Tribal Legal Code Resource:
Civil Dependency and Related Laws

Tribal Legal Code Resource: Civil Dependency and Related Laws

Guide for Drafting or Revising Tribal Civil Dependency and Related Laws

April 2017

Main Office: 8235 Santa Monica Blvd. Suite 211 | West Hollywood, CA 90046
Phone: 323-650-5467 | Fax: 323-650-8149

Tribal Law and Policy Institute: www.Home.TLPI.org

Tribal Legal Code Resource:
Civil Dependency and Related Laws

Guide for Drafting or Revising Tribal Civil Dependency and Related Laws

October 2016

A product of:

Tribal Law and Policy Institute

8235 Santa Monica Blvd, Suite 211
West Hollywood, CA 90046
www.Home.TLPI.org
www.tlpi.org
Telephone: (323) 650-5467
Fax: (323) 650-8149

This project was supported in part by Children's Justice Act Partnerships for Indian Communities Training and Technical Assistance Grants 2000-VI-GX-0001, 2003-VI-GX-0007, and 2006-VI-GX-0001 awarded by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice to the Tribal Law and Policy Institute. Points of view in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.

This project was supported in part by Grant No. 2012-IC-BX-K001 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile and Delinquency Prevention, the Office of Victims of Crime, and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking. Points of view or opinions in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.

This project was supported in part by the *UCLA Public Service Fellowship* awarded by the UCLA School of Law to Kori Cordero. Points of view in this document are those of the authors and do not necessarily represent the official position or policies of the UCLA School of Law or any group that contributed funds to *UCLA Public Service Fellowship* awards.

Primary Authors

Maureen L. White Eagle (*Ojibwe/Cree*)
Tribal Advocacy Legal Specialist, Tribal Law and Policy Institute

Kori Cordero (*White Mountain Apache*)
Tribal Justice Specialist, Tribal Law and Policy Institute

Pat Sekaquaptewa (*Hopi*)
Assistant Professor, University of Alaska Fairbanks

Contributors

Jerry Gardner (*Cherokee*)
Executive Director, Tribal Law and Policy Institute

Heather Valdez Freedman
Program Director, Tribal Law and Policy Institute

Suzanne Garcia
Staff Attorney, Tribal Law and Policy Institute

Craig J. Dorsey
Dorsey and Easton, LLP

Abby Abinanti (*Yurok*)
Chief Judge, Yurok Tribal Court

Roe Bubar
Associate Professor, Colorado State University

Carrie Garrow (*Mohawk*)
Chief Judge, St. Regis Mohawk Tribal Court

B.J. Jones,
Chief Judge Sisseton Wahpeton Oyate Court

O. Raquel Ramirez, J.D.

Evelyn Stevenson (*Salish*)
Tribal Attorney, The Confederated Salish and Kootenai Tribes

Editorial Assistance

Lou Sgroi
Webmaster, Tribal Law and Policy Institute

TABLE OF CONTENTS

Section I: Introduction 1
Chapter 1: How to Effectively Use This Guide 3
What the Resource Guide Does 4
What the Resource Guide Cannot Do 4
How to Use This Guide 4
Guide Components 5
A Note on Terminology 6
Chapter 2: Preliminary Considerations to Guide Code Development 7
A. Title IV-E Considerations 8
B. Adopting Family Wellness Systems 11
C. Code Development Team Selection and Guidelines 13
How to Organize to Create a Children's Code 15
D. Needs Assessment 18
Section II General Provisions 21
Chapter 3: Incorporating Custom, Tradition, and Generally Accepted Practices into Your Children's Code 23
A. Declaring Underlying Principles, Goals, Rights, Duties, and Obligations Regarding Children 25
Selected Tribal Codes 26
Tribal Code Commentary 37
Exercises 38
B. Defining Who Is a Parent, Extended Family Member, and Custodian 39
Selected Tribal Codes 41
Tribal Code Commentary 44
Exercises 45
C. Tribal Court Recognition and Application of Custom and Tradition 46
Selected Tribal Codes 47
Tribal Code Commentary 52
Exercises 53
D. Training Service Providers on Tribal History, Tradition, and Generally Accepted Practices 54
Selected Tribal Codes 55
Tribal Code Commentary 58
Exercises 59

Additional Resources 60
Chapter 4: Jurisdiction, ICWA Transfers, and ICWA Interventions 63
A. Jurisdiction 64
Selected Tribal Codes 65
Tribal Code Commentary 68
Exercises 69
B. ICWA Transfers from a State 70
Selected Tribal Codes 71
Tribal Code Commentary 77
Exercises 79
C. Intervention in ICWA Cases in State Court 80
Selected Tribal Codes 81
Tribal Code Commentary 83
Exercises 84
Additional Resources 85
Chapter 5: Definitions of Child Maltreatment 87
A. Defining Child Maltreatment 89
Selected Tribal Codes 91
Tribal Code Commentary 95
Exercises 96
B. Defining Physical Abuse 97
Selected Tribal Codes 98
Tribal Code Commentary 100
Exercises 101
C. Defining Sexual Abuse 102
Selected Tribal Codes 104
Tribal Code Commentary 107
Exercises 108
D. Defining Child Neglect 109
Selected Tribal Codes 111
Tribal Code Commentary 115
Exercises 116
E. Defining Psychological Maltreatment 117

Selected Tribal Codes 118
Tribal Code Commentary 120
Exercises 121
Additional Resources 122
Chapter 6: Procedural Rules, Evidence Rules, and Related Matters 123
A. Rules of Civil Procedure 124
Selected Tribal Codes 125
Tribal Code Commentary 129
Exercises 130
B. Confidentiality in Proceedings and Records 131
Selected Tribal Codes 132
Tribal Code Commentary 135
Exercises 136
C. Rules of Evidence—General 137
Selected Tribal Codes 138
Tribal Code Commentary 140
Exercises 141
D. Rules of Evidence—Reports 142
Selected Tribal Codes 143
Tribal Code Commentary 145
Exercises 146
E. Rules of Evidence—Children's Testimony 147
Selected Tribal Codes 148
Tribal Code Commentary 150
Exercises 151
F. Sovereign Immunity and Severability 152
Selected Tribal Codes 153
Tribal Code Commentary 154
Exercises 155
G. Appeals 156
Selected Tribal Codes 157
Tribal Code Commentary 159
Exercises 160

H. Appointing an Attorney, Advocate, or Guardian Ad Litem 161
Selected Tribal Codes 162
Tribal Code Commentary 165
Exercises 166
Additional Resources 167
Section III Child-in-Need-of-Assistance Proceedings 169
Chapter 7: Reporting and Investigation 173
A. Duty to Report Child Maltreatment 173
Selected Tribal Codes 175
Tribal Code Commentary 179
Exercises 180
B. Agencies Responsible for Receiving and Investigating Reports of Child Maltreatment 181
Selected Tribal Codes 184
Tribal Code Commentary 188
Exercises 189
C. Multidisciplinary Teams 190
Selected Tribal Codes 192
Tribal Code Commentary 194
Exercises 195
D Required Activities and Reports 196
Selected Tribal Codes 197
Tribal Code Commentary 202
Exercises 204
E. Requirement to Draft Forensic Interview Protocols 205
Selected Tribal Codes 208
Tribal Code Commentary 214
Exercises 215
F. Social Services' Findings, Conclusions, and Recommendations 216
Selected Tribal Codes 217
Tribal Code Commentary 219
Exercises 220
Additional Resources 221
Chapter 8: Preventing Physical Removal of Children from Their Homes 223

A. Reasonable Efforts 226
Selected Tribal Codes 228
Tribal Code Commentary 231
Exercises 232
B. Strategies to Support Families 233
Selected Tribal Codes 236
Tribal Code Commentary 238
Exercises 239
C. Removal of Offending Person from the Home 240
Selected Tribal Codes 241
Tribal Code Commentary 246
Exercises 247
Additional Resources 248
Chapter 9: Emergency Removal of a Child 249
A. Designating a Responsible Agency 250
Selected Tribal Codes 251
Tribal Code Commentary 252
Exercises 253
B. Emergency Custody without Court Order 254
Selected Tribal Codes 255
Tribal Code Commentary 260
Exercises 262
C. Filing an Emergency Custody Petition 263
Selected Tribal Codes 265
Tribal Code Commentary 267
Exercises 268
D. Emergency Placement 269
Selected Tribal Codes 270
Tribal Code Commentary 272
Exercises 273
E. Notice of Removal 274
Selected Tribal Codes 275
Tribal Code Commentary 277

Exercises 278
F. Release of the Child from Emergency Custody 279
Selected Tribal Codes 280
Tribal Code Commentary 282
Exercises 283
Additional Resources 284
Chapter 10: The Preliminary Hearing 285
A. Notice of the Preliminary Hearing 287
Selected Tribal Codes 288
Tribal Code Commentary 290
Exercises 291
B. Purpose of the Preliminary Hearing 292
Selected Tribal Codes 293
Tribal Code Commentary 294
Exercises 295
C. Time Limits for Holding a Preliminary Hearing 296
Selected Tribal Codes 297
Tribal Code Commentary 299
Exercises 300
D. Standard of Proof in a Preliminary Hearing 301
Selected Tribal Codes 302
Tribal Code Commentary 304
Exercises 305
E. Parental Rights in a Preliminary Hearing 306
Selected Tribal Codes 307
Tribal Code Commentary 308
Exercises 309
F. Outcome of the Preliminary Hearing 310
Selected Tribal Codes 312
Tribal Code Commentary 314
Exercises 315
G. Evaluations of the Child and/or Parents 316
Selected Tribal Codes 317

Tribal Code Commentary 318
Exercises 319
Additional Resources 320
Chapter 11: Child-in-Need-of-Assistance Proceeding 321
A. Subsection's Purpose 323
Selected Tribal Codes 324
Tribal Code Commentary 326
Exercises 327
B. Regular Dependency Petitions 328
Selected Tribal Codes 329
Tribal Code Commentary 334
Exercises 335
C. Rights of Parties 336
Selected Tribal Codes 337
Tribal Code Commentary 341
Exercises 342
D. Informal Resolution, Default, and Pretrial Hearings 343
Selected Tribal Codes 344
Informal Resolution Codes 344
Default Codes 348
Tribal Code Commentary 349
Exercises 350
E. Conduct of the Trial; Ruling of the Court 351
Selected Tribal Codes 352
Tribal Code Commentary 355
Exercises 356
F. Disposition 357
Selected Tribal Codes 358
Tribal Code Commentary 361
Exercises 362
Additional Resources 363
Chapter 12: Permanency Planning 365
A. Status Review Hearings 366

Selected Tribal Codes 367
Tribal Code Commentary 371
Exercises 372
B. Permanency Planning and Permanency Plan Review Hearings 373
Selected Tribal Codes 375
Tribal Code Commentary 382
Exercises 385
C. Concurrent Planning Requirements 386
Selected Tribal Codes 387
Tribal Code Commentary 388
Exercises 389
D. Aggravated Circumstances 390
Selected Tribal Codes 391
Tribal Code Commentary 395
Exercises 397
Additional Resources 398
Section IV: Out-of-Home Placements 399
Chapter 13: Disposition, Placement, and Visitation 401
A. Informal Conference Dispositions 402
Selected Tribal Codes 403
Tribal Code Commentary 405
Exercises 406
B. Emergency Placement Dispositions 407
Selected Tribal Codes 408
Tribal Code Commentary 411
Exercises 412
C. Regular Child-in-Need-of-Assistance Disposition and Placement 413
Selected Tribal Codes 414
Tribal Code Commentary 425
Exercises 427
D. Placement Prohibitions on Secure Detention Facilities 428
Selected Tribal Codes 430
Tribal Code Commentary 432

Exercises 433
E. Visitation 434
Selected Tribal Codes 435
Tribal Code Commentary 438
Exercises 439
Additional Resources 440
Chapter 14: Foster Care in Native Nations 441
A. Designate an Agency Responsible for Foster Care 443
Selected Tribal Codes 444
Tribal Code Commentary 445
Exercises 446
B. Foster Care Application Process 447
Selected Tribal Codes 448
Tribal Code Commentary 452
Exercises 453
C. Foster Care Applicant Eligibility 454
Selected Tribal Codes 455
Tribal Code Commentary 460
Exercises 462
D. Standards for Other Household Members 463
Selected Tribal Codes 464
Tribal Code Commentary 467
Exercises 468
E. Foster Care Home Standards 469
Selected Tribal Codes 470
Tribal Code Commentary 473
Exercises 474
F. Foster Parent Responsibilities 475
Selected Tribal Codes 476
Tribal Code Commentary 480
Exercises 482
G. Rejection, Review, or Disqualification of Foster Care License 483
Selected Tribal Codes 484

Tribal Code Commentary 487
Exercises 488
Additional Resources 489
Chapter 15: Modification of Parental Rights: Termination, Suspension, and Alteration 491
A. Termination of Parental Rights: Purpose and Policy 492
Selected Tribal Codes 493
Tribal Code Commentary 495
Exercises 496
B. Mandatory Termination of Parental Rights 497
Selected Tribal Codes 499
Tribal Code Commentary 502
Exercises 503
C. Voluntary Termination of Parental Rights 504
Selected Tribal Codes 505
Tribal Code Commentary 507
Exercises 508
D. Involuntary Termination of Parental Rights 509
Selected Tribal Codes 510
Tribal Code Commentary 512
Exercises 513
E. Petition for Termination of Parental Rights 514
Selected Tribal Codes 515
Tribal Code Commentary 517
Exercises 518
F. Notice and Reports 519
Selected Tribal Codes 520
Tribal Code Commentary 523
Exercises 524
G. Hearing and Disposition 525
Selected Tribal Codes 526
Tribal Code Commentary 529
Exercises 531
H. Effect on the Child's Rights—Enrollment, Inheritance, and Other Rights 532

Selected Tribal Codes 533
Tribal Code Commentary 536
Exercises 537
I. Suspension of Parental Rights: Petition and Hearing 538
Selected Tribal Codes 539
Tribal Code Commentary 544
Exercises 546
J. Suspension of Parental Rights: Final Order 547
Selected Tribal Codes 548
Tribal Code Commentary 551
Exercises 553
K. Emancipation 554
Selected Tribal Codes 555
Tribal Code Commentary 560
Exercises 561
Additional Resources 562
Chapter 16: Adoption, Customary Adoption, and Guardianship 563
A. Policy and Purpose 565
Selected Tribal Codes 566
Tribal Code Commentary 568
Exercises 569
B. Adoption Jurisdiction 570
Selected Tribal Codes 571
Tribal Code Commentary 573
Exercises 574
C. Customary Adoption 575
Selected Tribal Codes 577
Examples of Customary Law Adoption Statutes 577
Example of Court Certification of a Customary Adoption 578
Tribal Code Commentary 581
Exercises 582
D. Legal Relationships and Rights of the Adoptee 583
Selected Tribal Codes 584

Tribal Code Commentary 586
Exercises 587
E. Placement of Minor for Adoption—Who May Adopt? 588
Selected Tribal Codes 589
Tribal Code Commentary 591
Exercises 592
F. Consent and Relinquishment 593
Selected Tribal Codes 594
Tribal Code Commentary 599
Exercises 600
G. Preplacement Evaluation 601
Selected Tribal Codes 602
Tribal Code Commentary 604
Exercises 605
H. Petition for Customary Adoption 606
Selected Tribal Codes 607
Tribal Code Commentary 611
Exercises 612
I. Hearing and Decree 613
Selected Tribal Code 614
Tribal Code Commentary 619
Exercises 621
J. Records—Open or Closed? 622
Selected Tribal Codes 623
Tribal Code Commentary 625
Exercises 626
K. Guardianship 627
Selected Tribal Codes 628
Tribal Code Commentary 638
Exercises 641
Additional Resources 643
Glossary 645
Additional Resources 651

Section I: Introduction

Beginning in 1989, the Office for Victims of Crime provided support and funding to improve the capacity of tribal justice systems to handle serious cases of child abuse. Since then, many Native Nations have enhanced their justice systems to improve the reporting, investigation, prosecution, and processing of child abuse cases. Native Nations have also sought to reduce additional trauma to children within their child welfare systems. Increasingly, Native Nations are committed to developing systems that incorporate their unique cultural beliefs, using those beliefs to shape both the procedure and substance of their laws. Native Nations are recommitting to an approach that addresses underlying issues and is not just concentrated on punitive redress. Native Nations want their members to return to wellness and to a world where tribal values guide their daily actions.

Today, increased child protection in Indian country, and in Alaska Native communities, is dependent upon a process of tribal law development and reform with the careful selection of borrowed laws and practices tailored to tribal needs and values. This resource is designed to help with that process.

Over time, federal and state child abuse investigations, interventions, and prosecutions have increased in Indian country and within Alaska Native communities. However, federal prosecutors still decline to prosecute a majority of child abuse cases and many states lack criminal jurisdiction over Indian perpetrators in Indian country. At the same time, Native Nations are committed to exercising their inherent governmental powers to combat child abuse. One approach adopted by a growing number of Native Nations is to assert concurrent criminal jurisdiction with both the federal and state governments in child abuse cases. Another approach taken by Native Nations is to continue to exercise their original civil jurisdiction over dependency matters. Both approaches require the application of tribal laws and practices and sometimes require borrowing researched and tested child protection innovations from the federal and state systems. Imported innovations are necessarily modified to work effectively to meet tribal needs and to further tribal values.

> Native communities must defend their practices and decide how to adapt their values to practices that fit the needs of modern native communities. At the same time, the communities must cope with the intrusion of the specters of poverty, substance abuse, brutality toward the human and non-human community, loss of cultural knowledge and beliefs, poor health care, poor housing, inability to provide for family, poor education, and all the other losses that are partners of poverty. Native communities know they are burdened with these issues. It is these problems that are the breeding grounds for abuse and neglect of Indian children.
>
> —Abby Abinanti, Chief Judge Yurok Tribe Yurok in Passports for Native Children

This introductory section describes how to make the most effective use of this guide in developing an effective Children's Code that complies with the traditions of your community. This section provides a description of the guide and directions for implementing a code development process that includes community involvement. It also provides important information on necessary

considerations and decisions, which need to be resolved before starting the code development process.

Chapter 1: How to Effectively Use This Guide

The *Tribal Legal Code Resource: Civil Dependency and Related Laws Guide for Drafting or Revising Civil Dependency and Related Laws* is designed to be used while drafting new or amended tribal statutory provisions. It was developed to provide a starting point for drafting and revising tribal laws related to child dependency laws. The provisions covered may be set out in various parts of the tribal code, but are likely to be found in the Children's Code, Juvenile Code, rules of court, and/or the rules of evidence. This guide refers to the dependency code and related codes—such as adoption codes—as a "Children's Code."

It is essential for Native Nations to consider the potential role of collaborative court approaches that allow for the development of a fully developed voluntary or nonpunitive child welfare system. A system that can encourage families—nuclear and extended—to seek help and engage in a process to return their family systems to a state of wellness.

This guide is essentially an overview of the comparative laws, and underlying policies, impacting the well-being of children from three perspectives:

1. Tribal innovations in the area of civil child dependency in compliance with the federal Child Abuse Prevention and Treatment Act, the Adoption and Safe Families Act, the Indian Child Protection and Family Violence Prevention Act, and, where relevant, the Indian Child Welfare Act (ICWA);
2. Federal antiviolence and victim assistance legislation; and
3. Tribal law, including customs, traditions, and generally accepted practices, promoting the well-being of children.

There are a number of important commitments and preferred processes that underlie many of the tribal provisions included in the guide. Tribal law reflects a combination of community values, lifeways, and policy choices, as well as legal standards and processes borrowed from the federal and state systems. The development of tribal law involves careful consideration of both the needs and values of the tribal community and researched and tested innovations in the federal and state law. The following is a generalization of what may be important to Native Nations:

- A commitment to reinforce customs, traditions, and/or generally accepted local practices;
- Use of traditional or alternative dispute-resolution practices such as "peacemaking," "talking circles," and/or mediation;
- A commitment to pursue traditional or therapeutic healing practices such as traditional healers and/or "drug courts" or "wellness courts";
- Recognition of traditional or respected authorities, leaders, or elders; and
- Recognition of the roles, duties, obligations, privileges, and rights of relatives of a certain type (including tribally defined "extended family," "bands," "clans," etc.).

The main goal of this resource guide is to offer suggestions on how tribal dependency laws can be drafted in a way that provides safety and support for children while incorporating tribal traditions and values and meeting requirements of certain federal laws.

What the Resource Guide Does

This guide is intended to give Native Nations' Code Development Teams[1] an overview of comparative tribal statutory provisions for the drafting of a new or amended tribal Children's Code. These include what are generally known as dependency provisions, adoption provisions, foster care provisions, guardianship provisions, rules of court, and rules of evidence. The guide provides commentary on tribal code examples to help in highlighting differences. Finally, the guide includes exercises at the end of each section to be used by the Code Development Team. The exercises are designed to assist the drafters in discussing options and deciding on the key points to in the statute for their Nation.

What the Resource Guide Cannot Do

The guide is *not* a "model" code. None of the tribal examples should be adopted without a thorough discussion and analysis by the appropriate tribal bodies and their legal counsel. U.S. laws that impact tribal laws change frequently.

There are advantages and disadvantages to adopting each provision of the code. Tribal governments have different needs, resources, values, and policies. The exercises are provided to assist in such discussion and analysis.

The guide does not address criminal child protection issues or provisions (also known as "law and order codes"). Because the guide is specifically designed for civil justice system enhancements, the definitions of crimes against children are *not* covered here. The Tribal Law and Policy Institute has also developed a Resource Guide for Drafting New or Amended Tribal Laws on Crimes Against Children to assist with law reforms that further a criminal justice response to child abuse and neglect.

The guide is *not* a replacement for tribal agency or law enforcement protocol development or training. The guide is designed specifically for a tribal Code Development Team and legislative bodies responsible for drafting and enacting legislation that addresses child protection and child victims. Tribal employees and others who work with, or may come into contact with, abused or victimized children should receive special training on the appropriate responses for working with child victims and child abuse reporting requirements.

How to Use This Guide

We have divided the guide so that each section (and each chapter) could be used separately by a Code Development Team in discussions of amendments to a specific section of its code. This guide could also be used for a complete review and revision of laws related to dependency actions.

[1] See Chapter 2 for help in developing the right code drafting team.

Guide Components

The guide is comprised of sixteen chapters that are organized within four major sections. The first section is introductory and the remaining three sections could be described as workbooks.

Section I: Introduction consists of two chapters. The first chapter provides an overview of the resource and instruction on its use. The second chapter provides information on Title IV-E of the federal Social Security Act and certain preliminary matters. It also provides help in the formation of a Code Development Team.

Section II: General Provisions consists of four chapters that relate to common provisions of a Children's Code. The chapters include topics such as incorporating custom and tradition into the Children's Code; jurisdiction and transfers from the state or another Native Nation; key definitions of child maltreatment; and procedural and evidence rules.

Section III: Child-in-Need-of-Assistance Proceedings consists of six chapters. The chapters focus on provisions of the Children's Code that relate directly to a dependency or Child-in-Need-of-Assistance (CINA) proceeding. This section includes chapters on reporting and investigation; preventing removal of a child; emergency removal; the preliminary hearing; CINA proceedings; and permanency planning.

Section IV: Out-of-Home Placements consist of four chapters that focus on the disposition of a CINA proceeding. This section includes chapters relating to disposition, placement, and visitation; foster care in Native Nations; modification of parental rights; and adoption, customary adoption, and guardianship.

Each chapter is divided into several units, with each unit discussing an important piece of that particular Children's Code section. At the end of each chapter, a Resources section provides articles and websites that could be handouts or resources for your Code Development Team to use for particular topic discussions. A glossary of terms used in this guide is included at the end of the document.

Each chapter unit is divided into four parts and is designed to provide the Code Development Team relevant legal information, policy considerations, and decision-making tools. The four parts are:

Overview	The overview provides a basic introduction to the topics of the part and an overview of its contents.
Selected Tribal Codes	Example tribal codes are included in each unit to provide positive options and good examples of code that Native Nations have adopted. They are presented for discussion purposes not for wholesale adoption. Each Native Nation has different needs, resources, and values that require customized codes.
Tribal Code Commentary	This part discusses the tribal code examples provided in Selected Tribal Codes. It highlights key differences in the examples and/or key code provisions.
Exercises	Exercises are included at the end of each unit. The exercises are designed to facilitate discussion for the Code Development Team. The

exercises raise questions regarding the needs, resources, and values of the particular Native Nation. The first set of questions asks for analysis of current law and processes on a topic and the second set of questions leads to a discussion of the Code Development Team's vision.

It is helpful to work through this guide with a copy of the Native Nation's existing laws. Look for relevant provisions in the Children's Code (dependency and/or child welfare code), adoption code, the judicial or court establishment code (rules of court and/or rules of evidence), or as stand-alone child protection laws.

A Note on Terminology

This guide uses the term *Children's Code* to denote what may be referred to as a Juvenile Code, a Dependency Code, a Youth Code, Child Protection Code, Child Welfare Code, or may even be part of a Family Code. The term *Children's Code* is an umbrella term under which this guide includes dependency, adoption, guardianship, termination of parental rights, evidence rules, and procedural rules related to dependency proceedings. Because the guide uses the term *Children's Code*, the term *Children's Court*—referring to the court responsible for complying with the Children's Code—is also used. This court may have other names in tribal communities, that is, Youth Court, Juvenile Court, or Family Court. In the Tribal Code Commentary, the guide uses the terms mentioned in the corresponding tribal code examples.

This guide frequently uses the acronym CINA, which depending upon the jurisdiction stands for Child-in-Need-of-Aid or Child-in-Need-of-Assistance. The acronym is very widely used and is frequently used even when the jurisdiction calls a dependency proceeding something that doesn't fit the acronym. The guide uses the term simply to mean a dependency proceeding.

Tribal governments use a variety of terms to describe their laws, including "statutes," "ordinances," and codes. Generally, the term *code* refers to an organized listing of all laws for a given subject matter, while a specific subsection may be entitled a statute or ordinance. In this guide, the terms are used interchangeably in order to be relevant to a wide variety of audiences.

When using this guide, and throughout the drafting process, it is a good idea to keep at least one dictionary by your side. We recommend using one or more of the following:

A general dictionary, such as *Merriam-Webster's Collegiate Dictionary;*

A law dictionary, such as *Black's Law Dictionary;* or

A law dictionary for nonlawyers, such as *Law Dictionary for Non-Lawyers* by Daniel Oran.

A glossary is provided at the end of this document to define legal terms as they are used in this guide.

Chapter 2: Preliminary Considerations to Guide Code Development

Before starting the process of developing or revising a Children's Code it is important to make some decisions relative to Title IV-E of the Social Security Act (Title IV-E). This chapter provides some key information on Title IV-E in order to help inform that process. Additionally, because Native Nations can also develop a voluntary program that supports families, such programs should also be considered before delving into the code sections.

This chapter also provides some helpful information on selecting the right people to be on that team and provides a few tips learned through others' experiences that may help in developing the best Children's Code for your Nation.

Chapter Units

Unit A: Title IV-E Considerations

Unit B: Adopting Family Wellness Systems

Unit C: Code Development Team Selection and Guidelines

Unit D: Needs Assessment

A. Title IV-E Considerations

Perhaps the most important decision a Code Development Team must make—one that strongly influences many sections of the Children's Code—is whether to comply with Title IV-E of the federal Social Security Act.[2] Title IV-E is the major source of child welfare funding across the country; it provides major financial funding for salaries for child welfare workers and child welfare agency administration. Title IV-E also provides major funding for training and technical assistance. Foster Care Maintenance Payments, Guardianship Assistance Payments and Adoption Assistance Payments are available under Title IV-E. However, Title IV-E does not provide funding for services to families, such as mental health care. Because funding for tribal child welfare agencies from tribal financial resources and other state and federal sources is often inadequate, Title IV-E funding provides an important opportunity for Native Nations to (almost) fully staff and fund their child welfare agencies. However, it can be expensive to run a Title IV-E program because the federal government only reimburses a part of the total cost of the program.

At the same time, accepting Title IV-E funding requires compliance with a large body of federal rules and regulations, some of which may not fit well with tribal laws and traditions. And, there is limited flexibility to avoid or waive the application of these rules and regulations. If a Native Nation accepts Title IV-E funding, it must modify its tribal child welfare code to incorporate required provisions of Title IV-E law and regulations. So, one of the most important choices a Native Nation must make is whether the Nation intends to participate in the federal Title IV-E program. That choice affects what provisions can and must be in your code. Many Native Nations have decided that the advantages of obtaining federal Title IV-E funding to provide increased services to the tribal juvenile population outweigh the disadvantages of having to adopt federal standards and provisions that may not be completely consistent with current tribal law and/or custom. The impact Title IV-E has on particular Children's Code section is discussed and highlighted throughout this guide.

There are three basic options a Native Nation may choose with regard to Title IV-E in enacting its child welfare code and running its child welfare program. These options are as follows:

1. **Act as a Title IV-E Subcontractor with Your State**: Every state runs and administers a Title IV-E program because Title IV-E provides most of the funding for the state's program. The state may subcontract under Title IV-E with various providers, including Native Nations. A Nation may contract with its state to run a Title IV-E program for its member children. These contracts can take a variety of forms—they could be for a certain number of foster care "slots"—say ten foster care placements. Or they could be reimbursement for an unspecified number of placements. The advantage of contracting with your local state to run a Title IV-E program is that the state does most or all of the administrative work to ensure compliance with all of the technical Title IV-E reporting requirements. States are set up to run these programs. The Nation just has to fill out the forms and provide the information required by the state. The disadvantages of contracting with the state for Title IV-E are that the Native Nation has to comply with all of the state's Adoption and Safe Families Act (ASFA) and Title IV-E standards, which may conflict with tribal law and custom; it often must comply with state contracting standards such as nondiscrimination that may conflict with tribal preference; and often the

[2] 42 U.S.C. § 670 et seq.

Native Nation does not get the full proportionate share of Title IV-E funding—the state keeps a percentage for administrative overhead.

2. **Work Directly with the Department of Health and Human Services to Run Your Own Title IV-E Program**: In 2008, Congress passed the Fostering Connections to Succeed Act, Public Law 110-351, which, for the first time, allows Native Nations to work directly with the federal government to run their own Title IV-E programs. A number of Native Nations are in the planning stage to run their own Title IV-E program, and several are actually running a Title IV-E program.[3] The advantages of this option are that the Native Nation receives all of the Title IV-E funding, instead of having some funds siphoned off by the state. Also, the Nation gets to create and apply its own standards to its child welfare cases. This is especially important for issues related to foster care, whether "aggravated circumstances" allow the agency to stop services to a family, and whether a compelling reason exists not to proceed with termination of parental rights. The Native Nation can also take advantage of more culturally appropriate training and technical assistance opportunities. The disadvantages are that the Title IV-E regulations and requirements were designed for implementation by huge administrative agencies and it has been difficult to apply some of these requirements to Native Nations with a smaller government structure. The administrative requirements for Title IV-E can be complicated and complex, requiring resources and careful planning to successfully implement. Finally, another disadvantage is that the federal government has little flexibility in waiving or modifying its Title IV-E requirements to Native Nations, some of which are inconsistent with existing tribal law or tribal custom.

3. **Do Not Contract under Title IV-E**: Some Native Nations have decided that the requirements and standards of Title IV-E are fundamentally incompatible with tribal law and custom, and have decided not to contract for Title IV-E funding. This choice is easier to make for those Nations with other sources of funding available. However, incompatible customs and/or availability of other resources are not the only reasons to reject Title IV-E; a number of Native Nations have determined that they lack a significant percentage of tribal children who are Title IV-E eligible, making compliance with Title IV-E more trouble than it is worth. If only a small percentage of tribal children are Title IV-E eligible, the Native Nation may not qualify for as much Title IV-E funding as it originally planned. Because a child's family must meet Title IV-E financial eligibility standards—figured from 1996 poverty statistics—before the agency can obtain Title IV-E reimbursement for providing services, it may be difficult to receive enough Title IV-E reimbursements for Title IV-E funding to be impactful. The advantages of not contracting under Title IV-E are that Native Nations can enact or amend their child welfare code without having to take federal and/or state Title IV-E requirements into account. The tribal code can be fully consistent with tribal law and tradition. The disadvantage of not contracting under Title IV-E is that the Native Nation will most likely leave a significant amount of child welfare administration

[3] As of the date of this publication the Port Gamble S'Klallam Tribe of Kingston, Confederated Salish and Kootenai Tribes, South Puget Intertribal Planning Agency of Shelton, Keweenaw Bay Indian Community, Navajo Nation, Chickasaw Nation, and the Eastern Band of Cherokee Indians are approved to run Title IV-E programs.

and training money on the table, money that would help the Native Nation provide more services to its children.

The Preventing Sex Trafficking and Strengthening Families Act (Public Law 113-183) recently made some changes to Title IV-E which relates to sex trafficking[4] of children, particularly those in foster care. It requires Title IV-E agencies to consult with agencies that provide services to at risk children and victims of sex trafficking, and ensure that there are policies and procedures in place (including training for workers) to identify, document, and provide services for any child or youth in placement, care, or supervision by Title IV-E agency, who is at risk of becoming a victim of sex trafficking or is a sex trafficking victim. This includes youth in their home or who have run away from foster care and are under eighteen years of age. By September 16 2016, agencies are to have implemented these policies.[5]

Title IV-E agencies are also to develop protocols to find youth who are missing from foster care, determine why the youth was missing, determine if the youth was a victim of sex trafficking while absent from foster care and report if appropriate. A new Title IV-E Plan requirement includes reporting missing youth to law enforcement within 24 hours.

[4] Section 103(10) of TVPA: Sex trafficking: The term "sex trafficking" means the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act. (Updated to reflect the changes made to section 103(10) of TVPA (22 USC 7102(10)) by Public Law 114-22 effective May 29, 2015.)
[5] Information memorandum, U.S. Department of Health and Human Services, Administration on Children, Youth, and Families, Children's Bureau, October 23, 2014, updated November 4, 2015.

B. Adopting Family Wellness Systems

It is important for tribal leaders, including tribal courts, to examine how much tribal courts are beginning to resemble non-Native systems. Tribal leaders should then determine if the trend is purposeful or inadvertent—because there are so few models that could truly be considered systems evolved from each of our distinctive histories. This is important for a number of reasons, not the least of which is that non-Native punitive systems are not effective in redressing our issues and our people are not comfortable or happy in them.

This guide concentrates on those requirements a Native Nation may need to allow its systems to interface with existing federal mandates and to be eligible for funding pursuant to various federal programs, for example, Title IV-E. However, it is very important to consider an overall approach that includes code provisions that are driven not by those federal mandates but rather by cultural mandates. For instance, tribal codes could include a chapter that is designed to reflect adaptation of an extended-family system, meaning that the driving force of the section could be voluntary services, patterned after certain Tribal Wellness Court models that support a person or, in this case, a family petitioning for services. A petition for services request would simply be requesting services, stating that a family needed support, and either request specific services or request an evaluation to determine the service needs of the family.

Many tribal people are interested in moving away from systems that are based on punitive models, or models that set thresholds of demonstrated bad behavior as prerequisites for receiving help. This type of system would be a philosophical move back to family/village/clan systems of old. The "rules" would be rooted in the old ways and responsibilities; outreach would be based on empowering people to ask for help and getting help.

Examples could include the following:

1. When a parent wished support for wellness activities, including inpatient treatment, a supportive plan would be created that did not have a finding against the parent as a prerequisite.
2. When a parent has a child with serious mental health issues and needs support to determine the best approach to keeping the child supported and in the appropriate care setting.
3. If a parent has mental/physical limitations and requires support to parent.
4. If a child is having serious issues related to drugs/alcohol/school and the parent needs support to help the child avoid negative behaviors.
5. If parent(s) realize they need to resolve family structure issues, for example, family violence/anger management issues.
6. If parental absence, because of illness/incarceration/death/job demands, is creating a hardship on the family.
7. If the family system needed intervention to resolve grief issues or any other family system issue, such as sexual abuse.

The standard Western model rules including interventions supervised by strangers to the family would not necessarily guide this intervention. This "system," for instance, would not consider familial relationships to preclude a helping professional's involvement in service interventions, nor would they preclude payment/reimbursement for such involvement. Each Native Nation, regardless of adopting laws to allow for participation in federally funded programs, could create parallel systems that would be voluntary/preventative systems developed to reflect older patterns of helping and supporting families in need.

C. Code Development Team Selection and Guidelines

Much thought should go into selecting your code drafting team, for they will be the first line of drafters and must be willing to commit the time and energy needed for this very demanding project. The following is a list of people/agencies that may be useful in drafting this code.

- Survivors of the child protection system, including family members
- Tribal attorney or one who represents social services
- Tribal law enforcement
- Tribal juvenile probation officer
- Foster families
- Social services, including Child Protection or Indian Child Welfare workers
- Substance abuse treatment provider
- Mental health treatment provider
- Medical care personnel, including home health workers or newborn support
- Domestic violence advocates and batterer treatment provider
- School and daycare personnel
- Tribal education department
- Corrections personnel
- Youth council representative
- Defense advocates or attorneys
- Elders, traditional healers, or spiritual guides
- Cultural mentor/leader
- Tribal court judges including personnel in alternative judicial systems
- Any services that support families/children involved with dependency proceedings
- Tribal council members
- Any state or federal agency involved with child protection or prosecution of child abuse offenses

Indian country has been besieged with the need for code development and/or revisions in recent years. Historically, as Native Nations developed codes and courts to dispense justice, a very common practice was to simply adopt state code and change the name to a tribal name, oftentimes not even making the name switches throughout the document. As time has gone by many of those "change the name codes" have proven to be inadequate to address the needs of tribal people, and current code drafters are increasingly seeking to draft documents that reflect their tribal needs and values.

This history has created a knowledge base that allows us, the drafters of this resource, to make some suggestions for you to consider as you begin the code development process. The tips set out in the following text come from the successful efforts of other Native Nations.

1. **The primary work should be done by individuals known throughout the community as "problem solvers."** This work will not successfully reach the goal of producing a Children's Code if it becomes a process of finger pointing and blaming others for weakness in the current law or approach. The best laws are developed one step at a time by a group that is committed to brainstorming and reviewing possible solutions, both long term and short term, to problems.
2. **There should be equal representation from various tribal agencies and advocacy programs**. Equal representation is important. The code development process should not be the "property" of any one agency or group.
3. **The work should be completed in a setting of mutual respect**. The setting should be a safe environment in which the group can share, learn, and explore. It is okay to acknowledge differences of opinion, but not in a stereotypical or judgmental manner.
4. **The agenda should be focused upon areas of mutual concern or shared interest**. Try to focus on areas of common interest instead of differences. A shared vision such as meaningful consequences designed to address the needs of the family, child, and the community can create confidence and trust.
5. **The participants should be willing to examine not just the way things are, but also be willing to explore ways of improving the law**. All participants must be willing to talk about and explore new ways to address the needs of families and children in their community. This is a process in which different people will have differing views, and it is a time when it is possible to listen and learn from each other.
6. **The participants should be willing to be creative and persistent, which is necessary for success**. The process will undoubtedly have frustrations and difficult times. Think outside the box.
7. **The participants must be willing to share the burden**. This means sharing resources, training, technical assistance, and limited available funding. Alternate the locations of meetings so that the burden of hosting and/or travel does not fall on the same people.
8. **All agencies should be allowed input into drafting prior to finalization of the draft**. All tribal agencies involved should have a chance to review the draft code before it is considered completed. Allowing for this input will help to ensure each agency remains committed to the process and eventual implementation.
9. **Consider traditional/cultural strategies and the adaption of those values to modern issues and practices**. We are all aware that times have changed. That does not necessarily mean that values have, or should, change. However, we need to do the work of updating the application of those values to today's problems.
10. **Expect to spend a great deal of time together**. Try to be aware of applicable cultural practices, including making sure that meals are provided for lengthy meetings. Make sure

that everyone is as comfortable as possible. Note that there are now substantial restrictions on the use of federal funds for food. The safest practice is to use nongrant funds for food. If you are considering using federal grant funds, be sure to check with your grant manager.

How to Organize to Create a Children's Code

There are several approaches to organize to start work on a Children's Code. The key is to pick one that your initial team or council thinks will be successful. Some groups have decided to do the drafting in a "retreat" format, where the "team" spends several days in a row working through the process to create a working draft. Others have established representative working groups focusing on different areas with a time line and regular meetings scheduled to develop a draft. Another approach is to have a core group create a draft for wider circulation to representative groups and individuals, including a process for community input. Any of these approaches can use a facilitator and all should include a recorder to keep track of the work.

There is no right way or better way. The best way is the one that reflects the preference of your community. Remember, this is a very difficult and important process and taking the time to do the job right is essential. Do not rush the process. Do not cut short the input process. The code should be a document that reflects the needs and vision of the community it serves. It is not a standalone product and should not be developed as such.

It is important to ascertain if there are any funds available to assist in the development of the code. In-kind contributions can be important and significant: for instance, a meeting place; supply support (copying, mailing, paper, pens); any part-time staff assignment for research, note keeping, and creating drafts; covering mileage costs or providing transportation; and/or providing a meal.

It is important that all members of the team or working group be provided with a binder of existing documents that they agree to review and study before beginning their work together, including but not necessarily limited to:

- Tribal constitution and/or bylaws;
- Any existing controlling or impacting tribal/federal/state codes;
- All related tribal codes (family/dependency/placement/probate);
- Lay-friendly summary of scientific research on the human brain and child development;
- Any written stories from the community concerning corrective actions involving youth in a cultural context;
- Any anthropological documentation or historical records, regarding rearing/disciplining youth, about your Native Nation or other Native Nations with whom you share cultural or linguistic ties;
- Copies of any tribal court opinions related or relevant to youths in the community; and
- Any existing tribal Children's Code.
- Any written values and vision statements the Native Nation may have.

Here are a few "dos" and "don'ts" to consider as you plan this process for developing a Children's Code.

When developing your Code Development Team, DO . . .

- Select Code Development Team members with various viewpoints who have demonstrated interest, expertise, or experience with the child protection system.
- Select, if possible, members of all the disciplines who are involved in the child protection system.
- Select team members who are "survivors" of the current child protection system, including their family members.
- Make sure the selection process includes elders and cultural leaders.
- Select, if possible, a team member(s) who is currently in the foster care system, including family members.
- Design a process that invites broad-based participation in identifying issues and making recommendations. If possible, the process should be one of consensus, as that is more likely to ensure widespread acceptance and is more in keeping with many traditional resolution practices.
- Proceed in phases with set time frames/meeting times, including a study phase in which Children's Code issues that are important to the community are identified before drafting provisions.
- Assign manageable tasks to team members or subcommittees, to be accomplished within clear time frames.
- Emphasize person-to-person communication. Develop a communication plan that ensures everyone in the work group is kept informed of the process and project status.
- If experiencing an impasse or disagreement in the work group, consider having an expert address the issues, presenting a pro and con discussion for consideration.

When developing your Code Development Team, DON'T . . .

- Select code development members based only on their positions within the tribal judicial system.
- Overlook the current science on child development.
- Disregard the importance of traditional beliefs, values, approaches, and/or customary law.
- Devote resources to drafting before consensus is reached concerning priority issues and recommendations.
- Be discouraged by lack of participation or lack of progress.
- Delay too long before dividing the work of the team into tasks that can be accomplished within the time frames established.
- Get bogged down in what you cannot accomplish, or resources you do not currently have but need or want.

- Let difficult or divisive issues be resolved by forcing a change in the law or maneuvering to avoid public meeting and discussion that would provide a wider range of opinions.

D. Needs Assessment

Fact gathering is necessary before starting the actual work of drafting a new code. The need for legal, historical, cultural, and scientific research is described in the previous section. However, it is also necessary to do some basic fact gathering. The following information will be helpful:

- How many children are enrolled members in your Nation, or may be eligible for enrollment (some Native Nations have set ages for becoming enrolled)?
- How many of the children are members of other Native Nations residing on reservation?
- How many children are children of members, but not eligible for membership?
- How many enrolled children (in your Nation, in other Nations) and unenrolled children living in your Nation are currently involved with the child protection system either on or off the reservation? Keep separate statistics for your Nation and other Native Nations and on- and off-reservation actions. How many households?
- List the location and type of every placement option used for tribal and/or Indian children, including nontribal reservation residents.
- How many Native licensed foster families are available for placements?
- Identify all mental health assessment options (consider those that focus on trauma symptoms, dual diagnosis, and ongoing treatment options).
- Identify all inpatient/outpatient options (on and off reservation) for treatment of substance abuse for children and for adults.
- Make note of distance to all inpatient/outpatient options off reservation.
- Identify any case managers in any system currently with tribal children or Native families: domestic violence, substance abuse, and social services, including those with transitional caseloads.
- The team should visit the nearest commonly accessed juvenile and dependency courts to view hearings, that include, where relevant, tribal, state, and federal courts. The team when observing should pay particular attention to what "parts" are necessary and what parts could change—for example, must a judge sit on a bench with a robe or can the judge sit at a table?
- The team should tour commonly used treatment and detention facilities and group homes. The team needs to decide whether these facilities and approaches are the ones it is comfortable with for tribal children, adolescents, young adults, and their families.
- All available programming for children, adolescents, and adults should be listed, either tribal or community based.

As a starting point, it is important to know what options are available. At this juncture you may need to remind the team not to get bogged down in feeling bad about any perceived lack of resources. Every community has to start somewhere. Part of the process of developing a Children's Code will be to raise community awareness of the issues affecting tribal families and children. The team can continue to work on other system improvements after developing the code.

It will become clear early on that the issues of the child protection system are impacted not just by the law, but also by systems, including the tribal and local community systems. Tribal people once had intact systems and community supports for successfully raising and mentoring youth, and we can again if we have the will, or develop the will, to recreate these systems and supports.

Section II General Provisions

This section of the guide deals with a number of preliminary matters that are very important and impact a number of sections of the code and, in some cases, the entire Children's Code. The general provisions are basic considerations that range from incorporating custom and traditions into your code, to a discussion of subject matter jurisdiction, including the definitions of child maltreatment.

Four chapters are included in this section and the following is a brief synopsis of each chapter.

Chapter 3. Incorporating Custom, Tradition, and Generally Accepted Practices into Your Children's Code

This chapter provides examples of code sections and discussions on how other Native Nations have incorporated their customs and traditions into their Children's Code. Chapter 3 also addresses the key sections of the Children's Code that provide an easy opportunity for customization. Codifying definitions, such as *extended family members* and *custodian*, require the Nation to look at how it would traditionally define such terms in its Nation. Developing a process through which accurate information on custom and tradition can be provided to the Nation's court is also discussed, as is the importance of establishing a process to provide training to service providers working with the Nation's children and families.

Chapter 4. Jurisdiction, ICWA Transfers, and ICWA Interventions

This chapter helps a Nation decide how it defines subject matter jurisdiction in a child protection proceeding. It also examines options for transfer of an ICWA matter to a tribal court or intervention by the Nation in state court ICWA actions.

Chapter 5. Definitions of Child Maltreatment

This chapter is related to subject matter jurisdiction, it describes when a child protection case is properly before the Nation's court. This chapter also leads a Code Development Team through possible ways of defining child maltreatment, child physical abuse, sexual abuse, neglect, and psychological maltreatment.

Chapter 6. Procedural Rules, Evidence Rules, and Related Matters

This chapter discusses issues such as confidentiality, rules of procedure, and rules of evidence. It leads a Code Development Team through several available options to aid in the drafting of procedures and rules that fit its Nation's circumstances. Chapter 6 also discusses appeals, sovereign immunity, and appointing an attorney, advocate, or guardian ad litem.

Chapter 3: Incorporating Custom, Tradition, and Generally Accepted Practices into Your Children's Code

Working with custom, tradition, and generally accepted practice in both the drafting of tribal laws and in the application of those laws can be challenging. Some critics argue that this approach romanticizes tribal governance and law and/or that it results in the application of old, out-of-date, or simply wrong principles. Others argue that custom and tradition are too hard to work with or that they are inefficient or lack the status of being "legal." However, these criticisms are based in a misunderstanding of both the purpose this approach and the nature of custom, tradition, and generally accepted practice.[6]

Many tribal governments today are under a legal duty under their own written laws to identify, respect, and at least to consider the incorporation of persisting legal norms (also known as custom, tradition, and/or generally accepted practice) arising from local (often traditional) groups within their communities. These "legal norms" are original, naturally arising law—the glue that has kept and continues to keep people in Native communities together. Tribal governments, then, are also under a duty to ensure that their legal institutions and laws reflect principles that seem just or fair to people in the given tribal culture. This includes a duty to reform laws and institutions to keep in step with the changing values and expectations of Native community members.

Unfortunately, many, if not most Native Nations today have inherited "boilerplate law" drafted by non-Natives, usually U.S. government officials, based on Western models. Recognition of this fact by Native legal scholars has resulted in cries for the reform of tribal constitutions, codes, rules, and in the tribal common law. As one Native scholar has put it:

> [W]e are at an opportune moment to critically appraise our systems and evaluate them using Native ideals and taking into consideration the Native world view. It is the particular responsibility of Native lawyers, practitioners, professionals, and advocates working with tribal justice systems to assess the current situation of tribal courts and to determine the future course. . . .[7]

This chapter seeks to inform a critical appraisal of existing tribal children's law, spur an evaluation of Western-influenced statutory provisions, and prompt Native communities to explore their local ways in the reconceptualization and reform of their children's law(s).

This chapter also walks through the standard process whereby tribal justice systems and their related agencies respond to child maltreatment, focusing on those areas where the tribal children's law may need to be changed or modified to reflect local custom, tradition, and/or generally accepted practice ("custom").

---

[6] Pat Sekaquaptewa, "Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking," 32 *American Indian Law Review* 319 (2008).

[7] Christine Zuni, "Strengthening What Remains," 7 *Kansas Journal of Law and Public Policy* 17 (1997).

Terms and definitions used in this chapter:

Social Norm—A felt standard of proper behavior.

Legal Norm—A felt standard of proper behavior backed by official recognition or sanction.

Tradition—Old values or ways of doing things.

Current Practice—Current, generally accepted ways of doing things that may become custom and tradition over time.

Traditional Authority—The old offices or respected leaders.

Modern Secular Authority—Constitutionally or statutorily recognized leaders or other leaders elected or appointed by the community.

Legal Levels—Legal norms vary within different, traditional, and secular legal levels, that is, the custom law may be different for different villages, clans, bands, and so forth within one tribe. The written tribal law (constitution, codes, resolutions, tribal court opinions, and orders) may also deal differently with people from different villages, clans, bands, and so forth.

Chapter Units

Unit A: Declaring Underlying Principles, Goals, Rights, Duties, and Obligations Regarding Children

Unit B: Defining Who Is a Parent, Extended Family Member, and Custodian

Unit C: Tribal Court Recognition and Application of Custom and Tradition

Unit D: Training Service Providers on Tribal History, Tradition, and Generally Accepted Practices

A. Declaring Underlying Principles, Goals, Rights, Duties, and Obligations Regarding Children

The underlying principles and goals of the children's law, including general statements of worldview and family values and preambles describing the value and place of children in the Native community, are generally placed in the "Purposes and Construction" or "Purposes and Policy" section of the code. This section of the code may be reviewed by courts in interpreting sections of the code. Expressing your Native Nations underlying principle and goals in this section may help ensure that your code is interpreted according to your customs and traditions.

Additional terms may need to be defined to adequately explain customs and wording. The use of tribal language in the explanation of these terms and customs impacting children is frequently used in tribal statutes.

This section also explores existing Western notions of parental rights and the likely Native preference for focusing on the positive rights of children and the duties and obligations owed to them by their parents, cultural "third parents," extended family members and groups, and the Native Nation as a whole. Such a preference may take the form of official "bills of rights" and/or "bills of duties and obligations."

Selected Tribal Codes

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part A General and Dependency Provisions
Section 402—Definitions

§402.1 Wotakuye (Definitions of Lakota Kinship)[8]

(a) **Background, Tiospaye, and Tiwahe**

(1) The root of Lakota social structure is the tiospaye—extended family. Tiospaye are comprised of tiwahe, immediate families, as well as individuals adopted through formal ceremony. Equality is a prevailing principle of tiospaye life. Responsibilities are dispersed throughout the tiospaye and no one is above the laws. Social classes do not exist and leaders maintain prominence only insofar as they carry out the wishes of the people. Historically, tiospaye were self-sufficient and life revolved around them. However, federal policies and initiatives that accompanied reservation life promoted the assimilation of the Lakota into mainstream Anglo-American culture and have led to a loss of some of the strengths of the tiospaye lifestyle.

(2) Among the strengths of traditional tiospaye life and the strong emphasis on kinship was that children never really became orphans. Upon birth, they had many mothers, fathers, brothers, and sisters. Thus, even though children might lose their natural parents, relatives stepped forward and assumed parental responsibilities. Furthermore, kinship customs minimized violence, conflicts, and disputes within the tiospaye. Few individuals would consider causing trouble among the people, knowing of the consequences they would face from disrespecting relatives. Kinship customs in the historical tiospaye, with few exceptions, promoted a peaceful and harmonious life.

(b) **Awareness of Tradition Necessary for Service Provision**

(1) Acculturation and assimilation occurred in the contact between the Western Europeans and the Oyate of the Oceti Sakowin. As a result, contemporary reservation life represents a blend of Anglo-American ethos and traditional Lakota values. Everyone has adopted Anglo ways to a certain extent, but some have done so more than others. Moreover, institutions that serve the people operate primarily on Western European methods and concepts. Programs that impose these ways on the people, especially traditional people, encounter numerous obstacles. The people resent being subjected to practices that contradict their way of life. Hence programs are not as effective as they should be, in delivering services to the people.

[8] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

(2) Since about the late 1960s, the people have been reviving their traditions. They are positioning themselves to take back control over their lives. In order to survive and to be effective, programs that serve the people need to revise and adapt their methods to the traditional ways of the people. To do so, however, organizational stakeholders must first seek knowledge about the traditional way of life.

(3) In traditional tiospaye life, kinship determines how people talk to one another, how they interact, and how they behave around one another. Central to the work of programs that serve the people is to understand how traditional Lakota communicate. How effective service providers are in helping the children, tiwahe, and tiospaye depends on how effectively they communicate with them. Thus programs must understand traditional Lakota kinship and its rules for communication and interaction. Then programs must incorporate kinship customs into the services they provide and the means of providing those services. Programs that reinforce traditional customs will be far more effective than those that impose contradictory standards and practices.

(4) Kinship also holds strict rules for how traditional Lakota talk to one another, and how they interact. Traditional Lakota refer to their relatives by their relationship, rather than by their given names. Among certain relatives, respect is heightened to the point where special customs are observed. One such custom applies to the relationship between a son-in-law and his mother-in-law, and between a daughter-in-law and her father-in-law. A son-in-law does not communicate directly with his mother-in-law. Furthermore, they avoid direct eye contact, refrain from being in close proximity to one another, and shun being alone together. The same relationship applies between a daughter-in-law and her father-in-law.

(c) **Elders**

(1) The first important consideration in traditional kinship is age. We often hear of "respect your elders." Elders hold a special place and status in traditional Lakota society. They are revered for their knowledge and wisdom, which they have acquired through lifelong experiences and learning. They are looked upon as the foundation of tiospaye life because they provide the guidance and direction needed by the people to endure from generation to generation.

