

Tribal Customary Adoption: What Judges & Attorneys Need to Know

(Live Webinar recorded December 8, 2021)

Slide 1

Vida Castaneda: Now we think you will enjoy this presentation and thank you again for your patience as we tackle these glitches in our sign-on system at WebEx. Today's panelists are Shannon Cox Deputy county counsel Mendocino County, Liz Elgin DeRouen, Executive Director of the Indian Child and Family Preservation program, Judge Moorman, Presiding Judge of the Superior Court of California County of Mendocino, and Joanne Willis Newton attorney at the law offices of Joanne Willis Newton as well as general counsel to the Indian Child and Family Preservation program. (next slide please)

Slide 2

Vida Castaneda: we would like to acknowledge our presentation as brought to you today from the original and current lands of the Ohlone people in the San Francisco bay area where Judicial Council of California office is currently located. We thank the alone ancestors and present tribal communities. (next slide)

Slide 3

Vida Castaneda: Judge Moorman can you describe the objectives for this training?

Judge Moorman: Yes. Thank you and I do want to just reiterate we apologize for the delay. In the modern day of us all conducting webinars via remote technology it nevertheless has its challenges. So, thank you for your patience. Our objectives today for this training are to understand what a tribal customary adoption is and how it differs from a conventional adoption and other permanency options. We need to appreciate the importance of maintaining Indian children's connections with their extended family, their community, their identity, and their tribes and their tribal culture even if they cannot reunify with one or both parents. We must recognize the legal rights of all children in dependency to maintain their cultural identity, and social, cultural, political, and familial connections. And we must understand the roles and responsibilities of participants in the dependency system in ensuring the tribal customary adoption is implemented where appropriate. And I just want to point out that these objectives for today are consistent with the foster care bill of rights set forth at Welfare and Institutions Code 16001.9 which protects the legal rights of all foster children to maintain their cultural identity and their social, cultural, and political connections. As we know these connections have proven to support resiliency in children. So, we'll (next slide)

Slide 4

Judge Moorman: And I'll turn it over to Joanne.

Joanne Willis Newton: In a nutshell tribal customary adoption is a permanency option for Indian children that allows for the child to be adopted in accordance with the laws, traditions, and customs of their tribes. And it does not necessarily require termination of parental rights with regard to the biological parents. Tribal customary adoption or TCA as we call it came about as a result of Assembly Bill 1325 and took effect July 1st, 2010. And it came about as a result of tribally led initiatives spearheaded by the Soboba Band of Mission Indians and was also supported by the California Association of Counties and the CWDA. California remains the only state that has codified this tribal customary adoption option into the state law. It was essentially an effort to address fundamental inconsistency between the values of many tribes that do not believe in the termination of parental rights, and the hierarchy of the placement preferences in state and federal law which view adoption as the best, most permanent option if the child can't be successfully reunified with their parents. Although as I mentioned TCA does not require the termination of parental rights, the tribe can choose under these options not to or to terminate parental rights. (next slide)

Slide 5

Shannon Cox: Judge Moorman would you like to go over the considerations in selecting a permanent plan for the Indian child? I believe you're on mute.

Judge Moorman: Yes, I was on mute. And I was asking do we have Liz on the line yet? Not yet? Okay, so as Shannon was saying there are considerations in selecting the permanent plan for an Indian child. In selecting the permanent plan for Indian children, we must uphold the underlying values of the Indian Child Welfare Act. That being to respect tribal connection to Indian children and uphold the best interests and rights of Indian children to maintain their cultural, legal, and political connection and their cultural identity. Tribal customary adoptions which is our focus today, for our webinar today, is just one tool to achieve this goal. Not all tribes accept the idea of adoption. Not all tribes accept the idea of tribal customary adoption. In addition to tribal customary adoption, section 366.26 subdivision (c)(1)(b)(6) of the Welfare and Institutions Code, recognizes the potential interference with Indian children's connection to tribal community or membership rights, tribe's identification of guardianship, foster care with a fit and willing relative, or other planned permanent living arrangement as a compelling reason not to terminate parental rights. Today as I've said we are focusing on tribal customary adoption as the permanent plan. But the child's tribe may decide other plans may be more appropriate. The Welfare and Institutions Code recognizes other reasons not to terminate parental rights. This just may be one of them. There are both specific ICWA and non-ICWA reasons why something other than adoption is the most appropriate plan. (next slide please)

Slide 6

Joanne Willis Newton - So, according to the Assembly Bill analysis the motivation for AB1325 was born out of the tension between tribal cultural norms and existing state laws which does not include a culturally appropriate means of achieving permanency for dependent Indian children. And unfortunately, Liz is having trouble joining us, but I wanted her to in particular to present a cultural perspective in which tribal customary adoption is rooted. And that is essentially the fundamental view that children are sacred gifts from the creator. And in indigenous communities the extended family is viewed as the basic family unit rather than the nuclear family. And members of the extended family share responsibility for raising the child of the Indian child and supporting the parents in their role as primary caregivers. When the parents are unable to fulfill their role other extended family members step in to do so. But the parents remain part of the child's family circle. In indigenous communities the extended family is really viewed as the immediate family. And the tribe is viewed as the extended family. This reflects our fundamental belief as indigenous peoples that we are all related. And I should have mentioned in the introduction - that my name is Joanne Willis but I'm also a member of the Cree Nation of Chiasibi so when I share with you these principles I'm also speaking from my own indigenous experience. My mother still lives on our reserve in Northern Canada and was raised in a traditional manner. So, I also wanted to note that tribal customary adoption reflects the idea that the Indian child's best interests are best served by remaining part of the extended family, and the tribal family, even when the parents need to be replaced by other primary caregivers. The child does not lose their parents and extended families they essentially gain a new set of primary caregivers. (next slide)

