

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 2948 (Ramos)
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Fiscal: Yes
Urgency: No
AWM

SUBJECT

Adoption Assistance Program: tribal court order

DIGEST

This bill adds a final order of adoption issued by a tribal court as a qualifying circumstance to make a child eligible for the state's Adoption Assistance Program (AAP).

EXECUTIVE SUMMARY

The AAP is an entitlement program providing long-term financial and medical coverage to adoptive parents to encourage the adoption of children who otherwise would remain in long-term foster care. AAP's benefits can be the difference between whether a child with particular medical or other special needs is adopted or not: many prospective parents simply could not afford to adopt a child without AAP benefits. Current law sets forth several criteria for when a child is eligible for AAP benefits.

The Indian Child Welfare Act of 1978 (ICWA) and state law provide particular requirements on the juvenile court when a child who is or may be an Indian child is declared a dependent of the juvenile court. In recognition of the fact that federally recognized tribes are sovereign entities within the United States, ICWA and state law give primary jurisdiction over child custody matters of Indian children in certain circumstances; if an Indian child has already been declared a dependent of the juvenile court, the juvenile court must transfer the case to a tribal court that properly exerts jurisdiction. An Indian child may be adopted through a tribal customary adoption under the jurisdiction of the tribal court, or alternatively, if the case was not transferred to the tribal court, the juvenile court may finalize an adoption approved by the tribal court as a tribal customary adoption. Unlike non-ICWA adoptions, tribal customary adoptions do not require a termination of parental rights.

Under current law, there is an ambiguity regarding the eligibility of certain Indian children for AAP benefits. Specifically, the statute setting forth the criteria for eligibility is clear that an Indian child is eligible if their tribal customary adoption was finalized by the juvenile court, but it does not specifically grant eligibility to an Indian child if their case was transferred to the tribal court prior to the finalization of the tribal customary adoption. According to the author, this means that some Indian children in need of high levels of care have been denied AAP benefits, meaning they are less likely to be adopted than similarly situated non-Indian children.

This bill is included to clarify the eligibility of Indian children for AAP by expressly stating that an Indian child is eligible for AAP when the child was a dependent of the juvenile court immediately prior to the transfer of the Indian child's case to the tribal court and the tribal court has issued a final order of adoption.

This bill is sponsored by the author and is supported by the Alliance for Children's Rights, the California Alliance of Child and Family Services, and the California Tribal Business Alliance. The Committee has not received timely opposition to this bill. The Senate Human Services Committee passed this bill with a vote of 4-0.

PROPOSED CHANGES TO THE LAW

Existing federal law:

- 1) Provides that Indian tribes are domestic independent nations that exercise inherent sovereign authority which can be modified only through Congressional action. (*E.g., Michigan v. Bay Mills Indian Community* (2014) 572 U.S. 782, 788-789.)
- 2) Establishes ICWA, which requires states to establish specific adoption preferences for a child who is a member of a federally recognized Indian tribe, or who is eligible to be a member and is the child of a member of a federally recognized Indian tribe, and to make specified efforts to notify the child's tribe when an Indian child is placed in foster care. (25 U.S.C. §§ 1901 et seq.)
- 3) Defines the following relevant terms within ICWA:
 - a) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation, as defined.
 - a) "Indian child" means any unmarried person who is under 18 years of age and is either (1) a member of an Indian tribe or (2) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.
 - b) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary of the Interior because of their status as Indians, including any Alaska Native village, as defined.

- c) "Tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings. (25 U.S.C. § 1903.)
- 4) Provides that, in any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the child's Indian tribe; provided, however, that such transfer shall be subject to declination by the tribal court. (25 U.S.C. § 1911.)
- 5) Requires the United States, every state, every territory or possession of the United States, and every Indian tribe to give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity. (25 U.S.C. § 1911(d).)

