



Tribal Customary Adoption

The Nuts and Bolts of an Essential New Permanency Plan

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"Our families made strong through balance and support"

California Customary Adoption Law

- On October 11, 2009, Governor Arnold Schwarzenegger signed AB 1325 into law
- The law became effective July 1, 2010
- Sunsets January 1, 2014
- Essential provisions are found in **Welfare and Institutions Code §366.24**

The Need to Include Customary Adoption in California State Law



**Welfare and Institutions
Code
§366.24**

Looking back is part of looking forward...

“Historically and traditionally, adoption has been practiced in most tribal communities through custom and ceremony. In general, tribes did not practice termination of parental rights. Unfortunately, adoption became a negative thing due to forced assimilation policies; it was used as a tool to destroy Indian families and culture. Due to this historical trauma, many tribes actively abhor adoption as understood by the larger culture’s definition.”

From the website of the National Indian Child Welfare Association (www.nicwa.org).

Permanency and Termination of Parental Rights

- ❖ Federal child welfare law and policy express clear preference for termination of parental rights and adoption of children who cannot return to their families (ASFA).
- ❖ \$35 million allocated in September of 2009 by HHS for adoption incentive payments.

HOW DID WE GET HERE?



Why TCA?

- ❖ Tribes in California routinely contest adoption because it requires TPR and TPR is culturally offensive for many tribes.
- ❖ Tribal children often, if the Tribe is successful in opposing TPR, remain in guardianship.
- ❖ Guardianship = Kin-GAP
- ❖ Kin-GAP is an inferior funding stream compared to AAP
- ❖ Tribes can avoid costly and difficult legal battles, and the risk of losing.

Why TCA?

- ❖ TCA allows for AAP funding but without TPR.
 - The Administration for Children and Families stated, “It has been brought to our attention that there are situations in which adoptions are legal without a TPR...Specifically, in some Tribes adoption is legal without 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...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.” ACYF-CB-PA-01-01 (1/23/01)

The Definition

Tribal Customary Adoption is an agency adoption by and through the tribal customs, traditions, or law of an Indian child's tribe which transfers the custody of a child to the care and protection of adoptive parents **without** the termination of parental rights.

(W&I Code §366.24)

MAIN TENETS OF TCA

- ❖ Specific to CA dependent Indian children under the ICWA
- ❖ Occurs under the customs, laws, or traditions of an Indian child's tribe
- ❖ TPR is not required
- ❖ Selected by Indian child's tribe
- ❖ Requires consultation with the Indian child's tribe
- ❖ Main provisions in Welfare & Institutions Code, not Family Code
- ❖ Aligned with core objectives of CDSS
- ❖ Agency adoption
- ❖ Does not apply to:
 - Independent adoption
 - Inter-country adoption
 - Voluntary relinquishments
 - Probation

Key Similarities Between TCA and Conventional Adoption for a Dependent Indian Child

| | TCA | Conventional Adoption |
|--|-----|-----------------------|
| Dependents of California | ✓ | ✓ |
| Concurrent permanency plan to FR | ✓ | ✓ |
| Uses ICWA standard for placement preferences | ✓ | ✓ |
| Uses the State court | ✓ | ✓ |
| Optional plan | ✓ | ✓ |
| Noticing required | ✓ | ✓ |
| Applicant does not have to be Native American (However, ICWA placement preferences apply.) | ✓ | ✓ |
| Home study | ✓ | ✓ |
| Adam Walsh background checks | ✓ | ✓ |
| Adoptive placement | ✓ | ✓ |

Key Similarities Between TCA and Conventional Adoption for a Dependent Indian Child

| | TCA | Conventional Adoption |
|--|-----|-----------------------|
| AAP Benefits | ✓ | ✓ |
| Supervision of placement | ✓ | ✓ |
| Finalized in State court | ✓ | ✓ |
| Once finalized, adoption recognized in U.S. | ✓ | ✓ |
| Legal rights are vested with adoptive parents once adoption is finalized | ✓ | ✓ |
| Set aside | ✓ | ✓ |
| Grievance review hearing for agency's decision | ✓ | ✓ |
| Promotes safety, permanence, and well being for the child | ✓ | ✓ |

