

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 873 (Ramos)
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Fiscal: Yes
Urgency: No
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SUBJECT

Child welfare services: Indian tribes

DIGEST

This bill eliminates tribal share of cost requirements for an agreement entered into by the California Department of Social Services (DSS) with a tribe, consortium of tribes, or tribal organization regarding the care and custody of Indian children and jurisdiction over Indian child custody proceedings and strikes existing law related to the breakdown of the tribal share of costs, as provided, and prohibits cost-sharing going forward.

EXECUTIVE SUMMARY

“The Indian Child Welfare Act of 1978 (ICWA), which establishes federal standards for state-court child custody proceedings involving Indian children, was enacted to address ‘the consequences . . . of abusive child welfare practices that [separated] Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes,’ [citation].” (*Adoptive Couple v. Baby Girl* (2013) 570 U.S. 637, 637.) Among other things, ICWA sets forth minimum federal standards by: (1) establishing jurisdictional requirements; (2) allowing for notice of and intervention in Indian child custody proceedings by a tribe; and (3) providing that the acts, records, and judicial proceedings of tribal courts are entitled to full faith and credit to the same extent that the acts, records, or judicial proceedings of another state would be.

Under existing law, any agreement between the DSS and an Indian tribe, tribal organization, or tribal consortium located in California regarding the care and custody of Indian children and jurisdiction over Indian child custody proceedings must include certain cost sharing provisions that make the Indian tribe, consortium of tribes, or a tribal organization responsible for certain non-federal costs. These provisions are included in agreements that provide for orderly transfer of jurisdiction on a case-by-

case basis, for exclusive tribal or state jurisdiction, for concurrent jurisdiction between states and tribes, and others.

This bill is sponsored by the Alliance for Children's Rights and supported by the California Tribal Business Alliance, the Yocha Dehe Wintun Nation, and the Yurok Tribe. According to proponents, statutory cost-sharing requirements often prevent Indian tribes, consortiums of tribes, or a tribal organizations from entering such agreements with DSS due to the tribes' lack of available funding to cover necessary cost sharing. This, in turn, limits the tribes' ability to access the rights and protections provided under ICWA. This bill eliminates these cost sharing provisions and prohibits tribal cost-sharing going forward. The bill passed the Senate Human Services Committee by a vote of 5-0.

PROPOSED CHANGES TO THE LAW

Existing federal law:

- 1) Establishes, under Title IV-E of the federal Social Security Act, a funding program to, among other things, enable each State to provide foster care and transitional independent living programs for children who meet certain criteria, as specified. (42 U.S.C. § 670 et seq.) Federal foster care funds are also referred to as Aid to Families of Dependent Children-Foster Care (AFDC-FC).
- 2) Establishes ICWA (25 U.S.C. § 1901) to protect the best interest of Indian children by promoting the stability and security of Indian tribes and families by establishing minimum standards for:
 - a) removal of Indian children from their families;
 - b) placement of such children in foster or adoptive homes that reflect the unique values of Indian culture; and
 - c) assistance to Indian tribes in the operation of child and family service programs. (*Id.* at § 1902.)
- 3) Authorizes States and Indian Tribes to enter into agreements with each other respecting the care and custody of Indian children and jurisdiction over child custody proceedings, including agreements that may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements that provide for concurrent jurisdiction between States and Indian tribes. (*Id.* at § 1919(a).) Such agreements may be revoked by either party with 180 day's written notice. The revocation does not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise. (*Id.* at (b).)

Existing state law:

- 1) Requires the DSS to negotiate in good faith with the Indian tribe, organization, or consortium in the state that requests development of an agreement with the state to administer all or parts of the programs under Title IV-E on behalf of the Indian children who are under the authority of the tribe, organization, or consortium. (§ 16000.6.)¹
- 2) Provides that the DSS may enter into an agreement, as specified, with any California Indian tribe or any out-of-state Indian tribe that has reservation lands that extend into this state, consortium of tribes, or tribal organization regarding the care and custody of Indian children and jurisdiction over Indian child custody proceedings, as provided. (§ 10553.1(a).) An agreement regarding the care and custody of Indian children must provide for the delegation to the tribe, consortium of tribes, or tribal organization of the responsibility that would otherwise be the responsibility of the county for the provision of child welfare services or assistance payments under the AFDC-FC program, or both. (*Id.* at (b)(1).) Specifies types of agreements for which a tribal share of matching costs must be provided. (*Id.* at (b)(2)-(b)(4).) Upon the implementation of an agreement, provides that the county that would otherwise be responsible for providing the child welfare services or AFDC-FC payments specified in the agreement as being provided by the tribe, consortium of tribes, or tribal organization is no longer subject to that responsibility to children served under the agreement. (*Id.* at (c).)
- 3) Provides that a tribe, consortium of tribes, or tribal organization that is operating a program pursuant to an agreement with DSS under the provisions described above is responsible for specified shares of costs based on the nature of the program. (§ 10553.11.)

