the public must be admitted to hearings concerning allegations of the offenses stated in section 676(a).

(D) A victim of an offense alleged to have been committed by the child who is the subject of the petition, and up to two support persons chosen by the victim, are entitled to attend any hearing regarding the offense.

(E) Any persons, including the child, may move to exclude a victim or a support person and must demonstrate a substantial probability that overriding interests will be prejudiced by the presence of the individual sought to be excluded. On such motion, the court must consider reasonable alternatives to the exclusion and must make findings as required under section 676.5.

(f) Discretionary tribal participation (§§ 224, 306.6, 346, 676, 827, 16001.9)

When a proceeding involves a child described by section 224.1(a), 224.1(b) or 306.6 of the Welfare and Institution Code a request by the child's tribe to participate in the proceeding is governed by rule 5.482(d)(2) and (3) respectively.

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California Department of Justice DIVISION OF LAW ENFORCEMENT John D. Marsh, Chief		**INFORMATION BULLETIN**
Subject: **Clarification Regarding Law Enforcement Response to Trespass on Indian Lands[1]**	*No.* 2022-DLE-04 *Date:* March 28, 2022	*Contact for information:* Division of Law Enforcement (916) 210-6300

TO: ALL CALIFORNIA LAW ENFORCEMENT AGENCIES

The California Department of Justice, Division of Law Enforcement, is issuing this Information Bulletin to provide clarity regarding appropriate law enforcement response to trespass on Indian Lands.

Penal Code section 602, subdivision (m), criminal trespass, is enforceable on Indian Lands in the state.[2] Under that portion of the criminal trespass law, a violation occurs when a person willfully "enter[s] and occup[ies] real property or structures of any kind without the consent of the owner, the owner's agent, or the person in lawful possession."

Law enforcement may enforce section 602, subdivision (m), on Indian Lands, provided that each of the criminal elements are met, regardless of whether there is a tribal exclusion order that prohibits an individual from entering and occupying the relevant real property or structures. Nevertheless, the existence of a tribal exclusion order can be evidence of a necessary element of the crime—that the individual lacked consent of the owner, owner's agent, or person in lawful possession.

The Attorney General's 1997 Opinion No. 96-609, 80 Ops. Cal. Atty. Gen. 46 (1997), concluded that a violation of the particular tribal exclusion order in question did not satisfy all of the elements of trespass under section 602, subdivision (m).[3] Specifically, the tribal exclusion order at issue in that opinion prohibited the excluded person from entering, occupying *or* remaining on the reservation. However, a violation of subdivision (m) requires that the individual both enter *and* occupy real property or structures without the consent of the owner. Thus, the Opinion concluded that a violation of that tribal exclusion order alone could not be enforced as a violation of Penal Code section 602, subdivision (m). That opinion, however, did not foreclose the enforcement of Penal Code section 602, subdivision (m) where the violation of a tribal exclusion order would necessarily establish all of the elements required to establish a trespass under state law. Nor did it conclude that a tribal order was necessary for the enforcement of Penal Code section 602, subdivision (m), on Indian Lands.

Should you have any questions, please contact the Division of Law Enforcement at (916) 210-6300.

1 For the purpose of this Information Bulletin, "Indian Lands" refers to "Indian Country," a legal term that, for purposes of determining criminal jurisdiction, generally refers to all lands within a federal Indian reservation, all dependent Indian communities, and all tribal member allotments. (18 U.S.C. §1151).

2 Public Law 83-280 (18 U.S.C. § 1162).

3 The 1997 Opinion addressed prior Penal Code section 602, subdivision (l), which is now codified at subdivision (m).

West's Ann.Cal.Penal Code § 166

§ 166. Contempt of court; conduct constituting

Effective: January 1, 2022

Currentness

(a) Except as provided in subdivisions (b), (c), and (d), a person guilty of any of the following contempts of court is guilty of a misdemeanor:

(1) Disorderly, contemptuous, or insolent behavior committed during the sitting of a court of justice, in the immediate view and presence of the court, and directly tending to interrupt its proceedings or to impair the respect due to its authority.

(2) Behavior specified in paragraph (1) that is committed in the presence of a referee, while actually engaged in a trial or hearing, pursuant to the order of a court, or in the presence of a jury while actually sitting for the trial of a cause, or upon an inquest or other proceeding authorized by law.

(3) A breach of the peace, noise, or other disturbance directly tending to interrupt the proceedings of the court.

(4) Willful disobedience of the terms, as written, of a process or court order or **out-of-state court** order, lawfully issued by a court, including orders pending trial.

(5) Resistance willfully offered by a person to the lawful order or process of a court.

(6) The contumacious and unlawful refusal of a person to be sworn as a witness or, when so sworn, the like refusal to answer a material question.

(7) The publication of a false or grossly inaccurate report of the proceedings of a court.

(8) Presenting to a court having power to pass sentence upon a prisoner under conviction, or to a member of the court, an affidavit, testimony, or representation of any kind, verbal or written, in aggravation or mitigation of the punishment to be imposed upon the prisoner, except as provided in this code.

(9) Willful disobedience of the terms of an injunction that restrains the activities of a criminal street gang or any of its members, lawfully issued by a court, including an order pending trial.

(b)(1) A person who is guilty of contempt of court under paragraph (4) of subdivision (a) by willfully contacting a victim by telephone or mail, social media, electronic communication, or electronic communication device, or directly, and who has been previously convicted of a violation of Section 646.9 shall be punished by imprisonment in a county jail for not more than one year, by a fine of no more than five thousand dollars ($5,000), or by both that fine and imprisonment.

(2) For the purposes of sentencing under this subdivision, each contact shall constitute a separate violation of this subdivision.

(3) The present incarceration of a person who makes contact with a victim in violation of paragraph (1) is not a defense to a violation of this subdivision.

(4) For purposes of this subdivision, the following definitions shall apply:

(A) “Social media” has the same definition as in Section 632.01.

(B) “Electronic communication” has the same definition as in Section 646.9.

(C) “Electronic communication device” has the same definition as in Section 646.9.

(c)(1) Notwithstanding paragraph (4) of subdivision (a), a willful and knowing violation of a protective order or stay-away court order described as follows shall constitute contempt of court, a misdemeanor, punishable by imprisonment in a county jail for not more than one year, by a fine of not more than one thousand dollars ($1,000), or by both that imprisonment and fine:

(A) An order issued pursuant to Section 136.2.

(B) An order issued pursuant to paragraph (2) of subdivision (a) of Section 1203.097.

(C) An order issued after a conviction in a criminal proceeding involving elder or dependent adult abuse, as defined in Section 368.

