



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 22-160

For business meeting on: September 20, 2022

Title

Family Law: Recognition of Tribal Court
Orders Relating to Division of Marital Assets

Rules, Forms, Standards, or Statutes Affected

Adopt forms FL-540 and FL-541

Recommended by

Tribal Court–State Court Forum
Hon. Abby Abinanti, Cochair
Hon. Suzanne N. Kingsbury, Cochair

Family and Juvenile Law Advisory
Committee

Hon. Stephanie E. Hulsey, Cochair
Hon. Amy M. Pellman, Cochair

Agenda Item Type

Action Requested

Effective Date

January 1, 2023

Date of Report

September 1, 2022

Contact

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Executive Summary

The Family and Juvenile Law Advisory Committee and the Tribal Court–State Court Forum recommend that the Judicial Council, effective January 1, 2023, adopt two new forms to implement Assembly Bill 627 (Stats. 2021, ch. 58). This was Judicial Council–sponsored legislation that added section 2611 to the Family Code and revised various provisions of the Tribal Court Civil Money Judgment Act found in the Code of Civil Procedure. The provisions ensure that divorce or dissolution judgments issued by tribal courts that include division of pension assets are effective and, in particular, are recognized as meeting the requirements of the Employee Retirement Income Security Act of 1974 (ERISA). AB 627 mandated that the Judicial Council adopt forms to implement the legislation.

Recommendation

The Family and Juvenile Law Advisory Committee and the Tribal Court–State Court Forum recommend that the Judicial Council, effective January 1, 2023, adopt:

1. *Joint Application for Recognition of Tribal Court Order Dividing Retirement Plan or Other Deferred Compensation* (form FL-540); and
2. *Application for Recognition of Tribal Court Order Dividing Retirement Plan or Other Deferred Compensation* (form FL-541).

The proposed new forms are attached at pages 6–9.

Relevant Previous Council Action

In 2010, the Judicial Council established the Tribal Court–State Court Forum bringing together tribal court and state court judges to address areas of mutual concern. In October 2013, the Judicial Council adopted rule 10.60 of the California Rules of Court establishing the forum as a formal advisory committee to the council. Part of the forum’s charge is to make recommendations relating to the recognition and enforcement of court orders that cross jurisdictional lines. In 2012, the Judicial Council proposed legislation that eventually became the Tribal Court Civil Money Judgment Act (Sen. Bill 406 (Evans); Stats. 2014, ch. 243). This legislation added sections 1730–1741 to the Code of Civil Procedure to clarify and simplify the process for recognition and enforcement of tribal court civil money judgments.

Possibly because the provisions of the Tribal Court Civil Money Judgment Act did not address divorce and dissolution orders, and expressly excluded some such orders, tribal courts reported that litigants were having issues with recognition of domestic relations orders that included division of pension benefits and other deferred compensation benefits governed by ERISA or a similar statute. In 2011, the U.S. Department of Labor issued guidance on when a domestic relations order issued under tribal law would be a “judgment, decree or order ... made pursuant to a State domestic relations law within the meaning of federal law.”¹ That guidance concluded that a tribal court order could only meet the standard for a “qualified domestic relations order” under ERISA if it was treated or recognized as such by the law of a state that could issue such an order.

The result of the guidance issued by the U.S. Department of Labor is that, for a tribal court divorce or dissolution order to effectively distribute pension or other deferred compensation benefits governed by ERISA, state law must recognize the order as a judgment, decree, or order made under state domestic relations law.

¹ Advisory Opn. 2011-03A (Feb. 2, 2011), www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2011-03a.

Prior to the passage of AB 627, California law did not explicitly recognize judgments or orders from tribal courts that divide pension assets as judgments or orders made under state domestic relations law as required for orders to be valid under ERISA. Further, California law at the time had no mechanism to “recognize” a tribal court order. Therefore, in order for a party in a tribal court action to have an ERISA domestic relations order accepted, that party would have to “register” the order.

To remedy this problem, the Judicial Council sponsored and the Legislature enacted AB 627. AB 627 creates a simplified process for California courts to recognize domestic relations orders from tribal courts that would meet the definition of a “qualified domestic relations order” under ERISA and other similar statutes if they were issued by a state court. AB 627 mandates that the Judicial Council create a form or forms to implement the statute.

Analysis/Rationale

Section 1733.1(a) of the Code of Civil Procedure, added by AB 627, creates a process where the parties to the underlying tribal court proceeding, when they both agree, may file a joint application for recognition of a tribal court order, and section 1733.1(b) mandates that the application be on a form adopted by the Judicial Council. Proposed new form FL-540 fulfills that mandate, for a joint application. The FL-540 contains all the content required by section 1733.1(a), including the names and addresses of the joint applicants and the name and address of the tribal court, with an item stating that a certified copy of the order is attached. Although not required by the statute, the committees determined that adding the telephone number and email address for the tribal court that issued the underlying order would be useful to facilitate communication.