(2) Children are taught at an early age to respect their elders. They are also taught to know and to help their relatives. These teachings have a practical application of precluding intermarriages, but are mainly in keeping with the natural laws of respect and generosity. Elders are teachers and counselors in traditional Lakota life. Children are often sent to them for Wowahokunkiye, lecturing or teaching. This is done particularly when children misbehave or need help. Elders are also called upon to mediate disputes and to help keep peace and harmony within the tiospaye.

(3) In interactions among tiospaye members, preference is always given to elders. For example, in asking for assistance from a tiwahe or tiospaye, we

ordinarily work through the eldest members. We may ask the younger people, but, in most cases, they would need to confer with the elders anyway before our request is either granted or denied. Furthermore, in gatherings, such as meetings, preference is always given to the eldest individuals present.

(4) They are called upon for the wocekiye (prayer) and woiyaksape (words of wisdom) which always come first in a meeting. Elders always speak first, eat before others, and are made to feel comfortable until the gathering is concluded. If younger people are going to precede elders in any way, such as in speaking, it must be done with the permission or acknowledgment of the elders. In traditional Lakota society, we always give preference to individuals who are older than we are regardless of our relationship to them.

(d) **Addressing Relatives**

Males and females use different terms in some cases to refer to the same relative. For example, a male and female have a cousin named Jake. The male would refer to him as Tahansi or Tahansi Jake. The female would refer to him as Sicesi or Sicesi Jake. We must distinguish between male and female kinship terms in referring to our relatives. Otherwise, we might embarrass ourselves and our relatives by using a term reserved for the opposite gender. This is one of the reasons we are taught at an early age to know our relatives. We need to know them in order to refer to them and to address them in the proper way. By using the proper kinship terms in addressing our relatives, we command a great deal of respect from them. Children and young people who address their relatives by the appropriate kinship terms are admired because they reflect a proper upbringing.

(e) **Making Relatives**

(1) Tiospaye kinship also goes beyond bloodlines. Individuals are adopted into tiospaye through formal ceremony. Waliyacin means the prelude to the making of relatives; it means that individuals and their families make a commitment to being related which begins the necessary preparations for formal ceremony. The ceremony for making relatives is Hunkapi; individuals may also choose, however, to make relatives through a pipe ceremony and/or gift giving. Women who make relatives, such as taking on a sister, call the ceremony Sa Wicayapi. Ceremonies for making relatives are purposeful and elaborate. Spirituality is at the root of making relatives; individuals commit themselves before their tiwahe and tiospaye, and before Wakan Tanka, to be related from that time on.

(2) In the case of children, the making of relatives is a way for adults to provide a home for orphans, or children who have been abandoned. A father takes on a new son, or a mother a new daughter through formal ceremony. Once parents adopt children in this way, they treat them as they do their own children. Moreover, they acquire all the rights of kinship afforded other children in the tiospaye.

§402.2 Lena Tuwepi He/Hwo (Traditional Lakota Definitions)

(1) Oyate ("people"): The Lakota People.

(2) Tiospaye ("extended family"): The root of the Lakota social structure. Tiospaye are comprised of the immediate families of brothers and sisters, their descendants, and relatives adopted through formal ceremony.

(3) Tiwahe ("family"): A family unit resulting from Hasanipi (a union or partnering of a man and a woman) to raise children and to live according to the laws, ceremonies, and customs of the people.

(4) Wakanyeja ("child"): A sacred gift from Tunkasila, or Wakan Tanka (the Great Spirit) conceived by the union of a man and a woman. Spirits conduct ceremonies in Nagiyata (the spirit world) to prepare for the child's entry into earth. Children are given a vision or role for their life on earth. Children are pure and have special powers until around the age of puberty.

§402.3 Wasicu Woiwanke (General Definitions)

(33) **Extended Family Member**: An adult relative of a child who has not been deemed by a court of competent jurisdiction to be a danger to the child, including:

(A) The paternal and maternal grandfather and grandmother;

(B) Siblings of the grandparents;

(C) Father and mother;

(D) Paternal and maternal uncle and aunt;

(E) Brother and sister;

(F) The spouses of persons listed in (A) through (E);

(G)Any adult person legally adopted in (A) through (E); and

Any adult member of the child's tiospaye, or other adult person adopted by the child's tiospaye as a relative through a formal ceremony.

Section 401—Background and General Matters

§401.4 Purpose and Construction[9]

The Child and Family Code shall be liberally interpreted and construed to fulfill the following expressed purposes:

(1) To provide for the welfare, care and protection of the children and families within the jurisdiction of the Oglala Sioux Tribe;

(2) To preserve the unity of the tiwahe and tiospaye, separating the child from his or her parents, tiwahe and/or tiospaye, only when necessary;

[9] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

(3) To take such actions that will best serve the spiritual, emotional, mental, and physical welfare of the child;

(4) To prevent the neglect, abandonment, and/or abuse of children;

(5) To secure the rights and ensure fairness to the children, parents, guardians, custodians and other parties who come before the OST (Oglala Sioux Tribe) Children and Family Court under the provisions of this Code;

(6) To provide procedures for intervention in, and/or transfer from, state court regarding Indian children or for intervention in, and/or transfer from, other tribal courts regarding Indian children to the OST Children and Family Court;

(7) To recognize and reinforce the tribal customs and traditions of the Oglala Lakota Oyate regarding child-rearing;

(8) To preserve and strengthen children's cultural and ethnic identities; and

(9) To provide services and cultural support to children and families to strengthen and rebuild the Oglala Lakota Nation.

§401.5 Oyate Ta Woope-Traditional Laws to Govern Decisions Effecting Children

(a) This Code reincorporates familial practices retained, sometimes even unknowingly, by our people. We have retained many traditional practices in spite of a history of attempts to outlaw or prevent the practice of our culture. These practices are rooted in our history and our language, and they arose naturally over a long period of time or as gifts from Wakan Tanka to aid in harmonious living with each other and our natural world.

(b) The following traditional laws shall be considered and reinforced where the future of a child is decided or influenced, including in processes governed by this Code. Approximate English translations are provided, but the Lakota terms shall govern:

(1) Wocekiye ("faithfulness")—To believe in and pray to Tunkasila, or Wakan Tanka—the Great Spirit—as the supreme being and power, and as the creator of all that is. Wakan Tanka gave the people seven sacred ceremonies as means of cleansing themselves and seeking guidance and direction from the Great Spirit. The ceremonies, in the order they were given to the people, are: (i) Inipi (purification); (ii) Hanbleceyapi (seeking a vision); (iii) Wiwangwacipi (Sun dance); (iv) Hunkapi (making of relatives); (v) Nagi Gluhapi (keeping of the spirit); (vi) Isnati Awicalowanpi (womanhood ceremony); (vii) Tapa Wankayeyapi (throwing of the ball).

(2) Wowacinksape ("wisdom")—To be sound in mind and to acquire the knowledge necessary to make proper and effective decisions for the well-being of the people.

(3) Wonagiksape ("spirituality")—To be sound in spirit and to live according to the laws, direction, and guidance of Tunkasila.

(4) Wowacintanka ("fortitude")—To exercise self-control and discipline and to have the strength of mind to endure pain and adversity.

(5) Wowaunsila ("generosity")—To look after the well-being of others, and to share one's knowledge and materials so that others may prosper.

(6) Wawoyuonihan ("respect")—To respect oneself and the rights, beliefs, and decisions of others.

(7) Wowahokunkiye ("guidance and counseling")—To advise, counsel, and guide others in the proper ways and beliefs of the people, especially the youth.

Section 403—Children's and Family Rights[10]

§403.1 Wakanyeja Ta Wowasake (Traditional Children's Rights)

(a) All children have the rights set out in subsection (b), and all decisions concerning children shall be made in consideration and furtherance of these rights. By definition, these rights are in the best interests of the children.

(b) All children have a right to:

(1) a mother (Ina);

(2) a father (Ate);

(3) identify with the traditional way of life (Lakol wicoh'an);

(4) learn and speak his or her language (Lakol Iyapi);

(5) a family (Tiwahe na tiospaye);

(6) know their relatives (Wotakuye);

(7) know the traditional laws, customs, and ceremonies of the people; and

(8) live according to and to practice the traditional laws, customs, and ceremonies that govern the people.

§403.2 Tiwahe Na Tiospaye Ta Wowasake (Traditional Family Rights)

(a) Largely because of their primary role in taking care of the children, tiwahe and tiospaye groups also have certain rights as set out in subsection (b). By definition, these rights are in the best interests of the tiwahe and tiospaye, and in turn they are therefore in the best interests of the children for whom the groups care.

(b) Tiwahe and tiospaye have a right, and corresponding responsibilities, to:

(1) Wicozani—to make choices and decisions to live a healthy and prosperous life according to the traditional laws, customs, and ceremonies;

[10] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

(2) Igluhapi—to make choices and decisions to establish economic, political, educational, and cultural self-sufficiency, and to maintain privacy according to the traditional laws, customs, and ceremonies;

(3) Woope Gluhapi—to live and function according to the traditional laws, customs, and ceremonies; and to protect and nurture such laws, customs, and ceremonies;

(4) Woitancan—to select and designate leaders to serve the people and to promote the common good according to the traditional laws, customs, and ceremonies; and

(5) Woilake—to select and designate such official officers and workers as the tiospaye deem necessary to serve the people and to promote the common good according to the traditional laws, customs, and ceremonies.

Native Village of Barrow Iñupiat Traditional Government Tribal Children's Code
4-1 General Provisions
4-1-1 Short Title; Purpose and Construction; Policy

4-1-1 B. Purpose and Construction[11]

The Native Village of Barrow Iñupiat Traditional Government ("NVB Tribe" or "Tribe") hereby establishes the following procedures to protect the best interests of children, and the future of the Tribe and its customs and culture, as authorized by the Constitution of the NVB Tribe. All provisions of this Code shall be liberally construed in order to give effect to the following purposes with regard to child welfare:

(1) Protect the best interests of children, prevent the unwarranted breakup of families, maintain the connection of children to their families, their community and the Tribe, and promote the stability and security of the Tribe by establishing tribal standards for the conduct of legal proceedings involving children;

(2) Foster cooperative intergovernmental relations between the Tribe and the State of Alaska, and other states and tribes, with regard to the welfare of children and families;

(3) Provide child welfare services to children and families that are in accord with the laws, traditions, and cultural values of the Tribe; and

(4) Preserve the opportunity for children to learn about their culture and heritage, and to become productive adult members of the NVB Tribe community, by experiencing their culture on an ongoing basis.

[sections omitted]

4-3 Responsibilities and Rights Regarding Children

[11] This Code is on file with the Tribal Law and Policy Institute.

4-3-1 Rights of Children

4-3-1 A. Right to Life[12]

A child has an inherent right to life, survival, and development, and the right to a standard of living adequate to the child's physical, mental, spiritual, moral, and social development and reflective of the traditions and cultural values of that child's people. This right includes the right to nutrition, clothing, shelter, nurturing, and appropriate discipline.

4-3-1 B. Right to Identity

A child has the right from birth to acquire and form an identity, including name, tribal affiliation, language, and cultural heritage. A child has the right to learn about and preserve his identity throughout his life, including the right to maintain ties to his birth parents, his extended family, and his village. A child has the right to learn about and benefit from tribal history, culture, language, spiritual traditions, and philosophy.

4-3-1 C. Right to Protection

A child has the right to be protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment, or exploitation, including sexual abuse, while in the care of parents, extended family members, or any other custodian. A child has the right to be free from torture or other cruel, inhuman, or degrading treatment or punishment. A child has the right not to face capital punishment or life imprisonment without possibility of release.

4-3-1 D. Right to Health

A child has the right to enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. Mentally or physically disabled children have the right to enjoy a full and decent life in conditions which ensure dignity, promote self-reliance, and facilitate the child's active participation in the community. All children have the right to periodic review of any medical or mental health treatment.

4-3-1 E. Right to Family

A child has the right not to be separated from his parents forcibly or against his will, except when competent authorities subject to judicial review determine that such separation is necessary for the best interest of the child. In case such separation is necessary, a child shall have the right wherever possible not to be separated from other members of his immediate and extended family.

A child temporarily or permanently deprived of his family environment shall be entitled to special protection and assistance provided by the Tribe, which shall strive to ensure continuity in the child's upbringing and the maintenance of ethnic, cultural, religious, and linguistic heritage.

[12] This Code is on file with the Tribal Law and Policy Institute.

4-3-1 F. Right to Education

A child has the right to education, including academic, physical, and cultural teachings, and training on how to safely undertake subsistence activities and other potentially dangerous work.

4-3-1 G. Right to be Heard

A child who is capable of forming his own views has the right to express those views freely in all matters, including judicial proceedings, affecting that child and those views shall be given due weight in accordance with the age and maturity of the child.

4-3-1 H. Right to Due Process

A child has the right not to be deprived of his liberty unlawfully or arbitrarily. Every child deprived of liberty shall the right to challenge the deprivation of liberty and the right to appropriate judicial review. A child shall at all times be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of a person of his age.

4-3 Responsibilities and Rights Regarding Children

4-3-3 Responsibilities and Rights of Extended Family Members

4-3-3 A. Common Responsibility for Children[13]

Extended family members have secondary, common responsibility for the upbringing and development of children in their family. This includes ensuring each child's inherent right to life, survival, and development and to a standard of living adequate to the child's healthy physical, mental, spiritual, moral, and social development and reflective of the traditions and cultural values of that child's people. The best interests of the child shall be their basic concern.

4-3-3 B. Responsibility to Foster Identity

Extended family members are responsible for helping children acquire and form identities, including name, tribal affiliation, language, and cultural heritage.

4-3-3 C. Responsibility to Nurture and Discipline

Extended family members are secondarily responsible for nurturing children and for administering appropriate discipline to children.

4-3-3 D. Responsibility for Protection

Extended family members are responsible for helping to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, torture, or other cruel, inhuman, or degrading treatment or punishment.

[13] This Code is on file with the Tribal Law and Policy Institute.

4-3-3 E. Responsibility to Assist

Extended family members have a responsibility to intervene or assist when necessary to protect a child's rights and well-being, and to ensure the continuity of the child's upbringing and the maintenance of the child's ethnic, cultural, religious, and linguistic heritage.

4-3-3 F. Right to Notice

Any member of a child's extended family currently residing in the Native Village of Barrow has the right to be timely noticed by the court of any judicial or other proceeding involving that child.

4-3-3 G. Right to be Heard

Any member of a child's extended family who comes forward in a timely manner has the right to be heard in any judicial or other proceeding involving that child.

4-3-3 H. Right to Visitation

Any member of a child's extended family has the right to reasonable visitation with that child. This right shall be subject to limitations imposed by the child's parents or by the court if necessary for the best interests of the child.

4-3-3 I. Right to Request a Family Conference

Any member of a child's extended family has the right to request a family conference pursuant to Subchapter 4-5-2 of this Code

---

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.010 Purpose and scope.

The purpose of this code is to protect and cultivate the best future for the children in the Tulalip Tribal community. All departments, employees, volunteers, and agents of the Tribes shall, first and foremost, strive to protect children and to create systems and structures that preserve opportunities for children to learn about their unique culture and heritage and to become productive members of the Tulalip Tribal community.

The Juvenile and Family Code is a family-centered approach that places family as the primary source for understanding the needs and challenges of the child, with the belief that the child is best served in the context of families and that families are best served in the context of their community. Maintaining the child in the home of their natural parents is a major purpose of this chapter.

The scope of this code is to provide guiding principles and best practices to all matters that involve a child with any department, employee, contractor, agent, or the Tribal Court.

Therefore, be it enacted by the Board of Directors (hereafter "Board") of the Tulalip Tribes, pursuant to Article VI, Sections 1(K), (L), (O), and (P) of the Constitution of the Tulalip Tribes, that this chapter shall be the law of the Tribes from the date of Secretarial approval. [Res. 2015-101].

4.05.020 Guiding principles for child welfare.

The Tulalip Tribes endeavors to protect the best interest of Indian children by:

(1) Preventing the unwarranted breakup of families;

(2) Maintaining the connection of children to their families, the Tribes, and Tribal community when appropriate;

(3) Promoting the stability and security of the Tribes by establishing standards for appropriately handling situations involving Tribal children and families in need of services;

(4) Utilization of case management, which allows for and assumes individualized practice to best serve the varying strengths and needs of every child and family; and

(5) Utilization of ongoing assessments and reassessments to provide for the strengths and needs of the child and family.

Should there be any conflict in the application of these principles and the written law, the liberal application of these principles in the context of what is in the best interest of the child shall prevail. [Res. 2015-226; Res. 2015-101].

Tribal Code Commentary

In their definition section, the Oglala Sioux Tribe (OST) provides an important discussion on custom and tradition. Using Lakota terms, the code provides an understanding of family and kinship in Lakota culture. Kinship provides strict rules on how Lakota talk to each other and interact. It also defines responsibilities to each other and to children. The code provides sections on elders, addressing relatives, and making relatives all important in understanding the child's family and extended family in Lakota culture.

The purposes section of the Oglala Sioux's Code highlights not only the importance of providing for the welfare, care, and protection of children and families, but also of preserving the unity of the tiwahe (family) and tiospaye (extended family). Their stated purposes are also to preserve and strengthen children's cultural identities and recognize and reinforce the customs and traditions of the Native Nation.

An additional section of the Oglala Sioux's Code highlights other traditional laws that should be used to govern decisions effecting children, and two other sections define traditional children's rights and traditional family rights.

The Native Village of Barrow also mentions the importance of custom and tradition in its Children's Code and the need to preserve the opportunity for children to learn their culture and heritage. Its code indicates that the village provides child welfare service in accord with its laws, traditions, and cultural values of the Native Nation. It also identifies the rights of tribal children, which include the right to life, protection, identity, health, family, education, due process rights, and be heard.

Responsibilities of extended family members are described in the statute. The responsibilities include the upbringing of the child, fostering identity, protection, and assisting when necessary to protect a child's rights and well-being. A member of the extended family living in Barrow has a right to timely notice and a right to be heard at any judicial hearing involving the child. The family member also has a right to request a family conference.

The Tulalip Tribal Code purposes section of its Juvenile and Family Code focuses on keeping a family together. It promotes the best interest of Native children by preventing unwarranted family breakups and maintaining connection with family. It specifically mentions in its purposes statement the importance of assessing families and children's strengths and needs and addressing those strengths and needs.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Make a list of the challenges that children and families face in your community.
- What is happening to the children and families?
- How has that impacted your tribal community and culture?

STEP 2: Establish a Vision for the Future

- Brainstorm a list of reasons why your tribal government should pass laws that protect children. Consider reasons that reflect the unique cultural and spiritual beliefs of your community.
- What are traditional beliefs on protecting children? What are traditional rights of children? What are the traditional rights of parents? What are the traditional rights of extended family members?
- How do you want the new law or revised law to impact your community?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code. This checklist helps make sure you have considered the major issues, but not all are required.

- Goals of the Children's Code
- Cultural and traditional values and traditions
- Traditional rights of family and children
- Duties and responsibilities of the extended family
- Vision of safety and accountability (child and family)

B. Defining Who Is a Parent, Extended Family Member, and Custodian

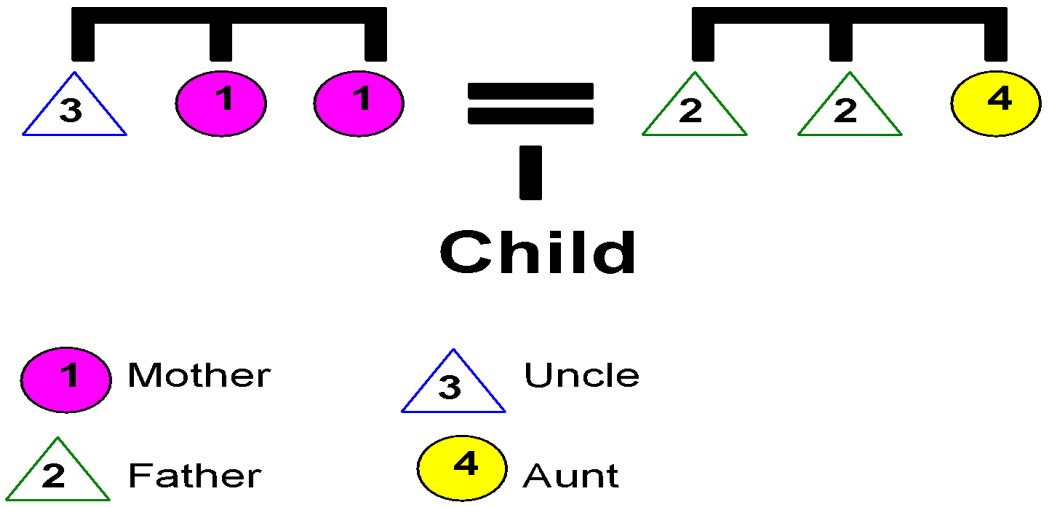
Part B focuses on the definition of a *parent*, an *extended family member*, and a *custodian* in the given community. The definitions become important when considering the rights and responsibilities of each. The definitions may be reflective of tribal custom and community practice.

Tribal children's laws have used the terms *extended family member*, *custodian*, and/or *guardian* to describe persons that are essentially acting as, and who are often recognized as, "third parents" within the culture. There is usually a desire to have the tribal law do the same. We omit a discussion of *guardian* here as that term has specific meaning in Western law and that discussion is handled in Chapter 16.

Under the sample tribal definitions in the following text a parent is either a biological parent or a parent by legal adoption (either traditional or Western adoption). These definitions are careful to exclude unwed fathers where paternity has not yet been established or acknowledged and any parent who has had their parental rights terminated.

Example: Hopi Matrilineage (A child has multiple mothers)

> Within different cultures and languages there are "kin terms," or words for certain kin—for example, in English, the word "mother." In some Native Nations the word for "mother" in the Native language is applied to more than just the biological mother. For example, among the Hopi, the same word used for biological mother is also applied to her sisters (a child's maternal aunts). See the family diagram in the following text where the child appears to have two "mothers" (two number ones). This means that members of this culture may equate the roles, duties, and responsibilities of mothers and their sisters (a child's maternal aunts). This is a useful observation in drafting Children's Code provisions. Should, for example, mothers and their sisters be given the same notice and rights in a children's court proceeding when any one of their children is involved?



The definition of *extended family member* includes a list of persons who may or may not have legally enforceable rights, privileges, and/or duties and obligations with respect to children under the tribal code, depending upon how it is drafted. Ideally, this list is tailored to the cultural understandings of who should be considered a relative to the child with (1) rights and privileges, and (2) duties and obligations owed the child. Persons standing as "third parents" (persons who are like parents) with respect to the child may be singled out from "extended family" as having greater rights, privileges, duties, and obligations.

Selected Tribal Codes

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part A General and Dependency Provisions
Section 402—Definitions

§402.1 Wotakuye (Lakota Kinship)[14]

(a) Background, Tiospaye, and Tiwahe

(1) The root of Lakota social structure is the *tiospaye*—extended family. Tiospaye are comprised of *tiwahe*, immediate families, as well as individuals adopted through formal ceremony. Equality is a prevailing principle of tiospaye life. Responsibilities are dispersed throughout the tiospaye and no one is above the laws. Social classes do not exist and leaders maintain prominence only insofar as they carry out the wishes of the people. Historically, tiospaye were self-sufficient and life revolved around them. However, Federal policies and initiatives that accompanied reservation life promoted the assimilation of the Lakota into mainstream Anglo-American culture and have led to a loss of some of the strengths of the tiospaye lifestyle.

(2) Among the strengths of traditional tiospaye life and the strong emphasis on kinship was that children never really became orphans. Upon birth, they had many mothers, fathers, brothers, and sisters. Thus, even though children might lose their natural parents, relatives stepped forward and assumed parental responsibilities. Furthermore, kinship customs minimized violence, conflicts, and disputes within the tiospaye. Few individuals would consider causing trouble among the people, knowing of the consequences they would face from disrespecting relatives. Kinship customs in the historical tiospaye, with few exceptions, promoted a peaceful and harmonious life.

§402.3 Wasicu Woiwanke (General Definitions)

[sections omitted]

(29) **Custodian**: An individual who has physical custody and control of a child, or under tribal law or custom, or to whom temporary physical care, custody, and control has been voluntarily transferred by the parent of such child.

§402.3 Wasicu Woiwanke (General Definitions)

[sections omitted]

(33) **Extended Family Member**: An adult relative of a child who has not been deemed by a court of competent jurisdiction to be a danger to the child, including:

[14] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

(A) The paternal and maternal grandfather and grandmother;

(B) Siblings of the grandparents;

(C) Father and mother;

(D) Paternal and maternal uncle and aunt;

(E) Brother and sister;

(F) The spouses of persons listed in (A) through (E);

(G) Any adult person legally adopted in (A) through (E); and

(H) Any adult member of the child's tiospaye, or other adult person adopted by the child's tiospaye as a relative through a formal ceremony.

[sections omitted]

§402.3 Wasicu Woiwanke (General Definitions)

(65) **Parent**: The biological mother or father of a child or any person who has lawfully adopted a child, including adoptions under tribal law or custom. This does not include the unwed father where paternity has not been acknowledged or established.

Native Village of Barrow Iñupiat Traditional Government Tribal Children's Code
Section 4-2 Definitions[15]

[sections omitted]

14. **Custodian**: Any person other than a parent who is primarily responsible for a child's care, including guardians and extended family members.
15. **Extended Family Member**: Any adult sibling, grandparent, aunt, uncle, great aunt, great uncle, or cousin of the child, including adoptive adult siblings, grandparents, aunts, uncles, great aunts, great uncles, and cousins. Extended family members have certain rights and responsibilities with respect to children.
26. **Parent**: Any person having parental rights over a child, whether by birth or adoption.

---

[15] This Code is on file with the Tribal Law and Policy Institute.

Hopi Indian Tribe, Law and Order Code (Last Updated 1991)
The Hopi Children's Code

Chapter I Definitions

[sections omitted]

17. **Extended Family**: Ascending blood relationship to the child. Clan relationship may be considered should blood relationship be exhausted prior to placement.

25. **Parent**: A natural or adoptive parent but not a person whose parental rights have been terminated.

Confederated Tribes of the Grand Ronde Community of Oregon Tribal Ordinances
Chapter 301 Children and Families Ordinance (Amended 6/03/15)

Part I General Provisions

[sections omitted]

(e) **Definitions**

(8) **Custodian**. Any person who has physical custody of a child under Tribal law or state law, or to whom physical care, custody, and control has been transferred by the child's parent, and who is providing food, shelter, and supervision to the child.

(9) **Extended Family**. Any person who is related to the child by blood or marriage, or any person who can establish a significant familial-type relationship to the child.

(21) **Parent**. Includes the child's mother and father, but does not include persons whose parental rights have been terminated.

(23) **Significant Familial-Type Relationship**. A long-term and ongoing personal relationship with a child, in which an individual:

(A) Has or had physical custody of the child or reside in the same household as the child;

(B) Supplied or otherwise made available to the child, food, clothing, shelter, and incidental necessities, and provided the child with necessary care, education, and discipline; and

(C) Through interaction, companionship, interplay, and mutuality, helped fulfill the child's psychological needs for a parent, as well as the child's physical needs.

Tribal Code Commentary

The Oglala Sioux Tribe's (OST's) definition of *parent* mirrors the definitions in ICWA.[16]

> **§ 1903 Definitions**
>
> For purposes of this chapter, except as may be specifically provided otherwise, the term
>
> (9) "**parent**" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established.

The definition of extended family specifically defines who the OST traditionally considers extended family and includes any adult member of the child's tiospaye. Tiospaye is described in the definitions section. The definition of *custodian* is quite broadly defined as an individual with physical custody and control or one to whom custody has been temporarily transferred by a parent.
The Village of Barrow defines *parent* and *custodian* much the same as the OST, and provides its own Native Nation's definition of *extended family*, in alignment with its traditions.

The Grande Ronde Community provides broad definitions of *custodian* and *significant familial-type relationship*, which should be sufficiently broad to cover what may be considered family in the Grande Ronde Community. Likewise, the definition of *extended family* is designed to cover any traditional family relationship.

[16] 25 U.S.C. §§ 1901-63.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Do tribal members today expect "Western parental rights"?
- How does your current code define the terms?
- Discuss whether your community's expectations are changing from traditional notions of family to that of the nuclear family with Western parental rights expectations.
- What are your traditional definitions of *parent*, *custodian*, and *extended family*?

STEP 2: Establish a Vision for the Future

- How do you want to define *extended family member*, if these members are to have important responsibilities with respect to children?
- Should certain extended family members be excluded based on the potential harm they may cause to a child? Using what criteria and who should decide? Should certain members have greater rights than others?
- How do you want to define *custodian* and *parent*?
- Would a term similar to the Grande Ronde Community that defines a significant familial-type relationship be consistent with your customs and traditions?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

Discussion Points

Western Parental Rights—This includes the concept that "natural parents" or "birth parents" have "fundamental liberty interests" that must be afforded "due process" and be protected from "undue governmental interference."

Natural Parent—The idea that because a child is biologically the offspring of only one mother and one father then the child can only have two parents.

Fundamental Liberty Interest of Parents—Natural parents, where minimally fit, have near absolute responsibility for the child's welfare. Natural parents have a fundamental right to conceive, rear their children, and maintain parent-child relations without "undue governmental interference" in their choices. These interests are "far more precious than property rights."

Due Process—The Indian Civil Rights Act (ICRA) right of all tribal members and people within tribal lands to be free of tribal government denial of their freedom of liberty without a compelling reason and without fair tribal process. Practically, due process requires that a natural parent get notice and an opportunity to be heard in all proceedings where the tribe interferes and makes decisions about their children. Due process also requires that tribes follow the provisions in their tribal codes.

C. Tribal Court Recognition and Application of Custom and Tradition

This section provides a process through which the tribal court recognizes and applies relevant custom, tradition, and/or generally accepted practice. Typically, these methods include:

1. A tribal judge taking *judicial notice* or simply stating what he or she understands to be generally accepted and widely known norms or practices within the community.
2. A judge allows parties to call traditional expert witnesses to testify as to the nature of a custom, tradition, or generally accepted practice.
3. A judge relies upon a written or other documentation of relevant custom.
4. The tribal code establishes a custom-law committee (with appointed elders or culture-bearers) that may hear and answers questions of custom certified from the tribal judge.

The tribal code provisions that follow exemplify each of these methods. However, some reservations may have more than one tribe within their jurisdiction that has different cultures and traditions, which must be considered. Also, it is possible that there is disagreement of tradition or custom from culture experts. Reviewing credentials and expertise and arriving at a decision relative to custom or common practice is not always easy.

Selected Tribal Codes

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part A—General and Dependency Provisions
Section 412—Tiospaye Nawicakicijinpi (Tiospaye Advisory Council) Established

§412.1 Background, Name, Purpose (Tiospaye Advisory Council)[17]

(a) **Background**

(1) The Child and Family Code, Wakanyeja Na Tiwahe Ta Woope, is grounded in traditional Lakota knowledge. It is important that individuals responsible for enforcing and interpreting the Code have a sufficient understanding of the traditional Lakota concepts, protocols, and definitions that are contained in this Code.

(2) The Tiospaye Nawicakicijinpi, Tiospaye Advisory Council, is hereby established to ensure that these concepts, protocols, and definitions are properly understood, enforced, and interpreted. The Advisory Council shall consist of Oglala tribal members who have demonstrated knowledge of all aspects of traditional Lakota life—language, history, culture, philosophy, and spirituality.

(3) The Advisory Council shall answer certified questions from the Children and Family Court and act as an advisory board to judges, attorneys, and other advocates involved in child and family issues. The Advisory Council shall also be available for consultation with other personnel involved in child and family issues, such as CPS Workers, DPS (Department of Public Safety) Officers, and to Tiospaye Interpreters and to tiospaye members. The Council shall also act as intermediaries between and among the Children and Family Court, other programs involved in child and family issues, and tiwahe and tiospaye.

(b) **Name**—The initial name of the advisory board set forth herein shall be Tiospaye Nawicakicijinpi, Tiospaye Advisory Council. The advisory board shall be empowered to change the name of their group from time to time as they might deem appropriate.

(c) **Purposes**

(1) The Tiospaye Nawicakicijinpi, Tiospaye Advisory Council, shall be an apolitical, advisory group that has no delegated power or authority to establish or change the Child and Family Code or any portions thereof. The Advisory Council shall supplement and reinforce rather than supplant the enforcement and interpretation of the Code. As an advisory group, however, the Advisory Council shall be empowered to make recommendations that may result in changes to the Code, providing the recommendations are channeled through the appropriate decision-making,

[17] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

administrative, and governance structures and processes of the Tribal Court and the Tribal Council.

(2) The Advisory Council also shall be empowered to issue official opinions on decisions of the Children and Family Court if the Council feels that such decisions are inconsistent with the provisions of the Child and Family Code. Such opinions shall be submitted to the Chief Judge of the Tribal Court, the Supreme Court, and to the members of the Judiciary Committee. The following purposes delineate the work of the Advisory Council:

(A) To promote, sustain, and support the Child and Family Code, Wakanyeja na Tiwahe Ta Woope, and all provisions thereof;

(B) To answer certified questions from the Children and Family Court judge;

(C) To promote, sustain, and support a Lakota perspective in all aspects of enforcing and interpreting the Child and Family Code, Wakanyeja Na Tiwahe Ta Woope, and all provisions thereof;

(D) To advise and counsel judges, attorneys, and other advocates involved in child and family issues on matters pertaining to the enforcement and interpretation of the Child and Family Code, particularly with respect to the Lakota concepts, protocols, and definitions contained in the Code;

(E) To advise and counsel other personnel involved in child and family issues, such as CPS Workers, DPS Officers, and Tiospaye Interpreters and tiospaye members, on matters pertaining to the enforcement and interpretation of the Child and Family Code, particularly with respect to the Lakota concepts, protocols, and definitions contained in the Code;

(F) To serve as intermediaries and/or interpreters in any and all matters arising of the enforcement and interpretation of the Child and Family Code, upon the request of court personnel, other program personnel involved in child and family issues, tiwahe, or tiospaye;

(G) To serve as mentors to court personnel and other program personnel involved in child and family issues for the purposes of orienting and educating such personnel to the Lakota concepts, protocols, and definitions contained in the Oglala Sioux Tribe Child and Family Code; and

(H) To provide training, education, and orientation on the Lakota concepts, protocols, and definitions contained in the Child and Family Code to court personnel, other program personnel involved in child and family issues, tiwahe, and tiospaye.

§412.2 Questions Certified from Children and Family Court

(a) If the Children and Family Court judge cannot take judicial notice of custom or tradition or if a question or dispute arises as to the existence or substance of custom or tradition, the judge shall certify that question to the Tiospaye Nawicakicijinpi, Tiospaye Advisory Council.

(b) The Tiospaye Advisory Council shall resolve questions or disputes about the customs and traditions certified to them by a Children and Family Court judge. Questions about customs or traditions shall be reviewed by the Tiospaye Advisory Council de novo. The Council shall not decide questions of fact or relevancy.

(c) The Tiospaye Advisory Council shall issue written findings of custom for each question of custom or tradition that comes before it. One copy of these findings shall be transmitted to the Children and Family Court for use in its proceedings and a second copy shall be maintained in a file for future reference by the Council.

(d) A decision of the Tiospaye Advisory Council shall not be binding as precedent until it is incorporated into an order of the Children and Family Court.

§412.3 Ongoing Compilation of Custom Law Treatises

The Tiospaye Advisory Council shall engage in ongoing documentation of custom and tradition in the following areas and in any other areas deemed necessary and funded by Tribal Council:

(1) How boys and girls are raised;

(2) How property is distributed, transferred, and inherited; and

(3) Roles and duties in marriage.

This documentation shall be preserved in a searchable archive, where possible and funded by Tribal Council, or on audio or video tapes or in some other digital form, and in written transcripts.

Native Village of Barrow Iñupiat Traditional Government Tribal Judicial Code
3-5 Trial Court

3-5 C. Judicial Notice of Custom[18]

The court may take judicial notice of Iñupiat custom or tradition only if the court finds the custom or tradition to be generally known and accepted within the NVB Tribal community. Parties need not plead and prove the existence of a custom when the court has taken judicial notice of it. The taking of judicial notice shall not dispense with a required showing of relevancy.

[18] This Code is on file with the Tribal Law and Policy Institute.

3-5 D. Notice and Pleading of Custom

A party who intends to raise an issue of Iñupiat custom or tradition shall give notice to the other party and the court through its pleading or other reasonable written notice as soon as its relevance becomes apparent. The proponent of custom or tradition must then plead it to the court with sufficient proof to establish by a preponderance of the evidence that the custom or tradition exists and that it is relevant to the issue before the court. The relevancy of Iñupiat custom or tradition as to any legal matter shall not be presumed.

3-5 E. Certification of Custom Questions

If the judge cannot take judicial notice of custom or tradition or if a question or dispute arises as to the existence or substance of custom or tradition, the court shall certify that question to the Elders Council.

3-5 F. Right of Parties to Petition for Recertification

Where a question of custom or tradition law has been decided in a previous case, any party may petition the court to recertify that question to the Elders Council under the facts of the new case.

[sections omitted]

3-7 Elders Council

3-7 A. Establishment of Elders Council[19]

An Elders Council is hereby established to resolve questions or disputes about the customs and traditions of the Iñupiat. The Elders Council shall decide such questions only when certified to them by a Tribal Court judge pursuant to Section 3-5 E or 3-5 F of this Code. Questions about customs or traditions shall be reviewed by the Elders Council de novo. The Elders Council shall not decide questions of fact or relevancy.

3-7 B. Composition

The Elders Council shall be comprised of three (3) elders appointed by the Tribal Council.

3-7 C. Written Findings

The Elders Council shall issue written findings of custom for each question of custom or tradition that comes before it. One copy of these findings shall be transmitted to the Trial Court and a second copy shall be maintained in a file for future reference by the Elders Council.

3-7 D. Effect of Decision

A decision of the Elders Council shall not be binding as precedent until it is incorporated into an opinion of the Tribal Court.

[19] This Code is on file with the Tribal Law and Policy Institute.

3-7 E. Custom Law Treatises

The Elders Council shall engage in ongoing documentation of custom and tradition in the following areas and in any other areas deemed necessary and funded by Tribal Council:

(1) How boys and girls are raised;

(2) How property is distributed, transferred, and inherited; and

(3) Roles and duties in marriage.

This documentation shall be preserved in a searchable video archive, where possible and funded by Tribal Council, or on audio tapes and video tapes, and in written transcripts.

Tribal Code Commentary

The Oglala Sioux describe numerous customs and traditions in their code, but they also provide for the establishment of an advisory council, the Tiospaye Nawicakicijinpi, whose purpose is to ensure that the code is properly understood, enforced, and interpreted. The advisory council consists of tribal members, who have knowledge of all aspects of traditional Lakota life—language, history, culture, philosophy, and spirituality. The advisory council responds to certified questions from the Children and Family Court and acts as an advisory board to judges, attorneys, and other advocates. It is also available for consultation by other personnel involved in child or family matters. The advisory council is given additional authority to make recommendations on changes to the code and to issue official opinions on decisions of the Children and Family Court if it feels a decision is inconsistent with the code. The council is obligated to provide education and orientation on Lakota concepts, protocols, and definitions in the Child and Family Code to court and program personnel.

The formal process to certify a question to the Tiospay Nawicakicijinpi is provided in the code. When a Children and Family Court judge cannot take judicial notice of a custom or tradition or a tradition is disputed, the judge shall certify that question to the advisory council. The council issues written findings of custom for each question or tradition and transmits them to the court for use in its proceedings. It does not deal with questions of fact or relevancy. The council documents custom and tradition and preserves it in a searchable archive.

The Native Village of Barrow Code instructs the judge to take judicial notice of Inupiat custom or tradition that is generally accepted within the community. When a party intends to raise custom or tradition as an issue in a case, notice is required to the opponent. If the judge cannot take judicial notice of a custom, as it is not one considered generally accepted, the court can certify a question to the Elders' Council. The Elders' Council is established to resolve questions or disputes about customs. It consists of three elders appointed by the tribal council. The Elder's Council is required to issue written findings of custom for each question certified, with one copy to the court and one copy maintained by the Elders' Council. The Elders' Council is required to maintain ongoing documentation of custom and tradition in the following areas: how boys and girls are raised; how property is distributed, transferred, and inherited; and the roles and duties of marriage.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Is there a group or status of people in your community that are knowledgeable of traditions and general practice?
- Is there a group of people that are generally consulted on questions of traditions?
- Is there a method that the Children's Court currently uses to obtain information on a Native Nation's traditions or general practices? If so, is that working adequately? Are there suggestions for improvement?
- In what situations has there been a need to examine traditions or generally accepted practices?

STEP 2: Establish a Vision for the Future

- How do you ensure that your traditions are accurately described to the court?
- Who do you want to be describing the traditions of your community? Is there more than one Native Nation's tradition that needs to be addressed? How will they be accessed?
- What situations do you believe may need to be addressed in the future?
- When do you think it appropriate for the court to consult with your local tradition experts?
- How many of your traditions do you want to actually describe in your code?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

D. Training Service Providers on Tribal History, Tradition, and Generally Accepted Practices

American Indian and Alaska Native (AI/AN) communities vary substantially in culture and geography. There are common features in many Native Nations' history as they share the consequences of common destructive federal policies including forced relocation, forced removal of their children to be educated in boarding schools, and prohibition of spiritual and cultural practices. The removal of generations of children over time has disrupted once well-established and venerable parenting practices. Children and their families experience historical trauma in addition to the current trauma they may be experiencing.

Native Nations in search of qualified professionals to work in their systems may find well-meaning educated individuals, but these are people who have no knowledge of tribal life, specifically the culture and history of the tribal community in which they work. Understanding history, culture, and traditional practices relative to raising children is vital to understanding the situation impacting a child and the solutions to problems that may exist for a child. All service providers working in your community should be knowledgeable about your communities, culture(s), and history.

Some agencies, programs, and Native Nations provide comprehensive orientation and training of their history and culture and require orientation for new employees through their personnel policies. Other Native Nations like the Oglala Sioux have incorporated many cultural traditions into their code and require a thorough knowledge of the traditions codified.

Selected Tribal Codes

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part C. Agency Compliance Provisions
Section 416—Compliance of LOWO Office, Divisions and Collaborating Organizations

§416.1 Background and Purpose[20]

(a) It is common knowledge that service providers for children and families on the Pine Ridge Reservation operate for the most part on Western European methods and concepts. This is happening despite the fact that many of the Oglala Lakota tiospaye have been reviving their traditions and customs, and have called for culturally based programs and services. The passage of the Child and Family Code, Wakanyeja Na Tiwahe Ta Woope, which is based on traditional Lakota knowledge, necessitates that service providers now honor the vision of the tiospaye. It is imperative that service providers and their employees and representatives have a sufficient understanding of the traditional Lakota concepts, protocols, and definitions that are contained in this Code.

(b) Requirements for compliance are hereby established in this Code to ensure that these concepts, protocols, and definitions are properly understood, enforced, interpreted, and followed in the delivery of services to children and families.

§416.2 Applicability

The requirements for compliance as defined in this section shall apply to any program, office, agency, association, or entity operating on the Pine Ridge Reservation whose business is to enforce, interpret, apply, or comply with the provisions of this Code. The requirements also apply to any program, office, agency, association, or entity operating on the Pine Ridge Reservation that, by the nature of the services they provide, could cause children and families to be subjected to the provisions of this Code. Programs, offices, agencies, associations, or entities shall be held accountable for the requirements of this section if their mission, purposes, services, or identities can be tied to any of the following areas:

(1) Law Enforcement;

(2) Social/Human Services;

(3) Child Protection;

(4) Child Advocacy;

(5) Child Neglect/Abuse;

(6) Domestic Violence;

[20] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

(7) Education;

(8) Foster Care;

(9) Medical Care;

(10) Mental Health Care;

(11) Adjudication; or

(12) Religion/Culture/Spirituality.

§416.3 Means of Compliance

(a) Programs, offices, agencies, associations, or entities shall be expected to comply with the provisions of this Code as defined in this section by initiating the necessary organizational changes and plans using their own resources and at their own expense. Changes and plans shall be directed at adapting the delivery of services to the Lakota concepts, protocols, and definitions contained in this Code. Changes and plans shall be directed also at providing opportunities for staff, board members, volunteers, consultants, and other institutional representatives to develop sufficient knowledge and understanding of the Lakota concepts, protocols, and definitions contained in this Code.

(b) Among the means by which entities shall be expected to comply are, but not limited to the following:

(1) Staff training and orientation;

(2) Board training and orientation;

(3) Training and orientation for volunteers, consultants, and other representatives of the entities;

(4) Restructuring;

(5) Revision of policies and procedures; and

(6) Revision of statements of mission, philosophy, vision, or purposes.

§416.4 Timelines for Compliance

(a) Within 120 days of the enactment of this Code, all programs, offices, agencies, associations, or entities to whom this section of the Code is applicable, shall submit compliance plans to the Children and Family Court. Such plans shall contain in sufficient detail the means by which the entity will come into compliance with the provisions of the Code as defined in this section. The Children and Family Court may require additional or supplementary information or plans from the entity if it finds that the plans are insufficient to meet the requirements for compliance as defined in this section. Entities that are already in compliance with the requirements as defined in this section shall submit a report to the Children and Family Court accordingly.

(b) Entities not in compliance with the requirements as defined in this section shall come into compliance no later than 150 days from the enactment of this Code, as determined by the Children and Family Court.

§416.5 Reporting and Findings of Noncompliance

Any individual or individuals affected directly or indirectly by this Code may report an entity to be out of compliance with the provisions of this Code as defined in this section. A complaint of noncompliance against an entity shall be submitted to the Tribal Court and be handled according to the Court's procedures for civil matters. Any and all such complaints shall be in writing, signed by the complainant or complainants, and notarized.

§416.6 Penalties for Noncompliance

Any entity found by the Tribal Court to be out of compliance with the requirements defined in this section either willfully or through negligence shall be assessed one or more of the following penalties at the discretion of the Tribal Court:

(1) A fine not to exceed $1,000.00 per day until such time that the entity is determined by the Tribal Court to be in compliance;

(2) Suspension of the entity from recognition by the Tribal Court with respect to any of the provisions of this Code. The Tribal Court shall set the period of suspension which shall ordinarily be until such time that the entity comes into compliance; and/or

(3) Reporting of the entity by the Tribal Court for noncompliance to the appropriate governing and/or certifying body or bodies having jurisdiction over the existence and operations of the entity.

Tribal Code Commentary

The Oglala Sioux Code acknowledges that many of the service providers and programs working on the Pine Ridge Reservation operate from Western Europeans concepts and methods. The Nation's desire to develop cultural-based programs and services was key to the passage of the Child and Family Code, which is based on traditional Lakota knowledge. The code requires that service providers have sufficient understanding of the traditional Lakota concepts, protocols, and definitions contained in the code. The requirement applies to all programs or entities operating on the Pine Ridge Reservation whose business is to enforce, interpret, apply, or comply with the Child and Family Code. They list the agencies and programs, which is quite expansive. Programs are required to comply within 120 days of the enactment of the code. The means of educating are not limited to training and orientation for employees, volunteers, and board members. Revision of policies and procedures consistent with the code and revision of mission statements and philosophy are also required. Penalties for noncompliance are listed in the code.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Describe the knowledge of service workers and agencies of tribal customs, traditions, history, and generally accepted practices.
- Is there a need in your community to have agency personnel or others take a class or workshop on tribal customs, history, traditions, and generally accepted practices?
- Do materials exist to teach such a class or workshop?
- Is there currently a tribal law or agency personnel policy that requires training on tribal customs and history of law enforcement personnel, social service agencies, and court personnel within your territory?

STEP 2: Establish a Vision for the Future

- What are the positions that you want to ensure are knowledgeable of your Native Nation's history, customs, and traditions?
- Do you want to require cultural education/orientation or make it available for those interested?
- Discuss the value of placing the requirement in law versus an agency's employment policy.
- Do you want to incorporate your traditions into a statute like the Oglala Sioux did in Pine Ridge or is there a better alternative for you?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

This checklist helps make sure you have considered the major issues, but not all are required.

- Who will be required to receive the training or orientation?
- Who will be providing the training or orientation?
- What will be taught—generally speaking?
- When will the training take place (within 120 days of employment, annually)?
- How will you enforce the requirement?

Additional Resources

Abinanti, Abby, Passports for Native Children: Best Practice Approach for Tribal Advocates Working with Native Children Who Have Suffered Abuse, *Tribal Law and Policy Institute, 2006.*
This suggests an approach to evaluating the needs of the children who enter the child protection system and a context for the evaluation that is culturally consistent with most tribal child-rearing philosophies.

Cruz, Caroline M., Tribal Best Practices: There Are Many Pathways, Presentation, 2015.
This culturally based PowerPoint's objectives are that one gains an understanding of the challenges Native Americans and minorities face with evidence-based practices and develop an understanding of work in process with current culturally validating practices based on evidence for Native American communities.

Echo-Hawk, Holy, Evidence-Based Practices and Minority Families and Consumers, Presentation, 2006.
PowerPoint presented at the 19th Annual Research and Training Center for Children's Mental Health Conference held in Tampa, Florida.

Evensen, Kimber, Pathways to Hope: Healing Child Sexual Abuse, Tribal Law and Policy Institute, 2007.
Guidebook and video that presents the voices of more than forty Native people, many of whom are survivors of child sexual abuse. The Community Facilitator's Guidebook provides a step-by-step process for tribal communities to end silence about child sexual abuse, support child victims, and promote healing of those who suffered childhood abuse.

Grant, Jamie, and Teresa Brown, Cultural Diversity Resource Manual—American Indian and Alaska Native Resource Manual, National Voice on Mental Illness, 2003.
This manual covers the need for AI/AN outreach, the importance of cultural competence and how to develop it, create AI/AN outreach plan, evaluate your efforts, and share your experience with others.

Marcynyszyn, Lyscha A., Stuart Eskenazi, Erin J. Maher, and Peter J. Pecora, Traditions Renewed: The Mille Lacs Band of Ojibwe Improves Its Indian Child Welfare, Casey Family Programs, 2013.
This research chronicle describes how one tribal Nation, the Mille Lacs Band of Ojibwe, came together to address the high number of children placed in non-Native foster care and residential settings through an innovative redesign of its child welfare programs.

National Resource Center for Permanency and Family Connections and the National Child Welfare Resource Center for Tribes, Healing Footsteps: Digital Stories from Two-Spirit/LGBTQ People, online video.
The National Resource Center for Permanency and Family Connections and the National Resource

Center for Tribes partnered with the Two-Spirit community in Minneapolis, Minnesota, to develop these digital stories. These digital stories were created by Lenny, Jason, and Joseph—Two-Spirit people whose lives were impacted by the child welfare system. The term Two Spirit is a universal Native American concept that relates to gender identity and sexual orientation. Generally, the term Two Spirit means that the individual's body houses both a masculine and a feminine spirit. Different Native Nations have different definitions of what it means to be Two Spirit.

Payne, Diane, Tips for Non-Native Medical Providers Working in Alaska Native Communities, Tribal Law and Policy Institute, 2008.
Provides information to assist non-Native medical personnel in responding appropriately to Native children and families when there are allegations or disclosures of child abuse and child sexual abuse.

Payne, Diane, et al., Child Abuse Protocol Development Guide, Tribal Law and Policy Institute and Southwestern Center for Law and Policy, 2003.
Intended to help Native Nations and collaborating agencies develop the type of protocol that will serve the needs of the community and the children. The guide is specifically designed to provide direction and information to local CPTs or MDTs toward development of protocols to address their system's response to child abuse and child sexual abuse.

Walker, Joe, Maria Scannapieco, Mary Iannone, and Jhon Goes In Center, Webinar Supporting the Use of Culturally Based Practices in Tribal Child Welfare, National Child Welfare Resource Center for Tribes, 2012.
This is the second in a series of webinars focusing upon the recommendations of the needs assessment. This second webinar focuses upon the findings of the NRC4T needs assessment, how to access free technical assistance through the T/TA Network, organizational assessments, as well as one tribal child welfare agency's experiences in receiving an assessment.

Wasserman, Eidell, Understanding the Effects of Childhood Trauma on Brain Development in Native Children, Tribal Law and Policy Institute, 2005.
Compiled to assist victim advocates who work with children and their caretakers in order to understand how trauma affects child development when abuse has occurred—especially when it occurs early in the child's life. This article should also be helpful to Native Nations and tribal agencies seeking to develop programs and services that promote healing and wellness for tribal children.

Weaver, Hilary N., "Native Social Work—Indigenous People and the Social Work Profession: Defining Culturally Competent Services," *Social Work* 44 (3) (1999): 217–25.
Discusses the challenges and opportunities when providing social work services in Indigenous communities.

Yellow Horse, Susan, and Maria Yellow Horse Brave Heart, Native American Children, University of Denver, 2004.
Literature review of articles and books related to evidence based and/or culturally appropriate practices in AI/AN communities.

Chapter 4: Jurisdiction, ICWA Transfers, and ICWA Interventions

This chapter discusses one of the more complicated aspects of child welfare cases—jurisdiction. A statement of jurisdiction is usually one of the first sections of any Children's Code. Before a CINA proceeding can occur in any court, that court must have jurisdiction over the child and the situation. Courts must also have a clear statement of jurisdiction and processes to cover CINA cases that are transferred from another court. For Native Nations, such transfers usually occur under ICWA.

Several Native Nations have expanded their court's jurisdiction to include nonmembers and non-Indians. Expanded jurisdiction is particularly useful for family preservation, cultural preservation, and long-term placement decisions because it allows siblings and stepsiblings to be treated equally throughout the process.

Other Native Nations have restricted their court's jurisdiction to cover only children who are members or eligible for membership. Even when expansive jurisdiction is an option, some Nations choose a more restrictive jurisdictional statement due to lack of services, funding, and limited general capacity to handle a large number of cases.

Definitions relative to child maltreatment are also jurisdictional in nature, as they define the situations in which a Dependency Court can rightfully assert its jurisdictional power. If the Children's Court finds that the situation does not meet one of the required definitions of maltreatment (child maltreatment, child neglect, physical abuse, sexual abuse, psychological abuse, etc.), it is in essence determining that the court has no power to act in the proceeding. Children's Courts can only interfere in a family and child's life when there is a need to protect the child.[21]

In addition to statements of jurisdiction, Native Nations can expand their jurisdiction in two ways:

1. Create a process for receiving ICWA transfers from a state court; or,
2. Intervene in a state court's child welfare case.

A Native Children's Court may elect to request a transfer or it may make more sense in some cases to have the case continue in state court. The codes related to statements of jurisdiction, ICWA transfers, and state court interventions are discussed in this chapter.

Chapter Units

Unit A: Jurisdiction

Unit B: ICWA Transfers from a State

Unit C: Interventions in ICWA Cases in State Court

[21] Chapter 5 provided discussion of these key definitions.

A. Jurisdiction

This section reviews statements of jurisdiction for a Children's Code. While it is outside the scope of this resource to explain civil jurisdiction in Native courts,[22] this section will briefly outline the relevant definitions and jurisdictional process.

There are two kinds of jurisdiction (authority) that a court can exercise:

1. **Subject Matter Jurisdiction:** Jurisdiction over a particular type of case. (For our purposes, the subject matter is CINA cases and related matters.)
2. **Personal Jurisdiction:** Jurisdiction over specific people. Substantial contacts between the individual and the Nation is generally required to assert personal jurisdiction.