(D) An order issued pursuant to Section 1201.3.

(E) An order described in paragraph (3).

(F) An order issued pursuant to subdivision (j) of Section 273.5.

(2) If a violation of paragraph (1) results in a physical injury, the person shall be imprisoned in a county jail for at least 48 hours, whether a fine or imprisonment is imposed, or the sentence is suspended.

(3) Paragraphs (1) and (2) apply to the following court orders:

(A) An order issued pursuant to Section 6320 or 6389 of the Family Code.

(B) An order excluding one party from the family dwelling or from the dwelling of the other.

(C) An order enjoining a party from specified behavior that the court determined was necessary to effectuate the orders described in paragraph (1).

(4) A second or subsequent conviction for a violation of an order described in paragraph (1) occurring within seven years of a prior conviction for a violation of any of those orders and involving an act of violence or "a credible threat" of violence, as provided in subdivision (c) of Section 139, is punishable by imprisonment in a county jail not to exceed one year, or in the state prison for 16 months or two or three years.

(5) The prosecuting agency of each county shall have the primary responsibility for the enforcement of the orders described in paragraph (1).

(d)(1) A person who owns, possesses, purchases, or receives a firearm knowing that person is prohibited from doing so by the provisions of a protective order as defined in Section 136.2 of this code, Section 6218 of the Family Code, or Section 527.6 or 527.8 of the Code of Civil Procedure, shall be punished under Section 29825.

(2) A person subject to a protective order described in paragraph (1) shall not be prosecuted under this section for owning, possessing, purchasing, or receiving a firearm to the extent that firearm is granted an exemption pursuant to subdivision (h) of Section 6389 of the Family Code.

(e)(1) If probation is granted upon conviction of a violation of subdivision (c), the court shall impose probation consistent with Section 1203.097.

(2) If probation is granted upon conviction of a violation of subdivision (c), the conditions of probation may include, in lieu of a fine, one or both of the following requirements:

(A) That the defendant make payments to a domestic violence shelter-based program up to a maximum of one thousand dollars ($1,000).

(B) That the defendant provide restitution to reimburse the victim for reasonable costs of counseling and other reasonable expenses that the court finds are the direct result of the defendant's offense.

(3) For an order to pay a fine, make payments to a domestic violence shelter-based program, or pay restitution as a condition of probation under this subdivision or subdivision (c), the court shall make a determination of the defendant's ability to pay. An order to make payments to a domestic violence shelter-based program, shall not be made if it would impair the ability of the defendant to pay direct restitution to the victim or court-ordered child support.

(4) If the injury to a married person is caused, in whole or in part, by the criminal acts of the person's spouse in violation of subdivision (c), the community property shall not be used to discharge the liability of the offending spouse for restitution to the injured spouse required by Section 1203.04, as operative on or before August 2, 1995, or Section 1202.4, or to a shelter for costs with regard to the injured spouse and dependents required by this subdivision, until all separate property of the offending spouse is exhausted.

(5) A person violating an order described in subdivision (c) may be punished for any substantive offenses described under Section 136.1 or 646.9. A finding of contempt shall not be a bar to prosecution for a violation of Section 136.1 or 646.9. However, a person held in contempt for a violation of subdivision (c) shall be entitled to credit for any punishment imposed as a result of that violation against a sentence imposed upon conviction of an offense described in Section 136.1 or 646.9. A conviction or acquittal for a substantive offense under Section 136.1 or 646.9 shall be a bar to a subsequent punishment for

contempt arising out of the same act.

Credits

(Enacted in 1872. Amended by Stats.1993, c. 345 (A.B.303), § 1; Stats.1993, c. 583 (S.B.850), § 4; Stats.1996, c. 904 (A.B.2244), § 3; Stats.1996, c. 1077 (A.B.2898), § 13.1; Stats.1999, c. 662 (S.B.218), § 7; Stats.2002, c. 830 (A.B.2695), § 1; Stats.2008, c. 152 (A.B.1424), § 1; Stats.2009, c. 140 (A.B.1164), § 139; Stats.2010, c. 178 (S.B.1115), § 44, operative Jan. 1, 2012; Stats.2010, c. 677 (A.B.2632), § 1; Stats.2011, c. 285 (A.B.1402), § 9; Stats.2011, c. 296 (A.B.1023), § 199; Stats.2011, c. 181 (A.B.141), § 4; Stats.2013, c. 76 (A.B.383), § 145.3; Stats.2013, c. 291 (A.B.307), § 2; Stats.2014, c. 99 (A.B.2683), § 1, eff. Jan. 1, 2015; Stats.2015, c. 279 (S.B.352), § 1, eff. Jan. 1, 2016; Stats.2016, c. 342 (S.B.883), § 1, eff. Jan. 1, 2017; Stats.2021, c. 704 (A.B.764), § 1, eff. Jan. 1, 2022.)

West's Ann. Cal. Penal Code § 166, CA PENAL § 166
Current with urgency legislation through Ch. 6 of 2022 Reg.Sess. Some statute sections may be more current, see credits for details.

End of Document

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688
Telephone 415-865-4200 • Fax 415-865-4205 • TDD 415-865-4272

MEMORANDUM

Date
April 11, 2022

To
Members of the Family & Juvenile Law Advisory Committee
Members of the Tribal Court - State Court Forum

From
Ann Gilmour, Attorney CFCC

Subject
Possible Rules Proposal re. ICWA Inquiry

Action Requested
Please Review

Deadline
N/A

Contact
Ann Gilmour, CFCC
415-865-4207 phone
ann.gilmour@jud.ca.gov

Three recent appellate cases have dealt with the issue of trial courts and agencies failing to fulfill their obligations regarding inquiry under California law implementing the Indian Child Welfare Act and whether that failure constitutes prejudicial error, and we have been asked to consider whether rules changes or other action might assist courts and agencies in meeting their duties of ICWA inquiry.

More detail about the cases themselves is set out in the case list attached. They all involve failures to fully investigate available information about possible Indian ancestry. In some cases, the agency had contact with various extended family members and failed to ask about Indian ancestry. In some cases, the parents or relatives gave specific information about tribal relationships and the agency and court failed to conduct required "further inquiry" by gathering available information.

Could the issues in any of these cases have been avoided by further clarifying the duties of ICWA inquiry and notice in the rules of court? Relevant portions of the existing rules are set out

below. In my opinion the existing rules and accompanying forms are clear, but I welcome committee thoughts on whether revisions would be helpful.

