



TRIBAL CUSTOMARY ADOPTION HANDBOOK

Presented by



through the support of California Department of Social Services (CDSS)

Use and Disclaimers

The Tribal Customary Adoption Handbook is a reference tool for attendees of this training. The Handbook is not intended to be legal advice, and is not intended to be a comprehensive discussion covering all legal issues or authority. When referring to the Tribal Customary Adoption Handbook, it is critical that the reader keep in mind that each case, situation, and legal circumstance is unique. Often cases or situations can also involve a number of complex issues that can cross over into other legal areas. Most importantly state and federal law is subject to change therefore the reader is encouraged to check legal citations, regulations and other legal references in the Handbook to ensure that the reader is relying on the most current law and regulations.

Credits

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Tribal Customary Adoption

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Tribal Customary Adoption

Outline of Course

Presented by Jedd Parr – CILS Directing Attorney, Sacramento
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1. Introductions
2. PowerPoint presentation on TCA
 - A. Background
 - B. Overview
 - C. Comparisons with other permanency options
 - D. Discussion of audience's experience
 - E. Nuts and bolts of a TCA – procedural requirements, timing, content, finalization
 - F. Questions and discussion
3. Hypothetical scenarios for sub-groups and further discussion
4. Final questions and wrap-up
5. Evaluations

TRIBAL CUSTOMARY ADOPTIONS

CALIFORNIA INDIAN LEGAL SERVICES
JEDD PARR, DIRECTING ATTORNEY (SACRAMENTO)
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BACKGROUND

- By conservative estimates, at least 80%-90% decline in California Indian population with influx of European settlers
 - Theft of land through unratified treaties
 - War parties paid by the state
 - Indentured servitude allowed by state law
 - Forced removals
 - Boarding schools
 - Assimilation policies
 - Relocations
- Result – immense loss of culture and continuity

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BACKGROUND

- In addition to the historical trauma from those policies, at the time of the ICWA's passage, staggering numbers of foster care and adoption placements for Native American children
- Often foster care and adoption placement to non-Indian homes resulted in psychological trauma and cultural disconnect
- Conventional adoptions associated with assimilation:
 - Breakup of Indian families
 - Damaged or destroyed connections between children and tribes
 - Interference with inheritance rights
 - Judgment regarding Indian families and culture

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TODAY

- California has the second highest number of federally-recognized tribes in the nation (second to Alaska)
- California has the highest number of residents identifying in whole or in part as Indian (2010 Census)
 - Many of these are from out-of-state tribes due to federal relocation programs of the 1950s

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TODAY

- Federal policy - removal and placement of Indian children should “**reflect the unique values of Indian culture**” (25 U.S.C. §1902)

This policy has also been recognized by the State of California:

- There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children, and ...the State of California has an interest in protecting Indian children ...The state is committed to protecting the essential tribal relations and best interest of an Indian child by promoting practices, in accordance with the Indian Child Welfare Act (25 U.S.C. §§1901 et seq.)

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TODAY

- (continued) and other applicable 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

(WIC §224(a)(1). See also Probate Code §1459(a)(1) and Family Code §175(a)(1))

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CALIFORNIA LAW AB 1325 TRIBAL CUSTOMARY ADOPTION

- Enacted February 27, 2009
- Effective July 1, 2010
- Legislation sponsored by Soboba Band of Luiseño Indians
- Supported by many tribes throughout California

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AB 1325

- AB 1325 included a four-year “sunset” provision
- Idea was to assess how valuable of an addition it was to existing permanency options, then decide whether to keep. Factors like:
 - How often it was used
 - Whether it benefitted Indian children
 - Whether it helped reduce number of contested hearings
- Ultimately it was kept and sunset provision is no longer in effect

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SO WHAT IS TCA?

- “Tribal customary adoption” means adoption...
- by and through the tribal custom, traditions, or law of an Indian child’s tribe...
- whereby termination of parental rights is not required

(WIC §366.24(a)(1))

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TCA = A POTENTIALLY CULTURALLY-APPROPRIATE OPTION

- Is it appropriate for your Tribe?
 - The Tribe decides that
 - Useful in many cases
 - But, with over 100 tribes in California and over 560 nationwide, obviously not every tribe agrees with TCA in every case

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WHY CONSIDER TCA?

- Concurrent planning:
 - 1. Plan if reunification is successful – placement remains with parent(s)
 - 2. Plan if reunification is not successful – placement with someone besides parent(s)

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WHY CONSIDER TCA?

- As mentioned before, conventional adoption historically associated with assimilation
- Detrimental effects to Indian children may include:
 - Loss of tribal membership
 - Loss of trust land inheritance rights (and associated rights – hunting, fishing, gathering, income from land, etc.)
 - Loss of connection to Tribe

So, before TCA, tribes often opposed adoption and supported guardianship if reunification with parent(s) was not successful.

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PROBLEMS WITH GUARDIANSHIP

- Guardianship funding for caregivers can be lower in amount or flexibility than adoptive assistance
- Less permanent, therefore lower on the list that state courts must follow, unless an exception applies (will address in more detail later)
- Result – tribes are often fighting an uphill battle for guardianship, which can be expensive and time-consuming

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TCA VS. GUARDIANSHIP

- TCA higher than guardianship or long-term foster care on the list that state courts must follow (WIC §366.26)
- More permanent situation for child, which courts favor
 - But... this may or may not be seen as an advantage by the parties, depending on the facts of the case

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TCA VS. GUARDIANSHIP

Some views in support of more permanency:

- In guardianships, parents can petition to get children back
 - So, foster parents and minor's counsel (and others) may oppose guardianship
- No uncertainty for children
- A non-federal non-relative guardianship must remain an open case for funding purposes, with social worker visits, even if there are no ongoing safety concerns
 - So, counties may prefer TCA at times

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TCA VS. GUARDIANSHIP

Some views against more permanency:

- Sometimes caregivers are willing to be placement, but not willing to be the child's legal parents
 - Could be true of relatives who do not want to confuse the status they already have ("I'm their aunt, not their mother"), or to be seen as "taking away" the children
- Sometimes there may be hope that the parents, with time, will correct what caused the dependency, and will be able to get the children back
 - Could be true of older caregivers who are willing to be permanent placement if necessary but want to leave the door open to the parents

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TCA & FUTURE CONNECTION TO TRIBE

- Key Point -- allows the Tribe to shape the conditions under which adoption will occur
 - Examples:
 - Visitation with extended family/tribal members
 - Attendance at cultural events
 - Language classes or cultural education
 - These can be ensured with a TCA, not simply left to a guardian's or conventional adoptive parent's discretion

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TCA VS. CONVENTIONAL ADOPTION

- If placement doesn't comply with terms, there are better enforcement options than post-adoption contact agreements
 - PACAs (WIC §366.29):
 - Must be entered into voluntarily
 - May not impair "the ability of the adoptive parent or parents and the child to change residence within or outside the state"
 - Enforcement subject not only to prior mediation, but also to court's determination that it is in the child's best interest
 - (Remember, it will not necessarily be the same judge hearing an enforcement request as the original case – so even if original judge in favor of PACA, later judge might not be)

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TCA VS. CONVENTIONAL ADOPTION

Compare PACA to contact arrangement under a TCAO (enforcement of TCAO covered at WIC §366.26(i)(2)):

- Not subject to adoptive parents declining to enter
- Not subject to being undermined or potentially voided by a long-distance move (“the rights and obligations of the parties as to the matters determined by the Indian child's tribe shall be binding on all parties”)
- Enforcement subject to prior mediation, but not to a new determination by court that it is in the child's best interest

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TCA VS. CONVENTIONAL ADOPTION

- Again, no termination of parental rights is required
 - No potential loss of tribal membership
- Tribe can ensure inheritance rights from biological family
 - AIPRA – for inheritance of trust property, adopted-out children shall not be considered heirs of birth parents
 - Nor for other birth family unless they have maintained a “family relationship” with the child (25 USC §2206 (j)(2)(B)(iii)(I))
 - But...

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TCA VS. CONVENTIONAL ADOPTION

- AIPRA also allows tribal law to provide otherwise (25 USC §2206 (j)(2)(B)(iii)(II))
- And again, what is TCA?
 - Adoption “by and through the tribal custom, traditions, or law of an Indian child’s tribe...” (WIC §366.24(a)(1))
 - ...that must address “the rights of inheritance of the child” (WIC §366.24(c)(10))

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TCA VS. CONVENTIONAL ADOPTION

- Strongly favored over conventional adoption in 1st District Court of Appeal (“default option” for Indian children under *In re H.R.* (2012) 208 Cal.App.4th 751)
 - 1st District – Humboldt and Del Norte; also Alameda, Contra Costa, Lake, Marin, Mendocino, Napa, San Francisco, San Mateo, Solano, and Sonoma
 - Rationale – that TPR can interfere with a child’s connection to the Tribe – stated in decisions in 3rd, 4th, and 5th Districts

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DISCUSSION

- Audience – any examples or experience with TCA vs. other forms of permanency?



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TCA - KEY POINTS

- Only available when the Tribe agrees
- Only in dependency
- Only available for children from federally-recognized tribes

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NUTS AND BOLTS

- Core of TCA – WIC §366.24

(Other sections do address TCA, but all of the major elements are at §366.24)

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ADOPTION STATUTES DO NOT APPLY TO TCA

Family Code §8600.5: general adoption codes do not apply to TCA:

“Tribal customary adoption as defined in Section 366.24 of the Welfare and Institutions Code and as applied to Indian Children who are dependents of the court, does not apply to this part.”

(Amended by Stats. 2012, Ch. 35, Sec. 9. Effective June 27, 2012)

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NO PRIOR CONSENT OF INDIAN PARENT OR INDIAN CUSTODIAN

The Indian parent or Indian custodian whose parental relationship will be modified is not required to give prior consent to TCA .

(WIC §366.24(c)(11))

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TCA MUST BE ADDRESSED IN ASSESSMENTS

- Whenever an assessment is ordered it must address the option of TCA, including those pursuant to Sections 361.5, 366.21, 366.22, 366.25, or 366.26 for Indian children
 - TCA as an option must be included in all of the reports to the court required under the above
 - Basically, from disposition hearing on, county should be consulting with Tribe on whether TCA is appropriate
 - However, Tribe should not wait on county – if TCA is identified as appropriate, Tribe should notify county as early as feasible

(WIC §366.24(b))

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TCA ORDER

A TCA Order must be done by the Tribe and include at least:

- A description of how the legal relationship of the birth parents or Indian custodian and the child has been modified, including;
 - Descriptions of contact between them, if any,
 - Responsibilities of the birth parents or Indian custodian, and
 - Inheritance rights of the child.
- A description of the child's legal relationship with the Tribe.

(WIC §366.24(c)(10))

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TCA ORDER

- There will be a conclusive presumption any parental rights or obligations not outlined in the TCA Order shall become rights or obligations of the adoptive parent(s)
- A TCA Order cannot include any child support obligations from the birth parents or Indian custodian

(WIC §366.24(c)(10))

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INFORMATION FOR TCA AND TAKING OF EVIDENCE

- “The child, birth parents, or Indian custodian and the tribal customary adoptive parents and their counsel, if applicable, may present evidence to the tribe regarding the tribal customary adoption and the child’s best interest.” (WIC §366.24(c)(7))
- Formal Tribal Court or Council hearing not required (*In re Sadie S.* (2015) 241 Cal.App.4th 1289)
- Exact procedures in tribal forum will vary from tribe to tribe – forum can be the Tribal Court, Tribal Council, or other body duly authorized by the Tribe

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INFORMATION FOR TCA AND TAKING OF EVIDENCE

- However, certain basics required to qualify for full faith and credit from state court:
 - Due process
 - Adequate notice
 - Opportunity to be “heard” (again, not necessarily in formal hearing)
 - Before neutral decision maker

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TCA ORDER – FULL FAITH AND CREDIT

- “Full faith and credit”
 - This means that tribal Order is adopted as the Superior Court’s own – state funding continues, Order is enforceable in state court
- Reasons FF&C might be denied:
 - No due process
 - Order offends important and legitimate state public policy
 - Excessive burden on adoptive parents could be viewed as discouraging adoption, which would be against state public policy

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REQUIRED HOME STUDY

- Tribe or Tribe’s designee must conduct TCA Home Study before final approval of placement (WIC §366.24(c)(1))
- Designee can be:
 - Licensed county adoption agency
 - State DSS when it acts as county adoption agency
 - Other CA-licensed adoption agency
- Often done at least in part by the County (criminal background checks and CACI checks)

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REQUIRED HOME STUDY

- The home study shall include an evaluation of:
 - Background, safety, and health information of the adoptive home,
 - Biological, psychological, and social factors of the prospective adoptive parent or parents,
 - Commitment, capability, and suitability of the prospective adoptive parent or parents to meet the child's needs.

(WIC §366.24(c)(1)(B))

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REQUIRED HOME STUDY

- Standard for Evaluation “of the prospective adoptive parents’ home shall be the prevailing social and cultural standards of the child’s tribe.” (WIC §366.24(c)(1)(B))
- What is the best authority on those standards?
 - The Tribe (obviously!)
- What does this mean for the Tribe and county?
 - Both should be checking in with each other during home study, especially if any possible problems arise

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REQUIRED HOME STUDY

- Who gets to see the home study?
 - Adoption assessment will be submitted to court – but this is a summary of the home study, not the home study itself
 - §366.24(c)(8) says Tribe must approve home study – but this is typically part of the adoption file and therefore confidential
 - Remember, most adoption laws do not apply to TCA (Fam. Code §8600.5)
 - What to do if Tribe wants to see home study itself and the home study entity refuses?
 - See if adoptive parents will consent
 - If not, court order

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BACKGROUNDS/CRIMINAL RECORDS/CHILD ABUSE INDEXES

Tribe versus Tribal Designee Conducting Home Study

1. If designee conducts, needs to be able to access all necessary child abuse index's and registers, and state and federal criminal records and background check through DOJ (See WIC §§366.24(c)(1)(a), (c)(2), (c)(3)(b))
2. If the Tribe conducts the home study the agency shall perform the necessary checks (WIC §366.24(c)(2), (c)(3)(C))
3. If federal or state law provides that tribes may conduct all required background checks, such tribally administered background checks shall satisfy the requirements of this section as long as the standards for the background checks are the same as those applied to all other prospective adoptive parents in California (WIC §366.24(c)(4))

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CERTAIN CRIMES BAR PLACEMENT

No child may be placed in a home with an adoptive parent or any adult with:

- A felony conviction for:
 - child abuse or neglect
 - spousal abuse
 - crimes against a child, including child pornography, or
 - a crime involving violence, including rape, sexual assault, or homicide, but not including other physical assault and battery.
- Or a felony conviction that occurred within the last five years for physical assault, battery, or a drug-related offense.

(WIC §366.24(c)(5))

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TIMING

- Initially, the timing seemed pretty simple
 - A .26 hearing is held at which, if the Tribe is in agreement, TCA is ordered as the permanent plan
 - The .26 is then continued for up to 180 days to allow the Tribe to draft the TCA Order, and to allow time for the home study to be completed
 - The Tribe files the TCA Order 20 days before the continued .26 hearing
 - At continued .26 hearing, court decides on full faith and credit, home study is approved, and remaining steps proceed from there
- This fits the most natural reading of WIC 366.24 and the de facto regulations implementing TCA (ACL 10-47)

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TIMING

- However, WIC §366.24 is somewhat vaguely worded in one area (“the court may continue” the .26 hearing... not “shall”)
- Third District decision: *In re A.M.* (2013) 215 Cal.App.4th 339
 - Timing problems vis-à-vis statute:
 - No provision for Tribe filing TCA Order before first .26
 - Decision says evidence may be submitted to Tribe at .26 hearing – but it is almost certain that no one from Tribe with the authority to consider that evidence or modify the TCA Order will be at that hearing
- Timing in *A.M.* appears in subsequent decisions in Fourth and Fifth Districts (*In re I.P.* (2014) 226 Cal.App.4th 1516; *In re Sadie S.* (2015) 241 Cal.App.4th 1289)

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TIMING

- **Result – if the Tribe believes that reunification may not occur, and that TCA is the best alternative, the Tribe should at least begin, and if possible complete, issuance of the Order before the initial .26 hearing**
- **Should also initiate home study enough in advance of the .26 hearing that it reasonably could be completed**

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CONTINUANCE FOR TCA PROCESS, FILING AND ORDER

- If the Tribe identifies TCA as the permanent placement plan the court may continue the §366.26 selection and implementation hearing for up to 120 days
- The Tribe must use this time to complete the TCA process and file a TCA Order with the court
- The court has discretion to grant an additional continuance to the Tribe of up to 60 days for the Tribe to file the TCA Order
- The TCA Order must be filed with the court at least 20 days prior to the set hearing date

(WIC 366.24(c)(6))

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CONTINUANCE FOR TCA PROCESS, FILING AND ORDER

- If the Tribe does not file the TCA Order within the designated timeframe, the court must make new findings and orders for the best permanent plan of the child
 - This does not absolutely eliminate TCA as an option – but practically speaking, the court may be unlikely to return to TCA and the delay involved if the process has not been successful thus far

(WIC §366.24(c)(6))

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FINALIZATION OF TCA

- A child will be eligible for TCA placement when:
 - TCA Order given full faith and credit, and
 - Home study approved by Tribe
- The Agency will then be authorized to make the TCA placement and sign a TCA placement agreement
- The Agency shall then sign an Adoption Assistance Agreement
- The adoptive parent(s) may then file a petition for adoption

(WIC §366.24(c)(8))

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FINALIZATION OF TCA

- Once the prospective adoptive parent(s) have filed the adoption petition, the agency must submit to the court a full and final report of the facts of the proposed TCA with required sections specified by the department's regulations. WIC §366.24(c)(12).
- The Agency must supervise the adoptive placement for 6 months unless:
 - The child was previously placed with the same family as a foster child, which may shorten the supervision by one month for each month there; or
 - The child is being adopted with a relative with whom he or she has an established relationship. (WIC §366.24(c)(8))

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FINALIZATION OF TCA

- After:
 - TCA Order has been issued
 - TCA Order given full faith and credit in state court
 - Supervision of placement has been complete, and
 - State court issues final decree of adoption
- Then:
 - The TCA adoptive parent(s) shall have all the rights and privileges afforded to, and are subject to all the duties of, any other adoptive parent(s) under the laws of California

(WIC §366.24(c)(13) (notwithstanding any other laws))

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FINALIZATION OF TCA

- The court must then terminate its jurisdiction over the case (WIC §366.24(c)(14))

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CALIFORNIA COURT WEBSITE

- <http://www.courts.ca.gov/12569.htm>
- Has links to:
 - Legislative text
 - Amendment text
 - Amended Court Rules re TCA
 - Amended Court Forms re TCA

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AMENDED COURT RULES FOR TCA

- [Rule 5.502](#) Definitions and use of terms
- [Rule 5.690](#) General conduct of a disposition hearing
- [Rule 5.708](#) General review hearing requirements
- [Rule 5.715](#) Twelve-month permanency hearing
- [Rule 5.720](#) Eighteen-month permanency review hearing
- [Rule 5.722](#) Twenty-four month subsequent permanency review hearing
- [Rule 5.725](#) Selection of a permanent plan
- [Rule 5.726](#) Prospective adoptive parent designation
- [Rule 5.727](#) Proposed removal
- [Rule 5.728](#) Emergency removal
- [Rule 5.730](#) Adoption
- [Rule 5.740](#) Hearings subsequent to a permanent plan

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AMENDED COURT FORMS FOR TCA

[Adopt-050 - How to Adopt a Child in California](#)

[Adopt-200 - Adoption Request](#)

[Adopt-210 - Adoption Agreement](#)

[Adopt-215 - Adoption Order](#)

[Adopt-220 - Adoption of an Indian Child](#)

[JV-300 - Notice of Hearing on Selection of a Permanent Plan](#)

[JV-320 - Orders Under Welfare and Institutions Code Sections
366.24, 366.26, 727.3, 727.31](#)

[JV-320 - Request for Prospective Adoptive Parent Designation](#)

[JV-327 - Prospective Adoptive Parent Designation Order](#)

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THE END

Questions?

Evaluations

Please take the next ten minutes to complete the evaluation form included in your handouts. This form will help us to improve our trainings and provide useful feedback that we will help us in the development of future trainings.

Thank you to our host and audience!

(916) 978-0960, x. 308 or jparr@calindian.org

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Tribal Customary Adoption

Tribal Customary Adoption Checklist

Presented by Jedd Parr – CILS Directing Attorney, Sacramento
Jasmine Andreas – CILS Directing Attorney, Bishop

This checklist was designed to assist tribes through the process of considering and implementing a tribal customary adoption (TCA) as a permanency plan for Indian children in the California dependency system. Please note that in certain appellate districts (as of March 2017, the Third, Fourth, and Fifth Districts), the relative timing of the selection and implementation hearing (“.26 hearing”), the TCA Order, and the home study may differ from other districts.