Section 1733.1(e) contemplates the situation where one of the parties to the tribal court order does not agree to join in the application and states that the other party may proceed by having the tribal court execute a certificate in lieu of the signature of the other party. Section 1733.1(e) mandates that the Judicial Council adopt a format for that certificate. The committees concluded that it would be clearest to create a separate form for the situation where one party is not joining in the application, and to include the certificate required to be executed by the tribal court in that form. Proposed new form FL-541 is for this situation. This form, like form FL-540, requires name, address, and contact information for the applicant and for the other party to the underlying tribal court case. It also includes an item to check if the applicant asked the other party to agree to file a joint application, and the other party did not agree or is unable to file jointly. The certificate to be executed by the tribal court on any application made by only one party is on the second page of form FL-541. The certificate requires that an authorized representative of the tribal court not only declare that the attached copy of the order is a true copy, but also that the order was made in compliance with the tribal court’s rules and procedures and that the order is final.

Policy implications

AB 627 requires that any application made under these provisions be on a form developed by the Judicial Council and also requires development of a format of tribal court certificate when one party to the Tribal Court action does not join in the application. Any policy implications are therefore due to the legislation, not this proposal.

Comments

The proposal circulated for public comment during the spring 2022 invitation-to-comment cycle. It was sent to the standard mailing list for family and juvenile law proposals that includes appellate presiding justices, appellate court administrators, trial court presiding judges, trial court executive officers, judges, court administrators and clerks, attorneys, family law facilitators and self-help center staff, legal services attorneys, social workers, probation officers, Court Appointed Special Advocate (CASA) programs, and other juvenile and family law professionals. It was also sent to tribal leaders, tribal advocates, and tribal attorneys, included in the monthly newsletter distributed by the Tribal Court–State Court Forum and sent to the listserve of the California Department of Social Services Office of Tribal Affairs to reach those with an interest in the Indian Child Welfare Act and tribal issues.

The proposal received four comments. The comments were from the California Tribal Families Coalition, the Orange County Bar Association, the Superior Court of Orange County, and the Superior Court of San Diego County. Neither the California Tribal Families Coalition nor the Superior Court of Orange County indicated whether or not they agreed with the proposal. The Orange County Bar Association and the Superior Court of San Diego County both indicated they agreed if modified.

The comments mainly suggested clarifications or corrections to language in the proposed forms. The forms were revised in response to those comments.

One commenter suggested that we draft a form of order recognizing the tribal court order. Under section 2611 of the Family Code, no order issues from the state court following the filing of the tribal court order: any order filed in accordance with section 1733.1 “shall be recognized as an order made pursuant to the domestic relations law of this state.” However, given that this is not a common approach, an alert box was added to the bottom of each form stating that the application is being made under section 1733.1 of the Code of Civil Procedure and according to section 2611 of the Family Code, the tribal court order shall be recognized as an order made pursuant to the domestic relations laws of this state.

The invitation to comment had specifically asked whether there should be one form for both a joint application and an application made by only one of the parties to the underlying tribal court action. Three of the four commenters felt that two forms were preferable to one. The California Tribal Families Coalition indicated that they believed that one form would be preferable, but after discussion and consideration the committees determined that because only one form of application requires a certificate from the tribal court, it was clearer to have a separate form for

that situation. The committees therefore decided to proceed with two forms, which is also consistent with the way the proposal circulated for comment.

The invitation to comment also specifically asked whether statewide rules for processing these applications would be helpful. All four commenters indicated that statewide rules would be helpful. The committees will consider developing such rules in a future cycle.

As circulated for public comment, the proposal contemplated allowing those who benefit from an order – such as children or other dependents who receive support payments or other allocations from a pension plan or other plan for deferred compensation – to use the simplified filing process provided for in section 1733.1 of the Code of Civil Procedure. Following comment period, however, the committees removed the reference to beneficiaries after concluding that legislation only authorized the simplified process in section 1733.1 to be used by the parties to the tribal court action. AB 627 did amend section 1731(b)(2) and (3) of the Code of Civil Procedure to permit recognition of tribal court orders establishing the right of a child or other dependent assigned a right to benefits from a retirement plan or other plan of deferred compensation to have that order recognized under section 1734 of the Code of Civil Procedure. The committees will consider in the future, as time and resources allow, whether some expedited process should be recommended for those requests for recognition.

Alternatives considered

The alternative of taking no action was not considered because the statute requires that the application be made on a Judicial Council form and that the Judicial Council develop a form of tribal court certificate. The committees did consider all of the alternatives discussed above in the Comments section.