Existing state law:

- 1) Provides that the terms "Indian," "Indian child," "Indian tribe," and "tribal court" have the same definitions as in ICWA; and "Indian child custody proceeding" means a hearing during a juvenile court proceeding under the Welfare and Institutions Code, the Family Code, or the Probate Code, as specified, involving an Indian child, that may culminate in foster care placement, termination of parental rights, preadoptive placement, or adoptive placement. (Welf. & Inst. Code, § 224.1.)
- 2) Requires the court, in an Indian child custody proceeding, to give full faith and credit to the public acts, records, judicial proceedings, and judgments of any Indian tribe to the proceeding to the same extent that such entities give full faith and credit to the public acts, records, judicial proceedings, and judgments of any other entity. (Welf. & Inst. Code, § 224.5.)
- 3) Requires a juvenile court, if at any stage of an Indian custody proceeding the court receives information that the Indian child is already a ward of a tribal court or domiciled within a reservation of an Indian tribe that has exclusive jurisdiction over Indian child custody proceedings, to expeditiously notify the tribe and the tribal court of the pending dismissal based on the tribe's exclusive jurisdiction.
 - a) Upon receipt of confirmation that the child is already a ward of the tribal court or is subject to the exclusive jurisdiction of an Indian tribe, the juvenile court shall dismiss the proceeding.

- b) In the case of an Indian child who is not a ward of a tribal court or subject to the exclusive jurisdiction of an Indian tribe, the juvenile court shall transfer the case to the tribal court upon petition of either parent, the Indian custodian, or the child's tribe, unless the court finds good cause not to transfer. (Welf. & Inst. Code, § 305.5.)
- 4) Defines "tribal customary adoption" as adoption by and through the tribal customs, traditions, or laws of an Indian child's tribe, and provides that termination of parental rights is not required to effect a tribal customary adoption.
 - a) A nonminor dependent may also be adopted through a tribal customary adoption, unless the nonminor dependent has elected not to be considered an Indian child.
 - b) The child's tribe or its designee must conduct a home study, as provided, prior to a tribal customary adoption, which must be approved by the tribe.
 - c) After the completion of specified proceedings, the juvenile court may afford full faith and credit to the tribal customary adoption order, at which point the child shall be eligible for tribal customary adoptive placement. (Welf. & Inst. Code, § 366.24.)
 - 5) Provides that, in the case of an Indian child, if the Indian child's tribe has elected a permanent plan of tribal customary adoption, the juvenile court, upon receiving the tribal customary adoption order, shall afford the tribal customary adoption order full faith and credit to the same extent that the court would afford full faith and credit to the public acts, records, judicial proceedings, and judgments of any other entity.
 - a) Upon a determination that the tribal customary adoption order may be afforded full faith and credit, consistent with 3), the court shall thereafter order a hearing to finalize the adoption to be set upon the filing of the adoption proceeding.
 - b) The prospective tribal customary adoptive parents and the child who is the subject of the tribal customary adoption petition shall appear before the court for the finalization hearing.
 - c) The court shall thereafter issue an order of adoption, pursuant to 5). (Welf. & Inst. Code, § 366.26(e)(2).)
 - 6) Establishes the AAP, which is intended to provide payments to adoptive parents to enable them to meet the needs of eligible adopted children. (Welf. & Inst. Code, §§ 16115, 16115.5.)
 - 7) Provides that a child is eligible for AAP benefits when specified conditions are met, including that it has been determined that the child cannot or should not be returned to the home of the child's parents as follows:
 - a) A petition for termination of parental rights has been filed.
 - b) The court has issued an order terminating parental rights.

- c) The parents have signed a relinquishment of parental rights.
- d) In the case of a tribal customary adoption, the court has given full faith and credit to a tribal customary adoption order as provided for in 5).
- e) In the case of a nonminor dependent, the court has dismissed dependency or transitional jurisdiction subsequent to the approval of the nonminor dependent, as specified. (Welf. & Inst. Code, § 16120(a).)

This bill:

- 1) Clarifies that an Indian child who was a dependent of the juvenile court immediately prior to the transfer of the Indian child's case, and for whom a final order of adoption was issued by the tribal court of the child's tribe, is eligible for AAP benefits.
- 2) Provides that the State Department of Social Services (DSS) may implement, interpret, or make specific 2) by means of all-county letters, written directives, interim standards, or similar written instructions from DSS until regulations are adopted under the Administrative Procedure Act; these all-county letters, written directives, interim licensing standards, or similar written instructions shall have the same force and effect as regulations until the adoption of regulations.
- 3) Makes nonsubstantive technical and conforming changes.

