

## **XII. Probate Guardianship Proceedings**

The ICWA is applicable to guardianships of the person or conservatorship proceedings that take place outside of the juvenile court.<sup>391</sup> Such cases are typically filed in probate court, but some counties may hear guardianship proceedings in family court, especially in cases where proceedings began as a custody dispute between parents.<sup>392</sup>

Although the ICWA was incorporated into the California Probate Code by SB 678 in 2006, its application to probate guardianships was not new law.<sup>393</sup> Most, but not all, ICWA issues arise in dependency cases rather than probate guardianships. Nevertheless, the same minimum standards are applicable to all Indian child custody proceedings, including probate guardianship and conservatorship proceedings.<sup>394</sup>

While there is little, if any, case law interpreting the mechanics of applying the ICWA to probate court proceedings, there is no ambiguity as to whether it applies. The language imported into the Probate Code mirrors that contained throughout the ICWA, and it is clear that tribes have analogous rights in such cases, including intervention, requiring a finding of detriment based on testimony by a qualified expert witness, ability to transfer the case to tribal court or jurisdiction, compliance with placement preferences, and compelling the removing party to meet the active efforts standard.<sup>395</sup> In addition, a tribe (or Indian custodian) having intervened in such proceeding, should be entitled to disclosure and discovery, and also the right to invalidate any proceedings that do not comply with the Act.<sup>396</sup>

The following sections address how application of the ICWA impacts the typical probate guardianship proceedings.

### **A. Applicability of the ICWA to Probate Guardianships of the Person**

Probate Code section 1459.5 by its own terms applies the ICWA to guardianship proceedings when the proposed ward is an Indian child and the proposed guardian is not the natural parent or Indian custodian of the proposed ward. When the proposed guardian is nominated by the parents, and they still retain the ability to have the Indian child returned on demand, then the Act arguably would not apply. The more common scenario, however, is when a relative obtains physical custody of an Indian child, or attempts to do so, and then files for

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<sup>391</sup> PROB. CODE § 1459.5.

<sup>392</sup> See, e.g., *Ericka K. v. Brett D.*, 161 Cal. App. 4th 1259, 1264 (2008) (where ICWA applied to a custody dispute wherein the caregiver joined and was awarded custody).

<sup>393</sup> See former PROB. CODE § 2112, enacted 1990, repealed 2006 ch. 838 (SB 678) § 27.

<sup>394</sup> See PROB. CODE § 1449 (defining Indian custody proceedings, and incorporating the definitions in 25 U.S.C. § 1903); § 1459 (placement of Indian children and legislative findings); § 1459.5 (application of the ICWA); § 1460.2 (notice when an Indian child is involved); § 1474 (appointment of counsel for Indian custodian or parent(s)); § 1500.1 (consent to nomination of guardian by Indian child's parent); § 1510(c)(6) (petition contents to include names and addresses of Indian custodian and child's tribe); § 1511(i) (notice must be given to Indian custodian or tribe); § 1513(h) (investigation and recommendation regarding proposed guardianship must contain consultation with Indian child's tribe and include any information provided by tribe); § 1601 (Indian child's tribe and Indian custodian have standing to petition for termination of guardianship).

<sup>395</sup> PROB. CODE § 1459.5(b), incorporating WELF. & INST. CODE §§ 224.4, 224.6, 305.5, 361.31, and 361.7.

<sup>396</sup> See CAL. RULES OF COURT, RULE 7.1015, incorporating CAL. RULES OF COURT, RULES 5.480 to 5.487.

temporary guardianship letters. In such circumstance the legislation does not distinguish between the removing relative and the social services agency in dependency cases. Nomination of a proposed guardian is governed by Probate Code section 1500 and is discussed below along with consent to nominations of guardians.

## **B. Nomination of Guardian**

A parent or parents may nominate a guardian using Judicial Council Form GC-211. This is a multipurpose form and includes: (1) *Consent of Proposed Guardian*, used to indicate that the proposed guardian consents to serving as the child's guardian; (2) *Nomination of Guardian*; and, (3) *Consent to Appointment of Guardian and Waiver of Notice*. If the parents nominate a guardian and both of them consent to the appointment, then the petition will be considered uncontested. However, that does not alter a tribe's rights, nor will it alter the substantive applicability of the ICWA to the proceeding.

