

The Indian Child Welfare Act for Incarcerated Parents

Resource Guide

Tribal/State Programs Unit
Center for Families, Children & the Courts
Judicial Council of California
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What if our family doesn't want the tribe to know about the court case?

The tribe has the right to intervene or participate without intervening in an ICWA case. The parents cannot waive the rights of the tribe.

Participating in court hearings

While in custody, you may participate in your child's court hearing in person, by phone, or virtually.

Can a tribal home visiting program assist my family?

Yes. A tribal home visiting program may be able to assist a parent in custody and their children. Reach out to your tribe or a tribal home visiting program for information. acf.gov/ecd/tribal/tribal-home-visiting

Lactation in custody

California Penal Code section 4002.5 requires county jails or sheriffs to develop policies around lactation support and storage and delivery of breast milk to an infant or toddler. [california breastfeeding.org/wp-content/uploads/2023/06/cbc-supporting-lactation-in-jails-DRAFT-5.pdf](http://california-breastfeeding.org/wp-content/uploads/2023/06/cbc-supporting-lactation-in-jails-DRAFT-5.pdf)

Are there traditional resources for tribal parents in custody?

Yes. The American Indian Religious Freedom Act of 1978 legalizes traditional ceremonies and the use of tribal resources. For information, ask for your facility's rules on religious or tribal accommodations. Traditional healers or tribal service providers may be able to enter your facility to meet with you and conduct ceremonies and traditions. Visit our services directory to find resources. courts.ca.gov/programs-initiatives/tribalstate-programs/indian-child-welfare-act-icwa/statewide-directory

FOR MORE INFORMATION

The Tribal/State Programs Unit of the Judicial Council's Center for Families, Children & the Courts provides support to local courts on tribal issues and assists with the development of policies, positions, and programs to ensure the highest quality of justice and service for California's Native American communities. The unit provides educational and technical assistance on the Indian Child Welfare Act, domestic violence, dating violence, sexual assault, trafficking, elder abuse, and stalking impacting tribal communities.

To learn more about the Tribal/State Programs Unit, or for assistance, call 415-865-7874 or visit courts.ca.gov/programs/tribalstate-programs.

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The Indian Child Welfare Act for Incarcerated Parents

Important Information for
Incarcerated Parents of
American Indian/Alaska Native
Children in California

May 2025



Judicial Council of California

What is the Indian Child Welfare Act?

The Indian Child Welfare Act (ICWA) is a federal law created to keep American Indian/Alaska Native (AI/AN) children with their families and connected to their cultures and communities. Congress passed ICWA in 1978 to protect the best interests of Indian children, keep AI/AN families together, and “promote the stability and security of Indian tribes and families” (25 U.S.C. § 1902). ICWA sets minimum federal requirements that apply to state child custody proceedings involving Indian children. California has passed laws that set higher standards and additional requirements. For more information about ICWA, visit courts.ca.gov/programs-initiatives/tribalstate-programs/indian-child-welfare-act-icwa.

What are the four types of ICWA court cases?

Family court

ICWA applies if custody or care of an Indian child may be given to someone other than the child’s parents or if parental rights may be terminated.

Probate court

ICWA applies to probate guardianship cases involving Indian children.

Juvenile Court—Dependency

ICWA applies in cases involving concerns about abuse or neglect of an Indian child. In these cases, the court may order that:

- Parents or Indian custodians and the child receive culturally appropriate services;
- The child be removed from the parents’ care and live in relative or foster care during the reunification process; or

- Parental rights be terminated or that the child is eligible for Tribal Customary Adoption per the laws, traditions, and customs of the tribe without termination of parental rights.

Juvenile Court—Delinquency

If a child is charged with breaking the law, the case may be heard in a delinquency court. ICWA’s requirements (other than inquiry) apply to delinquency proceedings only when an Indian child is in foster care or at risk of entering foster care. courts.ca.gov/sites/default/files/courts/default/2024-08/icwa-delinquency-factsheet.pdf

What are the rights of children and families under ICWA and related laws?

If ICWA applies, the case will include important legal protections, including the following:

- * Notice of court hearings to the parent(s), Indian custodian, and tribe for placement changes or termination of parental rights
- * Testimony of a qualified expert witness
- * Active efforts to keep families together and connected to the tribal community
- * Placement preferences
- * Transfer to tribal court in some cases
- * Tribal Customary Adoption

For additional information, please visit courts.ca.gov/programs-initiatives/tribalstate-programs/indian-child-welfare-act-icwa/icwa-job-aids.

The Foster Youth Bill of Rights applies to all youth in foster care and includes specific provisions for AI/AN children whether ICWA applies or not. fosteryouthhelp.ca.gov/foster-youth-rights/

How can I give the court information about our tribal lineage?

You can download this fillable family tree to provide to the court during a hearing or to your attorney: courts.ca.gov/documents/ICWA-Familyfillable_tree.pdf.

What if we are not from a federally recognized tribe?

In California, the court can apply “Spirit of the Law” for a Native American family that is not ICWA eligible to provide the same services and protections required by ICWA.

Can the tribe participate in my child’s court hearings?

Yes. A tribal representative or attorney may represent the tribe in a court hearing. The tribe can intervene at any stage of an ICWA case. If ICWA doesn’t apply, the court can allow the tribe to participate in hearings on a case-by-case basis.

Will the tribe know that our family is involved with the legal system?

Yes. If there is reason to know that a family is American Indian/Alaska Native, then the tribe, parent, guardian, Indian custodian, and Bureau of Indian Affairs must be notified by the:

- Social worker in a dependency case;
- Probation officer in a delinquency case;
- Parent in a family court case; or
- Court clerk in a probate guardianship case.



Indian Child Welfare Act (“ICWA”) Requirements*

Applicability (25 U.S.C. §§1901-1923, 1903(i); 25 C.F.R. §§23.2, 23.103, 23.107; Guidelines B.1 & B.2; W.I.C. §§224.1, 224.3; Fam. Code §170; Prob. Code, §§1459.5(a), 1516.5(d); Rule 5.480)

ICWA applies to any state court case involving an Indian child that may result in a voluntary or involuntary foster care placement; guardianship placement; custody placement under Family Code section 3041; declaration freeing a child from the custody & control of one or both parents; termination of parental rights; or voluntary or involuntary adoptive placement including all proceedings under WIC sections 300 et seq. & 601 & 602 et seq. when the child is in foster care or at risk of entering foster care & one of the following: 1) the proceedings are based on conduct that would not be a crime if committed by an adult, 2) the court is setting a hearing to terminate parental rights, or 3) the court finds that the foster care placement is based entirely on conditions within the child’s home & not even in part upon the child’s criminal conduct.

Indian Child (25 U.S.C. §1903(4); 25 C.F.R. §23.2; Guideline B.1; Fam. Code, §170(a); Prob. Code, §1449(a); WIC, §224.1(a) & (b))

Is an unmarried person under the age of 18 who is (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe & is a biological child of a member of an Indian tribe. Indian child may include a person over 18, but under 21, years who is a dependent of the court unless that person elects not to have ICWA apply. A determination by a tribe or the Bureau of Indian Affairs (BIA), absent a determination by the tribe to the contrary, that a child is or is not a member or eligible for membership is conclusive. The child is NOT required to be affiliated with the same tribe the parent is a member of. (25 U.S.C. §1903(4)). Enrollment is NOT required to establish membership unless the tribe confirms that enrollment is required. (WIC, §224.2(h))

Indian Custodian (25 U.S.C. §1903(6); 25 C.F.R. §23.2; Fam. Code, §170(a); Prob. Code, §1449(a); WIC, §224.1(a))

Is any person who has legal custody of an Indian child under tribal law or custom or state law or to whom temporary physical care, custody, & control has been transferred by the parent.