COMMENTS

1. Author's comment

According to the author:

Under current law, tribal children are being left behind and not being adopted at the same rate as non-tribal children because they simply don't have the same backing by the state for their care. AB 2948 would ensure that tribal children are provided the same benefits through the Adoption Assistance Program as non-tribal children, making adoption more likely and allowing them to have an equal opportunity to be adopted.

2. Background on AAP benefits

As explained by the Senate Human Services Committee in its analysis of this bill:

The AAP is an entitlement program providing financial and medical coverage to encourage the adoption of children who otherwise would remain in long-term foster care. The Adoption Assistance and Child Welfare Act of 1980 created federal incentives to encourage the adoption of special needs children. The

California State Legislature created the AAP with the intent to provide the security and stability of a permanent home through adoption. AAP eligible children may receive federally funded benefits or non-federally funded benefits per state guidelines. The request for AAP benefits, the eligibility determination, benefit negotiation and execution of the AAP agreement must be completed prior to the adoption finalization.

The benefits an AAP eligible child may receive include: monthly negotiated rate; medical coverage (Medicaid/Medi-Cal); reimbursement of nonrecurring adoption expenses (up to \$400 per child per adoption); payment for an eligible out of home placement; and payment for eligible wraparound services. These benefits may continue in a subsequent adoption and continues regardless of the adoptive family's state or country of residence. These benefits may continue until age 21.

According to the CDSS website, "The negotiated AAP benefits are based on the child's needs and the circumstances of the family which may not exceed the rate the child would have received had they remained in foster care. The intent of AAP benefits is to assist adoptive parents with their child's lifelong needs and not the short-term monetary needs that may occur during a crisis. If the child's needs require a higher level of care and supervision, they may be eligible to receive a Special Care Increment in addition to the AAP basic rate. A child who is developmentally delayed and eligible to receive California Regional Center services may receive the dual agency rate plus eligible supplemental rate."

Regulations (22 CCR 35326) set forth the criteria for eligibility for AAP. This three-part special needs determination requires all three of the following be met: evidence in the file that the child cannot or should not be returned to the home of their parents; a specific factor or condition makes it reasonable to conclude that the child cannot be adopted without providing AAP payments, and an effort to place the child for adoption with appropriate parents without providing adoption assistance unless it is against the best interest of the child.

3. ICWA and the primacy of tribal court jurisdiction

As explained by the United States Supreme Court:

[ICWA] came as a direct response to the mass removal of Indian children from their families during the 1950s, 1960s, and 1970s by state officials and private parties. That practice, in turn, was only the latest iteration of a much older policy of removing Indian children from their families—one initially spearheaded by federal officials with the aid of their state counterparts nearly 150 years ago. In all its many forms, the dissolution of the Indian family has had devastating effects on children and parents

alike. It has also presented an existential threat to the current vitality of Tribes – something many federal and state officials over the years saw as a feature, not a flaw.¹

ICWA, enacted in 1978, {finally} recognized that “an alarmingly high percentage of Indian families [had been] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children [had been] placed in non-Indian foster and adoptive homes and institutions.² ICWA was, therefore, passed with the goals of “protect[ing] the best interest of Indian children and...promot[ing] the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.”³

One key component of ICWA – which was subsequently incorporated into state law – is recognizing that the courts of federally recognized Indian tribes have primary jurisdiction over the Indian children who are members of the tribe.⁴ If a child under the jurisdiction of the juvenile court is determined to be already a ward of a tribal court or domiciled within a reservation of an Indian tribe that has exclusive jurisdiction over child custody proceedings, the juvenile court must transfer jurisdiction of the case to the tribal court unless the tribal court or the child’s parent or parents object.⁵ The transferred case may result in a tribal customary adoption under the oversight of the tribal court; the state must give full faith and credit to the tribal court’s adoption records.⁶ Alternatively, if the Indian child’s case is not transferred to the tribal court but the child’s Indian tribe has elected a permanent plan of tribal customary adoption, the juvenile court that still has jurisdiction over the dependent child can finalize the adoption upon the filing of the adoption petition and finalize the adoption.⁷

4. This bill clarifies that an Indian child who is the subject of a final order of adoption from the tribal court of the child’s tribe is eligible for AAP benefits

Under current law, an Indian child is eligible for AAP benefits when the juvenile court has given full faith and credit to a tribal customary adoption order while the child remained a dependent of the juvenile court.⁸ The statute does not, however, explicitly

¹ *Haaland v. Brackeen* (2023) 599 U.S. 225, 297 (conc. opn. of Gorsuch, J.).