Slide 7

Joanne Willis Newton - Part of AB1325 required the Judicial Council to prepare a report to the legislature on tribal customary adoption by January 2013. And the conclusions in that report were that TCA is a means, an appropriate means, for some children to avoid ending up in less permanent plans of long-term foster care or guardianship. TCA typically is finalized in a shorter time frame than traditional state adoptions. And there was definitely a learning curve marked by some challenges, by some confusion, you know judges for social workers even for tribes. For some tribes the idea of tribal customary adoption was one that they had to figure out as well. And most child welfare professionals reported that TCA was a benefit that possibly influenced the outcomes for current dependent Indian children. (next slide)

Slide 8

Shannon Cox - So, some of the key features of a tribal customary adoption. One is that in a tribal customary adoption it is only available when chosen by the Indian child's tribe as the child's permanency plan. So, while there are many decisions that are made in the courtroom, and the child the Indian child's tribe has input in those decisions, TCA is one in which it is wholly up to the Indian child's tribe. And if the tribe selects a TCA, it presumably becomes a child's permanent plan absent a finding that a TCA would be detrimental to the child. It should also be noted that the consent of the child and the biological parents is not required, and also that termination of parental rights under a TCA is not required. However, as we all know each tribal nation is a separate and independent sovereign entity, and certain tribes may have termination of parental rights written into their TCAs, written into their laws. But it is absolutely not a requirement of a tribal customary adoption. One of the pitfalls that we keep in mind -- that we want to avoid -- is one of the most important things is early communication between the agency and the Indian child's tribe. It is written into the findings and orders at a disposition hearing that is something that has been discussed. And that is incredibly important because if the agency presumes that a tribe may opt for a TCA when it hasn't been fully discussed, and then brings that to a possible placement family, that can then raise unrealistic expectations. As Judge Moorman and Joanne mentioned, there are other options apart from a TCA at a .26 hearing. And that's something the agency needs to keep in mind. And the best way for the county social services agency to do so, is to have really early and ongoing communications with the ICWA representative from the particular tribe. Joanne did you have anything you wanted to add to this slide?

Joanne Willis Newton: Yeah. Just as far as another pitfall, I just want to emphasize the point that it is the tribe's option to determine whether it's recommending that as a permanent plan. I was involved with the county a couple years ago and they were coming from a really good place. They're very enthusiastic about TCA. However, they were recommending in their reports that TCA was the permanent plan for an out-of-state tribe that didn't have familiarity or tribal law that supported choosing TCA. So, I had to educate the court and the county counsel that in fact, it is the tribe's option. And that should have been something identified with the tribe, you know, as part of the concurrent planning throughout. (next slide)

Slide 9

Shannon Cox - So going through the basic phases of a tribal customary adoption when opted as a permanent plan at the .26 hearing. And we'll get into these more in depth and later slides, but again, as I stated previously first and foremost is agency tribal consultation it really should begin previously. By law has to begin predisposition hearing and it should be continued throughout the hearing. And I would really urge county counsel as well as agency social workers to make sure it's very clear to all staff that prior, you know, ongoing prior to all review report hearings that you are in consultation with the tribe. If services have been terminated or it's been set for a .26 hearing at dispo due to bypass, at the initial 366.26 hearing the agency should have consulted with the tribe and learned that the tribe is interested in pursuing a tribal customary adoption. If so, the report and recommendation would say as such and at that hearing the .26 hearing would be continued to a second .26 hearing in order for the tribe to be able to effect its tribal customary adoption orders or TCAOs. After at that secondary or at that secondary hearing, ideally the TCAO would be finalized, and we'll go through the steps necessary later to finalize a TCAO. And then subsequent to that you would have your final adoption hearing in which the TCAO is filed. The court offers full faith and credit to the TCAO, and the case is dismissed from juvenile dependency. And one thing to keep in mind is it's very important that everyone is using the same terms. Especially in dealing with out-of-state tribes as we previously mentioned, California is the only state that has TCAs codified into law. They [out-of-state tribes] may not be familiar with it. So, it is key and critical to ensure that the tribe that you're working with understands the terminology and what exactly it entails. (next slide please)

Slide 10

Judge Moorman - It looks like Liz has joined us.

Shannon Cox - She has. Liz, can you hear us?

Liz DeRouen - I'm clicking on it.

Shannon Cox - We can hear you. We can hear you Liz. So again, apologies for the issues with the technology. But Liz we are on to slide 10. And we wanted her, and I wanted to talk about the early and ongoing consultation, and as I said before it's critical the agency has to address the disposition report whether a TCA is potentially appropriate if reunification fails, after having consulted with the tribe's ICWA representative. Whenever a .26 assessment is ordered either at disposition or at any of the reunification hearings, it must address whether, in consultation with the Indian child's tribe, a TCA is an appropriate permanent plan for the child. And again, the best practice is always address TCA as part of ongoing concurrent planning. A tribe has up to the point of the initial .26 hearing to select TCA as the appropriate permanent plan. Liz, do you want to talk about some of the pitfalls that you've seen when an agency is trying to work with tribes in terms of whether TCA should be selected at the .26 hearing? I believe you're on mute.

Liz DeRouen - Alright thanks for that. Lots of technology issues. Yes, addressing that question. Making certain that we are in consultation with the county counsel and social worker early on is really necessary. A lot of times what it takes is a little bit of on-the-spot training to really go into detail on what the expectation is. And just in many different counties there's a lot of unfamiliarity. So, we find ourselves really trying to do a really quick training on what's expected. And it's really necessary to make sure we get that update as early as possible. In that dispo report and then like you said, thereafter, and all the other reports. We've been contacted by numerous tribes from out-of-state about not knowing how to do and conduct some of this. So, we've offered some assistance in that regard as well.