Existing Rules

Rule 5.481. Inquiry and notice
(a) Inquiry
The court, court-connected investigator, and party seeking a foster-care placement, guardianship, conservatorship, custody placement under Family Code section 3041, declaration freeing a child from the custody or control of one or both parents, termination of parental rights, preadoptive placement, or adoption have an affirmative and continuing duty to inquire whether a child is or may be an Indian child in all proceedings identified in rule 5.480. The court, court-connected investigator, and party include the county welfare department, probation department, licensed adoption agency, adoption service provider, investigator, petitioner, appointed guardian or conservator of the person, and appointed fiduciary.
(1) The party seeking a foster-care placement, guardianship, conservatorship, custody placement under Family Code section 3041, declaration freeing a child from the custody or control of one or both parents, termination of parental rights, preadoptive placement, or adoption must ask the child, if the child is old enough, and the parents, Indian custodian, or legal guardians, extended family members, others who have an interest in the child, and where applicable the party reporting child abuse or neglect, whether the child is or may be an Indian child and whether the residence or domicile of the child, the parents, or Indian custodian is on a reservation or in an Alaska Native village, and must complete the *Indian Child Inquiry Attachment* (form ICWA-010(A)) and attach it to the petition unless the party is filing a subsequent petition, and there is no new information.
(2) At the first appearance by a parent, Indian custodian, or guardian, and all other participants in any dependency case; or in juvenile wardship proceedings in which the child is at risk of entering foster care or is in foster care; or at the initiation of any guardianship, conservatorship, proceeding for custody under Family Code section 3041, proceeding to terminate parental rights, proceeding to declare a child free of the custody and control of one or both parents, preadoptive placement, or adoption proceeding; and at each hearing that may culminate in an order for foster care placement, termination of parental rights, preadoptive placement or adoptive placement, as described in Welfare and Institutions Code section 224.1(d)(1), or that may result in an order for guardianship, conservatorship, or custody under Family Code section 3041; the court must:

(A) Ask each participant present whether the participant knows or has reason to know the child is an Indian child;

(B) Instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child; and

(C) Order the parent, Indian custodian, or guardian, if available, to complete *Parental Notification of Indian Status* (form ICWA-020).

(3) If the parent, Indian custodian, or guardian does not appear at the first hearing, or is unavailable at the initiation of a proceeding, the court must order the person or entity that has the inquiry duty under this rule to use reasonable diligence to find and inform the parent, Indian custodian, or guardian that the court has ordered the parent, Indian custodian, or guardian to complete *Parental Notification of Indian Status* (form ICWA-020).

(4) If the social worker, probation officer, licensed adoption agency, adoption service provider, investigator, or petitioner knows or has reason to know or believe that an Indian child is or may be involved, that person or entity must make further inquiry as soon as practicable by:

(A) Interviewing the parents, Indian custodian, and "extended family members" as defined in 25 United States Code section 1903, to gather the information listed in Welfare and Institutions Code section 224.3(a)(5), Family Code section 180(b)(5), or Probate Code section 1460.2(b)(5);

(B) Contacting the Bureau of Indian Affairs and the California Department of Social Services for assistance in identifying the names and contact information of the tribes in which the child may be a member or eligible for membership; and

(C) Contacting the tribes and any other person who reasonably can be expected to have information regarding the child's membership status or eligibility. These contacts must at a minimum include the contacts and sharing of information listed in Welfare and Institutions Code section 224.2(e)(3).

(5) The petitioner must on an ongoing basis include in its filings a detailed description of all inquiries, and further inquiries it has undertaken, and all information received pertaining to the child's Indian status, as well as evidence of how and when this information was provided to the relevant tribes. Whenever new information is received, that information must be expeditiously provided to the tribes.

(Subd (a) amended effective January 1, 2020; previously amended effective January 1, 2013.)

Then we've also woven this through the juvenile rules:

Rule 5.668. Commencement of hearing-explanation of proceedings (§§ 316, 316.2)

(c) Indian Child Welfare Act inquiry (§ 224.2(c) & (g))

(1) At the first appearance in court of each party, the court must ask each participant present at the hearing whether:

(A) The participant knows or has reason to know the child is an Indian child;

(B) The residence or domicile of the child, the child's parents, or Indian custodian is on a reservation or in an Alaska Native village;

(C) The child is or has ever been a ward of a tribal court; and

(D) Either parent or the child possess an identification card indicating membership or citizenship in an Indian tribe.

(2) The court must also instruct all parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child, and order the parents, Indian custodian, or guardian, if available, to complete *Parental Notification of Indian Status* (form ICWA-020).

(3) If there is reason to believe that the case involves an Indian child, the court must require the agency to proceed in accordance with section 224.2(e).

(4) If it is known, or there is reason to know, the case involves an Indian child, the court must proceed in accordance with rules 5.481 et seq. and treat the child as an Indian child unless and until the court determines on the record after review of the report of due diligence described in section 224.2(g) that the child does not meet the definition of an Indian child.

Published Appellate ICWA Decisions 2021

1. **In re A.C.** 4th DCA, Div. 2, 65 Cal.App.5th 1060 280 Cal.Rptr.3d 526 (June 25, 2021)

Holding: The juvenile court's failure to inquire or investigate father's Indian ancestry was harmless error since he did not assert such ancestry on appeal.

Facts: The juvenile court exercised jurisdiction over A.C. based on failure to protect and support then removed her from both parents' custody. Although the court ordered the parents to complete a "Parental Notification of Indian Status" form at the detention hearing, San Bernardino County Children and Family Services (CFS) neither notified father of this nor asked about his Indian ancestry when he was later located. The court also neglected to order father to complete the form during his first appearance. After the Confederate Tribes of the Colville Reservation determined that A.C. was ineligible for membership despite mother being a member, the court found the Indian Child Welfare Act (ICWA) did not apply at the 12-month review hearing and terminated mother's services but extended father's for 6 more months. Parental rights were later terminated and father appeals regarding ICWA noncompliance. Under ICWA, the court is mandated to ask each participant at the beginning of the proceeding whether he or she "knows or has reason to know that the child is an Indian child." The court and the social services agency also have an "affirmative and continuing duty" to make the same inquiry under California law, in addition to the court's obligation to order the agency to employ reasonable diligence to locate and inform parents of the court's order to complete the ICWA-020 form. Additionally, the agency has an ongoing obligation to inquire and document its efforts to determine the child's Indian status including asking parents and extended family members about such ancestry. Here, the court erred by failing to ask father at his first and subsequent appearances whether he had any Indian ancestry and CFS erred by neglecting to ask father and his relatives about this ancestry.