A parent is generally permitted to nominate a person to be appointed guardian of their child.<sup>397</sup> The nomination may be made either before or after the petition for the appointment of the guardian is filed, in the petition itself, or at the hearing.<sup>398</sup> Both parents must nominate or consent to the nomination of the same guardian, unless one of the parents is deceased, lacks mental capacity, or is otherwise not required.<sup>399</sup>

Consent to nomination or appointment of guardian by the parent(s) of an Indian child is governed by Probate Code section 1500.1. Parental consent given by the parent(s) is not valid unless it is: (1) executed in writing at least 10 days after the child's birth and recorded before a judge, and (2) certified by the judge that the terms and consequences of the consent were fully explained in detail in English and were fully understood by the parent or that they were interpreted into a language that the parent understood.<sup>400</sup> Under Section 1500.1, the parent of an Indian child may withdraw his or her consent to guardianship for any reason at any time prior to the issuance of letters of guardianship, at which time the child shall be returned to the parent.<sup>401</sup>

## **C. Inquiry**

As with other ICWA proceedings, there is a continuing duty to inquire whether the child involved is or may be an Indian child. Form ICWA-010(A) (*Indian Child Inquiry Attachment*) must be completed and attached to the petition. This duty is shared with the court, court investigators, and/or county officers appointed to conduct an investigation. The court must provide a petitioner with, and have him or her complete, Form ICWA-020 (*Parental Notification of Indian Status*). The petitioner may be ordered to use reasonable diligence to have this form completed by a non-appearing parent.<sup>402</sup>

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<sup>397</sup> PROB. CODE § 1500.

<sup>398</sup> PROB. CODE § 1502.

<sup>399</sup> PROB. CODE § 1500.

<sup>400</sup> PROB. CODE § 1500.1; *also* 25 U.S.C. § 1913.

<sup>401</sup> *Id.*

<sup>402</sup> *See* § III(A)(2)(c)(3) of this Benchguide.

## **D. Notice**

Notice of the time and place of the hearing on the petition for appointment of guardian should be given as provided in sections 415.10 or 415.30 of the Code of Civil Procedure at least 15 days before the hearing. The persons or tribes required to receive notice are listed in Probate Code section 1511. A copy of the petition must be included and the court may not shorten the time for giving the notice. The court may, however, make orders that notice is not required where it has been determined that: (1) the person cannot with reasonable diligence be given the notice, or (2) the giving of the notice would be contrary to the interests of justice.

If it is known, or there is reason to know that, the proposed ward may be an Indian child, Probate Code section 1460.2 imposes additional notice requirements. Notice sent to the parents, legal guardian, Indian custodian, and child's tribe must be sent by registered or certified mail with return receipt requested, and must include information that allows the tribe to determine whether the child is an Indian child. The notice must also inform the parents, Indian custodian, and tribe of their substantive rights, including a right to intervene, petition for transfer to tribal court, and to request an additional 20 days from the receipt of the notice to prepare for the proceeding. The parents or Indian custodians are also informed of their right to request appointment of counsel if they are unable to afford representation pursuant to the ICWA. Subsequent notices must comply with Probate Code sections 1460.2 and 1511, and the court can impose sanctions if a party knowingly and willfully falsifies or conceals a material fact concerning whether the child is or may be an Indian child.

As noted above, California Rules of Court, rule 7.1015 specifically addresses the applicability of the ICWA in guardianship and conservatorship proceedings, and incorporates Rules 5.480 through 5.487 in their entirety. Consequently, any references to social workers, probation officers, county probation departments, or county social welfare departments in those rules should apply to the petitioner for the appointment of a guardianship or conservatorship, including the notice requirements.<sup>403</sup>

## **E. Interested Parties**

### **1. Indian Child**

A minor's wishes receive consideration and are given due weight if the child is of sufficient age and capacity to reason so as to form an intelligent preference, and Probate Code section 1470 permits court-appointment of counsel to minors.<sup>404</sup>

### **2. Petitioner**

Section 1510(a) of the Probate Code identifies who may petition for appointment of a guardian. It may be a parent, a relative, an unrelated third party, or the child. Most commonly it is the person seeking to be appointed as guardian. Where the petitioner is also the proposed guardian they must complete the Judicial Council Form GC-212 (*Confidential Guardian*

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<sup>403</sup> CAL. RULES OF COURT, RULE 7.1015(c); see §§ III(A)(2)(c)(2) & VI of this Benchguide.

<sup>404</sup> FAM. CODE § 3042.

*Screening Form*) to file with their petition. This form is used to assist the worker charged with completing an investigation report for the court.