Intervention/Invalidation (25 U.S.C. §§1911(c), 1914; Fam. Code, §§175(e), 177(a); Prob. Code, §§1459(e), 1459.5(b); WIC, §§224(e), 224.4; Rules 5.482(d) & 5.487)

An Indian custodian, & Indian child’s tribe have the right to intervene at any point in the proceeding. If ICWA applies, the Indian child, parent, Indian custodian, or the child’s tribe may petition any court of competent jurisdiction to invalidate the proceedings for not complying with the requirements of sections 1911 (jurisdiction; transfer; intervention; full faith and credit to public acts, records, and judicial proceedings of Indian tribes), 1912 (notice, appointment of counsel, examination of reports or other documents, active efforts, qualified expert witness testimony) or 1913 (consent requirements) of ICWA.

Inquiry (25 C.F.R. §23.107(a); Fam. Code, §177(a); Prob. Code, §§1459.5(b), 1513(h); WIC, §224.2; Rules 5.481(a) & (b); 5.482(c) & 5.668(c))

In all child custody proceedings, the court & the petitioner, including a social worker, a probation officer, a licensed adoption agency or adoption service provider, or an investigator must ask the child, the parents or legal guardians, Indian custodian and extended family members as soon as possible whether there is information indicating the child is or may be an Indian child & must affirm on the petition that inquiry has been made. If that initial inquiry gives reason to believe the child is an Indian child, further inquiry regarding the possible Indian status of the child must be done as soon as practical. This further inquiry must include at a minimum interviewing the parents, Indian custodian and extended family members to gather ancestry information, contacting the California Department of Social Services (CDSS) & the BIA for assistance in identifying tribes and tribal contact information, contacting others that may reasonably be expected to have information about the child’s status, and contacting tribe(s) by telephone, facsimile or email and sharing with the tribe(s) any information the tribe(s) require to make a determination about the child’s status. In all child custody cases, at their first court appearance, the parent or guardian must be ordered

*Based on The Indian Child Welfare Act 25 U.S.C. §§ 1901-1963; Indian Child Welfare Act Regulations 25 C.F.R. Part 23; Guidelines for Implementing the Indian Child Welfare Act; and California statutes and rules of court.

to complete *Parental Notification of Indian Status* (form ICWA-020), & the court must ask all participants whether they have information indicating the child is or may be an Indian child & instruct them to inform the court if they subsequently receive such information.

Reason to Know the Child Is an Indian Child (25 C.F.R. §23.107(c); Fam. Code, §177(a); Prob. Code, §1459.5(b); WIC, §224.2(d); Rule 5.481(b))

The following circumstances give “reason to know” the child is an Indian child: 1. A person having an interest in the child provides information suggesting that the child is an Indian child; 2. The residence or domicile of the child, the child’s parents, or an Indian custodian is on a reservation or other tribal lands or in an Alaska Native village; 3. The child is or was a ward of a tribal court; or 4. Either parent or the child possesses an I.D. card indicating membership in an Indian tribe. If there is “reason to know” the court must require the petitioner to provide evidence that the petitioner has used due diligence to identify and work with all tribes the child may be affiliated with to verify the child’s status; require formal ICWA notice by registered or certified mail return receipt requested as discussed below; and must treat the child as an Indian child unless and until the court can confirm that the child is not an Indian child in accordance with WIC § 224.2(i).

Notice (25 U.S.C. §1912(a); 25 C.F.R. §§23.11 & 23.111; Guidelines D.1-D.7; Fam. Code, §180; Prob. Code, §1460.2; WIC, §§224.3, 727.4(a)(2); Rule 5.481(c))

When: For any hearing that may culminate in an order for foster care placement, including a guardianship placement, termination of parental rights or declaration freeing the child from the custody & control of one or both parents, preadoptive placement or adoptive placement.

How: Party seeking foster care placement, guardianship, termination of parental rights, or order declaring the child free from the custody & control of one or both parents, must notify the parent(s), Indian custodian, & the tribe(s) there is reason to know the child is a member of or eligible for membership in, of the pending proceedings by registered or certified mail, return receipt requested as specified in Fam. Code, §180, Prob. Code, §1460.2, or WIC, §224.3. *Notice of Involuntary Child Custody Proceedings for an Indian Child* (form ICWA-030) is required to be completed & sent for all cases except excluded delinquency proceedings, for every hearing that may culminate in one of the outcomes listed above. In addition to the information included on form ICWA-030, the party must also include: 1. Information regarding the Indian child’s Indian custodian including: all known names, including maiden, married, former, & aliases; current & former addresses; birthdates; places of birth & death; tribal enrollment numbers; & any other identifying information, if known. 2. A copy of the child’s birth certificate if available. 3. A copy of the petition by which the proceeding was initiated. 4. The location, mailing address, & telephone number of the court & all parties notified. When a child’s Indian tribe is identified, the tribe is entitled to notice of all other hearings and service of all documents in the same manner as all other parties.

Active Efforts (25 U.S.C. §1912(d); 25 C.F.R. §§23.2 & 23.120; Guidelines E.1-E.6; Fam. Code, §§177(a), 3041(e); Prob. Code, §1459.5(b); WIC, §§ 224.1(f), 361.7; Rule 5.485(c))

The party seeking an involuntary foster care placement, guardianship, order freeing the child from the custody & control of one or both parents, or termination of parental rights must provide evidence to the court that active efforts have been made to provide remedial services & rehabilitative programs designed to prevent the breakup of the Indian family & that these efforts were unsuccessful. What constitutes active efforts is assessed on a case-by-case basis. Active efforts must be affirmative, active, thorough, & timely. If an agency is involved, active efforts must begin at first contact with the family when there is reason to know the child may be an Indian child. If an agency is involved, active efforts must include assisting the parents through the steps of a case plan & accessing or developing the resources necessary to satisfy the case plan. Active efforts must consider the prevailing social & cultural values & way of life of the Indian child’s tribe. Active efforts must include the available resources of extended family members, the tribe, Indian social service agencies, & individual Indian caregivers. Active efforts must be documented in detail in the record.

Qualified Expert Witness (QEW) Testimony (25 U.S.C. §1912(e); 25 C.F.R. §§23.121 & 23.122; Guidelines G.1 & G.2; Fam. Code, §§177(a), 3041(e); Prob. Code, §1459.5(b); WIC, §§224.6, 361.7(c); Rule 5.485(a))

To involuntarily order foster care or adoptive placement, guardianship or terminate parental rights, when there is reason to know the child is an Indian child, the court must require testimony of a QEW regarding whether continued custody of the child by the parent or Indian custodian is likely to cause the child serious emotional or physical damage. The QEW cannot be an employee of the person or agency seeking the foster care placement or termination of parental rights.

Persons most likely to meet the requirements for a QEW are: 1. A person designated by the tribe as being qualified to testify to the prevailing social and cultural standards of the tribe; 2. a member of the child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices; 3. An expert witness having substantial experience in the delivery of child and family services to Indians, & extensive knowledge of prevailing social & cultural standards & child-rearing practices of the Indian child's tribe. The court may accept a declaration or affidavit from a QEW in lieu of testimony only if the parties stipulate in writing and the court is satisfied that the stipulation is made knowingly, intelligently, and voluntarily.

Placement Preferences (25 U.S.C. §1915; 25 C.F.R. §§23.129-23.132; Guidelines H.1-H.5; Fam. Code, §177(a); Prob. Code, §1459.5(b); WIC, §361.31; Rule5.485(b))

The following placement preferences & standards must be followed whenever there is reason to know the child is an Indian child and the child is removed from the physical custody of his or her parents or Indian custodian. The court must analyze the availability of placements within the preferences in descending order without skipping.