- Internal consideration of TCA as a possible permanent plan if reunification fails
(This may need to occur as early as the disposition hearing, if reunification services are bypassed and a selection and implementation hearing – “.26 hearing” – is set)
 - Desirability of TCA as opposed to less permanent alternative (such as guardianship) – benefits and drawbacks
 - Likelihood of availability of alternative(s) (i.e., will county, minor’s counsel oppose an alternative? Will court find an exception to TPR applies?)

- Discussion of TCA with county, birth parents (or Indian custodian), child, adoptive parents, and their counsel
(This should begin at around the same time as the Tribe’s internal consideration)

- Identification and formal notification of the entity who will perform which aspects of the home study (Tribe, county, etc.)
 - Does the Tribe have the resources to perform its own home study? Are there any advantages to performing it internally?
 - Can the Tribe do its own background checks, or will it need county/state involvement?
 - Is there any known criminal history in the home for which an exemption will be required?

- Written notice to child, birth parents (or Indian custodian), adoptive parents, and their counsel of how they may present evidence to the Tribe regarding the TCA and the child's best interest

(This can include other persons if the Tribe wishes, such as extended family or persons to whom the child is connected)

(This should be at least 30 days' notice, and should allow enough time after the date on which evidence is to be presented for the Tribe to consider and finalize its TCA Order, and then to file it 20 days in advance of the .26 hearing – so probably a minimum of 60 days before the .26 date)

- Receipt of evidence regarding the TCA and the child's best interest

- Finalization of TCA Order

- Filing of TCA Order with Superior Court – 20 days in advance of the .26 hearing

- Superior Court granting of full faith and credit to TCA Order

- Tribe's approval of the home study

- Remaining adoption documents (these usually do not directly involve the Tribe – adoption assistance agreement, formal petition for adoption, etc.)

- Expiration of county's supervision of the adoptive placement, final decree of adoption, and termination of dependency jurisdiction (these also do not directly involve the Tribe)



Tribal Customary Adoption Hypothetical TCA Scenario #1

**Presented by Jedd Parr – CILS Directing Attorney, Sacramento
Jasmine Andreas – CILS Directing Attorney, Bishop**

Three children are being adopted by non-Indians. They will live about three hours from the tribe's reservation. Every year the tribe holds two sacred dances in the summer and fall, but the exact dates are not determined until several weeks beforehand by the tribe's elders. The dances can last as long as two weeks, but there are certain days at the beginning and end of the dance which are the most important to attend. The dances are usually scheduled to allow these days to fall on weekends.

The tribe wants the children to attend all of the dances. But the adoptive parents are concerned about the children's schedules (school, other extracurricular activities like sports, etc.) and the short amount of advance warning for the dances. They are also concerned about whether as non-Indians they will be able to keep an eye on the children during the dances, and whether they will be welcome to stay on or near the reservation while the dances occur. (There are extended family members who live on the reservation and who have had some positive and some negative interactions with the adoptive parents in the past.)



Tribal Customary Adoption Hypothetical TCA Scenario #2

**Presented by Jedd Parr – CILS Directing Attorney, Sacramento
Jasmine Andreas – CILS Directing Attorney, Bishop**

Three children are being adopted by non-Indians. The adoptive parents are vegetarian. However, hunting and fishing are very important in the tribe's culture.

The tribe wants the children to at minimum be aware of the importance of these activities (if not actually learn how to do them). Under tribal custom, friends and family members will sometimes gift portions of a successful hunting or fishing trip. The tribe wants the children to be able to receive and consume these gifts.



Tribal Customary Adoption Hypothetical TCA Scenario #3

**Presented by Jedd Parr – CILS Directing Attorney, Sacramento
Jasmine Andreas – CILS Directing Attorney, Bishop**

Two young children are being adopted by non-Indians. The TCA Order calls for the children's attendance at two cultural events per year and visitation with extended family members.

Several years after the TCAs are finalized, one of the adoptive parents loses their job, but soon after receives a better job offer in the Midwest. The TCA Order does not explicitly provide for alternatives to attendance at cultural events or in-person visitation.



Tribal Customary Adoption Hypothetical TCA Scenario #4

**Presented by Jedd Parr – CILS Directing Attorney, Sacramento
Jasmine Andreas – CILS Directing Attorney, Bishop**

Four children (ages 10 – 2) are being adopted by non-Indians. The Tribe drafts a TCA Order that requires visitation with the parents if certain conditions (primarily sobriety) are met.

One parent then starts acting poorly in regards to visitation – not showing up for visits, and being hostile towards the adoptive parents when they do, questioning the children about the adoptive parents' home, and making comments like the adoptive parents are not fit to raise Indian children. The behavior begins to have an adverse effect on the children. They appreciate being able to visit with their parents, but are also happy in the adoptive home.

The adoption has not yet been finalized, as the home study is not yet complete.



Tribal Customary Adoption Hypothetical TCA Scenario #5

**Presented by Jedd Parr – CILS Directing Attorney, Sacramento
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One young child is being adopted by their Indian grandparent. The father has had a drug problem in the past. The grandparent is concerned about threatening statements and behaviors the father has made while under the influence, and wants all visits to be supervised.

The father has recently been diagnosed with an untreated mental illness for which he may have been self-medicating, and the Tribe is hopeful that in time he will be able to safely have unsupervised visits. The case has been open for a long time and the superior court is unwilling to continue it any further.

The child, both parents, and the grandparent are all members of the Tribe.

The Tribal Court is willing to hear the matter in the future solely for the purpose of determining whether visits can move to unsupervised upon improvement by the father in treatment and clean drug test results.

Frequently Asked Questions Tribal Customary Adoption

What is Tribal Customary Adoption?

Tribal Customary Adoption is a new permanency option for Indian children who are dependents of the California State Court. As described in Welfare and Institutions Code 366.24, Tribal Customary Adoption allows an Indian child who is a dependent of the California State Court to be adopted through the customs, laws and traditions of the child's tribe without the termination of the parental rights of the child's parents.

When is Tribal Customary Adoption available?

Tribal Customary Adoption is available as a permanency option for a dependent Indian child who is unable to reunify with his/her parents when the child's tribe elects tribal customary adoption as the child's permanent plan as described in Welfare and Institutions Code 366.24.

When did Tribal Customary Adoption become effective?

Tribal Customary Adoption became effective on July 1, 2010.

Does Tribal Customary Adoption only apply to new cases initiated after July 1, 2010?

No. Tribal Customary Adoption applies to both new and existing cases so long as parental rights have not yet been terminated.

What are the obligations of state and county workers under the new Tribal Customary Adoption law?

The primary obligation that Assembly Bill 1325 (Cook; Stats. 2009, ch.287) (the law enacting Tribal Customary Adoption) places on county child welfare workers is to consult with the child's tribe about the possibility of tribal customary adoption as a permanency option in every case involving an Indian child.

Specifically, Welfare and Institutions Code section 358.1(j), as amended by AB 1325, requires every social study or evaluation for an Indian child under section 358 include a discussion of whether tribal customary adoption is an appropriate permanent plan for the child if reunification is unsuccessful. In considering this issue, the social worker **must** consult with the child's tribe.

In addition, in cases involving an Indian child the court is required to make specific findings at each status review hearing concerning tribal customary adoption to ensure that the child's tribe has been consulted about tribal customary adoption.

Who decides whether to pursue tribal customary adoption as a permanent plan if reunification fails?

Initially, it is the child's tribe who elects whether or not to pursue tribal customary adoption. An essential element of tribal customary adoption is a valid tribal customary adoption order issued by a federal recognized tribe which can be given full faith and credit by the state court. This means that tribal customary adoption is only available with the consent and participation of the child's tribe.

Once the child's tribe elects tribal customary adoption as the child's preferred permanent plan, the child's permanent plan is selected at a hearing held under WIC 366.26.

Does the child or the parents need to consent to tribal customary adoption?

No. AB 1325 states that neither the parents, the Indian Custodian, nor the child need consent to tribal customary adoption as the child's permanent plan. [See § 8600.5 of the Family Code which excludes parts of the family code including requirement for consent of a child over 12 years of age to an adoption from application to a tribal customary adoption and Welfare and Institutions Code § 366.24 (c) (11) which provides that parents and Indian custodian do not need to consent] However, as discussed in the Advisory Committee Comment to Rule 5.730 http://www.courtinfo.ca.gov/rules/index.cfm?title=five&linkid=rule5_730 the wishes of the child are "... an important and appropriate factor for the court to consider and for children's counsel to ascertain and present to the court when determining whether tribal customary adoption is the appropriate permanent plan for an Indian child."

Can the parents of a child contest a decision to order tribal customary adoption as a child's permanent plan?

Yes. There is nothing in AB 1325 that limits any party's ability to contest the selection of tribal customary adoption as a child's permanent plan in the same manner that they could contest the selection of any other permanent plan.

Can the parents of a child (or any other party) appeal a decision to order tribal customary adoption as a child's permanent plan?

Yes. Welfare and Institutions Code section 366.24 (j) provides that “...except in the case of a tribal customary adoption where there is no termination of parental rights, a petition for adoption may not be granted until the appellate rights of the natural parents have been exhausted...”. Some parties have suggested that this means that parents cannot appeal an order for tribal customary adoption. However there is nothing in AB 1325 that exempts tribal customary adoptions from the operation of section 395 of the Welfare and Institutions Code which provides generally that:

- (a) (1) A judgment in a proceeding under Section 300 may be appealed in the same manner as any final judgment, and any subsequent order may be appealed as an order after judgment...”

The dispositional order is the “judgment” referred to in section 395 and all subsequent orders are appealable. (see *In re. S.B.* (2009) 46 Cal. 4th 529 at 532) Where the Legislature has neither precluded an appeal nor made any alternate arrangements for review of an order the presumption is that the section 395 right of appeal applies. (id. page 531):

We have repeatedly held that if the Legislature intends to abrogate the statutory right to appeal, that intent must be clearly stated. ‘The right of appeal is remedial and in doubtful cases the doubt should be resolved in favor of the right whenever the substantial interests of a party are affected by a judgment... (id. page 531)

Will Attorneys for the minor and the parents be paid by the Court or county for time they spend in the tribal forum in a tribal customary adoption case?

No. Tribal courts and tribal fora are not required to provide court appointed counsel for parties appearing before them. The proceedings in the tribal forum are separate and distinct from the proceedings in the dependency court.

Are there special forms for Tribal Customary Adoption?

No. There are no special forms related to Tribal Customary Adoption. Instead, existing Judicial Council forms have been revised and adapted to include Tribal Customary Adoption. You can find those revised forms here: [Judicial Council Forms Amended to Implement Tribal Customary Adoption.doc](#)

There have also been revisions to a number of forms issued by the California Department of Social Services: <http://www.cdss.ca.gov/cdssweb/entres/forms/English/AAP4.PDF> ; <http://www.cdss.ca.gov/cdssweb/entres/forms/English/AD4348.pdf> .

Are there special rules of Court related to Tribal Customary Adoption?

No. There are no specific rules related to tribal customary adoption. Instead the Judicial Council has made a number of revisions to existing rules to recognize tribal customary adoption. You can find those revised forms here: [California Rules of Court Amended to Implement Tribal Customary Adoption.doc](#)



CDSS

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DEPARTMENT OF SOCIAL SERVICES

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ARNOLD SCHWARZENEGGER
GOVERNOR

REASON FOR THIS TRANSMITTAL

- State Law Change
- Federal Law or Regulation Change
- Court Order
- Clarification Requested by One or More Counties
- Initiated by CDSS

October 27, 2010

ALL COUNTY LETTER NO. 10-47

TO: ALL COUNTY WELFARE DIRECTORS
 ALL CHIEF PROBATION OFFICERS
 ALL CDSS ADOPTION DISTRICT OFFICES
 LICENSED PUBLIC AND PRIVATE ADOPTION AGENCIES
 ALL CHILD WELFARE SERVICES PROGRAM MANAGERS
 ADOPTION SERVICE PROVIDERS
 TITLE IV-E AGREEMENT TRIBES

SUBJECT: IMPLEMENTATION OF TRIBAL CUSTOMARY ADOPTION -
 ASSEMBLY BILL 1325 (CHAPTER 287, STATUTES OF 2009)

REFERENCE: ASSEMBLY BILL 1325 (CHAPTER 287, STATUTES OF 2009);
 ALL COUNTY LETTER NO. 10-17; ALL COUNTY INFORMATION
 NOTICE I-86-08; AND CALIFORNIA CODE OF REGULATIONS FOR
 ADOPTION PROGRAMS (TITLE 22, DIVISION 2) AND CHILD
 WELFARE SERVICES (DIVISION 31).

In March 2010, the California Department of Social Services (CDSS) published All County Letter (ACL) No. 10-17 to provide introductory information regarding the passage of Assembly Bill (AB) 1325 (Chapter 287, Statutes of 2009) and the basic guidelines of tribal customary adoption (TCA) which became effective **July 1, 2010**. Prior to reading this ACL, please review ACL 10-17 located on the CDSS website at: <http://www.dss.cahwnet.gov/lettersnotices/entres/getinfo/acl/2010/10-17.pdf>.

The purpose of this ACL is to provide comprehensive information and direction to counties, adoption agencies, tribes and other individuals/organizations responsible for the statewide implementation of TCA. Additionally, this ACL will serve to administer the provisions of AB 1325 and should be used to implement TCA until regulations have

been adopted.¹ Currently, regulations at Title 22, Division 2 of the California Code of Regulations (CCR) and Division 31 of the Manuals of Policies and Procedures (MPP) are being reviewed for modifications to include TCA. Since TCA is considered an agency adoption, until Title 22 and Division 31 are updated, current regulations should be used to administer child welfare and adoption services. This ACL will incorporate the current regulations as well as provide the additional requisite elements for implementing TCA.

Following the passage of AB 1325, a workgroup comprised of representatives from counties, state adoption district offices (DO), private adoption agencies and tribes convened to discuss the requisite tenets necessary to implement TCA. As a result, many participants submitted questions to CDSS which addressed statutes, regulations, policy and procedures regarding the provision of TCA services. To provide the most efficient guidance, this ACL is organized via topic using a question and answer format which will include the following topics:

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¹ The relevant provisions of Section 26 of AB 1325 (Chapter 287, Statutes of 2009) reads, "...the Department of Social Services may implement and administer the applicable provisions of this act through all-county letters or similar instruction from the director until such time as the regulations are adopted."

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1.0 Tribal Customary Adoption

1.1 What is it? How is it different from a conventional adoption?

Tribal customary adoption is considered an agency adoption. However, TCA is an adoption which may occur for an Indian child who is a dependent of the California court, under the customs, laws or traditions of an Indian child's tribe, but where termination of parental rights (TPR) is not required. While tribal customary adoption is unique, it is intended to be a seamless integration into the current process of conventional adoption. From the disposition of a dependency case, to the date the TCA is finalized, agencies should be able to utilize many of their current conventional adoption procedures to facilitate a TCA.

The key differences between TCA and a conventional adoption are:

1. TCA allows a dependent Indian child to be adopted utilizing the state court without TPR. The current TPR procedures and corresponding forms and documents such as the AD 4333 are not required to finalize a TCA;
2. The plan of TCA cannot be recommended, selected, facilitated or finalized without the consultation (involvement) of the Indian child's tribe. Only the tribe can select TCA as an option for the Indian child; and
3. Per Family Code section 8600.5, TCA is excluded from Part Two of the Family Code, "Adoption of Unmarried Minors." The primary procedures and standards applicable to TCA are contained in Welfare and Institutions Code (W&IC) section 366.24.

1.2 To whom does TCA apply?

TCA is only available as a permanency option for those dependents that are Indian children under the Indian Child Welfare Act (ICWA). Further, it is only applicable where the Indian child's tribe has elected TCA as the permanent plan. TCA is not applicable to independent or intercountry adoption, an Indian child

who is a probation ward or has been voluntarily relinquished to an agency by his or her parents.

1.3 When does the TCA become effective? When does it end? Is this a pilot?

AB 1325, which adds TCA to state law, became operative on **July 1, 2010**, and sunsets on January 1, 2014. Although this statute includes a three year end date and report to the Legislature on its outcomes, TCA is not a pilot.

1.4 Does TCA apply to dependent Indian children who became dependents prior to the implementation of TCA (July 1, 2010)?

Yes. As long as the dependency case is still open and parental rights have not been terminated, TCA may be a permanency option for any dependent Indian child, regardless of the date the Indian child became a dependent.

1.5 At what stage in the case does TCA become relevant?

Once a federally recognized tribe has responded to an ICWA notice affirming that the child is a member or eligible for membership in the tribe, TCA will become a permanency option for a court dependent Indian child. Per W&IC section 358.1, this may begin as early as the dispositional stage of a dependency case. Aligned with the state's existing concurrent planning policies, when applicable, at any point following the disposition of the dependency case, the Indian child's tribe may elect for TCA to be included as an alternative permanent plan to family reunification.

Please note: As specified in W&IC section 361.31 (ICWA standards), the agency shall use the placement preference requirements when selecting prospective adoptive parents for an ICWA child.

1.6 What are the stages of a TCA?

- a. Dispositional hearing – Per W&IC section 358.1, the social worker in consultation with the Indian child's tribe reports to the court if TCA is an appropriate permanent plan.
- b. Recommend permanent plan of TCA - Per W&IC section 361.5, if reunification services are not offered or terminated and a permanency hearing pursuant to W&IC section 366.26 is ordered, the social worker or adoption worker, in consultation with the child's tribe, shall indicate in the report to the court that the tribe has selected TCA as the permanent plan.

- c. Early concurrent permanency planning – If reunification services are offered and the Indian child’s tribe selected TCA as the alternate permanent plan for the dependent Indian child, the social worker or adoption worker works with the child, child’s tribe and prospective TCA adoptive family to facilitate the alternative permanent plan of TCA. These services may include, but are not limited to:
1. Assessing the child’s likelihood of being adopted and including the assessment in the review hearing reports pursuant to W&IC sections 360(A), 366.21, 366.22, and 366.25.
 2. Conducting a TCA Home study as a tribal designee pursuant to W&IC section 366.24.
 3. Performing criminal/child abuse and neglect checks pursuant to W&IC section 366.24.
- d. Establish permanent plan of TCA – Once a hearing is set pursuant to W&IC Section 366.26 and the Indian child’s tribe recommends TCA, the court will review the report as specified in W&IC sections 361.5, 366.21, 366.22 or 366.25 and other evidence and order, **without TPR**, the plan of TCA. The report must include an assessment regarding the Indian child’s likelihood of being adopted in the court report for every review hearing. This report should also include if TCA would or would not be detrimental to the Indian child and whether the Indian child should be returned home to the Indian parent or Indian custodian.
- e. Case referred to Indian child’s tribe – Once TCA is ordered as the permanent plan, the case is referred to the tribe to conduct their part of the W&IC section 366.24 process, and the W&IC 366.26 hearing is continued for 120 days. The court can grant a continuance, but no more than an additional 60 days. This process includes:
1. **TCA home study (refer to section five of this ACL for more information on the TCA home study)** is completed (if not previously completed) by the Indian child’s tribe or tribal designee and either approved or denied by the Indian child’s tribe;
 2. **Review of criminal/child abuse and neglect background (refer to section seven of this ACL for more information on review of criminal/child abuse and neglect background)** are completed (if not previously completed) by the tribal designee, public adoption agency

otherwise authorized to perform adoption specific checks when tribe is unable to, or Indian child's tribe (if authorized to conduct them). Subsequently, the adoptive applicant's record is cleared or considered detrimental to the adoptive placement of the child. Additionally, their record may be denied pursuant to the federal Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act);

3. **Tribal Customary Adoption Order (TCAO) (refer to section eight of this ACL for more information on TCAO)** - The TCAO is completed and filed within 20 days of the continued W&IC section 366.26 hearing by the Indian child's tribe with the court; and
 - i. The child, birth parent, or Indian custodian and the prospective tribal customary adoptive parents and their counsel, if applicable, may present evidence to the Tribe regarding the TCAO and the child's best interest.
4. **Addendum to the continued W&IC section 366.26 report (refer to section nine of this ACL for more information regarding this addendum)** is completed by the Indian child's social worker or adoption worker and submitted to the court within seven days of the continued W&IC section 366.26 hearing.
- f. Continued W&IC section 366.26 hearing – Once the TCAO is filed by the Indian child's tribe and the addendum to the W&IC section 366.26 report is received by the court, the court affords full faith and credit to the TCAO; the court orders the finalization hearing be set upon the filing of the adoption petition. If the court does not receive the TCAO within the allotted time, the court has the discretion to order a new permanent plan.
- g. Tribal customary adoptive placement and placement agreement (refer to section 11 of this ACL for more information on adoptive placement) – Pursuant to W&IC section 366.24(c)(8), once the court affords full faith and credit to the TCAO and the Indian child's tribe approves the adoptive applicant's TCA home study and the applicant's criminal and child abuse and neglect checks are cleared, the Indian child is eligible for tribal customary adoptive placement. The public adoption agency that has placement and care responsibility of the Indian child is responsible for ensuring the process is completed. This process is analogous to the conventional adoption process which determines the placement agreement between the public adoption agency and the adoptive parent(s).