### **3. Parents**

Where the parent or parents are contesting a guardianship and the ICWA is applicable, but the parent(s) cannot afford legal counsel, Probate Code section 1474 provides for the appointment of counsel by the court. Their ability to request appointed counsel should be included in any notice they receive under Probate Code section 1460.2(b)(5)(G)(v). Probate Code section 1474 adopts 25 U.S.C. section 1912(b), which makes provision for appointed counsel in such cases, but arguably calls for compensation to come from the Secretary of the Interior (practically speaking, the BIA). The ICWA allows an appointment where state law makes no provision for counsel, but the circular funding logic contained in Probate Code section 1474 renders that an open question.

Since the interest of parents in making decisions about the care, custody, and control of their children has been characterized as the oldest of the fundamental liberty interests,<sup>405</sup> and since the U.S. Supreme Court has affirmed that the Due Process Clause of the Constitution does not permit a state to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a “better” decision could be made,<sup>406</sup> any deferment in appointing counsel while the funding issue is pending could infringe on a parent’s constitutional rights. The better practice would be to appoint counsel at the earliest possible stage of the proceeding if requested.

### **4. Indian Custodian**

Until recently there were not any cases interpreting the Indian custodian provision of the ICWA, how it could be established or revoked. The court in *In re G.L.* acknowledged that an Indian custodian can be designated by a parent with or without a writing.<sup>407</sup> Moreover, the court rejected the Agency’s assertion that such status requires some minimum frequency or duration to qualify as an Indian custodian.<sup>408</sup> Although the court in *G.L.* ruled that the designation as an Indian custodian can be revoked, it affirmed the process by which such custodianship may be established. It serves as an informal guardianship, and under the ICWA an Indian custodian is entitled to the same rights and privileges as a parent in an ICWA probate guardianship.

### **5. Child’s Tribe**

The Indian child’s tribe not only is an interested party but can participate and exercise its rights under the Act that are the subject of the other sections in this publication. In that capacity, the tribe (whether it intervenes or not) can participate in guardianship proceedings and invoke the applicable provisions of the ICWA. As noted in other sections, the ICWA will apply whether or not the tribe intervenes or participates if the proceeding involves an Indian child.

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<sup>405</sup> *Kyle O. v. Donald R.*, 85 Cal. App. 4th 848, 861 (2000).

<sup>406</sup> *Troxel v. Granville*, 530 U.S. 57, 72-73 (2000).

<sup>407</sup> *In re G.L.*, 177 Cal. App. 4th 683, 690-92 (2009).

<sup>408</sup> *Id.* at 693.

## **F. Investigation Reports, Expert Evaluations, and Indian Expert Witnesses**

### **1. Investigation Reports**

Probate Code section 1513 requires an investigation report with recommendations be filed with the court. If the proposed guardian is a relative, it may be made by a court or probate investigator. If the proposed guardian is a non-relative, then it is made by the agency that investigates potential dependency actions.<sup>409</sup> The Probate Code defines “relative” in Section 1513(g). Tribes and tribal people often have a broader understanding of the term relative. While a petitioner may be an “extended family member” for purposes of placement in an ICWA proceeding, they may still be considered a non-relative for investigation report purposes.

An investigation report must be reviewed and considered by the court prior to making any appointment of guardian.<sup>410</sup> In addition to the general substance required to be included in the investigation report, Probate Code section 1513(h) requires the investigator to consult with the tribe and include any information which the tribe provides in his or her report.

In *In re Noreen G.*, the appellate court found that an incomplete report was harmless error where the information that was omitted from the report was thoroughly presented and considered at trial in the form of testimony.<sup>411</sup> In an ICWA case the testimony of a qualified expert witness to support a finding of detriment does not fulfill the requirement in Probate Code section 1513(h). This section requires that the investigator consult with the Indian child’s tribe and include the information provided by the tribe in the report for purposes of compiling a social history. While there may be some overlap, this recommendation is not necessarily coextensive with the requirements imposed on a qualified expert.

### **2. Assessing Costs**

Probate Code section 1513.1(a) distributes the court’s or county’s cost of the investigation to parent(s) or person charged with minor’s support and maintenance, and the guardian, proposed guardian, or estate, unless the court finds hardship. A tribe should be excluded from any expense assessment as it is not responsible for the support and maintenance of the minor.

## **G. Appointment Hearing**

### **1. Standards of Proof**

Generally, under Probate Code section 1514, upon hearing the petition the court may appoint a guardian of the person if it appears necessary or convenient. The court’s decision is further governed by Chapter 1 and Chapter 2, Part 2, Division 8 of the Family Code. Guardianship hearings and determinations are made according to the rules and practice of civil

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<sup>409</sup> PROB. CODE § 1513(a).