CFS concedes that there was a failure to inquire about father's Indian ancestry but argues the error was harmless. In determining whether an error is prejudicial regarding failure to comply with a California law that is higher than ICWA requirements, it is deemed harmless unless the appellant can establish a reasonable probability of a more favorable result notwithstanding the error. When a parent asserts a failure to inquire, they must show that if the inquiry were made, he or she would have claimed Indian ancestry. Without father's offer of proof or affirmative assertion of Indian ancestry, there is no miscarriage of justice, and a reversal is not warranted. Similarly, under federal law, the party must also show prejudice resulted from the error. Here, there was no error in federal law because the father was unavailable at the beginning of the proceedings and there is no federal duty to make inquiries of extended family members. Assuming there was an error, father again failed to show prejudice. The court rejected father's argument that the record is void because of CFS's failure to adequately investigate his Indian ancestry. At a minimum, he must at least claim the child may have Indian ancestry. Although ICWA notice issues can be raised for the first time on appeal, there needs be some showing of prejudice before reversing an order terminating parental rights. Requiring father to submit post judgment evidence of his Indian ancestry would entail him going outside of the record which is an exception to the normal appellate process. However, this benefits father and relying on Josiah Z. (2005) 36 Cal.4th 664, it is warranted in rare cases so long as it isn't used to attack the

substantive merits of the trial court's decision. Because father failed to assert a claim of Indian ancestry, like the father in In re Rebecca R. (2006) 143 Cal. App.4th 1426, the failure to conduct ICWA inquiry was harmless and requiring the trial court and CFS to go through the inquiry process would be "wasteful and a mere delaying tactic" that disturbs the intended finality of WIC §366.26 orders. The order is affirmed.

2. In re A.T. 1st DCA, Div. 3, 63 Cal.App.5th 267 (April 20, 2021)

Holding: The provisions of the Indian Child Welfare Act (ICWA) do not apply when an Indian child is removed from one parent in a dependency proceeding and placed with the other non-offending parent. The placement with a parent does not qualify the proceedings as a "child custody proceeding" within ICWA.

Facts: A.T. lived with his parents in Washington state (WA) until their divorce in 2019, and the family law court awarded A.T.'s mother physical custody with visitation to the father. In violation of the family law custody order, the mother took seven-year-old A.T. to California (CA) and after four months, a dependency petition was filed, alleging that the mother was demonstrating severe mental health issues that impacted A.T.'s mental and physical wellbeing. Mother was an enrolled member of the Yurok Tribe, but A.T. was ineligible for enrollment because he did not meet the tribe's "blood quantum requirement". The mother filed an ICWA-020 form claiming Yurok and Wiyot tribal ancestry.

After a contested detention hearing, A.T. was detained and placed with a maternal aunt in the same county. The father requested placement with him in WA and agreed to further assessment by the Sonoma County Human Services Department (Department). In November 2019, the jurisdiction hearing was continued to allow the CA juvenile court to contact the WA court to ascertain which state properly had jurisdiction over the dependency case under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Father advised that the WA family law court had recently found A.T.'s mother in contempt, granted a restraining order and ordered her to return A.T. to the father's care in WA. At that same November 2019 hearing, the CA juvenile court granted the Department's request that A.T. would be placed with the father with attendant conditions.

In December 2019, the Wiyot Tribe intervened in the dependency case and a tribal representative appeared in court and declared that A.T. was eligible for enrollment in the tribe. In January 2020, the juvenile court stated that it had been in contact with the WA family court and determined WA had "exclusive jurisdiction" over the case under the UCCJEA. The Department, A.T.'s counsel and the father urged the court to dismiss the case in favor of jurisdiction in WA and that the ICWA provisions did not apply to placement with a parent. The Wiyot tribe and the mother asserted that ICWA applied and asked the court to keep the case in CA. The juvenile court properly determined that ICWA did not apply for two reasons: (1) A.T. was not an "Indian child" within ICWA terms because although he was eligible for inclusion in the Wiyot tribe, the mother was not an enrolled member and (2) A.T. was currently placed with the father, who was a non-offending parent, and that fact made the ICWA provisions inapplicable.

The ICWA statutes do not apply when a child is removed from one parent and placed with the other non-offending parent. Such proceedings do not qualify as a "child custody proceeding"

under ICWA. The court properly applied the UCCJEA to determine that Washington was the state with "exclusive jurisdiction" over the child. The order dismissing the dependency action is affirmed. The Department's motion to dismiss the appeal is denied as moot.

3. **In re Benjamin M.** 4th DCA, Div. 2. 70 Cal.App.5th 735 285 Cal.Rptr.3d 682 (October 22, 2021)

Holding: The Agency's failure to investigate readily obtainable information about whether the minor was an Indian child was prejudicial error.

Facts: The minor was removed from Mother. Father's whereabouts remained unknown throughout the proceedings, though paternal relatives were in contact with the Agency. The Agency did not question paternal relatives about the minor's Indian ancestry. Mother denied Indian ancestry. The trial court found that the Indian Child Welfare Act (ICWA) did not apply. Parental rights were terminated at the 366.26 hearing. The appellate court conditionally reversed the orders and remanded to the juvenile court with directions to comply with ICWA. The Agency and the court have a duty to inquire whether a minor subject to the proceedings of the court may be an Indian child. Here, the parties agreed that the Agency and the juvenile court failed to comply with their duty of initial inquiry when they failed to inquire of Father's family members whether the minor had Indian ancestry on his paternal side. Thus, the sole issue on appeal was whether prejudice resulted from this failure. The appellate court declined to apply *In re A.C.* (2021) 54 Cal.App.5th 1060, noting that ICWA imposes notice requirements that are, at their heart, as much about effectuating the rights of Indian tribes as they are about the rights of the litigants already in a dependency case. Requiring a parent to prove that the missing information would have demonstrated a reason to believe that the Minor may be an Indian child would effectively impose a duty on that parent to search for evidence that the Legislature has imposed only on the Agency. "[I]n ICWA cases, a court must reverse where the record demonstrates that the agency has not only failed in its duty of initial inquiry, but where the record indicates that there was readily obtainable information that was likely to bear meaningfully upon whether the child is an Indian child."

4. **In re Charles W.** 4th DCA, Div. 1, 66 Cal.App.5th 483 280 Cal.Rptr.3d 852 (June 17, 2021)

Holding: No further ICWA inquiry was required where there was a prior court finding that ICWA did not apply and the parents' representations in court through counsel was that there no change in information and no Indian ancestry.

