

Office of Child Support Enforcement,
Administration for Children and Families,
Department of Health and Human Services

Comment Form

To: Director, Division of Policy and Training, OCSE/DP, 901 D Street SW, Washington, DC 20447

From: Judicial Council of California

Tribal Affiliation: Comment prepared with input from the Tribal Court-State Court Forum, an advisory committee comprised of 30 members, including tribal and state court judges

Date: January 15, 2015

Comment:

The summary of the *Notice of Proposed Rule Making: Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs* (as published in the Federal Register on November, 17, 2014 (Vol. 79 FR No. 221 68548) states that these proposed revisions will make Child Support Enforcement program operations and enforcement procedures more flexible, more effective, and more efficient by recognizing the strength of existing state enforcement programs, which are laudable goals supported by the council. Under the Tribal Impact Statement, when the federal Office of Child Support Enforcement (OCSE) circulated the proposal in April 2011, it contacted tribal leaders to engage in written consultation. At that time, there were no Tribal IV-D programs operating in California. Today, however, there are; the Yurok Tribe began receiving grant funding from the OCSE for start-up planning for a tribal child support program on August 1, 2011, and now has a comprehensive IV-D program.

The Judicial Council is providing this comment to describe the impact this proposed rule would have in California on both the local tribal and state courts, and to request that the draft rule be revised to address the following concerns: (1) the narrow restrictions drawn from PIQT 05-01; (2) the proposal does not envision the type of judicial jurisdictional framework that exists in California; (3) it does not allow for flexibility of overlapping jurisdictions of a tribal and state court or overlapping tribal and state child support services; (4) it will cause confusion and undermine due process rights of parties in tribal and state courts; and (5) it may result in conflicting orders and redundancy in services.

Narrow Restrictions Drawn from the Transfer Protocol Set Forth in PIQT 05-01

The council supports the inclusion of a closure rule that provides that states may close a case when its case has been transferred to a Tribal IV-D agency. However, the proposed language as

written in 45 CFR 303.11(21) will create barriers and interfere with state/tribal transfer protocols currently in place.¹

The council recommends deleting the unnecessary restrictions drawn from PIQT 05-01. The PIQT was issued in 2004 when fewer than ten tribes operated child support programs. Sophisticated protocols for case transfers have since been developed between Tribal IV-D and State IV-D agencies, particularly in PL 280 states.²

In California, the protocol consists of two processes depending on whether an action has been filed in the court. A case transfer may occur from the State IV-D agency to the Tribal IV-D agency when no action has been filed in the court. A parallel process must also occur in the state court when an action has been filed there. In this situation, the Tribal IV-D agency notifies the case participants of its intent to transfer the IV-D case to the Tribe. The case participants are given an opportunity to consent or object. The state IV-D agency then files a motion in the Court requesting case transfer and provides a hearing to the case participants, and the Court then must make a finding of concurrent jurisdiction prior to ordering a case transfer to the Tribal IV-D agency. Thereafter, the court and agency files are transferred to the Tribal IV-D agency.

The council suggests refining the NPRM language for transfers by omitting the outdated transfer language in PIQT 05-01 and instead including a more broad rule that does not restrict the negotiation of protocols between state IV-D and tribal IV-D agencies. The rule should provide flexibility for PL 280 states with overlapping jurisdiction and avoid confusion to the parties and due process concerns.

Judicial Framework and Concurrent Jurisdiction Between Tribal and State Courts

The proposed rule does not address the concurrent jurisdiction of tribal and state courts nor does it allow for the complexity in enforcement procedures and practices that must be worked out between the tribal and state court, and the tribal and state child support services agencies.

The issue of concurrent jurisdiction between state and tribal courts is governed by various statutes and case law. In 1953, through the enactment of Public Law No. 83-280 (Public Law 280) (18 U.S.C. §1162 and 28 U.S.C. § 1360), Congress extended to six states (including California) state jurisdiction over many crimes and some civil matters when the cause of action arose in Indian Country. While Public Law 280 extended state jurisdiction in specified areas, it did not diminish any inherent tribal court jurisdiction. Federal courts have specifically found that tribal courts have concurrent jurisdiction over domestic relations actions as long as they are willing to assume jurisdiction. *Sanders v. Robinson* (9th Cir. 1988) 864 F.2d 630. The Full Faith and Credit for Child Support Orders Act, P.L. No. 103-383 (28 U.S.C. § 1738(B)) mandates full faith and credit for child support orders between tribal and state courts. The mutual recognition of child support orders issued by a tribal or state court has aided the ability of these orders to be transferred from an issuing court to another court for effective enforcement of those orders.