Foster Care, Guardianships, & Custody to Non-parent: The court must order the least restrictive setting that most approximates a family situation within reasonable proximity to the child's home & meets the child's special needs, if any. Preference must be given in the following order: 1. a member of the child's extended family as defined in 25 U.S.C. §1903(2); 2. a foster home licensed, approved, or specified by the Indian child's tribe; 3. an Indian foster home licensed or approved by an authorized non-Indian licensing authority; 4. an institution approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs.

Adoptive Placements: Preference must be given in the following order: 1. a member of the Indian child's extended family as defined in 25 U.S.C. §1903(2); 2. other members of the Indian child's tribe; 3. another Indian family.

For both foster care and adoptive placements, the tribe, may establish a different preference order by resolution. This order of preference must be followed if it provides for the least restrictive setting.

Placement Standards & Records (25 U.S.C. §1915; 25 C.F.R. §§23.129-23.132; Guidelines H.1-H.5; Fam. Code, §§177(a), 3041(e), 7892.5; Prob. Code, §1459.5(b); WIC, §§361(c)(6), 361.31, 361.7(c), 366.26(c)(2)(B); Rule5.484(b)(1))

The preferences of the child (if old enough) & the parent(s) must be considered. Placement standards must be the prevailing social & cultural standards of the child's tribe or the Indian community in which the parent or extended family member resides or extended family member maintains social & cultural ties. A determination of the applicable prevailing social & cultural standards may be confirmed by the Indian child's tribe or QEW testimony. CDSS must maintain a record of each placement of an Indian child. CDSS must also maintain evidence of efforts to comply with the placement preferences where ever the placement deviates from the preferences.

Good Cause to Deviate From the Placement Preferences (25 U.S.C. §1915; 25 C.F.R. §§23.129-23.132; Guidelines H.1-H.5; WIC, §361.31(h); Rule5.484(b)(2) & (3))

The court may deviate from the placement preferences list above only upon a finding of good cause. If a party asserts there is good cause to deviate from the placement preferences those reasons must be contained in the record either orally or in writing. The party requesting a different order has the burden of establishing good cause. The court may base a decision to deviate from the placement preferences on: 1. The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference; 2. The request of the child, if the child is of sufficient age & capacity to understand the decision that is being made; 3. The presence of a sibling attachment that can be maintained only through a particular placement; 4. The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live; 5. The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining

whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social & cultural ties. A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement. A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.

Burden of Proof & Qualified Expert Witness (25 U.S.C. §1912(e), (f); 25 C.F.R. §23.121; Guideline G.1; Fam. Code, §§3041(e), 7892.5; Prob. Code, §1459.5(b); WIC, §§361.7(c), 366.26(c)(2)(B); Rule5.484(a))

The burden of proof to place a child in foster care, appoint a guardian, & award custody to a non-parent is *clear & convincing evidence*, including testimony of a qualified expert witness establishing that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The burden of proof to terminate parental rights is *beyond a reasonable doubt*, including testimony of a qualified expert witness establishing that continued custody of the child by the child's custodian is likely to result in serious emotional or physical damage to the child.

Adoption (25 U.S.C. §§1917, 1951; 25 C.F.R. §23.140; Guideline J.2; Fam. Code, §9208; Rule 5.487)

The court must provide the Secretary of the Interior a copy of the adoption order & other information needed to show: 1. the name & tribal affiliation of the Indian child; 2. the names & addresses of the biological parents; 3. the names & addresses of the adoptive parents; 4. the identity of any agency having files or information relating to such adoptive placement; 5. any confidential parent affidavits; and 6. any information relating to Tribal membership or eligibility for Tribal membership of the adopted child. At the request of an adopted Indian child over the age of 18, the court must provide information about the individual's tribal affiliation, biological parents, & other information as may be necessary to protect any rights flowing from the individual's relationship to the tribe.

Jurisdiction & Transfer (25 U.S.C. §1911(a), (b); 25 C.F.R. §23.110; Guidelines F.1-F.6; Fam. Code, §177(a); Prob. Code, §1459.5(b); WIC, §305.5 Rule 5.483)

Exclusive Jurisdiction: If an Indian child is a ward of the tribal court or resides or is domiciled on a reservation of a tribe that exercises exclusive jurisdiction, notice must be sent to the tribe by the next working day following removal. If the tribe determines that the child is under the exclusive jurisdiction of the tribe, the state court must dismiss the case & ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including the pleadings & any court record.

Transfer to Tribal Jurisdiction: If the above exclusive jurisdiction does not apply, the tribe, parent, or Indian custodian may petition the court to transfer the proceedings to the tribal jurisdiction. The court must transfer the proceedings unless there is good cause not to do so. Either parent may object to the transfer, or the tribe may decline the transfer of the proceedings.

Right to Counsel (25 U.S.C. §1912(b); Fam. Code, §180(b)(5)(G)(v); Prob. Code, §1474; WIC, §317(a)(2))

The parent, Indian custodian, or Indian guardian, if indigent, has the right to court-appointed counsel.

Examination of Reports & Documents (25 U.S.C. §1912(c); Fam. Code, §177(a); Prob. Code, §1459.5(b))

The parent, Indian child, Indian custodian, tribe, & their attorneys have the right to examine all court documents related to the Indian child-custody case.

Full Faith & Credit (25 U.S.C. §1911(d); Fam. Code, §177(a); Prob. Code, §1459.5(b); WIC, §224.5)

Full faith & credit to the public acts, records, & judicial proceedings of any Indian tribe is required.

Right to Additional Time (25 U.S.C. §1912 (a); 25 C.F.R. §23.112; Fam Code §180(e); Prob. Code §1460.2(e); WIC §224.2(d); Rule5.482(a))

With the exception of an emergency proceeding as defined in 25 C.F.R. §23.113 the court cannot go ahead with a hearing that meets the definition of "child custody proceeding" under ICWA until 10 days after receipt of notice by tribe(s) & BIA & must grant 20 extra days for preparation if requested.

Family Tree or Pedigree Chart

Completed by:

Agency/court:

GREAT-GRANDFATHER	GREAT-GRANDMOTHER	GREAT-GRANDFATHER	GREAT-GRANDMOTHER	GREAT-GRANDFATHER	GREAT-GRANDMOTHER	GREAT-GRANDFATHER	GREAT-GRANDMOTHER
PATERNAL GRANDFATHER		PATERNAL GRANDMOTHER		MATERNAL GRANDFATHER		MATERNAL GRANDMOTHER	
FATHER				MOTHER			
CHILD'S NAME							
{ Court Case No. }							

NOTES



JUDICIAL COUNCIL OF CALIFORNIA

OPERATIONS AND PROGRAMS DIVISION
CENTER FOR FAMILIES, CHILDREN & THE COURTS

ICWA Information Sheet: Active Efforts and Resources

Why Are Active Efforts Important?

Active efforts are described in the Indian Child Welfare Act (ICWA) as important steps in providing remedial services and rehabilitative programs to prevent the breakup of the Indian family. Active efforts should be thoroughly documented and proven in court proceedings when involuntary foster care or termination of parental rights occurs.

Often, state or county agencies or assimilation programs established by the federal government entailed removal of Indian children from their tribal communities based on poverty and a lack of knowledge or understanding about cultural practices and the importance of connection to the tribal community. Indian children were then placed in non-Indian homes or institutional environments. These practices were based on the belief that Indian children raised in non-Indian environments would be better cared for or assimilated into American society. Over the years, these removal procedures created an overrepresentation of Indian children in out-of-home care.