Shannon Cox - And for the county counsel's listening, I would really just encourage you know, I think every county suffers and how much is delegated to the social workers. And how much they rely on their deputy county counsels. TCAs are, I think, unusual enough and complex enough that it's really critical to encourage your social workers to consult with county counsel.

Judge Moorman - And if I could add one thing before we move on -- to the judicial officers out there -- and frankly to all the attorneys -- it is the law that TCA gets addressed in the disposition report and subsequent reports. If --assuming there's not a bypass. And it can be just in the context of the tribe may be considering a TCA as a permanent plan, as a part of concurrent planning. It doesn't have to be definite. It is always, as I said, the tribe's decision. But the reports need to address it. And I just want to reiterate that. Thank you.

Joanne Willis Newton - And I would just add that we can't assume, especially for out-of-state tribes that the tribe is even aware that TCA is an option. And so, that's why it's really important for that consultation. As well as an issue that should be brought into the CFTs when we were talking about concurrent planning. I just wanted to make that practice note as well.

Shannon Cox - Absolutely and I think it's very common for an agent and agency's disposition report to say that they've consulted with the tribe and a TCA may be appropriate and they'll have ongoing discussions. However, you need to make sure you follow up on that. Because it is not, it shouldn't be unexpected that a tribe may not be willing to commit to a TCA at a disposition hearing. So just really encouraging social worker staff and county counsel to be inquiring repeatedly throughout the case. We have the (next slide please)

Slide 11

Judge Moorman - All right thank you. So, the court's roll and responsibilities during the consultation phase. The court must, in considering the case plan for an Indian child make a finding as to whether the tribe was actively involved in developing the case plan and whether tribal customary adoption was considered as an appropriate permanent plan if reunification is unsuccessful. And as we were just discussing, the ongoing consultation between the agency via deputy county counsel or social workers, that consultation must be reflected in reports. And judicial officers must make findings when adopting or modifying a case plan that the tribe was actively involved and specifically whether tribal customary adoption is a possibility if reunification is unsuccessful. And some tribes may know very early on that tribal customary adoption is not going to be a realistic concurrent plan for reasons relating to their own culture. Liz and Joanne will discuss that later. But this is this responsibility on the court is a way of guaranteeing that there's meaningful consultation between the agency and parents counsel, minors counsel, and the tribe. And again, part of this consultation may be in education. Because some tribes, particularly out-of-state tribes, may not be familiar with California's tribal customary adoption laws. So, thank you. (next slide)

Judge Moorman - Joanne you may be on mute.

Joanne Willis Newton - Thank you. If the tribe identifies TCA as the permanent plan for the child at or prior to the initial .26, they do have the option of coming to that initial .26 and requesting up to 120 days for continuance in order to complete the TCA home study and the background checks that are necessary. Or they might come into the initial .26 and have already have a TCA order in hand. Sometimes using the acronym TCA or TCA order. And if they do, they're supposed to file that at least 20 days prior to the .26 hearing. So, there's a couple of different scenarios that might play out at that initial .26 hearing.

Liz DeRouen - I would like to add to this slide, that sometimes coming into the .26 because there may be some outstanding issues that still need to be flushed out. A tribe may come in and say we need a little bit more time to determine what the permanent plan will be. Oftentimes they'll come in and file a tribal resolution which will designate their permanent plan. Sometimes they deliver that information orally. It just depends on the tribe. Also, with regard to the requests for the 120 days at the .26 hearing. Say for instance there are some things that we don't receive back within 120 days, there is also an extension of 60 days which totals 180 days total in which we can conduct the study and complete the order. During this time. If we are doing that, we want to make sure that we stay in close consultation with the county, so that if they do have to file any reports that report updates, that we are requesting an additional 60 days to go out and make sure that we complete and file that as Joanne said 20 days prior to that next hearing.

Joanne Willis Newton - And I just note that if the tribe does not file a TCAO prior to that initial .26 hearing there's essentially a two-step process that includes -- the court will select TCA as the permanent plan at that initial hearing, and then continue it out to address the TCAO when it is filed. I also want to reiterate one of the points that was made in an earlier slide, that once the tribe does identify TCA as the permanent plan for the Indian child, that is presumptively the permanent plan for the child.

Shannon Cox - And obviously the agency should be aware that that's the tribe's request. That it be a TCA selected at the .26 hearing and that should be encompassed in the agency's initial section .26 assessment report. That that is the tribe's wishes. Whether, and advising the court where the tribe is at on that process. If it's anticipated they'll have the TCAO ready to go prior to that .26 hearing, or if the request will be to put it over for 120 days in order to complete the necessary assessments and have the TCAO be adopted by the tribe. (next slide)

Slide 13

Shannon Cox - So, after the tribe has opted for a TCA -- and that as we've said -- this could be either prior to the .26 hearing if the tribe and agency -- if the tribe has notified the agency ahead of time, or it can be subsequent to the initial .26 hearing if it's designated at that initial .26 hearing. But part of affecting a

TCA is to do a home evaluation. And Liz why don't you go over on the steps in the TCA home evaluation please.

Liz DeRouen - Sure. With regard to the home evaluation, oftentimes it's referred to as a home assessment. We are looking for safety. Doing, conducting a background check, and the safety and health information of the prospective adoptive couple. Also, we're assessing the biological, psychological, and social factors of the prospective adoptive couple as well. We want to make sure that we're also interviewing or requesting information with regard to the caregiver. Their commitment. The capability and also some suitability standards that the tribe may have. And those can differ depending on the tribe. It also differs depending on the child's need. We also would be looking at evaluating in accordance with the prevailing social and cultural standards of the tribe. And sometimes those are defined, sometimes those are not. It depends on the tribe. We're also looking at the CACI checks and also making certain that the state and federal criminal background checks have been conducted. And for as well, for looking for out-of-state folks that have either worked or lived outside of California. So also conducting the national clearance checks for some. Especially for some of the counties and tribes that the Indian child family preservation works with. We conduct our own evaluations and do our own tribal criminal background checks. So, some of your counties may be working with tribes that have their additional 1460 clearance process. And they can do those themselves. Or like Shannon suggested, that there can be a designee and the designee would be the one who would be following up with those criminal background checks -- the CACI checks etc. Working in in coordination with the tribe. And of course, those designees can be licensed county agencies, state department of social services when they're acting for the adoption agency for the county, or other licensing agencies that some of the counties are contracting with.