- h. **Adoption assistance agreement (refer to section 13 of this ACL for more information on AAP)** - Pursuant to W&IC section 16120, similar to the conventional adoption process, once the tribal customary adoptive placement paperwork is signed the public adoption agency that has placement and care responsibility of the Indian child is responsible for facilitating this agreement between the public adoption agency and the adoptive parent(s).
- i. **Adoption petition** - Once the TCA home study is approved, the TCAO is afforded full faith and credit, and all the necessary documents are signed, the prospective adoptive parent(s) desiring to adopt the Indian child must file an adoption petition with the court presiding over the adoption. A copy of this petition will continue to be sent to CDSS.
- j. **Supervision of Adoptive Placement (refer to section 12 of this ACL for more information on supervision)** – Once adoptive placement of the Indian child has been made, pursuant to W&IC section 366.24(c)(8), the public agency that has placement and care responsibility of the Indian child will be responsible for ensuring the supervision of the adoptive placement.
- k. **Finalization (refer to section 15 of this ACL for more information on finalizing a TCA)** - Once the adoption petition is filed with the court, and a finalization hearing is set, the public adoption agency that has placement and care responsibility of the Indian child is responsible for ensuring a final report regarding the proposed TCA is submitted to the court.

1.7 If the tribe has questions the social worker or adoption worker cannot answer, to where should the worker refer the tribe?

Tribes may find information on the Tribal Successful Transition for Adult Readiness (STAR) website located at <http://theacademy.sdsu.edu/TribalSTAR/index.htm> or contact the sponsors of AB 1325. Their information is as follows:

Nancy Currie
Director of Social Services
Soboba Tribal Social Services
(951) 487-0283

Kimberly Cluff, Attorney
Forman & Associates
4340 Redwood Hwy Ste F228
San Rafael, CA 94903
Phone (415) 491-2310

2.0 Consultation with the Indian Child's Tribe

2.1 What does this mean?

Consultation means more than the agency making decisions and “checking in” with the Indian child’s tribe to approve them. It is an ongoing partnership with the tribe that requires their inclusion and, on many occasions, approval on decisions made regarding the TCA process. The Indian child’s tribe is a necessary part of the TCA process for a dependent Indian child for two main reasons: A TCA cannot commence unless the child’s tribe selects TCA as the permanent plan; and only the tribe can provide information regarding its tribal customs, traditions or laws.

2.2 When should the agency begin consulting the tribe?

The partnership between the agency and the child’s tribe is expected to begin as soon as the child is declared an ICWA eligible child and the concurrent planning process commences. As part of the concurrent planning process, the social worker must inform the tribe that TCA is a permanency option. When that option is selected by the tribe, the tribe may inform the agency either in a verbal or written format. Either way, the agency is responsible for including that information into all necessary reports to the court, the foster care and adoption case record and the case notes section in the Child Welfare Services/Case Management System (CWS/CMS). **(Refer to section 19 of this ACL for more information on inputting information into CWS/CMS).**

2.3 How should the agency consult with the tribe?

Consultation with the Indian child’s tribe includes, but is not limited to:

- Verbal and written communication;
 - Via telephone, regular or electronic mail, or facsimile
- In person meetings;
- Team Decision Making (TDM) Meetings; or
- Family Group Decision Making (FGDM) Meetings.

Please note: All information received, provided to or discussed with the Indian child’s tribe should be documented in the foster care and adoption case record.

2.4 What type of information should the agency discuss with the tribe?

The agency shall obtain all information from the child's tribe, that the tribe considers relevant and any information which will assist the agency in clarifying particular issues for the child or adoptive applicant(s). Examples may include, but are not limited to the following:

- Tribal Customs;
- Laws;
- Traditions;
- Ceremonies/Events;
- Geography; or
- Significant history.

Please note: Each tribe maintains the authority and discretion to determine what information it will share regarding its tribal customs, laws, traditions or significant history to the agency.

2.5 What does consulting with tribe include?

Consultation with the tribe may vary at any of the different stages of a dependency action but should include the same basic elements of communication and collaboration. In a dependency case, once a tribe has confirmed the Indian child is its child, the social worker must inform the tribe that TCA is available to the child as a permanency option. At any point in the dependency case, even as early as the dispositional hearing, the tribe may communicate its election of TCA. It is expected that the tribe and other affected individuals will have many questions regarding the TCA process and the social worker should be responsive. Interaction with the tribe's representative will be required throughout. Where the tribe has formally intervened in the action the tribe's representative would be identified in the tribe's "Notice of Designation of Tribal Representative" (ICWA - 40). Where the tribe has not formally intervened, it may be advisable to request a formal designation of a representative for purposes of the TCA process from the Tribe's chairperson in order to facilitate the consultation process.

If the agency with placement and care responsibility is informed **prior to the dispositional hearing** of the tribe's election of TCA, the agency is responsible for discussing the case with the tribe through its representative and obtaining information needed for the report to the court on the appropriateness of TCA as a plan for the child if reunification is unsuccessful.

If informed during the **concurrent planning process** (e.g. during review hearings held pursuant to W&IC sections 361.5, 366.21.366.25), the agency is responsible for communicating with the tribe through its representative, to obtain any relevant information needed to update the court regarding the likelihood the child will be adopted and if TCA continues to be the appropriate permanent plan for the child. During this stage it is possible that the **TCA home study process**, required by W&IC 366.24, will be commenced by the tribe and the tribe will communicate an interest in seeking designation of an agency to do its TCA home study. If the tribe is interested in designating an agency, the tribe is responsible for providing a written request to that agency asking the agency to be a designee. Throughout this process collaboration will be important between the different entities involved in the TCA home study process.

If reunification services are not offered or have been terminated and the W&IC section 366.26 hearing is set to order a permanent plan for the child, the agency with placement and care responsibility is responsible for completing a written assessment of the child's suitability for adoption and including TCA information in the report to the court. This will require requesting, if not yet received, written statement from the tribe of its decision to pursue TCA for that child that including whether the tribe will be conducting its own TCA home study or procuring a tribal designee. Once the statement is received, the agency is responsible for consulting with the child's tribe to obtain information to complete the written assessment of the child. **For information on the written assessment of the child, refer to section four this ACL.**

Once the case is **formally referred to the procedures required by W&IC section 366.24**, the agency will be responsible for assisting in ensuring the criminal record and child abuse background checks are conducted. If there is a designee, the designee will be responsible for the background check. If there is no designee, then the responsibility remains with the agency with placement and care responsibility of the child.

At the **adoptive placement and finalization stage**, the agency must consult with the tribe while facilitating and supervising the adoptive placement and finalization.

2.6 What if the child has more than one tribe to which it is associated?

If an Indian child is a member of more than one tribe or is eligible for membership in more than one tribe, it is preferable that the tribes determine among themselves which is the tribe that will serve as the primary tribe in the Indian child's case. Generally where it is confirmed in writing that a child is a member

(e.g. enrolled) in one of the tribes, we will accept that tribe as the child's tribe. However, where it is not clear, and if the tribes cannot reach an accord on the issue, then pursuant to W&IC section 224.1(d) the state court judge has the authority to determine which tribe has the most significant contacts with the child and will serve as the child's tribe in the proceeding. Once the primary tribe is established they become the Indian child's tribe responsible for recommending TCA as the permanency plan for the Indian child.

Please note: Until a primary tribe is established, the agency is responsible for consulting with all tribes associated with the Indian child to obtain information regarding the Indian child's case.

2.7 What about dependency cases involving a child from an out of state tribe?

As with any ICWA eligible child from an out of state tribe, communication becomes more challenging. Regardless, in all cases the tribe should be informed of, and provided information about, California's option of a TCA for the child.

3.0 Dependency Process

3.1 How is TCA included in the dependency process?

TCA is included as an additional permanency option for a dependent Indian child. This plan may be recommended by the Indian child's tribe at any point in the dependency process (as early as the dispositional hearing). When reunification services are offered, and the tribe recommends TCA, it will serve as the Indian child's concurrent permanent plan until reunification services are no longer offered. Once TCA becomes the concurrent plan, the agency, with placement and care responsibility of the Indian child, must consult with the Indian child's tribe to facilitate TCA.

TCA is intended to be seamlessly integrated into the current dependency process. There are minimal modifications to the current assessment, case planning and service delivery process for a dependent Indian child with a permanent plan of TCA. These modifications include, but are not limited to:

1. Consultation with the Indian child's tribe is required.
2. TPR is not required for adoptive placement to occur.
3. No voluntary or involuntary relinquishment paperwork or forms required.

4. Consent from Indian parent is not needed to recommend TCA at the W&IC section 366.26 hearing.
5. Since TPR is not required in a TCA, adoption finalization hearings will no longer be delayed for the time period currently allotted for birth parents to appeal a termination of their parental rights.
6. Post-adoption contact agreements are not applicable to TCA. Post adoption contact between the birth parents or Indian custodians and the child will be addressed in the TCAO. If applicable, the TCAO could also address contact between the Indian child and the child's siblings.

3.2 Does an Indian parent or Indian custodian have to consent to the TCA?

No. Prior consent to a permanent plan of TCA of an Indian child is not required of an Indian parent or Indian custodian whose parental relationship to the child will be modified by the TCA. (See W&IC section 366.24(11))

3.3 Does a child age 12 or older need to consent to the TCA?

No. The consent of a child age 12 or older is not required for a TCA. However, while the consent of the child age 12 or older is not required for a TCA, the wishes of a child are still an important and appropriate factor for the court to consider when determining whether TCA is the appropriate permanent plan for an Indian child. (See W&IC section 361.31(e))

3.4 Does a tribe need to formally intervene in a case in order for TCA to be considered as a placement option?

No. TCA is a permanency option for any "Indian Child" (as defined in ICWA) whose tribe wants to pursue TCA as a permanency option. Under ICWA, and the state laws implementing ICWA, an Indian child's tribe does not need to formally intervene in a case in order to be entitled to make representations to the agency and the court as to the appropriate permanent plan for that child. (See the California Rules of Court, Rule 5.534 (i)(2)).

3.5 How does TCA affect the judicial process?

For modifications in the judicial process, see the Judicial Council's modified rules of court located on the Judicial Council's website located at:

http://www.courtinfo.ca.gov/rules/documents/pdfFiles/title_5.pdf

3.6 Does a tribe have to choose TCA as the permanent plan for a dependent Indian child?

No. TCA is an optional plan. A tribe is not required to choose TCA as the permanent plan. All permanency options are available to tribes and the exceptions to TPR in the W&IC section 366.26(c)(1)(B)(vi) still apply. If TCA is not chosen, the agency with placement and care responsibility of the child would carry out the alternative permanent plan using the current standards and procedures regulating that process.

3.7 If the state court granted a permanent plan of legal guardianship for a dependent Indian child and TPR did not occur, can TCA become the new permanent plan?

Yes. Pursuant to W&IC section 366.3(c), if following the establishment of a legal guardianship for a dependent Indian child, the county, in consultation with the Indian child's tribe, becomes aware of changed circumstances that indicate TCA may be an appropriate plan for the child, the court may vacate its previous order dismissing dependency jurisdiction over the child and order that a new hearing be set to determine whether TCA or continued legal guardianship is the most appropriate plan for the child.

3.8 If a dependent Indian child has a plan of "conventional" adoption and TPR has occurred, but the adoption has not been finalized, can the tribe recommend the permanent plan be changed to TCA?

It depends. A TCA does not apply to a case where TPR has occurred. Pursuant to W&IC section 366.26 (i)(2), the state court would have the discretion to reinstate parental rights and order a new hearing to determine if TCA is the most appropriate permanent plan for the child. The agency would need to work closely with the tribe to ensure this information was submitted in the W&IC section 366.26 report.

3.9 Is a social worker required to recommend TPR for a dependent Indian child who has been in foster care 15 of the most recent 22 months?

No. Pursuant to W&IC section 16508.1(b)(7), a social worker is not required to recommend TPR if TCA has been recommended.

3.10 Is testimony of a qualified witness required for a TCA to be ordered as the permanent plan for an Indian child?

No. The testimony of a qualified witness, currently required by W&IC section 224.1, is not required for a TCA to be ordered (at the W&IC section 366.26 hearing), because the termination of parental rights is not required for a TCA. However, this testimony is still required when the dependency case of the Indian child is initiated.

3.11 Does TCA add any noticing requirements?

Pursuant to W&IC section 294(f)(6), TCA is added as a permanency option when noticing parents regarding a selection and implementation hearing as specified in W&IC section 366.26. Current noticing standards for this hearing will be applied for a TCA.

3.12 Does TCA add or amend the process for any hearings required in a dependency case?

No. TCA did not create a new hearing. However, the statute governing TCA requires the W&IC section 366.26 hearing be continued to afford the tribe time to complete the TCAO and file it with the court. After the filing of the TCAO and the social worker's addendum report, the court will have time to review the TCA and determine if full faith and credit should be afforded to the tribe's TCAO.

3.13 Does TCA require additional court reports or is any information required to be included in existing court reports?

Yes. The social worker must provide the tribe with information regarding TCA at every step throughout the case as part of concurrent planning. This must be documented in the court report, the foster care and adoption case record, and/ or in the case notes section of CWS/CMS. Once TCA is recommended, the agency must continue to provide a report to the court at each hearing thereafter as relevant to the individual case: prior to the dispositional hearing (W&IC section 358.1), the hearing to determine child welfare services (W&IC section 361.5), all status review hearings (W&IC sections 366.21, 366.22, 366.25, and 366.3), and the hearing to select a permanent plan for the child (W&IC section 366.26). Refer to those sections and W&IC section 366.24 for information required to be included in each court report.

TCA requires the social worker to prepare the addendum to the continued 366.26 report. At a W&IC section 366.26 hearing when the court orders TCA as the

permanent plan, it is continued and referred to the tribe to complete and file the TCAO. Prior to the continued W&IC section 366.26 hearing, the child's agency is now required to submit an addendum to the continued 366.26 report.

4.0 Written Assessment of the Child's Suitability for TCA

4.1 Does TCA affect the current regulatory standards for assessing a child's suitability for a conventional adoption?

Yes. Currently, prior to the initial W&IC Section 366.26 hearing, a report including a written assessment of the child's suitability for adoption must be submitted. The required standards for this assessment are located in Title 22, Division 2, CCR sections 35127.1-35127.3. TCA includes and excludes certain requirements specified in those sections. Modifications for this assessment include the following:

Additions to current standards

1. A written assessment of the child's suitability for adoption, as specified in Title 22, Division 2, CCR section 35127.1 (a), should include:
 - a. The Indian child's relationship to/with the Indian child's tribe.
2. Identifying information, as specified in Title 22, Division 2, CCR section 35127.1(b)(1) should include:
 - a. The Indian child's tribal membership or tribal affiliation; and
 - b. Any siblings with tribal membership or tribal affiliation.
3. A review of the amount of and nature of any contact between the Indian child and his or her birth parents or other members of his or her extended family since the time of placement in out-of-home care, as specified in Title 22, Division 2, CCR section 35127.1(b)(3) should include:
 - a. Family defined consistent with the tribe's culture when reviewing whether the child would benefit from contact with members of his or her extended family once the TCA is finalized.
4. Consistent with the stated religious and or cultural background preference from the birth parent, as specified in Title 22, Division 2, CCR section 35127.1(b)(6), this assessment should include:

- a. A stated religious or cultural background preference indicated by the tribe or tribes and the Indian child, unless the Indian child's age or physical, emotional or other conditions precludes his or her meaningful response.
5. Documents the agency shall obtain, as specified in Title 22, Division 2, CCR section 35127.2(a)(1), should include:
 - a. A written statement from the Indian child's tribe intention to pursue TCA for the Indian child.
 1. This statement should include whether the tribe or the tribe's designee will conduct the home study.
 6. Services for children accepted for adoption planning, as specified in Title 22, Division 2, CCR section 35127.3(a), should include:
 - a. Collaboration with the Indian child's tribe to provide these services.

Exclusions of current standards

1. An analysis of the likelihood that the child will be adopted, as specified in Title 22, Division 2, CCR section 35127.1(a)(8), should exclude:
 - a. If parental rights are terminated.
2. An assessment of the need for a psychological evaluation, as specified in Title 22, Division 2, CCR section 35127.1(b)(9)(A)(2), should exclude the list of abnormal and symptomatic illnesses used to determine if a child's behavior warrants this evaluation. The agency is expected to consult with the child's tribe and base the need of psychological evaluation on the child's behavior relative to the prevailing cultural and social standard of the child's tribe.

5.0 TCA Home Study

5.1 What is it? How is it different than a conventional adoption home study?

Similar to a conventional adoption home study, a TCA home study is an evaluation of the background, safety and health information of the adoptive applicant's home, including the biological, psychological and social factors of the adoptive applicant and an assessment of the commitment, capability and

suitability of the applicant to meet the child's needs. A TCA home study completed by a designee may be a full, abbreviated, or updated home study.

The key differences between a TCA and a conventional adoption home study are:

1. A TCA home study may be conducted by the Indian child's tribe or the tribe's designee.
2. A TCA home study must be completed by the designee in consultation with the Indian child's tribe using the tribe's prevailing social and cultural standard.

When the tribe conducts its own home study

5.2 What standards are the tribes required to use when conducting the home study?

Tribes must complete the TCA home study using the prevailing social and cultural standard of the child's tribe. Pursuant to W&IC section 366.24(c)(1)(B), the home study shall include an evaluation of the background, safety and health information of the adoptive home, including biological, psychological and social factors of the prospective adoptive parent(s) and assessment of the commitment, capability and suitability of the prospective parent(s) to meet the child's needs.

5.3 Does the agency with placement and care responsibility need a copy of the TCA home study if it is completed by the tribe?

Yes. The agency needs a copy of the approved or denied TCA home study from the tribe, **whether completed by the tribe or the tribal designee**, to be able to submit to the court all pertinent information addressing the TCA in the continued W&IC section 366.26 hearing report. The applicant would need to sign a release of information form allowing another entity, other than the one completing the TCA home study, to view it.

The agency should request a copy of the approved home study from the tribe. Where a tribe has formally intervened, the request should be sent to the tribal representative as identified in the "Notice of Designation of Tribal Representative and Notice of Intervention" (ICWA-40). Where the tribe has not formally intervened, and if a formal representative with authority to respond on behalf of the tribe has not already been identified by the tribe, the request should be sent to the Tribal Chair.

If the TCA home study is not received by the allotted time provided for the agency to submit the addendum to the continued W&IC section 366.26 report to the court (seven days), the agency must include that information in this addendum report and inform the court that it cannot recommend approval of the applicant until it has time to review the TCA home study.

When a tribe designates an agency to conduct the home study

5.4 What are the additional requisite elements of a full, abbreviated and updated home study TCA home study?

In addition to the information required for a conventional adoption as specified in Title 22, Division 2, CCR sections 35179 - 35183.1, when a TCA is completed by a designee, it must be done in consultation with the Indian child's tribe using the tribe's prevailing social and cultural standard. The information currently required to provide to, and obtain from, the adoptive applicant and information used to base a determination to approve or deny an adoptive applicant for TCA must include:

1. A designation of the agency by the child's tribe before accepting an application to adopt and begin the TCA home study;
2. On the adoption application, an indication that the home study is for the purposes of a TCA;
3. Identifying information about the applicant's tribal membership or affiliation, if applicable;
4. Determination of the applicant's commitment and capability to meet the needs of an Indian child which shall include the willingness to learn and incorporate the prevailing social and cultural standards of the Indian child's tribe into family life;
5. The applicant's understanding of the TCA process, including, but not limited to: the explanation of the agency as a designee, consultation with the Indian child's tribe; and the written approval process;
6. The applicants understanding of the concept of a TCAO, including, but not limited to the modification of the child's relationship to the adoptive parents and the birth parents and Indian custodian; and

7. The applicant's cultural competence of the child's tribe, especially customs, traditions and laws relevant to the child's development.

5.5 What are the additional eligibility requirements for a designated agency completing an abbreviated or updated TCA home study?

For an abbreviated TCA home study – In addition to the eligibility requirements to conduct an abbreviated conventional home study as specified in Title 22, Division 2, CCR section 35183, if the adoptive applicant has completed a tribal customary, conventional agency, independent, or intercountry adoption within the last five years, that applicant may be eligible to receive an abbreviated TCA home study.

For updating a TCA home study – There are no additional requirements for updating a TCA home study.

5.6 What happens to a conventional home study completed prior to the implementation of TCA (July 1, 2010), where the adoption has not been finalized and the applicant becomes interested in TCA?