To address the disparate treatment and prevent the continued breakup of Indian families, Congress enacted the Indian Child Welfare Act in 1978.¹ For more information on the historical factors leading up to the passage of ICWA, please see the *American Indian Policy Review Commission Final Report* at <https://files.eric.ed.gov/fulltext/ED164229.pdf>.

What Is the Legal Definition of Active Efforts?

Newly revised ICWA regulations were published in June 2016 by the Bureau of Indian Affairs (BIA).² In December 2016, ICWA guidelines were released to provide additional information regarding ICWA compliance.³

¹ See Indian Child Welfare, 25 U.S.C. §§ 1901–1963, www.courts.ca.gov/documents/IIB.pdf.

² See Indian Child Welfare Act, 25 e-C.F.R. §§ 23.1–23.144 (2018), www.ecfr.gov.

³ U.S. Department of the Interior, *Guidelines for Implementing the Indian Child Welfare Act* (ICWA Guidelines; December 2016), www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf.

Federal Definition

Active efforts are affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. When an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan, including accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and tribe. Active efforts are to be tailored to the facts and circumstances of the case.⁴ For additional citations on providing active efforts, see subdivision (d) of section 1912 of title 25 of the United States Code, Family Code section 177(a), Welfare and Institutions Code section 361.7, and rule 5.484(c) of the California Rules of Court.

Active Efforts Emergency Situations

§ 23.113 What are the standards for emergency proceedings involving an Indian child?

...

- (e) An emergency proceeding regarding an Indian child should not be continued for more than 30 days unless the court makes the following determinations:
- (1) Restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm;
 - (2) The court has been unable to transfer the proceeding to the jurisdiction of the appropriate Indian Tribe; and
 - (3) It has not been possible to initiate a "child-custody proceeding" as defined in § 23.2.⁵
- (25 C.F.R. § 23.113.)

The ICWA guidelines recommend that "[s]tate agencies work with Tribes, parents, and other parties as soon as possible, even in an emergency situation, to begin providing active efforts to reunite the family."⁶ An example of an emergency situation is when a crime is committed in which both parents are arrested, no family is in the home at the time of arrest, and the police notify the on-call emergency child welfare worker to bring the children to an emergency shelter. The child welfare worker arrives, discovers one or both of the parents are tribal members, and the parents have a case active in that county's social services family maintenance unit. The child welfare worker reaches out to the tribal representative to work together in locating a family or tribal member to provide temporary foster care immediately.

⁴ See Definitions, 25 e-C.F.R. § 23.2 (2018).

⁵ ICWA Guidelines, § C.5, Outer limit on length of emergency removal, p. 27.

⁶ *Id.*, § C.8, Active efforts in emergency situations, p. 29.

What Is the Difference Between Reasonable Efforts and Active Efforts?

When ICWA applies to child-custody proceedings, the agency involved must provide active efforts to assist the Indian family in remaining together. Reasonable efforts are insufficient. For a clearer understanding of reasonable and active efforts, see the chart below.

Reasonable Efforts	Active Efforts
Choosing standard items for the case plan	Working with the tribal representative and parents to identify goals for case plan and resources
Giving the parents a list of parenting classes	Going over the list of parenting classes with the parents, locating a culturally appropriate class, and assisting the parents in signing up for classes that their schedules allow them to attend
Identifying general counseling one time per week in the case plan	Locating culturally appropriate behavioral health resources; accompanying the parents, child, and/or family to the intake appointment; and having regular contact with the service provider
Documenting that the child is eligible for enrollment	Taking the necessary steps to secure tribal membership for a child if the child is eligible for membership in a tribe (Cal. Rules of Court, rule 5.484(c)), including contacting the tribal representative to find out how to get the child enrolled in the tribe and following the procedures of that tribe to get the child enrolled
Locating a standard substance abuse treatment program	Locating a culturally appropriate substance abuse treatment program and identifying when the child can visit or stay with the parent in the program
Placing child in a frequently used non-Indian foster home	Using ICWA placement preferences properly for the child's temporary home, beginning with contacting the family and tribe to begin identifying a home

Tip: If you work for a county agency, your agency may want to consider contracting with a genealogist to assist with tribal enrollment procedures for your clients. For additional information about working with a genealogist, please contact Vida Castaneda, Senior Analyst, Tribal/State Programs Unit at vida.castaneda@jud.ca.gov or 415-865-7874.

What is the Required Evidence for Active Efforts?

Evidentiary Requirements for Removal or Termination of Parental Rights

According to 25 Code of Federal Regulations part 23.121(c) (2018), “evidence must show a causal relationship between . . . custody [and] . . . serious emotional or physical harm.⁷ Only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself

⁷ See 25 e-C.F.R., § 23.121 (2018).

constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child.⁸

In any child custody proceeding listed in rule 5.480 of the California Rules of Court, the court may not order placement of an Indian child unless it finds by clear and convincing evidence that continued custody with the parent or Indian custodian is likely to cause the Indian child serious emotional or physical damage and it considers evidence regarding prevailing social and cultural standards of the child's tribe, including that tribe's family organization and child-rearing practices.

(1) Testimony by a "qualified expert witness," as defined in Welfare and Institutions Code section 224.6, Family Code section 177(a), and Probate Code section 1459.5(b), is required before a court orders a child placed in foster care or terminates parental rights.

(2) Stipulation by the parent, Indian custodian, or tribe, or failure to object, may waive the requirement of producing evidence of the likelihood of serious damage only if the court is satisfied that the person or tribe has been fully advised of the requirements of the Indian Child Welfare Act and has knowingly, intelligently, and voluntarily waived them. Any such stipulation must be agreed to in writing.

(3) Failure to meet non-Indian family and child-rearing community standards, or the existence of other behavior or conditions that meet the removal standards of Welfare and Institutions Code section 361, will not support an order for placement absent the finding that continued custody with the parent or Indian custodian is likely to cause serious emotional or physical damage.⁹

(Cal. Rules of Court, rule 5.484(a)(1)–(3).)

Documenting Active Efforts

On any ICWA case, the documentation of the active efforts to prevent the breakup of the Indian family must be clear and thorough. According to regulation 23.120(b), "[a]ctive efforts must be documented in detail in the record."¹⁰ This requirement is to ensure that the judicial officer can make the proper legal findings and orders and that the qualified expert witness can provide an accurate assessment from the reviewed written documentation provided and can prevent the potential of appeal. The social worker, probation officer, or petitioner is responsible for providing and documenting active efforts.

⁸ *Id.*, § 23.121(d) (2018).

⁹ Cal. Rules of Court, rule 5.484 (Placement of an Indian child), www.courts.ca.gov/cms/rules/index.cfm?title=five&linkid=rule5_484.

¹⁰ See Adjudication of Involuntary Proceedings, 25 e-C.F.R., § 23.120 (2018).

What Resources Are Available for American Indian/Alaska Native Families?

Many services are available for American Indian/Alaska Native individuals and families. These services are often free of charge and located within your region. Here are some examples of the different types of resources:

- ❖ Medical clinics
- ❖ Dental clinics
- ❖ Behavioral health programs
- ❖ Youth services
- ❖ Tribal CASA
- ❖ Substance abuse programs
- ❖ Domestic violence services
- ❖ Indian education programs

If you are interested in a resource outside your county, you may contact the resource agency directly to find out if it works with children and families outside the county area.

Please visit our resources and services database for more information about locating services in specific areas or topic searches: www.courts.ca.gov/5807.htm.

How Does Someone Qualify for Resources Available to American Indian/Alaska Native Individuals or Families?

