

Judicial Council of California • Administrative Office of the Courts

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INVITATION TO COMMENT

LEG13-03

Title	Action Requested
Proposed Legislation: Tribal Access to Confidential Juvenile Court Files	Review and submit comments by June 19, 2013
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Amend Welfare & Institutions Code § 827	January 1, 2015
Proposed by	Contact
California Tribal Court/State Court Forum	Ann Gilmour, 415-865-4207
Hon. Richard Blake, Cochair	ann.gilmour@jud.ca.gov
Hon. Dennis M. Perluss, Cochair	Jennifer Walter, 415-865-7687
	jennifer.walter@jud.ca.gov
Family and Juvenile Law Advisory Committee	Julia Weber, (415) 865-7693
Hon. Kimberly Nystrom-Geist, Cochair	julia.weber@jud.ca.gov
Hon. Dean Stout, Cochair	Christopher Wu, (415) 865-7721
	christopher.wu@jud.ca.gov

Executive Summary and Origin

As a result of comments from tribal court judges and advocates, the California Tribal Court/State Court Forum (forum) and the Family and Juvenile Law Advisory Committee (advisory committee) have considered and recommend amendments to section 827 of the Welfare and Institutions Code to address the issue of tribal access to confidential juvenile court files involving tribal children. The proposed legislation seeks to ensure tribal access to juvenile court files involving tribal children consistent with the mandates of existing federal and state law. Although both federal and state law mandate notice to tribes of all juvenile dependency and some juvenile delinquency matters involving tribal children and provide tribes with the right to participate in these proceedings, currently section 827 of the California Welfare and Institutions Code, which governs access to confidential juvenile court files, does not mention tribes.

Prior Circulation

There has been no prior circulation of this proposal.

The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.

The Proposal

Under the federal Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 *et seq.*) and California state law, tribes are entitled to notice of child welfare proceedings involving their children. Under state and federal law, tribes have presumptive jurisdiction over child welfare matters involving their children (25 U.S.C. § 1911, Welf. & Inst. Code § 305.5). Tribes are entitled to seek transfer of state court child welfare matters involving their children to tribal court. If a matter remains under state court jurisdiction, tribes are entitled to intervene and participate in those cases.

Further, various aspects of the federal ICWA and the California Welfare and Institutions Code implementing ICWA require child welfare agencies to consult with an Indian child's tribe on a variety of issues when an Indian child and the family come to the attention of the child welfare agency. Under Welfare and Institutions Code section 361.31, tribes are entitled to provide input on all foster care placements involving their tribal children, including emergency removals. Anyone involved in the foster care placement of an Indian child must use the available services of the tribe in seeking a placement.¹ In addition, before removing an Indian child from his or her parents or Indian custodian and placing the child in foster care, an agency is required to provide "active efforts" in accordance with Welfare and Institutions Code section 361.7. Active efforts require, among other things, use of available resources from the child's tribe.

Federal law also specifically addresses the provision of otherwise confidential child welfare matters to Indian tribal governments. Section 3205 of Title 25 of the United States Code states:

Pursuant to section 552a of Title 5, the Family Educational Rights and Privacy Act of 1974 (20 U.S.C. § 1232g), or any other provision of law, agencies of any Indian tribe, of any State, or of the Federal Government that investigate and treat incidents of abuse of **children may provide information and records to those agencies of any Indian tribe, any State, or the Federal Government that need to know the information in performance of their duties.** For purposes of this section, Indian tribal governments shall be treated the same as other Federal Government entities. (emphasis added)

Under California law, juvenile court files are generally confidential and access to them is governed by Welfare and Institutions Code section 827.² Under case law,³ juvenile court records are broadly construed to include any agency document, report or record pertaining to a child who is a ward or dependent of the juvenile court, or who is or was the subject of an investigation that could have resulted in an action to bring that child under the court's jurisdiction under sections 300, 601 or 602. Currently, section 827 does not mention tribes at all.

¹ Welf. & Inst. Code, § 361.31(g).

² All further references to code sections are to the Welfare and Institutions Code.

³ *T.N.G. v Superior Court* (1971) 4 Cal. 3d 767.