Most statements of jurisdiction for a Children's Code focus on the persons over whom the Children's Court has jurisdiction. Native Nations have several options to choose from, including:

- Asserting jurisdiction to the same extent as other civil matters,
- Expanding their jurisdiction for CINA cases to be more inclusive of
  - Non-Indians; and/or
  - Nonmembers,
- Asserting jurisdiction outside reservation boundaries, or
- Asserting jurisdiction over ICWA matters in a state court.[23]

It is important to craft a code that is a good fit for the resources, culture, and governance goals of each Native Nation.

While subject matter jurisdiction is relatively straightforward, it is important to remember that the definitions in the Children's Code, which define child maltreatment and other situations that trigger a CINA case, also define the subject matter jurisdiction.[24]

[22] See Justin B. Richland and Sarah Deer, *Introduction to Tribal Studies*, 2nd ed. (Lanham, MD: AltaMira Press, 2010), 171, for further discussion of civil jurisdiction.

[23] See Unit C of this chapter for a more detailed discussion of this option.

[24] See Chapter 3 for a discussion of definitions.

Selected Tribal Codes

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part I General Provisions

§ 8.003. Jurisdiction

(a) **Tribal Court Jurisdiction**—The Court shall have original jurisdiction over any child custody proceeding that involves:

(1) Any Siletz Child who resides or is domiciled within the Service Area of the Tribe;

(2) Any Siletz child who is enrolled or is eligible for membership, regardless of his or her residence or domicile;

(3) Any Siletz Child who has been placed in the temporary care of a Siletz member or in any care facility licensed by the Tribe for placement of Indian children; or

(4) Any Indian child as defined by the Indian Child Welfare Act, who resides within the Siletz Reservation

(b) **Jurisdiction Over Parents, Adults, and Guardians and Parties**—In order to fulfill the purposes of this Code, the Court shall have jurisdiction over parents, guardians, legal custodians and other parties to the proceeding and shall have the authority to make such orders for parents, guardians, legal custodians, and parties that are necessary to protect the safety and welfare of a child before the Court pursuant to this Code.

(c) **Concurrent Jurisdiction**—When state, federal, or other tribal courts have jurisdiction over any of the matters provided for in this Code, the Court shall have concurrent jurisdiction over the same matters, to the extent consistent with federal law.

(d) **Limitations Based on Tribal Priorities and Resources**—The limitations on jurisdiction in this section are not intended to reflect the Tribe's view of the legally permissible limits of jurisdiction, but are merely designed to limit tribal activity in this area in accordance with tribal priorities and resources.

The Law and Order Code of the Kalispel Tribe of Indians (Enacted 12.2.2015)
Chapter 7 Kalispel Youth Code
Part 1. General Provisions

7-2.01 Jurisdiction of the Tribal Court

The Kalispel Tribal Court shall have jurisdiction over cases arising under this Code, cases arising under other laws of the Kalispel Tribe of Indians providing for disposition by the Tribal Court, and any actions arising under the customs and traditions of the Kalispel Tribe of Indians affecting family and child welfare. The

jurisdiction of the Family Court over persons and territory is limited only by the Constitution of the Kalispel Tribe of Indians.

7-2.02 Jurisdictional Questions

The Tribal Court shall have the power to decide questions of jurisdiction which may be raised under this chapter. The Kalispel Tribe of Indians intends to vest the Tribal Court with the fullest jurisdiction possible, in order to protect the children and families of the Kalispel Tribal Community.

7-2.03 Emergency Jurisdiction

The Tribal Court shall have emergency jurisdiction over any Indian youth who is physically present on the Kalispel Reservation if the youth has been abandoned, or if it is necessary to protect the youth because of real or threatened abuse or if the youth is otherwise deprived.

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part A General and Dependency Provisions
Section 404—Jurisdiction of the Children and Family Court

§404.1 Creation of Children and Family Court[25]

There is hereby established for the Oglala Sioux Tribe, a court to be known as the Children and Family Court. The jurisdiction of the Children and Family Court shall be civil in nature and shall include the right to issue all orders necessary to ensure the safety, well-being, and best interests of children before it. The Children and Family Court shall also have the power to enforce subpoenas and orders of restriction, fines, contempt, confinement, and other orders as appropriate.

§404.2 Subject Matter and Personal Jurisdiction

(a) The Children and Family Court shall have civil adjudicatory jurisdiction over:

(1) All cases coming before the Children and Family Court in accordance with this Code; and

(2) Other cases under applicable provisions of the OST Law and Order Code.

(b) The Children and Family Court shall have personal jurisdiction over persons defined as follows:

(1) An enrolled member of the Oglala Sioux Tribe or eligible for enrollment in the Tribe, under the age of eighteen (18) years residing within the exterior boundaries of the Pine Ridge Indian Reservation;

(2) All children transferred to the Court pursuant to the Indian Child Welfare Act, 25 USC 1901, et. seq.;

(3) Any Indian child as defined by this Code residing within the original

[25] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

exterior boundaries of the Pine Ridge Indian Reservation;

(4) A non-Indian child residing within the original exterior boundaries of the Pine Ridge Indian Reservation and in the home of an enrolled member of either the Oglala Sioux Tribe or a member of any other Indian tribe;

(5) Any person causing a child to come within the jurisdiction of this Code;

(6) Any unborn child in need of protection or services and the expectant mother of such unborn child pursuant to Section 406, residing within the exterior boundaries of the Pine Ridge Indian Reservation;

(7) Any Indian male coming under the provisions of Section 406.24; and

(8) Nonmembers coming within applicable provisions of Chapter 2, Civil Actions, Section 20 (A) and (B), governing implied consent by nonmembers to the jurisdiction of the Oglala Sioux Tribe.

Tribal Code Commentary

The Siletz Juvenile Code indicates that the Siletz Nation has original jurisdiction over:

- All CINA proceedings when the child is enrolled or eligible for membership, regardless of residence or domicile.
- Any Indian child, as defined by ICWA, who resides within the Siletz Reservation.
- Parents, adults, guardians, and parties necessary to fulfill the purposes of the code.

The court may exercise concurrent jurisdiction over any of the matters provided in the Siletz Juvenile Code. Its code also specifically states that although it is limiting jurisdiction, this is based on Siletz governmental priorities, *not* the legally permissible limits of jurisdiction. Finally, the Siletz Nation is also authorized to enter into agreements with the state regarding jurisdiction over child custody proceedings on a case-by-case basis, as is necessary to protect the best interests of Siletz children and other children protected under the agreement.

The Kalispel Youth Code indicates that the Youth Court jurisdiction is limited only by the Constitution of the Kalispel Nation.[26] The Nation intended to vest their court with the fullest jurisdiction possible in order to protect the children and families of the Kalispel Tribal Community. Also, the Kalispel court shall have emergency jurisdiction over any Indian youth who is physically present on the Kalispel Reservation.

The Oglala Sioux Code provides expansive jurisdiction to its Children and Family Court. It covers:

- Enrolled members or those eligible for enrollment under the age of eighteen, residing on the Pine Ridge Indian Reservation;
- All children transferred pursuant to ICWA;
- Any Indian child within the original exterior boundaries of the Pine Ridge Indian Reservation;
- A non-Indian child residing within the original exterior boundaries of the Pine Ridge Indian Reservation and in the home of an enrolled members of any Indian tribe;
- Any person causing a child to come within the jurisdiction of the court;
- Any unborn child in need of protection or services and the expectant mother of the unborn child, residing within the exterior boundaries of the reservation;
- Any Indian male, presumed biological father; and
- Nonmembers where consent can be implied per the code section related to civil actions.

[26] Many constitutions limit jurisdiction to Indians.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Examine your current constitution and jurisdictional sections of your Children's Code to determine who the Children's Court may currently exercise jurisdiction. Make a list of the children who are covered.
- Are nonmember Indians and non-Indian children currently living in your Nation covered?
- Have there been situations in which the court could not exercise jurisdiction? Describe those situations.

STEP 2: Establish a Vision for the Future

- Describe children who should be covered by tribal court jurisdiction.
- Does the court have jurisdiction over all the people it needs to have jurisdiction over, in order to accomplish the purposes of the code?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

B. ICWA Transfers from a State

Another common way for Native Nations to receive jurisdiction over child welfare cases is through ICWA, which allows for the transfers of such cases from state court. Under ICWA, the transfer process from state court is usually triggered by a request from the parent(s), legal guardian(s), or a Native Nation. If a parent makes an oral or written request for a transfer, child welfare workers should recommend such a transfer, unless there is good cause not to transfer jurisdiction.[27] Once the transfer request is filed, the state court is *required* to make the transfer unless:

- The Native Nation declines jurisdiction,
- A parent or legal guardian objects to the transfer, or
- The state court determines that good cause exists to deny the transfer.

ICWA transfers to the Native Nation should be requested as early as practicable because ICWA allows a state court to deny the transfer if the proceeding is at "an advanced stage." If your Nation does not have the resources to accept an ICWA transfer, or would like to limit the amount of transfers, it is possible to wait for the permanent placement phase of the state court case. Native Nations can request transfer at this stage of proceedings even if it has previously declined to accept an ICWA transfer in the same case.[28]

Federal law creates the requirements mentioned previously; Native Nations need to create their own laws to govern the ICWA transfer process within their Nation and should consider writing specific code to govern when the court should accept or decline a transfer.

A Native Nation may also want to consider transfers to and from other tribal Nations. At times, a Native child from another Native Nation may be the subject of a CINA proceeding. In some situations, it may be in the child's best interest to transfer that proceeding to the child's own Nation.

[27] 25 U.S.C. § 1911[b]).

[28] Available at http://www.nicwa.org/icwa/pdfs/mod9.pdf.

Selected Tribal Codes

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part II Transfers and Intervention

§ 8.014. Policy Regarding the Transfer of Child Custody Proceedings Taking Place in State Court

It shall be the policy of the Siletz Tribe to request the transfer of child custody proceedings involving Siletz children taking place in state court under the Indian Child Welfare Act of 1978, 25 USC § 1901 et seq. ("ICWA"), except where good cause exists to the contrary.

§ 8.015. Procedure for Transfer

(a) **Authority to Request Transfer**—The ICWA Transfer Committee shall have sole authority to determine, by a majority vote, whether or not the Tribe will request the transfer of a child custody proceeding involving a Siletz child taking place in state court to the Tribal Court.

(1) The Committee's decision in each case shall be put into writing and shall be signed by all three Committee members.

(2) If the Committee decides not to seek a transfer, the Committee may reconsider its decision at any time if new information is obtained or if changed circumstances require it.

(3) It is within the Committee's discretion to request the transfer of a child custody proceeding for placement purposes only.

(b) **Assessment and Recommendation**—Within fourteen (14) days of receipt of notice of any kind that a Siletz child is the subject of a child custody proceeding in state court, the tribal ICW Program shall prepare an assessment of the child and the child's family situation, and shall make a written recommendation to the ICWA Transfer Committee concerning whether the case should be transferred from state court to the Tribal Court. The recommendation shall consider, among other factors:

(1) The age of the child;

(2) Any special needs of the family, if any;

(3) The location and circumstances of the family;

(4) Whether the state has made a serious attempt to reunite the family;

(5) The availability of tribal or state services that can address the child's needs and that would either weigh in favor or against transfer;

(6) The availability of a suitable tribal home for the placement of the child;

(7) Whether financial assistance for the care of the child by a home that meets the placement preferences will continue to be available if the proceeding is transferred to the Tribal Court.

(c) **Tribal Court Decision Regarding Transfer**

(1) If the ICWA Transfer Committee votes to seek transfer of a child custody proceeding, the tribal ICW Program shall petition the Tribal Court to issue an order indicating that the Court will accept the transferred child custody proceedings.

(2) The Tribal Court shall give notice, by certified, return receipt mail, to all parties to the state court proceeding that a petition to accept transfer the proceeding has been filed. The notice shall include:

(A) The date, time, and location of the Tribal Court hearing on the proposed transfer;

(B) A brief explanation of the subject of the hearing; and

(C) A statement that all parties to the state court proceeding shall be granted standing in the Tribal Court to express their views on whether the Tribal Court should accept or decline to transfer.

(3) The Tribal Court shall consider the following factors in determining whether to accept the transfer:

(A) The child's emotional, cultural, and family ties.

(B) The ability of necessary witnesses to appear in Tribal Court if adjudication is necessary; and

(C) The ability of the Tribe to provide necessary services to the child and the child's parent(s), guardian or custodian, including but not limited to counseling, medical treatment, and transportation.

(4) Tribal Court may decline to accept the transfer of a child custody proceeding if it finds that good cause exists to deny the transfer. The denial shall be based upon clear and convincing evidence that the transfer would not be in the best interests of the Tribe, the child, or the child's family.

(5) The Tribal Court may impose conditions on its acceptance of a transfer, such as conditioning the transfer upon the state court's willingness to enforce tribal subpoenas or to order state employees to testify in Tribal Court if witnesses are beyond the Tribe's subpoena and jurisdictional authority, or imposing other conditions as are necessary to ensure that the Tribe will have access to all necessary evidence and witnesses in the Tribal Court proceedings.

(6) If the Tribal Court issues an order indicating that it will accept the transfer, the ICW Program shall prepare a petition for the transfer and shall present the petition to the state court. The petition shall state that the Tribal Court has issued an order indicating that it will accept the transfer.

(d) **Transfer**—If the state court grants the petition to transfer the child custody proceeding to the Tribal Court, the Tribal Court shall immediately issue an order accepting the transfer, directing the tribal attorney to file a motion to transfer immediately and directing the state court to transfer its files

concerning the proceeding to the Tribal Court upon the state court's grant of transfer.

(e) **Transferred** Proceedings **Governed by Siletz Juvenile Code**—Child custody proceedings that have been transferred to Tribal Court shall proceed pursuant to this Code.

§ 8.016. Petition for Transfer by A Party Other Than the Tribe

(a) **Party to File Petition**—If the parent(s), guardian, or custodian of a Siletz child, the child, the child's legal representative, or any other party petitions a state court to transfer a child custody proceeding involving the child to the Tribal Court, the transfer shall not be effective until accepted by the Tribal Court. It shall be the duty of the party petitioning for the transfer to file a petition with the Tribal Court for acceptance of the transfer.

(b) **Assessment**—Upon receipt of a petition for acceptance of a transfer from a party to a child custody proceeding, the Tribal Court shall refer the petition to the tribal ICW Program for an assessment. The tribal ICW Program shall have fourteen (14) days from the date of the referral to prepare a written assessment and to submit the assessment to the Tribal Court.

(c) **Tribal Court Decision Regarding Transfer**

(1) The Tribal Court shall schedule a hearing on the petition for acceptance of the transfer at the earliest available time following the submission of the tribal ICW Program's assessment.

(2) The Court shall automatically grant standing to the Tribe as an interested party to express its views concerning whether the petition for acceptance of the transfer should be granted or denied.

(3) The Tribal Court shall follow the procedures set forth in section 8.040(c)(2)-(5) regarding a hearing on the proposed transfer.

(4) If the Tribal Court accepts the transfer, the Tribal Court shall enter a written order accepting the transfer and shall request that the state court transfer its files concerning the proceedings to the Tribal Court.

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Section 410 Transfer of Jurisdiction, Indian Child Welfare Act

§410.1 Application of the Indian Child Welfare Act[29]

The Children and Family Court may apply the policies of the Indian Child Welfare Act, 25 USC 1901 et seq., where they do not conflict with the provisions of this code. The procedures for state courts in the Indian Child Welfare Act shall not be binding upon the Children and Family Court unless

[29] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

specifically provided for in this code.

§410.2 Tribal Agent

The Oglala Nation Tiospaye Resource and Advocacy Center (ONTRAC) is the authorized agent of the tribe for purposes of intervention in proceedings in other jurisdictions. The ONTRAC director, social workers, and intake clerk shall be authorized to verify, and certify by signature, eligibility and enrollment under the Indian Child Welfare Act, provided that such persons are bound to uphold the confidentiality policies of the tribal enrollment office and have received training in enrollment office procedures and protocol.

§410.3 Transfer to State Court or Other Tribal Court

In any proceeding before the Children and Family Court, the Children and Family Court may transfer the proceedings to an appropriate foreign court of competent jurisdiction where the foreign jurisdiction has a significant interest in the child and the transfer would be in the best interest of the child.

§410.4 Transfer from Other Courts

The Children and Family Court may accept or decline, under the procedures set forth in this code, transfers of child welfare cases from other federal, state or tribal courts.

§410.5 Procedures for Transfer from State Court

(a) **Receipt of Notice**: The tribal agent for service of notice of state court child custody proceedings, as defined by the Indian Child Welfare Act, shall be the Oglala Nation Tiospaye Resource and Advocacy Center (ONTRAC). Upon receipt of notice, ONTRAC shall in turn notify the LOWO Division of Child Protective Services and the Youth and Family Court of the proceedings.

(b) **Investigation and Pre-Transfer Report by the Court Counselor**: The LOWO Division of Child Protective Services shall conduct an investigation and file a written report with ONTRAC and the Youth and Family Court within five (5) days of receipt of notice from ONTRAC.

(c) **Recommendations for Transfer or Intervention**: The LOWO Division of Child Protective Services shall make written recommendations to ONTRAC on whether or not the Tribe should petition for transfer from or intervene in state court.

(d) **Petition for Transfer**: The tribal petition for transfer shall be filed by ONTRAC within five (5) days of receipt of recommendations from the LOWO Division of Child Protective Services.

(e) **Intervention in State Court Proceedings**:

(1) The Tribe may intervene in state court child custody proceedings, as defined by the Indian Child Welfare Act, at any point in the proceedings; and

(2) ONTRAC, the Office of the Attorney General, or selected representatives shall file a motion to intervene within five (5) days of receipt of recommendations from the LOWO Division of Child Protective Services.

(f) **Acceptance of Transfer**: Prior to transfer of jurisdiction to Tribal Court, the Children and Family Court may enter an order conditionally accepting jurisdiction provided that the state or other foreign court transfers jurisdiction. The Children and Family Court shall not accept a transfer from state court unless:

(1) A parent or Indian guardian's or custodian's petition to state court for transfer is granted; or

(2) The Tribe's petition to state court for transfer is granted.

(g) **Procedure once Transfer Accepted**: Upon acceptance of transfer by the Children and Family Court, the following steps shall take place:

(1) ONTRAC shall be provided a copy of the order of transfer by the Children and Family Court and/or LOWO Division of Child Protective Services, as well as any other documentation relevant to the case.

(2) ONTRAC contacts the Child Protective Services worker of the transferring jurisdiction to inform them that the child(ren) are accepted into the tribal court system.

(3) ONTRAC meets with the Child Protective Services worker of the transferring jurisdiction to exchange any information pertinent to the case, and to arrange when and where the physical transfer will take place.

(4) ONTRAC takes physical and legal custody, and places the child(ren) in the care of a suitable foster or tiospaye home pending further court action.

(h) **Hearing(s)**: Upon receipt of transfer jurisdiction from state court, the Office of the Attorney General shall file a Child in Need of Care petition, and appropriate hearing(s) shall be held in accordance with this Code.

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part II Transfers and Intervention

§ 8.017. Transfers Involving Jurisdictions Other Than State Court

(a) **Proposed Transfers Involving Jurisdictions Other Than State Court**

(1) The Tribal Court may accept or decline the transfer of a child custody proceeding from any other court, tribunal, tribal council or other governing body, or administrative body.

(2) The Tribal Court may transfer a child custody proceeding involving a child who is not a Siletz child to another jurisdiction.

(b) **Transfer Procedures**—The Tribal Court may transfer a proceeding from or to other jurisdictions in accordance with the following procedures:

(1) Any person may petition the Tribal Court to transfer a child custody proceeding. The petition shall include:

(A) The name, address, age, and tribal status, if known, of the child who is the subject of the proceeding; and

(B) A plain and concise statement of the reasons the transfer should be granted.

(2) The Tribal Court shall hold a hearing on the transfer request within fourteen (14) days of the filing of the petition for transfer, unless a longer time is agreed upon.

(A) The Court shall provide written notice of the date, time, and location of the transfer hearing to the child, the child's parent(s), guardian, or custodian, and to the court, tribunal, or other body from or to which the transfer has been requested.

(B) The notice shall be delivered by a tribal law enforcement officer or an appointee of the Court or mailed by the Court. If the notice cannot be delivered personally, the notice shall be delivered by certified mail or any other method reasonably designed to give notice to the required persons.

(3) The child's best interests shall be the controlling factor in the Court's decision to accept or decline the transfer of any child custody proceedings concerning the child. The Court may also consider the wishes of the parent and the wishes of the child if he or she is fourteen (14) years of age or older.

(4) The Court may make any orders necessary to protect the best interests of the child pending the outcome of the transfer proceeding.

(5) If Tribal Court accepts or grants the transfer, the Court shall enter an order accepting or granting the transfer and shall arrange for the transfer of all files concerning the proceedings.

Tribal Code Commentary

The Siletz Nation specifically provides its policy relative to transfer or ICWA cases from a state court. It is the Nation's policy to request a transfer of child custody cases to the Siletz's court unless good cause exists to the contrary.

The Siletz Nation has a ICWA Transfer Committee with sole authority to determine, by a majority vote, whether or not the Nation requests the transfer of a child custody case already in state court. The Transfer Committee's decision should be in writing and demonstrate consideration of the child's age, needs, location, and family circumstances; the state's attempts to reunite; and the availability of a suitable tribal placement for the child. Indian Child Welfare (ICW) is required to prepare an assessment of the child and family, and make recommendations to the Transfer Committee within fourteen days of receipt of notice of any kind that a Siletz child is the subject of a child custody proceeding in state court. The Transfer Committee may request transfer for placement only.

If the Transfer Committee seeks to transfer, the ICW shall petition the tribal court to issue an order indicating that the tribal court will accept transfer. The tribal court will give notice to all parties. The notice will include, among other things, the time and location of the court hearing and a statement that all parties to the state court proceeding shall be granted standing in the tribal court to express their views on whether the court should accept or decline transfer. The court may decline transfer if it finds good cause to decline based on clear and convincing evidence. Otherwise, the court may accept the transfer. The court may impose conditions on its acceptance of a transfer, such as conditioning the transfer upon the state court's willingness to enforce Siletz's subpoenas or to order state employees to testify in Siletz's court. If the court issues an order indicating that it will accept the transfer, the ICW program shall prepare a petition for the transfer and shall present the petition to the state court. The petition shall state that Siletz's court has issued an order indicating that it will accept the transfer.

If the state court grants the petition to transfer the child custody proceeding, the Siletz court shall immediately issue an order accepting the transfer, directing its attorney to file a motion to transfer immediately and directing the state court to transfer its files concerning the proceeding to Siletz's court. Once the proceeding is transferred it, is subject to Siletz's Juvenile Code.

If a party other than the Native Nation petitions the state court for transfer, the transfer shall not be effective until accepted by the Siletz court. It is the duty of the party petitioning for transfer to file a petition with the Siletz court for acceptance of transfer. Upon receipt of the petition for acceptance of a transfer, the court shall refer the petition to Siletz's ICW program for an assessment. The ICW program will have fourteen days to prepare a written assessment and submit the assessment to the court. The Siletz court should schedule a hearing on the petition at the earliest available time. The same procedures relative to notice of the proceedings and court action are followed as in the case in which the Nation files the petition.

The Oglala Sioux Nation appoints the Oglala Nation Tiospaye Resource and Advocacy Center (ONTRAC) as the authorized agent of the Nation for purposes of intervention in child custody proceedings in other jurisdictions. Once the Oglala Nation's agent receives notice of a state court child custody proceeding, the Lakota Oyate Wakanyeja Owicakiyapi (LOWO) Division of Child

Protective Services (CPS) and the Youth and Family Court must be notified. The LOWO CPS is required to conduct an investigation and file a written report with ONTRAC and the Youth and Family Court within five days of receipt of notice. Oglala Nation child protection shall make a recommendation on whether or not the Nation should petition for transfer from or intervene in state court. A petition for transfer shall be filed by ONTRAC within five days of receipt of recommendations from CPS. Prior to transfer of jurisdiction to the Oglala Nation's court, the court may enter an order conditionally accepting jurisdiction provided that the state or other foreign court transfer jurisdiction.

The Oglala Nation's court shall not accept jurisdiction from state court unless a parent or Indian guardian's or custodian's petition to state court for transfer is granted or the Nation's petition to state court for transfer is granted. Upon acceptance of the transfer by the Children and Family Court, ONTRAC provides a copy of the order of transfer. Then ONTRAC contacts the CPS worker of the transferring jurisdiction to inform him or her that the child is accepted into the tribal court system, meets with that worker to exchange any information pertinent to the case, and arranges the physical transfer of the child. ONTRAC takes physical and legal custody and places the child in the care of a suitable foster or tiyospaye home. Upon receipt of the transfer from state court, the Office of the Attorney General shall file a CINA petition and appropriate hearings shall be held.

Also, included in the examples is a section from the Siletz Code that deals with transfers from other than state court. It allows transfer to tribal court from any court and allows transfer to any court from the Siletz court, when the proceeding involves a non-Siletz child. It outlines the procedures that are required in such a situation. The controlling matter in determining whether a transfer takes place is the child's best interests. The court also considers the parent(s) and child's wishes, if the child is fourteen or older.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- What is the current policy of the Nation relative to transfer or ICWA cases to tribal court?
- Who is the current authorized agent of the Nation for requesting a transfer?
- What is the current process of evaluating an ICWA case for potential transfer?
- What changes should be made?

STEP 2: Establish a Vision for the Future

- What changes should be made in the current policy relative to transfer from another court?
- Who should have the authority to request transfer on behalf of the Nation?
- Once the Nation is notified of a state action regarding a child, how quickly should it respond?
- Ensure you have a process that:
    - Covers both filing of a petition in tribal court to transfer by the Nation or by one of the parities to the state action;
    - Is responsible to assess and provide recommendations to the court;
    - Includes directions to the agency assessing what they should consider;
    - Includes time limits for actions;
    - Includes directions to the tribal court on what they should consider; and
    - Indicates the standard of proof for the court.

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

C. Intervention in ICWA Cases in State Court

If a Native Nation wishes to assert sovereignty, without assuming jurisdiction of an entire ICWA case, intervention is a good option. Native Nations can intervene at certain stages of a state court ICWA case if the child in that case is a member or is eligible for membership in the intervening Native Nation.

Under ICWA, Native Nations can intervene

- During the state court foster care placement,
- During a termination of parental rights proceeding "at any point in the proceedings," or
- During an appeal.

The right to intervene extends to voluntary as well as involuntary proceedings. If a Native Nation decides to intervene in a state ICWA case, it becomes a party with all the rights and privileges of any other party.[30] These rights include:

- The right to receive copies of all legal documents filed with the court or relied upon by the child welfare worker;
- The right to make motions and file reports with the state court;
- The right to receive notice of all involuntary proceedings in the case; and
- The right to present witnesses, cross-examine witnesses presented by other parties, and present other relevant evidence at any hearing.

Intervention ensures active participation for Native Nations that cannot, or decline to, assume jurisdiction of an ICWA case. The intervention can be handled by a child welfare worker, Native court advocate, or the Nation's attorney and is an important method of monitoring the state's ICWA case. Intervening also allows for better outcomes because the Native Nation can provide additional information that will help protect the well-being of the child and Nation and help with ICWA compliance.

[30] 25 U.S.C. § 1911[c].

Selected Tribal Codes

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part II Transfers and Intervention

§ 8.018. Intervention in Child Custody Proceedings

(a) **Authority**—The Tribe has the authority to intervene in any child custody proceeding taking place in any state or tribal court, pursuant to the ICWA or this Code.

(b) **Procedure**—The procedure for intervening in a child custody proceeding taking place in state court shall be as follows:

(1) The ICWA Program will file the appropriate and necessary legal documents to intervene in child custody proceedings within fourteen (14) days receipt of notice of the proceeding.

(2) The ICW Program or tribal attorney shall:

(A) Appear in the next state court proceeding concerning the child and make an oral motion to intervene in the proceedings; or

(B) File an Entry of Appearance and Motion to Intervene with the state court.

(3) Following intervention, the matter shall proceed under the guidance of the presiding state court judge. The tribal ICW Program shall monitor the case and represent the interests of the Tribe during the child custody proceedings in state court as appropriate.

(c) **Intervention in Child Custody Proceedings in Jurisdictions Other Than State Court**. If the ICWA Transfer Committee determines that intervention in a child custody proceeding taking place in a jurisdiction other than state court is in the best interests of the child and the Tribe, the tribal ICW Program shall intervene in the proceedings pursuant to applicable law.

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part A General and Dependency Provisions

§410.2 Tribal Agent[31]

The Oglala Nation Tiyospaye Resource and Advocacy Center (ONTRAC) is the authorized agent of the tribe for purposes of intervention in proceedings in other jurisdictions. The ONTRAC director, social workers, and intake clerk shall be authorized to verify, and certify by signature, eligibility and enrollment under the Indian Child Welfare Act, provided that such persons are bound to uphold the confidentiality policies of the tribal enrollment office and have

[31] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

received training in enrollment office procedures and protocol.

§410.5 Procedure for Transfer from State Court

[sections omitted]

(e) **Intervention in State Court Proceedings**:

(1) The Tribe may intervene in state court child custody proceedings, as defined by the Indian Child Welfare Act, at any point in the proceedings; and

(2) ONTRAC, the Office of the Attorney General, or selected representatives shall file a motion to intervene within five (5) days of receipt of recommendations from the LOWO Division of Child Protective Services.

Tribal Code Commentary

The Siletz Code gives the Nation's ICW program the authority to intervene in any child custody proceeding taking place in a state or tribal court. The ICW program files the appropriate documents to intervene within fourteen days of receipt of notice of the proceeding. The ICW program or the tribal attorney appears in the next state court proceeding and makes an oral motion to intervene or a written notice or motion to intervene. The Nation's ICW program shall monitor the case and represent the interests of the Nation during the child custody proceedings. If the ICW transfer committee determines that intervention in a child custody proceeding taking place in a jurisdiction other than a state court is in the best interests of the child and the tribe, the Nation's ICW program shall intervene in the proceeding.

The Oglala Sioux Code appoints ONTRAC as the authorized agent of the Nation for purposes of intervention in proceedings in other jurisdictions. Personnel of ONTRAC are authorized to verify and certify eligibility and enrollment. The Nation may intervene at any point in the child custody proceedings. ONTRAC or the Attorney General may file a motion to intervene within five days of receipt of recommendations from the LOWO Division of CPS.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- What is the current policy/code relative to the Nation's intervention in a state ICWA proceeding?
- Who is the current authorized agent of the Nation for intervention in a child custody proceeding of another jurisdiction?
- What is the current process for intervention?
- What is working well? What is not working?

STEP 2: Establish a Vision for the Future

- What changes should be made to the code to improve the intervention process? Consider providing the following direction for your process:
  - Cover the intervention in a state action or the proceeding in another Native Nation.
  - A process and agency responsible to assess and make a decision on intervention.
  - Directions to the agency assessing on what they should consider.
  - Time limits for actions.

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

Additional Resources

California Indian Legal Services Staff, California Judges Bench Guide: Indian Child Welfare Act, California Indian Legal Services, 2012.
Judges bench guide that explains ICWA proceedings and related matters. Contains separate chapters on jurisdiction under ICWA and interventions.

Clifford-Stoltenberg, Chey, et al., Indian Child Welfare Glossary and Flowchart, National Indian Child Welfare Association, 2005.
Provides a flow chart of the ICWA process and contains a glossary of relevant terms.

Richland, Justin B., and Sarah Deer, Introduction to Tribal Legal Studies, 3rd ed. Lanham, MD: Rowman and Littlefield, 2015.
As one of the only comprehensive introductions to tribal law, this book covers the history and structure of tribal justice systems; the scope of criminal and civil jurisdictions; and the various means by which the integrity of tribal courts is maintained. Provides an overview of tribal legal studies, including chapters on jurisdiction, tribal courts, and ICWA.

Chapter 5: Definitions of Child Maltreatment

The definitions of *child abuse*, *child neglect*, *sexual abuse*, and *psychological maltreatment* referred to collectively throughout this guide as *child maltreatment* serve at least two purposes in a tribal civil Children's Code.

1. The definitions delimit the power that the tribal legislature has given to the tribal courts with respect to children and their families. When the circumstances of such children meet the definition the court has the power to take action (also known as subject matter jurisdiction).
2. The definitions embody the policy of the Native Nation with respect to when the Nation chooses to intervene to protect children.

The standard terms *abuse* and *neglect* may include various sub-definitions and are not necessarily comprehensive. Also, it must be noted that the civil (noncriminal) definitions of child abuse, neglect, and so forth are not necessarily identical or consistent with the criminal definitions of child abuse, neglect, and so forth.

A growing number of Native Nations and states are currently expanding their definitions in their criminal laws. These are definitions of crimes against children and require a host of different and additional considerations. Please see the Tribal Law and Policy Institute's Resource Guide and Workbook for Drafting New or Amended Tribal Laws on Crimes Against Children[32] if you are interested in drafting criminal child protection provisions.

It is unclear to what extent the federal and tribal definitions for child maltreatment have been defined for civil rather than criminal application. For this reason, we include the federal definitions of child maltreatment, which tend to be used in a criminal context, as a starting point for discussion.

It may be useful for drafters to consider the implications of federal law in drafting definitions of child maltreatment. There are three federal statutes that may be relevant: the Child Abuse Prevention and Treatment Act[33] (CAPTA), the Indian Child Protection and Family Violence Protection Act,[34] and the Victims of Child Abuse Act of 1990 (Title II of the Crime Control Act of 1990),[35] reauthorized in 2013.

Child Abuse Prevention and Treatment Act (CAPTA)

CAPTA provides minimum, but not comprehensive, standards for states receiving federal grants for programs related to the prevention, treatment, investigation, and prosecution of child abuse and neglect. It is likely that Native Nations, both receiving federal funds and seeking to enter into Title

[32] Pat Sekaquaptewa et al., *A Victims-Centered Approach to Crimes Against American Indian and Alaska Native Children*, Resource Guide and Workbook for Drafting New or Amended Tribal Laws (August 2008). Available at http://www.tribal-institute.org/lists/ChildrensCriminalCode.htm (accessed March 31, 2016).

[33] 42 U.S.C. §§ 5101 et seq. (2005).

[34] 25 U.S.C. §§ 3201 et seq. (2005).

[35] 101 P.L. 647.

IV-E agreements with states receiving federal funds, will be expected to create tribal law definitions of child maltreatment that are consistent with CAPTA.

The Indian Child Protection and Family Violence Protection Act

The Indian Child Protection and Family Violence Protection Act[36] provides federal funding for the establishment of programs to prevent, treat, investigate, and prosecute child abuse and neglect. The programs established and funded under the act must, at a minimum, address actions that fall under the act's definition of *child abuse* or *child neglect*.

The Victims of Child Abuse Act of 1990

The Victims of Child Abuse Act of 1990 (Title II of the Crime Control Act of 1990)[37] establishes federal grant programs for various activities related to child abuse, including the investigation and prosecution of such abuse, training of court personnel involved in child abuse cases, development of a Court Appointed Special Advocates (CASAs) program, use of special procedures for the televising of child abuse victim testimony, and treatment of juvenile offenders who are abuse victims. Congress reauthorized funding in 2013.

We provide information on definitions from each of these federal acts as we discuss certain maltreatment definitions for the Children's Code in this chapter. The first section references the location of the definitions and the general definition of *child abuse*. This is followed by sections on physical abuse, sexual abuse (includes sexual exploitation or sex trafficking), child neglect, and psychological maltreatment.

Chapter Units

Unit A: Defining Child Maltreatment

Unit B: Defining Physical Abuse

Unit C: Defining Sexual Abuse

Unit D: Defining Child Neglect

Unit E: Defining Psychological Maltreatment

[36] 25 U.S.C. §§ 3201 et seq. (2005).
[37] 101 P.L. 647.

A. Defining Child Maltreatment

Definitions of child maltreatment are typically found in either a definitions section or a provision setting out the requirements for finding that a child is a CINA. A definitions section in a Children's Code may provide a comprehensive list of the acts and omissions that constitute child maltreatment. Alternatively, specific code provisions defining a term may merely be referenced in an initial definitions or CINA section.

Additionally, this section looks at general definitions of *child abuse* and *child neglect*. Reviewing the federal statutes is an important step in the process of establishing definitions. CAPTA defines child abuse and neglect for the purposes of the act as:

> **Section 3. General Definitions**
>
> In this act
>
> (Section omitted)
>
> 2. the term 'child abuse and neglect' means, at a minimum, any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm.[38]

Section 3202 of the Indian Child Protection and Family Violence Prevention Act provides:

> For the purposes of this title, the term—
>
> (3) "**child abuse**" includes but is not limited to—
>
> (A) any case in which—
>
> (i) a child is dead or exhibits evidence of skin bruising, bleeding, malnutrition, failure to thrive, burns, fracture of any bone, subdural hematoma, soft tissue swelling, and
>
> (ii) such condition is not justifiably explained or may not be the product of an accidental occurrence; and
>
> (B) any case in which a child is subjected to sexual assault, sexual molestation, sexual exploitation, sexual contact, or prostitution;
>
> (4) "**child neglect**" includes but is not limited to, negligent treatment or maltreatment of a child by a person, including a person responsible for the child's welfare, under circumstances which indicate that the child's health or welfare is harmed or threatened thereby;[39]

The Indian Child Protection and Family Violence Protection Act provides separate definitions for *child abuse* and *child neglect*. The definition of *child abuse* is not comprehensive, but specifically includes acts that result in the nonaccidental physical injury or sexual abuse of a child. The definition also

[38] Child Abuse Prevention and Treatment Act of 2010, § 3(2).
[39] 25 U.S.C. § 3202 Definitions

captures some aspects of what is traditionally termed child neglect (a failure to provide adequate food, clothing, shelter, medical care, education, or supervision) because it includes malnutrition and failure to thrive. The definition of *child neglect*, again, is not comprehensive, but specifically includes negligent treatment or maltreatment that harms or may harm a child's health or welfare. The act does not provide a separate definition for *psychological maltreatment*, but such acts probably fall roughly under the act's definition of *child neglect*.

The Victims of Child Abuse Act of 1990 defines the following terms:

(1) the term "child abuse" means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child.

(7) the term "negligent treatment" means the failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to seriously endanger the physical health of the child; and

(8) the term "child abuse" shall not include discipline administered by a parent or legal guardian to his or her child provided it is reasonable in manner and moderate in degree and otherwise does not constitute cruelty.

The Victims of Child Abuse Act of 1990 generally defines *child abuse* and then defines each subcategory of abuse. The subcategories of the definitions are discussed later in this chapter. The definition of *negligent treatment* is consistent with the traditional definition of *child neglect*. The act excludes from the definition of *child abuse* reasonable acts of discipline performed by a child's parent or legal guardian. The language of the act does not appear to extend this definition to custodians or other custodians, such as extended family members.

Selected Tribal Codes

Hoopa Valley Tribal Code
Title 14. Child Welfare Code
Chapter 4: Child Abuse

14.4.2 Definitions[40]

As used in this chapter unless the context otherwise requires.

[sections omitted]

14.4.2.1 "Abuse" or "Child Abuse or Neglect" means an act or omission which seriously threatens the health or welfare of a child. It means a physical injury which is inflicted by other than accidental means on a child by another person. Child abuse also means the sexual assault or exploitation of a child; willful cruelty or unjustifiable punishment of a child; corporal punishment or injury; neglect of a child; abuse in out of home care; or emotional abuse of a child.

(a) Any case in which a child exhibits evidence of skin bruising, bleeding, malnutrition, failure to thrive, burns, fracture of any bone, subdural hematoma, soft tissue swelling, or death, and such condition or death is at variance with the degree or type of such condition or death, or circumstances indicate that such condition may not be the product of an accidental occurrence.

(b) Any case in which a child is subject to sexual assault, molestation, or exploitation as described herein:

(i) "Sexual assault" means conduct in violation of the following: rape, rape in concert, incest, sodomy, lewd or lascivious acts upon a child, oral copulation, penetration of a genital or anal opening by a foreign object.

(ii) "Sexual molestation" means any indecent touching or acts designed to bring about a sexual response from a child.

(iii) "Sexual exploitation" means any acts involving a child for: employment of a minor to perform obscene acts; conduct involving matter depicting a minor engaged in obscene acts; preparing, selling, or distributing obscene matter involved in obscene acts; or prostitution.

(iv) These acts when committed by a person under the age of 18 who is either significantly older than the victim or in a position of power or control over another youth, may be considered sexual abuse.

(c) "Willful cruelty or unjustifiable punishment of a child" means a situation where any person willfully causes or permits any child to suffer, or inflicts hereon, unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of

[40] The Hoopa Valley Tribal Code is on file with the Tribal Law and Policy Institute.

such child to be placed in such a situation that his or her person or health is endangered.

(d) "Corporal punishment or injury" means a situation [in which] any person willfully inflicts upon the child any cruel or inhuman corporal punishment or injury resulting in a traumatic situation.

(e) "Neglect" means the negligent treatment or the maltreatment of a child by a person responsible for the child's health or welfare. The term includes both acts and omissions on the part of the responsible person.

(i) Typical forms of neglect include: abandonment, lack of supervision, nutritional neglect, medical, dental or health neglect, educational neglect, inappropriate or insufficient clothing, shelter neglect, emotional neglect, and moral neglect, also includes continued infestation of head lice on person and in home.

(ii) "General neglect" means the negligent failure of a person having the care or custody of a child to provide adequate food, clothing, shelter, or supervision where no physical injury to the child has occurred.

(iii) "Severe neglect" means the negligent failure of a person having the care or custody of a child to provide adequate food, clothing, shelter, or supervision where no physical injury to the child has occurred.

(f) "Abuse in out of home care" means a situation of suspected physical or mental injury on a child which is inflicted by other than accidental means, or of sexual abuse or neglect or the willful cruelty or justifiable punishment of a child, as defined in this subsection, where the person responsible for the child's welfare is a foster parent or the administrator or an employee of a public or private residential home, school, or other institution or agency.

(g) "Emotional or mental abuse" means injury to the intellectual or psychological capacity of the child as evidenced by an observable and substantial impairment in his ability to function within a normal range of performance and behavior, with due regard to his culture.

(h) In all cases, those investigating reports of child abuse shall take into account accepted child rearing practices of the culture in which the child participates. Nothing in this subsection shall refer to acts which could be construed to be a "reasonable" exercise of parental supervision.

Laws of the Confederated Salish and Kootenai Tribes (Revised March, 2013)
Title III, Chapter 2. Children
Part 3. Youth in Need of Care

3-2-102. Definitions.[41]

[41] The Laws of the Confederated Salish and Kootenai Tribes on file with the Tribal Law and Policy Institute.

[sections omitted]

(1) "**Adult**" means any person who has reached his or her eighteenth (18th) birthday or has otherwise been emancipated by a court of competent jurisdiction.

(2) "**Best Interests of the Child**" means the physical, mental, and psychological conditions and needs of the child and any other factor considered by the court to be relevant to the child.

(3) "**Child**" means any person under 18 years of age, and for implementation of the Title IV-E program, Allows the agency to provide foster care, adoption and, if applicable, guardianship assistance for eligible children up to 21 years of age if the child meets certain criteria established in section 475(8)(B) of the Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351).

(4) "**Child Abuse or Neglect**" means:

(a) **An Abused Child**: One who has suffered or is likely to suffer a physical injury inflicted upon the child by other than accidental means, which causes or creates a substantial risk of death, disfigurement, impairment of bodily functions, or serious physical or emotional harm, as determined by appropriate medical or professional personnel. The following are examples of circumstances in which a child could be found to be an abused child, but as such are not intended to be all-inclusive:

(i) A child who has been excessively beaten or suffered other unusual or inappropriate corporal punishment;

(ii) A child who suffers injury to his or her psychological functioning, as determined by an appropriate professional person, as a result of psychological or other abuse;

(iii) A child who has been subjected to obscene or indecent sexual activities.

(iv) A child who has been a passenger in a vehicle driven by an intoxicated person, with the knowledge or approval of the child's parent or guardian; and

(v) A child exposed to the criminal distribution of dangerous drugs as prohibited by Section 2-1-1401 (Mont. Code Ann. § 45-9-101 (2005)), the criminal production or manufacture of dangerous drugs, as prohibited by Section 2-1-1401 (Mont. Code Ann. § 45-9-110), the operation of an unlawful clandestine laboratory, as prohibited by Section 2-1-1401 (Mont. Code Ann. § 45-9-132), or consumption of dangerous drugs by the parent or custodian while in the physical presence of a child. For the purposes of this subsection "dangerous drugs" means the compounds and substances described in Section 2-1-1401 (Mont. Code Ann. § 50-32-101).

(b) **A Neglected Child**: One whose parent or custodian fails to provide such food, clothing, shelter, medical attention, hygiene, education, or

supervision as the child needs for development, although the parent or custodian was able to furnish such needs or has refused Tribal or other assistance for furnishing such needs, and such failure is likely to result in serious harm to the child as determined by appropriate medical or professional persons.

(c) **An abandoned infant**: One whose parent abandons the child outside of legal adoption

Native Village of Barrow Iñupiat Traditional Government Tribal Children's Code
4-4 Involuntary Proceedings
4-4-1 Child in Need of Aid

4-4-1 A. Child in Need of Aid[42]

The court may find a child to be a child in need of aid ("CINA") if it finds by a preponderance of the evidence that the child has been subjected to conditions which inflict upon the child or place the child in danger of physical, mental, or emotional harm, including:

(1) The parent or custodian has abandoned the child as described in Section 4-4-1 B, and the other parent is absent or has committed conduct or created conditions that cause the child to be a CINA under this Subchapter;

(2) The child has been neglected as described in Section 4-4-1 C;

(3) The child has suffered medical neglect as described in Section 4-4-1 D;

(4) The child is a habitual runaway as described in Section 4-4-1 E;

(5) The child has suffered physical abuse as described in Section 4-4-1 F, or there is substantial risk that the child will suffer physical abuse;

(6) The child has suffered sexual abuse as described in Section 4-4-1 G, or there is substantial risk that the child will suffer sexual abuse;

(7) The child has suffered emotional damage or mental injury as described in Section 4-4-1 H, or there is substantial risk that the child will suffer emotional damage or mental injury;

(8) The parent or custodian's ability to parent has been substantially impaired by the addictive or habitual use of an intoxicant, or the addictive or habitual use of an intoxicant has resulted in a substantial risk of harm to the child; and

(9) The parent or custodian has a mental illness, serious emotional disturbance, serious physical disability, or mental deficiency of a nature and duration that places the child at substantial risk of harm.

[42] This Code is on file with the Tribal Law and Policy Institute.

Tribal Code Commentary

Hoopa Valley's code defines abuse, child abuse, and differing types of abuse in its definition section. It means a physical injury inflicted purposefully, sexual assault or sexual exploitation of a child, willful cruelty or unjustifiable punishment, corporal punishment or injury, neglect of a child, abuse in out-of-home placement, or emotional abuse of a child. It then goes on to define those abuse terms in the remaining definitions.

The Salish and Kootenai Nations also place their descriptions of child abuse in the definitions section of their Youth Code, but define the words *abused child* and *neglected child*. The abused child is one who has suffered physical injury, inflicted by other than accidental means, that causes a substantial risk of death, disfigurement, impairment of bodily functions, or serious physical or emotional harm. This must be determined by a medical or other professional. Examples are then provided of abuse of a child:

- Excessively beaten;
- Suffers injury to psychological functioning;
- Subjected to obscene or indecent sexual activities;
- Passenger in a vehicle driven by an intoxicated person, with the knowledge or approval of the child's parent or custodian; or
- Exposed to criminal distribution of dangerous drugs, describing particular drugs.

The Native Village of Barrow places its definitions of maltreatment in its description of when the court may find a CINA. It includes times when conditions are inflicted on a child or a child is placed in danger of physical, mental, or emotional harm. It includes when a parent's ability to parent has been substantially impaired by the addictive or habitual use of an intoxicant or the habitual or addictive use of an intoxicant has resulted in a substantial risk of harm to the child. It also includes situations when a parent's mental illness, serious emotional disturbance, serious physical disability, or mental deficiency of a nature and duration places a child at substantial risk of harm.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Where does your maltreatment provision of appear in your current code? The definitions section? Describing a CINA?
- Are your current definitions compatible with your traditions?
- Are your current definitions compatible with federal definitions?
- Review the example definitions sections to see what method you prefer. Are there benefits or drawbacks?

STEP 2: Establish a Vision for the Future

- Have there been cases in your court that you feel should not have been in court/child protection system? Would a modification of a definition help?
- Have there been cases that you feel should have been in the child protection system or court, but were not because of the current definitions? Would a modification of a definition help?
- If you have a broad definition that covers many situations, do you have services and sufficient staff to work to resolve the situations?
- Identify changes that are needed in the definitions.

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

B. Defining Physical Abuse

Physical abuse is generally characterized by physical injury, such as bruises and fractures that result from punching; beating; kicking; biting; shaking; throwing; stabbing; choking; hitting with a hand, stick, strap, or other object; and burning.[43] Definitions of physical abuse often exclude accidental injuries but do not require that a parent or caregiver intentionally hurt the child. The definitions allow for injuries that may be the result of a single episode or repeated episodes. Further, definitions vary concerning the severity of the injury, ranging from minor bruising to death.

The Victims of Child Abuse Act of 1990 contains a definition of *physical abuse*.

> (4) the term "physical injury" includes but is not limited to lacerations, fractured bones, burns, internal injuries, severe bruising or serious bodily harm;[44]

The definition considers serious physical injury, which is not the result of an accident.

The Indian Child Protection and Family Violence Protection Act defines *child abuse* and incorporates *physical abuse* into that definition.

> (3) child abuse includes but is not limited to
>
> (A) any case in which
>
> (i) a child is dead or exhibits evidence of skin bruising, bleeding, malnutrition, failure to thrive, burns, fracture of any bone, subdural hematoma, soft tissue swelling, and
>
> (ii) such condition is not justifiably explained or may not be the product of an accidental occurrence; and
>
> (B) any case in which a child is subjected to sexual assault, sexual molestation, sexual exploitation, sexual contact, or prostitution[45]

In a few states labor trafficking of children (human trafficking) is included in the definition of physical abuse or the general definition of child abuse.[46]

---

[43] See *A Coordinated Response to Child Abuse and Neglect: The Foundation for Practice*, Chapter 3, a publication of the National Clearinghouse on Child Abuse and Neglect a division of the U.S. Department of Health and Human Services, Administration for Children and Families.
[44] 18 U.S.C. § 3509 (a)(4).
[45] 25 U.S.C. § 3202(3).
[46] See *Definitions of Child Abuse and Neglect*, Children's Bureau (June 2014).

Selected Tribal Codes

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.030 Definitions.

[sections omitted]

(3) "Abuse" includes but is not limited to:

(a) Physical abuse includes interfering with a child's breathing, any act that is likely to cause or does cause bodily harm greater than minor temporary marks including but not limited to: bruising, welting, abrasions, lesions, burns, broken bones, or other damage to a child's body not clearly caused by accident, and/or giving a child inappropriate food, drink, or drugs, withholding food for significant period or otherwise malnourishing a child.

Native Village of Barrow Iñupiat Traditional Government Tribal Children's Code
4-4 Involuntary Proceedings
4-4-1 Child in Need of Aid

4-4-1 F. Physical Abuse[47]

The court may find that a child has suffered physical abuse if the child was the victim of [homicide, assault, reckless endangerment, kidnapping, or endangering the welfare of a child in the first degree as defined by statute], and the abuse occurred as a result of conduct of or conditions created by the parent, guardian, or custodian.

Sisseton-Wahpeton Sioux Tribe of the Lake Traverse Reservation Codes of Law (Adopted 8/6/86)
Chapter 38. Juvenile Code
38-03-01 Definitions

38-03-03 Physically Abused Child

Is one found to be in one or more of the following situations:

1. Punishments of a nature that could be considered cruel and unusual;
2. A child who has clearly visible physical injuries or is knocked unconscious;
3. A child whose parents have failed to provide the child's basic needs for food, shelter, and clothing;

[47] This Code is on file with the Tribal Law and Policy Institute.

4. A child, including an unborn child, whose health is endangered by exposure to alcohol, drugs, tobacco; and/or
5. A child whose home life is dangerous (*e.g.*, excessive drinking, excessive numbers of people in the house, no food, etc.).

Nisqually Tribal Code
Title 50. Youth
Chapter I. Nisqually Youth Code
Section 50.11—Child in Need of Care

50.11.01 Child in Need of Care–Defined

[sections omitted]

A "**child in need of care**" is one who:

(d) Has been or is likely to be physically abused. Physical abuse includes but is not limited to:

(i) Any bruising, welting, abrasion, lesions, burns, broken bones, or other damage to the body, not clearly caused by pure accident;

(ii) Giving a child inappropriate food, drink, or drugs or a child who is suffering from malnutrition/ dehydration;

(iii) Extreme forms of punishment/ isolation including, but not limited to, hair pulling, slapping or hitting the child's head, severe shaking, yanking limbs, twisting or pulling the child's ears;

(iv) Blocking the child's airways or in any way hindering the child's ability to breathe;

(v) Exposing the child to toxic substances including, but not limited to, manufacturing or using drugs in the home.

Tribal Code Commentary

The Tulalip Code includes interfering with a child's breathing in its definition of *physical abuse*. It also includes any act that is likely to cause or does cause harm greater than minor temporary marks or causes other damage to a child's body, not clearly caused by accident. Giving a child inappropriate food, drink, and drug or withholding food for a significant time is also considered physical abuse.

The Native Village of Barrow uses its criminal code to define *physical abuse*: when a child suffers as a victim of a homicide, assault, reckless endangerment, kidnapping, or endangering the welfare in the first degree and the abuse was a result of the conduct or conditions created by the parent, custodian, or guardian. This may be problematic as it appears a crime would have to be committed to determine physical abuse. A better option would be to define within this code.

The Sisseton-Wahpeton Sioux include subjecting an unborn child to exposure to alcohol, drugs, and tobacco in their definition of physically abused child. They also include a child whose home life is dangerous (e.g., excessive drinking, excessive numbers of people in the house, no food). This definition may bring more families into the child protection system.

The Nisqually Tribal Code includes in its definition of *physically abused* giving a child inappropriate food, drink, or drugs or a child who is suffering from malnutrition. Extreme forms of punishment such as hair pulling, slapping, or hitting the child's head; severe shaking; yanking of limbs; and twisting or pulling the child's ears is physical abuse in the Nisqually Nation. Blocking the child's airways or exposing the child to toxic substances including manufacturing or using drugs in the home is also considered physical abuse.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Examine your current code or select one of the tribal examples. Is it consistent with the federal requirements? The tribal code can be more specific.
- Have there been situations in which your current code has not covered situations of physical abuse that you believe should have been covered? If so, explain.
- Has your current code definition been too inclusive, including situations that are better left to family?

STEP 2: Establish a Vision for the Future

- Describe the types of physical injury that should justify intervention by child protection.
- If you are seeking early intervention by child protection, what services do you have available to work with families?
- Do you prefer a very detailed physical abuse definition? Why or why not?

STEP 3: Drafting the Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

C. Defining Sexual Abuse

Definitions of sexual abuse and statutory schemes vary widely. Definitions of sexual abuse of children generally refer to sexual acts, sexually motivated behaviors involving children, or the sexual exploitation of children.[48] Sexual abuse involves a wide range of behaviors including touching offenses (e.g., fondling or sexual intercourse), nontouching offenses (e.g., exposing a child to pornography), and exploitation (e.g., using a child for prostitution or in the production of pornography).