In California, if you are an enrolled member of a federally recognized tribe or listed on the California Judgment Fund Rolls or a descendant of a person listed on the California Judgment Fund Rolls, you may be able to qualify for services available to American Indian/Alaska Native individuals. If you qualify, you could potentially use services such as Indian education services, behavioral health resources, or medical, dental, Tribal TANF, or substance abuse programs. The intake worker or representative for the resources you are interested in using will be able to tell you if you can access these resources. Resources available to American Indian/Alaska Native families, whether in an urban or a rural environment, are often at no cost or are charged on a sliding scale.

Additional References

If you are interested in tracing your ancestry, you can view these helpful resources:

- ❖ California Indian Legal Services, *How do I trace my California Indian Ancestry?* (2014), www.calindian.org/wp-content/uploads/2015/09/SelfHelpTracingCAIndianAncestry.pdf
- ❖ Bureau of Indian Affairs, Genealogy section (as of July 2018), www.bia.gov/bia/ois/tgs/genealogy

To view reference sheets on the following topics, please visit the web addresses provided:

- ❖ Active efforts, provided by the BIA:
www.bia.gov/sites/bia.gov/files/assets/bia/ois/ois/pdf/idc2-041405.pdf
- ❖ Active efforts, provided by Judge Leonard P. Edwards:
www.courts.ca.gov/documents/BTB_23_5N_5.pdf
- ❖ Dependency: www.courts.ca.gov/documents/ICWA-SSDRequirements.pdf
- ❖ Delinquency: www.courts.ca.gov/documents/ICWAProbationRequirements.pdf
- ❖ Family: www.courts.ca.gov/documents/ICWAFamilyCtsRequirements.pdf
- ❖ Probate: www.courts.ca.gov/documents/ICWAProbateCourtRequirements.pdf

- ◆ A member of the child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices.
- ◆ An expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and child-rearing practices of the Indian child's tribe.

How is a QEW located?

- ◆ The removing party (i.e., agency or guardian) should ask the tribe first if the tribe has a QEW. If the tribe doesn't have a QEW to recommend, your county may already work with individuals who can serve as a QEW.
- ◆ Contact the Bureau of Indian Affairs at 202-208-5116 or www.bia.gov/bia.
- ◆ View the California ICWA Expert Witness List at www.courts.ca.gov/8105.htm.

Will the child's tribe know that the child's family is involved with the legal system?

Yes. If there is reason for a court to know that a family is American Indian / Alaska Native, then the tribe, parent, guardian, Indian custodian, and Bureau of Indian Affairs must be notified by the:

- ◆ Social worker in a dependency case;
- ◆ Probation officer in a delinquency case;
- ◆ Parent in a family court case; or
- ◆ Court clerk in a probate guardianship case.

What if the family doesn't want the tribe to know about the court case?

The tribe has the right to intervene in an ICWA case. The parents cannot waive the rights of the tribe.

FOR MORE INFORMATION

This brochure was created in collaboration with QEW professionals & the Tribal/State Programs Unit of the Judicial Council of California's Center for Families, Children & the Courts.

The Tribal/State Programs Unit provides support to local courts on tribal issues and assists with the development of policies, positions, and programs to ensure the highest quality of justice and service for California's Native American communities. The unit provides educational and technical assistance to those communities in relation to the Indian Child Welfare Act.

To learn more about the Tribal/State Programs Unit or for assistance, call 415-865-7739 or visit www.courts.ca.gov/programs-tribal.htm.

This unit is supported with funds from the Office on Violence Against Women, U.S. Department of Justice. The funds are administered through the Governor's Office of Emergency Services, the U.S. Department of Health and Human Services, the Court Improvement Program, and the California Department of Social Services.



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THE INDIAN CHILD WELFARE ACT & QUALIFIED EXPERT WITNESSES

FAMILIES & CAREGIVERS

Important Information for
American Indian / Alaska Native
Families and Caregivers in California

January 2024



Judicial Council of California

What is the Indian Child Welfare Act?

The Indian Child Welfare Act (ICWA) is a federal law created to keep American Indian / Alaska Native (AI/AN) children connected to their cultures and communities. Congress passed ICWA in 1978 to protect the best interests of Indian children, to keep AI/AN families together, and “to promote the stability and security of Indian tribes and families” (25 U.S.C. § 1902). ICWA sets minimum federal requirements that apply to state child custody proceedings involving Indian children. California has also passed laws that set higher standards and additional requirements. For more information about ICWA, visit www.courts.ca.gov/3067.htm.

The law defines an Indian child as:

- ◆ Under 18 and unmarried; *or*
- ◆ A nonminor dependent; *and*
- ◆ A member of an Indian tribe; *or*
- ◆ Eligible for membership and a biological child of a member of a federally recognized tribe.

What are the four types of ICWA court cases?

Family court

ICWA applies if custody or care of an Indian child may be given to someone other than the child’s parents or if parental rights may be terminated.

Probate court

ICWA applies to probate guardianship cases involving Indian children.

Juvenile Court—Dependency

When there are concerns about abuse or neglect of an Indian child, the court may order that:

- ◆ Parents or Indian custodians and the child receive culturally appropriate services;
- ◆ The child be removed from the parents’ care and live in relative or foster care during the reunification process; or
- ◆ Parental rights be terminated or that the child is eligible for tribal customary adoption per the laws, traditions, and customs of the tribe without termination of parental rights.

Juvenile Court—Delinquency

If a child is charged with breaking the law, the case may be heard in a delinquency court. ICWA’s requirements (other than inquiry) apply to delinquency proceedings only when the child is in foster care or at risk of entering foster care. Additional specific requirements are available at www.courts.ca.gov/documents/ICWA-Delinquency-factsheet.pdf.

What are the rights of ICWA-eligible children and families?

If the case is ICWA eligible, under the Foster Youth Bill of Rights the child and parents have certain rights, including:

- ◆ Assistance with tribal enrollment for the child;
- ◆ Entitlement to services created for AI/AN families (if available in the family’s area);
- ◆ Placement preferences to keep the child connected to the child’s tribal community; and
- ◆ Additional assistance if the tribe intervenes on behalf of the family or child.

For more information on the Foster Youth Bill of Rights, please visit fosteryouthhelp.ca.gov/wp-content/uploads/sites/276/2020/10/Foster-Youth-Bill-of-Rights-WIC-16001.9_ADAComplaint.pdf.

Are there any additional requirements in ICWA cases?

Yes, a qualified expert witness (QEW) is required at certain times in an ICWA case.

What is the QEW’s role?

By law, the QEW must gather information to provide evidence to the court:

1. Before a state court can make an order for involuntary foster care placement or before a state court can involuntarily terminate parental rights of the parent of an Indian child;¹ and

¹ Welf. & Inst. Code, § 224.6(b); Fam. Code, § 177(a); Prob. Code, § 1459.5(b).

2. In California, if a party is seeking to deviate from the ICWA placement preferences based on the needs of the child.²

What evidence will the QEW provide to the court?

The evidence will include the following:

- ◆ Proof of harm to the child. Identify safety risks or harm in the home of the parent or Indian custodian, or determine whether a different placement is needed.
- ◆ Tribal cultural standards. Determine whether the child’s current home and resources are within the child’s tribe’s traditional ways of raising a child. The QEW may also testify about:
 - ◇ Active efforts;
 - ◇ The child’s placement; and
 - ◇ Findings involving laws or customs of the child’s tribe.

How will the QEW work with your family?