The failure of section 827 to refer to tribes or provide for their right of access to juvenile case files has resulted in some problems. Notwithstanding the provisions of state and federal law that authorize tribal access to juvenile case files involving tribal children, tribal representatives state that the goals of ICWA in ensuring that an Indian child is not unnecessarily removed from his/her Indian family without prior provision of “active efforts” as well as the goal of ensuring that when Indian children are removed from their Indian families, they are, wherever possible, placed in accordance with the placement preferences under the ICWA, are undermined because county child welfare agencies do not always provide timely information to the child’s tribe when the agency has first contact with the child’s family.

Tribal judges state that they need information from the juvenile case file to decide whether to accept transfer of a juvenile case from state court, and that this information is sometimes denied. As a result, they are required to file a petition requesting the information from the superior court, which unnecessarily expends tribal and state judicial resources, and can delay decisions about the Indian child’s welfare.

Child welfare agencies state that their child welfare files are confidential, and they are precluded by law from divulging confidential information absent a court order. County resources are unnecessarily expended when these agencies follow the statute to notify tribes when they file petitions asking the court to rule on providing these records.

The failure of section 827 to address tribal access to juvenile court file records has undermined the provisions of state and federal law that require and anticipate such access, and is causing unnecessary expenditure of judicial and county resources.

Some counties in the state have addressed the ICWA compliance problems caused by section 827 through local protocols and agreements or local rules. For instance, Mendocino County has enacted an Indian Child Welfare Act Protocol, which states in relevant part:

- **Indian Child Protection and Family Violence Prevention Act from 1990, 25 United States Code Section 3201-3210.** There is no prohibition to workers communicating with tribal representatives to discuss possible tribal affiliation and coordination of services in referrals and cases where there is reason to believe that an Indian child is involved.

Similarly, the Sonoma County Indian Child Welfare Act Protocol states, in pertinent part:

Once a minor is identified as an Indian child, or the social worker has reason to know that the child may be Indian, the obligations will be different depending upon whether a child is or may be removed from his/her family. For voluntary family maintenance and emergency response workers: it means early inquiry into possible tribal affiliation,

contacting and communicating with the tribal representatives, and making and documenting referrals to Indian providers to try to prevent the breakup of the Indian family. (See pages 8-9, “Inquiry to Family Members”.) There is no prohibition to workers communicating with tribal representatives to discuss possible tribal affiliation and coordination of services in cases where there is reason to believe that an Indian child is involved. In fact, **such communication is required** in cases involving Indian children. (25. U.S.C. § 3205) (emphasis added)

In Kings and Humboldt counties, tribal access to juvenile court files is dealt with through standing orders issued by the superior court. The Kings County standing order provides that Indian tribes may have access to the juvenile court file “...upon declaration showing a legitimate need ...” Upon such declaration a duly authorized representative of an Indian tribe may have access to records or documents “...for the purpose of ascertaining whether an Indian home is suitable for certification for foster care placement...”

The Humboldt County standing order is more comprehensive. It provides:

In potential and active dependency cases, the Humboldt County Department of Health and Human Services-Child Welfare Services may exchange information with the tribal governments of federally-recognized Indian tribes in Humboldt County (as well as their duly authorized representatives) regarding Indian children associated with their tribe.)

IT IS FURTHER ORDERED THAT:

In potential and active dependency cases, the tribal governments of federally-recognized Indian tribes in Humboldt County (as well as their duly authorized representatives) may inspect and make copies of the juvenile case files of the Humboldt County Department of Health and Human Services-Child Welfare Services involving Indian Children associated with their tribe.

Where neither a protocol nor a standing order exists, tribes either do not timely receive information from the juvenile court file or they may be required to petition the court for access to required information.

This legislation is intended to address these problems which have been identified. The proposal would amend section 827 of the Welfare and Institutions Code to define when an Indian child’s tribe and tribal government agencies could have access to the child’s juvenile court file. The amendments would help increase compliance with the requirements of the Indian Child Welfare Act, conform to existing federal law, and increase cooperation between state and tribal courts.

Alternatives Considered

The forum considered taking no action, and also considered waiting until there were more comprehensive amendments to section 827. However, given the problems reported by tribal judges and tribal advocates, and the need to conform to federal law, the forum and advisory committee decided that it would be appropriate to proceed with Judicial Council-sponsored

legislation. This legislative proposal is identified in the forum's current annual agenda, approved by the Judicial Council's Executive and Planning Committee.