Where the tribe has selected TCA, when the applicant has completed a full conventional adoption home study as specified by Title 22, Division 2, CCR section 35181 and the applicant is interested in pursuing an adoption of a dependent Indian child who is eligible for tribal customary adoption, the designated agency should update the assessment by incorporating all requisite elements of an updated TCA home study (see section 5.2)

5.7 Home Study Approval: Who has ultimate authority to decide approval of the TCA home study?

When an agency is designated to complete the TCA home study, the agency shall make a recommendation to the tribe regarding approval or disapproval of the adoptive applicant's TCA home study. The tribe has discretion to issue final approval or disapproval of the home study except however, that no home study shall be approved by the tribe where the applicant's criminal record and child abuse report has not been cleared pursuant to the W&IC section 366.24(c) (Adam Walsh Act).

5.8 What if the designated agency and the tribe disagree over a prospective adoptive family?

The tribe has the ultimate authority to approve or deny an adoptive applicant for TCA. If the agency's recommendation does not correspond to the tribe's decision, the agency, tribe and any other pertinent individuals should discuss the recommendation and issues of the applicant's case.

If the agency recommends approval of an applicant and the tribe disagrees, TCA with that applicant can no longer be the permanent plan, as the tribe cannot be forced to do a TCA. However, if the agency recommends denial and the tribe approves the applicant, the tribe may continue the preparation of a TCAO. When this occurs, if the agency believes the child would be at risk if placed with this applicant, the agency should include the facts that led to the agency not recommending approval of the applicant in the addendum to the continued W&IC section 366.26 report.

Please note: The TCA process does not prevent a mandated reporter from reporting any suspected child abuse or neglect or an agency with placement care and responsibility from investigating a report of child abuse or neglect.

5.9 Is an adoptive applicant still eligible to request a grievance review hearing if their TCA home study is denied?

Designated Agency

When a designated agency recommends a denial of an adoptive applicant's TCA home study, regardless of the tribe's final decision, the adoptive applicant will retain the right to request a grievance review hearing as specified in Title 22, Division 2, CCR section 35215.

Indian Child's Tribe

When a tribe denies a TCA home study completed by a designated agency, the tribe may, pursuant to its own laws or customs provide a grievance procedure similar to or above and beyond the one the agency must provide, but is not required.

6.0 Tribal Designee

6.1 What entities can be designated by Indian child's tribe?

The Indian child's tribe's designee may include a licensed county adoption agency, CDSS when it is acting as an adoption agency, or a California licensed adoption agency. Tribal designees **do not include** agencies the tribe may use when the tribe conducts its own home study.

6.2 How is an entity designated by the Indian child's tribe?

It is the tribe's decision to determine whether it will conduct the TCA home study itself or seek a designee. If the tribe chooses to seek a designee, it is responsible for providing the agency with a written request for that agency to be the designee and conduct the assessment of the TCA adoptive applicant. The request should come from a tribal representative with authority to make a request on behalf of the tribe. Where the tribe has formally intervened in the action, the tribe's representative would be identified in the tribe's "Notice of Designation of Tribal Representative and Notice of Intervention" (ICWA - 40). Where the Tribe has not formally intervened it may be advisable to request a formal designation of a representative for purposes of the TCA process from the Tribe's Chairperson.

6.3 What are the responsibilities of the tribal designees?

Tribal designees will be responsible for the following:

1. Working with the Indian child's tribe;
2. Completing the TCA home study using the prevailing social and cultural standards of the child's tribe. This includes, but is not limited to: accepting the adoption application and providing all required information to the applicant;
3. Recommending approval or denial of the adoptive applicant to the tribe;
4. Conducting California (CA) Department of Justice (DOJ) and Federal Bureau of Investigations (FBI) criminal background checks; and
5. Conducting Child Abuse Central Index (CACI) and out-of-state child abuse and neglect registry checks.

Additional responsibilities may include, but not be limited to:

1. Supervision of the adoptive placement;
2. Termination of the adoptive placement;
3. Completing the final court report; or
4. The immediate filing of the final court report.

6.4 Is an agency obligated to be a designee?

No.

6.5 What are the benefits of being designated to complete the TCA home study?

Facilitating a tribal customary adoption for a dependent Indian child supports the child's well-being, timeliness to permanence and placement stability. A designee will be afforded the opportunity to promote these objectives which are vital to some of California's most vulnerable children, who have either been abused or neglected at one time in their lives.

7.0 Review of Criminal and Child Abuse and Neglect Background

7.1 Who is responsible for completing the criminal background and child abuse and neglect checks?

When a TCA home study is initiated, the agency with placement and care responsibility over the child will have the ultimate responsibility to ensure any necessary checks of the adoptive applicant's criminal background and child abuse and neglect report history are completed. Pursuant to W&IC section 366.24(c)(3), no final approval by the tribe to the adoption may be granted without these checks.

If the tribe chooses a designee to conduct the home study, the designee shall perform a state and federal criminal background check and a check of CACI pursuant to section 1522.1 of the Health and Safety Code through DOJ on the prospective adoptive parents and any persons over 18 years of age residing in the household.

Any tribal designee must be an entity authorized to request a search of CACI and, if necessary, a check of any other state's child abuse and neglect registry and authorized to request a search for state or federal level criminal offender records information through DOJ.

If the tribe conducts its own home study, the public agency otherwise authorized to obtain criminal background and child abuse and neglect report information for the purpose of adoption shall perform the state and federal criminal background and child abuse and neglect report history check. If the public agency approves or denies the applicant's criminal background clearance,

they are responsible for informing the child's tribe, conducting the home study, of this decision in writing.

Pursuant to W&IC section 366.24(c), if the public agency denies the applicant a criminal background clearance, that applicant may make a written request to that public agency for a copy of his or her state or federal level criminal offender record information search response.

7.2 Is the child's tribe authorized to conduct its own background checks?

It depends. If the tribe has entered into a Title IV-E agreement with CDSS, currently only the Karuk and Yurok tribes, it would be authorized to conduct its own adoption specific background checks. Aside from the Karuk and Yurok, all other tribes would not have access to the CA DOJ criminal offender and/or child abuse index information. The background check will therefore have to be done by an entity with legal authority to access the CA DOJ information. If a designee is doing the home study, because the statute limits designees to entities with CA DOJ access, the designee will be able to do the checks. If the tribe does its own home study, the TCA statute requires the entity with placement and care responsibility do the background checks.

7.3 What standard will be applicable for the background checks in a TCA?

The standard currently used for prospective adoptive parents should be used for TCA. This means that a full state and FBI criminal background check as well as the CACI and out-of-state child abuse and neglect registries, if necessary, should be checked. This also means that a home study where the applicant, or an adult residing in the applicant's home, has a conviction located in Health & Safety Code section 1522(g)(1)(A)(i), 1522(g)(1)(B), or for physical assault, battery, or a drug-related offense within the last five years, cannot be approved.

8.0 The TCAO

8.1 What is TCAO?

The TCAO is an order completed by the Indian child's tribe that will represent the legal framework of the modified relationships of the child. It will establish the legal relationship, responsibilities and privileges between the Indian child and the adoptive family and the modified legal relationship between the Indian child and the birth parents after TCA is finalized.

Please note: The child's tribe is responsible for preparing the TCAO and is not required to disclose the tribal customs or ceremonies used during this process.

Pursuant to W&IC section 366.24(c)(10), the TCAO is required to address the following issues:

1. The modification of the legal relationship of the birth parents or Indian custodian and the child after TCA is finalized;
2. Contact between the birth parents or Indian custodians and the child;
3. Responsibilities of the birth parents or Indian custodians;
4. The child's legal relationship with the tribe; and
5. The rights of inheritance of the child.

Additionally, the tribe will be able to specify anything else it deems appropriate per its laws and customs except that the order shall not include any orders pertaining to the child support obligation of the birth parents or Indian custodian. There shall be a conclusive presumption that any parental rights or obligations not specified in the TCAO shall vest with the tribal customary adoptive parents. (See W&IC section 366.24(10))

8.2 Is the agency responsible for facilitating the TCAO?

No. The agency with placement and care responsibility for the Indian child or a tribal designee is not involved in completing the TCAO. The Indian child's tribe is responsible for facilitating the TCAO and is not required to disclose the tribal customs or ceremonies used during this process. To support effective case management, the agency may request updates of the completion of the TCAO from the tribe.

Once the W&IC section 366.26 hearing is continued, the dependency case is referred to the tribe to complete the TCAO. Pursuant to W&IC section 366.26(c)(6), the tribe has 120 days from the initial W&IC section 366.26 hearing to file the TCAO with the court. The court has the discretion to grant an additional continuance to the tribe for filing a TCAO up to, but no more than 60 days.

Note: If the tribe does not file the TCAO within the time allotted, the court has the discretion to make new orders to determine the best permanent plan for the child. This permanent plan could include any permanency plan options available

to a dependent child. In that case, the agency would use the current standards and procedures governing the permanency planning process.

8.3 Will the agency need a copy of the TCAO?

Yes. The agency should request a copy from the tribe. The public information required in the TCAO addressing the legal relationships of the child is pertinent to the case. This information should be documented in the case file and case notes in CWS/CMS.

Where a tribe has formally intervened, the request should be sent to the tribal representative as identified in the "Notice of Designation of Tribal Representative and Notice of Intervention" (ICWA-40). Where the tribe has not formally intervened, and if a formal representative with authority to respond on behalf of the tribe has not already been identified by the tribe, the request should be sent to the Tribal Chairperson.

8.4 Since the rights of the birth parents are not terminated, will they still have legal rights to the child?

The tribe is responsible for modifying the parental rights and obligations and specifying them in the TCAO.

8.5 What if rights of the birth parents are not specified in the TCAO?

Where any rights are not specified in the TCAO, the rights and obligations will presume to be with the tribal customary adoptive parents.

8.6 What will happen to the child support obligations of the birth parents?

Although the birth parents rights are not terminated in a TCA, they are modified by the tribe and through the TCAO. Pursuant to W&IC Section 366.24(c)(10), the TCAO is **not** to include child support obligations from the birth parents or Indian custodian. If the birth parent had an existing child support case prior to the TCAO, their case may remain open and arrears owed may still be enforced by the Local Child Support Agency (LCSA)². For more information regarding child support, contact the California Department of Child Supportive Services.

² Information regarding child support's applicability to TCA can be found at: <http://www.childsup.ca.gov/Portals/0/resources/docs/policy/eblast/2010/eblast10-03.pdf>

8.7 If there is a problem with visitation or other aspects of the TCAO is there a way to address the issues?

Yes, there is. Pursuant to W&IC section 366.26(i)(2), the parties must show evidence of good faith efforts to resolve the dispute prior to seeking judicial relief. They may use either tribal or other dispute resolution services to address the problem, but failure to comply with the TCAO does not undo the TCA. The parties may return to court to address the issues if the dispute resolution fails.

9.0 Addendum to the Selection and Implementation (W&IC section 366.26) Hearing Court Report

9.1 What is the “addendum selection and implementation hearing (W&IC section 366.26) court report”?

This addendum provides the agency the opportunity to express its opinion about the prospective tribal customary adoption including providing a recommendation to the court on whether it is or is not in support of the adoption. It is an additional section in the **continued W&IC section 366.26** report and should address the following:

1. Continued suitability of TCA being the appropriate plan for the child;
2. The recommendation for the approval or denial of the prospective tribal customary adoptive applicant(s). This is contingent on the completion of the home study. If the home study is not complete, the agency is responsible for including that information in this report. The agency is not expected to recommend an approval of an applicant when the home study is not complete or the agency has not reviewed the home study when completed by the Indian child’s tribe;
3. The results of the full state and federal level adoption specific background checks;
4. Any pertinent information gathered during the W&IC Section 366.24 process, including the TCAO;
5. Any updates regarding TCA the agency deems necessary to report to the court; and

6. Any concerns the agency may have with the TCAO.
The agency will be responsible for modifying this report to include this section.

9.2 Who is responsible for writing the “addendum to the selection and implementation hearing court report”?

This report is written by the agency with placement and care responsibility of the child and submitted to the court no less than seven (7) days prior to the continued W&IC 366.26 hearing.

10.0 Full Faith and Credit

10.1 What does full faith and credit mean?

Full faith and credit is a legal concept regarding when and how different sovereigns recognize and enforce each other’s court orders. For full faith and credit to tribal proceedings and records in California, see W&IC, Section 224.5.

10.2 How is full faith and credit used in a TCA?

At the continued W&IC 366.26 hearing, the state court may afford full faith and credit to the tribe’s TCAO. This means the state court would enforce the tribe’s TCAO and the Indian child would be eligible for adoptive placement and ultimate finalization. This **does not** mean the state court has finalized a TCA because a TCA adoption finalization hearing must still be held.

10.3 What occurs after full faith and credit is given by the dependency court?

After the state court affords full faith and credit to the TCAO, the following occurs:

1. The Indian child becomes eligible for adoptive placement.
2. The tribal customary adoptive placement agreement is executed and signed.
3. The AAP agreement is executed and signed.
4. Supervision of tribal customary adoptive placement begins.
5. The TCA prospective adoptive parents file the petition for adoption (TCA).
6. Once the petition is filed, the court sets a hearing to finalize the adoption.

7. The court issues a final decree of adoption.
8. The court orders dependency terminated.

10.4 Why would a court not afford full faith and credit to the tribe's TCAO?

If an order from the Indian child's tribe (sovereign #1) violates a generally accepted public policy of California (sovereign #2), then the state court of California may not enforce the tribe's order. Other reasons may include: fraud, the entity issuing the order had no authority to do so, due process not provided or the order offends a strongly held public policy.

10.5 What happens if full faith and credit is not given by the dependency court?

The tribe and other parties must address the issue. If the issues cannot be resolved and the plan of TCA may no longer be the appropriate permanent plan for the Indian child, the state court has the discretion to order a hearing to determine the most appropriate permanent plan for the Indian child.

11.0 Tribal Customary Adoptive Placement

11.1 When does tribal customary adoptive placement occur?

A tribal customary adoptive placement occurs after the dependency court has afforded full faith and credit to the TCAO. Unlike the conventional adoption process, it can be initiated without the termination of parental rights. A system change request is being created in CWS/CMS to allow this change, although this change will not be immediate.

11.2 What will be included in the tribal customary adoptive placement?

Until emergency regulations are modified to include TCA into the agency adoption process, refer to the following: Title 22, Division 2, CCR sections 35195 – 35207.1 to guide the practice of tribal customary adoptive placement:

Section 35195 - Child's Medical and Psychological Information

Section 35197 - Adoptive Placement Requirements

Section 35201 - Adoptive Placement Agreement

Section 35207 - Termination of Adoptive Placement

Section 35207.1 - Reporting Suspected Child Abuse

Similar to the conventional adoptive placement process found in Title 22, Division 2, CCR section 35195, pursuant to W&IC section 366.24(9) the following information is required to complete the tribal customary adoptive placement:

1. A written report, using form **AD 512**, on the Indian child's medical, and if available, the medical background on the child's biological parents, given to the prospective tribal customary adoptive parents and an acknowledgement they have received it.
 - a. The report on the Indian child's background must contain all known diagnostic information, including the following:
 - i. Current medical reports on the Indian child;
 - ii. Psychological evaluations;
 - iii. Scholastic information; and
 - iv. Developmental history.

11.3 When can the tribal customary adoptive placement agreement be signed?

Similar to the conventional adoption process, an adoptive placement agreement can be prepared and executed during the tribal customary adoptive placement process, after full faith and credit has been afforded to the TCAO and the home study has been completed and approved by the tribe.

11.4 Since the Indian child will essentially have two sets of legal parents, will the birth certificate need to include both names?

No, two sets of parents will not appear on the birth certificate. Subject to the terms of the tribally issued TCAO, TCA parents will be afforded the same opportunity as any current adoptive parent to maintain the Indian child's original birth certificate or have it amended.

Agencies should continue to use form VS-44. Regulations governing form VS-44 is located in Title 22, Division 2, CCR section 35211(d)(9).

11.5 Can a tribal customary adoptive placement be terminated?

Yes. Similar to a conventional adoptive placement, if an agency, in consultation with the child's tribe, has any reason to remove the child, the placement may be terminated. Please refer to Title 22, Division 2, CCR section 35207 to guide termination of a tribal customary adoptive placement.

12.0 Supervision of Tribal Customary Adoptive Placement

12.1 What will be included in the supervision of a tribal customary adoptive placement?

Pursuant to W&IC section 366.24(c)(8)(A) and (B), the agency with care and placement responsibility shall be responsible for ensuring the supervision of the tribal customary adoptive placement. Until emergency regulations are modified to include TCA into the agency adoption process, refer to the following Title 22, Division 2, CCR section 35203, to guide the practice of supervising a tribal customary adoptive placement:

Please note: Supervision of tribal customary adoptive placement is subject to compliance with federal Public Law 109-288 in regards to monthly case worker visits as long as the child is a court dependent and under the care and supervision of the county child welfare agency.

13.0 Adoption Assistance Program (AAP) Benefits

13.1 Will the child be eligible for Adoption Assistance Program?

Yes, pursuant to W&IC section 16120, access to AAP benefits are made available when a dependent Indian child is the subject of an order of the tribal customary adoption.

13.2 How will non-recurring expenses be handled in a TCA case?

The current process of using and tracking non-recurring expenses for conventional adoptions will be used for TCA.

14.0 Private Adoption Assistance Reimbursement Program (PAARP)

14.1 Will a designated licensed private adoption agency be able to claim PAARP?

Yes. Since TCA involves an Indian child who is a dependent of the court, effective July 1, 2010, licensed private adoption agencies can claim PAARP reimbursement for tribal customary adoptions. The same process and forms used for a conventional adoption of a child in foster care are used to complete the claiming process. AD PAARP Form 4348 has been modified to include TCA.

14.2 If a tribe conducts its own home study and chooses a tribal agency that is not licensed as a California adoption agency, is that tribal agency eligible to claim PAARP?

No. Pursuant to W&IC section 16122, only licensed private adoption agencies may claim PAARP. More information on PAARP is located on the internet at: <http://www.childsworld.ca.gov/PG1885.htm>.

15.0 Finalization

15.1 What duties are required of the agency with placement and care responsibility of the child for finalization?

Pursuant to W&IC section 366.24(c)(12), after the prospective adoptive parent(s) desiring to adopt the child has filed the adoption petition, the agency that has placement, care and responsibility for the child is responsible for ensuring a full and final report of the facts of the proposed tribal customary adoption is submitted to the court. The report must include the documents and information required in section 35211(d) of Title 22, Division 2 CCR regulations with the exception of:

- Documentation that the child is legally freed to finalize an adoption.

15.2 What happens to the rights of the biological parents?

The rights of the parents are modified during the TCAO process by the Indian child's tribe.

15.3 What are the rights of the adoptive parents?

Subject only to the terms of the TCAO, Tribal customary adoptive parents will be afforded the same rights and privileges, and are subject to all the duties of any other adoptive parent consistent with the TCAO.

16.0 Disclosure and Confidentiality

16.1 What disclosure and confidentiality standards will apply to a TCA?

TCA will apply where a tribe has acknowledged a child as a member or eligible for membership as defined by ICWA. Where the tribe has formally intervened in the matter, it will be entitled to more information pertaining to the case.

When the case is referred to the tribe for development of the TCAO, there will be a need to continue to collaborate with the tribe on the information relevant to the Indian child's case and in particular with respect to information on the prospective adoptive family.

Further, a designee doing the TCA home study will need to collaborate with the tribe because it will be required to conduct the home study "in consultation with" the tribe. Sharing of information will be necessary if not inevitable. The primary limitation would be in connection with sharing criminal record or child abuse registry information. The statute, however, provides that if the subject of the background check gives consent, then background check information can be released to the tribe.

Statute further specifies disclosure provisions applicable to children that are the subject of a TCA at W&IC section 366.24(d). In sum they are afforded the same protections as any other child that has been adopted.

17.0 Set Aside

17.1 What is a set aside?

Once an adoption is finalized, if a child shows evidence of a developmental disability or mental illness as a result of conditions existing before the adoption, to the extent that the child cannot be adopted and of which condition the adoptive parent had no knowledge or notice before the adoption was finalized, the adoptive family may file a (set aside) petition pursuant to W&IC section 366.26(e)(3) setting forth those facts with the juvenile court that granted the adoption petition in an attempt to set aside or dissolve the existing adoption order.

17.2 Will a TCA be able to be set aside?

Yes. Pursuant to W&IC section 366.26(e)(3), a finalized TCA will be able to be set aside within five years of the date of finalization.

17.3 Do the same standards currently used to set aside a conventional adoption apply to a TCA?

Most of the same standards currently used to set aside a conventional adoption apply to a TCA with the following exception:

1. As part of the investigative set aside report, the Adoption Worker conducting the investigation needs to consult with the child's tribe to develop a plan for the child. This recommended plan will be part of the report to the court.

18.0 ICPC

18.1 Can a tribal child from an out of state tribe be the subject of a TCA?

Yes. If the child is a California dependent, and the tribe elects a permanent plan of TCA, that tribe does not have to be a California tribe.