<sup>410</sup> PROB. CODE § 1513(b).

<sup>411</sup> *In re Noreen G.*, 181 Cal. App. 4th 1359, 1381 (2010).

action.<sup>412</sup> The default standard of proof is set by Evidence Code section 115 as a preponderance of the evidence. When a parent objects, or the proceeding involves an Indian child, the standard of proof changes.<sup>413</sup>

If a parent objects to another person being appointed guardian, the court must find, by clear and convincing evidence, that leaving legal custody with the parent would be detrimental to the child, and that awarding custody to the other person will serve the child's best interest.<sup>414</sup> A rebuttable presumption that the requirements of Family Code sections 3041(a) and (b) have been met is created where the court finds, by a preponderance of the evidence, that the proposed guardian is a person who has assumed the role of a parent for a substantial period of time.<sup>415</sup> Detriment to the child includes the harm of removing the child from a stable placement with a person who has assumed the role of a parent for a substantial period of time.<sup>416</sup> Finding detriment does not require a finding of parental unfitness.<sup>417</sup>

If the parent objects in a case involving an Indian child, then the ICWA's evidentiary standards set forth in 25 U.S.C. section 1912(d), (e), and (f), and the placement preferences and standards of Section 1922, all apply. This includes Section 1912(d)'s requirement that the petitioner satisfy the court that active efforts have been made to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.<sup>418</sup>

Section 1912(e) of the ICWA requires the court to determine that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. This determination must be supported by clear and convincing evidence, including the testimony of a qualified expert witness.

## **H. Placement**

Once detriment is determined by clear and convincing evidence as required in Family Code sections 3041(a)-(d), and the ICWA requirements of Section 1912 (d), (e) and (f) have been met, the court must make a placement determination. Due weight and consideration must be given to the minor's wishes, if they are of sufficient age and capacity to reason so as to form an intelligent preference.<sup>419</sup>

Under the Family Code, the court looks to the best interests of the child when choosing a guardian.<sup>420</sup> First preference is given to the person in whose home the child been living in a wholesome and stable environment.<sup>421</sup> Second preference is to any other person deemed by the

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<sup>412</sup> PROB. CODE § 1000.

<sup>413</sup> *Guardianship of Jenna G.*, 63 Cal. App. 4th 387, 393 (1998).

<sup>414</sup> FAM. CODE §§ 3041(a) & (b); *Guardianship of Stephen G.*, 40 Cal. App. 4th 1418, 1432 (1995).

<sup>415</sup> FAM. CODE § 3041(d).

<sup>416</sup> FAM. CODE § 3041(c).

<sup>417</sup> *Guardianship of Zachary H.*, 73 Cal. App. 4th 51, 62 (1999).

<sup>418</sup> See § VIII(A) of this Benchguide ("Evidentiary Standards").

<sup>419</sup> FAM. CODE § 3042.

<sup>420</sup> FAM. CODE § 3041.

<sup>421</sup> FAM. CODE § 3040(a)(2).

court to be suitable and able to provide adequate and proper care and guidance for the child.<sup>422</sup> However, if the proposed guardianship involves an Indian child, then the standards of the ICWA are applicable in making a placement with a nonparent.<sup>423</sup>

## **I. Temporary Guardianships**

### **1. ICWA Compliance Issues**

Probate Code section 2250 addresses temporary guardianships, which are limited to circumstances where good cause can be shown. This provision does not explicitly incorporate any ICWA provisions, but if a temporary order is made, it appears to fall within the “foster care placement” definition found in the ICWA and the Act should apply.<sup>424</sup>

California Rules of Court, rule 5.482 (which applies to dependency proceedings) has been incorporated into Rule 7.1015 covering ICWA guardianships. A temporary guardianship order is analogous to an emergency detention. In fact, Family Code section 3041(d) specifically incorporates Section 1922 of the ICWA, which does allow for the emergency placement under state law, in order to prevent imminent physical damage or harm to the child. Proceedings subject to the ICWA shall be expeditiously initiated, transfer to tribal court may occur, or restoration to the parent or Indian custodian shall occur immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

## **J. Termination of Guardianship**

Probate Code section 1601 sets forth the criteria to terminate a probate guardianship, and the court is charged with using a “best interest” standard in determining whether to do so. Notably, both the ward’s tribe and Indian custodian are specified as parties that can petition for termination.

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<sup>422</sup> FAM. CODE § 3040(a)(3).

<sup>423</sup> FAM. CODE § 3041(e).

<sup>424</sup> 25 U.S.C. § 1903(1)(i).