This bill:

- 1) Eliminates the tribal share-of-cost requirements for an agreement entered into by DSS with a tribe, consortium of tribes, or tribal organization regarding the care and custody of Indian children and jurisdiction over Indian child custody proceedings, as provided, and strikes existing law related to the breakdown of the tribal share of costs. Prohibits a tribal share of costs for such agreements.
- 2) Strikes existing law that requires the tribe, consortium of tribes, or tribal organization to bear responsibility for what would otherwise be the responsibility of the county for the provision of child welfare services or assistance payments under the AFDC-FC program, or both.

¹ All further section references are to the Welfare and Institutions Code unless otherwise specified.

- 3) Requires CDSS, subject to funding in the annual Budget Act or another statute, to establish a specialized unit within DSS to assist Indian tribes, tribal organizations, and tribal consortia in implementing agreements regarding the care and custody of Indian children and jurisdiction over Indian child custody proceedings, as provided.

COMMENTS

1. Background

a. ICWA

Congress enacted ICWA in 1978. In enacting ICWA, Congress explained that states “often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families,” and that the removal of Indian children was “often unwarranted.” (25 U.S.C. § 1901.) The goal of ICWA is thus to “protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.” (25 U.S.C § 1902.) ICWA establishes minimum federal standards, both procedural and substantive, that govern the removal of Indian children from their families and subsequent placement in foster or adoptive homes. (*Fresno County Dep’t of Children & Family Services v. Superior Court* (2004) 122 Cal.4th 626.) Under ICWA, there is a presumption that it is in the best interest of an Indian child to retain tribal ties and cultural heritage, and that this serves the interest of the tribe in preserving future generations.

Among other things, ICWA sets forth minimum federal standards by: (1) establishing jurisdictional requirements; (2) allowing for notice of and intervention in Indian child custody proceedings by a tribe; and (3) providing that the acts, records, and judicial proceedings of tribal courts are entitled to full faith and credit to the same extent that the acts, records, or judicial proceedings of another state would be. ICWA provides that an indigent Indian parent or custodian has the right to court-appointed counsel. (*Id.* at § 1912(b).) ICWA also prohibits placement in foster care unless clear and convincing evidence shows that continued custody of the child by the parent or custodian is likely to result in serious emotional or physical damage to the child. (*Id.* at (e).) Finally, ICWA prohibits termination of parental rights for an Indian child absent evidence beyond a reasonable doubt that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. (*Id.* at (f).)

In 2007, SB 678 (Ducheny, Ch. 838, Stats. 2006) codified many of the ICWA requirements into California law. As a result, the court in a child welfare proceeding involving an Indian child must not only consider the child’s interests, but also the interests of the child’s tribe. In any child custody proceeding in which the court knows or has reason to know that an Indian child is involved, the child’s tribe must be notified of the proceeding and of their right to intervene in the proceeding. (25 U.S.C. § 1912(a); Welf. & Inst. Code § 224.2(a).) Over the years, additional changes have been made to

California's statutes to better implement ICWA. In 2018, AB 3176 (Waldron, Ch. 833, Stats. 2018) made several changes to state law regarding the removal of Indian children from their families and their out-of-home placement in order to conform to changes to federal regulations governing ICWA.

A 2017 report by California's ICWA Compliance Task Force to the California Attorney General's Bureau of Child's Justice found that "there ha[d] been incremental process with sincere and innovative efforts to address concerns that tribal leaders and stakeholders had brought forward" with respect to ICWA's implementation. However, the report also found that "the promise and potential of the federal ICWA and Cal-ICWA have not been realized, as neither the letter nor the spirit of the law has been fully implemented."²

As of October 1, 2018, there were 59,487 children and youth in the state's child welfare services system; 1,216 were ICWA-eligible. Of those 1,216 children and youth, 466 were placed with relatives.

b. Title IV-E foster care funding

Various funding streams are available to provide for the care of foster youths. The amount of funding depends on the caregiver and the needs of the youth. Under Title IV-E of the Social Security Act, federal law reimburses a portion of a State's costs to provide care for children who have been removed from their home due to maltreatment. Federal foster care funds are known as Aid to Families of Dependent Children-Foster Care (AFDC-FC). To qualify, a juvenile court must find in the initial hearing that (1) continuance in the home would be contrary to the child's welfare, (2) placement and care is overseen by a designated public agency, and (3) reasonable efforts have been made to prevent or eliminate the need for removal. (42 U.S.C. §§ 671, 672.) Nonminor dependents are eligible to directly receive AFDC-FC support until they reach age 21. (42 U.S.C. § 675(8).) Additionally, AFDC-FC reimburses administrative and training expenses necessary to support foster youths. (42 U.S.C. §§ 672, 674.)