CAPTA defines *sexual abuse* as:

> (4) the term "sexual abuse" includes—
>
> (A) the employment, use, persuasion, inducement, enticement, or coercion of any child to engage in, or assist any other person to engage in, any sexually explicit conduct or simulation of such conduct for the purpose of producing a visual depiction of such conduct; or
>
> (B) the rape, and in cases of caretaker or inter-familial relationships, statutory rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children; and[49]

Victims of Child Abuse Act of 1990 defines *sexual abuse* as:

> (4) the term "sexual abuse" includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children;
>
> (5) the term "sexually explicit conduct" means actual or simulated—
>
> (A) sexual intercourse, including sexual contact in the manner of genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or of opposite sex; sexual contact means the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desire of any person;
>
> (B) bestiality;
>
> (C) masturbation;
>
> (D) lascivious exhibition of the genitals or pubic area of a person or animal; or
>
> (E) sadistic or masochistic abuse;

---

[48] See *A Coordinated Response to Child Abuse and Neglect: The Foundation for Practice*, Chapter 3, a publication of the National Clearinghouse on Child Abuse and Neglect a division of the U.S. Department of Health and Human Services, Administration for Children and Families.
[49] 42 U.S.C. § 5101(4).

(6) the term "exploitation" means child pornography or child prostitution;[50]

The Indian Child Protection and Family Violence Protection Act includes in its definition of *child abuse* "any case in which a child is subjected to sexual assault, sexual molestation, sexual exploitation, sexual contact or prostitution."[51]

[50] 18 U.S.C. § 3509(a)(4-6).
[51] 25 U.S.C. § 3202(3)(B).

Selected Tribal Codes

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part A—General and Dependency Provisions

§402.3 Wasicu ta woiwanke (General Definitions)[52]

[sections omitted]

(68) **Sexual Abuse:** Includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children.

(69) **Sexually Explicit Conduct:** Means actual or simulated:

(A) sexual intercourse, including sexual contact in the manner of genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or of opposite sex; sexual contact means the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desire of any person;

(B) bestiality;

(C) masturbation;

(D) lascivious exhibition of the genitals or pubic area of a person or animal; or

(E) sadistic or masochistic abuse.

(70) **Sexual Exploitation:** means child pornography or child prostitution.

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.030 Definitions

[sections omitted]

(40) "Sexual abuse" means:

(a) Contacts or interactions between a child and an adult when the child is being used for the sexual stimulation of the perpetrator or another person;

(b) Sexual abuse may also be committed by a person under the age of 18 when that person is either significantly older than the victim or when the perpetrator is in a position of power or control over the victim child;

[52] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

(c) The exposure of the perpetrator's genitals in the presence of a child, or any other sexual act, if such exposure or sexual act is for the purpose of sexual arousal or gratification, aggression, degradation, or other similar purpose;

(d) Obscene telephone calls, jokes, peeping, or sexual propositions;

(e) Child pornography or sexual positioning for photos;

(f) Forcing a child to watch a sexual act or sexual violence;

(g) Unwanted hugs, kisses, pinching, or tickling;

(h) French kissing, handling genitals, masturbation, or mouth-to-genital contact;

(i) Oral, anal, or vaginal rape; or

(j) Sexual maiming or sexual bondage.

Nisqually Tribal Code
Title 50. Youth
Chapter I. Nisqually Youth Code
Section 50.11—Child in Need of Care

50.11.01 Child in Need of Care–Defined

A "child in need of care" is one who:

[sections omitted]

(e) Has been or is likely to be sexually abused. Sexual abuse includes, but is not limited to, the following:

(i) Contacts or interactions between a child and an adult when the child is being used for the sexual stimulation of the perpetrator or another person (Pedophilia). Pedophilia includes grooming or soliciting a child for sexual purposes;

(ii) The exposure of the perpetrator's genitals in the presence of a child, or any other sexual act, if such exposure or sexual act is for the purpose of sexual arousal or gratification, aggression, degradation, or other similar purpose (Exhibitionism);

(iii) Obscene calls, jokes, peeping, sexual propositions, or other forms of sexual exploitation;

(iv) Sexual positioning for photos or other forms of child pornography;

(v) Forcing a child to watch or engage in sexual acts or sexual violence;

(vi) French kissing, handling genitals, masturbation, mouth to genital contact are forms of sexual intercourse. Rape is not limited to penetration;

(vii) Oral, anal, or vaginal rape;

(viii) Anal or vaginal digital penetration or penetration with any object;

(ix) Sexual maiming or sexual bondage.

(x) Failure to protect a child from sexual abuse by another or to protect against incest between siblings.

Sexual abuse may also be committed by a person under eighteen (18) years of age when that person is either three years or more older than the victim, when the victim is a mentally impaired child, or when the perpetrator is in a position of power or control over another child.

Tribal Code Commentary

The Oglala Sioux Nation definition of sexual abuse and sexually explicit conduct is taken directly from the Victims of Child Abuse Act of 1990. It covers prostitutions, rape, molestation, sexual exploitation (child phonography or child prostitution), incest, and sexually explicit conduct. Sexually explicit conduct is defined. It specifically describes sexual contact and includes either direct contact or through clothing. A person must have the intent to abuse, humiliate, harass, degrade, arouse, or gratify sexual desire of any person. This is a very broad definition.

The Tulalip Nation has a listing of acts that constitute sexual abuse. The acts can be committed by an adult or by a minor who is significantly older than the victim or in a position of control over the victim. It includes any contact when the child is being used for the sexual gratification of the perpetrator or another person. The list also includes unwanted hugs, pinching, and tickling.

The Nisqually Tribal Code includes those situations when the child is used for the sexual stimulation of the perpetrator or another person. It includes exposing oneself to a child for the purpose of sexual arousal, gratification, degradation, or other purposes. Obscene calls, jokes, peeping, sexual proposition, and other forms of sexual exploitation are considered sexual abuse. French kissing, handling genitals, masturbation, and mouth to genital contact along with other forms of sexual intercourse are included. Failure to protect a child from sexual abuse by another or to protect from incest between siblings is considered sexual abuse.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Compare your current Children's Code definition of *sexual abuse* with your current criminal code. Identify differences and similarities. The two definitions do not need to be the same. Discuss why there may be differences.
- How does your current Children's Code definition of *sexual assault* compare to the tribal code examples and the federal codes?
- Can you identify any problems in your current definition?

STEP 2: Establish a Vision for the Future

- What changes should be made to your current definition?
- Does it cover all the situations you want covered?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

D. Defining Child Neglect

Child neglect is one of the most common forms of reported and substantiated child maltreatment in Indian country. Neglect is often defined to include the failure to provide for a child's basic needs, except where a parent, guardian, or custodian is indigent.[53] Researchers and practitioners divide neglect into three categories:

(1) **Physical neglect**. Physical neglect includes refusal or delay in health care, abandonment, expulsion (blatant refusals of custody), inadequate supervision, failure to provide adequate nutrition, clothing, shelter, or hygiene, and other forms of reckless disregard for a child's safety and welfare.

(2) **Educational neglect**. Educational neglect includes permitted chronic truancy, failure to enroll, and inattention to special education needs.

(3) **Emotional neglect**. Emotional neglect includes inadequate nurturing or affection, exposure to chronic or extreme spousal abuse, exposure to drug or alcohol abuse, permitted drug or alcohol use, and refusal or delay in psychological care.[54]

CAPTA provides a definition for "withholding of medically indicated treatment." The definition describes a situation in which a parent, guardian, or custodian has failed to provide medical treatment recommended by a doctor. While there is an exception if the doctor believes that treatment would be futile, there is no exception for a failure to provide medical treatment based on a sincerely held religious or spiritual belief.

(6) the term "withholding of medically indicated treatment" means the failure to respond to the infant's life-threatening conditions by providing treatment (including appropriate nutrition, hydration, and medication) which, in the treating physician's or physicians' reasonable medical judgment, will be most likely to be effective in ameliorating or correcting all such conditions, except that the term does not include the failure to provide treatment (other than appropriate nutrition, hydration, or medication) to an infant when, in the treating physician's or physicians' reasonable medical judgment—

(A) the infant is chronically and irreversibly comatose;

(B) the provision of such treatment would—

(i) merely prolong dying;

(ii) not be effective in ameliorating or correcting all of the infant's life-threatening conditions; or

(iii) otherwise be futile in terms of the survival of the infant; or

[53] See *A Coordinated Response to Child Abuse and Neglect: The Foundation for Practice*, Chapter 3, a publication of the National Clearinghouse on Child Abuse and Neglect, a division of the U.S. Department of Health and Human Services, Administration for Children and Families.
[54] Ibid.

(C) the provision of such treatment would be virtually futile in terms of the survival of the infant and the treatment itself under such circumstances would be inhumane.[55]

The Indian Child Protection and Family Violence Protection Act provides a definition of *child neglect* that captures some of the aspects of what is traditionally termed child neglect: "child neglect includes but is not limited to, negligent treatment or maltreatment of a child by a person, including a person responsible for the child's welfare, under circumstances which indicate that the child's health or welfare is harmed or threatened thereby."[56]

The Victims of Child Abuse Act of 1990 uses a traditional definition of *physical neglect*, not mentioning educational or emotional neglect: "the term negligent treatment means the failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to seriously endanger the physical health of the child."[57]

[55] 42 U.S.C. § 5106g (2005).
[56] 25 U.S.C. § 3202(3)(A).
[57] 18 U.S.C. § 3509(a)11.

Selected Tribal Codes

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.030 Definitions

(24) "Neglect" means an act or failure to act, or cumulative effects of a pattern of conduct, behavior, or inaction that shows a serious disregard of consequences, and constitutes a clear and present danger to a child's health, welfare, or safety. Neglect includes, but is not limited to:

(a) A child who is not receiving the food, clothing, shelter, medical care, education, or supervision needed for his or her well-being or development;

(b) An infant who is failing to thrive as a result of the parent;

(c) A child left with a babysitter who is intoxicated, irresponsible, too young, or otherwise incapable of caring for the needs of the child;

(d) A child who is doing the work of a parent in running a household because the parent refuses or fails to act as a parent or forces the child to do the work of the parent;

(e) A child who is exposed to a dangerous situation as a result of parental negligence;

(f) A child whose parent(s) misuses benefits intended for the child, such as selling or trading public benefits such as an Electronic Benefits Transfer (EBT), commodities, the child's per capita, or the child's disability or Social Security benefits;

(g) An unborn or nursing child whose mother is using alcohol or nonprescribed drugs to the extent that the fetus or child may be endangered;

(h) An unborn child whose mother is not receiving adequate prenatal care;

(i) A child who is an unreported runaway;

(j) A child who has excessive unexcused absences from school or a child who is not enrolled in a school program;

(k) A child who is expected to provide prolonged and unsupervised babysitting services; or

(l) A child who has been a passenger in an automobile, boat, or other motorized vehicle driven by a person under the influence of alcohol and/or drugs, with the knowledge of the child's parent(s), guardian, or custodian.

Native Village of Barrow Iñupiat Traditional Government Tribal Children's Code
4-4 Involuntary Proceedings
4-4-1 Child in Need of Aid

4-4-1 B. Abandonment[58]

The court may find that child has been abandoned if a parent or custodian has shown conscious disregard of parental responsibilities toward the child by failing to provide reasonable support, maintain regular contact, or provide normal supervision, considering the child's age and need for care by an adult. Abandonment of a child also includes instances when the parent or custodian, without justifiable cause:

1. Left the child with another person without provision for the child's support and without meaningful communication with the child for a period of three (3) months;
2. Has made only minimal efforts to support and communicate with the child;
3. Failed for a period of at least six (6) months to maintain regular visitation with the child;
4. Failed to participate in a suitable plan or program designed to reunite the parent or custodian with the child;
5. Left the child without affording means of identifying the child and the child's parent or custodian;
6. Was absent from the home for a period of time that created a substantial risk of serious harm to a child left in the home;
7. Failed to respond to notice of child protection proceedings; or
8. Was unwilling to provide care, support, or supervision for the child.

For the purposes of this Section, a parent or custodian who is the victim of domestic violence, or who has a child in her care who is the victim of domestic violence, is considered to have justifiable cause to take an action or to fail to take an action that would otherwise be considered to be abandonment of a child if the action or failure to act is necessary to protect the parent or custodian, or a child in her care, from further acts of domestic violence. However, if the parent or custodian does not take reasonable steps to reunify with or provide care for the abandoned child after becoming secure from further acts of domestic violence, the child may be considered abandoned without justifiable cause.

4-4-1 C. Neglect

The court may find that a child has been neglected if the parent or custodian fails to provide the child with adequate food, clothing, shelter, education, medical attention, or other care and control necessary for the child's physical and mental health and development, though financially able to do so or offered financial or

[58] This Code is on file with the Tribal Law and Policy Institute.

other reasonable means to do so, or if a caregiver with whom the child has been left is unwilling or unable to provide care, supervision, or support for the child, and the whereabouts of the parent or custodian are unknown.

Nisqually Tribal Code
Title 50. Youth
Chapter I. Nisqually Youth Code
Section 50.11—Child in Need of Care

50.11.01 Child in Need of Care–Defined

A "child in need of care" is one who:

[sections omitted]

(b) Has been severely neglected. Signs that a child has been neglected include but are not limited to the following:

(i) A child who is not receiving the food, clothing, shelter, medical care, education, or supervision needed for his or her well-being or development;

(ii) An infant who is failing to thrive;

(iii) A child who is not dressed adequately for weather conditions;

(iv) A child who is truant;

(v) A child left with a baby-sitter who is intoxicated, irresponsible, incapacitated, or otherwise incapable;

(vi) A child who lacks parental control because of the habits or fault of the parent(s) or guardian;

(vii) A child who is doing the work of a parent in running a household because the parent or guardian refuses or fails to act as a parent or forces the child;

(viii) A child exposed to a dangerous situation as a result of negligence of the parent or guardian;

(ix) A child whose parent(s) or guardian misuse benefits intended for the child, such as selling or squandering food stamps or commodities;

(x) An unborn or nursing child whose mother is using alcohol or other drugs, to an extent that the fetus or baby may be endangered;

(xi) An unborn child whose mother is not receiving adequate prenatal care;

(xii) A minor who is allowed access to alcohol or other drugs;

(xiii) A child who is allowed to be out after curfew;

(xiv) A child with untreated head lice;

(xv) A child whose parent or custodian has failed to protect the child from an abusive custodian, partner, or significant other;

(xvi) A child who has been exposed to domestic violence in the home;

(xvii) A child whose custodian is using substances to the point that it affects the custodian's ability to take care of family or other household responsibilities;

(xviii) A child whose custodian(s) refuses to assist the child in his or her efforts to receive treatment for alcoholism, drug addiction, or any physical or emotional problem;

(xix) A child who is not receiving adequate dental care.

Tribal Code Commentary

The Tulalip Nation provides a specific list of examples of neglect after first listing what is a traditional definition of *physical neglect*. The list is quite expansive, including such actions as leaving a child with an intoxicated babysitter, driving while intoxicated with a child in the car, exposing a child to a dangerous situation as a result of parental negligence, selling food stamps or other misuse of benefits, a young child with five or more unexcused absences from school, a child who is runaway, a child out after curfew, and several more. The definition is comprehensive and intends to bring families into the child protection system easily and early. Tulalip has programs to address issues early.

The Native Village of Barrow has a traditional definition of *neglect*, but has a very specific definition of the word *abandonment*, describing specifically what type of action over what period of time leads to abandonment. When abandonment is due to domestic violence to protect the victim, it is considered justified.

The Nisqually's code provides an extensive list of situations in which a child is considered neglected. This includes such situations as a pregnant woman drinking alcohol or taking drugs. It also includes such things as a child with untreated lice or one without required immunizations, as well as one not receiving proper dental care. The expansive list enables child protection and the court to intervene in many family situations. If a tribe has the programs, staff, and facilities to address these situations, children's care can be improved.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- In viewing your current definitions do you find them to be too broad or too narrow?
- Are there any traditional practices or contemporary realities that are considered neglectful under your current definition? (Including such practices as culturally based shared child-raising practices, seasonal employment practices, school/job requirements, and incarceration patterns.)
- Identify problem areas in your current definitions.

STEP 2: Establish a Vision for the Future

- Do you prefer a very detailed *child neglect* definition? Why or why not? What provisions would you specifically include in such a definition?
- How can you insert traditions into your definition of *neglect* or in the manner neglect cases are addressed by child protection or court system?
- Discuss any difficulties your system may have in enforcing this definition.

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

E. Defining Psychological Maltreatment

Psychological maltreatment is often called "emotional abuse and neglect." It includes spurning (e.g., belittling, rejecting, ridiculing); terrorizing (e.g., threatening violence, endangerment); isolating (e.g., confinement, unreasonably limiting freedom of movement, restricting social interactions); exploiting or corrupting (e.g., rewarding antisocial behavior, encouraging prostitution, permitting substance abuse); denying emotional responsiveness (e.g., ignoring a child, expressing no affection); and neglecting mental or medical care and education.[59] Psychological maltreatment often results in a child feeling worthless, flawed, unloved, and unwanted.[60] To justify tribal intervention, psychological maltreatment must result in demonstrable harm to a child's safety or well-being.

The Victims of Child Abuse Act of 1990 does not define *psychological maltreatment*, but does define the result of that maltreatment in the term *mental injury*.

> (4) the term "mental injury" means harm to a child's psychological or intellectual functioning which may be exhibited by severe anxiety, depression, withdrawal or outward aggressive behavior, or a combination of those behaviors, which may be demonstrated by a change in behavior, emotional response, or cognition.[61]

[59] *A Coordinated Response to Child Abuse and Neglect: The Foundation for Practice*, Chapter 3, a publication of the National Clearinghouse on Child Abuse and Neglect, a division of the U.S. Department of Health and Human Services, Administration for Children and Families, 7–8, citing the research and expert opinions of Stuart N. Hart, Ph.D., and Marla R. Brassard, Ph.D.

[60] Ibid., 7.

[61] 18 U.S.C. § 3509(5).

Selected Tribal Codes

Tulalip Tribal Code (Current through passed May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.030 Definitions

[sections omitted]

(3) "**Abuse**" includes but in not limited to:

(b) "**Emotional maltreatment**" is defined as a repeated pattern of damaging interactions between a child and one or more parents or caregivers that becomes typical of the relationship. The pattern may be chronic and pervasive, or in some situations stimulated by the parental use of alcohol or drugs. Emotional maltreatment may coexist with or be a consequence of physical or sexual abuse, but it also can exist as a separate event. "Emotional maltreatment" may include but is not limited to the following: a child whose social relationships are seriously impaired, and/or a child with very low self-esteem, or a consistent pattern of emotional difficulties such as listlessness, apathy, depression, or self-deprecating remarks; a child who does not appropriately respond to normal adult behavior (e.g., cowering or ingratiating himself or herself to adults behaving normally); a child who is rejected or whose parent, guardian, or custodian refuses to accept him or her; a child whose parent, guardian, or custodian ignores him or her or deprives him or her of essential responsiveness which stifles emotional growth and development; a child who is severely intimidated, ridiculed, or terrorized by verbally assaulting, bullying, name calling, destroying possessions, or attacking pets or beloved people of that child; a child who is isolated from normal social experiences, prevented from forming friendships, or locked out of the home; a child who is taught socially deviant behavior, such as by rewarding aggression, delinquency, or sexual behavior; a child who is penalized for positive or normal behavior; or an infant who is failing to thrive as a result of the parent or discouraged from forming an attachment with his or her caregiver.

Native Village of Barrow Iñupiat Traditional Government Tribal Children's Code
4-4 Involuntary Proceedings
4-4-1 Child in Need of Aid

4-4-1 H. Emotional Damage and Mental Injury[62]

[sections omitted]

[62] This Code is on file with the Tribal Law and Policy Institute.

The court may find that a child has suffered emotional damage or mental injury if the parent or custodian causes the child to suffer any type of emotional or mental harm by:

1. Engaging in a pattern of rejecting, terrorizing, ignoring, or corrupting behavior;
2. Exposing the child to conduct by a household member against another household member that is [defined by criminal statute as homicide; assault, excluding assault in the fourth degree; assault in the fourth degree by causing physical injury; or sexual assault], or any offense having elements similar to those crimes, or an attempt to commit such an offense; or
3. Repeatedly exposing the child to conduct by a household member against another household member that is [defined by criminal statute as assault in the first degree by causing fear of imminent physical injury; reckless endangerment; or stalking], or any offense having elements similar to those crimes.

Swinomish Tribal Code
Title 8. Juveniles
Chapter 7—Youth in Need of Care

8-07.010 Youth-in-Need-of-Care (Defined).

(A) A youth in need of care is a youth who is found to be in one or more of the following states or conditions (the examples after each type of youth serve as guidelines to the Court but are not all-inclusive):

(3) Emotionally Abused—an emotionally abused youth shall include, but is not limited to the following:

(a) A youth whose parent, guardian, or custodian fails to love, listen, guide, or pay attention to him or her;

(b) A youth who receives no moral, spiritual, or intellectual instruction, by which a youth learns how to become part of the community, from his or her parent, guardian, or custodian;

(c) A youth who is involuntarily separated or isolated from other members of the family (*e.g.*, locked in or locked out);

(d) A youth whose parent, guardian, or custodian verbally harasses, teases, swears at, or ridicules, or whose parent, guardian, or custodian allows others to do so; or

(e) A youth who is subjected to unusual or inappropriate punishments.

(C) Child abuse and neglect are not always revealed by physical examination of the child or statements of a child. Behavior and emotional temperament of the child (and of the parent or perpetrator) may give more information about the existence of past or present maltreatment. The Court shall give weight to professional evaluations of these factors when deciding if a youth is in need of care.

Tribal Code Commentary

The Tulalip Code defines emotional maltreatment as a pattern of damaging interactions between a child and parent/caregiver that becomes typical of the relationship. It then provides examples of emotional maltreatment by example of a child's actions:

- A child whose social relationships are seriously impaired;
- A child with very low self-esteem;
- A child with a consistent pattern of emotional difficulties;
- A child who does not appropriately respond to normal adult behavior (cowering or ingratiating to adults);
- A child rejected or whose parent refuses to accept the child;
- A child who is severely intimidated, ridiculed, or terrorized by verbally assaulting, bullying, name calling, destroying possessions, or attacking pet or beloved people of that child;
- A child who is isolated from normal social experiences, prevented from forming friendships;
- A child who is taught socially deviant behavior, such as rewarding aggression, delinquency, or sexual behavior;
- A child penalized for positive or normal behavior; or
- An infant who is failing to thrive as a result of the parent or is discouraged from forming an attachment with the caregiver.

The Native Village of Barrow focuses on the parent/caretaker behavior that causes a child to suffer any type of emotional or mental harm. The behavior includes rejecting, terrorizing, ignoring, or corrupting behavior. Additionally, exposing the child to conduct by one household member against another household member that is a serious crime, such as sexual assault or homicide, is considered emotional abuse. Repeatedly exposing a child to violence in the home such as reckless endangerment or stalking, or a similar crime, is also considered emotional abuse.

The Swinomish Tribal Code, as one part of its definition of youth-in-need-of-care, define an emotionally abused youth as one whose parent, guardian, or custodian fails to love, listen, guide, or pay attention to the youth or a youth who receives no moral, spiritual, or intellectual instruction on how to become part of the community from his parent, custodian, or guardian. It could also include a youth locked out of their home, or subject to isolating or harassing behaviors or inappropriate punishments.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- How does your current code define *psychological maltreatment*?
- Are there certain parts of the current definition that are difficult to prove?
- Is there a conflict with any traditional practice?

STEP 2: Establish a Vision for the Future

- What are the characteristics of children that you want to see helped by the child protection system as a result of psychological maltreatment?
- Are there certain traditions or community practices that should be considered in drafting definitions?
- What services do you have available for the family to prevent and/or treat psychological maltreatment? What services do you have for the child?
- Do you prefer a very detailed definition? Why or why not?
- What provisions do you want to include in your tribal definition?
- Will your definition focus on the actions of the parent, custodian, or guardian or on the responses of the child or both?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

Additional Resources

Child Welfare Information Gateway, About CAPTA: A Legislative History, U.S. Department of Health and Human Services, 2011.
Brief fact sheet on the legislative history of the Child Abuse Prevention and Treatment Act.

Child Welfare Information Gateway, Definitions of Child Abuse and Neglect: Summary of State Laws, U.S. Department of Health and Human Services, 2014.
This publication presents state civil laws that define the conduct, acts, and omissions that constitute child abuse or neglect that must be reported to child protective agencies. The types of maltreatment defined include physical abuse, neglect, emotional abuse, and sexual abuse. Summaries of laws for all states and U.S. territories are included.

Goldman, Jill, et al., A Coordinated Response to Child Abuse and Neglect: The Foundation for Practice, National Clearinghouse on Child Abuse and Neglect, U.S. Department of Health and Human Services, Administration for Children and Families, 2003.
User manual on addressing child abuse and neglect, including discussions of child maltreatment.

Sekaquaptewa, Pat, Roe Bubar, and JoAnne Cook, A Victim-Centered Approach to Crimes Against American Indian and Alaska Native Children, Tribal Law and Policy Institute, 2008.
This resource guide and workbook aims to provide a process for enacting a culturally appropriate criminal code that addresses the victimization of tribal children. This resource attempts to balance the goals of protecting the sacredness of children while also assuring due process protections for the accused.

U.S. Department of Health and Human Services, The Child Abuse Prevention and Treatment Act (CAPTA) as amended by CAPTA Reauthorization of 2010, 2011.
This booklet presents CAPTA as amended by the CAPTA Reauthorization Act of 2010. The booklet also contains the Adoption Opportunities program and Abandoned Infants Assistance Act, as amended.

Chapter 6: Procedural Rules, Evidence Rules, and Related Matters

Because efficiency and expedience are especially necessary in a CINA case, it is important for every Children's Code to properly include rules of civil procedure and rules of evidence. The rules of civil procedure describe the required practice and procedure to be used in a civil court proceeding. Failure to follow the required procedure generally results in sanctions. The rules of evidence describe when, how, and for what purpose evidence can be placed before the court for consideration. These rules create an efficient process for a case and help protect the due process rights of all parties.

Native Nations have taken a few paths when it comes to the application of civil procedure rules, and those are outlined in this chapter. Because civil procedures are so standardized, they are one of the most straightforward areas to develop when creating or updating a Children's Code.

However, evidence rules require particular attention and generally warrant some deviation from the standard evidence rules of a civil court. For example, all CINA cases involve a child, and it is helpful to have evidence rules that protect the comfort and safety of a child providing evidence that may be used against a parent. This chapter discusses the different options for evidence rules and highlight particular evidence rules that should be included in every Children's Code.

In addition to civil procedure and evidence rules, the Court may need to address issues such as sovereign immunity, severability, appeals, and court-appointed counsel for parties to a CINA case. While the usual practice is to address those issues in the general tribal code, and incorporate relevant sections by reference, a Native Nation that chooses to address them separately in their Children's Code can have a more streamlined Children's Code by adding those code sections in the same code chapter as civil procedure and evidence.

Chapter Units

Unit A: Rules of Civil Procedure

Unit B: Confidentiality in Proceedings and Records

Unit C: Rules of Evidence—General

Unit D: Rules of Evidence—Reports

Unit E: Rules of Evidence—Children's Testimony

Unit F: Sovereign Immunity and Severability

Unit G: Appeals

Unit H: Appointing an Attorney, Advocate, or Guardian Ad Litem

A. Rules of Civil Procedure

The rules of civil procedure refer to the detailed procedural rules used by court in a civil case—from the format of court documents to the number of jurors in a trial, and everything in between. CINA cases are a type of civil case that is typically governed by the regular rules of civil procedure. Usually the Children's Court implicitly adopts the civil rules of court or has a Children's Code section that adopts additional or alternative rules of procedure.

However, because of the special nature of CINA cases, or any civil case involving a child, some Native Nations have created specialized civil procedure rules, usually added to individual Children's Code sections, that are used to govern CINA cases. For example, emergency removal hearings may not be covered in the regular civil procedure rules so the emergency removal section of a Children's Code should fill that gap by stating the procedure for emergency removal hearings. Some Children's Codes use specialized civil procedures *in addition* to incorporating the court's standard civil procedure rules. For example, the Children's Code may have a heightened notice requirement for a termination of parental rights hearing.

This unit outlines a few options for adopting another code chapter on civil procedure by reference within the Children's Code. Because there are so many variations and types of specialized rules depending on the Children's Code, this unit only highlights a few examples of specialized civil procedure rules that are tacked on to specific Children's Code sections. So, when reviewing the various chapters of this Children's Code resource, *be sure to pay attention to the different variations of specialized civil procedure rules as noted in the Tribal Code Commentary.*

Selected Tribal Codes

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.320 Civil rules of Tribal Court.

Chapter 2.10 TTC, Civil Rules of Tribal Court, shall apply unless otherwise provided within this chapter. [Res. 2015-101].

White Earth Band of Ojibwe Child/Family Protection Code
Title 4: Children and Families
Chapter IV. Procedures and Authorization

Section 1. Rules of Procedure.

The procedures in the children's court shall be governed by the rules of procedure for the tribal court which are not in conflict with this code.

Mille Lacs Band Statutes Annotated (Current through February 7, 2014)
Title 8–Children and Families
Chapter 13. Child/Family Protection
Subchapter 2—Children's Court

Section 3118. Rules and Procedure

The procedures in the Children's Court shall be governed by the rules of procedure for the Court of Central Jurisdiction which are not in conflict with this chapter.

Yurok Tribe Children's Code (Current through January 31, 2008)
Chapter 6: Emergency Custody Hearing

Section 8: Timing of Emergency Custody Hearing

The court shall immediately, and in no event more than three Court Days after being notified of the removal of a child from his or her home, hold an emergency custody hearing. If present at the hearing, a parent, guardian, or custodian of the child may request a continuance of the hearing for the purpose of preparing a response to the allegation that the child is a child in need of aid. The court may grant the request on a showing of good cause for why the parent, guardian, or custodian is not prepared to respond to the allegation. During a continuance, the child remains in the emergency custody of the tribal department of social services.

White Earth Band of Ojibwe Child/Family Protection Code **(Last accessed November 20, 2015)**
Title 4: Children and Families
Chapter XVII. Notice of Formal Trial on the Issues

Section 1. Summons.

The court shall issue a summons to the parent, guardian, or custodian and such other persons as appear to the court to be proper or necessary parties to the proceedings. The summons shall require them to appear personally before the court at the time set for the formal trial.

Section 2. Attachments to Summons.

A copy of the child/family protection petition shall be attached to each summons. The court shall also attach a notice to the parent, guardian, or custodian which advises them of their rights under Chapter XIV of this code.

Section 3. Personal Service.

If the parties to be served with a summons can be found within the exterior boundaries of the reservation, the summons, a copy of the child/family protection petition and the notice of rights shall be personally served upon them at least fifteen (15) court days before the formal trial on the issues.

Section 4. Mail Service.

If the parties are within the exterior boundaries of the reservation but cannot be personally served, and if their address is known, the summons, petition and notice of rights may be served by registered mail with a return receipt requested, at least ten (10) days before the formal trial.

Section 5. Notice to Extended Family.

If the court cannot accomplish personal service or mail service, the court shall attempt to notify the parent, guardian, or custodian by contacting members of the extended family of the parent, guardian, or custodian, and/or the extended family of the child.

Section 6. Service of Summons.

Service of summons may be made under the direction of the court by any person eighteen (18) years of age or older who is not a party to the proceedings.

Section 7. Publication.

In a child/family protection case where it appears within the body of the petition or within an accompanying statement that the parent, guardian, or custodian is a nonresident of the reservation, or that their name, place of residence, or whereabouts is unknown, as well as in all cases where after due personal service or service by registered mail has been unable to be effected,

the court shall direct the clerk to publish legal notice in a newspaper, printed in the county or on the reservation, qualified to publish summons once a week for three consecutive weeks with the first publication of the notice to be at least twenty-one (21) days prior to the date fixed for the hearing. Such notice shall be directed to the parent, guardian, or custodian if their names are known, or if unknown a phrase "to whom it may concern," be used and applied to and be binding upon any such person whose names are unknown. The name of the court, name of the child, the date of the filing of the petition, the date of the hearing, and the object of the proceeding in general terms, shall be set forth. There shall be filed with the clerk an affidavit showing publication of the notice. The publication of the notice shall be paid by the tribe. The publication of the notice shall be deemed equivalent to personal service upon all persons known or unknown who have been designated as provided in this section.

Section 8. Contempt Warning.

The summons issued by the court shall conspicuously display the words:

NOTICE: VIOLATION OF THIS ORDER IS SUBJECT TO PROCEEDINGS FOR CONTEMPT OF COURT PURSUANT TO CHAPTER VI OF THE WHITE EARTH BAND OF CHIPPEWA JUDICIAL CODE. THE COURT MAY FIND THE PARENT, GUARDIAN, OR CUSTODIAN IN CONTEMPT FOR FAILURE TO APPEAR AT A COURT HEARING OR FOR FAILURE TO FOLLOW COURT ORDERS.

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part I General Provisions

§ 8.005. Consolidation of Cases

When more than one child is involved in the same situation that may later be found to involve abuse or neglect, the Court may consolidate the proceedings, except that the Court may choose to hold separate dispositional hearings for the children if appropriate and in the best interests of the children.

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part A—General and Dependency Provisions

§408.15 Adjudication Hearings- Purpose and Procedures[63]

[sections omitted]

(6) **Findings of Domestic Violence**—If, during the course of the proceedings or based upon previous Children and Family Court findings or the existence of a Domestic Violence protection order, the Children and Family Court finds that domestic violence is a substantial factor leading to the filing of the petition, the Children and Family Court may grant a request by either party to bifurcate the proceedings to allow separate hearings for the mother and father of the child involved or the guardian or custodian of the child.

[63] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

Tribal Code Commentary

The Tulalip Tribal Code incorporated the Civil Rules of Tribal Court into their adjudicatory proceeding unless otherwise indicated in the code chapter. This is the same method used in the White Earth and Mille Lacs codes and is a common provision.

Procedural requirements specific to CINA proceedings are the norm. In the Yurok example the timing requirements for an emergency hearing are set out. This is followed by several examples of procedural requirements set out in White Earth Code. These examples specific to CINA cases define and describe who should receive a summons, what must be attached to the summons, and explain how it is properly served. The White Earth Code also gives the court authority to issue a contempt order if a parent, guardian, or custodian properly summoned fails to appear or obey an order in a CINA proceeding.

The Siletz Juvenile Code has a civil procedure provision specific to CINA proceedings that requires a consolidation of cases when more than one child is involved in the same situation that later leads to a CINA proceeding.

The Oglala Sioux Code has a special procedure that may be applied when domestic violence has been previously identified in the home and is a substantial factor leading to the filing of the CINA petition. The proceeding can be bifurcated to allow separate hearings for each parent involved (as well as guardians or custodians).

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Do you currently have a code provision in your Children's Code that incorporates the Nation's Rules of Civil Procedure into your CINA procedures?
- Do you have situations in which the current Rules of Civil Procedure are not adequate?
- What specific procedures currently are established for the hearings, services, and notice requirements?

STEP 2: Establish a Vision for the Future

- What changes need to be made to adequately and reasonably provide standard procedures in your CINA proceedings?
- Have you incorporated general Rules of Civil Procedure and developed specific rules required in CINA proceedings?
- What variances in procedure may be appropriate at the different hearings in the CINA proceedings in your court?
- Have you established special rules of service and provided notice to parties?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

B. Confidentiality in Proceedings and Records

Confidentiality is particularly important because CINA hearings are necessarily related to sensitive, and often traumatic, events for children and families. As such, a Children's Code should set out a clear procedure that is designed to balance the individual need for confidentiality against the community's standards of justice and transparency as reflected by the court's confidentiality procedures in other civil and criminal cases.

The main confidentiality concerns include:

- How to keep people involved in the case (court staff, witnesses, advocates, etc.) from disclosing confidential information.
- Keeping the actual hearing confidential. Who is allowed in the courtroom?
- Keeping records (courts and social service) confidential. Who can access them and how can they be accessed?
- Communicating across departments and jurisdictions to effectively resolve the case while respecting confidentiality.

Selected Tribal Codes

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part I General Provisions

§ 8.0011. Records Maintenance and Confidentiality

(a) **Records**—A record of all hearings under this Code shall be made and preserved until the jurisdiction of the Court has ended.

(b) **Confidentiality of Records**—All personal information, Court files, documents, and other materials associated with child custody proceedings conducted pursuant to Code, including the names of children, families, or witnesses involved in the proceedings, shall be kept confidential unless released by order of the Court. These records shall not be open to inspection other than by Court personnel or by any person other than the following:

(1) The child and his or her legal representative;

(2) The child's parent(s), guardian, or custodian and his or her legal representative;

(3) The tribal representative and the tribal attorney;

(4) Any other person who the Court determines has a valid reason to see the records and for whom the Court issues a written order detailing the reasons for permitting the person to review the records.

This confidentiality provision applies to all divisions and departments of the Tribe, including social service and law enforcement agencies. Disclosure of documents and material to authorized public agencies engaged in the performance of the official duties of those agencies, whether tribal, federal, or state, does not violate this section as required by applicable law.

(c) **Maintenance and Release of Records**—All records related to child custody proceedings conducted pursuant to this code shall be kept in a secure place by the Clerk of Court, and shall be released only pursuant to procedures developed by the Chief Judge of the Court.

(d) **Oath of Confidentiality**—Each person who inspects records pertaining to child custody proceedings pursuant to this Code is required to sign a written oath pledging to maintain the confidentiality of the records. Failure to obey this oath shall constitute contempt of court.

Pascua Yaqui Tribe Tribal Codes
Title 5 Civil Codes
Chapter 7 Juveniles (Amended February, 2015)

Section 490 Juvenile Court Records (5 PYTC § 7-490)

A record of all hearings in Juvenile Court shall be made and preserved. All Juvenile Court records shall be confidential and shall not be open to inspection to any but the following:

(A) The child.

(B) The child's parent, guardian, or custodian.

(C) The prospective adoptive parent(s).

(D) The child's counsel or guardian ad litem.

(E) The Juvenile Court's personnel directly involved in the handling of the case.

(F) Any other person by order of the Court having legitimate interest in the particular case or the work of the Court.

(G) The Juvenile Presenting Officer and Tribal Prosecutor.

(H) The Tribal Police Department, for inclusion in its records.

(1) Notwithstanding any other provision of Tribal law, the Tribal Police Department shall be authorized to share its records with any Law Enforcement Agency, including, but not limited to the Pima County Sheriff's Department and the City of Tucson, Police Department, for use in their records system and subsequent sharing.

(2) For purpose of this subsection, a Law Enforcement Agency shall be defined as any federal, state, state political subdivision, and or Indian Agency responsible for investigating possible violations of the criminal law, enforcing the criminal laws, prosecuting violations of the criminal laws, or detaining violators of the criminal laws of the United States, and state or political subdivision of a state or an Indian tribe.

The Law and Order Code of the Kalispel Tribe of Indians (Enacted 12.2.2015)
Chapter 7 Kalispel Youth Code
Part 2. Youth in Need of Care

7-11.01 Hearings and Conferences

All hearings under this Code shall be closed to the public. Only the Presenting Officer, the Judges, the Indian Child Welfare Worker, and the parties to the proceeding shall be permitted at the hearings and conferences; provided that the Court and the parties may agree to allow the presence of other persons. Any person asked to testify or speak shall be permitted at the hearings and conferences but only for the limited purpose of giving testimony or presenting evidence.

The Law and Order Code of the Kalispel Tribe of Indians (Enacted 12.2.2015)
Chapter 7 Kalispel Youth Code
Part 2. Youth in Need of Care

7-11.04 Open Communication Policy

The policy of the Kalispel Tribe of Indians toward investigation and resolution of child abuse and neglect is one of open communication between agencies and departments for the protection of children while respecting the confidentiality of statements by victims, their families, and reporters of abuse/neglect. Where there is a conflict, between confidentiality and the need for communication, protection of the child shall be the overriding consideration.

Tribal Code Commentary

The Siletz Tribal Code provides that the records of all hearings under the Juvenile Code be preserved until the jurisdiction of the court has ended. All personal information, court files, documents, and other materials associated with child custody proceedings are to be kept confidential unless released by court order. Only the court personnel; the child or legal representative; the parent, guardian, custodian, or legal representative; the tribal representative and tribal attorney; and any person who the court deems have a valid reason to see the records have access to the records. The law applies to all social service and law enforcement agencies. However, disclosure of document to authorized public agencies does not violate the law. The records are to be kept in a secure place by the Clerk of Court. Each person inspecting records is required to sign a written oath pledging to maintain the confidentiality of the records. Failure to obey the oath constitutes contempt of court.

The Pascua Yaqui Tribal Code specifies who is permitted to inspect the court records. In addition to the individuals named in the Siletz Code, it specifically includes the Tribal Police Department, for inclusion in police records. The Tribal Police Department is authorized to share its records with any law enforcement agency for use in its records system and subsequent sharing. This supports criminal investigations by state, tribal, and federal law enforcement agencies.

The Kalispel Tribal Code closes all child protection hearings to the public. Only specific people are allowed to attend the hearings and conferences, unless the parties agree to allow others to attend. Individuals testifying are only allowed to be present during their testimony. Another section of the code supports open communication between agencies and departments for the protection of children. Where there is a conflict between confidentiality and the need for communication, protection of the child shall be the overriding consideration.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- What are your current laws and protocols relative to confidentiality of CINA records and proceedings?
- Are the current practices consistent with cultural practices? What family members are involved in the CINA proceeding and what information is shared?
- What changes should be made in the current laws or protocols?

STEP 2: Establish a Vision for the Future

- How can you keep people involved in the case (court staff, witnesses, advocates, social workers, etc.) from disclosing confidential information?
- Should the actual hearing be confidential? Who is allowed in the courtroom?
- How do you envision involvement from traditional third parents?
- Should records be confidential? Who can access them and how can they be accessed?
- How will communication across departments and jurisdictions take place to effectively resolve the case while respecting confidentiality.

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

C. Rules of Evidence—General

The Rules of Evidence for CINA proceedings should be set out in the Children's Code. Often the code provides for application of the standard rules of evidence that apply in all civil proceedings, but allows the judge to modify those rules as necessary and appropriate to protect the best interests of the child. Other times a tribal Children's Code allows for a proceeding where the courts standard rules of evidence don't apply or apply differently. There may be different rules or the rules may be laxer depending upon the hearing. The compliance with standard Rules of Evidence at the Preliminary Hearing and Dispositional Hearing may be laxer than at the CINA or Adjudicatory Hearing.

However, because of the particularly sensitive nature of CINA cases, Native Nations tend to have a lower standard for evidence or hearsay evidence than would be allowed in other civil cases. So, while the Children's Code often incorporates the regular tribal court evidence rules, or the Federal Rules of Evidence, many of the Children's Code sections dealing with sensitive hearings have an added evidence clause that relaxes the evidence rules for that hearing.

In addition, many Native Nations create a special hearsay rule in their Children's Code that allows hearsay evidence that is often barred by the Nation's regular evidence rules. This is because the evidence available in a CINA case is often not the type of tangible evidence used in most civil proceedings, especially when it involves relaying the testimony of children; so, many Children's Codes provide for the use of hearsay evidence dependent upon the court's acceptance of its reliability. It is still a good idea, however, for social workers and other witnesses to try to make their evidence as firm and defensible from challenge as possible.

Selected Tribal Codes

The Law and Order Code of the Kalispel Tribe of Indians (Enacted 12.2.2015)
Chapter 7 Kalispel Youth Code
Part 2. Youth in Need of Care

7-22.06 Evidence

The Court may hear any evidence which is relevant to the case and which is reasonably reliable.

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part A—General and Dependency Provisions

§408.15 Adjudication Hearings—Purpose and Procedures[64]

[sections omitted]

(5) **Rules of evidence**—The Federal Rules of Evidence shall apply to the adjudicatory hearings, except that the Children and Family Court may modify those rules to provide for a more informal introduction of evidence provided such a modification does not violate the rights of the parents, guardian, or custodian, or child to a fair hearing. The Children and Family Court may admit medical and social work records without necessary foundation evidence provided those records are not challenged as being inaccurate copies. The Children and Family Court may also admit evidence regarding statements made by a child under the age of twelve (12) to other persons into evidence provided the Children and Family Court finds that said statements have the necessary indicia of reliability so as not to violate the due process rights of the parents, guardian, or custodian. The parents, guardian, or custodian may invoke the Indian Civil Rights Act privilege against self-incrimination only if it appears to the Children and Family Court that criminal charges may arise from the actions complained of in the petition. A child does not have the right to refuse to testify on self-incrimination grounds unless the Children and Family Court finds that there is a possibility of criminal charges arising from the conduct of the child.

---

[64] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

Mille Lacs Band Statutes Annotated (Current through February 7, 2014)
Title 8—Children and Families
Chapter 13. Child/Family Protection
Subchapter 2—Children's Court

Section 3240. Hearing Procedures

[sections omitted]

(e) The hearing shall be informal in nature. Concerned parties may present evidence relating to the situation. Hearsay evidence will not be excluded from the proceedings. Only the parties, their counsel, witnesses, the child's extended family, and other person determined to be appropriate by the court shall be allowed in the proceedings.

Tribal Code Commentary

The Kalispel Nation indicates in its Youth Code that the court can hear any evidence in a child dependency case that is relevant and reasonably reliable. A judge has a great deal of discretion in determining what is relevant and reliable.

The Oglala Sioux Nation's Code indicates that the Federal Rules of Evidence apply to adjudicatory hearings, except that the court may modify those rules to provide for a more informal introduction of evidence. Statements made by a child under the age of twelve to other persons may be admitted into evidence provided the court finds the statements have the necessary indicia of reliability. Note that the code may have different standards for the preliminary hearing and/or the dispositional hearing.

The Mille Lacs Code example focuses on the adoption proceedings. It allows for informality at the hearing as well as specifically allowing hearsay evidence. It also restricts the people who can be present at the hearing, although the restriction does not apply to the extended family.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- What Rules of Evidence are currently used in your various dependency hearings? Are they the same for other civil matters? Are they adequate?
- Do the current rules allow for some flexibility, yet ensure reliability of evidence? How do they do that?

STEP 2: Establish a Vision for the Future

- What changes, if any, are needed in the Rules of Evidence for adjudicatory hearings?
- How should the Rules of Evidence be different for preliminary or dispositional hearings?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

D. Rules of Evidence—Reports

Social service reports prepared by the child protection or social workers are an indispensable part of CINA proceedings. The reports summarize the case for the court, including all contacts with the child and parents, investigation and history, services provided, recommendations, and compliance with the recommendations. Frequently, the reports are required by the Children's Code and the code is specific on what must be included. If properly and timely prepared, the reports may meet the hearsay exception generally referred to as a "business record." However, generally, the Children's Code specifically allows the reports into evidence. Introduction of such reports cut down on the need to independently qualify and admit every piece of evidence the worker has obtained in support of the CINA petition. Reliability of the reports are generally assured by providing the reports to the parties in a timely manner, thus providing them an opportunity to review, respond, and cross-examine at the hearing.

For Title IV-E programs, judges must consider certain things and make certain rulings at various hearings to comply with federal requirements. Reports may be used to bring the required information to the attention of the court and be the basis of the required rulings.

The Children's Code must provide for the submission of such reports to the court and to opposing parties in timely and sufficient fashion before hearings in which the report is used as evidence. The code may restrict who is entitled to see reports because they often contain confidential information. The social worker is subject to cross-examination on their report. The Children's Code often provides for discovery of items related to the worker's creation of the report (time slips, worker notes, e-mails, texts, etc.) so that the parent's counsel or spokesperson may adequately cross-examine the worker about their factual findings and opinions about whether dependency or neglect as defined by the Children's Code exists.

Selected Tribal Codes

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part A—General and Dependency Provisions

§408.15 Adjudication Hearings—Purpose and Procedures[65]

[sections omitted]

(5) **Rules of evidence**—The Federal Rules of Evidence shall apply to the adjudicatory hearings, except that the Children and Family Court may modify those rules to provide for a more informal introduction of evidence provided such a modification does not violate the rights of the parents, guardian, or custodian, or child to a fair hearing. The Children and Family Court may admit medical and social work records without necessary foundation evidence provided those records are not challenged as being inaccurate copies. The Children and Family Court may also admit evidence regarding statements made by a child under the age of twelve (12) to other persons into evidence provided the Children and Family Court finds that said statements have the necessary indicia of reliability so as not to violate the due process rights of the parents, guardian, or custodian. The parents, guardian, or custodian may invoke the Indian Civil Rights Act privilege against self-incrimination only if it appears to the Children and Family Court that criminal charges may arise from the actions complained of in the petition. A child does not have the right to refuse to testify on self-incrimination grounds unless the Children and Family Court finds that there is a possibility of criminal charges arising from the conduct of the child.

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.330 Reports

Whenever a report is required for a hearing, it shall be filed and served on the parties 10 days prior to the court hearing, unless otherwise noted. Any party objecting to the report may file a motion with the Court and the hearing may be continued for a short period of time. [Res. 2015-101].

---

[65] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.440 Use of reports in youth-in-need-of-care proceedings.

For the purpose of establishing that a child is a youth-in-need-of-care, determining proper disposition of a child, and/or periodically reviewing the child's and family's progress, written reports and other materials relating to the child's mental, physical, educational, and social history and condition may be required by the Court, may be received in evidence, and may be considered by the Court along with other evidence, but the Court may require that the person who wrote the report or prepared the material appear as a witness if that person is reasonably available. [Ord. 81 § 81.1.14].

Reports prepared by guardians ad litem or CASAs shall be provided to parties pursuant to terms of a court order. [Res. 2015-101].

Tribal Code Commentary

The Oglala Sioux Nation's code allows the admission of medical and social work records into evidence without foundation, provided the records are not challenged as being inaccurate copies. Note the challenge to admission is based on inaccuracy of the copy, not that they are inaccurate factually. This could mean that the report contains hearsay statements that may not be true, but accurately reflect the report made by the social worker or medical worker.

The Tulalip Code allows social workers' reports into evidence anytime a report is required for a hearing, provided it is filed and served on the parties ten days prior to the court hearing. Any party objecting to information in the report may file a motion with the court. Written reports and other materials relating to the child's mental, physical, educational, and social history and condition may also be entered into evidence, but the court may require that the person who wrote the report or prepared the material appear as a witness. The Tulalip Code allows the report from the guardian ad litem be admitted into evidence as well, requiring it to also be provided to the parties.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Are reports from social workers, doctors, or other professionals allowed into evidence without the normal foundation? What reports are required by your current code?
- Is there currently a process to ensure reliability and accuracy of these reports?

STEP 2: Establish a Vision for the Future

- What changes if any should be made to ensure that professional's reports, particularly the social worker's reports, can be entered into evidence?
- Do you use guardians' ad litem or CASAs? Do you need a code section to ensure their reports are consistently entered into evidence?
- What process or procedure should be used in the submission of reports in order to ensure reliability of the information contained in the reports?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

E. Rules of Evidence—Children's Testimony

Securing a child's testimony for a court hearing is a complicated matter as there may be competing pressures. The child may be in the best position to know the facts of the situation, but even abused children love their parents/custodians and some may rightly fear them. Children are very susceptible to influences and may be influenced by parents, foster parents, social workers, or police officers. Forensic interviewers are specifically trained to interview children.

The use of a forensic interviewer during the CINA process helps secure accurate statements from children. The age, development, emotional stability, and experiences of the child all impact the quality and accuracy of the child's testimony and should be considered. The training of the interviewers throughout the process should be considered as well.

Because a CINA hearing begins due to a traumatic condition experienced by the child, the risk of retraumatizing the child through in-court testimony should be considered, as it is highly likely. Cultural sensitivity is extremely important as well. There are a variety of mitigation efforts that should be considered to limit any trauma the child may experience due to testifying in a CINA hearing. The CINA hearing is not a criminal matter with a high standard of proof and substantial protection for a defendant. It is a civil matter, so carefully examining whether a child's testimony is truly necessary is a first step. If testimony is necessary to ensure the child is protected from harm, determining ways to present the child's testimony in order to limit their trauma is the next step. These options should be provided in the Children's Code evidence rules.

Selected Tribal Codes

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.360 Court responsibility to make accommodations to help children testify.

The Court shall create court rules to protect a child and recognize their rights in all court proceedings; scrupulously take into consideration the traumatic effect of testifying, facing a respondent or defendant, and of being subject to cross-examination. A child is not required to testify unless accommodations are provided. Such accommodations may include but are not limited to: providing a child-friendly oath, rearranging the courtroom so that the child does not sit near or is not within direct line of sight of the offender during questioning, creating a safe and comfortable area for a child witness to wait before testifying, and allowing the child to hold a comfort item during his/her testimony. In addition, if a properly registered therapy animal is available, with a handler in attendance, it may be allowed to assist a child requesting such while testifying. [Res. 2015-101].

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.370 Court testimony of a child in a chambers or by videotape.

The Court, upon its own motion, or upon the motion of any party, may take testimony from any child appearing as a witness and may exclude the child's parent(s) or guardian(s) and other persons if the Court finds such action would be in the best interests of the child. In lieu of testimony and upon written motion, the Court may review a recorded forensic interview in chambers. [Res. 2015-101].

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part I General Provisions

§ 8.010. Child's Testimony by Videotape

The Court may, within its discretion, permit a child to testify by videotape, or may take other steps to protect the child in proceedings conducted pursuant to this Code, where necessary to protect the best interests of the child.

Mashantucket Pequot Tribal Laws (Enacted 2008)
Title 5. Child Welfare
Chapter 3. Reporting of Child Neglect and Abuse

§ 5. Hearing

[sections omitted]

b. Whenever any party intends to call the child as a witness, it shall notify the court no later than five days before the hearing, unless good cause is shown for short notice to the court. Upon receipt of the notice, the court may direct the child to be evaluated by an expert witness to determine if it is asserted that testifying in person would cause trauma to the child.

   (1) The child may be allowed to testify if such testimony will not cause serious emotional or psychological harm to the child.

   (2) If the court determines that such testimony may cause serious emotional or psychological harm to the child, the child may testify by means of a videotape deposition or other appropriate method. If the court allows these methods to be utilized, the court shall specifically set out the reasons for this determination on the record.

Tribal Code Commentary

The Tulalip Tribal Code makes it the court's responsibility to ensure children are protected whenever they must testify. The court is to make court rules to protect a child and recognize their rights in court proceedings. The code acknowledges the traumatic effect of testifying. Accommodations to be considered would be providing a child-friendly oath, rearranging the court room so the child does not sit near or in a direct line of sight of the offender, creating a safe, comfortable area for a child witness to wait to testify, allowing a child to hold a comfort item during testimony, or allowing a therapy animal to be in attendance. The code also allows the court to exclude the parent or guardian during a child's testimony if that would be in the child's best interests. The court may also review the forensic interview in chambers in lieu of testimony and upon written motion.

The Siletz Tribal Code permits a child to testify by videotape or the court may take other steps to protect the child in the proceedings.

The Mashantucket Pequot Tribal Laws require that any party intending to call a child witness notify the court no later than five days before the hearing. The court may direct the child to be evaluated by an expert witness to determine if testifying in person would cause trauma to the child. If it is determined that trauma would be caused by in-person testimony, the child may testify by means of a videotape deposition or other appropriate method.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- What protections does your code currently provide for children testifying in a CINA or other matter?
- Are these protections adequate to protect the child from additional trauma and protect parties' rights?
- Do you currently use forensic interviewers? Are they involved in this discussion?