Facts: The parents had a history of substance abuse that lead to a prior petition and removal of their two children in 2018. The mother reunified and the case was dismissed. In that case, the court found that ICWA did not apply. Several months later the couple had another child. A new petition was filed after the parents and the children were found by police in a hotel room with a large quantity of illicit drugs within reach of the children. During the initial investigation, Mother told the social worker she had Yaqui and Aztec heritage. The agency filed a completed ICWA-010(A) indicating Mother's report of "Yaqui and Aztec Native American heritage" and Father's denial of Indian heritage. The agency also kept a field demographic worksheet, that listed Sioux tribal affiliation for the children.

At a special hearing to appoint counsel, the parties appeared remotely due to COVID-19 protocols. Mother was present telephonically. Mother's counsel indicated that an ICWA-020 was filed in the previous case and that mother continues to indicate no Native American ancestry. The mother did not contest these representations and the court found ICWA did not apply, and no further inquiry was required. At the jurisdiction and disposition hearing, the court confirmed that ICWA did not apply. The father appealed.

Father claims that the agency did not make a sufficient inquiry of Indian heritage through the mother. Section 224.2(b) requires that after a child is placed in custody, the agency has the duty to inquire about Indian heritage, including, but not limited to, asking the child, parents, legal guardian, Indian custodian, extended family members, others who have an interest in the child, and the party reporting child abuse or neglect, whether the child is, or may be, an Indian child. Substantial evidence supports the finding that ICWA does not apply. Mother was present throughout the hearing, and she was in apparent agreement with her counsel's representation of "no Native American ancestry." Counsel is an officer of the court and a practitioner in juvenile dependency matters; there is no reason to believe he misreported Mother's ancestry or misunderstood the implications of his report. Furthermore, the court reasonably relied on a prior finding involving the same family. As to the social workers worksheet listing Sioux tribal affiliation, given the parents subsequent interviews in which no Sioux affiliation was named, this denotation was too vague and attenuated to give the court reason to believe the children might be Indian children.

Father also argues that the court had a duty to directly inquire of mother regarding her Indian heritage, and that the lack of an ICWA-020 form in the case was an error. Based on counsel's representation with mother present and the previous case finding that ICWA did not apply, it was appropriate for the court to rely on the attorney's representations. And while the ICWA-020 should have been filed, when the agency has no reason to know the child may be an Indian child, the agency is not required to cast about for information or pursue unproductive investigative leads. Any error would also be harmless, as there is no new assertion of Indian ancestry and there would be no miscarriage of justice absent further inquiry. The court's findings and orders are affirmed.

5. **In re J.S.** 2nd DCA, Div. 7. 62 Cal.App.5th 678 276 Cal.Rptr.3d 876 (March 02, 2021)

Holding: Ancestry.com results that a relative has significant Native American ancestry, without additional information regarding a possible tribe or geographic area of origin, is not sufficient to trigger a duty to further inquire under the Indian Child Welfare Act (ICWA).

Facts: Paternal grandmother submitted her DNA to Ancestry.com, the results of which indicated that she was 54% Native American. Paternal grandmother was shocked by these results and was not aware that any of her relatives were eligible for enrollment in any tribe. The results did not provide an associated tribe of descent. Based on this information, the court found that ICWA did not apply. Mother appealed the jurisdictional and dispositional findings and contended that the department had not complied with ICWA. The appellate court rejected the argument and affirmed. Federal regulations implementing ICWA require that state courts ask each participant in a child custody proceeding whether they have a reason to know if a child is an Indian child. An Indian child is a member of, or is eligible for membership in, a federally recognized Indian tribe

or is the biological child of a member of a federally recognized tribe. The term "Native American" has a different connotation for purposes of Ancestry.com, which includes ethnic origins from North and South America. Because the Ancestry.com results did not contain the identity of a possible tribe or any specific geographical region, the results have little usefulness in determining whether the minors were Indian children as defined under ICWA. Transmission of notice to the Bureau of Indian Affairs would have been an idle act as they could not have assisted the Department in identifying a tribal agent for any relevant federally recognized tribe without the identity of the tribe or at least a specific geographic area of possible ancestry origin.

6. **In re Josiah T.** 2nd DCA, Div. 8. 71 Cal.App.5th 388 286 Cal.Rptr.3d 267 (November 08, 2021)

Holding: Substantial evidence did not support the court's finding that there was no reason to know that the child was Indian based on DCFS's failure to make further inquiry about the father's Cherokee Indian ancestry and to disclose full information about its investigation to the court.

Facts: In 2017, Los Angeles County Department of Children and Family Services (DCFS) removed Josiah and his three older siblings following a lengthy investigation after the parents fled the state to evade investigation of domestic violence allegations. The court found it had no reason to know ICWA applied regarding mother after she denied having Indian ancestry. As for father, the court did not ask about his Indian ancestry when he appeared at the older siblings' arraignment. DCFS failed to ask him about any Indian ancestry, neglected to promptly report possible Choctaw ancestry that was disclosed by paternal relatives, and although paternal grandmother reported Cherokee ancestry to DCFS, they delayed disclosing this to the court. They later reported that the paternal grandmother disclosed Cherokee ancestry, but later denied such ancestry. Subsequent reports only contained information about her denial of Indian ancestry. The court found there was no reason to know that Josiah was an Indian child after DCFS received responses from the Bureau of Indian Affairs and three Choctaw tribes that he was not Choctaw.

Substantial evidence did not support the juvenile court's finding that there was no reason to know that Josiah was Indian. Under ICWA, courts have an affirmative and continuing duty to inquire whether a child may be an Indian. Further inquiry is required when there is reason to believe that an Indian child is involved, and formal notice is required when there is reason to know that child is Indian. In this case, DCFS did not fulfill its initial duty of inquiry because it failed to ask known paternal relatives about Indian ancestry until almost 18 months after the case began when reunification services were terminated. The paternal grandma's statements that she had Cherokee ancestry through her grandmother was sufficient support a "reason to believe" Josiah was Indian and trigger the duty to make further inquiry, but DCFS waited seven months before it followed up with other paternal relatives. They also failed to inquire if father's maternal side had Indian ancestry and did not contact the Bureau of Indian Affairs or any of the Cherokee tribes to see if Josiah had any Indian ancestry.

The paternal grandma's later statements that she did not have Cherokee ancestry was insufficient to justify DCFS's failure to make further inquiry for 7 months. When there is a conflict in the evidence, the social worker still has a duty to make further inquiry as held In re Gabriel G. (2012) 206 Cal.App.4th 1160. Additionally, DCFS also failed its obligation under California Rules of Court, rule 5.481.(a)(5) to provide the court with all information regarding the child's Indian status on an ongoing basis rather than waiting several months to provide the information in a report. By omitting this information, the evidence was insufficient to support the court's finding that it had no reason to know that Josiah could be Indian.