Shannon Cox - So here in Mendocino County we contract out our adoptions assessment to state adoptions. So, if for example, we were to have a local tribe opt for a TCA, and they were not under Liz's company for example, and they did not have the ability to conduct their, either both home evaluations, or background checks, we would work with state adoptions to work with the tribes in order to affect all of those items. The CACI check, the state and federal criminal background checks, as well as the home evaluation. And one thing to keep in mind, is in the TCA home study -- I liken it to an adoptions assessment. And what you would often see in traditional adoptions assessment cases -- but it has to be in accordance with the prevailing social and cultural standards [of the tribe]. But one thing I want to highlight it's not simply the initial RFA assessment if it's a placement that was approved through RFA. That is not enough. Obviously, we need to go through a more rigorous TCA adoptions assessment. For in conducting that, with the potential permanent placement -- and as Liz stated you know, this is in accordance with the prevailing social and cultural standards of the tribe. We have a lot of tribes. Sometimes they will be written, sometimes it will be oral. And so, what I would stress to all agencies, whether it be state adoptions or the county or whomever, would be conducting those assessments, that they really work in close consultation with the ICWA representative for that child's tribe. Just so that you can ensure that you are completing it up to the tribal standards. Because ultimately it is going to be up to the tribe to determine if they want to follow through with a TCA. And by this point, presumably the agency, the placement family, are all hoping to gain permanency for this child through a TCA.

Liz DeRouen - One thing that I would like to add to that too, is that even though the tribe may have its own tribally approved home process and doesn't opt to have the county conduct an RFA process for the family. That maybe the tribe decides that they do not want to tribally approve the home. So, they're working closely with the county to have them apply the RFA process. In that regard what we are still looking for is working in coordination, so that the prevailing social and cultural standards of the tribe are upheld. And what we mean by that is that there should be the collaborating piece that the tribe social worker or the tribe's ICWA representative is working in consulting in coordination so that we can have some things addressed that the tribe may choose not to put in the TCAO, but they have conferred with the family or with the caregivers -- prospective adoptive caregivers -- on what will be the requirements of the tribe. Also, when we're looking at the tribal criminal background check piece, we are not looking at different standards here. Tribes are using the same standards for approving all prospective adopted parents under the same process. So even though the tribe has its own process they are still looking for the same required language in order to clear families, prospective adoptive people. Although we may not grant final approval of different adults living in the home, we still have to use the same standards. I think

the requirements for felony convictions, for child abuse neglect, spousal abuse, crimes against children including child pornography, or crimes involving violence including rape, sexual assault or homicide but not including other physical assault or battery. And crimes involving violence means those contained in the Health and Safety Code section 1522(g)(1)(a) and also (b)(1). Also, the felony convictions that occurred within the last five years for physical assault and battery and drug related offenses would automatically prompt the tribe to say that with something that would be something we would not consider. We want to make sure that we're using the same standards. When we go into the final approval of the TCA placement, and also looking at the TCAO, we're looking at evaluating on whether or not we can move forward with the with the order -- the tribal customary adoption order. So, we have to factor this language in and also stay in consultation with our tribal governments as we're conducting the background piece and coming up with information on many different families, we want to make sure that we keep them apprised of what we're learning. And so, we oftentimes have to have multiple meetings in between. And then again meet up with county council again, to keep them apprised of where we are at in the process.

Shannon Cox - And I think the best way to ensure this goes as smoothly as possible -- and there are a lot of moving parts -- really is that early consultation. Early consultation regarding TCA and also early consultation regarding concurrent planning and placing the child in a home that the tribe is approving of and comfortable with. You know obviously in following ICWA placement preferences the first choice is always going to be the child's extended family. But if it's perhaps an extended family member who is not a tribal member, really working with that placement and the tribe to ensure that the placement understands just how important it is to raise this child in keeping with that specific tribe's prevailing social and cultural standards. So again, the early consultation, because it would be terrible to get to the point of a TCAO and people have not really had these conversations. And the tribe's not comfortable that a particular placement family will be able to or have the desire to raise the child in accordance with the TCAO. So, again I think the early consultation and making sure the placement is aware of what will be expected of them in consultation with the tribe is paramount to ensuring that ultimately the tribe is comfortable with this process and would opt for permanency under a TCA. (next slide please)

Slide 14

Liz DeRouen - So maybe what I can do here, is take the lead on the tribe's responsibility for the tribal customary adoption order? Of course, in developing the tribal customary adoption order we are working in accordance with tribal laws, customs, and traditions. This process must have allowed evidence from the child, the birth parents, and adoptive parents regarding the contents of the tribal customary adoption order. And taking into consideration the child's best interests. The tribal customary adoption order must also include a description of the modification of the legal relationship of the birth parents or the Indian custodians and the child, including any contact or any responsibilities of the birth parent and any rights of the inheritance of the child. That's usually spelled out word for word in the order. The child's legal relationship with the tribe will be defined as well. The order cannot include any child support obligations from the birth parents. So that's often something that we like to highlight and make sure that that's understood. That may be one of the main requirements that differed from tribes looking at guardianships as opposed to tribal customary adoptions. There is also a conclusive presumption that any parental rights or obligations not specified in the TCAO vest in the adoptive parents. And as Shannon described the reason why we want to have these conversations early on is so that everybody understands what will be required of the prospective adopted couple. And upholding the interests of both the children and the tribe.

