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# California's Tribal Customary

## *Culturally Connected Permanency Planning for American Indian Children*

In October 2009 California Governor Arnold Schwarzenegger signed Assembly Bill 1325, the California Tribal Customary Adoption statute. Assemblymen Paul Cook and Jim Beall were the authors with the Soboba Band of Luiseno Indians sponsoring the bill and more than 50 California Indian tribes actively supporting the effort.

AB 1325 was a legislative response by the California native community to increasing pressure by state courts to consent to permanent plans of adoption for their dependent tribal children.

In California, as with all other states, conventional adoption is the formal creation of legal parenthood that requires that the pre-existing parental rights of biological parents be terminated — either by consent or involuntary termination. Even with the increased acceptance of “open adoption,” adoption under state law typically severs the child’s relation to the birth parents and extended family. Once termination of parental rights is completed by state court order, the child and the parent become legal strangers to each other; the child is a legal orphan and only then is able to be adopted by other adults.

This model of conventional adoption runs counter to pan-tribal cultural norms. Many tribes embrace fluid concepts of family and parentage, placing great importance in shared responsibility for child-rearing, often resulting in various relatives, clan members and extended family having essential parenting roles with tribal children. Under this cultural construct most tribes in the United States have practiced adoption through tribal law, custom or tradition; a common term

used to describe adoption in tribal culture is “making relatives.” However, TPR and termination of the rights of extended family, clan members or tribal relations is outside the purview of tribal authority or tribal courts.

For many tribes, TPR is associated with some of the most oppressive government policies aimed at tribes and Indian people. Devastating government programs associated with the genocide of American Indian people included forced removal and adoption of American Indian children and the system of American Indian boarding schools. (“Boarding schools” is in part a misnomer as many of these schools were actually internment camps. See the books of Tim Giago, including “The Aboriginal Sin” for a glimpse into the horrors of the Indian boarding school era.) Given the intersection between TPR, conventional adoption and American Indian children, adoption, for Tribal communities, evolved into a negative construct.

“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,” it states on the website of the National Indian Child Welfare Association at [www.nicwa.org](http://www.nicwa.org).

Further, TPR has cultural implications for tribal community, for example disrupting important cultural norms of family structure and changing familial order. Additionally, TPR may affect the child’s ability to be a full member of the tribe, create barriers to full participation in tribal life, and may prevent the child from accessing

services and benefits available to American Indian people.

In California, when an Indian child cannot reunify with birth parents, tribes, in order to avoid TPR, have often advocated for a long-term plan of guardianship. However, guardianship does not offer the permanency that conventional adoption does, nor does it allow for the same type and level of supportive resources for the child as compared to TPR and adoption. Thus, tribes and native families have been forced to choose between a culturally offensive plan of TPR or a plan of guardianship, which is perceived by state and federal agencies. Further, because of state and federal mandates to secure adoption, many tribes have reported being pressured to accept TPR and adoption despite articulating fundamental opposition to TPR.

The new California Tribal Customary Adoption statute was borne out of the tensions between tribal cultural norms, existing state law, the desire to have Indian children in permanent, safe homes but an abhorrence for the legal construct of TPR. Further adding to the need for Tribal Customary Adoption in California is the lack of robust tribal court systems, a result of past policies of the federal government. Under the Indian Child Welfare Act tribes could, in some circumstances, transfer a case to tribal court and implement a permanent plan that is culturally appropriate. However, California is a Public Law 83-280 state. PL280 limited tribal jurisdiction resulting in many obstacles for California tribes with regard to developing tribal court systems. (See “Second Century of Dishonor: Federal Inequities and California Tribes,” Carole Goldberg, J.D. and Dane Champagne, Ph.D.,



# Adoption Law

feature

BY KIMBERLY A. CLUFF, JD, AND NANCY CURRIE, MFT

A Report Prepared by the UCLA American Indian Studies Center for the Advisory Council on California Indian Policy, March 27, 1996.)

TCA is an attempt to create a culturally appropriate means of achieving permanency for dependent Indian children. TCA allows Indian children and families to realize the permanency and support of adoption without the precursor of TPR thus providing a new, culturally appropriate option for permanency planning. Further, this culturally appropriate option is available to tribes that do not have their own tribal court systems, which currently is the vast majority of Tribes in California.

The process of TCA is built around the existing dependency law process, but provides that the Tribe will create the framework for the adoption and the state court will adopt the tribe's framework. Most importantly, with a TCA, the tribe and state court can complete the adoption without terminating the birth parents' parental rights.

In the early stages of a dependency case in which an Indian child is involved, the county must include TCA in the concurrent planning process. If the Indian child cannot be reunified with the birth parents, the Tribe can identify TCA as the preferred permanent plan. The state court then continues the case to provide the tribe time to complete the tribal adoption through their custom, tradition and tribal ceremony and for the tribe to prepare the Tribal Customary Adoption Order, which establishes the rights and responsibilities of the parties in the context of the complex interests of all involved. Once completed, the TCAO is filed in the state court and, barring any chal-

lenges to the TCAO, the state court extends deference to the tribe's adoption and accepts the TCAO it as if it were an order of the state court. Upon accepting the TCAO, the state court issues an Order of Adoption and terminates jurisdiction over the case. If disputes arise after the Order of Adoption is executed, the parties may utilize family mediation services of the court or dispute resolution processes through the tribe; further the parties may request assistance from the court to resolve any remaining disputes.

Laws that differentiate between dependent Indian and non-Indian children tend to provoke strong and vociferous condemnation or support, there is little middle ground. The legal battles over native children are often truly ugly and tragic. Tribal Customary Adoption is not the answer to the this cultural or legal divide- it is simply an additional option that proponents hope will allow for a child centered approach and that provides permanency without reliance on the offensive legal construct of terminating parental rights. \*

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