¹ The council has also received feedback from Yurok Child Support Services, and they also agree that the proposed language as written in 45 CFR 303.11(21) will create barriers and interfere with state/tribal transfer protocols currently in place.

² California, Wisconsin, and currently Minnesota.

In California, under Family Code section 4251 et seq., child support actions, where title IV-D services are being provided, are heard by child support commissioners and rule 5.300 et seq. of the California Rules of Court govern practice and procedures for these support actions. The largest tribe in California, the Yurok Tribe, operates a tribal IV-D program that offers the following services: locating non-custodial and custodial parents, establishing paternity by voluntary declaration or court order, establishing child support orders, providing a non-cash alternative for child support payments, petitioning the Yurok Tribal Court to issue orders for Yurok Reservation employers to withhold wages, collecting and processing child support payments, extinguishing past due child support debt owed to the State of California, and other enforcement mechanisms via intergovernmental agreement with the state IV-D agency.

Flexibility for Overlapping Jurisdictions

In California, rule 5.372³ governs transfer of court cases between the tribal and state courts. However, because not every operational aspect or procedure of the respective tribal and state IV-D agencies is addressed by the statewide rule of court, the state title IV-D program and the tribal IV-D program have concurrently executing protocol agreements to set forth the agencies' respective responsibilities for the process of transferring case management responsibilities for child support services from the state to the tribe. The rule is intentionally broad to allow the tribal IV-D agency and DCSS to develop protocols to meet the unique needs of each of the tribal IV-D programs and the state child support agency. Further, although it was anticipated that either a tribal IV-D agency or a state IV-D agency will be the party initiating case transfer, the rule allows for flexibility to permit a party to request transfer where appropriate. The proposed rule's case closure notice and criteria provisions will have narrowing effects, and do not allow for statewide rules of court and tribally-specific/state negotiated protocol agreements.

Confusion for the Parties and Due Process Concerns

Under section 303.11 of the proposed rule, the only party entitled to notice is the recipient of child support services, whereas under state court rule 5.372(d), all of the parties receive notice of the petition to transfer the case. Under section 303.11, the parties have no right to object to the transfer, whereas under rule 5.372(d), all parties have the right to object to the case transfer.

Under rule 5.372(e) and (f), if the state court, after notice to the parties, finds that a timely objection to the transfer is made, the court must conduct a hearing on the record and consider the following factors before making a determination of whether to transfer the case: (1) the nature of the action; (2) the interests of the parties; (3) the identities of the parties; (4) the convenience of the parties and witnesses; (5) whether state or tribal law will apply to the matter in controversy; (6) the remedy available in such tribal court; and (7) any other factors. In contrast, under the proposed rule, no court hearings are contemplated as part of the transfer and case closure procedures.

³ See link for copy of rule http://www.courts.ca.gov/cms/rules/index.cfm?title=five&linkid=rule5_372

Conflicting Orders and Redundancy in Child Support Enforcement Services

By not contemplating concurrent jurisdiction of either the tribal and state courts or the tribal title-IVD and state title-IVD services, there is great potential for conflicting child support orders and overlapping, inefficient child support enforcement services.

To address these concerns, the council recommends that the PIQT 05-01 language be removed from the proposed case closure rule, and that it be redrafted to acknowledge the type of legal framework that exists in California. At the very least, the council is requesting that clarification be made that the proposed rule has no impact on the intergovernmental agreements worked out between State and Tribal IV-D agencies that utilize judicial processes for notice, transfer, and closure. These changes to the proposed rule would promote flexibility, effectiveness, and efficiency by recognizing the strength of tribal and state courts, which have worked out the orderly transfer of court cases and management responsibility for child support services between tribal and state courts through statewide rules of court and intergovernmental agreements.

We thank you for the opportunity to submit these comments.