

Indian Child Welfare Act

ICWA: How to do it Right and Why it Matters

Federal Law: U.S.C. Title 25, Indians Chapter 21 – Indian Child Welfare, § 1901 et seq.

Congress has declared "it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs." [U.S.C. § 1902]

California State Law: WIC § 224 et seq.

"The state is committed to protecting the essential tribal relations and best interest of an Indian child by promoting practices, in accordance with the federal Indian Child Welfare Act ... and other applicable state and federal law, designed to prevent the child's involuntary out-of-home placement and, whenever that placement is necessary or ordered, by placing the child, whenever possible, in a placement that reflects the unique values of the child's tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the child's tribe and tribal community."

Duty of Inquiry

The juvenile probation department has an affirmative and continuing duty to inquire whether a child is a member or eligible for membership in an Indian tribe and the child of a member of an Indian tribe. Inquiry must occur whenever the department comes in contact with a child that could result in a petition pursuant to Welf. & Inst. Code § 601 or § 602 (Welf. & Inst. Code § 224.2(a)). The duty to inquire begins at initial contact and the probation officer must complete this inquiry even if contact with the child occurs because of conduct that would be considered a crime if the child were an adult. (*In re.W.B.* (2012) 55 Cal. 4th 30, 40) If as a result of this inquiry, the probation officer has reason to believe the child may be an Indian child, further inquiry, pursuant to ICWA requirements, may apply.

Duty Beyond Initial Inquiry

The probation officer has additional duties, beyond initial inquiry, if the child is in foster care, or at risk of foster care, AND one of these three factors also applies:

- the § 601 or § 602 petition only alleges status offenses;
- the court has set a hearing to terminate parental rights; or
- the court has placed the child in foster care and specifically found such placement was entirely because of the harmful conditions (abuse or neglect) in the child's home.

While going beyond the duty of initial inquiry is only statutorily *required* under the circumstances outlined above, Native youth—like all youth involved in the justice system—are better served when their community and cultural identity are included in case planning and when considering placement outside the home.

Especially during this time of realignment, where we have recognized the importance of creating new pathways to get youth back to, and supported by, their local communities, keeping Native youth connected to their tribal communities takes on new significance. Culturally respectful programming is legally required for the youth realigned under Senate Bill 823, but it should be our goal for *all* youth. Like community-based organizations around California, tribal communities can be helpful resources. They have already become great partners for justice involved youth in San Diego, Shasta, and Humboldt.

Best Practice Approaches

The Courtroom of Judge Ana Espana in San Diego County

In order to comply with the letter and, more importantly, the spirit of the law, not only do San Diego County probation officers ask youth and families about Native American heritage at initial contact, so do many defense attorneys, who can then notify the judge at the time of the initial appearance or the detention hearing. If not already brought up by probation or defense counsel, the judge should ask if the youth and/or his parents are enrolled members of a tribe or are living on a reservation. If so, what tribe? What reservation?

As an example of probation being proactive in identifying Native youth, in San Diego, the probation department automatically submits a Judicial Council form—the ICWA-010—in each case. Additionally, Judge Espana has created a Standing Order that applies the requirements of ICWA to juvenile justice cases and directs probation to work with all California tribes, federally recognized and unrecognized. For sample forms used in San Diego County see these:

[ICWA-010\(A\)](#) | [Form ICWA-020 Form](#) | [ICWA Order: Participation by Tribes](#)

El Dorado Superior Court and Shingle Springs Band of Miwok Indians Joint Jurisdictional Collaborative Court—The Family Wellness Court program is intended to provide system-involved youth and their families with a court-supervised alternative that emphasizes culturally-appropriate restorative justice practices. The program’s wrap-around continuum of care consists of prevention, intervention, and post-adjudication services. A Superior Court Judge and a Tribal Judge preside over the cases together. Program staff use a teamwork approach that includes services from both the county and the tribe, and the tribe’s probation officer works closely with the assigned El Dorado County probation officer. Chief Tribal Judge Victorio Shaw says that frequently the tribe can provide more services to the youth and families and provide it more quickly, because tribal court monies for services are not “pigeon-holed” like other county or state funds. Judge Shaw believes when a youth comes into his court it very likely means the family has underlying issues and because the tribe can incentivize or penalize parents in ways the Superior Court cannot, tribal courts utilize a very comprehensive, family-centered approach.