Shannon Cox - And one thing to keep in mind is that case law does require that parents have that opportunity to communicate with the tribe before it adopts the TCAO. So, the tribe does consider any evidence by the parents in finalizing any TCAO. Although a formal hearing process is not required it can be informal, but I would urge the county agencies and either the initial .26 report or the supplemental addendum report if it's a continued .26 hearing to detail that that involvement and opportunity of the biological parents did occur. Further a TCAO may require the adoptive parents to provide the child with opportunities to participate in tribal culture and again that is that is mandated by Appellate case law.

Judge Moorman: So, I just want to emphasize that last point those last two points actually. Thank you, Shannon. That the TCAO ultimately the Superior Court will be giving full faith and credit to this TCAO. So, it's I think it's really imperative on judicial officers to emphasize, when it does spell out requirements for the adoptive family to provide the child with opportunities to participate in tribal events and tribal culture, that needs to be emphasized with that adoptive family. In addition, Shannon made reference to the appellate case law, and I think we'll just go ahead and give the sites. It's In re. A.S.. A as in apple. S like Sam. Case from 2018 which is published at 239 Cal Rptr 3d 20. In re. Sadie S. published in 2015 which occurs at 241 Cal App. 4th 1289. And In re Sadie S. does speak to that last issue of requiring adoptive parents to ensure the child is given the opportunity to participate in tribal events and tribal culture. Thank you. (next slide)

Slide 15

Joanne Willis Newton – Liz, I'll let you take the lead on this one.

Liz DeRouen – Sure. Looking at some of the other possible provisions under the tribal customary adoption order what tribes are specifically looking for is to protect the child in all ways possible. In the first bullet up here, we have the protection of the child's inherent political relationship with the tribe. And that may be something that is not very familiar but what we try to do is we try to make sure the language is specific to the particular child or children and the particular tribe. Sometimes we have families that come from multiple tribes, and we want to make sure that we're being respectful of all of that relationship being upheld. Any of the inheritance rights as well. What was -- what's considered -- not able to inherit. A child now that is -- who will be -- adopted under a tribal customary adoption, has the ability to inherit both from the prospective adoptive parents and also the biological parents. So very often you'll see this language spelled out in the order. Protecting the legal and political rights of the child arising from the child's legal status and the relationship to the tribe. What we are hoping to do here is to not sever or lessen any of the child's future political rights to engage or participate in possibly the governance of the tribe. If they were adopted out, we want to make sure we protect language that doesn't remove them from a lineal descendancy line that allows them certain privileges in the tribe to participate. And it's been mentioned throughout the child's participation in cultural and other tribal activities. This is a very general broad statement I think and a lot of times it's very confusing for people to understand what that is. When we go in to do our home studies what we are looking for in the interview process is for families to make sure that they can help us define what their requirement will be to uphold some of the abilities to maintain the children in our in a strong relationship with their tribe. Sometimes that is through activities. Sometimes that's through language immersion. Sometimes that's through ceremony. Other times that could be through other historical events that the tribe is holding for its community. We're also defining visitation if any. We've done very -- a lot of tribal customary adoptions that don't allow for any visitation due to the specific facts of the case. We also are looking to identifying services for the child and also the caregivers making sure that they know that we've got a clearly defined process for them to obtain and receive ongoing services for the support of the children. Also support for the tribe in any of the child's tribes service providers within the tribe. My agency the Indian child family preservation program is often named in the tribal customary adoption order as being the liaison or helping to fulfill some of the outline language in the order. In addition to that we have specific family members that may be identified through the tribes say as specific caregivers or natural respite. These are all family members or people that are considered by the tribe and are named whether the child's name is going to be unchanged or modified. We probably have a good percentage of children's names that are modified. We have a lot of percentage also of children's names that are kept but that are hyphenated and take on the surname of the new prospective adoptive couple. So those are all considerations. This is not an exhaustive list. There's much more that could be in here, but this is some of the highlighted language that we wanted to include today. (next slide)

Slide 16

Joanne Willis Newton - So once we return for the continued .26, assuming that the tribe showed up at the initial .26 and TCA was ordered and a continuance was granted, the tribe can request an additional 60-day continuance, or it might file the TCAO. And then the agency upon receiving the TCAO would file an

addendum report seven days prior to that continued .26 hearing. And it's at this hearing assuming that the TCAO has been filed, that the court would give it full faith and credit and authorize the agency to make a TCA placement. If the tribe does not file a timely TCAO, the court can determine an alternative permanent plan. But in practice if it's kind of written in mandatory language if the tribe is moving toward that and there's oftentimes delays involved and the court will just continue to be turning out further even beyond the initial 120-, and 60-day continuances. Judge Moorman did you have anything to add?

Judge Moorman – Yes, I would speak to that last point for a moment. So, the court does retain discretion to select a different permanent plan even in the context where the tribe may issue a tribal customary adoption order. But that discretion evaporates once the TCA is selected as the permanent plan. And the Court must give the tribal customary adoption order full faith and credit once tribal customary adoption is selected as the permanent plan. And that principle is discussed in *In Re Sadie S.* the cite I provided earlier 241 Cal. App 4th 1289. In addition, the tribe may have an alternate alternative plan as Joanne alluded to a moment ago. So, if for some reason the tribal customary adoption order cannot be issued either time timeliness issues or something else that obviously the tribe has to be consulted about what the alternative plan should be. And of course, we all know those alternatives are there several to choose from. Some tribes prefer guardianship. Some don't. But that consultation has to occur even at this stage where we're several weeks beyond the initial .26. And maybe Shannon you want to speak to who may contest the selection of the TCA as a permanent plan?