Key Distinctions Between TCA and Conventional Adoption for a Dependent Indian Child

| | TCA | Conventional Adoption |
|---|--|--|
| Requires TPR to finalize | NO | YES |
| Parents' legal rights in tact | YES, but modified in the TCAO | NO |
| Mandated consultation with child's tribe | YES | NO, but should consult with tribe on any ICWA case |
| Main provisions found in | WIC 366.24 | Family Code |
| Requires testimony of qualified expert witness for 366.26 hearing | NO, no TPR | YES |
| Requires consent of child age 12 years and older | NO, but wishes of child remain important | YES |

Steps of Tribal Customary Adoption...

- ❖ An Indian child that is subject to a plan of Family Reunification in state court is identified, as part of concurrent planning, as eligible for customary adoption. **All reports** must include TCA as a concurrent plan option.

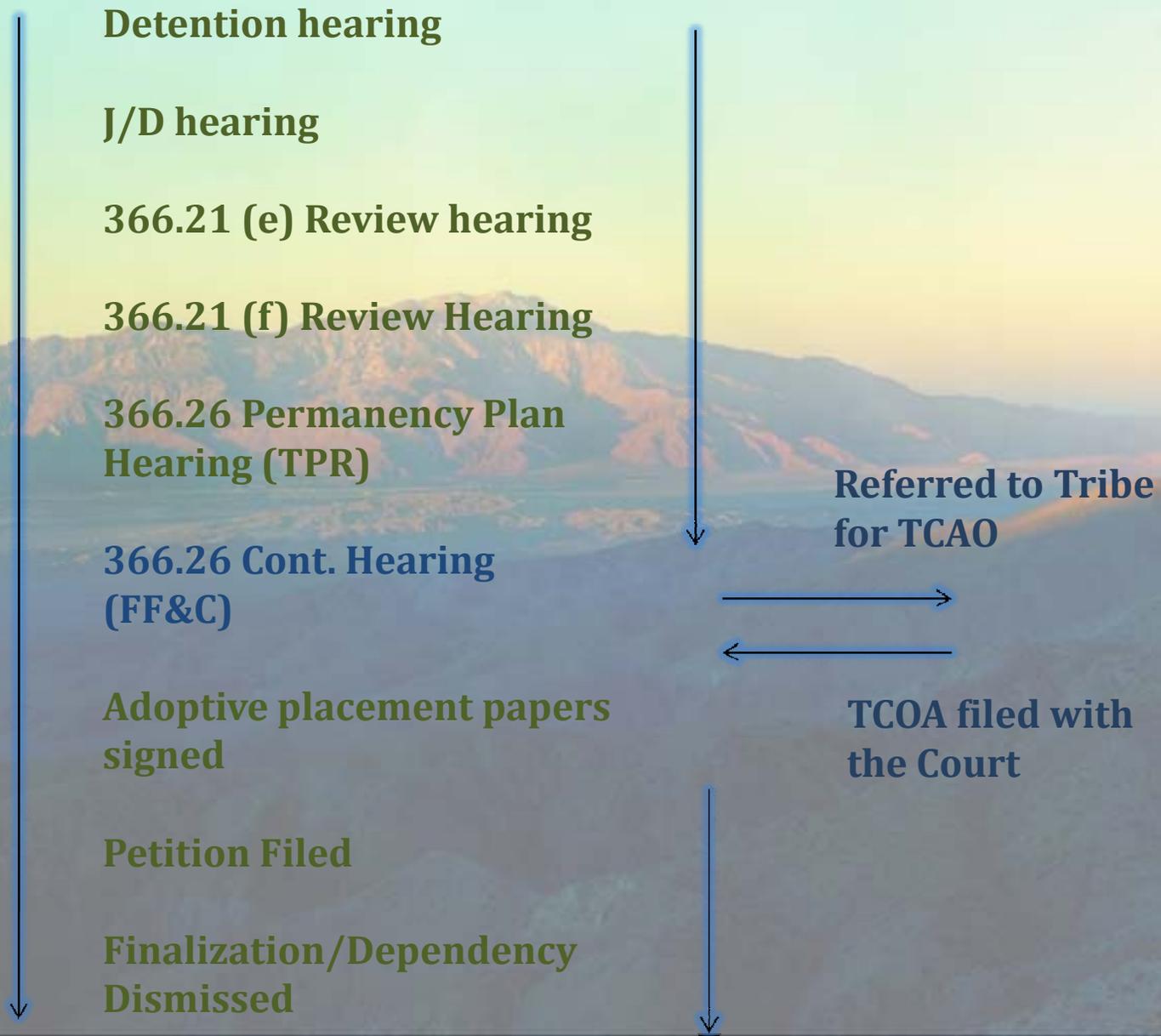
See W&I 366.24(b)