18.2 Does ICPC apply to TCA?

Yes. The TCA statutes do not alter ICPC obligations that apply if a California dependent child is placed with prospective adoptive parents residing out of state. The sending agency would have to consider and comply with the ICPC protocols and may be working with both the receiving state and the tribe to complete the ICPC requirements. See ACL 08-26 for additional information on the ICPC home study process, including the requirements of the federal Safe and Timely Interstate Placement of Foster Children Act. Because most out-of-state courts do not provide a process for finalizing an adoption without termination of parental rights, agencies will have to work to finalize the adoption in California or in the other state, as appropriate depending on the circumstances of the particular case. For questions on ICPC requirements you may contact the Out-of-State Placement Policy Unit at 916-651-8100 or ICPC@dss.ca.gov.

19.0 Data Reporting on TCA

The AB1325 requires the completion of a study and a report to the Legislature by January 1, 2013. The report must include the following information:

1. The number of families served and the number of completed tribal customary adoptions.
2. The length of time it takes to complete a completed tribal customary adoption.
3. The challenges faced by social workers, courts and tribes in completing a TCA.
4. The benefits or detriments to Indian children from a tribal customary adoption.

Being able to track an ICWA eligible child who may be the subject of a completed tribal customary adoption will provide valuable information as to the safety,

permanency and well-being of these children. Additionally, there is a need to gather as much data as possible on these cases to see in what ways the law was successful, to identify barriers that social workers, families, tribes and judges, etc. encountered, and to be able to write the report and make recommendations on whether or not tribal customary adoptions should continue beyond the January 1, 2014, sunset date, or should continue with modifications, etc.

19.1 How can information regarding TCA be entered into CWS/CMS?

The TCA Special Projects Code shall be selected on the Special Project tab of a case in CWS/CMS to indicate a child is being considered for tribal customary adoption. Any case in which TCA is considered as a permanency option (regardless of whether or not TCA was actually selected as the permanency plan), must be identified with this TCA Special Projects Code in CWS/CMS. The Special Projects Code should be selected at the time TCA is considered. Once a case is identified with the TCA special projects code, the code should remain selected regardless of the case/permanency outcome. The Special Projects Code will assist in tracking cases for data collection to include in the study and report to Legislature, as aforementioned.

In order to identify a case in which TCA has been considered, use the following steps in CWS/CMS:

Step 1: In the Case Folder of the CWS/CMS, go to the, “Special Projects” tab. Select the Special Projects page tab and then the (+) button in the grid to enter a new Special Project for the focus child. Click the down (+) button to display the available list of Special Projects.

Step 2: Select the following code:

“S-Tribal Customary Adoption”

The child is in out-of-home care, and reunification services have been ordered. The child has been determined to be ICWA eligible and tribal customary adoption is an option to be discussed with the tribe as a concurrent plan option should reunification be unsuccessful.

19.2 To enter adoptive placement information in CWS/CMS, a TPR date is currently required. Since TCA does not require TPR, which date do I enter to allow CWS/CMS to complete adoptive placement?

Until further notice directing you otherwise, enter the date the court afforded full faith and credit to the TCAO and note that in the case notes.

19.3 Since the case plan of TCA is not currently available, which case plan should be selected?

Until further notice directing you otherwise, select ADOPTION or ADOPTION WITH SIBLING(S).

20.0 Forms

20.1 What Judicial Council forms have been modified to include TCA?

The Judicial Council of California modified the following mandatory dependency and adoption forms to include TCA in the dependency and adoption process. They are located on the Judicial Council's website at:

<http://www.courtinfo.ca.gov/forms/>

1. JV – 300: Notice of Hearing on Selection of a Permanent Plan
2. JV – 320: Orders Under W&IC §§ 366.24, 366.26, 727.3, 727.31
3. JV – 321: Request for Prospective Adoptive Parent Designation
4. JV – 327: Prospective Adoptive Parent Designation Order
5. ADOPT – 050: How to Adopt a Child in California
6. ADOPT – 200: Adoption Request
7. ADOPT – 210: Adoption Agreement
8. ADOPT – 215: Adoption Order
9. ADOPT – 220: Adoption of Indian Child

The Judicial Council of California is in the process of modifying the following optional dependency forms to include TCA in the dependency process. Once approved they will be located on the Judicial Council's website at:

<http://www.courtinfo.ca.gov/forms/>

1. JV – 405: Continuance-Detention Hearing
2. JV – 406: Continuance-General
3. JV – 410: Findings and Orders After Detention Hearing (W&IC § 319)
4. JV – 412: Findings and Orders After Jurisdictional Hearing (W&IC § 356)
5. JV – 415: Findings and Orders After Dispositional Hearing (W&IC § 361et Seq.)
6. JV – 420: Dispositional Attachment: Removal From Custodial Parent-Placement with Previously Noncustodial Parent (W&IC §§ 361, 361.2)

7. JV – 421: Dispositional Attachment: Removal From Custodial Parent-Placement with Non-parent (W&IC §§ 361, 361.2)
8. JV – 425: Findings and Orders After In-Home Status Review Hearing (W&IC § 364)
9. JV – 426: Findings and Orders After In-Home Status Review Hearing-Child Placed with Previously Non-custodial Parent (W&IC §§364,366.21)
10. JV – 430: Findings and Orders After Six-Month Pre-permanency Hearing (W&IC § 366.21(e))
11. JV – 432: Six-Month Pre-permanency Attachment: Reunification Services Continued (W&IC § 366.21(e))
12. JV – 435: Findings and Orders After 12-Month Permanency Hearing (W&IC § 366.21 (f))
13. JV – 437: Twelve-Month Permanency Attachment: Reunification Services Continued (W&IC § 366.21 (f))
14. JV – 440: Findings and Orders After Eighteen-Month Permanency Hearing (W&IC §366.22)
15. JV – 445: Findings and Orders After Post-permanency Hearing-Parental Rights Terminated; Permanent Plan of Adoption (W&IC §366.3 (f))
16. JV – 446: Findings and Orders After Post-permanency Hearing—Permanent Plan Other Than Adoption (W&IC §366.3)

20.2 What CDSS forms have been modified to include TCA?

The CDSS modified the following adoption forms to include TCA in the adoption process. They are located on the CDSS website at:

<http://www.cdss.ca.gov/cdssweb/PG164.htm>.

1. AD 558: Notice of Placement (Adoptive)
2. AD 580: Notice of Removal of Child from Adoptive Home
3. AD 824: Adoption Petition - Consent and Joinder
4. AD 907: Adoptive Placement Agreement
5. AD 4348: PAARP

The CDSS is in the process of modifying the following adoption form to include TCA in the adoption process. Once approved, it will be located on the CDSS website at: <http://www.cdss.ca.gov/cdssweb/PG164.htm>.

1. AAP 4: Eligibility Certification – Adoption Assistance Program

20.3 My agency uses additional forms located on the CDSS website other than the ones listed. Are there any additional CDSS forms necessary to implement TCA that have not been modified?

Due to limited resources, many adoption forms currently located on the CDSS website were not modified. Most of the forms are templates that incorporate requested information required by statutes or regulations. Although the agency is required to retrieve certain information, the form itself may not be mandatory. Therefore, counties, DOs and adoption agencies will be responsible for modifying their own adoption forms to include TCA and ensure the required information is being documented. If this legislation is extended past 2014, CDSS will reassess its resources to determine if additional forms can be modified.

Should you have any questions regarding this letter you may contact me at (916) 657-2614 or the Permanency Policy Bureau at (916) 657-1858. Any questions regarding input to CWS/CMS should be directed to the County Single Point of Contact (SPOC). The SPOCs needing assistance should contact their System Support Consultant at the CWS/CMS Project.

Sincerely,

Original Document Signed By:

GREGORY E. ROSE
Deputy Director
Children and Family Services Division



Judicial Council of California
ADMINISTRATIVE OFFICE OF THE COURTS

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Chief Justice of California
Chair of the Judicial Council

STEVEN JAHR
Administrative Director of the Courts

December 30, 2012

Ms. Diane F. Boyer-Vine
Legislative Counsel
State of California
State Capitol, Room 3021
Sacramento, California 95814

Mr. Gregory P. Schmidt
Secretary of the Senate
California State Senate
State Capitol, Room 400
Sacramento, California 95814

Mr. E. Dotson Wilson
Chief Clerk of the Assembly
California State Assembly
State Capitol, Room 3196
Sacramento, California 95814

Re: Judicial Branch Report to the Legislature: Tribal Customary Adoption as required by Welfare and Institutions Code section 366.24(f).

Dear Ms. Boyer-Vine, Mr. Schmidt, and Mr. Wilson:

Attached is the Judicial Council report on Tribal Customary Adoption required under Welfare and Institutions Code section 366.24(f).

December 30, 2012

Page 2

If you have any questions related to this report, please contact Diane Nunn, Director, Center for Families, Children & the Courts, Judicial and Court Operations Services Division at 415-865-7689 or Diane.Nunn@jud.ca.gov.

Very truly yours,



Steven Jahr
Administrative Director of the Courts

SJ/eag

Attachment

cc: Members of the Judicial Council
Jody Patel, Chief of Staff, AOC Judicial Council and Court Leadership Services Division
Curtis L. Child, Chief Operating Officer, AOC Judicial and Court Operations Services Division
Diane Nunn, Director, AOC Center for Families, Children & the Courts
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TANI G. CANTIL-SAKAUYE
Chief Justice of California
Chair of the Judicial Council

STEVEN JAHR
Administrative Director of the Courts

Report Summary

Report title: Judicial Branch report to the Legislature: Tribal Customary Adoption

Statutory citation: Assembly Bill 1325 (Cook; Stats. 2009, ch. 287)

Code section: Welfare and Institutions Code 366.24(f)

Date of report: December 31, 2012

The Judicial Council has submitted a report to the Legislature in accordance with Welfare and Institutions Code section 366.24(f).

The following summary of the report is provided under the requirements of Government Code section 9795.

Assembly Bill 1325 (Cook; Stats. 2009, ch. 287), which became effective July 1, 2010, was tribally initiated legislation that added a new permanency option for “Indian children”¹ who are dependents of the California courts. This new permanency option, known as tribal customary adoption (TCA), allows these children, with the involvement of their tribe, to be adopted by and through the laws, customs, and traditions of their tribe without requiring termination of the parental rights of the Indian child’s biological parents. This report, required under Welfare and Institutions Code section 366.24(f) presents an evaluation of TCA.

The full report can be accessed at: <http://www.courts.ca.gov/7466.htm>

A printed copy of the report may be obtained by calling 415-865-4200.

¹ As that term is defined in 25 U.S.C. 1903(4) and Welf. & Inst. Code, § 224.1(a).

Judicial Branch Report to the Legislature: Tribal Customary Adoption

A REPORT TO THE CALIFORNIA
LEGISLATURE

JANUARY 2013



ADMINISTRATIVE OFFICE
OF THE COURTS

JUDICIAL AND COURT OPERATIONS
SERVICES DIVISION

CENTER FOR FAMILIES, CHILDREN & THE COURTS

Tribal Customary Adoption Handbook

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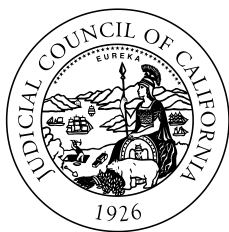
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Administrative Director of the Courts
and Secretary of the Judicial Council

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Judge of the Superior Court of California,
County of Alameda

Tribal Customary Adoption: Evaluation of Assembly Bill 1325

A REPORT TO THE CALIFORNIA LEGISLATURE

JANUARY 2013



ADMINISTRATIVE OFFICE OF THE COURTS

JUDICIAL AND COURT OPERATIONS
SERVICES DIVISION

CENTER FOR FAMILIES, CHILDREN & THE COURTS

This report has been prepared and submitted to the California Legislature under Assembly Bill 1325 (Stats. 2009, ch. 287).

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This report is also available on the California Courts website at www.courts.ca.gov/7466.htm.

For additional copies or more information about this report, please call the Center for Families, Children & the Courts at 415-865-7739 or write to:

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ADMINISTRATIVE OFFICE OF THE COURTS**

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Executive Summary

Assembly Bill 1325 (Cook; Stats. 2009, ch. 287), which became effective July 1, 2010, was tribally initiated legislation that added a new permanency option for Indian children who are dependents of the California courts. This new permanency option, tribal customary adoption (TCA), allows these children, with the involvement of their tribes, to be adopted by and through the laws, customs, and traditions of the tribe without requiring termination of the parental rights of the biological parents. The bill intends to offer a culturally appropriate permanency option for Indian children who are dependents of the California courts, while still providing those children with all the benefits associated with other state court adoption procedures.

Overview

Before Assembly Bill 1325, the permanency options for dependent “Indian children”¹ unable to reunify with their parents were limited to adoption under state law (i.e., requiring termination of parental rights), legal guardianship, or permanent placement with a fit and willing relative.² Federal and state law establish a preference for permanent plans of adoption for all dependent children who are unable to reunify with their parents.³ Many Indian tribes in California objected to adoptions that require termination of parental rights, however, which they “associated with oppressive policies used historically against tribes and Indian people—for example, forced removal of Indian children and Indian boarding schools.”⁴ The purpose of the bill was described as follows:

The motivation for AB 1325 was borne out of the tension between tribal cultural norms and existing state law, which does not include a culturally appropriate means of achieving permanency for dependent Indian children.⁵

AB 1325 was sponsored by the Soboba Band of Luiseno Indians and supported by the California State Association of Counties, the California County Child Welfare Directors Association, and more than 50 California tribes and agencies serving American Indians in California.⁶ In addition to the substantive and procedural aspects discussed below, AB 1325 required the Judicial Council to create the rules and forms necessary to implement TCA and to provide a report to the Legislature:

(f) The Judicial Council shall adopt rules of court and necessary forms required to implement tribal customary adoption as a permanent plan for dependent Indian children. The Judicial Council shall study California's tribal customary adoption provisions and their effects on children, birth parents, adoptive parents, Indian custodians, tribes, and the court,

¹ As that term is defined in 25 U.S.C. § 1903(4) and Welf. & Inst. Code, § 224.1(a).

² Welf. & Inst. Code, § 366.26.

³ *Ibid.* and 42 U.S.C. § 675(5)(E).

⁴ Assembly Bill 1325 Bill Analysis for Senate Human Services Committee (Sen. Carol Liu, Chair), June 23, 2009, p. 12, www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1301-1350/ab_1325_cfa_20090619_163123_sen_comm.html.

⁵ *id.* at p. 7.

⁶ *id.* at pp. 6 and 12–13; and the TCA History page on the California Tribal Customary Adoption website at www.caltca.org/index.php/tca-history.

and shall report all of its findings to the Legislature on or before January 1, 2013. The report shall include, but not be limited to, the following:

- (1) The number of families served and the number of completed tribal customary adoptions.
- (2) The length of time it takes to complete a tribal customary adoption.
- (3) The challenges faced by social workers, court, and tribes in completing tribal customary adoptions.
- (4) The benefits or detriments to Indian children from a tribal customary adoption.⁷

AB 1325 provided that the tribal customary adoption provisions would remain in effect until January 1, 2014,⁸ but that sunset date was subsequently removed by Senate Bill 1013 (Stats. 2012, ch. 35) as signed by the Governor on June 27, 2012. Although the sunset expiration was lifted, the requirement remained that the Judicial Council provide a report to the Legislature.

Methodology Overview

In answering the quantitative questions posed by the Legislature, the Administrative Office of the Courts (AOC) looked at data from the statewide Child Welfare Services/Case Management System (CWS/CMS) maintained by the California Department of Social Services (CDSS), as well as answers to surveys completed by child welfare professionals⁹ around the state. AOC staff sought information to answer the qualitative questions through a combination of court case file reviews, the surveys completed by child welfare professionals, and telephone focus groups with child welfare professionals who had been involved in tribal customary adoption cases. The methodology is discussed in more detail below.

Key Findings

Tracking child welfare cases that involve Indian children is difficult. AOC staff do not know whether we have identified all cases eligible for TCA, let alone all cases where TCA was (or should have been) considered as an option but not pursued. Case tracking depends on information entered and coded in the CWS/CMS. Because TCA is so new, it seems that some counties may not have been aware of the procedures for coding and tracking these cases. It also seems that different counties were not always using the coding system in the same way. Through the surveys of child welfare professionals and the telephone focus groups, AOC staff became aware of a number of TCA cases that were not coded in the CWS/CMS and looked at those cases for this report. It is possible, however, that there were others that were not identified.

The research identified fifteen finalized tribal customary adoptions involving eighteen children between July 1, 2010 and August 31, 2011. Of these, seven were already in permanent placement

⁷ Welf. & Inst. Code, § 366.24(f).

⁸ Welf. & Inst. Code, § 358.1(k), for example, as enacted by AB 1325.

⁹ The categories of child welfare professionals included social workers, county counsel, attorneys representing minors in dependency cases, attorneys representing parents in dependency cases, attorneys representing care givers/prospective adoptive parents in dependency cases and attorneys or advocates for tribes in dependency cases.

prior to July 1, 2010 when TCA became a permanency option for Indian children. The permanent plans for these children prior to TCA were either legal guardianship or long-term foster care. The advent of TCA allowed these children and families to move from guardianship into this new permanency option with the advantages of adoption. Similarly, county counsel in counties where tribes routinely object to termination of parental rights said that they believed that most, if not all, of their tribal customary adoption cases would have resulted in legal guardianship as the permanent plan for the children, had tribal customary adoption not been an available option.¹⁰

Not all tribes are comfortable with TCA. Many tribes object to any form of adoption, so the requirement in the law that child welfare workers continue to raise tribal customary adoption as a permanency option throughout the life of the case, even when a tribe has clearly stated that it does not want to pursue tribal customary adoption, has created friction in some counties. However, survey respondents from other counties state that they have been able to find ways to comply with the requirement while being sensitive to the expressed wishes of the tribe.

Some (but not all) system participants reported confusion, frustrations, and delays in implementing their first tribal customary adoptions due primarily to lack of knowledge and experience.

As discussed below in the section Challenges in Completing a Tribal Customary Adoption, questions linger about how the tribal customary adoption process fits with other aspects of the child welfare and adoption system.

Despite the challenges faced in early implementation of TCA, most of those involved in these cases expressed the view that this additional permanency option in cases involving Indian children is a benefit and had a positive impact on their cases.

Chapter 1: Overview

Overview of AB 1325

AB 1325 establishes a process to allow Indian children in the California child welfare system to enjoy the permanence offered by adoption without first terminating the parental rights of the child's birth parents.¹¹ The process requires the participation of the child's tribe. If a California superior court, in accordance with state law, finds that the child cannot successfully reunify with his or her parents, then if the child's tribe agrees, the superior court may order tribal customary

¹⁰ Since 2006, Welfare and Institutions Code section 366.26(c)(B)(vi) has provided that, with respect to Indian children, that the court may find as a compelling reason not to terminate parental rights and free a child for adoption, that such termination would substantially interfere with the child's connection to the tribal community or the child's tribal membership rights or that the child's tribe has identified guardianship, long-term foster care with a fit and willing relative, or another planned permanent living arrangement for the child.

¹¹ Assembly Committee on Judiciary, AB 2736 Bill Analysis Hearing (Cook and Beall), April 29, 2008, p. 1, www.leginfo.ca.gov/pub/07-08/bill/asm/ab_2701-2750/ab_2736_cfa_20080428_102800_asm_comm.html.

adoption as the child's permanent plan. If tribal customary adoption is selected as the child's permanent plan, then the state court proceedings are held in abeyance while the child's tribe develops and issues the tribal customary adoption order (TCAO),¹² which is then submitted to the superior court. The superior court decides whether or not to afford full faith and credit to the TCAO issued by the tribe. If the superior court affords the TCAO full faith and credit, the parental rights of the birth parents are modified in accordance with the TCAO rather than being terminated. The child may then be placed for adoption without termination of parental rights. When the adoption is finalized by the superior court, the TCAO is attached to and incorporated by reference into the adoption order issued by the superior court, and the dependency action is dismissed.

Prior to AB 1325, the Legislature had acted to address the specific circumstances of Indian children in the child welfare system. One such legislative initiative was SB 678 (Ducheny; Stats. 2006, ch. 838), which the Legislature adopted in 2006 to incorporate several provisions of the federal Indian Child Welfare Act (25 U.S.C. §§1901–1963), or ICWA, into California law. One key aspect of SB 678 was the creation of two exceptions for termination of parental rights in dependency cases involving Indian children where the court could otherwise order termination. Under SB 678, the court could decide not to terminate parental rights over an Indian child if it found that termination would be detrimental to the Indian child because 1) termination of parental rights would substantially interfere with the child's connection to his or her tribal community or the child's tribal membership rights or 2) the child's tribe has identified guardianship, long-term foster care with a fit and willing relative, or another planned permanent living arrangement for the child.¹³ When AB 1325 was passed, TCA added yet another permanent plan option which could be identified and form the basis for a finding that termination of parental rights was not the best interests of an Indian child.

