

# California Assembly Bill 1325

## Tribal Customary Adoption

### Background, Talking Points & Frequently Asked Questions

#### Soboba Band of Luiseño Indians

#### BACKGROUND

When a child is removed from the birth parents' care and custody because of allegations of abuse or neglect, the birth parents have an opportunity, in most cases, to try and get their child back or "reunify" with their child. If the parents are unable to reunify, the court and the parties work to find the best permanent plan for the children. In California, the choices for permanent plans are long-term foster care, guardianship or adoption, with a legislative preference for adoption. The Indian Child Welfare Act is a federal statute that alters many of the requirements for when an Indian child is removed from birth parents, they cannot reunify and a permanent plan is necessary. This federal statute was incorporated into state law when SB 678 passed in 2006.

In California, in order for a child to be adopted there is a two step process. First, the child-birth parent relationship must be legally severed or "terminated". When termination of parental rights (TPR) is completed by court order, the child and the parent become legal strangers to each other, the child is a legal orphan and then can be adopted by other adults.

For most tribes in the U.S., adoption has been practiced within the tribe through tribal law, custom or tradition. However, TPR 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; for example, forced removal of Indian children and Indian boarding schools.

"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](http://www.nicwa.org))

Further, TPR has cultural implications for the whole tribal community, disrupting important cultural norms of family structure, completely changing the fundamental dynamics and familial order. Additionally, this 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 tribal members.

Tribes, to avoid TPR when an Indian child cannot reunify with birth parents, often advocate that the Indian child remain in a permanent plan of guardianship. However, guardianship does not offer the permanency that adoption does, nor does it further the supportive resources available to families where there is TPR. Further, adoption is not available to families where there is a guardianship.

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. The experience of many tribes and tribal families engaged in the dependency system, is that of being pressured to accept permanent plans of adoption despite articulating fundamental opposition to TPR. AB 1325 will allow Indian children and families to realize the permanency and support of adoption without the culturally offensive precursor of TPR by providing "Customary Adoption" as an additional option for permanency planning in ICWA cases.

The process of Customary Adoption under AB 1325 is simple because it is built around the existing dependency law framework. At the early stages of a dependency case in which an Indian child is involved, the social worker will include Customary Adoption in concurrent planning. If the Indian child cannot be reunified with the birth parents, the tribe can identify Customary Adoption as the preferred permanent plan. The court then continues the case for 120 days, giving the tribe time to complete the tribal adoption and the Tribal Customary Adoption Order (TCAO), which establishes the rights and responsibilities of the parties. The tribe files the TCAO and the court extends full faith and credit, granting deference to the TCAO as an order from another sovereign. Upon accepting the TCAO, the court issues an Order of Adoption and terminates jurisdiction. If disputes arise after the Order of Adoption is executed, the parties may utilize family mediation services of the court or dispute resolution through the tribe, and ultimately request assistance from the court.

Since the introduction of the bill, there has been significant discussion and consultation with legislative staff, stakeholders, supporters and opponents. Many amendments have been incorporated. The primary remaining issue revolves around the level of, or type of, deference the court must extend to the TCAO. The original intent of the authors was to provide the California state court with the same level of review when considering the TCAO as the state court would have when considering an order of another sovereign; this "full faith and credit" standard is already in the federal ICWA and in state law. Opponents interpreted the language of the bill as forcing the state court to accept the TCAO with no ability to review and/or reject it. Based on this concern, a concern the proponents believe is unfounded, the language of the bill was amended. It is the proponents' hope that the bill can be restored, and the integrity and sovereignty of tribes can be protected, by amending the bill to include the language proposed to the Assembly Judiciary Committee staff with regard to full faith and credit. The proposed language, rejected by the Assembly Judiciary Committee is as follows: *"The court upon receiving the TCAO will afford the TCAO full faith and credit to the same extent that the court would give full faith and credit to the public acts, records, judicial proceedings, and judgments of any other entity, consistent with Welfare and Institutions Code 224.5, and thereafter issue an order of adoption."*