Shannon Cox - So, contesting TCA is the permanent plan -- obviously at the initial section .26 hearing any party may contest this selection. However, *In re. A.F.* also indicates that the parents don't have to consent to it. It's not like a voluntary relinquishment, or a voluntary adoption situation. However, they may attempt to contest the TCA. However, absent any evidence that indicates detriment would result from the TCA -- such as the interference of beneficial ties -- the default in the case of the Indian child should the tribe opt for it, would be a TCA. And that can be found in *In re. N.S.* a 2020 case which is again a Cal Reporter cite: 269 Cal. Rptr. 3d at page 732. As Judge Moorman mentioned, occasionally we might get to the 120 days the tribe for whatever reason perhaps the home assessment hasn't been completed perhaps the tribal council hasn't had an opportunity to meet. The TCAO may not be finalized. At that time the court has discretion to continue at an additional 60 days in order to get the finalized copy of the TCAO. Occasionally in my experience we've gotten to that 180 days post to the initial .26 hearing and the tribe is still will wanting to affect the TCAO however has just not been able to finalize its process. Up here in Mendocino County we often have wildfire issues we have -- seems like all of us in the last two years have had multiple emergencies that have come up and so while the code specifically doesn't lay out going beyond 180 days it has usually been our practice with the blessing of the court that if the tribe is wanting to affect the TCAO and working in good faith to do that that perhaps there should be good cause to continue it beyond that 180 days. Which is the initial 120 extension plus the 60-day kick. So, I would encourage that. However, occasionally the tribe may determine after all of that time period that a TCA is no longer their preferred plan. And again, because it's always ultimately up to the tribe for tribal customary adoptions they have to consent to it. That's within their purview to determine after going through the home evaluation or the entire process whatever the case may be that a TCA is no longer appropriate. In that circumstance I would it needs to go back to before the court for a new selection of a permanent plan. And at that point I think all options are on the table. However, as we discussed early on there are many alternatives laid out in 366.26 as alternative permanent plans short of termination of parental rights. But at that point it is a discussion that needs to be hashed out in court and ultimately up to the to the judge. (next slide please)

Slide 17

Judge Moorman - So, planning for contingencies. I think Liz and I let's talk about this a little bit. With regard to review hearings after selection of a permanent plan when the permanent plan is long-term foster care or relative -- placement with a fit and willing relative -- the tribal customary adoption must be reconsidered at every review hearing held every six months thereafter. And that's set forth in section 366.3 subdivision (e)(8) and subdivision (h)(i). I think we're missing a number there but so every review hearing, especially with long-term foster cares or and placements with a fit and willing relative that's the responsibility of the court to make sure TCA is still being considered and to evaluate and make findings

about what the status is. And the agency must consult with the tribe and revisit TCA prior to the final review hearing before the child is turning 18. And Liz would you like to add to this?

Liz DeRouen – Yes, thank you judge. I think it's really essential to make certain that even though we're talking about tribal customary adoption as if it's something that's new we've been trying to get these right for about 11 years now. And so numerous counties you know we're trying to work in better coordination to try to make sure that our reports our conversations our documentation is all done for these hearings. Making the job easier for our judges. Also, I'm lucky I have Judge Moorman who's there in the courtroom with us to help us wade through this. Making certain that we have good communication. We are also working continuously to make certain that at every hearing that if we have updates or if we have changes or if we have to inform the court that you know we may need a little bit more time for x y and z that you know we're raising those concerns early on. Sometimes what is maybe a something that's misunderstood is that we may not have the prospective adoptive family, or couple selected prior to the .26 or even at the dispo but we do have placements. And sometimes what happens is that we don't assess for the tribal customary adoption piece as early on as we should be. But you know we're doing much better to try to communicate that with our families. Also working with the counties and departments to make sure that we are working in coordination that all of the pieces get finalized when they need to according to the court timeline. So very necessary to continue to consult and I appreciate that we've got a really good working body in Mendocino County that we're able to conclude a lot of these TCAs on time.

Judge Moorman - Okay thank you. (next slide)

Slide 18

Joanne Willis Newton - Yes so then how is the TCA finalized after we've done our .26 hearing? Once the court authorizes the TCA placement and we call it a TCA placement but keep in mind the child might have already been physically placed with that family for a while. But it becomes a TCA placement in terminology after that hearing. The agency signs the TCA placement agreement and an adoption assistant agreement with the prospective adopted parent. And they also must provide a written background report on the child to the prospective adopted parents. And obtain written confirmation of receipt from those parents. The agency will then supervise the placement for six months. But there are exceptions to that six-month rule where the child has been in foster care with the family previously, or where this prospective adopted parent is a relative with a pre-existing relationship with the child. After that the prospective adopted parents would file a petition for adoption. The agency would submit a final report, including the facts of the proposed TCA, and then the court would issue the final adoption decree and terminate jurisdiction over the case. And it's you know, really important to realize that once the TCA is finalized, it's just as final as a regular adoption. It's not like a guardianship where parties can come forth you know and make a best interest argument to terminate the TCA. Anything to add anyone?

Shannon Cox - I would just also keep in mind that in counties where the adoptions assessments and adoptions are contracted out to state adoptions or even possibly a private adoption agency that full and final report on the facts of the proposed TCA may be accomplished by the state adoptions agency as well.