The QEW will provide the following:

- ◆ Document review. The QEW reviews case files, including court reports, case notes, and other documentation.
- ◆ Consultation.
 - ◇ The QEW is required to communicate with all parties to the case and document the information received.
 - ◇ The QEW can communicate via phone, via video, or in person.
- ◆ Evidence. The QEW may give written testimony, called a declaration, or live testimony in court.

Who can be a QEW?

- ◆ A person designated by the tribe as being qualified to testify to the prevailing social and cultural standards of the child’s tribe.

² 25 U.S.C. § 1912(e)–(f); Welf. & Inst. Code, § 224.6.



JUDICIAL COUNCIL OF CALIFORNIA

OPERATIONS AND PROGRAMS DIVISION
CENTER FOR FAMILIES, CHILDREN & THE COURTS

ICWA Information Sheet: Tribal participation in State court proceedings governed by ICWA.

Under ICWA and corresponding state law, an Indian child's tribe must receive notice of any state court proceedings governed by ICWA involving an Indian child. These proceedings include dependency proceedings, some delinquency proceedings, some family code proceedings and probate guardianship proceedings concerning an Indian child. (see 25 USC § 1903; Fam. Code §§ 170, 177, 3041, Prob. Code § 1459.5, WIC §§ 224, 224.1 CRC 5.480 & 7.1015) Federal and state law mandate and acknowledge a number of substantive and procedural rights of an Indian child's tribe in such state court proceedings, including a right to participate in various ways and an absolute right to intervene in such proceedings "at any point".

Rights if a tribe chooses not to intervene:

An Indian child's tribe is not required to formally intervene in proceedings. If the tribe acknowledges the child, all of ICWA's substantive requirements apply even if the tribe does not intervene. A non-intervening tribe must continue to receive notice of all court hearings involving the child. The tribe must be consulted with respect to the placement of the child. (CRC 5.482(g)) The tribe must be consulted with respect to case planning for both the Indian parents and the Indian child and those case plans must use the available resources of the tribe, extended family members, other Indian service agencies and individual Indian caregivers. (CRC 5.484 (c); CRC 5.690 (c); WIC § 361.7)

Whether or not the tribe intervenes, a representative of the Indian child's tribe is entitled to be present at all court proceedings involving the Indian child (CRC 5.530 (B) (7)) and may address the court, receive notice of hearings, examine all court documents relating to the dependency case, submit written reports and recommendations to the court, and perform other duties and responsibilities as requested or approved by the court. (CRC 5.534 (i))

Right of Intervention:

An Indian child's tribe may intervene, orally or in writing, at any point in the proceedings and may, but is not required to, file with the court the *Notice of Designation of Tribal Representative and Notice of Intervention in a Court Proceeding Involving an Indian Child* (form ICWA-040) to give notice of their intent to intervene. (CRC rule 5.482 (e); WIC § 224.4; 25 USC § 1911 (c))

The juvenile court has no discretion to deny a tribe's request to intervene. (*In re Desiree F.* (2000) 99 Cal.Rptr.2d 688, 83 Cal.App.4th 460)

Rights of the Intervening Tribe:

A tribe, as an intervening party, is entitled to all rights afforded to any party in a proceeding, including the right to sit at counsel table, the right to examine witnesses, and the right to be given copies of documents. See CCP §387; see also CRC 5.482(e) and Judicial Council form ICWA-040.

Who May Appear on Behalf of the Tribe:

The tribe may choose to be represented by an attorney at the tribe's expense, but the tribe may also designate any person to represent them in court, and this representative must be given the same rights and courtesies as the attorneys involved. (CJER ICWA Bench Handbook, 2013 at page 32).

The court may not limit the tribe's ability to participate effectively in the case if the tribe chooses to be represented by a non-attorney.¹ States' laws regulating attorneys and the practice of law cannot interfere with or burden the federally protected right of the tribe to participate in the proceedings.²

California Rule of Court, rule 5.534 specifically addresses this issue:

(i) Tribal representatives (25 U.S.C. §§ 1911, 1931-1934)

The tribe of an Indian child is entitled to intervene as a party at any stage of a dependency proceeding concerning the Indian child.

(1) The tribe may appear by counsel or by a representative of the tribe designated by the tribe to intervene on its behalf.

The California Rules of the Court, Rule 5.534(i)(1) permits intervention by an attorney or by a representative and makes no distinction between the rights granted to each respectively.

¹ *State v. Jennifer M.*, 277 Neb. 1023, 1024 (2009)

² *State ex rel Juvenile Department of Lane County v. Shuey*, 119 Ore.App. 185 (1993); *In the Interest of N.N.E.*, 752 N.W.2d 1 (2008)



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Indian Child Welfare Act INFORMATION SHEET

May 2024

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

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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.

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Juvenile Cases***

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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

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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.

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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**

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(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.

Contact:

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JUDICIAL COUNCIL
OF CALIFORNIA

OPERATIONS AND PROGRAMS DIVISION
CENTER FOR FAMILIES, CHILDREN & THE COURTS

Following The Spirit of the Indian Child Welfare Act (ICWA)

A guide to understanding the benefits of providing culturally appropriate services to Native American families from non–federally recognized tribes within the juvenile dependency and delinquency systems¹

In an effort to ensure proper inquiry and noticing and to reduce the number of ICWA-related appeals in child welfare cases, this handout is intended to help social workers and others respond when they encounter children and families that report American Indian or Alaska Native ancestry yet find they are not from a federally recognized tribe. What is good social work practice in these cases, and how can courts support culturally centered practice that results in positive outcomes?

How to Provide “Spirit of the Law” ICWA Services

- Find out which tribes and Native American resources are in your area.
- Visit and establish connections with local tribes and Native American resources regardless of federal recognition status.
- Request ICWA training from tribal resources, California Department of Social Services training academies, or with staff from the Judicial Council of California.
- Conduct a proper inquiry of possible Native American ancestry in every case at the front end and throughout the duration of the case if family members provide additional lineage information.
- Connect a child and family with their tribe and local Native American resources regardless of tribal affiliation.
- Assist the child or family with the tribal enrollment process but understand it is up to the tribe to determine who is or is not eligible for enrollment.
- Conduct placements consistent with ICWA placement preferences even though not technically required. In the case of non–federally recognized tribes, tribal members would likely meet requirements as nonrelated extended family members because tribal communities tend to be related or close-knit communities.
- Consider the child’s tribal members as viable options for holiday visits, tutors, mentors, Court Appointed Special Advocates, etc.

¹ This document was developed with the Fresno County Department of Social Services, Child Welfare Services, and Placer County System of Care as part of the American Indian Enhancement of the Casey Family Programs/Child and Family Policy Institute of the California Breakthrough Series on addressing disproportionality 2009–2010 in collaboration with the American Indian Caucus of the California ICWA Workgroup, Child and Family Policy Institute of California, Stuart Foundation, and Tribal STAR.



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The Benefits of Providing “Spirit of the Law” ICWA Services

- If the child’s tribe is seeking federal recognition and is granted such recognition, formal ICWA case services, such as active efforts to prevent the breakup of the Indian family, will be required. If ICWA active efforts are attempted before the federal recognition, it is less disruptive for the child than having to change services and placement to make them in accordance with ICWA.
- Welfare and Institutions Code section 306.6 leaves the determination of services to individuals of non-recognized tribes to the discretion of the court that has jurisdiction.
- Even if individuals are not associated with a federally recognized tribe, they can still be part of an Indian community, which can serve as a strength and provide resources that enhance resilience factors for youth.
- Native American agencies that serve youth regardless of their tribe’s status can have youth groups that provide mental health and substance abuse services as well as fun trips, at no cost to the county.
- Many resources available to Native Americans do not require status in a federally recognized tribe (such as tribal Temporary Assistance for Needy Families (TANF), Native American health centers, and title VII Indian education programs).
- Some Native American health centers can access funding for residential treatment in and out of the state for children who are from non–federally recognized tribes.
- When culturally centered practice is provided as early as possible, it can result in positive outcomes for tribal youth.
- Linking a child to cultural resources that support his or her development into a healthy self-reliant adult can reduce the number of times the person may enter public systems.
- Culturally centered practice provided at the front end and throughout the lifespan of the case, regardless of the recognition status of the tribe, can reduce the public burden of cost over time.