AB 1325 amended a number of sections of the Welfare and Institutions Code¹⁴ which govern the content of social studies submitted by social workers to the courts for certain hearings. Section 358.1¹⁵ as amended requires social workers to include in each social study of evaluation a discussion of *inter alia*:

(j) For an Indian child, in consultation with the Indian child's tribe, whether tribal customary adoption is an appropriate permanent plan for the child if reunification is unsuccessful.

Changes to sections 361.5(g)(1)(G), 366.21(i)(1), and 366.22(a) and (c) similarly require that the assessment prepared by the agency whenever the court orders a hearing under section 366.26

¹² The content of the TCAO is discussed in more detail below.

¹³ Assembly Committee on the Judiciary, AB 2736 Bill Analysis Hearing, April 29, 2008, p.8, www.leginfo.ca.gov/pub/07-08/bill/asm/ab_2701-2750/ab_2736_cfa_20080428_102800_asm_comm.html.

¹⁴ All further statutory citations in this report come from the Welfare and Institutions Code unless stated otherwise.

¹⁵ Specifically, Welf. & Inst. Code, § 358.1(j).

include analysis related to tribal customary adoption when the proceeding involves an Indian child.

The main implementation provisions appear in sections 366.24 and 366.26. Section 366.24 sets out how the adoptive home study for a TCA will be conducted, who may conduct the study, and what information must be included. It mandates criminal background checks and a check of child abuse registries and precludes any adoptive placement if these checks disclose that any adult in the home has felony convictions related to child abuse or neglect, spousal abuse, crimes against a child, including child pornography, or a crime involving violence, including rape, sexual assault, or homicide, but not including other physical assault and battery, or a felony conviction that occurred within the last five years for physical assault, battery, or a drug-related offense.¹⁶

It also sets out the superior court procedures in cases where TCA is selected as the permanent plan for an Indian child, the interaction between the superior court and the child's tribe, as well as the minimum features and content required in a TCAO.¹⁷

Impetus for the Legislation

The legislation was initiated and sponsored by the Soboba Band of Luiseno Indians and supported by a number of tribes and tribal agencies throughout the state as well as by the California State Association of Counties and the California County Child Welfare Directors Association. The legislative analyses prepared for the various Senate committees that reviewed the bill describe the impetus for the legislation.

First, these analyses note that for many tribal communities,

According to the author, the termination of parental rights which is currently a prerequisite to adoption of a child is “totally contrary to many tribes' cultural beliefs and it is, in fact, associated with some of the most oppressive policies historically used against tribes and Indian people...” By contrast, historically and traditionally, most tribes have practiced adoption by custom and ceremony.¹⁸

Tribal communities' objections to termination of parental rights created conflict because federal and state laws place a strong preference on adoption as a permanent plan where a dependent child cannot reunify with his or her parents:

From the tribal perspective, concepts of identity and belonging are central to the idea of permanency and are considered paramount in decisions regarding the placement of Indian children. Thus, within tribal communities, child welfare decisions often are based on the concept of community permanency. When family reunification is not an option, the tribal

¹⁶ The complete text of section 366.24 is attached as Appendix A.

¹⁷ Assembly Bill 1325 (Cook; Stats. 2009, ch. 287), section 12.

¹⁸ Assembly Committee on Human Services, AB 1325 Bill Analysis Hearing, April 14, 2009, p. 6, www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1301-1350/ab_1325_cfa_20090413_111557_asm_comm.html.

perspective places emphasis on permanency alternatives that help the child stay connected to his or her extended family, clan, and tribe.

In contrast, within mainstream society, greater emphasis is often placed on certain types of permanency, such as adoption with full termination of parental rights. Many tribal communities, however, do not agree with terminating a parent's rights and may instead utilize customary adoption practices. In a customary adoption, the child is taken by a family or community member but still has the opportunity to have a relationship with his or her biological parents and extended family.¹⁹

The legislation was intended to reconcile requirements under state and federal law that mandate adoption as the most preferred permanent plan for a dependent minor who is unable to reunify with the birth parents, with the cultural values of tribal communities:

... tribal customary adoptions allow a person or persons to adopt a child while still maintaining the birth parents' parental rights. Maintaining a connection with the birth parent is a way that tribes can find permanency for a child while continuing to honor tribal values and beliefs. Extended lineages and tribal family systems form the basis for all tribes. Maintaining the birth parent/child connection, even when the child is permanently placed with another family, protects the child's connection to their extended family and their lineage.²⁰

The goal of the legislation was to provide an option that was culturally sensitive to the needs of tribes but with all the benefits of a "state" adoption for children, adoptive families, and counties:

... the sponsor states that non-adoption outcomes are a disincentive for counties because of federal and state laws. The sponsor explains that counties do not receive the same reimbursement from the State and Federal governments for guardianships as they do for adoptions and, even though these placements are permanent, counties are unable to report them to the State and Federal governments as completed cases. Additionally, funding for guardianship placements is very limited. While there are Kinship Guardianship Assistance Payment Program (Kin GAP) funds available to guardians, the amounts are significantly less than those available to adoptive parents through the Adoption Assistance Program (AAP). The AAP can help with the cost of therapy, out-of-home placement, and wrap-around services to minimize the effects of the disruption in the child's life. Kin GAP lacks the comparable ability to provide for the needs of these children and their families.²¹

¹⁹ Senate Judiciary Committee, AB 2736 Bill Analysis Hearing, June 24, 2008, pp. 7–8, www.leginfo.ca.gov/pub/07-08/bill/asm/ab_2701-2750/ab_2736_cfa_20080626_115809_sen_comm.html.

²⁰ Assembly Committee on Appropriations, AB 2736 Bill Analysis Hearing, May 14, 2008, p.2, www.leginfo.ca.gov/pub/07-08/bill/asm/ab_2701-2750/ab_2736_cfa_20080513_155322_asm_comm.html, p..

²¹ Assembly Committee on Human Services, AB 2736 Bill Analysis Hearing, April 15, 2008, pp. 4–6. www.leginfo.ca.gov/pub/07-08/bill/asm/ab_2701-2750/ab_2736_cfa_20080414_093238_asm_comm.html.

Implementation

Following passage of AB 1325, the Judicial Council amended a number of rules of court and forms to implement tribal customary adoption in compliance with the requirement in section 366.24(f). These changes essentially wove the requirements of tribal customary adoption throughout the rules and forms which govern placement and permanency planning hearings in dependency cases and adoptions. The Judicial Council report on the proposal that introduced these changes, *Juvenile Law: Tribal Customary Adoption*, was approved by the council on April 30, 2010, as Item A-6 (report online at www.courts.ca.gov/documents/20100423itema6.pdf.)

The California Department of Social Services (CDSS) issued two All County Letters to explaining tribal customary adoption and its requirements to social service agencies. The first of these was All County Letter No. 10-17 dated March 24, 2010. That All County Letter can be found at www.dss.cahwnet.gov/lettersnotices/entres/getinfo/acl/2010/10-17.pdf. The second of these was All County Letter No. 10-47, dated October 27, 2010, which can be found at www.dss.cahwnet.gov/lettersnotices/entres/getinfo/acl/2010/10-47.pdf.

Chapter 2: Methodology

Tracking tribal customary adoption cases has proven challenging. In anticipation of this report, CDSS modified its CWS/CMS to include a special project code intended to help identify TCA cases. However, when AOC staff spoke with child welfare agency staff in several counties they reported that they were not aware of the special project's code. Child welfare departments had different interpretations from county to county as to when they should apply the special project's code—some took it to mean the code should be used anytime an Indian child was in foster care placement and TCA was available and under consideration as a permanency option, others only when a tribe expressed a wish to pursue TCA, and still others only after TCA had been selected and finalized as a child's permanent plan.

Further, owing to the confidential nature of the information in the CWS/CMS and the strict federal and state regulations that govern access to it, CDSS could offer no identifying information for those cases flagged in the CWS/CMS with the special project code. CDSS could provide overall aggregate numbers for TCA cases but could not name the counties where cases were located nor the social workers or other professionals involved in them. The AOC received two data runs from CDSS. The first run, dated May 9, 2011, listed 11 children whose cases had been flagged with the special project code. The second, dated May 18, 2012, showed open case information from July 1, 2010, through December 31, 2011, with 31 cases flagged. While this information was useful in determining the number of TCA cases, did not enable us to identify the challenges (if any) faced by child welfare professionals and other system participants in implementing TCA. From the data, the AOC was able to look at length of time to permanency, but few other factors that would assist in determining the benefits or detriments to Indian children of choosing tribal customary adoption as a permanency option.

To answer both the quantitative and qualitative questions posed by the Legislature, the AOC drew on a combination of data and information from CWS/CMS, surveys of child welfare professionals, file reviews, and focus groups.

In October 2011, the AOC sent an e-mail questionnaire (attached as appendix B) to more than 130 tribal advocates, more than 600 attorneys representing parents and minors in dependency proceedings, child welfare directors, and county counsel across the state, as well as all participants in the Statewide Indian Child Welfare Working Group.²² The AOC received 43 substantive responses. The low response rate and low number mean that we must be cautious about drawing too many general conclusions.

The AOC also convened eight focus group conference calls, two each for tribal advocates, county social workers, minors' attorneys, parents' attorneys and county counsel. There were eight participants in total on these calls. The AOC emailed the presiding juvenile court judges in each of the counties identified by questionnaire respondents and focus group participants as having tribal customary adoption cases and requested permission to conduct file reviews and also requested comments from those judicial officers involved in tribal customary adoption cases.

The AOC requested permission to conduct file reviews from the juvenile court presiding judges in all 15 counties identified as hosting TCA cases. AOC staff attorneys received permission to conduct file reviews in 11 counties, where they reviewed a total of 36 cases. AOC staff were unable to conduct file reviews in 4 counties that represented at least 7 cases.

In light of concerns about the confidential nature of child welfare proceedings and the potential emotional and psychological sensitivity of parties directly involved in child welfare proceedings to the results of those proceedings, the AOC did not conduct any interviews directly with children, birth parents, adoptive parents or other individuals party to the dependency or adoption proceedings. Instead the AOC relied upon information received from tribal advocates, social workers, minors' and parents' attorneys, county counsel and judicial officers to assess the impact of tribal customary adoption.

Chapter 3: Findings

Number of Tribal Customary Adoptions

In addition to the data runs from CDSS, the AOC used the questionnaire and interviews to seek information from child welfare professionals, including county social workers, attorneys, county counsel and tribal representatives. To the extent possible, the AOC cross-referenced the responses to these sources against the data runs from CDSS. From all of these sources, the AOC

²² The Statewide Indian Child Welfare Working Group, convened by CDSS, includes tribal advocates and representatives, county child welfare representatives, county counsel, state representatives, and others. Currently more than 200 individuals participate in this group. You can find more information about the Statewide ICWA Working Group at www.childsworld.ca.gov/PG2073.htm.

identified 39 cases²³ involving 42 children for whom tribal customary adoption was at least considered as a permanency option.²⁴

Of those 39 cases, 15 cases (involving 18 children) have resulted in finalized tribal customary adoptions, and another 5 cases are pending TCA finalization. Some permanency option or case resolution other than TCA concluded another 16 cases: 10 where the chosen plan was guardianship, 3 subject to state adoptions that included the standard termination of parental rights of the biological parents, and 3 where jurisdiction was transferred to tribal court after termination of reunification services but before selection of a permanent plan.

Two cases were appealed, with one decision having now been rendered and reported (*In re. H.R.* 208 Cal.App.4th 751).

The AOC was unable to determine the outcome or current status of 1 case.

Time to Complete a Tribal Customary Adoption

Of the 15 finalized TCA cases identified, the AOC was able to review the court case files for 10. In the cases reviewed, it took an average of 9.7 months from the court's order of TCA as a permanent plan until the TCA was finalized and the dependency dismissed, the range in finalization time was from a low of 3 months to a high of 17 months. At the shorter end of the spectrum were cases where children had been in long-term foster care or legal guardianship placement prior to TCA becoming available as a permanency option; these cases were "reactivated" to move to a TCA in lieu of the other permanent plan. The cases on the long end of the spectrum, typically, were ones in which it was the first tribal customary adoption being completed by both the county and the tribe. In these cases (as detailed under "Challenges Faced in Tribal Customary Adoptions," below), parties tended to report uncertainties and lack of information about how the TCA process worked.

The AOC also analyzed data from CDSS, including data on 18 cases for which there was both a tribal customary special project code start date and a TCA special project code end date. Note that the end date could signify either that the case finalized as a tribal customary adoption, or that tribal customary adoption was rejected and the case finalized in some other way. The average time from a TCA start date to end date was 8.1 months, from a low of 2 months to a high of 15.

The CDSS data also included information on all "ICWA-eligible"²⁵ children in adoption placements in open cases between July 1, 2010, and December 31, 2011. The AOC analyzed

²³ It is difficult to be certain that we have correctly identified the outcomes in all cases because we found a number of instances where the CDSS data showed parental rights as terminated but our file review confirmed the case's disposition as a TCA with parental rights modified rather than terminated.

²⁴ Some courts open a separate case for each child in a sibling group, while other courts count a matter involving multiple siblings as a single case.

²⁵ The "ICWA-eligible" code is used in the CDSS data to identify those cases in which a specific finding has been made that the child is eligible under the Indian Child Welfare Act.

these cases to compare the total length of time to permanency in other state adoption cases involving Indian children against that in the identified TCA cases. The CDSS data show these cases took an average of 13.1 months from the date of termination of parental rights to finalization of the adoption, with the longest taking 39 months and the shortest only 2 months. The AOC had no other information on these cases to assess whether there were any particular characteristics associated with the outer ends of the spectrum.

Caution should be used in drawing a comparison between the special project's initiation date and the termination of parental rights date. In TCA cases, parental rights are not terminated, but are instead modified when the superior court accords full faith and credit to the TCAO submitted by the child's tribe. Accordingly, the date the TCAO developed by the tribe is accorded full faith and credit by the superior court would correspond to the date of termination of parental rights. Unfortunately, this is not a data element that was captured or included in the CWS/CMS data the AOC received on tribal customary adoption cases. Further, because TCA was new as of January 2010, the longest possible time it could have been a permanency option for case data captured in December 2011 was 18 months. At this point, it is impossible to know how long the TCA cases in progress will take to finalize.

Six cases appeared both on data runs for the TCA special project code and for ICWA-eligible children in adoption placements. Comparing the information on these cases in the two data sets, the AOC determined that the special project's start date, (i.e., the date TCA was identified as a permanency option and the special project code entered in CWS/CMS) was invariably earlier than the date listed for termination of parental rights. In the six cases that appeared on both data runs, the TCA initiation date averaged six months earlier than the date listed for TPR.

Although the sample size is very small, available data suggest it takes less time to complete a TCA (9.7 months, on average) from its identification as a permanency option to finalization than it does to complete a conventional adoption in an ICWA case (13.1 months on average) from termination of parental rights to finalization of the adoption. If we had used the TPR date as the start date on both sets of cases rather than using the TCA initiation date as the start date on the tribal customary adoption cases, the difference would have been even greater.

The questionnaire for child welfare professionals asked whether, in the respondent's opinion, TCA had increased or decreased the number of hearings required; the length of hearings required; and the total length of time to permanency. As to number of hearings, the responses split almost evenly among those who felt the TCA option in their cases increased the number of hearings, decreased the number of hearings, and had no impact. The questionnaire also asked whether TCA had increased or decreased the length of hearings required. Again, the responses were almost evenly split between those that felt it had increased the length of hearings, those that felt it had decreased the length of hearings and those that felt it had had no impact. There was similarly an even split in response to the question of whether tribal customary adoption had increased or decreased length of time to permanency. Thus, there does not appear to be a clear-

cut answer from child welfare professionals on the impact of tribal customary adoption on the timing of their cases.

Challenges in Completing a Tribal Customary Adoption

Information about the challenges of completing a TCA came primarily from the responses to the questionnaire sent to child welfare professionals as well as focus group calls, calls for technical assistance and discussions with child welfare professionals throughout the state. The questionnaire specifically asked, “Were there any particular challenges in implementing TCA?” Several respondents reported that there were no specific challenges. A higher number reported that there were challenges related to the newness of the process and a lack of knowledge and information on the part of those involved. Several respondents reported that there were challenges with timing and timeliness, and several reported that there were problems getting the criminal background checks completed so that the tribes could complete the home studies.

In focus group calls, child welfare professionals in some counties reported problems with county social workers raising the option of TCA with caregivers before the tribe had decided whether they were interested in tribal customary adoption in the case. Because a tribal customary adoption cannot be completed without the participation of the child’s tribe, this caused unnecessary tension between the tribe and the caregivers.

Tribal representatives commented that in some cases, tribes and families were being pressured into tribal customary adoption in inactive cases with established guardianships. Tribes reported that these were not priority cases for them and social services unilateral action seeking to alter the permanent plan to tribal customary adoption caused problems for the tribe.

Some county social workers reported that TCA increased the total time to permanency when compared to a state adoption.

Attorneys for several parents reported that parents in some TCA cases were not afforded the same kind of procedural and constitutional protections nor had the same standards applied as they would have had in a state adoption that included termination of parental rights. Although, through modification of parental rights under a TCA, parents can permanently lose virtually all of the substantive rights related to legal parentage, these attorneys reported that the same evidentiary standard was not being applied because there was an assumption that tribal customary adoption would provide for a continuing relationship with the child. This was so even though any ongoing relationship between the child and parent was left to the discretion of the tribe and the adoptive parents.

One social worker reported difficulty accessing Private Adoption Assistance Reimbursement Program (PAARP) funds for home studies completed by a private foster family agency, because to access the benefits, the social worker needed to enter a code for termination of parental rights.

One county counsel indicated that some tribes oppose any form of adoption, including tribal customary adoption. California law requires the child welfare agency to discuss TCA as a permanency option in every case where an Indian child cannot reunify. Further, the law requires that the agency raise the issue with the Indian child's tribe prior to each hearing from disposition leading to the finalization of a permanent plan. The county counsel reports that the requirement to continue to raise the option of tribal customary adoption has caused some tension when the tribe has rejected the proposal of tribal customary adoption on a number of occasions and explained that the tribe is opposed to any form of adoption as a matter of principle.

Tribal representatives reported that TCA as codified within California law was not reflective of some tribes' customs and traditions, and these tribes did not want to pursue this option.

In some of the files reviewed, tribal customary adoption was not always raised at an early stage in the proceedings, nor identified as a permanency option, as contemplated by section 358.1. Also in some of the files reviewed, specific findings and orders around tribal customary adoption as a potential permanent plan were not consistently made. As discussed earlier, we were not able to review social worker files, which might have revealed that discussions did occur early in these cases between social workers and tribal representatives concerning tribal customary adoption, and that it was among the permanency options considered by the court. In these cases, if there was a failure to raise tribal customary adoption at the earliest stage or to consider it as a permanency option, it did not appear to cause any delays in finalizing a permanent plan.

Tribal representatives in one case reported some confusion in integrating tribal customary adoption with other child welfare provisions. Specifically, section 366.24 requires each TCAO issued by a tribe to contain provisions related to postadoption contact between the child and the birth parents. Should the issue still be referred to mediation concerning post adoption contact when the matter has already been dealt with in the TCAO?

Benefits or Detriments to Indian Children From Tribal Customary Adoption

Information to answer this question was obtained primarily from questionnaires completed by child welfare professionals, as well as through focus group calls and other discussions with system participants. In response to the question about whether the option of tribal customary adoption had positively or negatively affected their cases, most respondents stated that it had positively affected the outcome of the case. The few negative comments generally related to the length of time it took to complete the adoption.

The AOC also received comments on this during our focus group calls. Again, most respondents indicated that tribal customary adoption had had a positive impact on their cases. Many felt that without the option, their cases would have resulted in legal guardianships. A permanent plan of tribal customary adoption was seen as more beneficial to both children and county agencies.

Generally, respondents stated that birth parents were happy about having the option of TCA, which they saw as providing them with an option of some kind of ongoing participation in the

child's life. Commentators reported that birth parents were generally less likely to contest a termination of services and permanent plan of tribal customary adoption as they were to fight a state adoption with full termination of parental rights (TPR).

One of the initial rationales for the legislation, as presented by the sponsors of AB 1325, the Soboba Band of Luiseno Indians, was that it provided Indian children and their tribal customary adoptive parents with the federal benefits and funding available under the Adoptive Assistance Program (AAP) but without requiring termination of parental rights. Appendixes C and D were charts prepared by the Soboba Band of Luiseno Indians and reviewed by CDSS comparing tribal customary adoption to other permanency options. Researchers were unable to confirm whether or not all adoption assistance program (AAP) resources and funding were being provided to families who had completed tribal customary adoptions. However, the Child Welfare Policy Manual published by the federal Administration for Families and Children does state that:

... there are situations in which adoptions are legal without a TPR. Specifically, in some Tribes adoption is legal without a TPR or a relinquishment from the biological parent(s), and there is at least one State that allows relatives who have cared for a related child for a period of time to adopt without first obtaining a TPR.