- ❖ At the point the court orders that reunification services have not been successful, the Tribe can elect a permanent plan of Customary Adoption.

See W&I 361.5(g)(1)(G)

- However, the Tribe may know that the plan of TCA may be necessary before the .26 hearing and can prepare in advance, notifying the County that the Tribe wishes to pursue TCA.

PROCESS: Conventional Adoption vs. TCA



Home Study

Home Study:

- ❖ The Tribe may conduct its own home study or designate an agency to conduct the TCA home study.

ONLY 3 types of tribal designee:

- Public adoption agency (County)
 - Private adoption agency
 - CDSS adoption district office - DO (State)
-
- ❖ The home study must be completed and approved by the Tribe before the completion of the TCAO. The background checks of the adoptive family (all individuals in the home ages 18 years of age and older) will be completed by the state, county or the tribe's designee.

W&I 366.24(c)(3)-(5)

Mandatory Elements of a TCAO

The TCAO, in combination with the State Court Order of Adoption, will represent the legal framework of the modified relationships of the Indian child.

The TCAO must address the “mandatory” issues:

- Modification of the legal relationship of the birth parents/Indian Custodian and the child
- Contact between birth parent/Indian Custodian
- Responsibilities of the adoptive parents/birth parents/Indian Custodian
- Inheritance rights of the child
- The child’s legal relationship with the Tribe

TCAO Process

- The Tribe develops the TCAO.
- The other parties may provide evidence to the Tribe regarding the TCAO and the child's best interests. W&I 366.24(c)(7)
- The Tribe's TCAO cannot be "revised" or "negotiated" at the .26 hearing, as the order is from the Tribe or the Tribal Court. When the State Court judge determines that the TCOA does not meet the FF&C standards, the judge can refer the TCOA back to the Tribe to address those concerns.

TCA Process

- ❖ The Court shall continue the Permanency Planning Hearing for 120 days (an additional 60 days may be granted if needed and less than 120 days can be requested) for the Tribe to file the Tribal Customary Adoption Order (TCAO) evidencing that a Customary Adoption has been completed. W&I §366.24(c)(6)
- ❖ The Tribe must file the TCAO no less than 20 days prior to the continued .26 hearing. W&I 366.24(c)(6)
- ❖ The County shall file an addendum report no less than 7 days prior to the continued .26. W&I 366.24(c)(6)

TCA Process

- ❖ The court will either afford Full Faith and Credit to the TCAO or it will not. If FF&C is not offered, the Tribe, and possibly the parties, must address the issue.
 - Some general standards for FF&C: No fraud, the entity issue the order had statutory authority to do so, due process provided, the Order does not offend a strongly held public policy.