Historical Background

- In 1848, gold was discovered in Coloma, California.
- In 1851 and 1852, representatives of the United States entered into 18 treaties with tribes throughout California that would have provided for more than 7.5 million acres of reserve land for the tribes’ use. These treaties were rejected by the U.S. Senate in secret session. The affected tribes were given no notice of the rejection for more than 50 years, and the promised reserve lands were never provided.
- In 1928, a census was conducted to determine the number of American Indians in California, resulting in the establishment of the 1933 California Indian Rolls (also referred to as the California Judgment Rolls). The purpose of the census and the rolls was



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to determine the number of Indians in California who had families alive in 1851–1852, when treaties were signed by the original Californians.

- From 1953 to 1964, called the “Termination Era,” the U.S. Congress terminated the federal recognition status of more than 40 California tribes. These tribes were deemed as not federally or state recognized, though previously descendants of these tribes were federally recognized.
- Many tribes that were terminated are currently seeking federal recognition by the U.S. government.
- Tribal communities throughout California are active and thriving, whether or not they have federal recognition.
- Descendants of family members listed on the California Judgment Rolls can use this documentation of Native American ancestry to provide information as to tribal affiliation. *Note:* Finding an ancestor on the roll does not mean an individual is an enrolled member in that particular tribe. Only one tribe can be listed on this document, and it is possible to descend from more than one tribe.
- Senate Bill 678, passed in 2006 by the California Legislature, allows participation of non–federally recognized tribes, on request and at the discretion of the judge in the dependency matter. This expands the option and availability of culturally appropriate services to children from non-recognized tribes.

Additional Tips for Practice

- Some tribes include descendants as members, not only those who are enrolled.
- Best practices will vary depending on the location, available resources, and tribe.
- If you are having challenges in working with the family, local Native American agencies or tribes can assist.
- If the family requests additional resource information to trace its lineage, you can provide the following resource information:
 - The tribe;
 - Mission church records;
 - Mormon genealogical records;
 - Historical societies and museums;
 - Genealogical Web sites; and
 - Historical statistical information and documents in the county of the family’s origin.

FOSTER YOUTH BILL OF RIGHTS

A Guide to Your Rights in Foster Care



Personal Rights

You have the right to live in a safe, comfortable home where you are treated with respect and to have:

- enough clothes and healthy food
- clothing, grooming, and hygiene products that respect your culture and ethnicity
- a private place to keep your things
- a phone you can use to make private calls (unless a judge says you cannot)
- a caregiver that has special training on trauma and ways to help you

You have the right to:

- go/not go to religious services and activities of your choice
- participate in cultural, racial, ethnic, personal enrichment, and social activities
- fair and equal access to all available foster care services, placements, care, and benefits

No one can:

- lock you in a room or a building (unless you are in a community treatment facility)
- make you stay in juvenile hall because they can't find you a home
- use law enforcement as a threat or retaliation
- abuse you physically, sexually, emotionally, or exploit you for any reason
- punish you by physically hurting you for any reason
- look through your things unless they have a reasonable or legal reason
- treat you unfairly because of your race, ethnicity, ancestry, national origin, color, religion, sex, sexual orientation, gender identity and expression, mental or physical disability, HIV status, or membership in a federally recognized Indian tribe

Sexual Orientation, Gender Identity, and Expression (SOGIE)

You have rights to protect your SOGIE. You have the right to:

- live in a home or STRTP based on your gender identity
- be called by your chosen name and gender pronouns
- see a doctor or counselor who is gender affirming
- have clothing, grooming, and hygiene products that respect your gender identity and expression
- have a caregiver, social worker/probation officer, and lawyer that have been trained on SOGIE and how to care for LGBTQ+ youth
- keep your SOGIE information private

Indian Child Welfare Act (ICWA)

Are you a member, or could you be a member, of a federally recognized Indian tribe?

You have the right to:

- live in a home or STRTP that maintains the social and cultural standards of your Tribe and tribal community
- live in a home of your relatives or extended family or a home that is licensed, approved, or specified by your Tribe
- live in an Indian foster home that is licensed or approved, or a facility that is approved by your Tribe or an Indian organization that meets your needs
- live in a place that reflects and keeps you connected to the cultural and social standards of your Tribe and/or tribal community
- contact your ICWA advocate and have them attend court
- contact your Tribe, tribal members, and Indian community
- have a social worker/probation officer, and lawyer who is trained in ICWA
- participate in traditional Native American religious practices
- get help becoming a member of an Indian tribe or Alaskan village
- get all the benefits that come from being a member of an Indian tribe or Alaskan village
- be free from discrimination and be recognized for your relationship with an Indian Tribe or Alaskan village
- have protections for your tribal relationship in your case plan

Education

You have school rights. You have the right to:

- go to school every day
- get help with school
- stay at your same school if it's best for you
- enroll right away at a new school
- get partial credits for all classes you were passing if you change schools
- go to after-school activities
- have priority enrollment in pre-school and after-school programs
- have priority enrollment at California State Universities and community colleges
- access information about college and career education programs

Health

You have health rights. You have the right to:

- see a doctor, dentist, eye doctor, or talk to a counselor when you need to
- see a doctor who is gender affirming
- refuse to take any medicines, vitamins, or herbs, and no one can punish you for it
- keep your medical records private
- have the risks/benefits of treatment explained to you in a way that is easy to understand

Mental Health

You have mental health rights too. You have the right to:

- keep your mental health records private
- get gender affirming mental health treatment
- work with your doctor to safely stop taking psychotropic medication
- refuse to take psychotropic medication, and no one can punish you for it
- know about your diagnosis and understand treatment options
- get help with an alcohol or drug problem without permission
- get mental health services in a place that meets your needs
- if you are 12 years or older, choose your own doctor or counselor and make decisions about your mental health treatment

Sexual & Reproductive Health

You have sexual health rights too. You have the right to:

- get information about your sexual health in a way that you understand
- use or refuse services for birth control, condoms, other types of protection, and pregnancy care, including abortion, without telling an adult
- get healthcare services for sexual assault without telling an adult
- if you are 12 years or older, choose your own doctor or counselor and make decisions about preventing, testing, or treating STIs and HIV without permission from any adult

Case Plan

You have the right to:

- help create your case plan
- have a case plan within 60 days of being in foster care
- have your case plan updated at least every 6 months
- be told of any changes to your case plan
- get a copy of it if you are age 10 and older
- have your Tribe involved in case plan decisions

Your case plan will have:

- health and education plans
- the best place for you to live
- the services you need
- a long-term plan for where you will live
- gender-affirming healthcare plans
- plans for visitation with your parents and siblings
- transition to independent living plan (TILP), if you are 16 or older

Court

You have rights at court too. You have the right to:

- be told about court hearings in writing
- go to court and talk to the judge
- tell the judge what you want to have happen in your case
- tell the judge how you feel about your psychotropic medications
- ask the judge for visits with your siblings
- request a hearing if you feel like your lawyer is not acting in your best interest
- ask for people to be in the courtroom or ask for people to leave
- keep your court records private (unless the law says otherwise)
- tell the judge how you feel about your family, lawyer, and social worker/probation officer
- a lawyer, separate from your parents and the county