2. Eliminates provisions requiring cost sharing or cost matching

ICWA provides that States and Indian Tribes to enter into agreements with each other respecting the care and custody of Indian children and jurisdiction over child custody proceedings, including agreements that may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements that provide for concurrent jurisdiction between States and Indian tribes. (25 U.S.C. § 1919(a).) Such agreements may be revoked by either party with 180 day's written notice. The revocation does not affect any action or

² ICWA Compliance Task Force Report to the California Attorney General's Bureau of Children's Justice (2017), p. v, available at <https://theacademy.sdsu.edu/wp-content/uploads/2015/06/icwa-compliance-task-force-final-report-2017.pdf> (as of Jun. 24, 2021).

proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise. (*Id.* at (b).) Consistent with this provision, section 16000.6 requires the DSS to negotiate in good faith with the Indian tribe, organization, or consortium in the state that requests development of an agreement with the state to administer all or parts of the programs under Title IV-E on behalf of the Indian children who are under the authority of the tribe, tribal organization, or tribal consortium.

Sections 10553.1 and 10553.11 require the tribe, organization, or consortium to bear certain costs under these agreements. An agreement regarding the care and custody of Indian children must delegate to the tribe, organization, or consortium the county's responsibility for provision of child welfare services or assistance payments under Title IV-E, or both. (§ 10553.1(b)(1).) Section 10553.11 provides for tribal matching shares of costs under specific types of agreements, including those for child welfare services, assistance payments, and adoption assistance.

This bill strikes those provisions and instead prohibits a tribal share of costs for such agreements. Proponents argue that existing provisions that micromanage cost-sharing have created unintended barriers that have deterred tribes from entering into or using these agreements. According to the author, some tribes are reimbursed under Title IV-E at higher rates than the State. For instance, the Yurok Tribe's reimbursement rate is 87 percent, while the State's is 50 percent. Thus, if an agreement is crafted so that the State absorbs all of the un-reimbursed costs under the tribe's reimbursement rate, both sides would save money, thereby freeing up limited tribal resources to take advantage of ICWA's protections.

The author argues that one such benefit would be more legal representation in court. The author writes:

A child's future, when they are removed from their family and enter the foster care system, is decided in a courtroom. All of the parties in state court cases have legal counsel provided to them, except in a case involving an Indian Child, where the tribe, an essential party, does not have a right to resources for legal counsel. Because of a lack of resources, a tribal social worker is often the only voice in court trying to protect the complex legal rights of a tribe. The result is that cases that could be resolved in Tribal Courts remain in the overburdened and underequipped state courts with often elongated court proceedings, appeals which drain tribal and judicial resources and tribal children losing their connection to culture and community.

The bill also requires DSS, if funding is provided, to establish a specialized unit within DSS to assist Indian tribes, tribal organizations, and tribal consortia in implementing agreements regarding the care and custody of Indian children and jurisdiction over Indian child custody proceedings, as provided.

SUPPORT

Alliance for Children's Rights (sponsor)
California Tribal Business Alliance
Yocha Dehe Wintun Nation
Yurok Tribe

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: AB 1283 (Stone, 2021) would further facilitate implementation of the Continuum of Care Reform of the foster care system as it relates to criminal background checks for tribally approved homes, the appeals process for resource family applicants, and temporary exclusions from community care facilities. That bill will be heard in this Committee on the same day as this one.

Prior Legislation:

SB 1013 (Committee on Budget and Fiscal Review, Ch. 35, Stats. 2012), made numerous changes, including specifying the shares of costs required of tribes, consortiums of tribes, or tribal organizations that enter into an agreement with the state regarding the care and custody of Indian children and jurisdiction over Indian child custody proceedings.

PRIOR VOTES:

Senate Human Services Committee (Ayes 5, Noes 0)
Assembly Floor (Ayes 76, Noes 0)
Assembly Appropriations Committee (Ayes 16, Noes 0)
Assembly Human Services Committee (Ayes 8, Noes 0)
