



## Probate Courts

### Recommended Legal Findings and Orders for the Indian Child Welfare Act (ICWA)\*

- I. Inquiry (at every hearing) (Prob. Code, § 1459.5(b); WIC, §§ 224.2(a)(5) and 224.3(a); Cal. Rules of Court, rules 7.1015(d)(2) and 5.481(a))<sup>1</sup>**
- A. The court finds that the petitioner, the court investigator, and the court have inquired whether the child has Indian ancestry;
  - B. The court finds that the *Guardianship Petition—Child Information Attachment* (form GC-210(CA)) has been completed and is in the court file;
  - C. The court finds that the *Indian Child Inquiry Attachment* (form ICWA-010(A)) has been completed and is in the court file; and
  - D. If the parents or the Indian custodian (if any) have appeared, they have been ordered to complete *Parental Notification of Indian Status* (form ICWA-020) and those documents are in the court file; or
  - E. If the parents or the Indian custodian (if any) have not appeared, the petitioner or court investigator has been ordered to use reasonable diligence to have them complete ICWA-020;
  - F. The court finds, after the petitioner, the court investigator, and the court have inquired, that there is reason to believe the child may be an Indian child; or
  - G. The court finds, after the petitioner, the court investigator, and the court have inquired, that there is no reason to believe the child may be an Indian child.
  - H. If there is reason to believe that the child is an Indian child:
    - 1. The court finds that the petitioner, the court investigator, or the court have interviewed the parents, Indian custodian, extended family and has contacted the child's potential tribe and the Bureau of Indian Affairs (BIA) to obtain information contained in WIC, § 224.2(a)(5).
    - 2. The court finds that the petitioner and the court have inquired whether the child may be resident or domiciled on a reserve.
    - 3. The court finds that the petitioner and the court have inquired whether the child is the ward of a tribal court.
- II. Consent (Note: If the parent or Indian custodian consents to the guardianship of an Indian child, most of the procedural and substantive provisions of ICWA do not apply. However, for consent to be valid under ICWA, it must meet ALL of the requirements set out in this provision. (25 U.S.C. § 1913(a) and (b); Prob. Code, §§ 1459(b) and (d) and 1500.1))**
- A. The court finds that the parent's or Indian custodian's consent to this guardianship has not been given within 10 days after the birth of the child;
  - B. The court finds that the parent's or Indian custodian's consent is in writing and has been recorded before a judge of the court and is accompanied by the judge's certificate that the terms and consequences of the consent have been fully explained in detail and have been fully understood by the parent or Indian custodian;
  - C. If the parent or Indian custodian does not understand English, the court certifies that the explanation has been interpreted into a language that the parent or Indian custodian understands; and
  - D. The court finds that the guardianship provides that the parent or Indian custodian may withdraw consent to the guardianship at any time and upon such withdrawal of consent, all provisions of the Indian Child Welfare Act, including inter alia 25 U.S.C. § 1913(b), shall apply.

\*All citations in this chart are to the California Probate Code, California Welfare and Institutions Code, and the California Rules of Court.

<sup>1</sup> Prob. Code, § 1459(b) and Cal. Rules of Court, rule 7.1015(d)(7) incorporate various provisions of WIC and juvenile rules of court into probate proceedings.,

**III. Application (at any hearing) (25 U.S.C. § 1903(1) and (4); Prob. Code, § 1459.5; WIC, § 224.3; Cal. Rules of Court, rule 5.480)**

- A. The child has Indian ancestry, and therefore the act may apply.
- B. The child is an Indian child because the court has proof of tribal membership or eligibility or the tribal determination received by the court indicates that the child is a member or is eligible for membership.
- C. The child is not an Indian child because the tribal determination received by the court indicates that the child is not a member and is not eligible for membership in any tribe.
- D. The court will proceed as if the act does not apply because proper notice was sent to the tribe with which the child may be affiliated or to the Bureau of Indian Affairs (BIA) and 60 days have elapsed with no determinative response from the tribe or the BIA. However:
  - 1. If the court receives information on the child's Indian heritage, it will send the information to the tribe or the BIA.
  - 2. If the court later receives evidence of the applicability of the act, the court will apply the act. (WIC, § 224.3(e)(3).)

**IV. Tribal Representative/Intervention (at every hearing) (25 U.S.C. § 1911(c); WIC, § 224.4; Cal. Rules of Court, rule 5.482(e))**

- A. The (*name of tribe*) \_\_\_\_\_ Tribe has acknowledged that the child is a member of or is eligible for membership in the tribe and will monitor the case.
- B. The (*name of tribe*) \_\_\_\_\_ Tribe has designated (*name of representative*) \_\_\_\_\_ to be the tribe's representative.
- C. The tribe's representative is entitled to the rights listed in *Notice of Designation of Tribal Representative and Notice of Intervention in a Court Proceeding Involving an Indian Child* (form ICWA-040).
- D. The (*name of tribe*) \_\_\_\_\_ Tribe has intervened in this case and will be treated as a party to the proceedings.

**V. Continuances (all hearings) (25 U.S.C. § 1912(a); Prob. Code, § 1460.2(e); Cal. Rules of Court, rule 5.482(a))**

- A. Upon request, this court grants the parent, the Indian custodian, or the tribe a continuance of up to 20 days to prepare for the hearing.