After consideration, we believe that our earlier policy is an unduly narrow interpretation of the statute. Consequently, if a child can be adopted in accordance with State or Tribal law without a TPR or relinquishment, the requirement of section 473 (c)(1) of the Act will be satisfied, so long as the State or Tribe has documented the valid reason why the child cannot or should not be returned to the home of his or her parents.²⁶

It appears, therefore, that children and families adopting under tribal customary adoption should be eligible for AAP assistance.

File reviews, particularly of those cases moved from a permanent plan of legal guardianship or long-term foster care to tribal customary adoption, confirmed that parties viewed assistance as a benefit to both the child and their caregivers. Tribal customary adoption is not subject to modification by a Welfare and Institutions Code 388 petition in the same way as a plan of legal guardianship or long-term foster care.

²⁶ Children's Bureau, U.S. Dept. of Health & Human Services, "8.2B.11 TITLE IV-E, Adoption Assistance Program, Eligibility, Special Needs," www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=49 (as of Oct. 30, 2012).

Discussed in more detail below are some of the conditions found in the tribal customary adoption orders that the AOC reviewed. Virtually all of these orders contained provisions:

- stating that the child maintained his or her rights of inheritance from and through their birth parents, and specifically retained the right to inherit trust assets under tribal and federal law;
- related to the child maintaining the right to a variety of services through the tribe, tribal agencies and/or the Indian Health Service;
- related to the child’s ongoing connection with the tribe and participation in cultural and community events; and
- allowing for some ongoing contact and visitation with birth parents and extended family members.

It is too soon to assess the long term impact of these provisions, but certainly many system participants stated that the provisions are potentially beneficial to the children involved.

System participants also remarked that whether tribal customary adoption is a benefit or a detriment to other system participants—and particularly birth parents and caregivers or adoptive parents—depends on what alternative permanent plan it is compared it to. Most respondents who represented birth parents expressed the view that TCA was more beneficial to their clients than the alternative of state adoption with termination of parental rights, because it left open the potential for future contact and relationship between the birth parents and the child. However, in those cases where respondents believed that a state adoption would have been warranted on the facts of the case and that either reunification services should have been continued or the children should have been returned to the birth parents, respondents expressed concern that the option of tribal customary adoption might have resulted in a lessening of protections for their clients. The AOC is aware of at least one such case currently under appeal.

One respondent also stated that she believed that caregivers would be less interested in adopting a child if it had to be through a tribal customary adoption rather than a state adoption because “... [a]doptive families do not like the uncertainty of the tribe intervening and dictating what happens post-adoption.” Other than this one survey response, the AOC did not receive any information supporting the proposition that caregivers withdrew from children rather than complete a tribal customary adoption. In most of the cases which were identified, children had been in placement with the caregivers for a substantial period of time. In some cases, the child was in a placement with a relative who did not want to participate in termination of parental rights. In other cases, where the caretaker might have agreed to a state adoption, the Indian child’s tribe opposed termination of parental rights and thus the adoption itself. In a number of cases, the child’s tribe was seeking to remove the child from the existing placement. File reviews and focus group discussions confirm that caretakers in a number of cases might have preferred a non-tribal state adoption. The exact nature of the required ongoing visits with the birth family and participation in tribal and cultural events does seem to have been a subject of concern and negotiation. The AOC reviewed several files in which the tribe had initially sought a requirement

of specific visits and participation in tribal cultural events. The final tribal customary adoption orders, however, required only “best efforts” or “reasonable efforts”.

The main drawback of tribal customary adoption identified by respondents to the AOC’s questionnaire and focus group calls was the length of time it took to complete a tribal customary adoption.

Conditions in the Tribal Customary Adoption Order

Welfare and Institutions Code section 366.24(c)(10) requires that the tribal customary adoption order issued by the tribe:

Include, but not be limited to, a description of (A) the modification of the legal relationship of the birth parents or Indian custodian and the child, including contact, if any, between the child and the birth parents or Indian custodian, responsibilities of the birth parents or Indian custodian, and the rights of inheritance of the child and (B) the child’s legal relationship with the tribe. The order shall not include any child support obligation from the birth parents or Indian custodian. There shall be a conclusive presumption that any parental rights or obligations not specified by the tribal customary adoption order shall vest in the tribal customary adoptive parents.

Several samples of “generic” tribal customary adoption orders were drafted by the sponsors of AB 1325 and are attached as Appendixes E and F. These samples are fairly representative of the TCAOs that were reviewed in actual case files. Summaries of the nature and content of the TCAOs are provided.

None of the tribal customary adoption orders reviewed reserve or afford any legal rights to the birth parents. All of the orders say that the birth parents may visit the child, but most also say that such visitation shall be at the discretion of the adoptive parents, who may suspend or discontinue the visits if they believe they are no longer in the best interests of the child.

Several of the orders say that both the tribe and the adoptive parents will be involved in decisions concerning ongoing contact or visitation between the birth parents and the child.

Several also require the birth parents to provide test results prior to any visitation to prove that they are free of drugs and alcohol, and several also set conditions on the maximum number and duration of such visits, require that such visits be supervised, and that the birth parents pay for the supervision. Other orders set up very detailed provisions for the birth parents to request visits, require that such visits be supervised, or provide that if the birth parents miss two consecutive visits that they shall lose all rights to visitation.

All of the orders relieve the birth parents of their legal and financial obligations to the child, while providing that the child shall maintain rights of inheritance from the birth parents under

federal and tribal law (and sometimes state law, too). Some specifically reference the continued right to inherit trust property.

All of the orders say something about the tribal customary adoptive parents maintaining contact and connections between the child and the tribe and require that the adoptive parents shall make “best efforts” to maintain these contacts. The exact terms differ; some orders are quite specific about the number and nature of tribal events that the child should attend—particularly in those cases where the adoptive parents are not tribe members—while others are more general in their terms.

Most orders contain some reference to the child’s ongoing right to receive services from the tribe, or from Indian health services. Some of the orders also say that the tribe will provide support and assistance to the child and adoptive parents in meeting the requirements of maintaining the cultural connection between the child and the tribe.

Many of the orders contain clauses that express the tribal views on the relationship between children and the tribe. The following are examples of some representative terms from a tribal customary adoption order:

[M]inor must grow and develop with a sound, solid, and organic connection to [his or her] cultural and racial identity...

[Tribe] ...has inherent sovereign right to make decisions regarding the best interests of its children including who should provide care, custody and control of its children...

...the Tribe does not believe in or adhere to Termination of Parental Rights and finds that the state law construct of Termination of Parental Rights is inconsistent with Tribal Customs and traditions...

...the Tribe does support the process of joining individuals and relatives into family relationships and expanding family resources...

In several cases where the adoptive parents were elderly or single, the tribal customary adoptive order contained a specific provision for successor care planning. Under these orders, the tribal customary adoptive parent agrees to appoint in his or her will a specific person as the child’s caregiver. Another provision of the will must agree that if the successor caregiver is unable or unwilling to serve in that capacity when the time comes, the tribal customary adoptive order provides that the tribe will designate a successor.

Questions outstanding

In the course of this research, child welfare professionals raised a number of questions about tribal customary adoption procedures and implementation for which there do not yet seem to be clear answers. These questions include:

- When a new birth certificate is issued following a TCA, will it list all four parents by default if nothing is said to the contrary in either the adoption order or TCAO?

- When do a birth parent’s appellate rights accrue if they want to contest the plan of TCA? Are their appellate rights the same as if there had been a termination of parental rights?
- When do substitute caregivers become “prospective adoptive parents” within the meaning of the Welfare and Institutions Code?

Chapter 4: Conclusion

Despite the relatively small number of tribal customary adoption cases completed to date, we can conclude from the sample identified in this report that some children who would have otherwise remained in less permanent plans of long-term foster care or legal guardianship were successfully adopted and had their dependencies dismissed through TCA. Available statistics further suggest that it takes less time to complete a TCA than a standard state court adoption in an ICWA case that includes termination of parental rights.

Child welfare professionals report that tribal customary adoption offers a more permanent and more advantageous resolution for both children and their adoptive families. Despite a learning curve marked by some challenges and confusion in these first years of implementation, most child welfare professionals involved in these cases believed that having TCA available as an additional permanency option for Indian children was a benefit that positively influenced their outcomes.

Appendix A

Welfare and Institutions Code section 366.24

§ 366.24. Tribal customary adoptions

(a) For purposes of this section, “tribal customary adoption” means adoption by and through the tribal custom, traditions, or law of an Indian child's tribe. Termination of parental rights is not required to effect the tribal customary adoption.

(b) Whenever an assessment is ordered pursuant to Section 361.5, 366.21, 366.22, 366.25, or 366.26 for Indian children, the assessment shall address the option of tribal customary adoption.

(c) For purposes of Section 366.26, in the case of tribal customary adoptions, all of the following apply:

(1) The child's tribe or the tribe’s designee shall conduct a tribal customary adoptive home study prior to final approval of the tribal customary adoptive placement.

(A) If a tribal designee is conducting the home study, the designee shall do so in consultation with the Indian child's tribe. The designee may include a county adoption agency, the State Department of Social Services when it is acting as an adoption agency, or a California-licensed adoption agency. Any tribal designee must be an entity that is authorized to request a search of the Child Abuse Central Index and, if necessary, a check of any other state's child abuse and neglect registry, and must be an entity that is authorized to request a search for state and federal level criminal offender records information through the Department of Justice.

(B) The standard for the evaluation of the prospective adoptive parents' home shall be the prevailing social and cultural standard of the child's tribe. The home study shall include an evaluation of the background, safety, and health information of the adoptive home, including the biological, psychological, and social factors of the prospective adoptive parent or parents, and an assessment of the commitment, capability, and suitability of the prospective adoptive parent or parents to meet the child's needs.

(2) In all cases, an in-state check of the Child Abuse Central Index and, if necessary, a check of any other state's child abuse and neglect registry shall be conducted. If the tribe chooses a designee to conduct the home study, the designee shall perform a check of the Child Abuse Central Index pursuant to Section 1522.1 of the Health and Safety Code as it applies to prospective adoptive parents and persons over 18 years of age residing in their household. If the tribe conducts its own home study, the agency that has the placement and care responsibility of the child shall perform the check.

(3)(A) In all cases prior to final approval of the tribal customary adoptive placement, a state and federal criminal background check through the Department of Justice shall be conducted on the prospective tribal customary adoptive parents and on persons over 18 years of age residing in their household.

(B) If the tribe chooses a designee to conduct the home study, the designee shall perform the state and federal criminal background check required pursuant to subparagraph (A) through the Department of Justice prior to final approval of the adoptive placement.

(C) If the tribe conducts its own home study, the public adoption agency that is otherwise authorized to obtain criminal background information for the purpose of adoption shall perform the state and federal criminal background check required pursuant to subparagraph (A) through the Department of Justice prior to final approval of the adoptive placement.

(D) An individual who is the subject of a background check conducted pursuant to this paragraph may be provided by the entity performing the background check with a copy of his or her state or federal level criminal offender record information search response as provided to that entity by the Department of Justice if the entity has denied a criminal background clearance based on this information and the individual makes a written request to the entity for a copy specifying an address to which it is to be sent. The state or federal level criminal offender record information search response shall not be modified or altered from its form or content as provided by the Department of Justice and shall be provided to the address specified by the individual in his or her written request. The entity shall retain a copy of the individual's written request and the response and date provided.

(4) If federal or state law provides that tribes may conduct all required background checks for prospective adoptive parents, the tribally administered background checks shall satisfy the requirements of this section, so long as the standards for the background checks are the same as those applied to all other prospective adoptive parents in the State of California.

(5) Under no circumstances shall final approval be granted for an adoptive placement in any home if the prospective adoptive parent or any adult living in the prospective tribal customary adoptive home has any of the following:

(A) A felony conviction for child abuse or neglect, spousal abuse, crimes against a child, including child pornography, or a crime involving violence, including rape, sexual assault, or homicide, but not including other physical assault and battery. For purposes of this subdivision, crimes involving violence means those violent crimes contained in clause (i) of subparagraph (A) and subparagraph (B), or paragraph (1) of, subdivision (g) of Section 1522 of the Health and Safety Code.

(B) A felony conviction that occurred within the last five years for physical assault, battery, or a drug-related offense.

(6) If the tribe identifies tribal customary adoption as the permanent placement plan for the Indian child, the court may continue the selection and implementation hearing governed by

Section 366.26 for a period not to exceed 120 days to permit the tribe to complete the process for tribal customary adoption and file with the court a tribal customary adoption order evidencing that a tribal customary adoption has been completed. The tribe shall file with the court the tribal customary adoption order no less than 20 days prior to the date set by the court for the continued selection and implementation hearing. The department shall file with the court the addendum selection and implementation hearing court report no less than seven days prior to the date set by the court for the continued selection and implementation hearing. The court shall have discretion to grant an additional continuance to the tribe for filing a tribal customary adoption order up to, but not exceeding, 60 days. If the child's tribe does not file the tribal customary adoption order within the designated time period, the court shall make new findings and orders pursuant to subdivision (b) of Section 366.26 and this subdivision to determine the best permanent plan for the child.

(7) The child, birth parents, or Indian custodian and the tribal customary adoptive parents and their counsel, if applicable, may present evidence to the tribe regarding the tribal customary adoption and the child's best interest.

(8) Upon the court affording full faith and credit to the tribal customary adoption order and the tribe's approval of the home study, the child shall be eligible for tribal customary adoptive placement. The agency that has placement and care responsibility of the child shall be authorized to make a tribal customary adoptive placement and sign a tribal customary adoptive placement agreement and, thereafter, shall sign the adoption assistance agreement pursuant to subdivision (g) of Section 16120. The prospective adoptive parent or parents desiring to adopt the child may then file the petition for adoption. The agency shall supervise the adoptive placement for a period of six months unless either of the following circumstances exists:

(A) The child to be adopted is a foster child of the prospective adoptive parents whose foster care placement has been supervised by an agency before the signing of the adoptive placement agreement in which case the supervisory period may be shortened by one month for each full month that the child has been in foster care with the family.

(B) The child to be adopted is placed with a relative with whom he or she has an established relationship.

(9) All licensed public adoption agencies shall cooperate with and assist the department in devising a plan that will effectuate the effective and discreet transmission to tribal customary adoptees or prospective tribal customary adoptive parents of pertinent medical information reported to the department or the licensed public adoption agency, upon the request of the person reporting the medical information.

(A) A licensed public adoption agency may not place a child for tribal customary adoption unless a written report on the child's medical background and, if available, the medical background on the child's biological parents, so far as ascertainable, has been submitted to the prospective tribal customary adoptive parents and they have acknowledged in writing the receipt of the report.

(B) The report on the child's background shall contain all known diagnostic information, including current medical reports on the child, psychological evaluations, and scholastic information, as well as all known information regarding the child's developmental history.

(10) The tribal customary adoption order shall include, but not be limited to, a description of (A) the modification of the legal relationship of the birth parents or Indian custodian and the child, including contact, if any, between the child and the birth parents or Indian custodian, responsibilities of the birth parents or Indian custodian, and the rights of inheritance of the child and (B) the child's legal relationship with the tribe. The order shall not include any child support obligation from the birth parents or Indian custodian. There shall be a conclusive presumption that any parental rights or obligations not specified in the tribal customary adoption order shall vest in the tribal customary adoptive parents.

(11) Prior consent to a permanent plan of tribal customary adoption of an Indian child shall not be required of an Indian parent or Indian custodian whose parental relationship to the child will be modified by the tribal customary adoption.

(12) After the prospective adoptive parent or parents desiring to adopt the child have filed the adoption petition, the agency that has placement, care, and responsibility for the child shall submit to the court, a full and final report of the facts of the proposed tribal customary adoption. The requisite elements of the final court report shall be those specified for court reports in the department's regulations governing agency adoptions.

(13) Notwithstanding any other provision of law, after the tribal customary adoption order has been issued and afforded full faith and credit by the state court, supervision of the adoptive placement has been completed, and the state court has issued a final decree of adoption, the tribal customary adoptive parents shall have all of the rights and privileges afforded to, and are subject to all the duties of, any other adoptive parent or parents pursuant to the laws of this state.

(14) Consistent with Section 366.3, after the tribal customary adoption has been afforded full faith and credit and a final adoption decree has been issued, the court shall terminate its jurisdiction over the Indian child.

(15) Nothing in this section is intended to prevent the transfer of those proceedings to a tribal court where transfer is otherwise permitted under applicable law.

(d) The following disclosure provisions shall apply to tribal customary adoptions:

(1) The petition, agreement, order, report to the court from any investigating agency, and any power of attorney filed in a tribal customary adoption proceeding is not open to inspection by any person other than the parties to the proceeding and their attorneys and the department, except upon the written authority of the judge of the juvenile court. A judge may not authorize anyone to inspect the petition, agreement, order, report to the court from any investigating agency, and any power of attorney except in exceptional circumstances and for good cause approaching the necessitous.

(2) Except as otherwise permitted or required by statute, neither the department, county adoption agency, nor any licensed adoption agency shall release information that would identify persons who receive, or have received, tribal customary adoption services. However, employees of the department, county adoption agencies, and licensed adoption agencies shall release to the State Department of Social Services any requested information, including identifying information, for the purpose of recordkeeping and monitoring, evaluation, and regulation of the provision of tribal customary adoption services.

(3) The department, county adoption agency, or licensed adoption agency may, upon written authorization for the release of specified information by the subject of that information, share information regarding a prospective tribal customary adoptive parent or birth parent with other social service agencies, including the department, county adoption agencies, and other licensed adoption agencies, or providers of health care as defined in Section 56.05 of the Civil Code.

(4) Notwithstanding any other law, the department, county adoption agency, or licensed adoption agency may furnish information relating to a tribal customary adoption petition or to a child in the custody of the department or any public adoption agency to the juvenile court, county welfare department, public welfare agency, private welfare agency licensed by the department, provider of foster care services, potential adoptive parents, or provider of health care as defined in Section 56.05 of the Civil Code, if it is believed the child's welfare will be promoted thereby.

(5) The department, county adoption agency, or licensed adoption agency may make tribal customary adoption case records, including identifying information, available for research purposes, provided that the research will not result in the disclosure of the identity of the child or the parties to the tribal customary adoption to anyone other than the entity conducting the research.

(e) This section shall remain operative only to the extent that compliance with its provisions does not conflict with federal law as a condition of receiving funding under Title IV-E or the federal Social Security Act (42 U.S.C. Sec. 670 et seq.).

(f) The Judicial Council shall adopt rules of court and necessary forms required to implement tribal customary adoption as a permanent plan for dependent Indian children. The Judicial Council shall study California's tribal customary adoption provisions and their effects on children, birth parents, adoptive parents, Indian custodians, tribes, and the court, and shall report all of its findings to the Legislature on or before January 1, 2013. The report shall include, but not be limited to, the following:

(1) The number of families served and the number of completed tribal customary adoptions.

(2) The length of time it takes to complete a tribal customary adoption.

(3) The challenges faced by social workers, court, and tribes in completing tribal customary adoptions.

(4) The benefits or detriments to Indian children from a tribal customary adoption.

Appendix B

TRIBAL CUSTOMARY ADOPTION QUESTIONNAIRE:

County where matter is located:

Court case number:

Name and contact information of social worker and attorneys (please do not include any personal identifying information about the minor, parents or other parties) including:

County child welfare worker:

Minor's attorney:

Parents' attorney(s):

County Counsel:

Tribal Advocate/representative:

Tribal Attorney (if any):

Other attorney (ie. attorney for de facto parents):

How long at the case been open and what stage was the case at when Tribal Customary Adoption (TCA) was first raised as a permanency option?

Which party raised TCA as a permanency option?

What position did each of the parties take to the prospect of TCA? Did they oppose or support TCA?

If a party opposed TCA, what was the basis for this opposition?

Were there any particular concerns or issues raised by any party?

Were there any particular challenges in implementing TCA?

Did the option of TCA:

- Increase or decrease the number of hearings that were required? _____

- Increase or decrease the length of hearings required?

- Increase or decrease the length of time to permanency? _____
- Other? _____
- Overall would you say that the option of TCA positively or negatively affected this case?