Implementation Requirements, Costs, and Operational Impacts

The forum does not believe that there will be any costs associated with the proposal. The forum believes that there may be cost savings as a result of this proposal by reducing the number of petitions that tribes are required to file with the superior courts concerning access to juvenile court files.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal reasonably achieve the stated purpose?
- Would this proposal have an impact on public's access to the courts? If a positive impact, please describe. If a negative impact, what changes might lessen the impact?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide costs savings? If so, please quantify. If not, what changes might be made that would provide savings, or greater savings?
- What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems.
- Would several months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- If this proposal would be cumbersome or difficult to implement in a court of your size, what changes would allow the proposal to be implemented more easily or simply in a court of your size?

Attachments and Links

1. Local protocols and Standing Orders: www.courts.ca.gov/17422.htm

The Welfare and Institutions Code Division 2. Children, Part 1. Delinquents and Wards of the Juvenile Court, Chapter 2. Juvenile Court Law, Article 22. Wards and Dependent Children—Records Section 827(a)(1) would be amended.

1 SECTION 827.

2 (a)(1)(A) Court personnel, including personnel from a court of the Indian child's
3 tribe as defined by the Indian Child Welfare Act under Section 1903(5) of Title 25 of the United
4 States Code.

5 (B) - (D) ***

6 (E) The attorneys for the parties, judges, referees, other hearing officers, probation
7 officers, and law enforcement officers who are actively participating in criminal or juvenile
8 proceedings involving the minor- including proceedings taking place in a court of the Indian
9 child's tribe as defined by the Indian Child Welfare Act under Section 1903(5) of Title 25 of the
10 United States Code.

11 (F) The county counsel, city attorney, or any other attorney representing the petitioning
12 agency in a dependency action- including an action in a court of the Indian child's tribe as
13 defined by the Indian Child Welfare Act under Section 1903(5) of Title 25 of the United States
14 Code.

15 (G) ***

16 (H) Members of the child protective agencies as defined in Section 11165.9 of the Penal
17 Code- and including child welfare agencies of the Indian child's tribe as defined by the Indian
18 Child Welfare Act under Section 1903(5) of Title 25 of the United States Code.

19 (I) - (J) ***

20 (K) Members of children's multidisciplinary teams, persons, or agencies providing
21 treatment or supervision of the minor- including representatives and service providers from the
22 Indian child's tribe as defined by the Indian Child Welfare Act under Section 1903(5) of Title 25
23 of the United States Code.

24 (L) A judge, commissioner, or other hearing officer assigned to a family law case with
25 issues concerning custody or visitation, or both, involving the minor- a judge or other hearing
26 officer from a court of the Indian child's tribe as defined by the Indian Child Welfare Act under
27 Section 1903(5) of Title 25 of the United States Code, and the following persons, if actively
28 participating in the family law case: a family court mediator assigned to a case involving the
29 minor pursuant to Article 1 (commencing with Section 3160) of Chapter 11 of Part 2 of Division
30 8 of the Family Code, a court-appointed evaluator or a person conducting a court-connected
31 child custody evaluation, investigation, or assessment pursuant to Section 3111 or 3118 of the
32 Family Code, and counsel appointed for the minor in the family law case pursuant to Section
33 3150 of the Family Code. Prior to allowing counsel appointed for the minor in the family law
34 case to inspect the file, the court clerk may require counsel to provide a certified copy of the
35 court order appointing him or her as the minor's counsel.

36 (M) A court-appointed investigator who is actively participating in a guardianship case
37 involving a minor pursuant to Part 2 (commencing with Section 1500) of Division 4 of the
38 Probate Code and acting within the scope of his or her duties in that case- or an individual

1 servicing in a similar capacity on behalf of a court of the Indian child's tribe as defined by the
2 Indian Child Welfare Act under Section 1903(5) of Title 25 of the United States Code.

3 (N) A local child support agency- including a child support agency of the Indian child's
4 tribe as defined by the Indian Child Welfare Act under Section 1903(5) of Title 25 of the United
5 States Code for the purpose of establishing paternity and establishing and enforcing child support
6 orders.

7 (O) ***

8 (P)(2) – (4) ***

9 (5) Individuals listed in subparagraphs (A), (B), (C), (D), (E), (F), (H), (I) and (Q) of
10 paragraph (1) may also receive copies of the case file. In these circumstances, the requirements
11 of paragraph (4) shall continue to apply to the information received.

12 (Q) The authorized representative of an Indian tribe as defined by the Indian Child
13 Welfare Act under Section 1903(8) of Title 25 of the United States Code for the purpose of the
14 protection and welfare of the Indian child.

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