STEP 2: Establish a Vision for the Future

- How can you improve your support and protection of children that need to testify?
- What resources might be helpful?
- What would need to be in the tribal code to ensure this protection and support?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

F. Sovereign Immunity and Severability

This section addresses two important aspects of any tribal code: sovereign immunity and severability. Although both issues are typically addressed in the main tribal code "general provisions" or constitutions, these issues should be addressed if your Children's Code is a stand-alone code section.

Sovereign immunity is the legal principle that governments may not be sued in their own courts, unless they voluntarily waive or surrender that privilege.[66] For the purposes of the Children's Code, generally, Native Nations have never found reason for a limited waiver of sovereign immunity in CINA cases.

As to severability, this is a simple code provision that states that if one part of a law is struck down by the courts, it is "severed" from the rest of the law and the rest of the code remains valid. A severability clause allows the Children's Code to be preserved in the event that one section is stricken. For example, imagine that a Children's Code states that a termination of parental rights can happen without notice to the parents, which violates the Native Nation's constitution. If there is a challenge to that section, and a court rules it unconstitutional, a severability clause would protect the *entire* Children's Code from being invalidated. Instead, only the invalid code section, or piece of a code section, is severed.

Like sovereign immunity, a severability clause should be included if the Children's Code is a stand-alone code that does not fall under the umbrella of the main tribal code "general provisions" section.

[66] Melissa Tatum et al., *Structuring Sovereignty, Constitutions of Native Nations* (Los Angeles: UCLA American Indian Studies Center, 2014), 70.

Selected Tribal Codes

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.050 Nonwaiver of sovereign immunity

Nothing in this chapter shall be deemed to constitute a waiver by the Tulalip Tribes of its sovereign immunity for any reason whatsoever. [Res. 2015-101].

4.05.080 Severability

If any part, or parts, or the application of any part of this chapter is held invalid, such holding shall not affect the validity of the remaining parts of this chapter. The Tulalip Tribes Board of Directors hereby declares that it would have passed the remaining parts of this chapter even if it had known that such part or parts or application of any part thereof would be declared invalid. [Res. 2015-101].

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part VI Immunity and Severability

§ 8.045 Sovereign Immunity

The sovereign immunity of the Tribe, the Tribal Council, and tribal employees is not waived by this Ordinance.

§ 8.046 Severability

If any provision of this Ordinance or its application to any person, entity, or circumstance is held to be invalid by a court of competent jurisdiction, the remainder of the Ordinance shall not be affected.

Tribal Code Commentary

The Tulalip and Siletz codes are very similar. Each has a section that states that sovereign immunity is not waived by any provisions of their Children's Codes. Each Nation also has a standard severability clause as a part of its Children's Code to ensure that if one section is struck down by the court, the remaining provisions would stand.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Does your current Children's Code have a section indicating that sovereign immunity is not waived?
- Does your current Children's Code have a severability clause? Is it adequate?

STEP 2: Establish a Vision for the Future

- Do you have a provision relating to nonwaiver of sovereign immunity?
- What changes should be made, if any, to your severability clause?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

G. Appeals

Every Children's Code includes provisions related to appeals. Even if the Children's Code incorporates the regular civil procedure chapter of a tribal code, which includes code sections on appeals, it is useful to restate those provisions in the Children's Code in order to add clarity to the process for the benefit of all affected parties and the community at large. Because attorneys and lay advocates are not always provided to parents and children in CINA cases, it is important that they can easily access the code sections related to appeals in a context that is easy to understand. This helps ensure that due process rights are known to people navigating the process alone, with family, or with nonattorney advocates.

Generally, there are two types of appeals: regular appeals and interlocutory appeals.

Regular appeals can occur once a hearing, or similar process, has concluded and a final decision has been issued by the judge. In the CINA proceeding there are certain orders that are considered "final" orders, and it is helpful if this is indicated in the code. Because a CINA proceeding may result in several hearings and several orders, indicating that the order is final means it is appealable. Indicating that an order is final does not necessarily mean it cannot be amended in a later part of the CINA proceeding. Usually, an appeal must occur within a short time frame in order to promote stability for the child and reduce uncertainty for all parties.

Interlocutory appeals are appeals that occur during an intermediate stage of the case. If a party was claiming that the tribal court lacked personal or subject matter jurisdiction over a case, the party may file an immediate appeal. This would be an interlocutory appeal. Codes addressing these types of appeals need to set out a process that allows for the main CINA proceeding to continue, or be paused, in order for the appellate court to rule on the merits of the appeal.

Selected Tribal Codes

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part III. Children in Need of Care

§ 8.026. Adjudicatory Hearing

[sections omitted]

(f) **Finality of Court Order**—A finding by the Court that the child is a child-in-need-of-care shall be considered to be a final order for purposes of appeal.

§ 8.029. Dispositional Hearing

(d) **Final Order**—The dispositional order constitutes a final order for purposes of appeal.

§ 8.038. Termination of Parental Right

(l) Order Terminating Parental Rights

(2) Omitted.

(3) An order terminating parental rights is a final order for purposes of appeal.

Mille Lacs Band Statutes Annotated (Current through February 7, 2014)
Title 8—Children and Families
Chapter 3. Juvenile Offenders

Section 148. Appeal

(a) Any party to a Court hearing may appeal a final order or disposition of the case by filing a written notice of appeal with the Court within thirty days of the final order of disposition.

(b) A decree or disposition of a hearing may be stayed by such appeal.

(c) All appeals shall be conducted in accordance with 24 MLBSA § 2501 et seq.

(d) For purposes of appeal, a record of the proceedings shall be made available to the minor, his parents, guardian, or custodian. Costs of obtaining this record shall be paid by the party seeking the appeal.

White Earth Band of Ojibwe Judicial Code

Title 4a: Customary Adoption Code
Chapter XXX. Children's Court Appeals

Section 1. Who Can Appeal.

Any party to a children's court hearing may appeal a final order of the children's court.

Section 2. Time Limit for Appeal.

Any party seeking to appeal a final children's court order shall file a written notice of appeal with the court within thirty (30) days of the final order.

Section 3. Record.

For purposes of appeal, a record of proceedings shall be made available to the child, his or her parent, guardian, or custodian, and child's counsel and others upon court order. Costs of obtaining this record shall be paid by the party seeking the appeal.

Section 4. Stay of Appeal.

A court order may be stayed by such appeal upon specific request.

Section 5. Conduct of Proceedings.

All appeals shall be conducted in accordance with the tribal code and tribal court rules of procedure as long as those provisions are not in conflict with the provisions of the children's code.

Tribal Code Commentary

The Siletz Code sections clearly indicated which orders are appealable by using the words *final order*. The sections used as examples indicate that an order following the adjudicatory hearing that finds a child is a child-in-need-of-care is a final order that is appealable. An order terminating a parent's rights is a final order that is appealable. The dispositional order issued after that hearing is a final order that is appealable.

The Mille Lacs Code also indicates in its Children's Code which of its orders are final orders. Those final orders or other dispositional orders may be appealed by any party to the proceeding. A written notice of appeal must be filed with the court within thirty days of the order. The regular appeals process is followed. A judge may stay (suspend) the proceeding. Often when there is an appeal there is an automatic stay of the proceeding, but due to the time-sensitive nature of the CINA proceeding, the judge is given discretion.

The White Earth Code lays out the appeals process in numerous sections. It also requires written notice of appeal to be filed within three days of a final order. The record is made available to the parties on appeal. The order may be stayed, but a party must specifically request it and the judge rule on it.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- What is the current appeals process? Examine the following:
- Is there a short time limit by which appeals must be filed?
  - Does it indicate who may appeal?
  - Is there a method to stay the proceeding during an appeal that adequately protects the child and the other parties?
- Is the process and language easy to understand for unrepresented individuals?
- Is it clear in your code what orders are appealable?

STEP 2: Establish a Vision for the Future

- Indicate any changes in your current law relative to:
  - Timing of the appeal.
  - Who may appeal.
  - The method to stay the proceeding during an appeal.
- What rewording of the code are you going to make to ensure it is understandable by unrepresented individuals?
- Clarify, if needed, what orders in a CINA proceeding are appealable.

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

H. Appointing an Attorney, Advocate, or Guardian Ad Litem

Because the CINA process is a complex legal matter, one with stakes that are arguably higher than those in some criminal proceedings, it is important for Native Nations to seriously consider providing some form of counsel for the parties involved.

If legal counsel or lay advocates are available to parties in a CINA case, the Children's Code needs to outline the circumstances that trigger appointed counsel. For example, there may be access to court-appointed counsel only if the party falls below a certain income level.

For Nations that cannot afford to provide legal counsel for parents and children in their CINA cases, appointing a guardian ad litem is a more cost-effective option that helps protect the best interests of the child. Unlike legal counsel, the guardian ad litem is appointed to represent the child's best interest at all stages of a CINA case and often works closely with the child welfare worker to supervise an ongoing placement or reunification plan.

The decision to appoint a lawyer, advocate, or guardian ad litem is one that must be made in light of the goals, resources, and structure of a tribal court and in light of the culture and values of the tribal community.

Selected Tribal Codes

Laws of the Confederated Salish and Kootenai Tribes (Revised March, 2013)
Title III, Chapter 2. Children
Part 1. General Provisions and Definitions

3-2-110. Representation.[67]

At their own expense, parents or guardians may be represented at each stage of child custody proceedings by an attorney or lay advocate. In a proceeding for termination of parental rights, the Tribal Court will determine if the parent or guardians meet the definition of indigence as defined in Section 1-2-402, CSKT Laws Codified, and if so, the judge may appoint a tribal advocate for the parent or guardian, if so requested and if an advocate is available.

3-2-105. Guardian ad Litem.

In every Tribal Court judicial proceeding, upon the motion of any party or on its own motion, the court may appoint a Guardian ad Litem to protect the legal rights and best interests of the child.

(1) The guardian ad litem is charged with the representation of the child's best interests and shall perform the following general duties:

(a) to conduct investigations to ascertain the facts constituting the alleged abuse or neglect;

(b) to interview or observe the child who is the subject of the proceeding;

(c) to have access to court, medical, psychological, law enforcement, social services, and school records pertaining to the child and the child's siblings and parents or guardians;

(d) to make written reports to the court concerning the child's welfare;

(e) to appear and participate in all proceedings to the degree necessary to adequately represent the child's best interests and make recommendations to the court concerning the child's welfare;

(f) to ascertain and report to the court the wishes and/or desires of the child with respect to any action contemplated or taken by the parties or the court; and

(g) to perform other duties as directed by the court.

(3) Information contained in a report filed by the guardian ad litem or testimony regarding a report filed by the guardian ad litem is not hearsay when it is used to form the basis of the guardian ad litem's opinion as to the best interests of the child.

[67] The Laws of the Confederated Salish and Kootenai Tribes is on file with the Tribal Law and Policy Institute.

(4) Any party may petition the court for the removal and replacement of the guardian ad litem if the guardian ad litem fails to perform the duties of the appointment.

White Earth Band of Ojibwe Judicial Code
Title 4a: Customary Adoption Code

Chapter XIV. Notification of Rights

All parties have a right to be represented by an advocate/attorney at their own expense in all proceedings under this code, to introduce evidence, to be heard on his or her own behalf, to examine witnesses, and to be informed of possible consequences if the allegations of the petition are found to be true. All parties shall be entitled to advance copies of court documents, including petitions and reports, unless deemed inappropriate by the court.

White Earth Band of Ojibwe Judicial Code
Title 4a: Customary Adoption Code
Chapter V. Child Protection Workers

Section 4. Guardian Ad Litem.

At any stage of the proceedings conducted under this code the children's court may appoint separate counsel or spokesperson for the child, without affecting the right to counsel of the parents, guardians, or other legal custodians, to act as guardian ad litem representing the child's best interests.

Mille Lacs Band Statutes Annotated **(Current through February 7, 2014)**
Title 8—Children and Families
Chapter 13. Child/Family Protection
Subchapter 2—Children's Court

Section 3123. Guardian ad Litem

At any stage of the proceedings conducted under this chapter the Children's Court may appoint separate counsel for the child, without affecting the right to counsel of the parents, guardians or other legal custodians, to act as guardian ad litem representing the child's best interests.

§ 3124. Additional Court Personnel

The court may set qualifications and appoint additional juvenile court personnel such as guardians ad litem, court appointed special advocates, Children's Court advocates, whenever the court decides that it is appropriate to do so.

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.410 Attorney, Guardian ad litem or CASA for child.

The Court, at any stage of a youth-in-need-of-care proceeding, may appoint an attorney, a guardian ad litem, or CASA, for a child who has no parent, guardian, or custodian appearing on behalf of the child, or whose interests conflict with the interests of parents, guardians, or custodians, or when it appears to the Court that the child's best interests warrant such an appointment. At the time of appointment, the Court shall enter an order specifying the rights, duties, and term of appointment. [Res. 2015-101].

Tribal Code Commentary

The Laws of the Confederated Salish and Kootenai Tribes provides that the parents or guardians may be represented by an attorney or lay advocate at all stages of the CINA proceedings at their own expense. The Nation considers court appointment of tribal advocate at the termination stage if it is requested and if there is one available. The court may appoint a guardian ad litem at any stage of the proceedings. The guardian ad litem is appointed to represent the best interests of the child in the proceeding. This directive is different than the responsibility to an attorney who would represent the wishes and express the concerns of the child and be the child's voice at hearings. The guardian ad litem is required to investigate, interview certain parties, make recommendations, and write a report. This provides another perspective on what is in the child's best interest. Some Native Nations use CASAs instead of guardians' ad litem for the same purpose.

The White Earth Nation allows all parties to be represented by an attorney or advocate at all stages of a proceeding at the party's expense. The court may also appoint a guardian ad litem to represent the best interests of the child. The Mille Lacs Nation expands the possible appointments to support a child to a guardian ad litem, CASA, or Children's Court advocate.

The Tulalip Tribal Code allows for the court appointment of an attorney, a guardian ad litem, or CASA for a child in a dependency proceeding. The court at the time of appointment lays out the responsibilities and term of appointment.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Does your current code allow for parties to be represented by an attorney or advocate at their own expense?
- How frequently are parties able to secure representation in a dependency proceeding?
- Does your Nation provide for court appointment of an attorney or advocate for indigent parents/custodians in a CINA proceeding?
- Does your court utilize guardians ad litem or CASAs to represent the best interests of a child in a CINA proceeding? Is this effective? Is this allowed in your code?
- Does your court ever appoint attorneys to represent children in your CINA proceedings?

STEP 2: Establish a Vision for the Future

- If you currently are not using guardians ad litem or CASAs to represent the best interests of a child, consider the development of a program that trains guardians ad litem and CASAs. See the CASA website on development of a program.
- Discuss ways to provide representation for indigent parents in termination of rights hearings.
- What changes do you envision are needed to adequately represent parent's/guardian's rights and the rights of children?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

Additional Resources

Cornell University Law School, Federal Rules of Civil Procedure, Legal Information Institute, 2015.
The federal rules of civil procedure are the standard rules of procedure, created by branches of the U.S. government, which are frequently copied and/or slightly modified by states and Native Nations.

Cornell University Law School, Federal Rules of Evidence, Legal Information Institute, 2015.
The federal rules of evidence are the standard rules of evidence, created by branches of the U.S. government, which are frequently copied and/or slightly modified by states and Native Nations.

National CASA Association and Tribal Law and Policy Institute, A Guide to Establishing a Tribal Court CASA Program Board of Directors or Advisory Committee, National CASA Association, 2008.
A general guide on how to create a board of directors and/or advisory committee for tribal court CASA programs.

Richland, Justin B., and Sarah Deer, Introduction to Tribal Legal Studies, 3rd ed. Lanham, MD: Rowman and Littlefield, 2015.
As one of the only comprehensive introductions to tribal law, this book covers the history and structure of tribal justice systems; the scope of criminal and civil jurisdictions; and the various means by which the integrity of tribal courts is maintained. Provides an overview of tribal legal studies, including chapters on jurisdiction, tribal courts, and ICWA.

Sekaquaptewa, Pat, Abby Abinanti, Maureen White Eagle, and Chia Halpern Beetso, Tribal Legal Code Resource: Juvenile Justice Guide for Drafting or Revising Tribal Juvenile Delinquency and Status Offense Laws, Tribal Law and Policy Institute, 2015.
A guide for drafting juvenile laws; contains one chapter on drafting evidence laws that includes tribal code examples and commentary.

Sekaquaptewa, Pat, Roe Bubar, and JoAnne Cook, A Victim-Centered Approach to Crimes Against American Indian and Alaska Native Children, Tribal Law and Policy Institute, 2008.
This resource contains a chapter addressing specialized evidence rules for cases involving children as victims of crime.

Tribal Law and Policy Institute (in conjunction with the National CASA Association), Tribal Court CASA: A Guide to Program Development, Tribal Law and Policy Institute, 2000.
A general guide to CASA program development using examples from tribal and nontribal CASA programs.

Section III Child-in-Need-of-Assistance Proceedings

This section provides important information and options relating to the CINA proceedings. It follows the process from the initial report and investigation to the permanency plan and discusses processes used by certain Native Nations. There are six chapters in the section and each chapter focuses on an important part of the process. The following provides a brief synopsis of each of the chapters in this section:

Chapter 7: Reporting and Investigation.

This chapter discusses code sections related to the individual duty to report child maltreatment and the agency responsible for receiving and investigating those reports. Sections of codes relating to the use of multidisciplinary teams, reports required from the investigative agencies, protocols for forensic interviews of children, and findings and conclusions required of social services are reviewed and discussed.

Chapter 8: Preventing Physical Removal of Children from Their Homes.

This chapter analyzes code sections related to "reasonable efforts" within the context of federal requirements. Chapter 8 also provides a variety of strategies used by Native Nations to support families and keep children in their homes, including a discussion of the impact those strategies have on the Children's Code. This chapter highlights one strategy in particular—removing the offending person rather than the child is discussed and an example code is provided.

Chapter 9: Emergency Removal of a Child.

This chapter focuses on the process (the who and when) of making an emergency removal of a child from their home (from their parent[s], guardian[s], or custodian[s]). This chapter discusses the process required and emergency placement, which leads into the preliminary hearing. Finally, Chapter 9 addresses issues such as notice of removal and release of the child from emergency custody.

Chapter 10: The Preliminary Hearing.

The requirements of the preliminary hearing are discussed in this chapter, including a discussion of the purpose of the hearing as well as the notice requirements. Chapter 10 also addresses topics related to the hearing such as evaluation of the child and parents as well as parental rights.

Chapter 11: Child-in-Need-of-Assistance Proceeding.

This chapter reviews the CINA purpose and the requirements of a regular CINA proceeding and petition requirements. Chapter 11 also addresses the rights of parties, alternative informal resolutions, the conduct of the trial and the disposition of the CINA proceeding.

Chapter 12: Permanency Planning.

This chapter discusses status review hearings in the context of permanency planning, the requirements of permanency planning, and the ways "aggravated circumstances" affect permanency planning.

Important Policy Considerations

Children's proceedings follow well-defined steps and procedures, but variations can be developed to reflect the laws and customs of each Native Nation. Requirements are also different depending on whether your Nation wants to receive Title IV-E[68] funding.

Before your Code Development Team commences discussions related to specific code sections, it is advisable to review Title IV-E. Under Title IV-E, certain steps must be completed, even before a preliminary hearing takes place, unless they are explicitly excused. Specific documentation and statements must be made part of the record in order to qualify a child for payment under Title IV-E. If specific findings are not made by the Nation's court, the child can *never* qualify for Title IV-E eligibility or payment during that removal episode. If the case is closed and the child is later removed, the Nation may be eligible for Title IV-E payments.

ASFA[69] (and other provisions of Title IV-E) impose requirements on social services agencies in preliminary hearings. These requirements are discussed later in this section. While the standard of proof may be lower in a preliminary hearing than in the full CINA hearing, the agency must still show at the preliminary hearing[70] that it made efforts to prevent the removal of the child from the family. ASFA requires that:

> except as provided in subparagraph (D), reasonable efforts shall be made to preserve and reunify families—(i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and (ii) to make it possible for a child to safely return to the child's home. . . .[71]

However, ASFA also requires that the paramount interest in any child custody proceeding is the health and safety of the child. ASFA states:

> in determining reasonable efforts to be made with respect to a child, as described in this paragraph, and in making such reasonable efforts, the child's health and safety shall be the paramount concern.[72]

Therefore, even at the preliminary hearing stage, reasonable efforts to prevent removal or to return a child to the family home are required. Title IV-E requires the court to either make a ruling that reasonable efforts were made, or that under the circumstances, reasonable efforts did not have to be made.

[68] Title IV-E of the Social Security Act.

[69] The biggest changes to the law from ASFA was the amendment of Title IV-E of the Social Security Act.

[70] Whatever the name—preliminary hearing, emergency hearing, or initial hearing—the agency must make the required showings at the first hearing in order for the child to qualify for Title IV-E funding.

[71] 42 U.S.C. § 671(a)(15)(B).

[72] 42 U.S.C. § 671(a)(15)(A).

Reasonable efforts are not required in the following circumstances:

> if a court of competent jurisdiction has determined that—
>
> (i) the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse);
>
> (ii) the parent has—
>
> (I) committed murder (which would have been an offense under section 1111(a) of Title 18, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;
>
> (II) committed voluntary manslaughter (which would have been an offense under section 1112(a) of Title 18, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;
>
> (III) aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter; or
>
> (IV) committed a felony assault that results in serious bodily injury to the child or another child of the parent; or
>
> (iii) the parental rights of the parent to a sibling have been terminated involuntarily. . . .[73]

If your Native Nation has contracted with the state as a subcontractor to run a Title IV-E program, your Nation will be required to follow the state's definition of "aggravated circumstances" and needs to enact that list into tribal law or rule and to follow it. Otherwise, the state may have such placements disqualified from eligibility for Title IV-E payment.

If your Native Nation directly runs its own Title IV-E program, it can adopt its own circumstances listed in the federal statute. But your Nation's list of aggravated circumstances can end there, the Nation can adopt the local state's list of aggravated circumstances as its own, or your Nation can develop its own list of aggravated circumstances that reflects tribal law and custom. Remember, even though tribal law cannot require that reasonable efforts to keep the family together continue if the specific aggravated circumstances listed in the federal statute exist, nothing prevents the Nation from voluntarily continuing to offer such services. For Native Nations contracting with a state to run a Title IV-E program, such efforts are required by ICWA. Your Nation may want to enact into tribal law criteria that can be applied by the tribal social services agency in deciding whether to continue providing such services.

If aggravated circumstances exist as defined under Title IV-E, there is no requirement of providing reasonable efforts to keep the family together before holding a preliminary hearing or removing a

[73] 42 U.S.C. § 671(a)(15(D).

child from their family.

Certain findings must be made by the tribal court at the emergency or preliminary hearing stage in order to qualify a child for Title IV-E funding throughout the proceeding. If these findings are not made on the record and don't appear in the order, the child is banned from eligibility for Title IV-E funding throughout the proceeding. The three findings that must be made in every Title IV-E case at the preliminary hearing stage are:

(1) Reasonable efforts were made to prevent or eliminate the need for removal of the child from their home;

(2) Continuation of the child in the home is contrary to the child's welfare; and

(3) Legal responsibility for the child's placement and care has been placed with the tribal social services agency.[74]

If your Nation is not contracting with the state or federal government to run a Title IV-E program, there are less restrictions on what your Nation can do at the preliminary hearing stage. Your Nation must still comply with requirements and restrictions of its own laws and constitution, if one exists, and with the federal ICRA.[75] But, without Title IV-E funding, your Nation will not receive payment or reimbursement from the state or federal government for foster care placements, and must rely on its own funding sources.

While ICWA does not technically apply to Native Nations or their court proceedings, many Nations have incorporated its principles into their legal codes. ICWA requires "active efforts" in all cases by a party seeking "to effect a foster care placement" in order to provide remedial services and rehabilitative programs designed to prevent the breakup of the Native family. ICWA states that no foster care placement may be ordered in the absence of a determination by clear and convincing evidence that the continued custody of the child by the parent(s) is likely to result in serious emotional or physical damage to the child.[76] Further, it requires that no foster care placement proceeding can be held until at least ten days after notice to the parent(s) and Native Nation.[77]

[74] 42 U.S.C. § 672(a)(1), (2).
[75] 25 U.S.C. § 1302.
[76] 25 U.S.C. § 1912(d); 25 U.S.C. § 1912(e).
[77] 25 U.S.C. § 1912(a).

Chapter 7: Reporting and Investigation

All states and most Native Nations have statutes requiring certain professionals to report child abuse. Generally, the mandated reporters are professionals that work frequently with children. To adequately respond to reports of child maltreatment, Native Nations should designate the agency (social service, law enforcement, etc.) to receive complaints or reports of child maltreatment and respond.

An effective policy or law should specify what agencies must work together in carrying out investigations and which agencies should be notified and receive final written reports following an investigation. There should be special urgent response protocols for coordinating multiple agencies in cases of severe physical or sexual abuse.

Whether a standard or extreme case, there should be specific directives in the Children's Code or mandated department protocols. These protocols should specify what activities should be undertaken in an investigation and how these activities should be undertaken, for example, how children should be interviewed (e.g., forensic interviews). Finally, many jurisdictions specify in their law how social services agencies should use the information that is gathered in making recommendations with respect to a child and their parent(s), guardian(s), and/or custodian(s) to a judge.

Chapter Units

Unit A: Duty to Report Child Maltreatment

Unit B: Agencies Responsible for Receiving and Investigating Reports of Child Maltreatment

Unit C: Multidisciplinary Teams

Unit D: Required Activities and Reports

Unit E: Requirement to Draft Forensic Interview Protocols

Unit F: Social Services' Findings, Conclusions, and Recommendations

A. Duty to Report Child Maltreatment

Mandated reporters are professionals who are required to report child maltreatment to the appropriate agency. Certain professionals who work with children are always listed as mandated reporters:

- Social workers;
- Teachers, principals, and other school personnel;
- Physicians, nurses, and other health care workers;
- Counselors, therapists, and other mental health professionals;
- Child care providers;
- Medical examiners or coroners; and

- Law enforcement officers.

Other professionals are sometimes considered as mandated reporters:

- Chemical dependency counselors;
- Professionals working in the film or computer industry;
- Probation or parole officers;
- Employees of children camps;
- Clergy;
- Volunteers and staff in youth organizations;
- Athletic staff and others that work in colleges or university; and
- Any person is required to report.

Determining who should be a mandated reporter in your Nation requires conversation with the professionals that you are considering including to fully understand the impact of reporting on the ability of certain professionals to completely achieve other goals. Some professionals need to have privileged conversations to conduct their work. Consideration of certain traditional leaders should involve them in the conversation. What would the impact be on spiritual leaders or clergy, if they were required to report?

When a mandated reported is required to communicate may also vary. Generally, a reporter must share when, in the reporter's official capacity, he or she suspects or has reason to believe that a child has been abused or neglected. Another standard frequently used is in situations in which the reporter has knowledge of, or observes a child being subjected to, conditions that would reasonably result in harm to the child.[78] Some statutes use language to ensure that an advocate meets their duty to report, if they "caused" a report to be made. They might not actually sign the report, but provided information for a supervisor to make the report or used other means to report. This method may be helpful in protecting the relationship between the family and advocate.

[78] Child Welfare Information Gateway, Mandatory Reporters of Child Abuse and Neglect. Available at https://www.childwelfare.gov/pubPDFs/manda.pdf (accessed December 5, 2015).

Selected Tribal Codes

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.140 Mandated reporters.

Persons who reasonably suspect that a child has been abused, neglected, or abandoned shall report the matter to the Child Protection Services hotline, 1-866-ENDHARM (1-866-363-4276) for investigation. The Tulalip Tribes considers all employees, volunteers, and agents of the Tulalip Tribes to be mandatory reporters unless special circumstances exist or the information has been obtained as a result of privileged communication. [Res. 2015-101].

4.05.150 Anonymity.

A community member who files a report may remain anonymous. A mandated reporter may not unless exceptional circumstances exist. [Res. 2015-101].

4.05.160 Immunity from liability.

All persons or agencies reporting in good faith, and with reasonable grounds, known or suspected instances of abuse or neglect shall not be subject to civil liability or criminal prosecution in Tribal Court. [Res. 2015-101].

4.05.170 Sanctions for failure to report—Mandated reporter.

Any person who is required to report abuse or neglect under this chapter, or supervises someone who is required to report and knowingly fails to report abuse or neglect, or prevents that person from reporting the abuse or neglect, is subject to a civil fine not to exceed $5,000 or, if an employee of the Tribes, subject to a sanction under the Tulalip Tribal Government Employee Handbook. [Res. 2015-101].

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part A. General and Dependency Provisions
Section 406—Child Neglect and Abuse Reporting, Emergency Custody, Unborn Child of Expectant Mother in Need of Protection or Services

§406.2 Reporting Child Neglect and/or Abuse—Voluntary Reporting[79]

Any person who knows, or has a reasonable suspicion that a child has been neglected or abused as defined in this Code may report that information to the LOWO Division of Child Protective Services or to the Department of Public Safety.

[79] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

§406.3 Reporting Child Neglect and/or Abuse—Mandatory Reporting

(a) **Any person who—**

(1) **Is a—**

(A) Physician, surgeon, dentist, podiatrist, chiropractor, nurse, dental hygienist, optometrist, medical examiner, emergency medical technician, paramedic, or health care provider,

(B) Teacher, school counselor, instructional aide, teacher's aide, teacher's assistant, or bus driver employed by any tribal, Federal, public, or private school,

(C) Administrative officer, supervisor of child welfare and attendance, or truancy officer of any tribal, Federal, public, or private school,

(D) Child day care worker, Head Start teacher, public assistance worker, worker in a group home or residential or day care facility, or social worker,

(E) Psychiatrist, psychologist, or psychological assistant,

(F) Licensed or unlicensed marriage, family, or child counselor,

(G) Person employed in the mental health profession, or

(H) Law enforcement officer, probation officer, worker in a juvenile rehabilitation or detention facility, or person employed in a public agency who is responsible for enforcing statutes and judicial orders;

(2) **Knows, or has reasonable suspicion, that—**

(A) a child was neglected or abused, or

(B) Actions are being taken, or are going to be taken, that would reasonably be expected to result in neglect or abuse of a child; and

(3) Fails to immediately report such neglect or abuse or actions described in paragraph (2) to the LOWO Division of Child Protective Services or the Department of Public Safety, shall be fined under this title or imprisoned for not more than 6 months or both.

(b) **Any person who—**

(1) supervises, or has authority over, a person described in subsection (a) (1), and

(2) Inhibits or prevents that person from making the report described in subsection

(a) Shall be fined under this title or imprisoned for not more than 6 months or both.

(c) The following agencies or entities shall establish a written policy for the filing of reports under this Code, and shall provide a copy of the same to all employees subject to the reporting requirements of this section:

(1) Hospitals and medical clinics;

(2) Mental health clinics and facilities;

(3) Police departments or administrative facilities, courts, and law offices;

(4) Schools up to grade 12, any post-secondary school that has students that meet the definition of child under this Code, and school administration facilities; and

(5) Licensed child care provider facilities and Head Start facilities.

(d) Any person making a report described in subsection (a) which is based upon their reasonable belief and which is made in good faith shall be immune from civil or criminal liability for making that report.

(e) Any person making a report described in subsection (a) which is based upon their reasonable belief and which is made in good faith, shall have a cause of action in Tribal Court against their employer for retaliatory employer action(s) for declaratory relief, injunctive relief, and/or compensatory damages for any of the following acts in retaliation: demotion, cut in pay, loss of benefits, firing, or refusal to hire or to give a standard increase in pay or promotion. Where the Tribe is the employer, compensatory damages are limited to caps for amounts insured under the Tribe's applicable insurance policy.

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part II Transfers and Intervention

§ 8.020. Duty to Report Child Abuse and Neglect

(a) **Basis of Report**—Any person who knows or has probable cause to suspect that a child has been abused or neglected shall report the suspected abuse or neglect to the ICW Program.

(b) **Mandatory Reporters**—The following persons are mandatory reporters and are required to report suspected child abuse or neglect:

(1) Physicians, nurses, dentists, optometrists, and other health professionals;

(2) School principals, school teachers, and any other school officials;

(3) Child day care center workers and other child care staff, including foster parent(s) and residential care, or institutional personnel;

(4) Counselors, social workers, psychiatrists, psychologists, and other mental health professionals;

(5) Peace officers and other law enforcement officials;

(6) Judges, court counselors and clerks, and other judicial system officials;

(7) Commercial film and photo processors; and,

(8) Attorneys or spokespersons provided that an attorney/spokesperson is not required to make a report under this provision if the information is communicated to the attorney in the course of representing a client and the disclosure of the information would be detrimental to the client.

(9) Tribal employees pursuant to Section 2.816 of Tribe's Personnel Policies.

(c) **Anonymity**—Any person who files a report of suspected child abuse or neglect may, upon request and approval of the Court, remain anonymous, except those persons who are mandatory reporters pursuant to section (b) of this section or other professional licensing standards.

(d) **Immunity from Liability**—All persons or agencies reporting known or suspected instances of child abuse or neglect in good faith shall be immune from either civil liability or criminal prosecution for making the report.

Tribal Code Commentary

The Tulalip Code requires anyone who reasonably suspects that a child has been abused to report the matter by calling a hotline. All employees, volunteers, and agents of the Tulalip Tribes are considered mandatory reporters, unless special circumstances exist or the information was contained in a privileged conversation. A community member who reports remains anonymous, but a mandated reporter may not unless there are exceptional circumstances. Reporters who report in good faith and with reasonable grounds are not subject to civil liability or criminal prosecution. A mandated reporter who fails to report or prevents an employee from reporting is subject to a civil fine not to exceed $5,000. If an employee of the Nation fails to report, they may be subject to sanctions under the *Tulalip Tribal Government Employee Handbook*.

The Oglala Sioux Code lists the specific professionals who are required to report abuse and neglect. They are required to reports suspicions that a child was neglected or abused or that actions are being taken that could reasonably be expected to result in neglect or abuse of a child. Failure of a mandatory reporter to immediately report neglect or abuse to the LOWO Division of CPS or the Department of Public Safety may result in a fine or imprisonment of up to six months. Anyone who supervises or has authority over a mandatory reporter and inhibits or prevents the reporting is subject to fine and imprisonment. Certain agencies that have substantial contact with children are required to establish written policies for filing reports of abuse or neglect.

The Siletz Code provides a list of mandatory reporters in its code which includes:

- Health care professionals;
- School teachers and other school staff;
- Child care workers and other staff;
- Foster parents and residential care or institutional personnel;
- Counselors, social workers, psychiatrists, and other mental health professionals;
- Law enforcement officers;
- Judges, court clerks, and other judicial officials;
- Commercial film and photo processors;
- Attorneys or spokespersons (privileged communication that is detrimental to a client is not required to be disclosed); and
- Tribal employees pursuant to the Native Nation's personnel policies.

Under the Siletz Code, persons that file a report of neglect or abuse with the ICW program may remain anonymous, except mandated reporters. All persons filing a report in good faith are immune from civil liability or criminal prosecution.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Review your current law relating to mandatory reporters.
- Identify any shortcomings in the current reporting process.
- Do you currently have a civil or criminal penalty for mandated reporters who do not immediately report? Has it been utilized in the past?

STEP 2: Establish a Vision for the Future

- Provide a list of professionals that should be mandatory reporters in the future. Do you desire to use the list method in your code or use an encompassing term, such as *all employees of the Nation*?
- What agencies are to receive reports?
- Do you have some accommodation for privileged conversations?
- What penalty is there for nonreporting?
- Do you want a provision protecting anonymity of private citizens who report?
- How can you be assured that agencies develop protocols relative to their employees reporting abuse and neglect?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

B. Agencies Responsible for Receiving and Investigating Reports of Child Maltreatment

Timely and effective investigation of reports of child maltreatment is critical to protect children. Coordination of that investigation is also vital. In Indian country, investigation can become extremely complicated as the child protection system may become involved with the criminal justice system. Additionally, depending on the Public Law 280 (PL-280) status of the state and Native Nation, the federal or state law enforcement and state child protection agency may be involved with tribal social services and tribal law enforcement. It is important that from the first report of abuse, proper agencies are involved and responsibilities of investigation, reporting, and sharing are clear to all. Memorandums of Understanding (MOUs) in addition to statutes and protocols ensure that the responding agencies are effective in sharing data and minimizing negative impact on the children involved.

When Congress enacted the Indian Child Protection and Family Violence Prevention Act of 1990, it was concerned with the serious underreporting of child maltreatment and lack of background investigations of employees who interact with Indian children. Many of these concerns were directed specifically at Bureau of Indian Affairs schools, and the lack of response of federal and tribal governments to reported cases.[80]

The Indian Child Protection and Family Violence Prevention Act contains specific reporting requirements for serious child abuse, as defined by the statute (includes skin bruising, bleeding, fractures, soft tissue swelling, failure to thrive, sexual molestation, sexual exploitation, etc.).[81]

> The criminal justice system in Indian country often seems like a series of twists and turns. Despite the challenges they face tribal police are innovative and have implemented several practices that provide effective law enforcement services.
>
> Indian Country is home to 560 federally recognized tribal governments and a population of nearly 2 million. Each tribal government provides law enforcement services differently depending on its government structure and state. Larger tribes operate individual police departments—totaling 223 agencies—while others rely on law enforcement services from the U.S. Department of the Interior Bureau of Indian Affairs (BIA)—more than 30 agencies—and still others rely on the state or on county sheriffs. ...Tribal police must obtain lawful authority from three separate sovereigns: tribal state and federal governments. ...
>
> Despite barriers tribal police have taken steps to develop partnerships and enhance information sharing mutual aid and cooperation with their state local county and federal counterparts. These partnerships are crucial considering the current state of homeland security and the need for solidarity on all fronts. To form such allies' education is a must for through education comes cooperation.
>
> Edward Reina
> Tohono O'odham Public Safety Department Director
> Indian Country Law Enforcement: A Primer

[80] 25 U.S.C. § 3201 (2005).
[81] 25 U.S.C. § 3202(3).

United States Code
Title 25. Indians
Chapter 34. Indian Child Protection and Family Violence Prevention
25 U.S.C. § 3203. Reporting procedures.

(a) [Omitted]

(b) **Notification of child abuse reports**

(1) When a local law enforcement agency or local child protective services agency receives an initial report from any person of—

(A) the abuse of a child in Indian country, or

(B) actions which would reasonably be expected to result in abuse of a child in Indian country, the receiving agency shall immediately notify appropriate officials of the other agency of such report and shall also submit, when prepared, a copy of the written report required under subsection (c) to such agency.

(2) Where a report of abuse involves an Indian child or where the alleged abuser is an Indian and where a preliminary inquiry indicates a criminal violation has occurred, the local law enforcement agency, if other than the Federal Bureau of Investigation, shall immediately report such occurrence to the Federal Bureau of Investigation.

(c) **Written report of child abuse**

(1) Within 36 hours after receiving an initial report described in subsection (b), the receiving agency shall prepare a written report which shall include, if available—

(A) the name, address, age, and sex of the child that is the subject of the report;

(B) the grade and the school in which the child is currently enrolled;

(C) the name and address of the child's parents or other person responsible for the child's care;

(D) the name and address of the alleged offender;

(E) the name and address of the person who made the report to the agency;

(F) a brief narrative as to the nature and extent of the child's injuries, including any previously known or suspected abuse of the child or the child's siblings and the suspected date of the abuse; and

(G) any other information the agency or the person who made the report to the agency believes to be important to the investigation and disposition of the alleged abuse.

(2)

(A) Any local law enforcement agency or local child protective services agency that receives a report alleging abuse described in section 3202(3) of this title shall immediately initiate an investigation of such allegation and shall take

immediate, appropriate steps to secure the safety and well-being of the child or children involved.

(B) Upon completion of the investigation of any report of alleged abuse that is made to a local law enforcement agency or local child protective services agency, such agency shall prepare a final written report on such allegation.

(d) **Confidentiality of informant:** The identity of any person making a report described in subsection (b)(1) shall not be disclosed, without the consent of the individual, to any person other than a **court** of competent jurisdiction or an employee of an Indian tribe, a State or the Federal Government who needs to know the information in the performance of such employee's duties.

The multiple purposes of the Indian Child Protection and Family Violence Prevention Act include:

- Requiring that reports of abused Indian children are made to the appropriate authorities in an effort to prevent further abuse;
- Establishing a reliable database for statistical purposes and authorizing a study to determine the need for a central registry for reported incidents of abuse; and
- Authorizing such other actions as are necessary to ensure effective child protection in Indian country.

If Section 3203 of the Indian Child Protection and Family Violence Prevention Act were modified and adopted under tribal law, it would require the tribal Social Services Department to conduct an investigation after receiving a report of child maltreatment and before filing papers in tribal court. Further, the provision requires the tribal social services agency and the law enforcement agency to notify each other when they receive a child maltreatment report and to share written findings and conclusions with each other in a written report. If an Indian child or perpetrator is involved, and the matter involves what amounts to a federal crime, the provision mandates that the tribal agencies also notify the Federal Bureau of Investigation. The provision also sets out the requirements for the timing and contents of the required agency written reports. Finally, the provision provides for keeping the identity of the original reporter of child maltreatment confidential in order to encourage more people to report such incidents.

Selected Tribal Codes

Hoopa Valley Tribal Code
Title 14. Child Welfare Code
Chapter 4: Child Abuse
14.4.8 Action Upon Receipt of Report

14.4.8.1[82]

The Social Services Department shall make a thorough investigation immediately upon receipt of any report of known or suspected child abuse or neglect. The immediate concern of such investigation shall be the protection of the child.

14.4.8.5

If a local law enforcement agency receives a report of known or suspected child abuse or neglect, it shall first attempt to contact the Social Service Department in order to refer the case for investigation. If the local law enforcement agency is unable to contact the department, it shall make a complete investigation and may institute appropriate legal proceedings on behalf of the subject child or other children under the same care. The Tribal Law Enforcement Agency, upon receipt of a report and upon completion of any investigation it may undertake, shall immediately forward a summary of the investigatory data plus all relevant documents to the Social Service Department.

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part A. General and Dependency Provisions
Section 406—Child Neglect and Abuse Reporting, Emergency Custody, Unborn Child of Expectant Mother in Need of Protection or Services

§406.1 Reporting Child Neglect and/or Abuse—Entities to Receive and Communicate the Contents of Reports[83]

(a) The following entities and their designated officials, when legally operating on the Pine Ridge Indian Reservation, may receive reports of child neglect and abuse, also known as "reports of harm," under this Code, and shall communicate with each other concerning the contents of each report:

(1) LOWO Division of Child Protective Services;

(2) Child Advocacy Center;

(3) Department of Public Safety;

(4) Criminal Investigation Unit; and

(5) Office of the Attorney General.

---

[82] The Hoopa Valley Tribal Code is on file with the Tribal Law and Policy Institute.
[83] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

(b) The LOWO Division of Child Protective Services shall be responsible for notifying the parent(s), guardian, custodian, and extended family members that a report of child neglect and/or abuse has been received.

§406.4 Investigation and Referral of Reported Child Neglect and/or Abuse Responsibilities of Agencies

(a) **Requirement of Collaborative Development of Protocols**—The entities and their designated officials listed in Section 406.1(a), as part of the Integrated Child Welfare Workgroup, shall collaboratively develop and implement protocols that carry into effect the requirements of this Code. The adopted protocols shall state that these entities and their designated officials:

(1) Recognize that the primary objective of any intervention shall be to protect and support the child and to do no further harm to the child;

(2) Recognize that early detection and prevention are the keys to ending child neglect and abuse and its destructive consequences to children and families;

(3) Commit to fully cooperating and coordinating in response to reports of child neglect and/or abuse;

(4) Recognize that children are capable of being credible reporters of events. All allegations of child neglect and/or abuse should be taken seriously and be thoroughly investigated by the Department of Public Safety (in child sexual abuse cases, by the Criminal Investigation Unit), the LOWO Division of Child Protective Services, and the Office of the Attorney General;

(5) Recognize that the number of interviews with a child should be kept to a minimum and the interviewer(s) should be the same person(s) throughout the investigation;

(6) Recognize that, following the disclosure of child neglect and/or abuse, every effort should be made to ensure the safety of the child during both the course of the investigation and afterwards;

(7) Recognize that child neglect and abuse are unacceptable and contrary to Lakota values. Persons responsible for such maltreatment shall be prosecuted when there is probable cause to do so;

(8) Commit to using a victim-centered approach to the investigation and prosecution of child neglect and/or abuse;

(9) Commit to dedicating the necessary time, attention and support to developing culturally appropriate treatment services for neglected and abused children, their families, and for the offender;

(10) Commit to promoting and implementing local community strategies and education/awareness initiatives for addressing issues related to child neglect and abuse;

(11) Commit to developing a common language for ongoing and future discussions concerning child neglect and abuse; and

(12) Commit to upholding the dignity of child victims and their families and to ensure that all reports, information, contacts, shared-information, and referrals made in accordance with this Code shall be considered confidential in nature and maintained pursuant to the requirements of this Code.

(b) **Requirement of Joint Investigation**—All reports of child neglect and/or abuse shall be jointly investigated by the LOWO Division of Child Protective Services and the Department of Public Safety, with referrals of severe child physical abuse and/or sexual abuse to the Criminal Investigation Unit. The LOWO Division of Child Protective Services shall be the lead entity for investigating reports of child neglect and abuse, whether substantiated or unsubstantiated, for purposes of assessing the need for treatment and services, and for providing such treatment and services to children and their families, and for supporting petitions filed by the Office of the Attorney General under this Code. The Department of Public Safety shall be the lead entity for investigating reports of child abuse for purposes of criminal prosecution, including in situations where suspected child abuse is encountered during the course of other law enforcement activities. The Criminal Investigation Unit shall be the lead entity for investigating reports of child sexual abuse for purposes of criminal prosecution.

The Law and Order Code of the Kalispel Tribe of Indians (Enacted 12.2.2015)
Chapter 7 Kalispel Youth Code
Part 2. Youth in Need of Care

7-20.09 Receipt of Report by Indian Child Welfare Worker.

Upon receipt of a report under this chapter or receipt of notice from any source that a youth is in need of care, the Indian Child Welfare Worker shall investigate the report and determine if further action is necessary. The Indian Child Welfare Worker may request C.P.S. and law enforcement to conduct or assist in conducting the investigation. If the Indian Child Welfare Worker reasonably believes that a youth is in an emergency situation and requires out-of-home placement, he or she shall:

(1) Request an emergency custody order, if time permits and a judge or judicial officer is available; or

(2) Immediately place the youth in an out-of-home placement. This decision shall be made with the assistance of the Indian Child Welfare Advisory Committee if there is time and the Committee members are available. The Indian Child Welfare Worker may request assistance of C.P.S. and law enforcement in making such placement.

(3) If the youth's parent, guardian, or custodian has not been notified, the Indian Child Welfare Worker shall inform him or her at the earliest possible time and return the youth to him or her if such action is appropriate.

(4) If a youth is taken into custody and it is unlikely that he or she will be released to his or her parent, guardian, or custodian within two (2) working days, the Indian Child Welfare Worker or other authorized person shall immediately file a Youth in Need of Care Petition.

7-20.10. Receipt of Report by Law Enforcement.

Upon receipt of a report that a youth is in need of care, law enforcement shall take the following action:

(1) Law enforcement shall immediately investigate the report. Law enforcement shall notify the Indian Child Welfare Worker of all reports received. If the Indian Child Welfare Worker is not available, C.P.S. shall be notified. Based on the investigation, a detailed written report shall be completed by law enforcement. A copy of such report shall be delivered to the Indian Child Welfare Worker and C.P.S. within three (3) working days of the date the report was received.

(2) If law enforcement reasonably believes the youth is in immediate and serious danger from his or her surroundings and removal is necessary for the youth's safety or well-being, the officer may take the youth into custody; provided, that if there is sufficient time and a judge or judicial officer is available, law enforcement shall first request an emergency custody order.

(3) If law enforcement takes a youth into custody without first obtaining an emergency custody order, he or she shall:

(A) Release the youth to the youth's parent(s), guardian, or custodian and issue verbal counsel or warning as may be appropriate; or

(B) Immediately notify the Indian Child Welfare Worker and the Indian Child Welfare Advisory Committee and request direction as to whether the youth should be placed out-of-home and if so where; or

(C) If the Indian Child Welfare Worker and the Indian Child Welfare Advisory Committee cannot be reached, the officer may place the youth out-of-home, but shall continue attempts to notify the Indian Child Welfare Worker. Placement of the youth shall be in a facility approved by a member of the Social Services Staff or the Indian Child Welfare Advisory Committee for emergency out-of-home placement in that particular case. A list of persons to contact in emergency placements may be set by the Social Services Staff and the Indian Child Welfare Advisory Committee and provided to law enforcement.

(D) If the youth if not released, immediate and continuing efforts shall be made by both law enforcement and the Indian Child Welfare Worker to notify the youth's parent(s), guardian, or custodian as to the circumstances surrounding the youth's custody.

Tribal Code Commentary

In Hoopa Valley the Social Service Department is primarily responsible for investigation. The Hoopa Valley Code requires that local law enforcement office contact the Social Service Department if it receives a report of known or suspected child abuse. The Social Service Department is the primary investigator of child abuse. If the Social Service Department cannot be reached, law enforcement should conduct a complete investigation and may commence legal action. The summary of the investigatory data and all relevant documents shall be immediately forwarded to the Social Service Department.

The OST's code provides a listing of agencies or departments that are authorized to receive a report of abuse or neglect, and these agencies are required by statute to communicate with each other:

- LOWO Division of CPS;
- Child Advocacy Center;
- Department of Public Safety;
- Criminal Investigation Unit; and
- Office of the Attorney General.

The entities are also ordered to develop, collaborate, and implement protocols that carry out the purposes and requirements of the Children's Code and Family Code. The code requires joint investigation of reports of abuse by the CPS and the Department of Public Safety, with referrals of severe child abuse to the Criminal Investigation Unit. CPS investigates to determine needs for treatment and services and to provide those services. The Department of Public Safety investigates for the purposes of criminal prosecution.

The Kalispel Youth Code requires the ICW worker to investigate all reports of child abuse that he or she receives in order to determine if further action is needed. The worker may ask CPS or law enforcement to conduct or assist in the investigation. Law enforcement is required to immediately investigate reports it may receive and notify the ICW worker. If the worker is not available, then he or she needs to notify CPS. Law enforcement must submit a written report of their investigation to the ICW worker within three days. This is a good example of how the code should clearly delineate responsibility and conform to the staff available. If law enforcement finds a child in immediate danger, the officer may take the child into custody without first obtaining an emergency order. The officer is required to immediately notify the ICW worker and CPS and then request direction regarding the placement of the child.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Which agency or agencies are currently receiving reports of child maltreatment?
- Which agency or agencies are currently investigating reports?
- How are the child protection and law enforcement agencies working together in your community? What improvement could be made?
- What protocols are in place for the investigation of child maltreatment?
- What are the current problems in the investigation process?
- Do agencies have deadlines or content requirements that must be followed when completing their written reports? What information should be included? How are reports shared?
- Is there a provision for keeping the identity of the initial reporter of child maltreatment confidential? (Except for mandatory reporters do you think these names should be kept confidential? Why or why not? Are there circumstances in which these names should be disclosed?)

STEP 2: Establish a Vision for the Future

- Identify changes to make.
- Discuss the process and the agencies involved in the process.
- Will you need to revise agency protocols?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

C. Multidisciplinary Teams

Special provisions are needed for cases involving severe physical abuse or sexual abuse of a child, where there is a likelihood that a tribal and/or federal prosecutor may charge the alleged perpetrator with a crime. In such cases, the tribal system needs to coordinate an urgent response with increased care to achieve four simultaneous goals:

1. Ensure the safety of the child.
2. Provide for the sound collection and preservation of evidence of the crime.
3. Provide appropriate and coordinated services to assist the child and their family in healing.
4. Ensure that the victim's rights with respect to confidentiality, access to information, and input in the criminal proceedings are met.

One way such a response has been accomplished is by the establishment of a multidisciplinary team (MDT), comprised of representatives from the social services agency, the law enforcement agency, the prosecutor's office, the medical facility, the mental health providers, and the victims' advocate agency. The primary task of the MDT is to coordinate investigations and to make recommendations to the prosecuting attorney in a criminal proceeding and in postplea/conviction proceedings.

Note that the purpose, function, and membership of an MDT is different from that of a child protection team (CPT). The purpose of CPTs varies from jurisdiction to jurisdiction and may be as limited as providing community education and outreach with respect to system services and responses to child maltreatment in general. Sometimes, a CPT's purpose is to ensure child safety and healing by coordinating services to that child and their family in specific child maltreatment cases. It helps to think of MDTs as primarily concerned with investigation, evidence collection, and providing recommendations to the government officials filing criminal charges in specific cases. CPTs, by contrast, may coordinate services for victims and their families in specific cases and/or advise the court and child welfare systems on general, *not* specific, cases and/or provide information to the public in general.

The Crime Control Act[84] authorized federal funds for local law enforcement programs, including the improvement of local criminal justice systems, prevention of crime, enforcement of drug laws, building of effective prison systems, and development of alternatives to incarceration. The act also established grant programs for the investigation and prosecution of child abuse cases and relevant programs, provided enhanced penalties for child pornography, and codified a Crime Victim's Bill of Rights for use in the federal system.

[84] 18 U.S.C. § 3509.

United States Code, Title 18—Crimes and Criminal Procedure
Chapter 223—Witnesses and Evidence
§ 3509. Child victims' and child witnesses' rights

§3509 (a)(7) Definitions.

(7) the term "multidisciplinary child abuse team" means a professional unit composed of representatives from health, social service, law enforcement, and legal service agencies to coordinate the assistance needed to handle cases of child abuse.

§3509(g) Use of Multidisciplinary Child Abuse Teams.

(1) **In general**. A multidisciplinary child abuse team shall be used when it is feasible to do so. The court shall work with State and local governments that have established multidisciplinary child abuse teams designed to assist child victims and child witnesses, and the court and the attorney for the Government shall consult with the multidisciplinary child abuse team as appropriate.

(2) **Role of multidisciplinary child abuse teams**. The role of the multidisciplinary child abuse team shall be to provide for a child services that the members of the team in their professional roles are capable of providing, including—

(A) medical diagnoses and evaluation services, including provision or interpretation of x-rays, laboratory tests, and related services, as needed, and documentation of findings;

(B) telephone consultation services in emergencies and in other situations;

(C) medical evaluations related to abuse or neglect;

(D) psychological and psychiatric diagnoses and evaluation services for the child, parent or parents, guardian or guardians, or other caregivers, or any other individual involved in a child victim or child witness case;

(E) expert medical, psychological, and related professional testimony;

(F) case service coordination and assistance, including the location of services available from public and private agencies in the community; and

(G) training services for judges, litigators, court officers and others that are involved in child victim and child witness cases, in handling child victims and child witnesses.

Selected Tribal Codes

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part A. General and Dependency Provisions
Section 406—Child Neglect and Abuse Reporting, Emergency Custody, Unborn Child of Expectant Mother in Need of Protection or Services

§402.3 Wasicu ta woiwanke (General Definitions)[85]

[sections omitted]

(61) **Multi-disciplinary Team**: A team, directed by the Child Advocacy Center, comprised of the tribal and/or federal prosecutor, tribal and/or federal law enforcement supervisor(s)/officer(s) and CPS supervisor(s)/worker(s) to investigate and prosecute cases where a child is alleged to be a victim of or a witness to abuse. The dual purposes of the multidisciplinary team are to collect evidence to criminally prosecute child abuse and/or domestic violence and to reduce the number of times that a child is called upon to recite the events involved in the case as well as to create a feeling of trust and confidence in the child. Members of such teams have specialized training in the investigation and prosecution of cases where children are alleged victims and witnesses of abuse.