Any other comments:

Appendix C

COMPARISON OF FINANCIAL BENEFITS of ADOPTION, LEGAL GUARDIANSHIP, KIN GAP, LONG TERM FOSTER CARE and TRIBAL CUSTOMARY ADOPTION

COMPARISON OF FINANCIAL BENEFITS					
	Adoption (Adoption Assistance Program –AAP)	Tribal Customary Adoption (Adoption Assistance Program –AAP)	Kin-GAP (Legal Guardianship)	Non-Relative AFDC Foster Care (FC) (Legal Guardianship)	Long Term Foster Care
Amount	A negotiated rate based on the special needs of the child and circumstances of the family	A negotiated rate based on the special needs of the child and circumstances of the family	A fixed payment according to age	A fixed payment according to age	Based on age and in some cases, child's disability
Special Needs Allowance	Available in most counties; varies according to county A child who is developmentally delayed and a current consumer of California Regional Center may qualify for the dual agency flat rate.	Available in most counties; varies according to county A child who is developmentally delayed and a current consumer of California Regional Center may qualify for the dual agency flat rate.	Included if child was eligible while in foster care	Available in most counties	Based on current Foster Care funding
Medi-Cal	Included	Included	Included	Included	Included
Clothing Allowance	None	None	Varies according to county	Varies according to county	Varies according to county

Information compiled by the Soboba Band of Luiseño Indians 2/11/11

Maximum Age	Until child turns 18; can be extended to 21 if a child has a mental or physical handicap that warrants continuation of benefits.	Until child turns 18; can be extended to 21 if a child has a mental or physical handicap that warrants continuation of benefits.	Until child turns 18; until 19 if child is in school and can graduate	Until child turns 18; until 19 if child is in school and can graduate	Until child turns 18; can be extended to 21 if a child has a disability
Independent Living Program	Yes, if child adopted at or after age 16	Yes, if child adopted at or after age 16	Yes	Yes	Yes
Reassessment	At least every two years	At least every two years	Every year	Every six months	Ongoing
Foster Care Case Closed	Yes	Yes	Yes	No	No

Appendix D

COMPARISON OF RIGHTS AND RESPONSIBILITIES				
	ADOPTIVE PARENTS	TRIBAL CUSTOMARY ADOPTIVE PARENTS	LEGAL GUARDIANS	FOSTER PARENTS/RELATIVE CAREGIVER
Relationship	The child becomes the adoptive parent's child in all respects	The child becomes the adoptive parent's child in all respects	The child becomes the "ward" of the guardian	The child remains the responsibility of the county agency and Juvenile Court
Parental legal rights and responsibilities for the child are transferred to the adopting relative	Yes	Yes	No	No
Relative makes decisions for the child	Yes	Yes	Most	Some
Relative has control over visitation with parents	All	May be determined through Tribal Customary Adoption Order (TCAO)	Some	None
Child will stay in the foster care system	No	No	Maybe	Yes
A payment and Medi-Cal is available for the child	Yes	Yes	Yes	Yes

COMPARISON OF RIGHTS AND RESPONSIBILITIES				
	ADOPTIVE PARENTS	TRIBAL CUSTOMARY ADOPTIVE PARENTS	LEGAL GUARDIANS	FOSTER PARENTS/RELATIVE CAREGIVER
Child's Residence	Residence solely determined by adoptive family	Residence solely determined by adoptive family. Tribe may request that minors remain in local area to maintain their Tribal ties.	Guardian may decide where child and family live in California. Need court permission to move from California or placed back with parent. If move to new state, must re-establish guardianship in new state, subject to new state's rules	Placement/residence determined by Juvenile Court and Social Services Department. Juvenile Court must pre-approve any move out of California. The family may need to be licensed in the new state
Education	Adoptive parents make all decisions. Special services may be available from schools, regional centers and other service providers	Adoptive parents make all decisions. Special services may be available from schools, regional centers and other service providers Johnson O'Malley Act College benefit – may be college benefits through the tribe.	Guardian can make all decisions. Legal guardian can request special services from schools, regional centers, or any other service providers	Unless education rights are limited by the Court or parental rights are terminated, the birth parents retain the right to make critical decisions regarding education
Marriage	Adoptive parents may consent to the marriage of the child	Adoptive parents may consent to the marriage of the child	Both guardian and the court must give consent to the child's marriage. If the child enters a valid marriage, the child becomes emancipated under California law	Juvenile Court retains the responsibility to consent to the marriage of a child under its jurisdiction

COMPARISON OF RIGHTS AND RESPONSIBILITIES				
	ADOPTIVE PARENTS	TRIBAL CUSTOMARY ADOPTIVE PARENTS	LEGAL GUARDIANS	FOSTER PARENTS/RELATIVE CAREGIVER
Child's Drivers License and Driving	Adoptive parents may sign for child's drivers license. The law requires anyone signing DMV application get insurance to cover the child driver	Adoptive parents may sign for child's drivers license. The law requires anyone signing DMV application get insurance to cover the child driver	Guardian has authority to consent to the child's application for drivers' license. Guardian becomes liable for any civil damages that may result if the child causes accident. The law requires anyone signing DMV application get insurance to cover the child driver	Require child to file proof of financial responsibility. Certain adults, such as biological parents, can sign the DMV application. Contact DMV
Armed Services	Adoptive parents may consent to enlistment of child	Adoptive parents may consent to enlistment of child	Guardian may consent to enlistment of child. If child enters into active duty with the armed forces, the child becomes emancipated under California law	Juvenile Court retains the responsibility to consent to the enlistment of child
Death of Caregiver	Adoptive child is treated the same as birth child. Adoptive parents can designate who will raise child in the event of their deaths. Adoption Assistance Program payments will terminate	Wills, advanced directive, may be addressed in TCAO	Guardianship terminates in event of death of caregiver. Birth parents may attempt to regain custody. Court may appoint successor guardian, in which case Kin-GAP eligibility may be continued, or reopen dependency and place child in long-term foster care	The agency retains placement authority and must locate a new living situation for the child

COMPARISON OF RIGHTS AND RESPONSIBILITIES				
	ADOPTIVE PARENTS	TRIBAL CUSTOMARY ADOPTIVE PARENTS	LEGAL GUARDIANS	FOSTER PARENTS/RELATIVE CAREGIVER
Social Security Benefits	An adopted child may be eligible for Social Security dependent's or survivor's benefits when the adopted parent(s) retires, becomes disabled or dies	An adopted child may be eligible for Social Security dependent's or survivor's benefits when the adopted parent(s) retires, becomes disabled or dies Child may also be eligible for dependent/survivor benefits from birth parents	Eligible for benefits under the birth parent's accounts	Eligible for benefits under birth parent's accounts
Inheritance	An adoptive child is a legal heir of the adoptive parents	An adoptive child is a legal heir of the adoptive parents Child may inherit from birth parents. May be specified in TCAO	Child has no inheritance rights unless the guardian chooses to make the child a legal heir through a will. The child retains rights of inheritance from the birth parents	Child has no inheritance rights unless the foster parent chooses to make the child a legal heir through a will. The child retains rights of inheritance from the birth parents
Child Misconduct/ Destruction of Property	Adoptive parent is generally responsible for damages resulting from a child's misconduct or destruction of property of others	Adoptive parent is generally responsible for damages resulting from a child's misconduct or destruction of property of others	A guardian, like a parent, is liable for the harm and damages caused by the willful misconduct of a child. There are special rules concerning harm caused by the use of a firearm. If you are concerned about your possible liability, you should consult an attorney	The foster parents are not legally liable for the behavior of the child

COMPARISON OF RIGHTS AND RESPONSIBILITIES				
	ADOPTIVE PARENTS	TRIBAL CUSTOMARY ADOPTIVE PARENTS	LEGAL GUARDIANS	FOSTER PARENTS/RELATIVE CAREGIVER
Support of Child	Adoptive parent is legally responsible for the support of the child	Adoptive parent is legally responsible for the support of the child	The parents remain legally responsible for the child's support. The child may be eligible for TANF (formerly known as AFDC), social security benefits, Veterans Administration benefits, and other public or private funds	The foster parent has no responsibility for the financial support of his/her foster child
Additional Responsibilities	Adoptive child is treated as birth child	Adoptive child is treated as birth child. Other: May include specifics regarding culture, activities, ceremony, name and birth certificate changes	Judge may ask the guardian to agree to other special conditions concerning the child's welfare, such as ongoing visitation with birth parents. A birth parent can petition the court at any time to rescind the guardianship and return custody to the parent. The court will determine if this is a safe and appropriate plan for the child	Foster parents are expected to remain available and to make the child available for visitation by the birth parent and for regular contact with the social worker, CASA, child's attorney and/or other professionals needing access to the child. They must be accountable for any monies received on behalf of the child

Appendix E

TRIBAL CUSTOMARY ADOPTION ORDER OF THE [CALIFORNIA TRIBE]

CASE. NO:

SUBJECT: IN THE MATTER OF THE _____ MINOR
[_____] COUNTY JUVENILE COURT NO. _____
TRIBAL CUSTOMARY ADOPTION ORDER

WHEREAS, the [California Tribe] is a federally recognized Indian tribe eligible for all rights and privileges afforded to federally recognized tribes; and

WHEREAS, the [California Tribe] Tribal Council is the governing body of the [California Tribe] under the authority of the Constitution/Customs and Traditions of the [California Tribe]; and

WHEREAS, the minor child/ren, _____, date of birth _____, is a member of the [California Tribe] or is eligible for membership and is the natural child/descendent of _____, who is/was a member of the [California Tribe]; and

WHEREAS, it has been determined that return of the above named minor child/ren to the birth parents would likely result in serious detriment to the child/ren, the [California Tribe] Tribal Council has met with the family and determined, after careful consideration regarding the best interest of the child/ren, birth parents, adoptive family and tribal community, that customary adoption is in the child/ren's best interest. To that end, the above named child/ren shall now be considered the legal child/ren of _____ and _____, who are the minor's _____.

WHEREAS, under California State law (Welfare and Institutions Code §XX), a permanent plan of Tribal Customary Adoption can and has been found to be in an Indian Child's best interest and the Tribe retains all rights and responsibilities for ordering the Tribal Customary Adoption,

NOW THEREFORE BE IT RESOLVED, the parental rights of _____ shall be suspended/modified as follows:

1. **The Birth Parent/s:** _____ is/are no longer physically, legally, or financially responsible for the child. All such responsibilities are hereby transferred to the customary adoptive parents. However, under and pursuant to the customs and traditions of the Tribe and the inviolate nature of the connection between tribal children and tribal parents, the birth parents shall retain the following rights:

- (a) Visitation:

Birth parents and/or child can have contact in a manner at a time that the adoptive family determines is in the child's best interest and as follows:

- (b) Inheritance:

2. The Adoptive Family: Rights and obligations of the adoptive family, _____ and _____ are now the legal parents of _____. They shall have the following rights and obligations as defined below:

- (a) Financial Support:
- (b) Medical/Dental/Mental health care, including, but not limited to, the right to make all medical decisions:
- (c) Educational rights:
- (d) Inheritance:
- (f) Receipt of benefits: For purposes of all tribal, state and federal benefits, including, but not limited to, financial, insurance, educational, cultural, and citizenship benefits, the child/ren is/are the children of the adoptive parents.
- (g) Travel:
- (h) Cultural support: The adoptive parents will endeavor to keep the minor child closely connected to his [California Tribe] heritage and will provide the child with every opportunity to develop a strong cultural identity as a member of the [California Tribe].

All rights not specified herein shall be invested to the adoptive family.

OTHER POTENTIAL ISSUES TO BE ADDRESSED:

- Clan, family, village, community, ceremonial affiliation
- Name Change

3. The Tribal Council, or any other tribal entity exercising authority specifically delegated to it by and through the duly exercised authority of the Tribal Council, retains jurisdiction to review and thereafter alter and/or modify this Order from time to time as necessary. Parties seeking such review, alteration or modification must utilize an available dispute resolution process prior to seeking Tribal Council review.

CERTIFICATION

We, the elected members of the Tribal Council of the [California Tribe] do hereby certify that the foregoing Order was adopted by the [California Tribe] Council at a duly held meeting convened on the [California Tribe] [Reservation/Rancheria] on _____, ____ by a vote of ____ "FOR", ____ "AGAINST", ____ "ABSTAINING", and such Order has not been rescinded or amended in any way.

_____, Chairman

_____, Vice-Chair

_____, Treasurer

_____, Secretary

_____, Member

SAMPLE

APPENDIX F

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In the Matter of

_____ DOB: _____

A Minor Child

**TRIBAL CUSTOMARY ADOPTION
ORDER OF [TRIBE]**

This matter came before the TRIBE on the ____ day of _____, 20___. No formal appearances were made and the Tribal Council has either reviewed or been briefed on all the documents of record received by the TRIBE in the XXXXX County Superior Court Case No. _____, In the Matter of _____, A Minor Child, DOB: _____.

The Tribal Council has also been well briefed by the Tribe's ICWA representative(s) and the TRIBE's legal counsel regarding this case and is also knowledgeable of the minor's siblings' status and their case while it was pending before the XXXXX County Superior Court.

This matter comes before the TRIBE for the purpose of considering the long term placement plan of the minor and after said deliberation the TRIBE orders a tribal customary adoption of the minor, _____.

TRIBAL CUSTOMARY ADOPTION ORDER OF [TRIBE]

1 History:

2 _____, DOB: _____, is the biological
3 child of his/her mother, JANE DOE, who is a member of the TRIBE.

4 _____ is also the biological child of the father, JOHN DOE. Mr. DOE is
5 not a tribal member. The TRIBE is the minor's Indian tribe. The Tribe formally intervened in the
6 XXXXX County Superior Court case in _____. According to
7 XXXXX County Superior Court documents, Ms. DOE has not appeared in the Superior Court
8 matter since _____, and Mr. DOE has not appeared since
9 _____.

10 _____ was removed from his/her mother's custody and care on or
11 about _____. The mother was allegedly under the influence and
12 unconscious at the time of the removal. She was later transported to the
13 _____. The XXXXX County Department of Human Services was
14 informed that the mother tested positive for methamphetamine.

15 The father has complied with services as ordered but has not regularly visited his child.
16 Of concern to the TRIBE is each parent's failure to attend court hearings, comply with their
17 service plans and remain clean and sober and maintain or form a connection with the child.

18 The TRIBE understands these parents have struggled in the past and continue to struggle
19 to this day. These parents have two other children, who are members of the TRIBE, and are in a
20 guardianship because the parents can not provide for the children. _____

21 is placed with his siblings and being cared for by their guardians, _____.

22 The TRIBE is familiar with the _____ and knows they are non-Indian and
23 their home does not comply with the placement preferences of the Indian Child Welfare Act (25
24 U.S.C. §1915), state law (Welf. & Inst. Code §361.31) or the Tribe's preferences. However, the
25 Tribe has agreed to this placement in an effort to keep _____ with his/her
26 siblings, _____, and keep the children together. On

27 _____, the TRIBE filed Tribal Resolution No. ____ in the XXXXX County
28 Superior Court action which outlined the TRIBE's custom regarding termination of parental

TRIBAL CUSTOMARY ADOPTION ORDER OF [TRIBE]

1 rights and its commitment to a permanent placement for _____.

2 Findings:

3 Based upon the XXXXX County Superior Court record, information from the TRIBE's
4 ICWA representative(s) and tribal legal counsel, and tribal customs and tradition, the TRIBE
5 makes the following findings:

6 1. As an exercise of its inherent sovereignty the TRIBE, by and through its
7 governing body, the TRIBE, has the authority and jurisdiction to formally order a placement plan
8 of tribal customary adoption of the minor, _____, DOB _____.
9 (Site the constitution here or some other source of authority).

10 2. The TRIBE finds that the Tribe possesses the inherent sovereign right to make
11 decisions regarding the best interests of its children including who should provide care, custody
12 and control of its children.

13 3. The TRIBE finds that the protection of the child's safety, well-being and welfare
14 and his/her sense of belonging; preservation of the child's identity as a tribal member and
15 member of an extended family; preservation of the culture, religion, language, values, and
16 relationships with the Tribe embodies and promotes the traditional values of the TRIBE
17 regarding the protection and care of the Tribe's children. The TRIBE believes that it is the
18 responsibility of the TRIBE, the tribal communities and extended families to protect, care for and
19 nurture our children.

20 4. The TRIBE finds that children deserve a sense of permanency and belonging
21 throughout their lives and at the same time they deserve to have knowledge about their unique
22 cultural heritage including their tribal customs, history, language, religion, values and political
23 systems.

24 5. The TRIBE finds that based upon tribal custom and tradition, the TRIBE does not
25 believe or adhere to termination of parental rights and finds that the state law construct of
26 Termination of Parental rights is inconsistent with tribal customs and traditions. The TRIBE
27 does support the process of joining individuals and relatives into family relationships and
28 expanding family resources. The TRIBE recognizes that the relationship between the minor and

TRIBAL CUSTOMARY ADOPTION ORDER OF [TRIBE]

1 the GUARDIANS will be one of Tribal Customary Adoptive family. The TRIBE also recognizes
2 the minor's right to a continued relationship with his birth parents and extended families.

3 6. The TRIBE finds that _____ will benefit from a relationship with
4 his/her biological parents and encourages said relationship. The TRIBE also recognizes that
5 _____ will benefit from a relationship with his/her extended family. The
6 biological parents may have visitation with _____ provided the following
7 conditions are met: the parents offer proof of sobriety from a recognized health facility and all
8 visits take place in the presence of the GUARDIANS either in their home or at a mutually agreed
9 upon location. At any time should the GUARDIANS have a reasonable belief that either parent
10 is under the influence of drugs or alcohol a visit may be cancelled or terminated. Visitation
11 between _____ and his/her extended family may take place upon consultation
12 with the GUARDIANS and the TRIBE and at the discretion of each.

13 7. The TRIBE finds that _____ shall attend any and all holiday
14 functions hosted by the TRIBE and the Tribe's Pow Wow. The TRIBE or its designee shall assist
15 the GUARDIANS with the development of regalia, language, cultural and ceremonial
16 development of _____.

17 8. The TRIBE is confident the GUARDIANS have and will always provide
18 with all the love, caring, dedication and support they would provide to a biological child and it is
19 the TRIBE's intention that _____ be raised until the age of majority and
20 beyond by the _____ family. The TRIBE has and will continue to
21 provide support, guidance and assistance to _____ and the
22 _____ family including offering tribal services and programs to the family. The
23 services and programs which may be available to the _____ family shall
24 include, but not be limited to: Medical, dental, and behavioral health services at Indian Health
25 Services centers; Timely enrollment consideration for _____ upon
26 completion of his/her application form and its submission by the GUARDIANS at the next
27 scheduled meeting of the Enrollment Committee; The TRIBAL ICWA Representative and staff
28 are available to _____ and the _____ family currently

1 and after the tribal customary adoption order is finalized and the case is dismissed by the
2 XXXXX County Superior Court. The Tribe's ICWA staff can assist by conducting traditional
3 and culturally appropriate mentoring and activities, interfacing with mental health and medical
4 providers, provide respite care, transportation and guidance to _____ and the
5 _____ family now and in the future.

6 9. The TRIBE is committed to the permanent placement of
7 _____ with GUARDIANS. The Tribe is committed to this placement and
8 this tribal customary adoption and believes THE MINOR will thrive with the
9 _____ family as his/her tribal customary adoptive family, and become a
10 successful and meaningful member of the tribal community. In an effort to protect
11 and preserve the _____ family structure the TRIBE pledges its full
12 commitment to this family and its continuing development and evolution with
13 _____ including support for _____'s legal name to be
14 changed to reflect both his/her birth name and the _____ surname and
15 recognition that, as the adoptive parents of _____,
16 _____'s share all the rights and responsibilities as his/her parents including
17 control over family visitation and his/her health, education and welfare.

18 10. The TRIBE finds that _____ may possess certain rights of
19 inheritance which may be controlled by federal law pursuant to the American Indian Probate
20 Reform Act of 2004, ("AIPRA") P.L. 108-374, or by tribal probate laws enacted now or in the
21 future. The TRIBE further finds that the minor will benefit from maintaining rights of
22 inheritance by and between himself and his biological parents and his tribal customary adoptive
23 family.

24 11. The TRIBE finds that the biological parents have no ongoing legal obligations to
25 and are not responsible for his/her care, custody or welfare. The parents may however contribute
26 to his/her welfare by purchasing age appropriate gifts, school supplies and by providing culturally
27 appropriate items to assist with his/her cultural and ceremonial development.

28 12. The TRIBE finds that based on tribal custom and tradition the TRIBE must

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1 support and protect the legal relationship between the minor and the TRIBE, the minor's current
2 or future citizenship in the TRIBE and therefore where the care, custody and control of the child
3 will be placed with non-tribal members the child shall retain his/her legal relationship with the
4 Tribe as a citizen or eligible for citizenship in the Tribe with all of the rights, duties and
5 privileges that are inherent in his/her status as a citizen and member of a federally recognized
6 tribe.

7 Therefore, the TRIBE hereby orders the following:

8 The TRIBE hereby adopts findings 1 – 12 as its Tribal Customary Adoption Order in this
9 case and will submit the final Order to the XXXXX County Superior Court to grant full faith and
10 credit, and make this Order the Order of the Court.

11

12 IT IS SO ORDERED, this ____day of _____, 20____.

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Chairperson/Tribal Council

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[TRIBE]

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TRIBAL CUSTOMARY ADOPTION ORDER OF [TRIBE]