Fiscal and Operational Impacts

Both of the superior court commenters indicated that there would be some costs associated with implementation, including updating internal procedures, creating event codes, case management entries, and training staff. These costs are one time and unavoidable given the legislative mandate to implement AB 627.

Attachments and Links

1. Forms FL-540 and FL-541, at pages 6–9
2. Chart of comments, at pages 10–14

ATTORNEY OR PARTY WITHOUT ATTORNEY NAME: FIRM NAME: STREET ADDRESS: CITY: TELEPHONE NO.: EMAIL ADDRESS: ATTORNEY FOR (name):	STATE BAR NUMBER: STATE: ZIP CODE: FAX NO.:	<p style="text-align: center;"><i>FOR COURT USE ONLY</i></p> <p style="text-align: center;">DRAFT Not approved by the Judicial Council</p>
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:		
APPLICANT ONE: APPLICANT TWO:		
JOINT APPLICATION FOR RECOGNITION OF TRIBAL COURT ORDER DIVIDING RETIREMENT PLAN OR OTHER DEFERRED COMPENSATION		CASE NUMBER:

Use this form to ask the court to recognize a tribal court order that assigns all or part of the following types of benefits to an alternative payee: child support payments; spousal support payments; or marital property rights for a spouse, former spouse, child, or other dependent of a participant in a retirement plan or other plan of deferred compensation. You can make this application in the superior court of any county in which an applicant resides. **You must attach a certified copy of the tribal court order.**

If one party to the tribal court action has not agreed to or is unable to proceed with the filing of a joint application for recognition, use *Application for Recognition of Tribal Court Order Dividing Retirement Plan or Other Deferred Compensation* (form FL-541).

Note: Recognition of a tribal court order based on this application does not give a court of this state jurisdiction to modify or enforce the tribal court order.

1. Applicant One (Petitioner in the tribal court action) (name):
 Mailing address:

 Telephone number:
 Email address:
2. Applicant Two (Respondent in the tribal court action) (name):
 Mailing address:





 Telephone number:
 Email address:
3. Tribal court that issued the order (name):
 Mailing address:

 Telephone number:
 Email address:

APPLICANT ONE: APPLICANT TWO:	CASE NUMBER:
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4. The applicants are parties to the underlying action in tribal court, and ask the court to recognize the order from the tribal court (*name of court*): _____ issued on (*date issued with tribal court*): _____ under Code of Civil Procedure section 1733.1.
5. A certified copy of the tribal court order to be recognized is attached to this form.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____ _____ (TYPE OR PRINT NAME)	 _____ (SIGNATURE OF APPLICANT ONE)
Date: _____ _____ (TYPE OR PRINT NAME)	 _____ (SIGNATURE OF APPLICANT TWO)
Date: _____ _____ (TYPE OR PRINT NAME)	 _____ (SIGNATURE OF ATTORNEY)
Date: _____ _____ (TYPE OR PRINT NAME)	 _____ (SIGNATURE OF ATTORNEY)

Notice: This application form complies with the requirements of Code of Civil Procedure section 1733.1. Under Family Code section 2611, a final order of a tribal court filed in accordance with section 1733.1 of the Code of Civil Procedure shall be recognized as an order made pursuant to the domestic relations laws of this state.

Note: Recognition of a tribal court order based on this application does not give a court of this state jurisdiction to modify or enforce the tribal court order.

- b. Applicant has tried to have the respondent agree to the filing of a joint application under Code of Civil Procedure section 1733.1(a), but the respondent has not agreed or is unable to proceed.

Family Law: Recognition of Tribal Court Orders Relating to Division of Marital Assets (Adopt forms FL-540 and FL-541)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
1.	California Tribal Families Coalition by Mica Llerandi, Senior Attorney, Legal and Program Services	N/I	<p><i>Does the proposal adequately address the stated purpose?</i> Yes, the proposal is clearly and adequately addressed.</p> <p><i>Is it clearer to have two application forms, one for joint applications and one for single-party applications, or should there be a single application form that could be used for either a joint or solo application?</i> After reviewing the proposed form, it seems that having a single form for either joint or solo application will be easier to use. When using two forms, parties may become confused about which form to use.</p> <p><i>Do commenters suggest any additions or changes to the proposed tribal certificate in the proposed form FL-541?</i> The Coalition makes the following recommendations (see screenshot below): <ul style="list-style-type: none"> - Removing “Representative” and leaving it as “Certification of Tribal Court.” - Removing “tribal court” as the name may be in the title of the Tribe’s court name. </p> <p><i>Would rules describing the process for recognizing and filing these tribal court orders be useful and of assistance to the courts and justice partners?</i> Yes. Providing rules on how the recognition process works would provide practitioners greater clarity of the court’s process. Additionally, it might be beneficial to have a form for the order</p>	<p>No response required.</p> <p>The majority of commenters felt that two forms were preferable to one. After discussion and consideration the committees determined that because only one form of application requires a certificate from the tribal court, it was clearer to have a separate form for that situation. The committees have decided to proceed with two forms as circulated.</p> <p>The form has been revised in response to these suggestions.</p> <p>All commenters agreed that rules would be helpful, and the committees will consider developing rules in a future cycle.</p> <p>Under section 2611 of the Family Code, no order issues from the state court following recognition</p>