Liz DeRouen - Right Shannon I would agree that we've worked in coordination with state adoptions on many of the home studies in the TCAs that the ICFPP tribes have been involved with over the years. Some of that primarily is due to location in California really hard to get sometimes. And like you said, there's been a lot of different acts of mother nature that's prevented us from getting to places at certain times. But that is true. We want to make sure that we're working coordination as well to finalize these at all at all times. (next slide)

Slide 19

Judge Moorman - So the pitfalls problems and how to avoid them. You know all of these have been mentioned I'm just going to highlight a few and then turn it over to my co-presenters. So as Shannon has mentioned several times today, when the agency doesn't highlight the discussion that's necessary early

in the case of a tribal customary adoption, raising it later in the case can be problematic. And not only for these issues surrounding timing, but for out-of-state tribes or tribes unfamiliar with TCA there's a whole education piece that needs to take place. And that's why consultation early and often is really, really, really, important. From a judicial perspective, the evidence of these discussions needs to be in every assessment report. Obviously, it needs to be in the disposition report. And the court has to make sure that the issue is being discussed, and that the tribe fully understands the option and what would be required of the tribe. Again, Liz has made reference to and so has Joanne there's many tribes outside California that appear in our courts. And they are not familiar with tribal customary adoption. And the education of what it involves, what it means and what their responsibilities are, what the tribe's responsibilities are. It's not simple. It's not easy. It's not quick. So, I do want to turn it over maybe the last bullet point Shannon you and Liz and Joanne can discuss the other pitfalls that we've identified.

Shannon Cox - Thank you. And again, as we've said throughout the most important thing is early and ongoing consultation. And I would really encourage all the county counsel out there and agency social workers really make sure that good procedures are developed in-house for your templates in all reports as well as checklists and you know and ongoing training for your social workers. Because I think that while it's highlighted obviously in the disposition report when you're at your initial CFT case planning and trying to come up with a reunification plan, yes you should be addressing concurrent planning and whether TCA would be a, you know, an appropriate permanent plan. But often that can be a difficult time to really focus on that. And so, while it may be either not nailed down at that point which it probably shouldn't be. You know, you should have had that conversation. You should note it in your court report. But you know plans may change and so don't just rely on the CFT predisposition hearing and noting in the disposition report that TCA was discussed, and the tribe thinks it may be appropriate. You know again, all of the checklists that you create for your agency staff. All of the templates for the reports should discuss this. And they really should have it hammered in that this needs to be something that makes it into every assessment report. Liz did you want to add, or do we want to move on to the next slide?

Liz DeRouen - I'm sure I just want to add that even though we're talking about tribal customary adoption being a familiar process possibly for the last 11 years, we do have many California tribes who are not familiar with the process or may not have the administrative, legal support to fulfill this whole process. When this whole legislation came in, sure it gave the alternative. It also gave support to tribes to consider doing something different than conventional adoption. And it does it does a really good job of that. But also, what did not happen was that it was an unfunded mandate. It was a piece of legislation that came in that didn't allow tribes additional funding to administer to carry out, to fulfill all of this. So, we are looking to make sure that we are filling gaps with that. To make sure tribes are having the capability to go from start to finish on what's needed. One thing that I also want to stress too is that when we are working with some of our out-of-state tribes that whoever is spearheading the conversations in the CFTs or in the disposition reports whether that be an attorney or a social worker we want to make sure that we're providing the tribe with information. And that may be where Judicial Council comes in. That we develop some materials, some technical assistance, in some way so that we're really working hand-in-hand with tribes that may want to look at this as an option. And yes, I would agree that transparency is probably the most important piece of this. Is that we need to make sure that everybody knows how to accomplish this. And as many TCAs that my organization has been involved with, every one of them is different. All the tribes that we work with all have different traditions and customs and political hierarchy that we really need to uphold, and we need to address. We need to be in constant communication with our tribal governments. Likewise, they need to be updated on any new issues that come up. And I know we talked about a process that might appear to be very easy, but sometimes like Shannon said, there are things that pop up. And TCA may not be able to be accomplished. But we also are working to make sure we have a permanent plan established in the event that that doesn't come through. And then I think Joanne might have a comment.

Judge Moorman - And before that I think I should answer the question in the chat because it's really important. So, there's a question in the chat: "Are the terms and conditions of the TCAO incorporated by reference into the final adoption order?" So, the short answer is yes. But the example given "Will California courts enforce visitation provisions that were written into the TCAO but would not normally occur under California law?" So, when the final adoption decree is issued, it is it's mandated legislatively

that the California court adoption decree incorporate by reference and attachment the tribal customary adoption order. So, if it gets full faith and credit in California courts, if any provision of it needs to be enforced. I don't know if Joanne you want to add anything to that or some of our subject matter? But let's turn to the next slide.

Slide 20

Joanne Willis Newton - So I don't have any on that particular point. Thank you for making that point though. This first bullet we've already talked about. It's really important basically that everyone's communicating and that, you know, we don't give any false expectations to either the caregivers or the parents and that everyone is just being up front and transparent about the status of the discussions. About permanency planning, including TCA. But sometimes there can be a problem, where, as I mentioned, maybe the county doesn't understand that it's, it's up to the tribe. And maybe it's pushing for that and again it's only the tribe that can say TCA as a recommended permanent plan and present that to the court. But it is also not unusual for tribes not to opt for TCA. And in fact, they may consider TCA as with any adoption is inconsistent with their values and customs. I have worked for one southern California tribe, and we have never done a TCA because they don't have a problem with traditional adoption when that is their preferred plan. So, it just really varies from tribe to tribe. I think it's really important to understand that there are 109 federally recognized tribes in California, and they are very diverse in their cultures and their traditions, their laws. And so really each case has to be approached with an open mind. And there's no assumptions made about how the tribe is going to want to go forward.