Pokagon Band of Potawatomi Indians Child Protection Code

Section 9. Child Protection and Multidisciplinary Teams

A. **Child Protection Team**. The Child Protection Team is technical and advisory in nature and shall serve to promote cooperation, communication, and consistency among Tribal agencies seeking to improve the Tribe's child protection services. Members of the Child Protection Team shall maintain confidentiality as to all information acquired through or for a Child Protection Team meeting. At least annually and on a case-by-case-basis as needed, the Director of the Department of Social Services shall convene a Child Protection Team meeting with Tribal employees and representatives the Director of the Department of Social Services deems appropriate, which may include the Presenting Officer and other Tribal Court officers; Department of Social Services Personnel; Health Services Personnel, such as doctors, nurse practitioners, nurses, and tribal substance abuse or mental health workers; and Tribal law enforcement personnel. The Director may also invite local, state, and federal personnel involved with child protection to participate on the Child Protection Team. The Director shall have discretion to determine which persons may serve on the Child Protection Team. The Child Protection Team shall collaborate in the development of systems for sharing information and for improving treatment strategies in an effort to fully achieve the purposes of this Code.

[85] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

B. **Multidisciplinary Team**. In cases involving allegations that may lead to criminal prosecutions, the Presenting Officer, the Director of Social Services, and the Captain of the Tribal Police shall communicate and decide, under appropriate protocol, on whether a case should be handled by civil or criminal process or whether the case should be referred for prosecution in Tribal Court or to the United States Attorney for federal prosecution. The Director of Social Services and the Tribal Police Captain may, at their discretion, include other Tribal staff and representatives, and representatives from Federal and state law enforcement and social services agencies on the Multi-Disciplinary Team.

Tribal Code Commentary

Although many Native Nations have MDTs without describing the MDTs in their tribal code, the Oglala Sioux Nation clearly outlines the functioning and purpose of the MDT in its code. The code places the Child Advocacy Center in charge of the MDT. Representatives from the Child Advocacy Center, the federal and/or tribal prosecutor's office, federal and/or tribal law enforcement agency, and the supervisor and/or CPS worker are all members of the team. They are to investigate and prosecute cases in which child abuse is alleged, including a child observing violence. The MDT has two purposes: to collect evidence of child abuse or domestic violence for criminal prosecution and limit the number of times the child is called on to recite the events. Clearly the statute attempts to increase criminal prosecutions without retraumatizing the child.

The Potawatomi Nation's code provides a description of a CPT and an MDT. The CPT focuses more on sharing information and improving treatment strategies to better collaborate treatment and services for children and families. The MDT focuses on the cases that could lead to criminal prosecutions. It requires development of appropriate protocols. The MDT decides whether a case should be handled by civil or criminal process and whether a case should be referred to a tribal or federal prosecutor.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- In your Nation, who or what agency would be responsible for:
  - Receiving a report of child maltreatment?
  - Notifying the tribal prosecutor?
- Do you have a prosecutor who convenes an MDT?
- Do you have involvement from your Nation and federal/state authorities (depends on federal and state authority in your Nation)?
- What persons or agencies are included on the team?
- What is the purpose of your Nation's MDT?

STEP 2: Establish a Vision for the Future

- What improvements should be made to the current MDT?
- If you do not have an MDT:
  - What would the purpose be?
  - What agencies should be involved?
  - What process do you envision?
- Is there a benefit for you to have a description of your MDT in your code?

STEP 3: Drafting a Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

D Required Activities and Reports

This unit looks at the activities required to be undertaken by responsible agencies when conducting an investigation of a report of child maltreatment. Some codes are quite specific about which agency is responsible for activities, what activities are required in an investigation, what information should be collected, and what reports must be filed. The code does not have to track every step along the way, but it is helpful if it does provide structure and clear direction. Protocols with more specific activities may be developed—your code can even require the development of more detailed protocols by specific agencies.

Common activities required in an investigation are:

- Good faith attempt to contact and interview all relevant parties, including the parents and children, as well as, if appropriate, custodians, relatives, extended family members, neighbors, teachers, and treatment personnel.
- Good faith attempt to visit the home and/or place where the child is residing.
- Investigate and report on the child's current circumstances, including home environment; parental and family history, including criminal histories; parent(s)' current circumstances, including financial information if relevant; the nature of the reported charges; and the information supporting or contravening those charges.
- Determine if the child can remain safely in the home with services provided and assist in providing those services.
- Seek out relatives, extended family members, or others with whom the children are familiar and with whom the children can be placed, if necessary, pending further investigation.
- Make tentative conclusions as to what is in the best interests of the child, and how best to protect the child's health and safety until further investigation can be concluded.
- Information gained in the investigation shall be included in a written report and included with the petition or presented and filed at the preliminary hearing.

Selected Tribal Codes

Confederated Tribes of the Grand Ronde Community of Oregon Tribal Ordinances
Children and Families Ordinance (Amended 6/03/15)
Part II Youth-in-Need-of-Care

(h) **Pre-Adjudication Procedures and Services**

[sections omitted]

(3) **Scope of Continued Investigation and Provision of Services by CFS**. Pending the Adjudicatory Hearing, CFS shall continue its investigation and shall continue to offer appropriate services to the parent, guardian, or custodian and the child, and shall make reasonable efforts to prevent the removal of the child from the care of the parent, guardian, or custodian, and/or to eliminate the need for continued removal. In the course and scope of the continuing investigation, CFS shall, to the extent possible:

(A) Contact and interview all parties and, if appropriate, caretakers, relatives, extended family members, neighbors, teachers, and treatment personnel;

(B) Visit the home or place where the child was residing and/or now resides;

(C) Address the child's past and current circumstances, including home environment, family and parental history, parent's current circumstances, including financial information if relevant, the nature of the reported charges, and the information supporting or contravening those charges;

(D) Determine if the child can remain safely in parental care with services provided, and assist in providing those services;

(E) Determine what services are necessary to facilitate return of the child to parental care, with or without continuing supervision; locate and offer, and refer the parent to, those services;

(F) Seek out relatives, extended family members, or others with whom the child is familiar, and with whom the child can be placed if return home is not possible; and

(G) Draw conclusions as to what is in the best interests of the child, and how best to protect the child's health and safety to prevent removal or make return to parental care possible.

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.180 Investigation upon report.

(1) **Protection of Chil**d. It is the policy of the Tulalip Tribes that examinations and interviews of a child suspected of having been subject to abuse or neglect shall be conducted under such circumstances and with such safeguards as are designed to minimize additional trauma to the child. It shall be the responsibility of the departments involved in the investigation and/or prosecution of the alleged offenses to coordinate their interviews and intrusive examinations with respect to the child.

(2) **Waiver of Parental Consent**. Photographs, X-rays, medical examinations, psychological examinations, drug testing, interviews, and forensic interviews of a child alleged to have been subject to abuse or neglect shall be allowed without parental consent if beda?chelh or law enforcement officials have reason to believe the child has been subject to abuse or neglect. The interviews may be conducted at school, the child's day care facility, or at other suitable locations outside the presence of parents or guardians.

(3) **Role of beda?chelh**. Upon receiving a report of alleged abuse and/or neglect of a child under this chapter, designated beda?chelh personnel shall investigate such allegations and have access and be provided copies within a timely manner, recognizing that time may be of the essence, of all records, reports, files, and other relevant information of the child from Tribal departments, clinics, child care facilities, and schools for the purposes of investigating abuse and/or neglect. These records may include but are not limited to health and medical records, school attendance records, disciplinary records, and other behavioral information that may be relevant to a dependency case. This information shall continue to be available throughout the course of an investigation or dependency case. At this stage, beda?chelh will make a determination as to whether the referral is credible, and if so, if the case is appropriate for prevention using a family centered intervention, or if the child is at imminent risk of harm requiring court intervention.

(a) Beda?chelh shall make a referral to the proper law enforcement agency if at any point in their civil investigation of alleged abuse or neglect pursuant to this chapter, beda?chelh determines that the child may be a victim of a possible criminal law violation.

(b) The Child Advocacy Center shall be provided a copy of the CPS referral by beda?chelh and/or police report, regarding suspected abuse, neglect or abandonment of a child, as soon as it is available.

(c) Records covered by this section shall be kept in accordance with TTC 4.05.430, Confidentiality.

(4) **Role of Tulalip Tribal Police (TPD)**. The TPD is an integral part of the MDT and has a direct responsibility in identifying and reporting incidents of when a child is suspected to be abused, neglected, or abandoned. The Tulalip Police Department shall:

(a) If during the course of any police investigation, child abuse or neglect is suspected, TPD shall immediately report any child abuse or neglect to the Child Protection Services hotline, 1-866-ENDHARM (1-866-363-4276).

(b) Provide protection and assistance in the removal and placement of children on request by beda?chelh or authorized child protection and placement agency personnel.

(c) Take immediate custody of a child if the officer suspects that the child's health, safety, and welfare will be endangered if the child is not taken into protective custody. The officer shall immediately contact beda?chelh to discuss emergency placement options. If beda?chelh is not available, the officer shall request assistance from the Washington State Child Protection Agency.

(d) Perform child welfare checks upon reasonable request by beda?chelh or the CAC.

(e) Work collaboratively with other appropriate disciplines to provide information when children are identified as being, or at risk of being abused, neglected, or abandoned. [Res. 2015-101].

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part III Children in Need of Care

§ 8.021. Investigation and Evaluation of Reports of Report of Child Abuse and Neglect

(a) **Receipt of a Report by Tribal Law Enforcement Officers**

(1) Upon receiving a report of suspected child abuse or neglect, a tribal law enforcement officer shall immediately notify the ICW Program.

(2) If requested by the ICW Program or if the ICW Program representative is unavailable, a tribal law enforcement officer shall immediately investigate the report and determine whether further action is necessary. The ICW Program and law enforcement officer may conduct their investigation jointly. Based on the investigation, a detailed written report shall be completed and a copy shall be sent to the tribal representative.

(3) If the law enforcement officer reasonably believes that the child is in immediate and serious danger from his or her surroundings and that immediate removal is necessary for the child's safety or well-being, the officer may take the child into emergency custody. If a Tribal Court judge is available and delay will not jeopardize the health or safety of the child, the law enforcement officer shall first request an emergency custody order pursuant to this Code.

(4) A law enforcement officer who takes a child into custody without first obtaining an emergency custody order shall proceed as follows:

(A) The officer shall immediately notify the tribal ICW Program and request direction as to whether the child should be placed in emergency shelter care and if so, where;

(B) If the tribal ICW Program cannot be reached, the officer may place the child in emergency shelter care but shall continue attempts to notify the tribal ICW Program. Placement of the child shall be in a facility approved by the Tribe for emergency shelter care or with a relative of the child if the relative is known to the officer, the relative is not currently on probation or parole, does not have known children in the care of any social services agency, and resides within the Tribe's service area.

(C) Immediate and continuing efforts shall be made by both the officer and the tribal ICW Program to notify the child's parent, guardian, or custodian as to the circumstances surrounding the child's emergency custody.

(b) **Investigation of Report by Tribal ICW Program**

(1) Upon receiving a report of suspected child abuse or neglect or a notice from a tribal enforcement officer, the Tribal ICW Program shall immediately assess the report and determine whether to open a case. The ICW Program shall open a case if the representative has reasonable suspicion that the child who is the subject of the report has been or likely may be abused or neglected.

(2) If the ICW Program opens a case, the ICW Program shall immediately initiate an investigation of the report to determine whether the best interests and health and safety of the child and the tribal community require that further action be taken. If necessary, the tribal representative may ask a law enforcement officer to conduct or assist with the investigation. The investigation shall cover the child's home environment, history and associations, the present condition of the child and the child's family, and shall make recommendations as to the child's future care. The tribal representative shall make conclusions as to the likely future of the family if no intervention occurs, and whether removal of the child from the family likely will be required. In cases involving the duty of financial support, the study shall include such matters as earnings, assets, financial obligations, and employment.

(3) Upon completion of the investigation, the tribal representative shall determine whether:

(A) No further action should be taken;

(B) To hold an informal resolution conference with the child and the child's parent(s), guardian, custodian, or legal representative to discuss alternatives to filing a petition alleging that the child is a child-in-need-of-care;

(C) To file a petition with the Court alleging that the child is a child-in-need-of-care;

(D) To seek an emergency custody order from the Court to take the child into emergency custody; or

(E) Emergency removal and custody of the child is necessary without a Court order because the child is in immediate danger from his or her surroundings.

(4) If the tribal representative determines that no further action shall be taken, the child shall be released immediately if the child is in emergency custody.

(5) If the ICW Program determines that emergency custody of the child is necessary, the representative shall proceed pursuant to section 8.017 of this Code.

Tribal Code Commentary

The language in the Indian Child Welfare Ordinance of the Confederated Tribes of the Grand Ronde Community of Oregon specifies the types of minimal activities that should take place in an investigation of a report of child maltreatment. This includes attempts to contact parents, children, and other relatives, as well as neighbors, teachers, and treatment service providers who have been working with the child or their family members. This also includes a home visit and gathering basic background information on the home environment and family history, including financial and past criminal histories of immediate family and household members. The provision also specifies that final reports must be written and include recommendations as to what would be in the best interest of the child.

The Tulalip Code provides a policy designed to protect a child from further trauma that may result from the criminal investigative process. It requires that all examinations and interviews of a child be conducted in such a manner to minimize trauma, and it is the responsibility of the departments involved in the investigation of the alleged offenses to coordinate their interview and intrusive examinations. The responsibilities of the beda?chelh, the child advocacy center, and law enforcement are clearly outlined in the code.

The Siletz Code allows two departments, ICW and law enforcement, to take a child into emergency custody without a prior court hearing. If the law enforcement agency is the removing agency, the Siletz Code is more explicit with its directive and codifies safeguards that are not applied to the ICW program. Both the ICW and law enforcement are operating under a similar "immediate" or "immediate and serious" danger standard, but law enforcement is required to seek out a second opinion if possible. For example, the code explicitly requires law enforcement to request a court order if the delay does not harm the child. If a court order cannot be obtained the officer is required to get the ICW program involved in the decision and placement. Finally, if the ICW program is unavailable, only then can the officer make placement decisions, within specific guidelines.

This approach allows for the protection of children, and it recognizes the difference in expertise that exists between law enforcement agents and ICW workers. By setting out a specific procedure for taking a child into emergency custody without a court order, this code helps mitigate some of the due process concerns related to the very serious government action of removing a child from their parent(s)' or guardian(s)' custody.

The ICW program can remove the child, without a court order under two circumstances. First, when the child is in immediate danger. Second, when a child subject to the court's jurisdiction might leave without permission or might leave without a reasonable means of returning the child to the court.

When the ICW program in the Siletz Nation receives a report of child abuse, it is required to immediately investigate in order to determine whether the best interests and health and safety of the child and the tribal community require that further action be taken. They may ask law enforcement to assist with the investigation. The investigation shall cover the home environment, history and associations, and the present condition of the child and child's family and shall make recommendation as to the child's future care. The tribal representative shall make conclusions as to

the likely future of the family if no intervention takes place and whether removal of the child is required. Upon completion of the investigation the tribal representative shall determine whether:

- No further action is necessary;
- An informal resolution conference with the child and the child's parent(s) should be held to discuss alternatives to filing a petition alleging that the child is in need of care;
- A petition with the court should be filed;
- An emergency custody order should be sought from the court to take the child into emergency custody; or
- The child should be taken into emergency custody without a court order because the child is in immediate danger from their surroundings.

If no further action is to be taken, the child shall be released immediately. If emergency custody is necessary, then the representative proceeds with the action required by the code involving the tribal court.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- What investigative tasks does your jurisdiction currently require by statute and by protocols?
- Are they currently effective or should there be changes?
- Who performs the tasks?
- If such tasks are not spelled out in the tribal law, will agency employees consistently undertake them?

STEP 2: Establish a Vision for the Future

- What basic investigative tasks should be minimally required?
- It is not only important to have specific laws but also to discuss what should be in agency protocols as opposed to codes. It is much more cumbersome to keep codes current, and protocol should have built-in review dates to make sure that they are current.
- Review the introduction of this section for a list of activities that might appear in a statute or protocol.

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

E. Requirement to Draft Forensic Interview Protocols

Interviewing children is an activity that requires a great deal of skill, and unskilled, repeated interviewing can severely retraumatize children. It can also cause evidence in a criminal case to become untrustworthy. It is very important that agencies work together to ensure that child victims are not revictimized by multiple interviews and that interviewers are highly trained.

This section focuses on a code provision that requires the Nation's prosecutor's office, the law enforcement agency, and the social services agency to work together to draft and implement a tribal forensic interview protocol for use in severe child physical abuse and sexual abuse investigations. A forensic interview protocol should be designed with two primary goals: (1) to obtain truthful information from children; and (2) to avoid revictimizing child victims with multiple interviews.

The problems associated with assessments of children's reports of victimization in criminal proceedings came to national attention during the 1980s and 1990s in a series of highly publicized trials of daycare staff. In the McMartin Preschool case, more than 350 children claimed to have been molested at the preschool and a number of public locations including a market, a car wash, and a church. During interviewing, some children reported that, in addition to experiencing sexual abuse, they had been taken on plane rides and forced to drink blood and to watch animals being mutilated. Prosecutors said that the suggestive techniques used to elicit retrospective reports from such young children were appropriate, whereas the defense claimed that the interviewing and videotaping procedures were inept. When the trial ended in January of 1990, several jurors reported that they believed some of the children had in fact been molested but that the state had failed to prove the identity of the perpetrator(s). This three-year trial—the longest-running criminal trial in the history of the United States—cost taxpayers between thirteen and fifteen million dollars, produced no convictions, and destroyed the lives of many individuals connected to the case. In the end, it was not possible to determine whether the reports provided by the children interviewed were accurate.

Research completed since the McMartin trial shows that the skill of the interviewer directly influences whether a child relates a true memory, discusses a false belief, affirms details suggested by others, embellishes fantasies, or provides no information at all. For example, Sena Garven and colleagues demonstrated that the coercive techniques used by interviewers in the McMartin case elicited substantially more false allegations from children than did simple suggestive questions. This finding is particularly important given the fact that suggestive questions have long been known to have a negative impact on the quality of children's reports. When exposed to the "McMartin techniques" for less than five minutes, children in the study conducted by Garven and colleagues showed error rates of nearly sixty percent. Moreover, children subjected to social influence techniques became more acquiescent as the interview proceeded.

As the McMartin Preschool and Michaels cases illustrate, truth-finding involving assessments of children's retrospective reports may be seriously compromised, if not completely obscured, when interviewing techniques are faulty. What these cases teach is that it is necessary to establish and maintain standards for quality control in conducting and evaluating forensic interviews of children. Interviewers require information from both social science and the law, such as information on child development, memory, and communication as well as information on legal standards for assessing the admissibility of interview evidence. Interviewers also require state-of-the-art training in best practices in forensic interviewing. In addition, to maintain quality after initial training, interviewers should engage in frequent and sustained peer review, including systematic analysis of videotaped and transcribed interviews.[86]

Nancy E. Walker
Associate Director, Institute for Children, Youth, and Families, Michigan State University

In addition to seeking truthful information, it is equally important to protect child victims against revictimization. Children may be traumatized by inexperienced medical providers conducting interviews and medical exams by doctors, nurses, or paraprofessionals. There are a number of ways to solve these problems. For Nations with a full legal, law enforcement, and service infrastructure, the solution may be to require the collaborative development of a child forensic interview protocol with the accompanying training. Nations lacking the necessary specialized medical providers should explore establishing a tele-medicine consultation system for this purpose or hiring their own on-site Sexual Assault Nurse Examiners. It may also be necessary to enter into a MOU with the Indian Health Service where the Nation's specialists need to access or coordinate with its facilities. If none of these options are feasible, then Nations should consider entering into MOUs with neighboring jurisdictions and service providers that have the specialized training and expertise in conducting child forensic interviews and medical exams.

The mandate for the Nation's law enforcement agency, social service agency, and prosecutor's office to coordinate efforts to develop a child interview protocol does not set out of the protocol. Rather it is a legislative mandate that these agencies: (1) coordinate to develop a separate nonstatutory protocol; and (2) consider the following factors in that protocol.

1. Whenever possible, interviews should be conducted in a safe, neutral, and preferably child-friendly environment, such as a child advocacy center;

2. A multidisciplinary approach to child abuse investigations is preferable when the option is available;

[86] Nancy E. Walker, "Children as Victims and Witnesses in the Criminal Trial Process: Forensic Interviews of Children: The Components of Scientific Validity and Legal Admissibility," 65 *Law and Contemporary Problems* 149 (2002): 149–50.

3. The child's age and developmental ability should be considered when choosing interviewing techniques. Open-ended questions should be used with older children when possible, while cued invitations and specific, yet nonleading, questions should be used with younger children. Leading and suggestive questions should always be avoided.

4. Interviewer gender should be considered when scheduling appointments and training new interviewers. It may be particularly helpful to pair female interviewers with female victims.

5. Forensic interviewers should possess the ability to establish rapport through warmth and friendliness, experience working with children, previous training in interviewing or counseling, training in child sexual abuse and child development, a master's level education, an objective and nonjudgmental stance toward interviews, and the ability to take feedback constructively and change accordingly.

6. Structured interview protocols (i.e., National Institute of Child Health and Human Development investigative interview) are recommended, due to their effectiveness, ease of use, and limited training requirements. However, they should be used in combination with ongoing supervision and feedback.

7. Ground rules should be outlined for the child at the onset of the interview, including what should happen if the child does not know an answer, does not understand the question, does not remember something, does not want to answer a question, or if the interviewer makes a mistake.

8. Before discussing the abuse allegations, the interviewer should discuss with the child the difference between a truth and a lie, discuss the consequences of telling a lie, and obtain the child's agreement to tell the truth.

9. The Touch Survey[87] can be used as a technique to elicit details about good and bad touches that the child has experienced, although it should be used in combination with other empirically supported techniques.

10. Cognitive interviewing techniques should be used whenever possible (particularly with older children) to obtain further details about the abuse. The child's developmental level should be considered when determining which techniques may be most useful.

11. Anatomically detailed dolls should be used cautiously, avoided with very young children, and introduced to obtain further details only after the child has already disclosed.

12. If conducted appropriately, extended forensic evaluation appears to be a valuable option for children who do not disclose during the initial interview and should be used only when necessary.

[87] An interviewing technique that has gained popularity in recent years is the Touch Survey, developed by Sandra Hewitt in the early 1980s (Carnes, 2000; Hewitt, 1998; and Hewitt and Arrowood, 1994). It was developed as a screening for child abuse and was based on the idea that touches fall along a continuum, ranging from good to neutral to bad (Hewitt, 1998).

Selected Tribal Codes

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part A. General and Dependency Provisions
Section 406—Child Neglect and Abuse Reporting, Emergency Custody, Unborn Child of Expectant Mother in Need of Protection or Services

§406.4 Investigation and Referral of Reported Child Neglect and/or Abuse-Responsibilities of Agencies[88]

(a) **Requirement of Collaborative Development of Protocols**—The entities and their designated officials listed in Section 406.1(a),[89] as part of the Integrated Child Welfare Workgroup, shall collaboratively develop and implement protocols that carry into effect the requirements of this Code. The adopted protocols shall state that these entities and their designated officials:

(1) Recognize that the primary objective of any intervention shall be to protect and support the child and to do no further harm to the child;

(2) Recognize that early detection and prevention are the keys to ending child neglect and abuse and its destructive consequences to children and families;

(3) Commit to fully cooperating and coordinating in response to reports of child neglect and/or abuse;

(4) Recognize that children are capable of being credible reporters of events. All allegations of child neglect and/or abuse should be taken seriously and be thoroughly investigated by the Department of Public Safety (in child sexual abuse cases, by the Criminal Investigation Unit), the LOWO Division of Child Protective Services, and the Office of the Attorney General;

(5) Recognize that the number of interviews with a child should be kept to a minimum and the interviewer(s) should be the same person(s) throughout the investigation;

(6) Recognize that, following the disclosure of child neglect and/or abuse, every effort should be made to ensure the safety of the child during both the course of the investigation and afterwards;

(7) Recognize that child neglect and abuse are unacceptable and contrary to Lakota values. Persons responsible for such maltreatment shall be prosecuted when there is probable cause to do so;

(8) Commit to using a victim-centered approach to the investigation and prosecution of child neglect and/or abuse;

[88] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

[89] Includes (1) LOWO Division of Child Protective Services; (2) Child Advocacy Center; (3) Department of Public Safety; (4) Criminal Investigation Unit; and (5) Office of the Attorney General.

(9) Commit to dedicating the necessary time, attention, and support to developing culturally appropriate treatment services for neglected and abused children, their families, and for the offender;

(10) Commit to promoting and implementing local community strategies and education/awareness initiatives for addressing issues related to child neglect and abuse;

(11) Commit to developing a common language for ongoing and future discussions concerning child neglect and abuse; and

(12) Commit to upholding the dignity of child victims and their families and to ensure that all reports, information, contacts, shared information, and referrals made in accordance with this Code shall be considered confidential in nature and maintained pursuant to the requirements of this Code.

(c) **Responsibilities of the LOWO Division of Child Protective Services**—The LOWO Division of Child Protective Services shall be responsible for:

(1) Directing the activities of the Integrated Child Welfare Workgroup in its efforts to collaboratively formulate and implement policies, procedures, protocols, and training; and when it functions as a Child Protection Team to staff and review cases where a child is found by the Children and Family Court to be a Child in Need of Care;

(d) **Responsibilities of the Child Advocacy Center**—The Child Advocacy Center shall be responsible for:

[sections omitted]

(5) Coordinating the activities of the Multi-Disciplinary Team entrusted with evidence collection in criminal child abuse and domestic violence cases;

[sections omitted]

(e) **Responsibilities of the Department of Public Safety**—The Department of Public Safety shall be responsible for:

(1) Developing, implementing and publishing its own written, internal protocols for responding to, and investigating reports of, alleged child neglect and abuse as defined within this Code and within Chapter 9 of the OST Law and Order Code, within 120 days of the enactment of this Code. The DPS shall provide a written copy of the protocols to the entities listed in Section 406.1(a), at this time and each time they are amended. These protocols shall include, but are not limited to:

(A) Procedures for notification and referral, coordination of investigations, and information sharing with the entities listed in Section 406.1(a);

(B) Responsibilities of, and procedures to be followed by, first responding officers and their supervisors in misdemeanor child neglect and/or abuse cases, including required coordination with the LOWO Division of Child Protective Services;

(C) Guidelines for crime scene processing, evidence recognition, preservation, and handling, including the collection and preservation of DNA;

(D) Responsibilities of, and procedures to be followed by, first responding officers and their supervisors in child sexual abuse cases, including required coordination with the LOWO Division of Child Protective Services and the Child Advocacy Center;

(E) Procedures for conducting victim interviews consistent with a policy of limited first-responder inquiry and a policy of having a single interviewer and a single interview, with all forensic interviews conducted by the Child Advocacy Center;

(F) Requirements for the content to be included in reports of investigation consistent with the requirements of this Code;

(G) Mandatory training requirements, to be completed within 120 days of the enactment of this Code, for all first responding officers and their supervisors, including the topics of First Response to Child Neglect and Abuse, the Rights of Children, their Parents, Extended Family Members, and Tiospaye, and Conducting Victim Interviews;

(H) Setting out ongoing training requirements for first responding officers and DPS personnel who may receive, investigate, or be responsible for the coordination of information concerning child neglect and abuse cases;

(I) Mandatory training requirements for sixteen (16) hours of annual refresher training for first responding officers and their supervisors;

(J) Mandating that new DPS employees complete an initial training on the topics listed in Section 406.4(e)(1)(G) within six (6) months of the date of being hired or rehired; and

(K) Setting out sanctions for DPS officers, personnel, and/or supervisors who fail to follow or enforce these DPS protocols;

[sections omitted]

(f) **Responsibilities of the Criminal Investigation Unit**—The Criminal Investigation Unit shall be responsible for:

(1) Developing, implementing, and publishing its own written, internal protocols for responding to, and investigating reports of, alleged child neglect and abuse as defined within this Code and within Chapter 9 of the OST Law and Order Code, within 120 days of the enactment of this Code. The Criminal Investigation Unit shall provide a written copy of the protocols to the entities listed in Section 406.1(a), at this time and each time they are amended. These protocols shall include, but are not limited to:

(A) Procedures for notification and referral, coordination of investigations, and information sharing with the entities listed in Section 406.1(a);

(B) Responsibilities of, and procedures to be followed by, Criminal Investigators and their supervisors in misdemeanor child neglect and/or abuse cases, including required coordination with the LOWO Division of Child Protective Services;

(C) Responsibilities of, and procedures to be followed by, Criminal Investigators and their supervisors in child neglect and/or abuse cases, including physical and sexual abuse, and the required coordination with the LOWO Division of Child Protective Services and the Child Advocacy Center;

(D) Procedures for conducting victim interviews consistent with a policy of limited first-responder inquiry and a policy of having a single interviewer and a single interview, with all forensic interviews conducted by the Child Advocacy Center;

(E) Requirements for the content to be included in reports of investigation consistent with the requirements of federal criminal investigation guidelines and this Code;

(F) Standards for the proper recognition, investigation, and documentation of child neglect and abuse, including both physical and sexual abuse;

(G) Mandatory training requirements, to be completed within 120 days of the enactment of this Code, for all Criminal Investigation Unit personnel, including the topics of Investigation of Child Neglect, Child Abuse and Child Sexual Abuse, the Rights of Children, their Parents, Extended Family Members, and Tiospaye, and Conducting Victim Interviews;

(H) Mandatory training requirements for sixteen (16) hours of annual refresher training for Criminal Investigators and their supervisors;

(I) Mandating that new or reassigned Criminal Investigators or their supervisors complete an initial training on the topics listed in Section 406.4(f)(1)(G) within six (6) months of the date of being hired or assigned; and

(J) Setting out sanctions for Criminal Investigators and/or supervisors who fail to follow or enforce these protocols and/or governing regulations;

[sections omitted]

(g) **Responsibilities of the Office of the Attorney General**—The Office of the Attorney General shall be responsible for:

(1) Developing, implementing, and publishing its own written, internal protocols for responding to, and investigating reports of, alleged child neglect and abuse as defined within this Code and within Chapter 9 of the OST Law and Order Code, within 120 days of the enactment of this Code. The Office of the Attorney General shall provide a written copy of the protocols to the entities listed in Section 406.1(a), at this time and each

time they are amended. These protocols shall include, but are not limited to:

(A) Procedures for notification and referral, coordination of investigations, and information sharing with the entities listed in Section 406.1(a);

(B) Procedures for notification and referral, coordination of investigations, and information sharing with the U.S. Attorney's Office for the District of South Dakota;

(C) Guidelines for the prosecution of misdemeanor child neglect and/or abuse cases in Tribal Court, regardless of possible or pending federal prosecutions in federal court;

(D) Guidelines for the prosecution of child sexual abuse cases in Tribal Court, regardless of possible or pending federal prosecutions in federal court;

(E) Procedures for conducting victim interviews consistent with a policy of limited first-responder inquiry and a policy of having a single interviewer and a single interview, with all forensic interviews conducted by the Child Advocacy Center;

(F) Requirements for the content to be included in Office of the Attorney General reports of investigation of child neglect and abuse consistent with established prosecutorial guidelines and the requirements of this Code;

(G) Mandatory training requirements, to be completed within 120 days of the enactment of this Code, for all Tribal Prosecutors and Juvenile Presenting Officers, including the topics of the OST Child and Family Code, Preparation of Criminal Cases, Cross-Examination, Rules of Evidence, the Rights of Children, their Parents, Extended Family Members, and Tiospaye, Voir Dire Techniques, Investigation of Child Physical and Sexual Abuse, Conducting Victim Interviews, and other topics designated by the Office of the Attorney General;

(H) Mandatory training requirements for sixteen (16) hours of annual refresher training for all Tribal Prosecutors and Juvenile Presenting Officers;

(I) Mandating that new Tribal Prosecutors and Juvenile Presenting Officers complete an initial training on the topics listed in Section 406.4(g)(1)(G) within six (6) months of the date of being hired or rehired; and

(J) Setting out sanctions for Tribal Prosecutors and Juvenile Presenting Officers who fail to follow or enforce these protocols;

[sections omitted]

(j) **Role of the Integrated Child Welfare Workgroup**—The role of the Integrated Child Welfare Workgroup shall include:

(1) Advising the OST Judiciary Committee concerning the handling of child neglect and abuse cases;

(2) Serving as the body, comprised of the entities and their designated officials listed in Section 406.1(a), and working with the Tiospaye Point(s) of Contact, that shall collaboratively develop and implement the protocols that will carry into effect the requirements of this Code; and

(3) Constituting the Tribal Child Protection Team(s) that will staff and review cases where a child is found by the Children and Family Court to be a Child in Need of Care.

(k) **Role of the Tiospaye Nawicakicijinpi (Tiospaye Advisory Council)—**The role of the Tiospaye Nawicakicijinpi (Tiospaye Advisory Council) shall include advising the Court, the entities listed in Section 406.1(a), and tiospaye members and Tiospaye Interpreters, concerning traditional Lakota definitions, concepts, and protocols

Tribal Code Commentary

The Oglala Sioux Code is quite far-reaching and provides an opportunity to review several different points. It not only directs entities through their designated officials to develop and implement protocols, but Section 406.4(a) specifically provides priorities and standards that the protocols must meet. Twelve objectives are listed in this section, for example, commit to a victim-centered approach, provide culturally appropriate treatment, protect the child and do no further harm, and keep information confidential. These standards are meant to clearly help in developing the necessary protocols.

Next, the code assigns certain entities certain responsibilities. The LOWO Division of CPS is responsible for directing the activities of the work group to collaboratively formulate and implement policies, procedures, protocols, and training. The child advocacy center is responsible for providing technical assistance in the development of policies, procedures, protocols, and training.

Placing a time limit on development and implementation of policies and protocols is also covered. The Department of Public Safety is responsible for developing, implementing, and publishing its internal protocols for responding to and investigating reports of alleged child neglect and abuse within 120 days of enactment. The code goes on to describe what should be included in the Department of Public Safety's internal protocols.

The Criminal Investigation Unit is responsible for developing, implementing, and publishing its own written, internal protocols for responding to and investigating reports of alleged child neglect and abuse. The protocols should cover procedures for notification and referral, coordination of investigations, and information sharing, among other requirements, including victim interviews.

The Office of the Attorney General is responsible for developing, implementing, and publishing its own written, internal protocols for responding to and investigating reports of alleged child neglect and abuse with 120 days of the code enactment. The statute requires formulating guidelines for the prosecution of child sexual assault cases in tribal court, regardless of possible or pending federal prosecution. Procedures for victim interviews consistent with the policy of limited first-responder inquiry and a policy of having a single interviewer and a single interview, with all forensic interviews conducted by the child advocacy center. Other guidelines and procedures are specifically required by statute.

The role of the Integrated Child Welfare Workgroup is also defined by the code. It is to advise the Judiciary Committee concerning handling of child maltreatment cases, develop and implement protocols, and constitute the Tribal Child Protection Team where a child is found to be a child-in-need-of-care by the court.

The Tiospaye Advisory Council has the responsibility of advising all the entities involved as well as tiospaye members and Tiospaye Interpreters concerning traditional Lakota definitions, concepts, and protocols.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Where do your Nation's children who are suspected of being victims of child abuse receive medical examinations? Are the medical providers trained in conducting a forensic exam specific to child sexual abuse?
- Where does your Nation conduct interviews in child abuse cases? Are investigators trained to conduct forensic interviews of children in abuse cases?
- What services are available to provide victim advocacy and support services for tribal child victims of sexual abuse? Are local mental health providers trained specifically to work with child victims of sexual abuse and severe physical abuse?
- What coordination is already in place to assure agencies involved with the investigation, prosecution, and services to child victims are victim centered and child friendly? Discuss any obstacles in law or policy regarding all aspects of this coordination.
- Do you currently have a statute requiring the adoption of protocols designed to prevent the retraumatization of children during the investigation (e.g., repeated interviews by untrained interviewers)?
- What are your current protocols?

STEP 2: Establish a Vision for the Future

- What needs to change to improve the current process?
- Is there further work that should be done on your protocols?
- What agencies should be mentioned in the code section?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

F. Social Services' Findings, Conclusions, and Recommendations

A code provision requires the social services agency to spell out its initial findings in writing, make a conclusion about what it found, and provide the alternatives that it may pursue after the investigation of a report of child maltreatment. Many jurisdictions come up with a series of standard conclusions to be included in their social services agency reports. Documenting these conclusions is crucial for child safety, the protection of individual rights, and record keeping in order to preserve federal or other funding of justice and child welfare programs. These conclusions are then used when a social services agency decides whether it will proceed with a child protection action in court and, if so, what it will recommend to the judge.

Any of the following conclusions, or something similar, may be included in a written social services agency report of an investigation of child maltreatment:

1. **Unfounded Report**: A report deemed to be false, be inherently improbable, involve an accidental injury, or not constitute child maltreatment;
2. **Substantiated Report**: A report deemed to be based upon some credible evidence that child maltreatment occurred;
3. **Inconclusive report**: A report, not unfounded, in which the findings are inconclusive and there is insufficient evidence to determine whether child maltreatment has occurred.

The preceding determinations are to be made by the investigator who conducted the investigation.

Following the report of child maltreatment and investigation, the social services agency may pursue one of the following courses of action:

1. Close the case if the agency determines that the child is not a CINA or at risk of becoming a CINA.
2. Keep the case open and offer family support services in order to alleviate the need for a CINA petition.
3. Keep the case open and offer to schedule a family group conference in order to alleviate the need for a CINA petition.
4. File a CINA petition in accordance with the Nation's code.

Selected Tribal Codes

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part I General Provisions

§ 8.021. Investigation and Evaluation of Reports of Child Abuse and Neglect

[sections omitted]

(b) **Investigation of Report by Tribal ICW Program**

(1) Upon receiving a report of suspected child abuse or neglect or a notice from a tribal enforcement officer, the Tribal ICW Program shall immediately assess the report and determine whether to open a case. The ICW Program shall open a case if the representative has reasonable suspicion that the child who is the subject of the report has been or likely may be abused or neglected.

(2) If the ICW Program opens a case, the ICW Program shall immediately initiate an investigation of the report to determine whether the best interests and health and safety of the child and the tribal community require that further action be taken. If necessary, the tribal representative may ask a law enforcement officer to conduct or assist with the investigation. The investigation shall cover the child's home environment, history and associations, the present condition of the child and the child's family, and shall make recommendations as to the child's future care. The tribal representative shall make conclusions as to the likely future of the family if no intervention occurs, and whether removal of the child from the family likely will be required. In cases involving the duty of financial support, the study shall include such matters as earnings, assets, financial obligations, and employment.

(3) Upon completion of the investigation, the tribal representative shall determine whether:

(A) No further action should be taken;

(B) To hold an informal resolution conference with the child and the child's parent(s), guardian, custodian, or legal representative to discuss alternatives to filing a petition alleging that the child is a child-in-need-of-care;

(C) To file a petition with the Court alleging that the child is a child-in-need-of-care;

(D) To seek an emergency custody order from the Court to take the child into emergency custody; or

(E) Emergency removal and custody of the child is necessary without a Court order because the child is in immediate danger from his or her surroundings.

(4) If the tribal representative determines that no further action shall be taken, the child shall be released immediately if the child is in emergency custody.

(5) If the ICW Program determines that emergency custody of the child is necessary, the representative shall proceed pursuant to section 8.017 of this Code.

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part C. Agency Compliance Provisions
Section 406—Child Neglect and Abuse Reporting, Emergency Custody, Unborn Child of Expectant Mother in Need of Protection or Services

§406.5 Investigation of Reported Child Neglect and Abuse—Contents of Report of Investigation[90]

Reports of Investigation completed by any of the entities listed in Section 406.1(a) at any stage, shall include the child's name, birth date, and place of birth; the known name(s) and address(es) of the child's parents, guardians, or custodian; the nature of the suspected child neglect and/or abuse, as defined in this Code; and a description of any evidence found of the suspected child neglect and/or abuse.

§406.6 Investigation of Reported Child Neglect and Abuse—Actions Authorized Upon Completion of Report

If the investigation and report of investigation indicate that child neglect and/or abuse has occurred, the Office of the Attorney General is authorized to take appropriate action immediately, including the following:

(1) Initiation of judicial proceedings for the Tribe to assume care and custody of a neglected and/or abused child;

(2) Initiation of appropriate criminal action(s); and

(3) Any other action deemed necessary for the safety and well-being of the child.

[90] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

Tribal Code Commentary

The Siletz Tribal Code requires the tribal representative, after their initial investigation, to make conclusions as to the likely future of the family if no intervention occurs and to decide whether removal of the child from the family is necessary. The agency protocol may be more specific about the conclusions required. From these conclusions the tribal representative determines whether further action should be taken or not. Some action may keep them from filing a petition, such as an informal resolution conference in order to discuss alternatives to filing a petition. The representative could also, if needed, file a petition with the court alleging the child is a CINA or seek an emergency custody order to take the child into emergency custody. If the representative determines that no further action is needed and the child is in emergency custody, the child should be released immediately.

1. During the investigation, evaluate and assess the home environment of the child or children in the same home, the risk to such children if they continue to be subjected to the existing home environment, and all other facts or matters found to be pertinent. The division shall determine whether any of such children is a child in need of protective services.
2. Make reasonable efforts, when required, to prevent the need for removal of the child from the family, and offer appropriate services to the family of any child determined to be a child in need of protective services.
3. If the division in its assessment finds that court intervention is warranted, it shall refer the matter to the Office of the Prosecutor or an individual who is a member of the Navajo Bar Association and employed/contracted by the Navajo Nation.

The Oglala Sioux Code requires specific information to be contained in the investigative report (provided by agencies authorized to receive and investigate) of child abuse and neglect, including basic identification information as well as any evidence of abuse or neglect. If the Nation's CPS determines maltreatment has occurred, then the Attorney General is authorized to commence a proceeding or perform any other action necessary to protect the child.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- What does a child protection worker rely on when making their conclusion(s) that a particular situation gives rise to a "substantiated" decision that child maltreatment has occurred or is present in your jurisdiction?
- How does the social worker document this information?
- Would the parent(s) or guardian(s) be more or less likely to cooperate with social services and treatment services if the case were closed, kept open with the possibility of filing, or filed?
    - Why might it be important for social services to have these options?
- Should these options exist in both a dependency and criminal investigation? How should these investigations be handled any differently?

STEP 2: Establish a Vision for the Future

- Discuss any difficulties you encounter in the current system and brainstorm ways of changing or creating language to fix the difficulties.
- What options for intervention do you want for your community before a petition is filed? Why might this be important?
- What activities should be in the code, and what might be more appropriate for agency or department protocols?
- Will you need to make revisions to your agency protocols?

STEP 3: Drafting the Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

Additional Resources

Bubar, Roe, Basic Guide for Forensic Interviewers in Child Sexual Abuse Cases in Indian Country and Alaska Native Communities, Tribal Law and Policy Institute, 2000.
This short resource provides an overview of the primary considerations for the interview process when allegations of child sexual abuse arise in Indian country and Alaska Native communities. Forensic interviews are an important part of the investigative process, but require specialized training. This document outlines three areas of particular concern: training for interviewers, cultural competence, and core components of the child interview.

Education Development Center, Inc. and Massachusetts Child Exploitation Network, Child Sexual Exploitation: Improving Investigations and Protecting Victims, A Blueprint for Action, Education Development Center, 1995.
This document was designed to serve as a national prototype guiding collaboration among federal, state, and local agencies that are involved in investigating and prosecuting child pornography or prostitution cases and providing services to the young victims of these crimes.

Governor's Task Force on Children's Justice and Family Independence Agency, Forensic Interviewing Protocol, State of Michigan, Department of Human Services, 2011.
Provides a thorough introduction to forensic interviewing protocols and provides a series of examples, reference materials, and "Quick Guides" for trained professionals.

Payne, Diane, et al., Child Abuse Protocol Development Guide, Tribal Law and Policy Institute, 2003.
Intended to help Native Nations and collaborating agencies develop the type of protocol that will serve the needs of the community and the children. The guide is specifically designed to provide direction and information to local CPTs or MDTs toward development of protocols to address their system's response to child abuse and child sexual abuse.

U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, Law Enforcement Response to Child Abuse, Office of Justice Programs, 2001.
This guide is designed to assist those working to help protect children from being victimized and to improve the investigation of child abuse cases. Pertinent consideration and helpful investigatory protocols are provided. Other useful materials include suggestions on working with physicians, responding to domestic disturbance calls, and placing children in protective custody.

Walker, Nancy E., "Children as Victims and Witnesses in the Criminal Trial Process: Forensic Interviews of Children: The Components of Scientific Validity and Legal Admissibility," 65 *Law and Contemporary Problems* 149 (2002).
The problems associated with assessments of children's reports of victimization in criminal proceedings came to national attention during the 1980s and 1990s in a series of highly publicized trials of daycare staff. Walker describes information that professionals need to know if they are to conduct valid interviews of children in forensic contexts.

Chapter 8: Preventing Physical Removal of Children from Their Homes

Because removal of a child from the home has such an impact on the child and family, it is important to discuss strategies to prevent removal. Because a finding of neglect, rather than physical abuse, is often the main reason for removal of Native children, Native Nations should consider strategies that would eliminate the need for removal by providing family and community support services that address problems that lead to neglect and other forms of child maltreatment. Prevention being the ideal option.

Alternative options may be explored in order to keep the child in their family home, such as emergency services, in-home services, or removing an offender from the home environment. In that case, the preliminary hearing or a full CINA hearing may occur with the child in the home.

The designated agency needs to promptly evaluate the family situation and decide whether the child may remain in the family home and what specific services assists in preventing removal. Services should be provided immediately if appropriate.

- If a Nation wishes to use Title IV-E funding, it is *required* to adopt strategies to prevent removal, that is, make "reasonable efforts" to keep the child in their home. So, for Title IV-E Nations, any efforts to prevent the physical removal of the child from their home needs to comply with the "reasonable efforts" standard and should be reviewed on a case-by-case basis. Considering the following may be helpful in determining whether "reasonable efforts" were made:
- Would the child's health or safety be compromised by attempting to maintain the child at home?
- Was the service plan customized to the individual needs of the family or was it a standard package of services?
- Did the agency provide services to ameliorate factors present in the child or parent, that is, physical, emotional, or psychological, that would inhibit a parent's ability to maintain the child safely at home?
- Do limitations exist with respect to service availability, including transportation issues? If so, what efforts did the agency undertake to overcome these obstacles?

If reasonable efforts to prevent removal fail, Title IV-E funding requires that certain findings and protocols occur along with the child's removal. Nations that want Title IV-E funding must be sure to adopt these strategies.

The preliminary hearing is usually necessary only if the child is removed from their home; if the child can be retained in the home with appropriate protections and services, the child's future can be decided through the regular dependency and neglect procedure. If a preliminary hearing occurs, the Nation's social services agency must make several showings at the preliminary hearing in order to meet Title IV-E eligibility and payment for the child services—all of which require actions and

decisions before that hearing takes place. See Chapter 6 and Chapter 7 for more discussion on emergency removal and the preliminary hearing.

"Reasonable efforts" is a straightforward and unobjectionable concept in most Native and non-Native communities. But, controversy surrounds the further requirements of ASFA. ASFA sets out the circumstances under which reasonable efforts are not required, and it fast tracks termination of parental rights and/or the permanent placement of a child once the determination is made that reasonable efforts to reunite are not required. Native Nations planning on entering into or maintaining Title IV-E agreements to access federal funds must take steps to comply with ASFA.

There are three parts of a Children's Code that should be reviewed for potential amendment relating to preventing removal and Title IV-E compliance:

1. Many Children's Codes lack a provision requiring that reasonable efforts be made to keep a child in the home before removing the child. Determine whether your code has such a provision and, if it doesn't, it needs to be added in for Title IV-E funding purposes.
2. A section of the code should require an assessment and define the phrase "imminent risk of removal." Other jurisdictions tend to use a risk assessment form with varying factors.
3. Determine where in the Children's Code it first requires the judge to make a finding or to hold a hearing. If it appears that a significant amount of time elapses before a judge can make a finding that a child in the home is at imminent risk of removal, then it is important to allocate this duty of finding imminent risk of removal to the social services agency at an earlier stage, as the finding of imminent risk of removal triggers Title IV-E funding.
4. "The fact that a child is the subject of [a child abuse/neglect report] falls far short of establishing that the child is at serious risk of placement in foster care and thus of becoming eligible for TITLE IV-E assistance. . . . A candidate, in the opinion of the DAB [Departmental Appeals Board], is a child who is at serious risk of removal from his/her home because the State is either pursuing that removal or attempting to prevent it. A child cannot be considered a candidate for foster care when the State agency has no formal involvement with the child or simply because s/he has been described as 'at risk' due to circumstances such as social/interpersonal problems or a dysfunctional home environment."[91]

[91] Departmental Appeals Decision, No. 1428, Child Welfare Policy Manual, 8.1D TITLE IV-E, Administrative Functions/Costs, Candidates, Children's Bureau. Available at http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=79 (accessed June 16, 2015).

Chapter Units

Unit A: Reasonable Efforts

Unit B: Strategies to Support Families

Unit C: Removal of Offending Person from the Home

A. Reasonable Efforts

A Children's Code should include provisions requiring, at minimum, reasonable efforts to keep the child in their home. The Adoption Assistance and Child Welfare Act (AACWA) does not specifically define the term *reasonable efforts*, and no other federal law, policy, or regulation has explicitly defined it. Yet, AACWA requires that states and Native Nations entering into state-tribal Title IV-E agreements make reasonable efforts to keep the child in their physical home or reunite families if the child is physically removed, unless reunification is specifically exempted by ASFA. For "reasonable efforts," Native Nations must remember two important principles:

1. The child's safety is paramount in determining which services should be provided in order to prevent physical removal or reunify the child and family.
2. At minimum, "reasonable efforts" must be made to preserve families prior to placement of a child in foster care or reunite families of children already in placement.

Native Nations are not bound by ICWA's higher requirement of "active efforts." States, by contrast *are* bound by ICWA, which raises the question whether a Native Nation, as a party to a Title IV-E agreement, is also required to undertake active efforts with respect to Indian children and their families. This is essentially a policy question to be decided by the Nation and, if necessary, negotiated with the state as part of any Title IV-E negotiations. In general, however, Nations with the necessary resources should consider requiring the maximum amount of assistance to their Indian children and families in need—"active efforts," instead of "reasonable efforts." Instead of inserting the words *active efforts* into the code, a Nation may spell out the specific required undertakings and services to be provided to Indian children and families in need.

The Department of Health and Human Services (DHHS) has also issued a set of principles to help states and Native Nations develop services to families that help to meet the reasonable efforts requirement. In response to the question of "what is the definition of 'reasonable efforts'?" DHHS has indicated that:

> We have not, nor do we intend to define "reasonable efforts." To do so would be a direct contradiction of the intent of the law. The statute requires that reasonable efforts determinations be made on a case-by-case basis. We think any definition would either limit the courts' ability to make determinations on a case-by-case basis or be so broad as to be ineffective. In the absence of a definition, courts may entertain actions such as the following in determining whether reasonable efforts were made:
>
> 1. Would the child's health or safety have been compromised had the agency attempted to maintain him or her at home?
> 2. Was the service plan customized to the individual needs of the family or was it a standard package of services?
> 3. Did the agency provide services to ameliorate factors present in the child or parent, i.e. physical, emotional or psychological problems that would inhibit a parent's ability to maintain the child safely at home?

4. Do limitations exist with respect to service availability, including transportation issues? If so, what efforts did the agency undertake to overcome those obstacles?
5. Are the State agency's activities associated with making and finalizing an alternate permanent placement consistent with the permanency goal? For example, if the permanency goal is adoption, has the agency filed for termination of parental rights, listed the child on State and national adoption exchanges, or implemented child-specific recruitment activities?[92]

It is also important to note that reasonable efforts to reunify with the family may be concurrent with efforts toward adoption, placement with a legal guardian, or another appropriate permanency plan. In state courts, this is known as *concurrent planning*.

In state jurisdictions, social service agencies often have a legal mandate to offer a minimal amount of in-home services to the parent(s) and children before seeking to remove a child. The social services agency then has to explain to a judge in a court proceeding specifically how this was done, if it is seeking to remove the child and/or get the court to exercise jurisdiction over the child.

Note that code provision(s) requiring reasonable efforts to return a child to the home needs to have a partner provision requiring "reasonable efforts to place the child in a timely manner" where social services has obtained a judicial determination that the parent has subjected the child to "aggravated circumstances" (abandonment, torture, chronic abuse, or sexual abuse) or has been convicted of one of the designated crimes, or that parental rights have been terminated involuntarily with respect to a sibling.

[92] See Child Welfare Policy Manual, 8.3C.4: Title IV-E, Foster Care Maintenance Payments Program. Available at: https://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp_pf.jsp?citID=59, accessed April 23, 2016.

Selected Tribal Codes

Native Village of Barrow Iñupiat Traditional Government Tribal Children's Code
4-4 Involuntary Proceedings
4-4- Reasonable Efforts

4-4-4 A. Reasonable Efforts to Reunite Required[93]

The Social Services Department shall provide timely, reasonable efforts to unite or reunite any child removed from the home with his parent or custodian. The duty to make reasonable efforts includes the duty to:

1. Identify family support services that will assist the parent or custodian in remedying the conduct or conditions in the home that created the need removal or made the child a CINA;
2. Actively offer the parent or custodian, or refer the parent or custodian to, the services identified under Subsection (1);
3. Refer the parent or custodian to community-based family support services whenever community-based services are available and desired by the parent or custodian; and
4. Document all actions taken by the Department pursuant to Subsections (1), (2), and (3).

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.030 Definitions.

Terms under this chapter shall be liberally construed so as not to limit the jurisdiction of the Tulalip Tribes over Indian children, and to facilitate the authority of the Court and the Tribal agencies directly responsible for serving the needs of the children to act to protect the interests of Indian children and their families. When interpreting terms not defined by this chapter, consideration shall be given to Tulalip Tribal laws, customs, and traditional child-rearing practices. Unless in conflict with applicable Tribal law, terms not specifically defined in this chapter shall be defined according to their normal usage.

(1) "Active efforts" means to provide ongoing and proactive rehabilitative and/or remedial services to the family to prevent removal of the child from his or her parent or guardian, visitation with the parents if the child is removed from the home and reunify the child with his or her parent(s) or guardian(s) as soon as possible after removal once safe for the child. Beda?chelh case managers must arrange visitation with parents or cleared family and assist in obtaining services for parents to work toward reunification or for the child if necessary to be

[93] This Code is on file with the Tribal Law and Policy Institute.

placed with their parents or family. In the event reunification is not possible beda?chelh case managers must make efforts to place the child with family members or other placements in accordance with the highest placement preferences for the child to achieve permanency.