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			recognizing the tribal court order.	of the tribal court order. The tribal court order is recognized upon filing. However, in response to this comment language has been added to the bottom of each form clarifying that it was filed under section 1733.1 of the Code of Civil Procedure and pursuant to section 2611 of the Family Code the tribal court order shall be recognized as an order made pursuant to the domestic relations laws of this state.
2.	Orange County Bar Association by Daniel S. Robinson, President	AM	There is an extra word on page two, item 5 of FL-540. The applicants are parties to the underlying action, or in the case of another applicant a beneficiary of the order, in tribal court, (date filed with tribal court) ask the court to recognize of the order from the tribal court (name of court) issued on (date filed with tribal court) under Code of Civil Procedure section 1733.1.	The form has been revised in response to this comment.
			Does the proposal appropriately address the stated purpose? Yes.	No response required.
			Is it clearer to have two application forms, one for joint applications and one for single-party applications, or should there be a single application form that could be used for either a joint or solo application? Two forms are clearer.	No response required.
			Do commenters suggest any additions or changes to the proposed tribal certificate in proposed form FL-541? No.	No response required.
			Would rules describing the process for recognizing and filing these tribal court orders be useful and of assistance to the courts and justice partners? Yes.	All commenters agreed that rules would be helpful, and the committees will consider developing rules in a future cycle.

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3.	Superior Court of California, County of Orange by Vivian Tran, Operations Analyst	N/I	<i>Does the proposal appropriately address the stated purpose?</i> Yes, the proposal appropriately addresses the stated purpose.	No response required.
			<i>Is it clearer to have two application forms, one for joint applications and one for single-party applications, or should there be a single application form that could be used for either a joint or solo application?</i> It is clearer to have two application forms. It would be too confusing to have both options on one form, and it would also make the form longer than it should be.	No response required.
			<i>Do commenters suggest any additions or changes to the proposed tribal certificate in n proposed form FL-541?</i> In item number 4(a), the recommendation is to remove the word “in,” and the space between “tribal court” and “on (date).”	The form was revised in response to this comment.
			<i>Would rules describing the process for recognizing and filing these tribal court orders be useful and of assistance to the courts and justice partners?</i> Yes, the rules would be useful to the courts and justice partners.	All commenters agreed that rules would be helpful, and the committees will consider developing rules in a future cycle.
			<i>Would the proposal provide cost savings? If so, please quantify.</i> The proposal does not appear to provide cost savings.	No response required.
			<i>What would the implementation requirements be for courts—for example, training staff (please</i>	No response required.

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			<p><i>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?</i></p> <p>Creating or revising case processing and courtroom procedures.</p> <p>Training case processing clerks and courtroom clerks (approximately 1-2 hours).</p> <p>Creating event codes for case management systems.</p>	
			<p><i>Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?</i></p> <p>Yes, three months will be sufficient time for implementation.</p>	No response required.
			<p><i>How well would this proposal work in courts of different sizes?</i></p> <p>This proposal would work for Orange County.</p>	No response required.
4.	Superior Court of California, County of San Diego by Mike Roddy, Executive Officer	AM	<p>Does the proposal appropriately address the stated purpose? Yes.</p>	No response required.
			<p>Is it clearer to have two application forms, one for joint applications and one for single-party applications, or should there be a single application form that could be used for either a joint or solo application?</p> <p>Yes. It is clearer to have two separate forms.</p>	No response required.
			<p>Do commenters suggest any additions or changes to the proposed tribal certificate in the proposed form FL-541?</p> <p>No. The certificate appears to be sufficient.</p>	No response required.

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			Would rules describing the process for recognizing and filing these tribal court orders be useful and of assistance to the courts and justice partners? Yes.	All commenters agreed that rules would be helpful, and the committees will consider developing rules in a future cycle.
			Would the proposal provide cost savings? If so, please quantify. No.	No response required.
			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? Updating internal procedures, case management entries, and training staff.	No response required.
			Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes.	No response required.
			How well would this proposal work in courts of different sizes? It appears that the proposal would work for courts of all sizes.	No response required.
			FL-540: Propose deleting “the” from the following sentence in the information box “If the one party to the tribal court action...”	The form was revised in response to this comment.