Shannon Cox - Yeah, again, it's ultimately up to the tribe and to determine whether or not to do a TCA. The agency and county counsel should not be pressuring the tribe, but it should be engaged in dialogue. And making sure early that the concurrent placement is aware of kind of the direction the case is going so that expectations aren't falsely raised or lowered. And having that dialogue with the placement. And also encouraging them to develop a relationship with the tribal representatives and the tribal social workers I think is really important for the tribe to feel comfortable with establishing permanency with the placement that the child is in. Can we go to next or next slide please?

Slide 21

Judge Moorman - There is a question in the chat. So, Liz maybe you can answer this question: "What do you do when the tribe does not know how to fill out the TCA paperwork or does not have the infrastructure to complete the TCA?" So, I think let's take the first half of the question first. If it's a tribe initially being introduced to the notion of a tribal customary adoption. Liz, in your experience what happens to assist them?

Liz DeRouen - Well I think it varies from tribe to tribe. Again, depending on who is participating on the tribe's behalf. You may have a tribal lawyer who's very knowledgeable about it. You may have other tribal reps that can have some knowledge about it, but not be familiar with the legal process, the paperwork involved. And then you may have tribes that can do the whole gamut from A to Z. You know that includes a home study, that also includes any exemptions criminal background checks. Also fulfilling the writing of the tribal customary adoption order. Meeting and getting it certified and then filing it with the court. It just depends on who you're working with. And I think the question is very interesting because it sounds as if there's an application and there really is not. I know that there are some helpful documents that are available. But when you look at a tribal customary adoption it really is the tribe's ability to work with somebody who is familiar with fulfilling the requirements for the tribal customary adoption and making certain that you know all your "I"s are dotted your "T"s are crossed. And that we're completing everything we need to. And some of our counties are more familiar. Some counties who have never done them, or look like deer in the headlights, you know, when they don't see that, or they hear about that. So, we're working pretty closely with some of those counties and social workers, county counsel that are less familiar. And then with regard to the infrastructure question I think that raises a really high concern for me, that you know, we've had to look at these pieces of legislation. These enactments. The ability for tribes to do certain things on their own with little or no training. And so, we've gone to do a lot of that we've worked with a lot of tribal lawyers over the years. And I do want to say my gratitude to Kimberly Cluff and

Nancy Curry who were the originators of the tribal customary adoption from the Soboba tribe at the time. We all worked very closely in trying to get this enactment passed and really just felt that there wasn't any hand holding during that time. So, throughout the years we've tried to extend ourselves to as many families, tribes, counties as possible to offer that. And I think a training like this is really good when we're working with Judicial Council who can get this information out to more people. To have this training in education.

Joanne Willis Newton - Yeah and I just wanted, with regard to that question, also I wanted to point out you know as I mentioned California is the only state that has tribal customary adoption. And so, we have over 400 federally recognized tribes outside of California who may be coming into contact with our court because their families live here. And this is the first time they're hearing about this as an option. So, I think as Liz said there's really a community of support here you know you can reach out to Liz's program. You can reach out to me or refer the tribal that the one of those you may be less familiar with and how to go forward you know to agencies or advocates who are more familiar with the process. And we're happy to do that.

Shannon Cox - And I believe as part of the packet materials for this training and some template TCAOs are going to be provided in the material. Just moving on quickly because I know we're keeping people over to the final slide of pitfalls when the agency refuses to collaborate with the tribe and completing the home study and any other requirements to finalize the TCA. I frankly don't understand how this would happen. I haven't noticed this in my county. And I should please tell me, Liz, if there's ever an issue with that. Really you know our goal is to get permanency for these children. And TCA is the preferred permanency goal if the tribe opts for it. So, I would really encourage all county counsel and agency and state staff to collaborate with the tribes. And that kind of and collaborate with them in terms of completing the home study as needed. Not all tribes are going to be able to do their own home study. And I it's my opinion that an agency should be working with them if they don't have that ability to do the CACI background, to do the criminal background, to do those components for them if it's needed. And to do the home evaluation. Because if we were doing a traditional adoption you would have to do all of those things anyway. So, I really hope that county and state agencies are not having issues and not collaborating on those home studies and other requirements to finalize. That also goes into when an agency doesn't know how to use tribal cultural standards to evaluate the home. I again -- we have so many tribes in this state. Every tribe is individualized and has its individual social and cultural standards. My advice would be work with that tribe's representative that tribal ICWA representative tribal social worker however whoever the representative is that is the surest way for an agency to collaborate appropriately in utilizing that specific tribe's tribal cultural standards to evaluate the proposed home. Again, quickly going through minors' council or proposed adopted parents may push for conventional adoption rather than a TCA -- I think the law is pretty clear that if the tribe is opting for a TCA that takes priority that is superior to a conventional adoption. Again, it's ultimately up to the tribe, but simply because minors counsel or a proposed adopted parent to prefer traditional adoption that is not a valid reason not to do a TCA should the tribe choose to opt for a TCA.

Judge Moorman - Real quick once the court selects TCA's permanent plan the discretion to change it disappears. So, I think just as the judge on the webinar this last bullet point "The tribe isn't given enough time to complete the tribal custody adoption order". As Shannon has mentioned I've given extra time and I think if everything is moving in the direction of a TCAO and simply because tribal council can't meet because of fire for example, or the roads closed or something else. Just remember that the spirit of ICWA would require the court, in my opinion, to give extra time. So, I know we've run over. I know all of us Shannon, Liz, Joanne, we're sorry for the delay up front. We had a good time preparing for this. And Vida, we'll turn it over to you.

Slide 22

Vida Castaneda - Amanda can you go to the last slide? Please well thank you for attending today's webinar. And we're so happy you were able to -- most of you make it to the very end. If you have any questions, please reach out to me, Vida Castaneda or reach out to Ann Gilmour. And for those who called in and are seeking continuing education credits and you were not able to input your name into the

participants list but you would like credit please reach out to one of us and we will make sure that the information is put into our system. Thank you