The case is remanded for DCFS to provide full disclosure of its investigation and then the court can decide whether there is reason to know that Josiah is an Indian child. The orders terminating parental rights are reversed and can be reinstated if the court receives no further information about Indian ancestry after DCFS conducts an adequate investigation.

7. **In re S.R.** 4th DCS, Div. 2 64 Cal.App.5th 303 278 Cal.Rptr.3d 766 (April 28, 2021)

Holding: In a dependency case, disclosure of specific information regarding Indian ancestry does provide "reason to believe" that the children may be Indian children, thus triggering the court and the child welfare department's duty to inquire further under the Indian Child Welfare Act ("ICWA").

Facts: At the permanency planning review hearing after reunification services were terminated to the parents, the maternal grandparents sought custody of the two young children. The maternal grandmother completed the ICWA Inquiry form. She indicated that the children had other unidentified relatives with Indian ancestry and had relatives who lived on federal trust land or an Indian reservation. The maternal grandfather completed the same form and indicated that he had lineage tracing to the Yaqui tribe of Arizona and the children had other relatives who lived on federal land or an Indian reservation. He further identified the children's great-grandmother as a Yaqui ancestor, and she currently resided with the grandparents. The parents denied knowledge of Indian ancestry at the time of detention. After the disclosures by the grandparents, the juvenile court did not inquire about the children's Indian ancestry, and the Agency did no further investigation. Parental rights were thereafter terminated, and adoption was ordered as the permanent plan. The mother appealed on the basis that the court should have applied the provisions of the ICWA to the case, since there was evidence that the children had Indian ancestry.

The juvenile court and the county child welfare department have an "affirmative and continuing duty" to inquire whether a child who is the subject of a juvenile dependency petition is an Indian child. The department must provide notice to the Indian tribe in any case involving foster placement of the child or termination of parental rights where the court knows or has reason to know that the child is an Indian child.

If information becomes available suggesting affiliation with a tribe, there is a duty of further inquiry regarding the possible Indian status of the child. The question of tribal membership is

determined by the tribes, not the courts or the child welfare department. The court and the department each erred in not conducting further inquiry with the very specific information in this case, even if the evidence did not directly establish the children or their parents are members or eligible for membership in the tribe. The WIC 366.26 orders are conditionally reversed, and the matter remanded to the juvenile court to comply with the inquiry and notice provisions of ICWA and related California law.

8. **In re Y.W.** 2nd DCA, Div. 7. 70 Cal.App.5th 542 285 Cal.Rptr.3d 498 (October 19, 2021)

Holding: A parent need not assert Indian ancestry to show that the Agency's failure to make an appropriate inquiry under the Indian Child Welfare Act (ICWA) was prejudicial.

Facts: The minors were removed due to the parents' substance abuse. At the detention hearing, Father said he believed his grandmother was 95% Cherokee. Mother, who was adopted, said she did not have Indian ancestry. The Agency mailed ICWA-030 forms to the various Cherokee tribes. The notice listed Mother's biological parents as unknown, and specified some of Father's paternal grandmother's information, but neglected to include her date and place of birth. The Agency located Mother's adoptive parents who stated that they knew the name of Mother's biological father and had contact information for a maternal aunt. The Agency did not follow up to obtain further information about Mother's biological parents. At the section 366.26 hearing, the court found that ICWA notice was proper, that ICWA did not apply, and terminated parental rights. The appellate court affirmed the orders but remanded the case with directions to comply with ICWA. If the court or Agency has reason to believe that an Indian child is involved in a proceeding but does not have sufficient information to determine that there is a reason to know that the child is an Indian child, the court and the Agency shall make further inquiry regarding the possible Indian status of the child. (§ 224.2, subd. (e).) As part of its inquiry, section 224.2, subdivision (b) requires the Agency to ask extended family members whether the child is or may be an Indian child. Here, the Agency failed to satisfy its duty to inquire because once the social worker learned of a potentially viable lead to locate Mother's biological parents, it did not make meaningful efforts to locate and interview them. Further, the Agency omitted key information about Father's relative on the ICWA-030 forms. The appellate court disagreed with *In re Rebecca R.* (2006) 143 Cal.App.4th 1426 and *In re A.C.* (2021) 54 Cal.App.5th 1060, concluding that "[i]t is unreasonable to require a parent to make an affirmative representation of Indian ancestry where the Department's failure to conduct an adequate inquiry deprived the parent of the very knowledge needed to make such a claim." A parent does not need to assert he or she has Indian ancestry to show the Agency's failure to make an appropriate inquiry under ICWA was prejudicial.

2022 (Current as of April 7, 2022)

1. *In re A.C.,* 2nd DCA, Div. 1 – Cal. Rptr. 3d – 2022 WL 630860 (March 4, 2022)

Holding: When there is some indication that a child may be an Indian child, a child welfare agency's failure to ask the child's extended family about possible Indian heritage under the Indian Child Welfare Act (ICWA) constitutes prejudicial error.

Facts: A.C. and two siblings were removed from mother and father and declared dependents after Welfare and Institutions Code (WIC) sections 300, 360, and 342 petitions were filed by the Department of Children and Family Services (DCFS) of Los Angeles County. Both parents filed ICWA-020 forms in which they each denied Indian ancestry for A.C., and the dependency court found that it had no reason to know or to believe that A.C. was an Indian child as described by ICWA. For no stated reason, a detention report stated that mother denied Indian ancestry for her family, but ICWA may apply. There was no further ICWA inquiry reported by DCFS. At different points in time, A.C. and the two siblings were placed with two different maternal aunts and a maternal cousin. Father lived with his paternal grandmother and paternal uncle. Social workers did not ask these maternal and paternal relatives about potential Indian ancestry.

ICWA requires the child welfare department to inquire about possible Indian ancestry with the child, parents, legal guardian, Indian custodian, extended family members, others who have an interest in the child, and the party reporting child abuse or neglect. (WIC section 224.2(b).) The term "extended family member" is defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, as a person at least 18 years old who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent. (25 U.S.C. 1903(2).)

The detention report stated that A.C. might be an Indian child, and the fact that DCFS failed to conduct any further inquiry into mother's and father's extended family members was prejudicial. The ICWA-020 form filled out by both parents is not intended to constitute a complete inquiry into Indian heritage and further inquiry by the department may be required by ICWA. Mother herself was in the foster care system and may not have known her cultural heritage, so it was even more important that DCFS ask maternal relatives about possible Indian heritage.