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part A. General and Dependency Provisions

§408.5 Removal of Child from Home and Reasonable Efforts to Prevent Removal or to Return the Child to Home.[94]

(a) The LOWO Division of Child Protective Services shall make reasonable efforts prior to the removal of an alleged or adjudicated neglected or abused child from the home of the child's parent(s), guardian, or custodian to prevent or eliminate the need for removal of the child. If the child has been removed from the home and has been placed in temporary custody of LOWO, LOWO shall make reasonable efforts to make it possible for the child to return to the home of the child's parent(s), guardian, or custodian. If the child is to be or has been removed from the home, the Children and Family Court shall first make a judicial determination that removal of the child from the home is or was necessary because continued presence of the child in the home would be contrary to the welfare of the child and that reasonable efforts by LOWO to avoid removal of the child from the home have been made. If the child has been removed from the home and has not been returned to the home, the Children and Family Court shall first make a judicial determination that reasonable efforts have been made by LOWO to return the child to the home and that the child cannot be returned to the home because it would be contrary to the welfare of the child.

(b) Reasonable efforts to prevent the necessity for removal of a child from the home of the child's parent(s), guardian, or custodian and reasonable efforts to return the child to the home mean provision by LOWO of any assistance or services that:

(1) Are appropriate for the child's parent(s), guardian, custodian, or any other caretaker family of the child existing at the time of removal or possible return of the child, including instruction on parenting;

(2) Are available pursuant to the comprehensive plan of preventive services of LOWO;

(3) Could be made available without undue financial burden on LOWO; or

(4) Would have a significant likelihood of protecting the child from substantial danger to the child's physical health or from severe emotional damage while enabling the child to remain in the home or to be returned to the home.

[94] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

(c) In determining the adequacy of reasonable efforts, the court shall consider the assistance, services, and efforts of LOWO. The court shall also consider the good faith efforts or the lack of good faith efforts made by the child's parent(s), guardian, custodian, or other caretaker family to cooperate with LOWO and to effectively utilize the assistance or services for the benefit and welfare of the child.

Tribal Code Commentary

The Native Village of Barrow's code specifically requires that the Social Service Department identify family support services in a timely fashion in order to remedy the conduct or conditions in the home that created the need for removal or made the child a CINA. They must "actively offer" the parent/custodian or refer the parent or custodian to the services identified and refer the parent/custodian to community-based family support services whenever available and desired by the parent/custodian. Documentation of all action is required.

The Tulalip Code defines *active efforts* as ongoing and proactive rehabilitative or remedial services to the family in order to prevent the removal of the child from the parent(s)' custody. If the child is removed visitation with the child and reunification as soon as possible is the goal. Bedaʔchelh case managers must arrange visitation and work with parents or cleared family and assist in obtaining services for parents to work toward reunification. If reunification is not possible then managers must make efforts to place the child with family members or other placement in accordance with the highest placement preferences in order for the child to achieve permanency.

The Oglala Sioux Tribal Code requires that CPS make reasonable efforts prior to the removal of an alleged or adjudicated neglected or abused child from the home of the child's parent/custodian to prevent or eliminate the need for removal. If the child has been removed, reasonable efforts are required to be made to return the child home. Reasonable efforts to prevent the necessity for removal of a child or to return a child home means assistance appropriate for the child's parent/custodian, including instruction on parenting, and means services available pursuant to the comprehensive plan of preventive services of LOWO, including services that could be made available without undue financial burden on LOWO or services that would likely protect the child from substantial danger or from severe emotional damage while enabling the child to remain in the home or to be returned to the home. The court should consider the assistance, services, and efforts of LOWO in determining the adequacy of reasonable efforts. It should also consider the good faith or lack of good faith in the parent/custodian cooperating.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Does your Nation's code have a provision for "reasonable" or "active" efforts to provide services to families and children prior to removing a child from the home?
- Does the current code or policy provide a list of what your Nation believes to be reasonable efforts?
- Is the removing agency required to make findings of any kind before removing a child? If so, identify the types of findings and where these requirements are found.

STEP 2: Establish a Vision for the Future

- If your Nation's code is not Title IV-E compliant, is this something that you desire to work toward in the future?
- What code or policy changes would be needed?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's code.

B. Strategies to Support Families

Prevention can focus on strengthening the family to ensure that all, or at least most, families have the proper cultural education in child-rearing practices. Parent education and support is clearly a cornerstone in the configuration of tribal prevention services.

Currently, child abuse prevention efforts in Indian country follow six general tracks, which are for the most part consistent with efforts across the United States and other developed countries. These approaches include:

- Public awareness,
- Parent support,
- Child resistance education (safe touch, stranger danger, etc.),
- Intervention to reduce problem behavior,
- Social risk reduction, and
- Cultural strengths.[95]

This chapter addresses code sections that focus on preventing removal. However, before discussing code the next section provides a description of a variety of in-home service programs that support children and families in their homes and prevent removal of children from their homes.

Promising Practices in Native Nations Supporting Families

Family Spirit Programs

The Family Spirit Program is a culturally tailored home-visiting intervention delivered by Native American paraprofessionals as a core strategy to support young Native parents from pregnancy to three years postpartum. Parents gain knowledge and skills to achieve optimum development for their preschool age children across the domains of physical, cognitive, social-emotional, language learning, and self-help. The Family Spirit Program consists of sixty-three lessons to be taught from pregnancy up to the child's third birthday. This in-home parent training and support program has been designed, implemented, and rigorously evaluated by the Johns Hopkins Center for American Indian Health in partnership with the Navajo, White Mountain Apache, and San Carlos Apache Tribes since 1995.

Parents as Teachers

Parents as Teachers is the trusted resource providing a proven home-visiting model for the most respected organizations and professionals who meet the evolving needs of families. Its work with the professional community helps young children grow up healthy, safe, and ready to learn. All cultures are openly welcomed and valued, and multiculturalism is appreciated and practiced.

[95] Terry Cross and Seathl Ollgaard, *The Status of Child Abuse and Neglect Prevention in American Indian Communities*, National Indian Child Welfare Association (1999). Available at http://www.nicwa.org/resources/library/abuse/statusofchildabuse.pdf (accessed June 24, 2015).

Nurse-Family Partnership

Nurse-Family Partnership helps transform the lives of vulnerable first-time moms and their babies. Through ongoing home visits from registered nurses, low-income, first-time moms receive the care and support they need to have a healthy pregnancy, provide responsible and competent care for their children, and become more economically self-sufficient. From pregnancy until the child turns two years old, Nurse-Family Partnership Nurse Home Visitors form a much-needed, trusting relationship with the first-time moms, instilling confidence and empowering them to achieve a better life for their children—and themselves. An evidence-based community health program, Nurse-Family Partnership's outcomes include long-term family improvements in health, education, and economic self-sufficiency.

The Incredible Years

The Incredible Years offers a Home Visiting Coach protocol for Baby, Toddler, Preschool, and School Age Basic Parent Programs. The Home Visiting Coach model is intended to be used in conjunction with the group-based model. There is also a self-study model for teachers to do as a companion to the full Teacher Classroom Management Program.

The Incredible Years (IY) Series is a set of interlocking and comprehensive training programs for parents, teachers, and children. There are five "basic" parenting programs that target key developmental stages: IY Baby Program (0–12 months), IY Toddler Basic Program (1–3 years), IY Preschool Basic (3–6 years), IY School Age Basic (6–12 years), and Advance Parenting Program (4–12 years) (focuses on parent interpersonal problems such as depression and anger management). Additionally, there are four adjunct parent programs: Well-Baby Prevention Program, Attentive Parenting Prevention Program, Autism Spectrum and Language Delays Program, and the School Readiness Program.

Residential Treatment Centers

While not exactly "in-home"—residential treatment centers that allow parent(s) and children to stay together are another way to prevent the removal of children from their parent(s)' care, because once the program is complete, the entire family goes home together. These family-friendly residential treatment centers are ideal because they often have a range of on-site services for both parents and children. One example of a successful residential treatment center that allows for family preservation is Amity.

Amity has long been on the frontiers of drug treatment, trying things that others could not—or would not—do. It is now becoming widely known in the drug abuse treatment community that those parents who are able to bring their children with them into treatment are usually the most successful at turning around their lives. Families that are able to come into treatment receive not just help with their drug problems, but also they have the chance to learn parenting skills, effective discipline techniques, how to communicate with their children, and how to deal with the myriad of life's little details that non-drug-using parents seem to deal with, but that often overwhelm people who are in an alcohol or drug-induced haze. Parents who bring their children into treatment leave knowing so much more about how to raise their children, so that they in turn don't become tomorrow's statistics.

Indigenous Triple P

The Triple P—Positive Parenting Program—is a parenting and family support system designed to prevent as well as treat behavioral and emotional problems in children and teenagers. It aims to prevent problems in the family, school, and community before they arise and to create family environments that encourage children to realize their potential.

Indigenous Triple P allows providers accredited in Primary Care, Group, and/or Standard Triple P programs to tailor their delivery of the programs to suit Indigenous families. Materials and content for Indigenous Triple P were created in consultation with elders from remote and urban Indigenous communities in Australia. Indigenous Triple P has been used with both Indigenous Australian families and aboriginal Canadian families.

State Collaboration

In addition to providing direct services, Native Nations can optimize resources and participation by collaborating with the surrounding state(s). One such example is the Navajo/Apache Regional Partnership Council, which links local and state governments in specific regions for the purpose of collaboration and resource sharing for CPS cases. Native Nations can use MOUs or other intergovernmental agreements to link up with these types of programs, which may be useful for Nations that have citizens living in other jurisdictions.

Selected Tribal Codes

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code
Part 2. Article IV. Prevention Using a Family Centered Response

4.05.190 Purpose

"Prevention" refers to the approach or techniques used by those individuals or teams who respond to situations involving suspected child abuse, neglect, or abandonment. Prevention and assessment are the first steps in strengthening the family and its resources. [Res. 2015-101].

4.05.200 Assessment of risk.

Beda?chelh must first determine, through an assessment, whether child abandonment, abuse, or neglect is likely to occur again, and then determine if the child can safely remain in the house based on the child's age, individual and special needs, and capabilities. In evaluating a family, the child's safety is the most important factor. If safety cannot be assured in the home, then the child must be removed for his or her own safety. Beda?chelh, in consultation with the MDT, shall use available tools to assess risk specific to the incident involved. With such understanding, prevention workers can more adequately assess risk to the child or children and develop an appropriate plan.

(1) While meeting with the family, a prevention worker shall make an assessment based on:

(a) The events that precipitated the crisis;

(b) The nature of the family interactions and conditions;

(c) How to best leverage family strengths and assessing the family's perceived social or emotional and financial needs; and

(d) Whether there are any previous reports of abuse or neglect.

(2) Once risk is assessed and child safety is determined:

(a) To not be imminent, but determined to be low to moderate risk of further harm, then the family may be referred for services using voluntary Family Assessment Response.

(b) To be imminent harm or continuing risk, then appropriate action will be to move to court intervention. [Res. 2015-101].

4.05.210 Voluntary Family Assessment Response (FAR) and voluntary placement of children.

The voluntary Family Assessment Response (FAR) intervention is available when there is a low to moderate risk of harm, imminent danger, or subsequent abuse to the child(ren). This intervention team is comprised of beda?chelh case managers and personnel who practice solution-based casework by assessing a family's needs

and strengths, by delivery of concrete and supportive services, and by focusing on child safety. [Res. 2015-101].

4.05.220 Voluntary FAR plan.

As part of the intervention process, beda?chelh FAR team members in consultation with stakeholders, including family members, shall design a voluntary FAR plan to provide the necessary services and support to remedy any issue that impacts child safety and well-being. [Res. 2015-101].

4.05.230 Voluntary placement of child.

If the child is voluntarily placed outside of the home, he or she cannot remain out of the home for more than 45 days unless a court action is commenced, or all parties agree to another 45 days in writing. The voluntary placement may be revoked by the parent or guardian in writing at any time and the child will be immediately returned to the parent's care unless beda?chelh obtains a protective custody order and initiates a youth-in-need-of-care action. If the child is placed out of the home under a voluntary FAR, a notarized letter signed by the parent, legal custodian, or guardian granting the custodian rights to provide emergency medical care and the limits or extent of the custodian's decision-making authority on behalf of the child will be required. [Res. 2015-101].

4.05.240 Role of beda?chelh FAR.

The beda?chelh FAR team should make contact with FAR eligible families within 72 hours of a determination that the family situation is appropriate and discuss the FAR option with them. If the family is agreeable beda?chelh should immediately complete an assessment and begin to develop a voluntary FAR plan for the family. The plan should include the necessary services and support to remedy issues that impact child safety and well-being, while also reflecting the needs and strengths of the family while striving to provide for the preservation of the family unit. Within five days of the completion of the family assessment beda?chelh should meet with the family to discuss recommended services. Beda?chelh shall be responsible for ongoing monitoring of this process.

A Family Team Decision Meeting shall be set up as soon as practical to work towards a solution and to identify the support for the family. Statements made at this meeting are not admissible as evidence at any proceeding unless all parties agree, but the terms of any voluntary FAR plan agreed to in writing at this meeting are admissible as evidence should a court proceeding be necessary. [Res. 2015-101].

4.05.250 Referral for investigation purpose and scope.

If a family does not agree to enter a voluntary FAR plan, refuses to engage in the services recommended, or circumstances change that warrant further investigation or action, the case may be transferred for investigation and possible court action. [Res. 2015-101].

Tribal Code Commentary

The Tulalip Code has a section focused on prevention, which it defines as the approach or techniques used to respond to suspected child abuse, neglect, or abandonment. Prevention and assessment are the first steps to strengthening the family. The assessment process determines if the child can safely remain in the home and whether neglect or abuse is likely to occur again. The code mentions tools to assess risk specific to the incident involved. If the risk of reoccurrence is low or moderate the family may be referred for voluntary Family Assessment Response (FAR). If the child is assessed to be in imminent harm or continuing risk, the court would be involved.

The voluntary FAR response team put together a plan for services and actions with the input from the family and other stakeholders. A child may be voluntarily placed outside the home as a part of the plan for up to forty-five days without court intervention. The purpose of this voluntary program is to solve the issues that resulted in the complaint to CPS. If the family does not act voluntarily, it is still possible for CPS to proceed with court action.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- What programs are available in your community that support families and prevent child maltreatment? What is their primary emphasis?
  - Parent support,
  - Child resistance education (safe touch, stranger danger, etc.),
  - Intervention to reduce problem behavior,
  - Social risk reduction, and
  - Cultural strengths.
- Does your Nation's code have a provision that outlines the assessment process after intervention of a child protection agency?
- Does your code have a voluntary process to provide support for families?
- What support services or programs are available for in-home assistance to families in your community?

STEP 2: Establish a Vision for the Future

- What improvements do you desire to make in programs and services?
- How do you see that supported by code development?
- Do you have other ideas for early intervention to support families?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

C. Removal of Offending Person from the Home

In cases in which a child is exposed to domestic violence in the home due to a batterer that is living or visiting the child's home, removal of the batterer from the home should be considered before the child is removed from a nonabusive parent. Likewise, if a family member or visitor in the home is responsible for the abuse against the child, consider removing the abuser from the home if there is a nonabusive parent/custodian to provide for the child. Keeping the child in the family home increases the stability in their life, which is important for their well-being and development.

Some Native Nations have Protection Order Codes that allow for a child protection worker or other person intent on protection of a child to seek a protection order. This ability gives the child protection worker one more tool to provide safety for the child. The enforcement of protection orders through the criminal process, generally, is more persuasive in convincing an abuser to comply with a no-contact order and is more easily and strongly enforced. In reviewing a Nation's code one would need to review the protection order statute:

- Who can petition the court for a protection order? (Can anyone petition for the protection of a child?)
- What is the definition of *domestic violence* under the statute? (Is the child covered under the definition? Is the situation covered?)
- Does the abuser meet the definition required by the statute?
- Does the child need to be physically injured by the abuser or is hearing/seeing the domestic violence adequate for an order to be issued to protect the child?

Although using a protection order may not always be effective, it is one more tool to consider. The use of a protection order is a very efficient and relatively effective way to evict the offending person from the home and to eliminate contact with the child temporarily. If the offending person is non-Indian this can be difficult unless the Nation has adopted and complied with the enhanced jurisdiction over non-Indians reinstated by the Violence Against Women Act 2013 and other provisions of that act are met.

In domestic violence situations encouraging the victim (other than the child) to secure a protection order can also be effective in some instances, but it should not be used without carefully examining the situation in order to ensure that it is an effective safety plan for the family. Consulting a domestic violence advocate may be helpful in developing a safety plan for the whole family.

Some Native Nations have incorporated a protection order type of action into their child protection emergency and subsequent proceedings. Examining code provisions to ensure that this type of action is possible, if it should appear appropriate for a child's situation, is essential.

Selected Tribal Codes

Eastern Band of Cherokee Tribal Code (Amended 2003)
Part II—Code of Ordinances
Chapter 50B: Domestic Violence Prevention

Section 50B2: Definitions

Domestic violence occurs when a person commits one of the following acts against an intimate partner or against a member of such intimate partner's family or household; but does not include acts of self-defense:

(1) Attempting to cause bodily injury, or intentionally causing physical harm, bodily injury, or assault to an intimate partner or to a member of such intimate partner's family or household, or to an animal of such intimate partner;

(2) Placing an intimate partner or a member of the intimate partner's family or household in fear of the infliction of physical harm, bodily injury or assault;

(3) Forcing an intimate partner or a member of the intimate partner's family or household to engage in sexual activity by force, threat of force, or duress;

(4) Attempting to cause or causing emotional distress to an intimate partner or to a member of such intimate partner's family or household; Willfully violating a court order intended to protect the intimate partner or a member of such person's family or household; or

(6) Committing one of the following offenses, as defined by chapter 14, Cherokee Code, against an intimate partner or against a family or household member of such intimate partner:

a. Injuring real property (§ 14-10.11);

b. Injuring telephone, wires, or other communication equipment; Interfering with emergency communication (§ 14-10.14);

c. Criminal Trespass (§ 14-10.15, 14-10.16, and/or 14-10.17);

d. Burglary (§ 14-10.40);

e. Breaking and entering (§ 14-10);

f. Criminal mischief (§ 14-10.9);

g. Arson (§§ 14-10.50, 14-10.51, and/or 14-10.52);

h. Assault (§§ 14-40.10, 14-41.11, 14-40.12);

i. Maiming (§ 14-40.14);

j. Discharging a firearm into an occupied building (§ 14-40.15);

k. Harassment; telephone harassment (§§ 14-25.13 and/or 14-5.3);

l. Kidnapping (§ 14-40.30);

m. False imprisonment (§ 14-40.31);

n. Custodial interference (§ 14-40.32);

o. Homicide (§§ 14-40.40 and/or 14-40.41);

p Sex offenses, including rape, taking indecent liberties with children, aggravated sexual abuse, sexual abuse, sexual abuse of minor or ward (§§ 14-20.1, 14-20.2, 14-20.3, 14-20.4);

q. Stalking (§ 14-5.5);

r. Communicating threats (§ 14-5.2);

s. Weapons law violations (§§ 14-34.10, 14-34.11, 14-34.12, 14-34.13 and/or 14-34.14);

t. Cruelty to animals (§ 14-5.20) when such cruelty is inflicted on an animal belonging to or residing in the household of the intimate partner or family member.

Sec. 50B-3.t—Domestic violence prohibited—Who may seek relief.

(a) Domestic violence is prohibited within the territory of the Eastern Band of Cherokee Indians.

(b) **Who may seek relief**. Any person may seek relief under this chapter on behalf of a person who is a victim of domestic violence and who is residing in the Territory of the Eastern Band of Cherokee Indians by filing a small claims action (pursuant to § 1-11 Cherokee Code) to obtain an Order of Protection, or by filing a motion in any existing family law action, alleging acts of domestic violence. Persons outlined below who are entitled to seek relief under this chapter may proceed pro se, without the assistance of legal counsel. No filing fee shall be required for actions filed under this chapter. A person may seek a protective order or file an action pursuant to this chapter in an existing family law action:

(1) For herself or himself; or

(2) On behalf of a minor child; or

(3) On behalf of any person prevented by a mental or physical incapacity or by hospitalization, from seeking a protection order

Oglala Sioux Tribe Law and Order Code
Chapter 2. Criminal Penalties and Procedures

Section 99.2—Domestic Violence Code[96]

(1) A law enforcement officer who responds to an allegation of domestic violence shall use all reasonable means to protect the victim and others present from further violence and has a duty to arrest upon finding probable cause to believe that domestic violence has occurred. A law enforcement officer need not obtain a search warrant in order to enter a residence where s/he has probable cause to believe a crime of domestic violence is occurring or has just occurred, nor to seize property under this subsection. Such reasonable means include but are not limited to:

(d) Taking any lawful action necessary to provide for the safety of the victim and any family or household member.

(e) Confiscating any weapon involved in the alleged domestic violence.

(f) Transporting or obtaining transportation for the victim and any child(ren) to a shelter or any other place of safety.

(g) Assisting the victim in removing essential personal effects.

(h) Assisting the victim and any child(ren) in obtaining medical treatment, including obtaining transportation to a medical facility.

(i) Giving the victim immediate and adequate notice of the rights of victims and or the remedies and services available to victims of domestic violence.

(j) Enforcing an order for protection.

(2) As part of the notice required by paragraph (f) of subsection 1, the law enforcement officer shall give, in addition to verbal notification, written notice to the adult victim substantially as follows:

"If you are the victim of domestic violence and you believe that law enforcement protection is needed for your physical safety, you have the right to request that the officer assist in providing for your safety, including asking for an emergency order for protection that will provide for your immediate protection. You may also request that the officer assist you in obtaining your essential personal effects and locating and taking you to a safe place, including but not limited to a shelter, a family member's or friend's residence, or a similar place of safety. If you are in need of medical treatment, you have the right to request that the officer assist you in obtaining medical treatment. You may request a copy of the report at no cost from the law enforcement department.

Please be advised that the prosecutor may choose to file a criminal complaint against your assailant. You also have the right to file a petition requesting a permanent order for protection from domestic violence which could include any of the following orders:

(a) An order enjoining your abuser from threatening to commit or committing further acts of domestic violence;

(b) An order prohibiting your abuser from harassing, annoying, telephoning, contacting, or otherwise communicating with you, directly or indirectly through family members, relations by marriage, friends, and coworkers;

(c) An order removing your abuser from the residence regardless of ownership or lessee of record;

(d) An order directing your abuser to stay away from your or any other designated household/family member's place of residence, school, place of employment, or any other specified place frequented by you;

(e) An order prohibiting your abuser from using or possessing any firearm or other weapon specified by the court;

(f) An order granting you possession and use of an automobile and other essential personal effects, regardless of ownership;

(g) An order granting you custody of your child or children;

(h) An order denying your abuser visitation;

(i) An order specifying arrangements for visitation, including requiring supervised visitation; and

(j) An order requiring your abuser to pay certain costs and fees, such as rent or mortgage payments, child support payments, medical expenses, expenses for shelter, court costs, and attorney's fees.

The forms you need to obtain an order for protection are available from Cangleska, Inc. advocates, any reservation legal services office, and/or the clerk of court. The services of Cangleska, Inc. are available to assist you in obtaining information relating to domestic violence, treatment of injuries, community resources, community services, and places of safety and shelter. You also have the right to seek reimbursement for losses suffered as a result of the abuse, including medical and moving expenses, loss of earnings or support, and other expenses for injuries sustained and damage to your property. This can be done through Tribal court.

(3) The written notice:

(a) Must not include the addresses or locations of shelters, and

(b) Must be provided in the native language of the victim, if practicable, when the native language of the victim is not English.

(4) Any law enforcement officer who enforces this section in good faith shall be immune from suit by any person alleging a violation of this subsection or any other section of tribal law.

[96] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.25.160 Emergency criminal no contact order.

A Police Officer shall have the authority to request from the on-call Judicial Officer an emergency criminal no contact order prohibiting contact with the victim, including third party contact, on a form approved by the Court, if the officer has probable cause to believe that a crime involving domestic violence or family violence has occurred. One of the following methods shall be used:

(1) The officer shall call the on-call Judicial Officer from jail at time of booking and provide the Judicial Officer with enough information for a finding of probable cause. The officer shall then sign the order on the Judge's behalf and serve it on the defendant.

(2) The officer shall call the Judicial Officer from the scene once arrest has been made and follow the same procedure as above, providing the victim with copy of the order at the scene if possible.

(3) The order shall be effective until the first Court appearance or as vacated or amended by Court order.

(4) Upon issuance of such an order, the officer shall serve a copy on the perpetrator and file the order with the Court by noon on the next judicial day. The officer shall provide a copy of the order to the victim and assist the victim in securing any essential personal effects. [Res. 2013-379].

Tribal Code Commentary

The Eastern Cherokee Domestic Violence Code permits anyone to file a petition for a protection order to protect a child, whether the child is abused by the intimate partner of the child's custodian or emotionally abused by the violence that occurs in the home. It has a broad definition of *domestic violence* covering a wide range of activities that are consistent with domestic violence.

The Oglala Sioux Tribal Law and Order Code ensures that the officer called to assist in a domestic violence disturbance has the responsibility to provide for the safety of the victim and children of the victim on-site. When this is coupled with a mandatory arrest (existing in many jurisdictions), it should assure that the immediate safety of the child exposed to domestic violence is provided for. The perpetrator may only be incarcerated for seventy-two hours or less, but it may be adequate time to provide for a safety plan for both the victim of abuse and the children.

The Tulalip Code allows the law enforcement officer to request an immediate emergency protection order. This also should help keep the victim and child safe until the time for the first hearing. At that time the judge would determine whether there is need for a permanent protection order.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Does your Nation have a protection order statute?
- How is *domestic violence* defined in your current statute? Can it be applied to children? In what situations?
- What is the required relationship to the perpetrator?

STEP 2: Establish a Vision for the Future

- What changes would be necessary to apply an existing statute to specifically protect a CINA?
- What situations would you want to be covered by a protection order?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

Additional Resources

Andrews, Mark, "'Active' Versus 'Reasonable' Efforts: The Duties to Reunify the Family under the Indian Child Welfare Act and the Alaska Child in Need of Aid Statutes," *Alaska Law Review* 19 (2002): 85–118.
In this article, the author analyzes recent decisions of the Alaska Supreme Court pertaining to the duties imposed upon the Alaska Department of Health and Social Services to make efforts to reunify the family after a child is taken into state custody. The article analyzes the distinction between "active efforts" as required under ICWA and "reasonable efforts" as required under Alaska's CINA statutes. The article begins with a discussion of these statutory duties and continues with a summary of the legal history and development of the two legislative "efforts" standards. The author argues that despite a few aberrations, the Alaska Supreme Court has consistently applied a single standard for both active and reasonable efforts.

Evensen, Kimber, Pathway to Hope: Healing Child Sexual Abuse, Tribal Law and Policy Institute, 2007.
Video and guidebook that presents the voices of more than forty Native people, many of whom are survivors of child sexual abuse. The Community Facilitator's Guidebook provides a step-by-step process for tribal communities to end silence about child sexual abuse, support child victims, and promote healing of those who suffered childhood abuse.

Hegland, Susan, and Kere Hughes, Ten Evidence-Based Practices for Home Visiting Programs, Department of Human Development and Family Studies.
Highlights ten evidence-based practices for home visiting programs, including implementation recommendations and research articles that correspond with each practice.

National Child Welfare Resource Center for Tribes, Family Engagement, Family Preservation, and Support, web page, 2015.
This web page contains multiple resources on prevention resources tailored to American Indian and Alaska Native communities.

National Resource Center for Community Based Grants for Child Abuse and Prevention, Home Visiting Programs: A Brief Overview of Selected Models, National Resource Center for Community Based Grants for Child Abuse and Prevention, 2008.
Provides a synopsis of several home visiting programs.

White Eagle, Maureen, Bonnie Clairmont, and Lonna Hunter, Responses to the Co-Occurrence of Child Maltreatment and Domestic Violence in Indian Country, Tribal Law and Policy Institute, 2011.
This looks at the issues specific to Indian country relative to the co-occurrence of domestic violence and child maltreatment and highlights those practices that seem to be moving toward Native-specific promising practices.

Yellow Horse, Susan, and Maria Yellow Horse Brave Heart, *Native American Children*, University of Denver, 2004.
Literature review of articles and books related to evidence based and/or culturally appropriate practices in AI/AN communities.

Chapter 9: Emergency Removal of a Child

The emergency removal of a child is a drastic measure that requires careful planning and consideration. As such, this section of the code is particularly important and should be developed with your particular Nation's values and resources in mind. This chapter discusses issues related to the emergency removal of a child.

Removal of a child, by the very nature of being an emergency, typically involves law enforcement. If the emergency is related to domestic violence—medical staff, victim's service providers, probation officers, and extended family members may also be involved. So, this section of the code necessarily interacts with more actors, and it's important to reflect on how it complements, overrides, or conflicts with procedures and practices of other government departments and/or private service providers.

There are advantages to codifying detailed procedures; the code is a higher authority than a department's protocol and can be used to ensure consistency and compliance, regardless of changes in department structure or leadership. Plus, a code is more transparent and accessible to the community than internal procedures, so it's easier to avoid the common criticism that the system isn't fair and decisions are arbitrary. However, if the code gets too detailed it can hamstring the ability of government actors to make good decisions in the field. So, it's important to balance these concerns and create a code that addresses your particular community's needs.

Emergency Removal Proceedings are typically triggered by an emergency. What constitutes an emergency should be defined somewhere in your code. If an emergency exists, the responsible agency may remove the child. If there's time and the safety of the child is not compromised, an emergency custody petition may be filed, but it is not always necessary.

Whenever an emergency removal occurs, the parent(s), custodian(s), or guardian(s) must be given notice. Depending on your Nation's code, notice to extended family members and/or the court may be appropriate.

Typically, emergency removal results in an "emergency placement" that usually lasts until a full emergency custody hearing can occur.[97] The emergency placement of the child is an important decision and likely reflects the placement preferences for nonemergency (or permanent) placements. ICWA has been an important reference points for Native Nations but does not need to be replicated in tribal codes.

Chapter Units

Unit A: Designating a Responsible Agency
Unit B: Emergency Custody without Court Order
Unit C: Filing an Emergency Custody Petition
Unit D: Emergency Placement
Unit E: Notice of Removal
Unit F: Release of the Child from Emergency Custody

[97] Not every emergency removal results in a full hearing, e.g., if the child is removed due to domestic violence and the offender is immediately jailed, it is possible that the nonoffending parent retains custody. In that case, an emergency custody petition, and any resulting hearing, may be unnecessary.

A. Designating a Responsible Agency

A Children's Code needs to designate at least one agency that is responsible for the emergency removal of a child and their placement into emergency custody. The Nation's policy makers and drafters must decide whether law enforcement, the Nation's social services, and/or other agencies have the authority to remove a child from their home in the event of emergency circumstances. In many jurisdictions, multiple agencies are given emergency removal authority.

Because emergency circumstances tend to arise outside of regular business hours, it's important that the responsible agencies are practically capable of arriving on the scene quickly. First responders, such as law enforcement and emergency medical technicians may be good options for emergency removal but not necessarily for making emergency placement decisions. A code can split the responsibilities and rights of agencies based on their training while still serving the goal of preventing further trauma to the child.

Factors to consider when deciding if your child protection workers are the only group that should handle this delicate responsibility are the:

- Size of the Nation's jurisdiction,
- Number of child protection workers,
- Average travel time to jurisdiction, and
- Past and projected number of cases.

If the Nation has a large jurisdiction and/or the child protection workers are too few or too far away to arrive quickly—it may make sense to authorize another agency to take custody until their arrival. Ultimately, a Nation's particular government structure and department resources may greatly inform this section of the code.

Many codes simply incorporate their definitions section by reference when stating the responsible agencies or persons that can conduct an emergency removal. However, if your code limits the relevant government actors to "the court," "law enforcement," and "child protection worker" it may be worth specifying more actors that have authority for emergency removal under this subsection of the code.

Selected Tribal Codes

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.010 Protective Custody

(1) A child may be taken into protective custody by a law enforcement officer, a representative of bedaʔchelh or State CPS.

[sections omitted]

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part A. General and Dependency Provisions

§406.7 Emergency Removal of Child—Authorization and Placement[98]

(a) In any case where a child is in immediate danger due to the actions or omissions of the parent(s), guardian, or custodian, or due to the child's own actions or omissions, the Department of Public Safety or the LOWO Division of Child Protective Services may immediately remove the child from his/her home and place the child in an appropriate placement.

---

[98] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

Tribal Code Commentary

The Tulalip Code is very straightforward; it allows an authorized law enforcement officer to make an emergency removal. Because the code does not say more, it's likely that the law enforcement agency has its own procedure for taking a child into protective custody. The law enforcement agency may also have a protocol that requires the officer to contact a child protection worker. If you follow this model, it may help to have a written procedure in your code or in the law enforcement manual that explains the protocol further.

The Tulalip Code also allows for a representative of the tribe's child protection team to make an emergency removal. If your Nation has a robust law enforcement department and Social Services Department, it is likely that this would be sufficient. However, it's not uncommon for emergency removal situations to arise without the presence of law enforcement, so that factor should be considered.

The Oglala Sioux Code section is very similar to the Tulalip Code. The code allows anyone from the Department of Public Safety (police) to conduct an emergency removal. However, the Oglala Sioux do not separate emergency removal and emergency placement authority, whoever removes can also choose an emergency placement—pursuant to other sections of the code. Tulalip does not allow law enforcement to make emergency placement decisions; they can remove, but must contact and defer to the child protection worker regarding emergency placement. If a child protection worker is unavailable, only then may the officer make an emergency placement decision from a "short list" of options that are mentioned in the code.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- List the agencies, departments, and service providers in your community that are available to remove a child in an emergency situation.
    - Do they have written procedures or protocols?
    - Do they have consistent funding?
- Who on the list is appropriate to remove a child in an emergency situation?
- Who on the list is appropriate to remove a child and make an emergency placement?
- What is the community's opinion regarding emergency removals?
- Is there a cultural or religious law or practice that impacts the responsible agencies' (or a subset of their employees) ability to make an emergency removal?

STEP 2: Establish a Vision for the Future

- Do the responsible agencies allow any employee to exercise removal power? If so, would you like to limit that?
- Do the agencies use different procedures for emergency removals?
- Do the agencies have a protocol when multiple agencies are on scene?
- How do you want the new law or revised law to impact your community?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

B. Emergency Custody without Court Order

Protocols and practices for emergency removal of a child from their home by the responsible agency (law enforcement officers, child protection workers, etc.) are pretty standard provisions that Native Nations must include in their code. However, a Nation also needs to decide when a child may be removed without prior court approval. That decision greatly impacts emergency removal procedures because it determines the practical realities on the ground: specifically, how quickly and in what situations the responsible agency can take the child into custody.

When a child is at risk of immediate danger due to their parent's, guardian's, or custodian's maltreatment, under most codes, a Native Nation's responsible agency may immediately remove the child from their home without first seeking permission from the court. The Nation should ensure that the definition of *emergency situation* is provided in the code, so the responsible agency can clearly identify when it may remove without court permission.

Once an emergency removal without prior court approval has occurred, the Nation may still mandate the filing of an Emergency Custody Petition. The hearing on this petition is discussed in Chapter 9.

Selected Tribal Codes

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part III Children in Need of Care

§ 8.021. Investigation and Evaluation of Reports of Report of Child Abuse and Neglect Jurisdiction

(a) **Receipt of a Report by Tribal Law Enforcement Officers**

(1) Upon receiving a report of suspected child abuse or neglect, a tribal law enforcement officer shall immediately notify the ICW Program.

(2) If requested by the ICW Program or if the ICW Program representative is unavailable, a tribal law enforcement officer shall immediately investigate the report and determine whether further action is necessary. The ICW Program and law enforcement officer may conduct their investigation jointly. Based on the investigation, a detailed written report shall be completed and a copy shall be sent to the tribal representative.

(3) If the law enforcement officer reasonably believes that the child is in immediate and serious danger from his or her surroundings and that immediate removal is necessary for the child's safety or well-being, the officer may take the child into emergency custody. If a Tribal Court judge is available and delay will not jeopardize the health or safety of the child, the law enforcement officer shall first request an emergency custody order pursuant to this Code.

(4) A law enforcement officer who takes a child into custody without first obtaining an emergency custody order shall proceed as follows:

(A) The officer shall immediately notify the tribal ICW Program and request direction as to whether the child should be placed in emergency shelter care and if so, where;

(B) If the tribal ICW Program cannot be reached, the officer may place the child in emergency shelter care but shall continue attempts to notify the tribal ICW Program. Placement of the child shall be in a facility approved by the Tribe for emergency shelter care or with a relative of the child if the relative is known to the officer, the relative is not currently on probation or parole, does not have known children in the care of any social services agency, and resides within the Tribe's service area.

(C) Immediate and continuing efforts shall be made by both the officer and the tribal ICW Program to notify the child's parent, guardian, or custodian as to the circumstances surrounding the child's emergency custody.

(b) **Investigation of Report by Tribal ICW Program**

(1) Upon receiving a report of suspected child abuse or neglect or a notice from a tribal enforcement officer, the Tribal ICW Program shall immediately assess the report and determine whether to open a case. The ICW Program shall open a case if the representative has reasonable suspicion that the child who is the subject of the report has been or likely may be abused or neglected.

(2) If the ICW Program opens a case, the ICW Program shall immediately initiate an investigation of the report to determine whether the best interests and health and safety of the child and the tribal community require that further action be taken. If necessary, the tribal representative may ask a law enforcement officer to conduct or assist with the investigation. The investigation shall cover the child's home environment, history, and associations, the present condition of the child and the child's family, and shall make recommendations as to the child's future care. The tribal representative shall make conclusions as to the likely future of the family if no intervention occurs, and whether removal of the child from the family likely will be required. In cases involving the duty of financial support, the study shall include such matters as earnings, assets, financial obligations, and employment.

(3) Upon completion of the investigation, the tribal representative shall determine whether:

(A) No further action should be taken;

(B) To hold an informal resolution conference with the child and the child's parent(s), guardian, custodian, or legal representative to discuss alternatives to filing a petition alleging that the child is a child-in-need-of-care;

(C) To file a petition with the Court alleging that the child is a child-in-need-of-care;

(D) To seek an emergency custody order from the Court to take the child into emergency custody; or

(E) Emergency removal and custody of the child is necessary without a Court order because the child is in immediate danger from his or her surroundings.

(4) If the tribal representative determines that no further action shall be taken, the child shall be released immediately if the child is in emergency custody.

(5) If the ICW Program determines that emergency custody of the child is necessary, the representative shall proceed pursuant to section 8.017 of this Code.

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part III Children in Need of Care

§ 8.023. Emergency Custody

(a) **Emergency Custody by the ICW Program**

(1) The ICW Program shall take a child into emergency custody if:

(A) An emergency custody order concerning the child has been issued by the Tribal Court; or,

(B) The ICW Program has probable cause to believe that the child is a child-in-need-of-care and that emergency removal is necessary because the child's health or safety is in immediate danger from his or her surroundings; or

(C) The ICW Program has probable cause to believe that a child who is subject to the Tribal Court's jurisdiction is leaving or will leave the jurisdiction of the Court without permission or without appropriate conditions in place to return the child if appropriate.

[sections omitted]

The Law and Order Code of the Kalispel Tribe of Indians (Enacted 12.2.2015)
Chapter 7 Kalispel Youth Code
Part 2. Youth in Need of Care

7-20.09. Receipt of Report by Indian Child Welfare Worker

Upon receipt of a report under this chapter or receipt of notice from any source that a youth is in need of care, the Indian Child Welfare Worker shall investigate the report and determine if further action is necessary. The Indian Child Welfare Worker may request C.P.S. and law enforcement to conduct or assist in conducting the investigation. If the Indian Child Welfare Worker reasonably believes that a youth is in an emergency situation and requires out-of-home placement, he or she shall:

(1) Request an emergency custody order, if time permits and a judge or judicial officer is available; or

(2) Immediately place the youth in an out-of-home placement. This decision shall be made with the assistance of the Indian Child Welfare Advisory Committee if there is time and the Committee members are available. The Indian Child Welfare Worker may request assistance of C.P.S. and law enforcement in making such placement.

(3) If the youth's parent, guardian, or custodian has not been notified, the Indian Child Welfare Worker shall inform him or her at the earliest possible time and return the youth to him or her if such action is appropriate.

(4) If a youth is taken into custody and it is unlikely that he or she will be released to his or her parent, guardian or custodian within two (2) working days, the Indian Child Welfare Worker or other authorized person shall immediately file a Youth in Need of Care Petition.

7-20.10. Receipt of Report by Law Enforcement

Upon receipt of a report that a youth is in need of care, law enforcement shall take the following action:

(1) Law enforcement shall immediately investigate the report. Law enforcement shall notify the Indian Child Welfare Worker of all reports received. If the Indian Child Welfare Worker is not available, C.P.S. shall be notified. Based on the investigation, a detailed written report shall be completed by law enforcement. A copy of such report shall be delivered to the Indian Child Welfare Worker and C.P.S. within three (3) working days of the date the report was received.

(2) If law enforcement reasonably believes the youth is in immediate and serious danger from his or her surroundings and removal is necessary for the youth's safety or well-being, the officer may take the youth into custody; provided, that if there is sufficient time and a judge or judicial officer is available, law enforcement shall first request an emergency custody order.

(3) If law enforcement takes a youth into custody without first obtaining an emergency custody order, he or she shall:

(A) Release the youth to the youth's parent(s), guardian, or custodian and issue verbal counsel or warning as may be appropriate; or

(B) Immediately notify the Indian Child Welfare Worker and the Indian Child Welfare Advisory Committee and request direction as to whether the youth should be placed out-of-home and if so where; or

(C) If the Indian Child Welfare Worker and the Indian Child Welfare Advisory Committee cannot be reached, the officer may place the youth out-of-home, but shall continue attempts to notify the Indian Child Welfare Worker. Placement of the youth shall be in a facility approved by a member of the Social Services Staff or the Indian Child Welfare Advisory Committee for emergency out-of-home placement in that particular case. A list of persons to contact in emergency placements may be set by the Social Services Staff and the Indian Child Welfare Advisory Committee and provided to law enforcement.

(D) If the youth if not released, immediate and continuing efforts shall be made by both law enforcement and the Indian Child Welfare Worker to notify the youth's parent(s), guardian or custodian as to the circumstances surrounding the youth's custody

Mashantucket Pequot Tribal Laws (Enacted 2008)
Title V. Child Welfare
Chapter 3. Reporting of Child Neglect and Abuse

§ 3. Emergency Removal

a) If a child is in imminent danger from her surroundings and removal from such surroundings is necessary to insure the child's safety, the LES (Law Enforcement Services) or CPS may remove the child from such surroundings without a court order and place her in protective care or a Foster Home. A child shall be considered to be in imminent danger when:

(1) the failure to remove the child may result in an immediate and substantial risk of death, permanent or serious injury, or serious emotional harm to the child; or

(2) the parent, guardian/custodian is absent and it appears from the circumstances that the child's basic necessities of life are not being met, and proper arrangements have not been made by the parent, guardian/custodian to provide for such necessities.

b) When a child is removed, the LES or CPS shall make reasonable efforts to contact a member of the child's extended family.

c) Such removal shall not exceed 96 hours, within which time an emergency protective care petition shall be filed with the court or the child shall be returned to her parent or guardian/custodian.

d) If a petition is filed, the procedures for removal shall be followed, provided that the court shall schedule a hearing on the petition within 10 days from the date the petition was filed.

Tribal Code Commentary

The Siletz Code allows two departments, ICW and law enforcement, to take a child into emergency custody without a prior court hearing. If the law enforcement agency is the removing agency, the Siletz Code is more explicit with its directive and codifies safeguards that are not applied to the ICW program. Both the ICW and law enforcement are operating under a similar "immediate" or "immediate and serious" danger standard, but law enforcement is required to seek out a second opinion if possible. For example, the code explicitly requires law enforcement to request a court order if the delay does not harm the child. If a court order cannot be obtained the officer is required to get the ICW program involved in the decision and placement. Finally, if the ICW program is unavailable, only then can the officer make placement decisions, within specific guidelines.

This approach allows for the protection of children, and it recognizes the difference in expertise that exists between law enforcement agents and ICW workers. By setting out a specific procedure for taking a child into emergency custody without a court order, this code helps mitigate some of the due process concerns related to the very serious government action of removing a child from their parent(s)' or guardian(s)' custody.

The ICW program can remove the child, without a court order under two circumstances. First, when the child is in immediate danger. Second, when a child subject to the court's jurisdiction might leave without permission or might leave without a reasonable means of returning the child to the court.

When the ICW program in the Siletz Nation receives a report of child abuse, it is required to immediately investigate in order to determine whether the best interests and health and safety of the child and the tribal community require that further action be taken. It may ask law enforcement to assist with the investigation. The investigation shall cover the home environment, history and associations, and the present condition of the child and child's family and shall make recommendation as to the child's future care. The tribal representative shall make conclusions as to the likely future of the family if no intervention takes place and whether removal of the child is required. Upon completion of the investigation the tribal representative shall determine whether:

- No further action is necessary;
- To hold an informal resolution conference with the child and the child's parent(s) to discuss alternatives to filing a petition alleging that the child is in need of care;
- To file a petition with the court;
- To seek an emergency custody order from the court to take the child into emergency custody; or
- To take the child into emergency custody without a court order because the child is in immediate danger from their surroundings.

If no further action is to be taken, the child shall be released immediately. If emergency custody is necessary, then the representative proceeds with the action required by the code involving the tribal court.

The Kalispel Youth Code takes a similar approach. However, an ICW worker is also subject to oversight regarding emergency removal decisions. Kalispel has an Indian Child Welfare Advisory Committee that must be consulted when an emergency removal occurs, if there is time. Kalispel also allows ICW workers to request outside assistance from the state CPS. However, seeking such assistance is not required.

The Mashantucket Pequot Code varies from the first two because it is more explicit about when an emergency removal is appropriate. This approach puts detailed explanations in the emergency custody section. This approach might be more convenient if the removing agent needs a refresher—he or she can simply go to one page in the code and have all the information they need. While most codes use their "definitions" section to describe what constitutes an emergency, there is no legal and little practical significance as to where emergency is defined.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Under what circumstances and procedures can law enforcement make an emergency removal of a child?
- Which agency is responsible for documenting the emergency removal?
- What is your Nation's definition of *emergency* or *immediate danger* under the current code?
- What are your Nation's cultural, political, ethical, and/or financial concerns related to court authorization of an emergency removal?

STEP 2: Establish a Vision for the Future

- What improvements in your current emergency removal procedures are necessary?
- What type of oversight do you want in the emergency removal situation?
- Based on your resources and goals, what are some reasonable time frame requirements for the filing of an emergency custody petition before a child is removed?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

C. Filing an Emergency Custody Petition

The agency that removed the child from their home and/or the agency with authority to initiate CINA proceedings in the Nation's court must file a petition with the court to start the process. An emergency custody petition is usually a separate and distinct petition, very different from a regular CINA petition. Different facts may apply to each of these petitions and proceedings, and each type of petition must meet different legal standards. It's important to note that this petition, if filed, is usually the first petition in a CINA case and results in an initial hearing—some Nations call this hearing a *preliminary hearing*, others call it an *emergency removal hearing*.

The petition for emergency custody or emergency removal is usually shorter and more informal because it only establishes probable cause for removal and custody determinations. The claims in the initial petition have to be confirmed by the court in a full adjudication once the full investigation has taken place and facts and potential services have been established.

The Emergency Custody Petition process typically begins in one of the following situations:

1. **Before an emergency removal has occurred**: When there is cause to believe an emergency removal is (or will be) necessary and the child is not exposed to greater risk by potential delays caused by filing a petition.
2. **After an emergency removal has occurred**: When an emergency situation occurs and delaying removal would put the child in question at further risk.

The basic facts and allegations that must be included in an emergency removal petition are:

- The family situation that has led to the present emergency and the need to remove the child;
- Whether the child could be safely left with the family;
- What services or actions could alleviate the need to remove the child from their home; and whether those services have been provided.
- Why continued custody of the child, and/or placement of the child out of the home, is appropriate.
- The petition must conclude by alleging that the child is a dependent, neglected, or abused child as defined by the Nation's code.

If the petition alleges that services have not been provided, then it must explain why they cannot reasonably be provided before the preliminary hearing. If the petition alleges that the child cannot safely remain home, it must explain why.

Usually, the facts supporting an initial hearing are set out in an affidavit or a statement by the worker of the social services or other agency. The agency's filing worker testifies at the initial hearing about what was included in its petition, rather than having multiple witnesses testify.

Because it's an *emergency* petition, time lines should be quite short. If removal has already occurred, it's important to notify the court and get approval as soon as possible. However, practical concerns

(such as court hours of operation and availability of judges after hours) should be considered in the code.

The Nation's court reviews the emergency removal petition at the initial hearing and decides to approve the initial or continued removal of the child or to deny it and order the return of the child to the family, with protections and services if appropriate.

Selected Tribal Codes

Confederated Tribes of the Grand Ronde Community of Oregon Tribal Ordinances
Children and Families Ordinance (Amended 6/03/15)

Part II Youth-In-Need-Of-Care

[sections omitted]

(g) **Preliminary Inquiry Hearing**

(1) **Purpose**. Following the taking of a child into emergency custody or the filing of a Petition for Custody, the Court shall conduct a Preliminary Inquiry Hearing to determine if there is probable cause to believe the child is a Youth-in-Need-of-Care.

(A) **Emergency Custody**. If the child is taken into emergency custody pursuant to Part II(e), the Court shall conduct the Preliminary Inquiry Hearing at 1:30 p.m. the third (3rd) day following emergency removal. Prior to this hearing, CFS shall file and attempt to serve a copy of the Petition for Custody and a summons pursuant to Part II(f).

Mashantucket Pequot Tribal Laws (Enacted 2008)
Title V. Child Welfare
Chapter 3. Reporting of Child Neglect and Abuse

§ 3. Emergency Removal

[sections omitted]

c. Such removal shall not exceed 96 hours, within which time an emergency protective care petition shall be filed with the court or the child shall be returned to her parent or guardian/custodian.

d. If a petition is filed, the procedures for removal shall be followed, provided that the court shall schedule a hearing on the petition within 10 days from the date the petition was filed.

Pascua Yaqui Tribe Tribal Codes
Title 5 Civil Codes
Chapter 7 Juveniles (Amended February, 2015)

Section 370 Filing Protection Petition (5 PYTC § 7-370)

(A) **Authorization to File Petition**.

Formal child/family protection proceedings shall be instituted by a child/family protection petition filed by the juvenile presenting officer on behalf of the Tribe and in the best interest of the child.

(B) **Time Limitations**.

If a child has been removed from the home, then a child/family protection petition shall be filed with the Children's Court no later than 12:00 p.m. of the second Court working day following the removal.

Tribal Code Commentary

The Confederated Tribes of the Grand Ronde Code requires that whenever a child is removed from their home, the agency *must* file an Emergency Custody Petition within twenty-four hours if it continues to retain emergency custody, regardless of whether the child is returned to the physical custody of their parent(s) or guardian(s). This approach may work for the Grand Ronde community; however, a twenty-four-hour deadline may be difficult for those Nations that only operate their court Monday through Friday because weekend removals will necessarily violate the code.

The Mashantucket Pequot Code does not *require* the filing of a petition in all situations. Instead, once a removal occurs, the agency or government official can either return the child to their parent(s)' or guardian(s)' custody or file an Emergency Custody Petition. For example, if the offender has been removed from the home and is in jail, there may be no reason to file an Emergency Custody Petition, as long as the child is returned to the nonoffending parent. While there may still be a reason for some type of supervision after it has been determined safe to return the child, child protection workers may get involved in a less formal way that doesn't involve the court. This also allows for cultural flexibility. The responsible agency may decide against filing a petition, but ask the child's cultural leader and/or clan to participate in an evaluation and report.

The Pascua Yaqui Tribe minimizes timing concerns by using tribal court working days as a way to measure deadlines. It makes it easier to comply if the removal occurs on a weekend or holiday. The Pascua Yaqui Tribe Code requires a petition to be filed by the juvenile presenting officer even if the child is back in their home after the emergency situation has ended. Social services has three days after it completes its investigation to file with the court, even if the child remains in the home after the investigation.

It may be useful to follow the Pascua Yaqui Tribe model and mandate the filing of an Emergency Custody Petition and create at least one court document related to the child's removal. The Emergency Custody Petition can simply state that a removal was made (or was at least contemplated), the emergency situation is over, and there is no need to further supervise the child or family. Because social services files are usually confidential and kept within the department, if the child or their parent(s) or guardian(s) end up before the court again the judge might not find out about the past removals and therefore be unable to take the removal into account. For example, if a child has been subject to emergency removal due to domestic violence on multiple occasions, but officials have properly used discretion to return the child and did not file a petition because the offender has been jailed—the court has no record of the event. If the child ends up in juvenile court for starting a fight in school, knowledge of these removals, through mandated emergency custody petitions after any removal, may better equip the court to handle the case and provide appropriate services and adjudication for a youth offender that has witnessed domestic violence in their home.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Which agency is responsible for documenting the emergency removal?
- Which agency officer is responsible for completing a written petition to the court that complies with the Emergency Custody Petition requirements?
- Does your Nation have an Attorney General, prosecutor, or presenting officer who drafts and files the petition? Is the Social Services Department ultimately responsible for drafting and filing petitions?
- Does your court automatically request social service files for children who appear in juvenile court?

STEP 2: Establish a Vision for the Future

- Considering your resources and goals, which agency is best situated to file the Emergency Custody Petition?
- What time frame works for your Nation and your families?
- Describe how the process should work.

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

D. Emergency Placement

It is important to include a provision in the code setting out where a removed child may be temporarily delivered or placed.

Upon removal, the child must be placed in an appropriate, safe environment. In making such a placement, the removing agency must make every attempt to place the child with a suitable family, community member, or alternative placement. A detention facility is never appropriate. If the removing agency fails to follow the criteria that the Nation sets out for placement, then the Nation may opt to allow the court to issue sanctions against the removing agency.

ICWA established placement preferences for Indian children placed by state courts. For instance, foster care or preadoptive placements are prioritized from the least restrictive Indian placement to the least restrictive non-Indian placement under ICWA. Prior to that act, placement was left to various state officials and judges, and most states exercised placement discretion in such a fashion as to deprive Indian children of Indian homes. Now more placement decisions are made with ICWA preferences in mind.

Although ICWA was meant to create a framework for states, the preferences were generalized and simplified and not culturally specific for any one Native Nation. Instead they were designed to stop the flow of children out of Indian homes—a flow that was generated by state action. ICWA standards were never intended to become the definitive standards for all Native Nations; ICWA provides for the preferences outlined in the act to be preempted by tribally enacted preferences.

It is important that each Nation examine the cultural and historical patterns of its community as it relates to child-rearing practice. Specifically, how was a substitute care provider selected when a parent was not able to maintain complete responsibility for their child's well-being?

Once that practice is identified, the emergency placement and subsequent long-term placement presumptions may be drafted to reflect the cultural practices of the Nation as they relate to substitute child care. The persons who historically had the responsibility to provide substitute child care could be acknowledged in the Nation's placement preference section of its Children's Code.

Selected Tribal Codes

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part III Children in Need of Care

§ 8.023. Emergency Custody

[sections omitted]

(d) **Emergency Placement**

(1) A child who has been taken into emergency custody shall be placed, pending a preliminary inquiry hearing, with one of the following, in order of priority:

(A) Extended family members who will be able to protect the health and safety of the child;

(B) A private family home, located within the Siletz Service Area, which has been certified as a foster home by the ICW Program;

(C) A foster care facility, located within the Siletz Service Area, which has been licensed or approved by the ICW Program.

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part A. General and Dependency Provisions

§406.7 Emergency Removal of Child—Authorization and Placement[99]

(a) In any case where a child is in immediate danger due to the actions or omissions of the parent(s), guardian or custodian, or due to the child's own actions or omissions, the Department of Public Safety or the LOWO Division of Child Protective Services may immediately remove the child from his/her home and place the child in an appropriate placement.