**VI. Appointment of Counsel (at every hearing) (25 U.S.C. § 1912(b); Prob. Code, § 1474)**

- A. The court finds that the parent or Indian custodian appears to be indigent, and the court hereby appoints counsel to represent the parent or Indian custodian; or
- B. The court finds that the parent or Indian custodian do not appear to be indigent.

**VII. Notice (at every hearing) (25 U.S.C. § 1912(a); Prob. Code, § 1460.2; Cal. Rules of Court, rules 5.481(b) and 7.1015(c))**

- A. The court finds that notice has been provided by certified mail with return receipt requested to all tribes of which the child may be a member or eligible for membership and to the BIA.
- B. Notice to the tribe was addressed to the tribal chairperson unless the tribe has designated another agent for service of ICWA notice.
- C. The court finds that proof of notice has been filed with the court and includes: (a) a copy of the notices sent; (b) the return receipt; (c) copies of all correspondence received from the tribe or the BIA relevant to the minor's Indian status.
- D. The court finds *either* that the identity or location of the parent or Indian custodian or tribe cannot be determined *or* that the child has Indian ancestry but is not a member of an identified tribe or eligible for membership in an identified tribe; accordingly, notice has been provided to the specified office of the Secretary of the Interior. A copy of the notice sent and the return receipt have been filed with the court.
- E. The court finds that notice has been provided by sending *Notice of Child Custody Proceeding for Indian Child* (form ICWA-030) with a copy of the child's birth certificate and a copy of the petition by registered or certified mail with return receipt requested, and additional notice by first-class mail, to the parent, the tribe, the Indian custodian, and the BIA.

**VIII. Consultation with Tribe (Prob. Code, § 1513(h))**

- A. The person preparing the investigative report has consulted with the child's tribe and included information provided by the tribe in its report.

**IX. Detriment and Standard of Proof (prior to involuntary guardianship order) (25 U.S.C. § 1912(e) and (f); WIC, §§ 361.7, 366.26(c)(2)(B); Cal. Rules of Court, rule 5.484(a))**

- A. The parents or Indian custodians have not consented to the appointment of guardian on item 4 of *Consent of Proposed Guardian, Nomination of Guardian, and Consent to Appointment of Guardian and Waiver of Notice* (form GC-211); the court finds by *clear and convincing* evidence, including the testimony of one or more qualified expert witnesses, that the continued custody of the child by the parent, legal guardian, or Indian custodian is likely to result in serious emotional or physical danger to the child.

**X. Active Efforts (at every hearing where the child is out of the custody of his or her parents, Indian custodians, or legal guardians) (25 U.S.C. § 1912(d); WIC, § 361.7; Cal. Rules of Court, rules 5.484(c) and 5.485(a)(1))**

- A. If a tribe has indicated that the child would be eligible for enrollment if certain steps were followed, the court finds that the petitioner has made active efforts by taking steps to secure tribal membership. (Cal. Rules of Court, rules 5.482(c) and 5.484(c).)
- B. The court finds after reviewing all evidence, that the petitioner has made active efforts to provide culturally appropriate services and rehabilitative programs designed to prevent the breakup of the Indian family.

**XI. Placement Preferences (at every hearing) (25 U.S.C. § 1915; Prob. Code, 1513(h); WIC, § 361.31; Cal. Rules of Court, rule 5.484(b))**

- A. The court finds that the petitioner and the court investigator have consulted with the child's tribe and Indian organizations concerning the appropriate placement of the child; and *either*:
1. The court finds that the proposed guardianship complies with the placement preferences of ICWA; or
  2. The court finds good cause to deviate from the placement preferences under the act on the grounds that \_\_\_\_\_.

**XII. Jurisdiction and Transfer (at any hearing) (25 U.S.C. § 1911; WIC, § 305.5; Cal. Rules of Court, rule 5.483)**

- A. The court finds that the child resides or is domiciled on the reservation of the \_\_\_\_\_ Tribe or that the child is the ward of the \_\_\_\_\_ tribal court and, accordingly, the \_\_\_\_\_ Tribe has exclusive jurisdiction.
- B. The court finds that this court and the court of the child's tribe have concurrent jurisdiction.
- C. The (*specify tribe or parent or Indian custodian*) \_\_\_\_\_ has petitioned this court to transfer the proceedings to the tribal court, and finding no good cause not to transfer, this court transfers the case to the tribal court of (*name of tribe*) \_\_\_\_\_ Tribe.
- D. After holding an evidentiary hearing, this court finds that the (*specify tribe or parent or Indian custodian*) \_\_\_\_\_ has petitioned this court to transfer the proceedings to the tribal court, and the court finds that the following reason is good cause not to transfer the case to the tribal court:
1. The child's parent objects to the transfer;
  2. The child's tribe does not have a tribal court or any other administrative body as defined in section 1903 of the act; or
  3. The tribal court of the child's tribe declined the transfer.
- E. After holding an evidentiary hearing, this court finds that the (*specify tribe or parent or Indian custodian*) \_\_\_\_\_ has petitioned this court to transfer the proceedings to the tribal court, and the court finds that the following circumstances in the case constitute in the court's discretion good cause not to transfer the case to the tribal court:
1. The evidence necessary to decide the case cannot be presented in tribal court without undue hardship to the parties;
  2. This proceeding is at an advanced stage, and the petitioner did not make the request within a reasonable time after receiving notice of this proceeding;
  3. The child is over age 12 and objects to the transfer; or
  4. The child is over age 5 and has had little or no contact with his or her tribe or members of the child's tribe, and the child's parents are not available.