Your lawyer must:

- keep what you tell them private
- have special training on ICWA and SOGIE
- make sure you are safe and have the services and supports you need
- tell the judge what you want to have happen
- answer questions you have about court, foster care, and other laws

Children and Family Team (CFT)

You have the right to a CFT. You have the right to:

- request CFT meetings
- have support people at your CFT meeting
- talk about your needs in the CFT meeting
- a CFT meeting within 60 days of entering foster care
- a CFT meeting every 6 months
- a CFT meeting at least every 90 days if you are in an STRTP or in a therapeutic foster home
- a CFT meeting at least every 90 days if you are getting certain types of services
- a CFT meeting when any changes are going to be made to your case plan

Family and Social Connections

You have the right to:

- visit and contact your parents, siblings, and other family members in private (unless a judge says you cannot)
- contact people who are not in the foster care system (like friends, church members, teachers, and others), unless a judge says you cannot

Preparing for Adulthood and Money Management

You have the right to do some things on your own. You have the right to:

- have an allowance
- your own bank account (unless your case plan says you cannot)
- learn job skills for your age
- work (unless the law says you are too young)
- earn, save, and manage your money (unless your case plan says you cannot)
- go to Independent Living Program (if you are old enough)
- beginning at age 14, get a credit report every year from 3 major reporting agencies and have help fixing any issues

Communications

You have the right to:

- use a phone to make and get confidential (private) calls
- use a computer and the internet
- privately use email, text messages, or other electronic communication
- send and receive unopened mail

These rights can be changed if there is a safety concern. Only a judge can take these away or stop you from communicating with certain people.

You have the right to contact the following people in private, and no one can stop you or punish you for speaking with them:

- your social worker/probation officer
- your lawyer
- service providers
- foster youth advocates and Court Appointed Special Advocates (CASAs)
- Education Rights Holder
- Tribe (if you have one)
- Office of Foster Care Ombudsman (OFCO)
- Community Care Licensing Division (CCL)

Records

You have the right to see and get a free copy of the following until you are 26:

- medical records
- child welfare records
- juvenile court records
- educational records



You have rights!

You have the right to speak to these offices immediately and confidentially.

You cannot be threatened, punished, or retaliated against for making complaints.

Who to call about my rights

California Foster Care
Ombudsman
Helpline: 1-877-846-1602
Website: www.fosteryouthhelp.ca.gov
Email: fosteryouthhelp@dss.ca.gov

Community Care Licensing
Division
Helpline: 1-844-538-8766
Email: letusknow@dss.ca.gov

The Indian Child Welfare Act for Incarcerated Parents: Resource Guide

Additional Links for Further Information

Judicial Council Links:

- ❖ **Tribal/State Programs Unit:** <https://courts.ca.gov/programs/tribalstate-programs>
- ❖ **ICWA:** <https://courts.ca.gov/programs-initiatives/tribalstate-programs/indian-child-welfare-act-icwa>
 - **ICWA Laws, Regulations & Rules:** <https://courts.ca.gov/programs-initiatives/tribalstate-programs/indian-child-welfare-act-icwa/icwa-laws-regulations-rules>
 - **Webinars:** <https://courts.ca.gov/programs-initiatives/tribalstate-programs/indian-child-welfare-act-icwa/icwa-education>
 - **Statewide Directory of Services for Native American Families:** <https://courts.ca.gov/programs-initiatives/tribalstate-programs/indian-child-welfare-act-icwa/statewide-directory>
 - **Tribal Customary Adoption:** <https://courts.ca.gov/programs-initiatives/tribalstate-programs/indian-child-welfare-act-icwa/tribal-customary-adoption>
 - **ICWA for Kin Caregivers and Foster Parents:** <https://courts.ca.gov/documents/ICWA-Act-for-Kin-Caregivers.pdf>
 - **Crossover Issues Relating to the Indian Child Welfare Act and Domestic Violence:** <https://courts.ca.gov/sites/default/files/courts/default/2024-08/tribal-crossoveriwca.pdf>
- ❖ **Juvenile Law:** <https://courts.ca.gov/programs-initiatives/families-and-children/juvenile-law>
 - **The Juvenile Dependency Court and You – A Guide for Parents:** <https://courts.ca.gov/sites/default/files/courts/default/2024-08/juvenile-dependency-court-and-you.pdf>
 - **Juvenile Dependency Court Orientation Video:** <http://youtu.be/Y7Xz4QdNoEY>
 - **Juvenile Delinquency Court Orientation Video:** https://www.youtube.com/watch?v=rRXKIZTKJ-w&list=TL3255_ZEDYTQ4xueFivL679Dxh380ulkU **and transcript:** <https://courts.ca.gov/documents/VideoJVDelinCrtTranscript.pdf>
- ❖ **Family Law:** <https://courts.ca.gov/programs-initiatives/families-and-children/family-law>
- ❖ **Judicial Council of California-Self-Help Guide to the California Courts:** <https://selfhelp.courts.ca.gov/>

California Department of Corrections and Rehabilitation Links:

- ❖ **Main Website:** <https://www.cdcr.ca.gov/>
- ❖ **Community Participant Mother Program:** <https://www.cdcr.ca.gov/rehabilitation/pre-release-community-programs/cpmp/>

❖ **In Prison Programs Available by Location:**

<https://www.cdcr.ca.gov/rehabilitation/programs/inprison/mapip/>

Pregnancy, Early Childhood Parenting and Lactation in Custody Links:

- ❖ **Guide to Breastfeeding and Incarceration:** <https://mibreastfeeding.org/wp-content/uploads/2018/05/Guide-to-Breastfeeding-and-Incarceration.pdf>
- ❖ **Supporting Lactation in Jails:** <https://californiabreastfeeding.org/wp-content/uploads/2023/06/cbc-supporting-lactation-in-jails-DRAFT-5.pdf>
- ❖ **Pregnant Women in California Prisons and Jails: A Guide for Prisoners and Legal Advocates:** https://courts.ca.gov/sites/default/files/courts/default/2024-12/btb_23_4k_5.pdf
- ❖ **Tribal Maternal, Infant, and Early Childhood Home Visiting: A Report to Congress OPRE Report #2015-88 November 2015:**
<https://acf.gov/sites/default/files/documents/occ/Tribal%20Home%20Visiting%20Report%20to%20Congress%20%281%29.pdf>
- ❖ **Tribal Home Visiting: An Introduction to the Tribal Home Visiting Program:**
<https://acf.gov/sites/default/files/documents/occ/An%20Introduction%20to%20the%20Tribal%20Home%20Visiting%20Program.pdf>

State and Legal Services Links:

- ❖ **Office of Tribal Affairs, California Department of Social Services:**
<https://www.cdss.ca.gov/inforesources/tribal-affairs>
- ❖ **California Indian Legal Services:** <https://www.calindian.org/>
- ❖ **California Tribal Families Coalition:** <https://caltribalfamilies.org/>
- ❖ **Child Custody and Visiting Rights Manual for Incarcerated Parents:**
https://courts.ca.gov/sites/default/files/courts/default/2024-12/btb_23_4k_3.pdf
- ❖ **Legal Services for Prisoners with Children-Incarcerated Parents Manual: Legal Rights and Responsibilities:**
https://courts.ca.gov/sites/default/files/courts/default/2024-12/btb_23_4k_4.pdf
- ❖ **Friends Outside:** <https://www.friendsoutside.org/>
- ❖ **Foster Youth Bill of Rights Handbook:** https://fosteryouthhelp.ca.gov/wp-content/uploads/sites/276/2020/11/EnglishHandbook_Final1.19.21.pdf