The majority opinion discussed different perspectives about the appropriate standard of review for an ICWA inquiry challenge and the resulting prejudice analysis. In determining that prejudice existed in this case, the appellate court weighed the competing interests of ICWA and prompt resolution of dependency cases. ICWA was designed to remedy child welfare abuses by officials, judges, and adoption agencies that led to widespread removal of Indian children from their homes and communities. The importance of ICWA's goal warrants enforcement of its requirements, even if it delays permanency for children.

In discussing the harmless error standard that has been applied to ICWA inquiry challenges, the dissent noted that the ICWA-020 form admonished father to provide new information on Indian ancestry to the court, but father remained silent. The dissent argued that remand for further ICWA inquiry should require a proffer that a relative has information about Indian ancestry to minimize unwarranted delays in permanency for children.

The jurisdiction and disposition orders concerning A.C. are affirmed with instructions, but the case is remanded for compliance with WIC section 224.2.

2. *In re Antonio R.*, 2nd DCA, Div. 7 –Cal. Rptr.3d – 2022 WL 794843 (March 29, 2022)
Holding: Information from extended family members is meaningful in determining whether a minor is an Indian child, and it is not necessary to show that the information is likely to indicate the child is in fact of Indian heritage. An agency's failure to include extended family members in its inquiry is inadequate and therefore prejudicial.

Facts: In October 2018, the Los Angeles County Department of Children and Family Services (DCFS) filed a Welfare and Institutions Code (WIC) section 300 petition alleging that mother abused drugs and failed to supervise and protect then one-year-old Antonio. Mother and father both denied Indian ancestry, and the court found that ICWA did not apply. Paternal grandparents told the court that father did not have Indian ancestry, but DCFS did not ask maternal grandmother, maternal aunts, and a maternal uncle who were in the courtroom for the disposition hearing. In August 2021 at the WIC 366.26 hearing, maternal grandmother was questioned but was not asked if Antonio may have Indian ancestry. The court terminated mother's and father's parental rights and designated maternal grandmother and maternal grandfather prospective adoptive parents. Mother appealed, claiming DCFS failed to comply with the inquiry and notice provisions of ICWA and WIC section 224.2(b).

DCFS has a duty under WIC section 224.2(b) to ask extended family members about a child's possible Indian ancestry despite denials by both mother and father. The duty of inquiry extends beyond parents because relatives may have information that parents do not have. Requiring inquiry of extended relatives is also meant to counter possible reluctance of parents and Indian custodians to having tribes involved. The court and the agency have a continuing duty of further inquiry. Despite opportunities over the course of nearly three years to speak with them at court hearings and outside of court, DCFS failed to ask maternal relatives about Antonio's possible Indian ancestry. The court failed to ensure that DCFS met its duty and erred in finding that ICWA did not apply.

The order terminating mother's and father's parental rights is conditionally affirmed. The matter is remanded for the juvenile court and DCFS to comply with the inquiry and notice provisions of ICWA and California law.

3. In re A.R., 4th DCA, Div. 3 G060677 (decided March 29, 2022 certified for publication April 7, 2022)

Holding: Failure to conduct ICWA inquiry constitutes a miscarriage of justice notwithstanding no claim that children are in fact Indian children.

Facts: In January 2021 Mother stabbed father to death while the children were in the home. She was taken into custody and charged with murder. Children were taken into custody by the agency and placed with their paternal grandparents. Mother submitted on the petition and court bypassed services and scheduled a 366.26 hearing and terminated parental rights. No one ever asked about Indian ancestry. Mother made no claim of ancestry on appeal.

4. In re Darian R., 2nd DCA, Div. 1 75 Cal. App. 5th 502 (February 24, 2022)

Holding: The DCFS's failure to interview extended family members as part of the ICWA inquiry was not a prejudicial error because there was no readily obtainable information that would meaningfully help determine whether the children were Indian.

Facts: Following an unsuccessful family maintenance case involving the two older children, Los Angeles County Department of Children and Family Services (DCFS) removed the parents' three children over their problems with substance abuse and mental health issues. The court previously determined that the Indian Child Welfare Act (ICWA) did not apply in the family maintenance case and made the same determination after both parents reported no known Indian ancestry. The court terminated both parents' parental rights after they failed to reunify with their children. Mother appeals arguing that DCFS and the court failed to comply with ICWA by neglecting to interview the maternal grandfather and aunt about the children's Indian ancestry.

As part of compliance with ICWA, WIC §224.2 requires only the child welfare agency to interview extended family members about Indian ancestry. DCFS's failure to interview the maternal grandfather and aunt was error. In determining whether this error is prejudicial, the court applied *In re Benjamin M.* (2021) 70 Cal.App.5th 735 holding failure to interview extended family members is prejudicial if there is "readily available information" in the record that is likely to help determine whether the child is Indian. Additional inquiry in this context is required where there is a reasonable probability that it will yield meaningful information about the Indian ancestry.

In this case, DCFS error in failing to interview the extended maternal relatives was not prejudicial. Continual inquiry of the maternal grandfather and aunt is unlikely to reveal meaningful information about the children's Indian ancestry. The juvenile court previously determined that ICWA did not apply in the family maintenance case and because the children all have the same parents and thus the same ancestry, it is unlikely to uncover new information. Additionally, unlike *In re Y.W.* (2021) 70 Cal.App.5th 542, mother was not estranged from her relatives and therefore unaware of any potential relationship with a tribe. Mother lived with the maternal grandfather and aunt and was subject to an ongoing court order to provide information related to ICWA. Accordingly, it is unlikely that continual inquiry will yield meaningful information.

The juvenile court's order terminating mother's parental rights is affirmed.

5. *In re H.V.*, 2nd DCA, Div. 5 75 Cal. App. 5th 422 (February 18, 2022)

Holding: The county agency's failure to comply with ICWA inquiry duties by not interviewing extended family members was not a harmless error because mother neglected to assert Indian ancestry on appeal. Accordingly, the case is remanded to ensure ICWA compliance.

Facts: The juvenile court sustained a petition filed by Los Angeles County Department of Children and Family Services (Dept.) based on mother's violent altercation with her companion that endangered her child. The Dept. had no reason to believe the child was Indian after interviewing mother, but there was no indication that they asked the maternal great-grandparents about this ancestry. Mother reported she did not have any Indian ancestry on the Parental Notification of Indian Status form and at the detention hearing, where she also indicated that the alleged father did not have such ancestry. The court found that neither mother nor the alleged father had any Indian ancestry.

6. *In re I.F.* 6th DCA H049207 (April 6, 2022)

Holding: Department's initial investigation triggered the duty of further inquiry under state law and failure to complete further inquiry requires remand.