## TALKING POINTS

- 1.) AB 1325 adds to existing state dependency law a culturally appropriate alternative to the list of permanent plans available for American Indian children, harmonizing state law and tribal custom where a tribe has identified that termination of parental rights is not in the Indian child's best interest.
- 2.) AB 1325 provides that where legal termination of parental rights is contrary to tribal custom and an Indian child's best interest, the adopting family can still have parity as to support and resources (Adoption Assistance funding) with parents in mainstream adoptions.
- 3.) Customary Adoption is practiced in Minnesota and is under consideration in other states. The Administration for Children and Families recognizes tribal customary adoption (or adoption without termination of parental rights) as a valid permanent plan and one that, despite there being no TPR, makes adoptive families eligible for Adoption Assistance.
- 4.) The concept of Customary Adoption has been discussed and examined by tribes in California for several years. For example, many tribes that participate in the California Tribal-State ICWA Workgroup have contemplated and considered codifying customary adoption, and there has been over the last several months outreach and consultation with tribes, tribal groups and stakeholders, *e.g.* TASIN (Tribal Alliance of Sovereign Indian Nations), California Welfare Directors Association (CWDA), Administrative Office of the Courts (AOC), California Association of Adoption Agencies (CAAA).
- 5.) AB 1325 provides tribes the opportunity (it is not mandatory) to chose a permanent plan of Customary Adoption, to develop a tribal adoption "plan" or "order" to meet the interests of the Indian child and have that Tribal Customary Adoption Order (TCAO) be recognized by the state.
- 6.) The TCAO will delineate the rights and responsibilities of the parties, including, but not limited to, rights of inheritance and contact with birth relatives. The state court will have an opportunity to review the TCAO and will have discretion not to enter it under a full faith and credit analysis.
- 7.) The TCAO is an order of a sovereign, providing deference to the TCAO is required under existing full faith and credit provisions of federal and state law and is essential to the best interests of Indian children, families and tribes.

## FREQUENTLY ASKED QUESTIONS

1. Question: Isn't AB 1325 unnecessary because tribes can just transfer these cases to their tribal courts and not make state courts be involved in Customary Adoption?  
Response: California is a PL 280 state, and thus the overwhelming majority of California tribes do not have tribal courts.
2. Question: Didn't the passage of SB 678, which created new exceptions to adoption, make AB1325 unnecessary?  
Response: No, while SB 678 was a landmark bill in regards to state law and dependent Indian children, its exceptions to TPR do not offer an option that achieves the benefits of adoption in a culturally appropriate way.
- 3.) Question: Won't AB 1325 cause disruption of established placements of Indian children when tribes move Indian children into customary adoptive homes?  
Response: This bill is not about changing Indian children's placements, but is about offering a new form of placement. Further, there is nothing in the bill that allows or encourages placements to be disrupted.
- 4.) Question: When and how will parties and the court know about Customary Adoption?  
Response: The bill includes language regarding customary adoption as a concurrent plan, to be considered early in an ICWA case.
- 5.) Question: Isn't it true that AB1325 will allow Indian children to be placed in homes that are substandard, do not meet state or county standards and put children at risk?  
Response: Families that enter into a customary adoption will undergo the exact same criminal/child abuse background checks and home studies as currently required under state and federal law.
- 6.) Question: Isn't it true that this bill will disrupt the dependency process and legal structure that provide permanency for Indian children and is too complicated to work.  
Response: The current process and laws do not provide a culturally appropriate option for Indian children, families and tribes to achieve permanency; the current statutes require parties to choose either a less permanent and less supportive plan of guardianship or a culturally offensive and destructive plan of TPR and adoption. The addition of Customary Adoption is neither disruptive nor complicated, it simply adds an additional option to the choices for permanent plans.
- 7.) Question: Will state court judges still have the ability to control the process of permanency planning for dependent Indian children?  
Response: AB 1325 does not remove the state court's role in permanency planning for Indian children. The bill does provide that at the point where a court determines that the Indian child cannot reunify with the birth parents, the tribe can elect that the permanent plan be customary adoption; the tribe then has 120 days to develop the TCAO. The TCAO is then filed with the court and reviewed and implemented accordingly.

8.) Question: Will AB1325 negatively affect private adoption agencies by impacting their ability to provide services?

Response: No, the opposite may be true. There may be more adoptions occurring with ICWA cases since this bill will help relieve tribes' current reluctance to deviate from guardianship. Further, under existing law, tribes can complete their own home studies; under AB 1325 tribes can continue with that or may choose to delegate this role to an outside adoption agency.

9.) Question: Since every tribe is different, isn't it true that each tribal customary adoption will have different requirements?

Response: True, every tribe is different; however, this fact is not currently a problem in state court and will not be altered by AB 1325. Currently, for example, different tribes and different states have differing ways in which transfers of jurisdiction are accomplished and this has not been problematic for courts. There will be variations in the structure, content and appearance of each tribe's TCAO (Tribal Customary Adoption Order). However, the bill states both what must be included in the TCAO and what occurs if an essential element is not included (there is a default to rights and obligations going to the adopting parent(s)).

10.) Question: Why is there a sunset clause in AB1325?

Response: The sunset provision in the bill was an amendment in the Assembly Judiciary Committee.