² 25 U.S.C. § 1901.

³ *Id.* § 1902.

⁴ *Id.*, § 1911; Welf. & Inst. Code, § 305.5.

⁵ 25 U.S.C. § 1911; Welf. & Inst. Code, § 205.5.

⁶ Welf. & Inst. Code, § 224.5.

⁷ *Id.*, § 266.26(e)(2).

⁸ Welf. & Inst. Code, §§ 366.26(e)(2), 16120(a).

extend AAP eligibility to an Indian child who was adopted pursuant to a tribal court's adoption order when the child's case was transferred to the tribal court at an earlier stage of the case.⁹ As a result, there is confusion over whether AAP benefits extend to all Indian children who were, at one point, dependents of the juvenile court and were subsequently adopted pursuant to a tribal court adoption order. According to the author, some Indian children have been denied eligibility for AAP benefits as a result of this confusion; because AAP benefits are worked out prior to the legal adoption, this could lead to Indian children not being adopted because the prospective parents cannot afford the adoption without AAP benefits.

This bill is intended to clarify the scope of eligibility for AAP benefits for Indian children. To do so, this bill expressly states that an Indian child who was a dependent of the juvenile court immediately prior to the transfer of the case to the tribal court of the child's tribe, and for whom the tribal court issued an order of adoption, is eligible for AAP benefits.

5. Arguments in support:

As explained by the California Tribal Business Alliance (CTBA):

AAP is a benefits program that provides financial and medical coverage to facilitate the adoption of children with special needs who otherwise may remain in long-term foster care. Under existing law, a child is eligible for AAP benefits only if certain criteria are met and there is no provision in statute for instances where an Indian child's case is being transferred from juvenile court to a tribal court.

According to the California Department of Social Services, tribal children who find themselves in this situation have been denied AAP benefits even though they met the criteria to receive them. The result is that tribal children with special needs are not being adopted at the same rate as their non-tribal counterparts simply because they do not have the financial and medical coverage backing of AAP.

CTBA strongly supports [AB 2948] that will rectify the deficiency in law and ensur[e] tribal children with special needs have the same benefits that other non-tribal children receive which will help make adoption into stable, secure homes more likely.

SUPPORT

Alliance for Children's Rights
California Alliance of Child and Family Services

⁹ See *id.*, §§ 305.5, 16120(a).

California Tribal Business Alliance

OPPOSITION

None received

RELATED LEGISLATION

Pending Legislation:

AB 2255 (Joe Patterson, 2055) expands eligibility for AAP benefits to nonminor dependents under 26 years of age in extended foster care, as specified. AB 2255 is pending before the Assembly Appropriations Committee.

AB 81 (Ramos, 2023) codifies within State law certain provisions relating to ICWA, and renames the provisions of the Family Code, the Probate Code, and the Welfare and Institutions Code as the Californian Indian Child Welfare Act. AB 81 is pending on the Senate Floor.

Prior Legislation:

AB 1862 (Ramos, 2022) would have established the Tribally Approved Homes Compensation Program to provide funding to eligible tribes and tribal organizations in California to assist in funding the costs associated with recruiting and approving homes for the purpose of foster or adoptive placement of an Indian child pursuant to ICWA. AB 1862 died in the Senate Appropriations Committee.

AB 3176 (Waldron, Ch. 833, Stats. 2018) revised and recast the state statutes implementing ICWA to comply with federal regulations, including revising the specific steps a social worker, probation officer, or court is required to take in making an inquiry of a child's possible status as an Indian child and the various notice requirements that are mandated during an Indian child custody proceeding.

PRIOR VOTES:

Senate Human Services Committee (Ayes 4, Noes 0)
Assembly Floor (Ayes 65, Noes 0)
Assembly Appropriations Committee (Ayes 14, Noes 0)
Assembly Judiciary Committee (Ayes 12, Noes 0)
Assembly Human Services Committee (Ayes 6, Noes 0)