Facts: Petition filed in December of 2019. Grandfather reported that his own father (maternal great-grandfather) was from Minnesota and might have had Indian ancestry. Initial report of social worker indicated there was "reason to believe" child may be an Indian child. Mother filed an ICWA-020 form saying she "may have Indian ancestry." Child was returned to mother's care in January 2020 and the following month worker's report stated child should stay in mother's care and that ICWA did not apply. In March the petition was sustained and child was declared a dependent of the court, but no ICWA findings were made. Child remained in mother's care with family maintenance services. In May 2020 mother had another baby and department filed a petition due to mother's inability to care for the newborn. Mother again reported she may have Indian ancestry on her father's side. She had no more information about ancestry and stated that relatives with information had passed away. Again worker interviewed maternal grandfather and checked box that there is "reason to believe". Children both remained with mother and no further ICWA findings were made. Children were taken into protective custody in April 2021. Report alleged that ICWA had been found not to apply. At initial hearing

7. *In re J.C.* 2nd DCA, Div. 7 B312685 (April 4, 2022)

Holding: Because the juvenile court failed to ensure the Department fulfilled its duty of inquiry under section 224.2, subdivision (b), substantial evidence did not support the court's finding ICWA did not apply.

Facts: Petition filed in August 2018. Parents each filed an ICWA-020 saying they had no Indian ancestry as far as they knew. Mother denied Indian heritage to social worker and both parents denied Indian ancestry at the detention hearing when asked by the court. No inquiry made beyond that. Department interviewed paternal grandmother and great grandmothers and mother's stepfather but did not ask any of them about Indian ancestry.

8. *In re K.T.,* 4th DCA, Div. 2 2022 WL 872477 (March 23, 2022)

Holding: When there is reason to believe that children may be Indian children because parents and extended family members provided specific tribal information to the child welfare agency and the agency fails to conduct further inquiry or investigation, it is prejudicial error.

Facts: In June 2019, K.T. and his younger half-brother, D.M., were declared dependents after a court found true allegations of physical abuse by mother. In October 2019, mother gave birth to K.T.'s younger sister, D., who was also declared a dependent. Mother informed San Bernardino Children and Family Services (CFS) of possible Blackfeet ancestry. Mother and maternal grandmother provided names and contact information for maternal grandfather and great-grandmother. Father filed two ICWA-020 forms, the first claiming Blackfeet and Cherokee ancestry, and the second claiming Choctaw ancestry. Paternal grandmother provided dates and places of birth for herself and paternal great-grandfather. At the detention hearing for D., maternal relatives were present in the courtroom and counsel for D. informed the court that they claimed Cherokee heritage. Without inquiring of these relatives, the court noted there was a dependency hearing for D.'s siblings and ordered CFS to consult with social workers in the siblings' case to prepare ICWA notices for D. CFS sent notices to Blackfeet and Cherokee tribes that omitted tribal and biological information for maternal great-grandmother and contained no information about paternal great-grandfather. CFS sent no notices Choctaw tribes. Nothing in the record showed that social workers followed up on information about D.'s Indian ancestry, and CFS sent the same notices for D. that they sent for her siblings. Nearly two years later, when parents failed to reunify, the court found that ICWA did not apply to K.T. or D., that the children were likely to be adopted, and terminated parental rights of mother and father. Parents appealed, arguing that CFS failed to conduct adequate inquiry as required by Welfare and Institutions Code (WIC) section 224.2.

ICWA requires notice to tribes when a court or social worker knows or has reason to know that proceedings involve an Indian child. The child welfare agency has a duty to conduct additional investigation if the court or social worker has reason to believe the child is an Indian child. Reason to believe is defined as having information suggesting that a child's parent or the child is a member or may be eligible for membership in a tribe. The duty of further inquiry is triggered even when the information is not strong enough to trigger the notice requirement. To satisfy this duty, an agency must, as soon as it is able, interview parents and extended family members and share information with the Bureau of Indian Affairs (BIA) and tribes so tribes can determine membership or eligibility and whether it will participate in the proceedings.

Mother, maternal grandmother, father, and paternal grandmother provided information about Indian ancestry, giving CFS reason to believe that K.T. and D. were Indian children. CFS should have contacted relatives whose names were provided and submitted all information to the BIA and tribes. In light of his two ICWA-020 forms, CFS should have clarified with father whether he was claiming Choctaw heritage in addition to Blackfeet and Cherokee heritage. Because CFS did not adequately investigate claims of Indian heritage, the juvenile court should not have found that ICWA did not apply.

The order terminating parental rights is conditionally reversed. The matter is remanded for the juvenile court to direct CFS to comply with the inquiry and notice provisions of ICWA and update the court.

9. In re. S.S.., 2nd DCA, Div. 1 75 Cal. App. 5th 575 (February 24, 2022)

Holding: DCFS's failure to conduct ICWA inquiry of the maternal grandmother was a harmless error absent any readily available information in the record likely to meaningfully determine whether the child is Indian.

Facts: Los Angeles County Department of Children and Family Services (DCFS) removed S.S. from mother and placed her in foster care with a non-relative. The court found there was no reason to know that Indian Child Welfare Act (ICWA) applied after mother reported no known Indian ancestry. Although the maternal grandmother came forward requesting placement, DCFS failed to inquire about her Indian ancestry. The juvenile court denied the grandmother's request for placement after she had only inconsistent virtual visits, terminated mother's parental rights, and designated the foster parent as the prospective adoptive parent. Mother appeals arguing DCFS failed to complete the ICWA inquiry.
WIC §224.2 requires the court and county welfare agency to make an affirmative and continuing duty to inquire whether the child may be Indian which includes asking extended family members about this ancestry. In determining whether such a failure is prejudicial, ordinarily the appellant must show a more favorable outcome absent the error. However, this is difficult where there are deficiencies in the record because of the agency's failure to document or conduct the ICWA inquiry. In resolving this issue, the court in *In re Benjamin M.* (2021) 70 Cal.App.5th 735 rejected requiring an affirmative assertation of Indian ancestry on appeal and held that an error is prejudicial, and a reversal is warranted if the record shows a failure to complete the initial duty of inquiry and there is "readily obtainable information that was likely to bear meaningful upon whether the child is an Indian child."
Here, DCFS met the duty of inquiry for mother but not for the grandmother. Although both S.S. and mother's counsels requested that the grandmother be assessed for placement, they never asserted any possible Indian ancestry knowing that she would've been preferred for placement under ICWA. This omission indicates there is no such information that will bear meaningfully to reveal that S.S. is an Indian child. Accordingly, DCFS's failure to conduct ICWA inquiry of the grandmother is harmless.

The juvenile court's order is affirmed.