Full Faith and Credit

- ❖ Congress has enacted legislation that requires state and federal courts to give tribal orders and judgments full faith & credit
 - Indian Child Welfare Act
 - Indian Land Consolidation Act (American Indian Probate Reform Act)
 - Violence Against Women Act

TCA Process

Once the court affords FF&C:

- The child is eligible for adoptive placement
- The TCA placement agreement and the Adoption Assistance Agreement shall be signed with the family
- The TCA parents (or in some cases the County) may then file the petition for adoption

W&I 366.24(c)(8)

TCA Process

- After FF&C is afforded, the court shall set a hearing to finalize the adoption upon the filing of the adoption petition. W&I 366.26(e)(2)

- At the Finalization Hearing, the court shall order the adoption and terminate dependency.

W&I 366.26(e)(2)

- Biological parents have no appellate rights triggered by TPR therefore, finalization does not need to wait.

W&I 366.26(j)



Where Do We Go From Here?

The Next Steps

Report Requirements

- 366.24(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 affects 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.

Data Collection

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Judicial Council of California

Administrative Office of the Courts

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AOC website:

<http://www.courtinfo.ca.gov/programs/cfcc/programs/description/TribalProjectUnit.htm>

Successes, Challenges, & Concerns

- ❖ 20 completed TCAs – throughout the State
- ❖ 12 TCAs in process
- ❖ Meeting the needs of children and families
- ❖ Education (trainings)
- ❖ Understanding fundamentals (Indian law, tribal governments)
- ❖ Cooperation and letting go

Successes, Challenges, & Concerns

- ❖ TCA has generally well received by the Tribes, State Court, and families.
- ❖ TCA has been used to resolved highly contested cases.
- ❖ TCA has been used to re-open dependency guardianships to create a more permanent plan.

Successes, Challenges, & Concerns

- ❖ Changing the birth certificate is not required by law
- ❖ Any changes in the child's name should be addressed in the TCOA
- ❖ Data collection is an issue
- ❖ Getting a letter regarding fingerprint clearances from the County has been difficult.
- ❖ Length of time it took to complete the adoption – training is an issue on both County and Tribal side

Successes, Challenges, & Concerns

- ❖ Need more discussions and education for Tribal leaders and tribal social services department about how to implement TCA
- ❖ Some tribes will always object to any type of adoption – which is their right

Successes, Challenges, & Concerns

- ❖ The Special Projects code is not being consistently used to report and track these cases!
- ❖ Workers are not consistently including TCA as a permanency option in their court reports
- ❖ Discussions should take place first between the tribal representatives and the county regarding TCA. Should the Tribe decide not to pursue TCA, it can create unnecessary friction between the Tribe and caregivers if the county promotes TCA to caregivers prior to discussions with Tribe.

Successes, Challenges, & Concerns

- The JV-320 – the .26 orders – MUST be completed by County worker or County Counsel.
 - There are specific items to be checked off with regards to a TCA.
 - The TCOA MUST be attached to the JV-320.

Legislation

- The TCA statute has a sunset provision which means that unless the Legislature passes a bill extending or deleting the sunset, TCA will remain in effect only until January 1, 2014.
- Legislation is being developed to remove the sunset and address other lingering issues.

Resources

- All County Letter (ACL) No. 10-17,
<http://www.dss.cahwnet.gov/lettersnotices/entries/getinfo/acl/2010/10-17.pdf>
- All County Letter (ACL) No. 10-47,
<http://www.cdss.ca.gov/lettersnotices/entries/getinfo/acl/2010/10-47.pdf>
- AB 1325, Chapter 287, Statutes of 2009,
http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1301-1350/ab_1325_bill_20091011_chaptered.pdf

Resources

- California Indian Legal Services (CILS), <http://www.calindian.org>
- CDSS ICWA Unit website:
<http://www.childsworld.ca.gov/PG1322.htm>

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