(b) In the event that the designated Tiospaye Interpreter(s) have not come to know and/or have not worked with members of the child's tiospaye to handle child neglect and/or abuse pursuant to Section 405.2(d), in making an emergency placement, DPS and CPS must make every attempt to notify the child's Tiospaye Interpreter and place the child with a suitable tiospaye member if possible.

(c) If such placement is not possible the child may be placed in an alternative placement provided the child is not removed from the reservation unless adequate emergency services cannot be provided on the reservation.

(d) Placement of children who are members of the Oglala Sioux Tribe or who are eligible for membership should be in accordance with Section 408.20 of this Code describing Temporary Dispositional Alternatives.

[99] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

Mashantucket Pequot Tribal Laws (Enacted 2008)
Title V. Child Welfare
Chapter 3. Reporting of Child Neglect and Abuse

§ 8. Placement Preferences

a. Whenever the court has adjudged a child to be in need of protective or foster care, the child shall be placed in the least restrictive setting which most approximates a family and in which her special needs, if any, may be met. The child shall also be placed within reasonable proximity to her home, taking into account any special needs of the child. A placement preference shall be given, in the absence of good cause to the contrary and taking into consideration the child's age and maturity, to a placement with:

(1) members of the child's family or extended family;

(2) other members of the Mashantucket Pequot Tribe;

(3) tribally approved foster home or facility for children which has a program suitable to meet the child's needs;

(4) other Indian families.

b. Where a child is placed outside of the tribal community, the tribal court shall include in its order provisions for continuing contact between the child and the tribal community.

Confederated Tribes of the Grand Ronde Community of Oregon Tribal Ordinances
Children and Families Ordinance (Amended 6/03/15)
Part II Youth-In-Need-Of-Care

[sections omitted]

(g) **Preliminary Inquiry Hearing**

(4) **Placement**. A child who cannot be released to a parent, guardian, or custodian shall be placed, pending the Preliminary Inquiry Hearing, according to the placement preferences set forth in Part II(b)(2).

Tribal Code Commentary

The Siletz Code requires placement first with the child's extended family. If no extended family members are available, then the child may be placed in a foster home within the Siletz Service Area. If neither of those options are available, then the child may be placed in a foster care facility located within the Siletz Service Area.

The Oglala Sioux Code requires that CPS or the Department of Public Safety make every attempt to notify the child's Tiospaye Interpreter and place the child with a suitable tiospaye member, if possible. If not possible, placement should be on the reservation unless adequate emergency services cannot be provided on the reservation.

The Mashantucket Pequot tribal laws are quite similar to ICWA placement preferences. They attempt to keep the child with the family and, if not possible, in the community. The Grand Ronde Code is also similar to ICWA placement preference, but much more specific in its priority listing. The importance of keeping the child close to their home is evident throughout the law as well as placing the child in the least restrictive placement.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- What types of placements are available to your Nation?
- How does your Nation prioritize these placements?
- What resources (families or facilities) does your community have to take in children removed from their homes on an emergency basis?

STEP 2: Establish a Vision for the Future

- Considering your Nation's resources and goals, what are the main priorities that you would like the emergency placement code section to address?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

E. Notice of Removal

Once a child is removed from a parent, guardian, or custodian, the removing agency must make every effort to inform absent parent(s), guardian(s), or custodian(s). Native Nations should also consider including provisions for notification of the court as well.

Also, it is important to note that this notice is different than the notice of the emergency removal hearing. It is possible that a child may be removed, but the removing agency may decide against filing a petition and return the child.

In many cases the court is "notified" of the removal once the removing agency files a petition. Although, not all Nations require the filing of a petition when a removal occurs; some make filing a petition discretionary when, for example, the child is returned due to the end of the emergency.

Selected Tribal Codes

Confederated Tribes of the Grand Ronde Community of Oregon Tribal Ordinances
Children and Families Ordinance (Amended 6/03/15)

Part II Youth-In-Need-Of-Care

[sections omitted]

(e) **Emergency Custody**

(2) **Notice of Hearing**. When a child is taken into emergency custody, the child's parent, guardian, or custodian shall be notified immediately, or as soon thereafter as is practicable, of the removal and the reasons therefore, and the date of the Preliminary Inquiry Hearing.

Pascua Yaqui Tribe Tribal Codes
Title 5 Civil Codes
Chapter 7 Juveniles (Amended February, 2015)

Section 80 Notification of Family (5 PYTC § 7-80)

If a child is taken into custody and not released to his/her parent, guardian, or custodian, the person taking the child into custody shall immediately attempt to notify the child's parent. All reasonable efforts shall be made to advise the parent of the reason for taking the child into custody and the place of continued custody.

Such reasonable efforts shall include telephone and personal contacts at the home or place of employment or other locations where the person is known to frequent. If notification cannot be provided to the child's parent, the notice shall be given to a member of the extended family of the parent, guardian, or custodian.

Section 350 Notice of Removal (5 PYTC § 7-350)

(A**) Notice to Juvenile Court**. After a child is removed from his home, the person who removed the child shall attempt to contact the Juvenile Court within six hours. The attempt to contact the Court shall be documented. Actual notice to the Court shall be made, by the removing person, no later than the close of business next Court working day.

(B) **Notice to Parent, Guardian, or Custodian**. The Court shall make all reasonable efforts to notify the parents, guardian, or custodian, within 12 hours of the Court knowing the child was removed. Reasonable efforts shall include personal, telephone, and written contacts at their residence, place of employment, or to the location where the parent, guardian, or custodian is known to frequent with regularity. If the parent, guardian, or custodian cannot be found, notice shall be given to members of the extended family of the parent, guardian, or custodian and/or the extended family of the child.

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part A. General and Dependency Provisions

§406.8 Emergency Removal of Child—Notice to Parent, Guardian or Custodian, and *Tiospaye*[100]

The LOWO Division of Child Protective Services shall make all reasonable efforts to notify the parents, guardian, or custodian, as soon as possible and not later than twelve (12) hours after the removal of the child from the home. Reasonable efforts shall include personal, telephone, and written contacts at the residence, place of employment, or other location where the parents, guardian, or custodian are known to frequent with regularity. Notice shall also be given to the child's Tiospaye Interpreter(s).

[100] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

Tribal Code Commentary

Whenever a child is taken into emergency custody their parent(s) or guardian(s) must be notified. This section of the code is fairly simple and straightforward.

The Confederate Tribes of the Grande Ronde Community of Oregon uses a fairly standard approach: notify the parent(s) or guardian(s) of the removal and let them know when the hearing is scheduled.

The Pascua Yaqui Nation also uses a standard approach, but is more explicit about what steps must be taken when attempting to give notices and requires that notice to include the child's current location. Notably, the Pascua Yaqui Tribe allows for the child's *extended* family to receive notice if the parent(s) or guardian(s) can't be reached. Before adopting an extended family notification, be sure to check how that interacts with the court and/or CPS confidentiality rules.

The Oglala Sioux Code requires that reasonable efforts be made to notify the parents, guardian, or custodian immediately, but no longer than twelve hours after the removal. It specifies various methods of notice. Notice is also required to be given to the child's Tiospaye Interpreter.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- What notice does your current system require when an emergency removal of a child occurs?
- Who gets notice of the emergency removal?
- When is the notice required to be delivered?

STEP 2: Establish a Vision for the Future

- What changes, if any, need to be made to the current process?
- How should notice of removal be made (in person, by leaving a phone or written message, by mail)?
- Which agency or officer should be responsible for providing notice of removal to parents, guardians, or custodians?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

F. Release of the Child from Emergency Custody

Native Nations should consider including provisions in their Children's Code that set out the conditions under which a child must be returned to their home after being taken into emergency custody. These condition could include that the statutory requirements for emergency custody were not met or the circumstances that placed the child in imminent danger have ended. It could also mean that safeguards have been put in place to protect the child. In some circumstances custody could be terminated if the proper procedure was not followed. Return of a child could take place before a preliminary hearing or before the filing a petition.

Selected Tribal Codes

Confederated Tribes of the Grand Ronde Community of Oregon Tribal Ordinances
Children and Families Ordinance (Amended 6/03/15)
Part II Youth-In-Need-Of-Care

(I) **Emergency Custody**

[sections omitted]

(3) **Release of Child Taken into Emergency Custody**. A child taken into emergency custody shall be released to the physical custody of his/her parent, guardian, or custodian if safeguards are in place which make it reasonable to believe that the child is no longer in immediate danger of harm while in the parent, guardian, or custodian's care. Notwithstanding placement in the physical custody of the child's parent, guardian, or custodian, the child remains in the emergency custody of the Tribe pending the Preliminary Inquiry Hearing or termination of emergency custody as provided below.

(4) **Placement**. A child who cannot be released to a parent, guardian, or custodian shall be placed, pending the Preliminary Inquiry Hearing, according to the placement preferences set forth in Part II(b)(2).

(5) **Termination of Emergency Custody**. Emergency custody of a child under this Part II shall terminate three (3) days after the child was taken into custody unless the Juvenile Court has issued an order continuing custody of the child with the Tribe.

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part III Children in Need of Care

§ 8.023. Emergency Custody

(e) **Releasing a Child from Emergency Custody**

(1) The tribal representative, immediately upon arranging for emergency custody of the child or upon placement of the child following removal, shall review the need for such custody and shall:

(A) Notify the child's parent(s), guardian, or custodian within twenty-four (24) hours of learning that the child has been taken into emergency custody; and

(B) Release the child to his or her parent, guardian, or custodian unless the ICW Program determines that the child's health or safety requires continued out-of-home care; and

(C) File a petition for custody of the child(ren).

(2) A child taken into emergency custody under this section shall be released to his or her parent(s), guardian, or custodian within five (5) days of the time that the child is taken into emergency custody, unless the Court issues an order continuing the emergency custody of the child, or unless the child's health or safety requires continued custody.

(3) In the event of a dispute regarding a child's release from custody during the first five (5) days of custody, the tribal representative and the Programs I Manager shall have authority, in the absence of a Court order, to determine if the child shall remain in emergency custody.

Tribal Code Commentary

The Grand Ronde's Code describes the circumstances requiring return of physical custody of the child to their parent(s) or other responsible person:

- Safeguards are in place, and the child is no longer in immediate risk of harm while in the parent/guardian/custodian custody.
- The parent(s), guardian(s), or custodian(s) is not the person from whom the child was removed.

Even when the child may be placed in the physical custody of the parent(s), legal custody may remain with the Nation. Under the Grand Ronde Code, if a petition is not filed within twenty-four hours of the taking into custody, emergency custody is terminated.

The Siletz Code requires the parents or custodian to be notified within twenty-four hours of the child's removal from the home, and the child to be released unless ICW determines that out-of-home care is required for the safety of the child. A petition is filed and, unless an order is issued by the court, the child must be returned within five days.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- What rules/laws are currently in place regarding the return of a child to their home after an emergency removal has occurred?
- Are there problems with the current process and/or speed of the process?

STEP 2: Establish a Vision for the Future

- Should the court be involved in releasing the child from emergency custody or would you like the responsible agency to have discretion regarding release?
- Under what circumstance should child protection return the child after emergency removal?
- What safeguards should be in place?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

Additional Resources

Chill, Paul, "Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings," *Family Court Review* 41 (4) (2003): 457–70.
This article examines the tendency of emergency child-removal decisions—by social workers, police officers, and judges—to become self-reinforcing and self-perpetuating in subsequent child protective proceedings. This "snowball effect," as one court has referred to it, is widely acknowledged by juvenile court lawyers and judges but is largely unknown outside their circles. The article explores the causes and consequences of this phenomenon in the age of ASFA2 (the 1997 federal Adoption and Safe Families Act), which converts every day that a child spends in foster care into one more tick of the clock in a countdown toward termination of parental rights. The article provides some background on the law and practice of emergency child removal in the United States today; analyzes the factors that make initial removals outcome determinative in many child protection cases; considers the implications of this phenomenon in light of ASFA; and identifies possible solutions.

National Child Welfare Resource Center for Tribes, Tribal Courts in the Tribal Child Welfare System, web page, National Child Welfare Resource Center for Tribes, 2015.
Web page with multiple information resources on the role of tribal courts in the child welfare system.

National Indian Law Library, ICWA Guideline Topic 6. Emergency Removal, NARF, 2015.
Provides a break down and explanation of the legal issues related to emergency removals under ICWA, including placement preferences.

National Resource Center for Child Protective Services, Safety Intervention Policy Standards and Agency Self-Assessment, National Resource Center for Child Protective Services, 2007.
Self-assessment tool for child welfare agencies to use in order to update and/or understand their safety policies in removal situations. Designed to help identify gaps between policy and practice.

Schechter, Susan, and Jeffrey Edleson, Effective Intervention in Women Battering and Child Maltreatment Cases: Guidelines for Policy and Practice: Recommendations from the National Council of Juvenile and Family Court Judges Family Violence Department, The National Council of Juvenile and Family Court Judges, 1999.
This book is intended to offer communities a guiding framework to develop interventions and measure progress as they seek to improve their responses to families experiencing domestic violence and child maltreatment. Chapter 1 articulates an overall principle of safety, well-being, and stability for all victims of family violence and the need to hold batterers accountable for their violence. In Chapter 2, a series of principles are developed to guide communities in structuring their responses to families experiencing dual forms of violence. Chapters 3, 4, and 5 focus on specific recommendations for the child protection system, the network of domestic violence service providers, and the juvenile and other trial courts with jurisdiction over child maltreatment cases.

Chapter 10: The Preliminary Hearing

Once an emergency petition is filed with the court, a preliminary hearing is scheduled. This hearing may take place either before or immediately after the removal of a child from their home.

Preliminary hearings are just what they say—preliminary. They are not full trials. This means that the procedure in such hearings, including rules of evidence, should be relaxed. The hearings are expedited; there is usually not a chance for full presentation and development of evidence, and notice to interested parties is likely to be quick and informal. Hearsay rules generally do not apply in preliminary hearings and the social worker is allowed to testify about statements made by persons who are not available in the court for cross-examination. If possible, the social worker should develop a written summary report setting out the information, facts, recommendations, and their conclusions. Although general rules of evidence may not apply in the preliminary hearing, in order to comply with due process and to prevent unnecessary appeals, a code provision *should explicitly state* which rules of evidence govern the preliminary hearing. However, if the program is Title IV-E, the first court order must contain certain words in order to secure the appropriate funding.

As with all dependency proceedings, but even more critical in this preliminary stage, the hearing should be closed to the public and restricted to parties, counsel, family, any witnesses, and any other person that the court specifically allows in the hearing. Many codes exclude the presence of children because of the potential adverse reaction they may have. However, age, maturity level, and cultural custom should be considered before deciding to exclude the child from a hearing. Alternatively, the child may participate in specific aspects of the hearing or speak to the judge in chambers, if appropriate.

Whenever possible, the parent(s) or other custodian(s) from whose custody the child has been removed should be given notice of the preliminary hearing. They should also be permitted to appear and respond to the initial information presented by the removing agency, including custody and placement recommendations. Typically, only "reasonable cause" is required for the court to continue an out-of-home placement and schedule a full hearing. The parent(s) or custodian(s) should be informed of their increased rights at the full hearing—that they have the opportunity to present all of their evidence, cross-examine the Nation's witnesses, contest the court's jurisdiction, and contest their child's out-of-home placement. Because the rights of parent(s) or other custodian(s) may be affected at a preliminary hearing with a lower threshold for evidence, the length of any custody or removal order issued by the court in a preliminary hearing is short. A full hearing and adjudication must be scheduled as quickly as possible, consistent with gathering all the evidence, so that any unsubstantiated interference with parental custody is ended as soon as possible.

Preliminary hearings are usually brief. The child welfare worker and/or law enforcement officer presents:

- The information acquired through their investigation that supports the child's removal;
- The agency's efforts to assist and provide services to the family;

- The identification of any alternatives to continued removal of the child from the home;
- Alternative, more appropriate placements pending a full hearing;
- Recommendations regarding placement of the child; and
- Visitation plan for the child and appropriate family members.

Note that some Nations use different names for the preliminary hearing, the most common substitute is "emergency hearing." Sometimes, the preliminary hearing is called an "initial hearing," "emergency removal hearing," or some variation of the three.

The purpose of this chapter is to set out the details of a preliminary hearing. Protections and procedures to protect the rights of the child and the rights of the parent(s) must be in place.

Chapter Units

Unit A: Notice of the Preliminary Hearing

Unit B: Purpose of the Preliminary Hearing

Unit C: Time Limits for Holding a Preliminary Hearing

Unit D: Standard of Proof in a Preliminary Hearing

Unit E: Parental Rights in a Preliminary Hearing

Unit F: Outcome of the Preliminary Hearing

Unit G: Evaluations of the Child and/or Parents

A. Notice of the Preliminary Hearing

The time between initial removal of a child from their family and when the preliminary hearing must take place should be short, usually within forty-eight hours or seventy-two hours depending on the availability of a tribal court judge. There is usually not time to provide formal notice of the preliminary hearing through regular service of process procedures and time lines. Notice is required to provide due process to interested parties, especially the parents.

Provisions may be enacted to require notice to all interested parties by all practical means. Title IV-E has a list of specific people required to be notified within thirty days of removal of a child from the child's home.[101] A Native Nation may have relatives that should be provided notice due to their traditional responsibilities. Such provisions might be kept nonspecific to avoid tying the hands of the court and/or social services agency in providing notice in a timely manner. Policy and procedures may be more specific than the code section.

One of the first things a tribal court judge asks in a preliminary hearing is whether the parents have received notice of the hearing, and if not, when the agency expects to provide that notice and why the agency was unable to provide notice sooner. If notice has not been provided, it is likely that the court will schedule a second preliminary hearing once notice has been provided.

Under the Adoption and Safe Families Act (ASFA) and Title IV-E, the primary consideration in any CINA proceeding is the health and safety of the child. So, if it is clear that a child has been abused, or is in danger of continued or future abuse; it is unlikely that a court will dismisses a case or order the return of the child due to lack of notice. Nevertheless, the court must have authority to order notice where it has not been timely or reasonably provided, and to take appropriate action if it finds that the agency has no excuse for providing notice or refuses to do so.

[101] 42 U.S.C. 671(a)(29), (Title IV-E, State Plan for Foster Care and Adoption Assistance) requires a state exercise due diligence to identify and provide notice to the following relatives: all adult grandparents, all parents of a sibling of the child, where such parent has legal custody of such sibling[235], and other adult relatives of the child (including any other adult relatives suggested by the parents), subject to exceptions due to family or domestic violence, that a child has been removed, rights, and other matters.

Selected Tribal Codes

Confederated Tribes of the Grand Ronde Community of Oregon Tribal Ordinances
Children and Families Ordinance (Amended 6/03/15)
Part II Youth-In-Need-Of-Care

[sections omitted]

(g) **Preliminary Inquiry Hearing**

(2) **Parent, Guardian, or Custodian Not Present**. If the child's parent, guardian, or custodian is not present at the Preliminary Inquiry Hearing, the Court shall make an inquiry into what efforts have been made to notify and to obtain the presence of the parent, guardian, or custodian. If it appears that further efforts are likely to produce the child's parent, guardian, or custodian, the Court shall continue the hearing for not more than twenty-four (24) hours and direct CFS to make continued efforts to obtain the presence of the child's parent, guardian, or custodian

---

Mashantucket Pequot Tribal Laws (Enacted 2008)
Title V. Child Welfare
Chapter 3. Reporting of Child Neglect and Abuse

§ 3. Emergency Removal

[sections omitted]

d. Upon the filing of the petition, the court shall cause a summons to be issued requiring the parents and any other persons necessary or proper to the proceedings to appear in court at the time and place named therein. The summons and petition shall be personally served upon the party at least 10 days before the scheduled hearing. If the party to be served is not within the Reservation boundaries or personal service cannot be effected, the summons and petition may be served by certified or registered mail, with a return receipt requested. The summons shall contain the following information:

(1) identify the parties and the nature of the proceedings;

(2) state that the party served shall personally appear before the court and respond to the Petition at a specified date and time;

(3) state that the party has the right to be represented by an attorney/advocate at her own expense in all proceedings under this Law, to introduce evidence, to be heard on her own behalf, to examine witnesses, and to be informed of possible consequences of the proceeding.

The Law and Order Code of the Kalispel Tribe of Indians (Enacted 12.2.2015)
Chapter 7 Kalispel Youth Code
Part 2. Youth in Need of Care

7-21.01 Youth in Need of Care Hearing.

If an emergency order is issued by this court, or a Youth in Need of Care Petition is filed with this Court, the Court shall set a date and time for a Youth in Need of Care hearing and shall advise the parties of the date, time, and place of that hearing, and shall order their attendance at the hearing. If the whereabouts of the parent(s), guardian, or other custodian is unknown, notice of the Youth in Need of Care Hearing may be served in accordance with Chapter 3.

7-22.05 Notice.

Notice of a Youth in Need of Care Hearing shall be served as specified under Chapter 3 by the Court Clerk or other person designated by the Tribe to perform this duty, at least five (5) working days before the hearing. The notice shall include the name of the court; the date, the time and place of the hearing; and a copy of the petition. The notices shall be served on the following:

a) The youth or his/her representative or guardian ad litem;

b) The youth's parent(s), guardian, or custodian;

c) Any person the Court believes is necessary for the hearing;

d) Any person the parties believe is necessary for the hearing;

e) Presenting Officer; and

f) The Indian Child Welfare Worker.

Tribal Code Commentary

The Confederated Tribes of the Grand Ronde Community require the court to inquire into the efforts made to notify and obtain the presence of the parent, guardian, or custodian if the parent, guardian, or custodian is not present at the Preliminary inquiry hearing. If further efforts are likely to bring the parent into court, the court is required to postpone the hearing, but not for more than twenty-four hours.

The Mashantucket Pequot require a summons to be issued upon filing of the petition, necessitating the parents and any other person necessary to appear at the proceedings. The summons is required to be personally served upon the party at least ten days before the scheduled hearing. If the summons cannot be served within the Nation's boundaries, it may be served by certified or registered mail, with a return receipt requested. In addition to the parties and time and date of the hearing, the summons contains a statement of the parties' rights to an attorney/advocate at their own expense, introduce evidence and be heard, examine witnesses, and be informed of possible consequences of the proceeding.

Anytime an emergency order is issued by the Kalispell Tribal Court or a Youth in Need of Care Petition is filed, the court is required to set a date and time for a Youth in Need of Care Hearing and notify the parties and order their attendance at the hearing. If the whereabouts of the parent(s), guardian, or custodian is unknown, alternative methods of service are authorized. Having alternative means of service is essential, as some parties deliberately avoid service. The notice of the hearing should be served by the court clerk or other person designated by the Nation at least five working days before the hearing. The notice includes a copy of the petition. In addition to the parties in the case, the worker and the presenting officer, the court may require any person the court or the parties believe is necessary to attend the hearing.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Does your Nation's law require parent(s), guardians, and custodians to be notified within a reasonable time of any emergency custody hearings involving children under their care?
- Does your Nation define *reasonable time*? If not what are some of the factors to be considered?
- What might be the consequences of a failure to provide such notice?
- What might be the consequences of a failure to require that the Nation provide such notice?

STEP 2: Establish a Vision for the Future

- What type of notice should be required for the preliminary hearing in the future?
- When should the parents be notified of the preliminary hearing? Do you want to define *reasonable time*?
- Are there extended family members in your Nation's culture that act like third parents or that have parent-like responsibilities with respect to the child that should be notified and included in an emergency custody hearing?
- What methods of service may be used if the parent(s), guardian, or custodian cannot be found within the boundaries of your Nation?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

B. Purpose of the Preliminary Hearing

The preliminary hearing is limited in purpose and scope. That purpose should be clearly spelled out in your code.

The preliminary hearing takes place a set number of hours or days after a child has been removed from the home by a law enforcement officer and/or a social services worker (or other designated official). Under most tribal and state children's laws, the maximum legal time limit for emergency removal expires if there is no preliminary (a.k.a. emergency custody) hearing approving an extension of time for removal.

In these hearings the presenting officer, Social Services Department, or other designated official must convince the court that a longer removal of the child should be approved to protect the child's safety and welfare. If the court is unconvinced, or if the hearing is not held in a timely fashion, the child must be returned home.

There are dual purposes for the preliminary hearing:

1. To secure the immediate safety of the child.
2. To determine whether there is enough evidence to legally support both the removal of the child and the continued interference of the Nation in the life of the child and their family (a.k.a. whether there is "probable cause" to believe that a child is a CINA).

Selected Tribal Codes

Mashantucket Pequot Tribal Laws (Enacted 2008)
Title V. Child Welfare

Chapter 3. Reporting of Child Neglect and Abuse

§ 5. Hearing

The purpose of the hearing is to determine whether or not the child is in need of care and court intervention and protective supervision are necessary to protect the best interests of the child.

The Law and Order Code of the Kalispel Tribe of Indians (Enacted 12.2.2015)
Chapter 7 Kalispel Youth Code

Part 2. Youth in Need of Care

7-22.01 Purpose

The Court shall conduct a Youth in Need of Care Hearing for the purpose of determining whether a youth is in need of care.

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part III Children in Need of Care

§ 8.024. Preliminary Inquiry Hearing

(a) **Purpose**—The purpose of a preliminary inquiry hearing is to determine the best interests of a child who has been taken into emergency custody, and whether the child's health or safety is in jeopardy. In determining the child's best interests, the Court shall examine whether probable cause exists to believe the alleged act, abuse or neglect was committed and whether the continued custody is necessary to protect the child's health and safety pending further proceedings.

Tribal Code Commentary

The Mashantucket Pequot's code simply states the purpose of the preliminary hearing is to determine whether the child is in need of care and court intervention and protective custody.

The Kalispell Code simply indicates that the purpose of the hearing is to determine whether a youth is in need of care.

The Siletz Code directs that the preliminary inquiry hearing is to determine the best interests of the child taken into custody and whether the child's health or safety is in jeopardy. The court should examine whether probable cause exists to believe the alleged act, abuse, or neglect was committed and whether the continued custody is necessary to protect the child's health and safety. This wording is required to be in a preliminary hearing's order for Title IV-E participants.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Review your current code section to identify the purpose of the preliminary hearing.
- Identify any problems with that section.
- Is the section culturally appropriate?

STEP 2: Establish a Vision for the Future

- Identify any changes needed in the preliminary hearing purpose section.
- Have you clearly stated the purpose of the preliminary hearing and is that different than the purpose of the adjudicatory hearing?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

C. Time Limits for Holding a Preliminary Hearing

Time limits should be set out in the code for when a preliminary hearing must take place. A preliminary hearing should be held as soon as possible after a child has been removed from their home, or even before removal if that is feasible. These time limits vary based on the situation of each Nation. For Nations with large jurisdictions, it may be difficult to get to the court in a timely fashion. For Nations that only have a part-time judge, the time frame for when the judge is available and even the budget of the court may need to be taken into account.

Generally, holding a preliminary hearing within seventy-two hours of the child being removed is considered reasonable. If the Nation has the resources, and delay will not harm the child, it may even hold a preliminary hearing *before* a child is removed.

Selected Tribal Codes

Mashantucket Pequot Tribal Laws (Enacted 2008)
Title V. Child Welfare
Chapter 3. Reporting of Child Neglect and Abuse

§ 3. Emergency Removal

[sections omitted]

c. Such removal shall not exceed 96 hours, within which time an emergency protective care petition shall be filed with the court or the child shall be returned to her parent or guardian/custodian.

d. If a petition is filed, the procedures for removal shall be followed, provided that the court shall schedule a hearing on the petition within 10 days from the date the petition was filed.

Confederated Tribes of the Grand Ronde Community of Oregon Tribal Ordinances
Children and Families Ordinance (Amended 6/03/15)

Part II Youth-In-Need-Of-Care

[sections omitted]

(g) **Preliminary Inquiry Hearing**

(1) **Purpose**. Following the taking of a child into emergency custody or the filing of a Petition for Custody, the Court shall conduct a Preliminary Inquiry Hearing to determine if there is probable cause to believe the child is a Youth-in-Need-of-Care.

(A**) Emergency Custody**. If the child is taken into emergency custody pursuant to Part II(e), the Court shall conduct the Preliminary Inquiry Hearing at 1:30 p.m. the third (3rd) day following emergency removal. Prior to this hearing, CFS shall file and attempt to serve a copy of the Petition for Custody and a summons pursuant to Part II(f).

(B) **Non-Emergency Custody**. The Court shall conduct the Preliminary Inquiry Hearing within seven (7) days after the filing of a Petition for Custody.

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part III Children in Need of Care

[sections omitted]

§ 8.024. Preliminary Inquiry Hearing

(b) **Time Frame**—A preliminary inquiry hearing shall be held as soon as possible after a child has been taken into emergency custody and in no event later than five (5) days from the time that the child is placed in emergency custody. If the child has been released from emergency custody, the preliminary inquiry shall be held within ten (10) days from the date the child is released from emergency custody. If a child has not been placed in emergency custody, the preliminary inquiry shall be held within (10) days of the filing of the petition, if the petition has not been dismissed.

Tribal Code Commentary

The Mashantucket Pequot Nation indicates that when there is an emergency removal of a child, an emergency protective care petition shall be filed within ninety-six hours of the removal. A hearing is scheduled within ten days of the filing of the petition.

The Grand Ronde Community requires that a preliminary hearing be scheduled at 1:30 p.m. the third day following the emergency removal. Prior to the hearing, the Nation's social services is required to file and attempt to serve a copy of the petition and a summons. Quick court review, allowing the parent, guardian, or custodian to respond, is a priority for the community. In a nonemergency case the preliminary inquiry is within seven days after filing the petition.

The Siletz Code requires a preliminary inquiry as soon as possible after a child is taken into emergency custody, but never longer than five days. If the child is released from custody, the hearing takes place within ten days of the release. If the child was not taken into custody, the hearing takes place within ten days of filing of the petition.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- What is the current time limit between removal of the child and the preliminary hearing?
- Does this minimize the time the child is out of home and provide adequate time to do a preliminary investigation?

STEP 2: Establish a Vision for the Future

- Imagine that your agency is the first responder to a reported incident of child maltreatment. How long might it take you to respond, investigate, and write up a report and a petition to be filed with the tribal court?
- Will you have different time frames based on whether a child is in custody or not? What are they?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

D. Standard of Proof in a Preliminary Hearing

The standard of proof and the burden of proof in a preliminary hearing should be clearly set out. The standard of proof refers to the level or amount of proof needed, and the burden of proof refers to who must reach that standard. The burden of proof is on the Nation or agency. The standard of proof in a preliminary hearing is usually not as stringent as in the adjudicatory hearing that follows. The standard of proof your Nation selects should be spelled out clearly in order to protect the rights of all parties and reduce opportunities for delay.

In preliminary hearings, the standard of proof most often used is referred to alternatively as "probable cause," "reasonable cause," "sufficient cause," or "reasonable grounds." Your Nation should pick one standard that is clearly defined and apply it consistently. By this standard, the court must find that the child welfare worker has presented enough information for the court to form a reasonable belief that the child is a CINA. The court must also find that the child cannot safely be left in the home or special protections must be in place before the child can be safely returned.

If the specified grounds cannot be proven with the requisite level of proof, the child must either be returned to their home or a full hearing must occur as soon as practicable. The expedited hearing is one alternative that a Nation may offer, but it's not required.

Selected Tribal Codes

The Law and Order Code of the Kalispel Tribe of Indians (Enacted 12.2.2015)
Chapter 7 Kalispel Youth Code
Part 2. Youth in Need of Care

7-20.10 Emergency Custody Orders—Grounds:

A tribal court judge or judicial officer may issue an emergency custody order upon a sworn oral or written statement of facts showing probable cause to believe the youth is in need of care and that his or her health, safety and/or welfare will be seriously endangered if not taken into custody.

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.510 Preliminary Inquiry Hearing

[sections omitted]

(4) **Case Plan on Finding of Probable Cause**. If the Court determines there is probable cause to believe the child is a youth-in-need-of-care, the Court may:

(a) Continue the petition, grant legal custody of the child to the Tribes, and place the child in the physical custody of the parent, guardian, or custodian, and set an adjudicatory hearing; or

(b) Continue the petition, grant legal custody of the child to the Tribes, and place the child in a beda?chelh approved placement, and set an adjudicatory hearing; or

(c) Affirm any other reasonable plan supported by the evidence, including but not limited to the postponement of proceedings, mediation, or a plan agreed to by the parties; and

(d) If the child is placed in out-of-home care, the Court shall set out in detail the visitation which beda?chelh will provide between the child and parent, guardian, or custodian, and relatives, if appropriate. Visitation is to provide for time for the parent/guardian/child relationship to continue.

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part III Children in Need of Care

§ 8.024. Preliminary Inquiry Hearing

[sections omitted]

(d) **Findings**

(1) If the Court determines that there is no probable cause to believe that the child is a child-in-need-of-care, the case shall be dismissed without prejudice and the child shall be released to the custody of the child's parent(s), guardian, or custodian.

(2) If the Court determines that there is probable cause to believe that the child is a child-in-need-of-care, but that the child is not in need of emergency custody, the Court shall take jurisdiction of the child but the child shall be released to the custody of his or her parent(s), guardian, or custodian, under the protective supervision of the Tribe, pending final disposition of the petition.

(3) If the Court determines that there is probable cause to believe that the child is a child-in-need-of-care and that the child is in need of continued out-of-home care, the Court shall make an order providing the ICW Program with placement and care responsibility of the child pending final disposition of the petition. The Court shall make a determination that continuation of the child in the home from which the child is removed is contrary to the welfare of the child, and that reasonable efforts to prevent the removal have been made.

Tribal Code Commentary

The Kalispel Code uses "probable cause" as the standard of proof at its initial hearing. Probable cause is the same standard that a law enforcement officer uses to make an arrest. It means sufficient reason based on known facts. The evidence must be sufficient to demonstrate that if the child is not taken into custody, the child's the health, safety, and welfare are seriously endangered.

The Tulalip Code also requires "probable cause" at its preliminary hearing. Sufficient evidence must be provided to believe that the child is a youth-in-need-of-care. Once the court finds probable cause to believe the child meets Tulalip's definition of youth-in-need-of-care, the court decides on the temporary placement of the child.

The Siletz Code also requires "probable cause" at its initial hearing. The court may find that the child is not a child in need of care according to the code's definition and return the child to their custodian and dismiss the matter. It could also find that there is probable cause that the child is in need of care, but does not need to remain outside the custody of their parent(s). The court could find that there is probable cause to believe that the child is in need of care and of continued out-of-home placement. This provision meets Title IV-E requirements.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- What is the standard of proof for the preliminary hearing in your current code? Is it different than the standard in the adjudicatory hearing?
- Is there any problem with this?

STEP 2: Establish a Vision for the Future

- Discuss the conditions under which a sensible, objective tribal person would have reasonable ground to suspect that the parent(s), guardian, or custodian abused or neglected a child.
- Should there be changes in your current statute relative to the standard of proof at a preliminary hearing?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

E. Parental Rights in a Preliminary Hearing

Things are often chaotic at a preliminary hearing. The parent(s), custodian(s), or guardian(s) from whom a child has been removed are usually upset and angry—they may not even know why the removal occurred. Most people are unfamiliar with legal proceedings in general and preliminary hearings in particular.

Therefore, it is extremely important that parent(s) or custodian(s) are advised:

- Of their legal rights to be represented by an attorney or advocate, and information regarding court-appointed counsel (if that right is available);
- Of the purpose and process of the preliminary hearing and other dependency proceedings. This includes evidence considered and types of statements parties can make;
- That if the matter proceeds to a full hearing they may permanently lose physical custody of the child;
- That a full hearing can also result in a permanent guardianship or adoption of the child; and
- That a full hearing can result in the termination of parental rights.

Selected Tribal Codes

Mashantucket Pequot Tribal Laws (Enacted 2008)
Title V. Child Welfare
Chapter 3. Reporting of Child Neglect and Abuse

§ 4. Procedures for Removal

d. Upon the filing of the petition, the court shall cause a summons to be issued requiring the parents and any other persons necessary or proper to the proceedings to appear in court at the time and place named therein. The summons and petition shall be personally served upon the party at least 10 days before the scheduled hearing. If the party to be served is not within the Reservation boundaries or personal service cannot be effected, the summons and petition may be served by certified or registered mail, with a return receipt requested. The summons shall contain the following information:

(1) Identify the parties and the nature of the proceedings;

(2) State that the party served shall personally appear before the court and respond to the Petition at a specified date and time; and

(3) State that the party has the right to be represented by an attorney/advocate at her own expense in all proceedings under this Law, to introduce evidence, to be heard on her own behalf, to examine witnesses, and to be informed of possible consequences of the proceedings.

[sections omitted]

White Earth Band of Ojibwe Child/Family Protection Code (Last accessed November 20, 2015)
Title 4: Children and Families
Chapter XIII. Initial hearing

Section 3. Advise of Rights

During the hearing, the court shall advise the party(s) of the reason for the hearing and of their basic rights as provided for in Chapter XIV of this code.

[section omitted]

White Earth Band of Ojibwe Child/Family Protection Code (Last accessed November 20, 2015)
Title 4: Children and Families
Chapter XIV. Notification of Rights

All parties have a right to be represented by an advocate/attorney at their own expense in all proceedings under this code, to introduce evidence, to be heard on his or her own behalf, to examine witnesses, and to be informed of possible consequences if the allegations of the petition are found to be true. All parties shall be entitled to advance copies of court documents, including petitions and reports, unless deemed inappropriate by the court.

Tribal Code Commentary

The Mashantucket Pequot Code requires the summons to include an advisement of rights including the following:

- To be represented by an attorney (paid by the individual),
- To present evidence,
- To examine witnesses,
- To be heard, and
- To be informed of the possible consequences of the hearing.

The White Earth Code requires that the parties to a dependency action be advised of their basic rights and of the reasons for the proceeding. Their basic rights include the right to be represented by an attorney or advocate at their own expense. It also includes the rights to present evidence, be heard, and examine witnesses. They also should be informed of the consequences if the allegations in the petition are proven. In addition, they have a right to court documents in advance of hearings.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- What rights to the parent, guardian, or custodian have under your current code? Are these adequate? Explain.

STEP 2: Establish a Vision for the Future

- List the rights that a parent, guardian, or custodian should be advised of at the preliminary hearing.
- How can you include tribal custom and tradition? Are there third parties (extended family members, clan members, etc.) that should have rights and be involved in the hearing?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

F. Outcome of the Preliminary Hearing

This section considers the specific findings of the court following the preliminary hearing. At the preliminary hearing, the court must make its decision in writing. If the child was removed from the home, this is an opportunity for the court to examine the reasons for the removal, review the petition, take testimony, and see what efforts have been made to provide services and reunite the family.

This preliminary hearing is important regardless of whether Title IV-E applies, but it is vitally important if the Nation wishes to use Title IV-E funding. The court must make specific findings to ensure that the child in question is eligible for Title IV-E funding for the remainder of the case. If these findings are not made at the preliminary hearing or initial hearing in the case, the child is not eligible for Title IV-E for the remainder of the case, no matter how long the case lasts. The required Title IV-E findings are:

1. Reasonable efforts were made to prevent or eliminate the need for removal of the child from their home;
2. Continuance in the home is contrary to the child's welfare; and
3. Responsibility for care and placement is vested with the Nation's social services agency.[102]

The specific federal law relating to reasonable efforts states:

Public Law 105-89—Adoption and Safe Families Act of 197[103]

SEC. 101. Clarification of the Reasonable Efforts Requirement.

(a) **IN GENERAL**—Section 471(a)(15) of the Social Security Act (42 U.S.C. 671(a)(15)) is amended to read as follows:

(15) provides that—

(A) in determining reasonable efforts to be made with respect to a child, as described in this paragraph, and in making such reasonable efforts, the child's health and safety shall be the paramount concern;

(B) except as provided in subparagraph (D), reasonable efforts shall be made to preserve and reunify families—

(a) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and

(b) to make it possible for a child to safely return to the child's home.

. . .

[102] See "Title IV-E: Helping Tribes Meet the Legal Requirements." Available at http://www.nrc4tribes.org/files/Tab%209_9E_Helping%20Tribes%20Meet%20the%20Legal%20Requirement.pdf.
[103] 42 U.S.C. § 1305, § 101(A) and (B).

These findings cannot be boilerplate findings; specific findings must be made in each individual case, along with the reasons supporting each finding. If "aggravated circumstances," as defined by law, state law, or ASFA depending on whether the Native Nation is a Title IV-E Nation or not, exist, the court may be excused—even at the preliminary hearing stage—from requiring reasonable efforts to prevent removal of the child from their family.[104] See Chapter 5 of this resource for a detailed discussion of reasonable efforts.

Your Nation may want to specifically set out in its code what some of the possible outcomes of the preliminary hearing might be. Possible outcomes are:

- Continued removal of the child;
- Scheduling a full hearing;
- Retention of preliminary jurisdiction and custody;
- Placement of the child with the parent(s) or other custodian(s) with appropriate protections and services; or
- Dismissal of the petition and return of the child to their family.

If jurisdiction is retained by the court, the order should:

- Require the agency continue to be responsible for care and placement of the child;
- Require the development of a service plan by the agency;
- Require parent(s) to participate in services designated; and
- Provide specific information on when and where the full adjudication takes place and provide for the plan leading up to the full adjudication, that is, stating when exhibits are to be exchanged between the parties.

The order may provide for interim dismissal of the case if specific services are completed or specific improvements in family functioning have occurred.

Native Nations may want to specifically provide in the code what some of the possible outcomes of the emergency custody hearing can be. These include:

- Dismissal of the petition and return of the child to the parent(s), guardian, or custodian;
- Retention of the petition, but return of the child to the parent, guardian, or custodian with the appropriate services and a setting of an adjudicatory hearing; or
- Continued removal of the child and a setting of an adjudicatory hearing.

In those cases in which a petition for emergency custody is retained or continued, the court continues to exercise jurisdiction over the case and orders the Social Services Department to continue to supervise the home, requiring that the parent(s), guardian(s), or custodian(s) (and possibly the child) participate in mandated services. The petition may be dismissed when home conditions improve and the court ends its supervision.

---

[104] See "Title IV-E: Helping Tribes Meet the Legal Requirements." Available at http://www.nrc4tribes.org/files/Tab%209_9E_Helping%20Tribes%20Meet%20the%20Legal%20Requirement.pdf.

Selected Tribal Codes

Confederated Tribes of the Grand Ronde Community of Oregon Tribal Ordinances
Children and Families Ordinance (Amended 6/03/15)

Part II Youth-In-Need-Of-Care

[sections omitted]

(g) **Preliminary Inquiry Hearing**

(4) **Findings**. At the hearing, the Court shall determine whether or not probable cause exists to believe that the child is a Youth-in-Need-of-Care.

(A) **Probable Cause Not Found**. If probable cause to believe that the child is a Youth-in Need-of-Care is not found the Court shall dismiss the petition and, if the child was taken into emergency custody, order the child returned to the child's parent, guardian, or custodian.

(B) **Probable Cause Found**. If the Court finds that probable cause exists to believe that the child is a Youth-in-Need-of-Care, the Court shall determine the following:

(i) Whether the home conditions continue to present a substantial risk of harm to the child's life, physical health, or emotional or mental well-being;

(ii) Whether any alternative except removal of the child is reasonably available to adequately safeguard the child from such risk; and

(iii) If the child was taken into emergency custody, whether or not CFS made reasonable efforts to prevent removal of the child from the parent, guardian, or custodian considering the circumstances of the child and parent, guardian, or custodian, and if removal could not have been prevented, whether CFS has made reasonable efforts to reunite the family once separated and eliminate the need for removal.

Mashantucket Pequot Tribal Laws (Enacted 2008)
Title V. Child Welfare
Chapter 3. Reporting of Child Neglect and Abuse

§ 5. Hearing

The purpose of the hearing is to determine whether or not the child is in need of care and court intervention and protective supervision are necessary to protect the best interests of the child.

c. The court shall hear testimony from the parties and make specific findings as to whether or not the allegations of the petition are supported by the evidence and whether or not the best interests of the child will be served by court intervention, protective supervision, or by removal from her home.

   (1) Whenever removal and foster care placement of a child is recommended, the court shall be satisfied that active efforts have been made to provide remedial and rehabilitation services designed to prevent the breakup of the family and that these efforts have proved unsuccessful.

[sections omitted]

§ 6. Court Findings

a. The court shall enter a written order with specific findings of fact and conclusions of law.

b. If the court concludes that removal or continued out of the home placement is not warranted, the child shall be returned immediately to the custody of her parents, custodian/guardian; provided however, that the court may define the terms and conditions for returning the child to her home, continue court jurisdiction and protective supervision.

c. If, pursuant to Section 5.c.(2), the court finds that removal or continued removal is in the best interests of the child, the court shall determine:

   (1) the proper placement of the child;

   (2) the services or treatment to be provided to the child and the child's family to help address the circumstances underlying the removal; and

   (3) the terms and conditions for placement of the child, returning the child to her home, and family visitation.

[sections omitted]

Tribal Code Commentary

At the preliminary hearing in the Grande Ronde Community the court is directed to determine whether or not there is probable cause (sufficient reason based on facts) to believe the child is a youth-in-need-of-care. If probable cause is not found, the petition is dismissed and the child is returned to the parent, guardian, or custodian. If probable cause is found, the court is required to determine:

1. Whether home conditions present a substantial risk of harm to the child's life, physical health, or emotional or mental well-being.
2. Whether any alternative except removal is reasonably available.
3. Whether or not Child and Family Services (CFS) made reasonable efforts to reunite the family once separated and eliminated the need for removal.

The Mashantucket Pequot Nation defines the purpose of the preliminary hearing as an opportunity for the court to determine whether or not the child is in need of care and whether court intervention and protective supervision are necessary. The court may hear testimony from the parties and make a determination regarding whether the allegations in the petition are supported by evidence. Whenever removal from the home is recommended, the court must be satisfied that active efforts have been made to provide remedial and rehabilitation services designed to prevent the breakup of the family and that these efforts have proved unsuccessful. If the court concludes that removal or continued out-of-home placement is not warranted, the child shall be immediately returned to the parent, guardian, or custodian. If out-of-home placement continues, the court shall determine the proper placement of the child; services provided the child and family; and the terms and conditions for placement of the child, returning the child to their home, and family visitation.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- What are the current findings or outcomes required by your Nation's law at the preliminary or initial hearing?
- Do these outcomes meet the Title IV-E requirements or is that not a concern?
- What types of services may be offered to parent(s), guardian(s), or custodian(s) and required by a Social Services Department to help families improve their home environments and to ensure the safety of the child? Are these services available in your community?

STEP 2: Establish a Vision for the Future

- What minimum services should tribal social services be required to offer the families of children in crisis before continuing the removal of the child from their parent, guardian, or custodian?
- What should the tribal Social Services Department be required to demonstrate to a judge in order to show that it has complied with such requirements?
- What changes are needed in your current outcomes of the preliminary hearing? Why?
- If desired, will the court findings be compliant to Title IV-E?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

G. Evaluations of the Child and/or Parents

The mental, emotional, psychological, or physical condition of the child and/or parents may be a critical issue in a child protection proceeding. The court may want an evaluation before makings its final decision. The agency (or parent[s]) may request an evaluation to plan for appropriate services to the child or family, or to develop evidence necessary for the full hearing. If a case is going forward to a full hearing, an evaluation is often useful to determine the fitness of a parent and the likelihood that the parent(s) is able to change its conduct in a satisfactory and timely matter so as to obtain the return of the child.

If allegations have been made that a child has been physically or sexually abused, those allegations should be evaluated by appropriate medical personnel. Protocols should be established to prevent retraumatizing the child by repeated or careless evaluations.[105]

A specific provision in the code authorizing the court to order any appropriate evaluations or testing is a useful tool in obtaining a speedy and comprehensive resolution to any CINA petition.

[105] Please see the Resource sections at the end of each chapter for more information on trauma-informed evaluation and care of Native children.

Selected Tribal Codes

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.450 Assessments, evaluations and examinations.

The Curt may order a medical, dental, psychological, psychiatric, sexual deviancy evaluation, therapist report, bonding assessment, or other professional examination of a child or any other party or person if it is relevant to the issues before the Court. Such examination shall be paid for by the parties if they can afford it, and if not, beda?chelh will request funds from the State and if those are not available, then as a last resort by the Tribes; provided, that the Tribes shall not be required to pay for such examinations and/or evaluations unless the funds have been appropriated to do so. The results of these reports shall be the property of beda?chelh and filed under seal. These reports may not be released without a court order. Only the parties to the case or their attorney may motion the Court to review their sealed reports. Outside agencies may not access these reports for any purpose. [Res. 2015-101].

Mashantucket Pequot Tribal Laws (Enacted 2008)
Title V. Child Welfare
Chapter 3. Reporting of Child Neglect and Abuse

§ 2. Interviews and Examinations

a. In any case where the LES or CPS reasonably believe that the child has been subjected to neglect or abuse, officials of those agencies shall be allowed to take photographs, x-rays, medical and psychological examinations of the child, and interview the child without first obtaining the consent of the parent, guardian/custodian.

b. All examinations and interviews of a child who may have been subjected to neglect or abuse shall be conducted under the supervision of the MDT and in a manner that minimizes additional trauma to the child.

c. The expense of such examinations and diagnostic tests shall be paid by the parents or guardian/custodian of the child, or if they are unable to pay, by HHS, which may seek reimbursement according to tribal law.

Tribal Code Commentary

The Tulalip Code authorizes the court to order medical, dental, psychological, psychiatric, sexual deviancy evaluations, therapist report, bonding assessment, or other professional examination of a child, or any other party or person, if it is relevant. This gives the court broad authority even to persons who may not be a party to the child protection action. The costs are the responsibility of the parent, if he or she can afford the expense. If the parents cannot afford it, then funds may be requested from the state, and only in the last instance is the Tulalip Nation required to pay. The resulting reports are the property of the beda?chelh and filed under seal and may not be released unless by court order. Outside agencies have no right to view the reports.

The Mashantucket Pequot Code authorizes CPS or law enforcement to take photographs, x-rays, and medical and psychological examinations of the child and interview the child without parental consent. These examinations should be conducted under the supervision of the MDT in order to minimize additional trauma to the child. The expense shall be paid by the parent or custodian of the child, if he or she can afford to do so.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- What types of evaluations would be helpful in the investigation of whether a child has been maltreated? Do you have these services in your Nation?
- Does your current code authorize the agency or the court to seek the evaluation or reports?

STEP 2: Establish a Vision for the Future

- What types of exams should be authorized by the court and which should be authorized by the child welfare agency?
- What changes should be made in your current law?
- What confidentiality protections do you have in your code?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

Additional Resources

Bubar, Roe, Basic Guidelines for Forensic Interviewers in Child Sexual Abuse Cases in Indian Country and Alaska Native Communities, Tribal Law and Policy Institute, 2000.
This short resource provides an overview of the primary considerations for the interview process when allegations of child sexual abuse arise in Indian country and Alaska Native communities. Forensic interviews are an important part of the investigative process, but require specialized training. This document outlines three areas of particular concern: training for interviewers, cultural competence, and core components of the child interview.

Evensen, Kimber, Pathway to Hope: Healing Child Sexual Abuse, Tribal Law and Policy Institute, 2007.
Guidebook and video that presents the voices of more than forty Native people, many of whom are survivors of child sexual abuse. The Community Facilitator's Guidebook provides a step-by-step process for tribal communities to end silence about child sexual abuse, support child victims, and promote healing of those who suffered childhood abuse.

Trope, Jack F., Title IV-E: Helping Tribes Meet the Legal Requirements, National Congress of American Indians Policy Research Center, 2010.
This guidebook was designed to provide Native Nations with information for running child welfare programs in compliance with federal law, with a particular focus on Title IV-E.

Victims of Child Abuse Project, Resource Guidelines, Improving Court Practice in Child Maltreatment Cases, National Council of Juvenile and Family Court Judges, 1995.
The purpose of these resource guidelines is to set forth the essential elements of properly conducted court hearings. The guidelines describe the requirements of juvenile and family courts in fulfilling the role now placed upon them by federal and state laws. These guidelines also describe how court calendars can be efficiently managed to achieve efficiency and avoid delays; explain the court staffing and organization necessary to make the judicial process run smoothly; and clarify costs associated with such reforms. These guidelines are meant to influence future administrative and funding decisions concerning juvenile and family courts. They are intended to help correct the gaping discrepancies that presently exist between legislative demands and judicial resources for child abuse and neglect cases.

White Eagle, Maureen, Bonnie Clairmont, and Lonna Hunter, Responses to the Co-Occurrence of Child Maltreatment and Domestic Violence in Indian Country, Tribal Law and Policy Institute, 2011.
This looks at the issues specific to Indian country relative to the co-occurrence of domestic violence and child maltreatment and highlights those practices that seem to be moving toward Native-specific promising practices.

Chapter 11: Child-in-Need-of-Assistance Proceeding

If after the completion of emergency or preliminary hearing proceedings addressed in Chapter 10, the child cannot be returned to the custody of the parents or other custodians without either a dismissal of the proceeding or a voluntary service agreement, the proceeding must move forward to the next phase, which is a regular foster care proceeding and is often called a CINA[106] proceeding.

A regular CINA proceeding is a more deliberate process; it has more protections that apply and is a more in-depth review of the family and child's situation than took place at the emergency proceeding. A full adjudication of whether the child is dependent or neglected and in need of care takes place, and full examination of the facts and witnesses is allowed. The responsible agency bringing the petition cannot rely on the affidavits of workers, as it could at the emergency hearing. A new, more comprehensive petition is usually filed, reflecting a more complete investigation of the family's circumstances and deficiencies. The responsible agency has had time to fully investigate placement options as well as services that may benefit the family and help it obtain the return of its child.

ASFA[107] plays a strong role in CINA proceedings; deciding what language to include in this code section may depend on whether a Nation contracts with a state or federal government for Title IV-E funding. ASFA requirements apply at several steps of a CINA hearing: the petition must make certain allegations to maintain eligibility for Title IV-E funding and the order entered by the judge must make specific findings. The court must make findings regarding aggravated circumstances, which ends the requirement of providing services to the family and determines whether the proceeding should move to terminate parental rights and make placement decisions.

Although we refer to these proceedings as CINA proceedings, the code examples in this section and other sections may call the proceedings child-in-need-of-care or youth-in-need-of-care proceedings.

CINA proceedings begin with a CINA petition. This should be a new petition and is not a continuation of any petition filed in a prior hearing. Emergency or preliminary hearing petitions are based on limited events and circumstances and do not meet the standards needed for a CINA petition.

A CINA proceeding includes a full trial, with opportunity for interested parties to conduct discovery, conduct evaluations, present evidence, present witnesses, cross-examine witnesses and evidence presented by other parties, submit motions, and present arguments on issues of concern and interest. The court must make a finding that it is not in the child's interest to return to the custody of the parents/custodian before the court can place the child elsewhere.

The tribal code should contain the following sections, and the CINA petition allegations should follow the specific requirements set out in the code. The CINA petition should have specific

[106] The terms child-in-need-of-aid, child-in-need-of-care, and youth-in-need-of-care are also used frequently. The acronym CINA is often used for all of those terms.
[107] Adoption and Safe Family Act of 1997, P.L. 105-89.

allegations (set forth in the code) that justify assuming jurisdiction over a child, and the factual circumstances supporting the allegations must be included in the petition. The tribal code must have the provisions on the following:

- Service of the petition to interested parties;
- The rights and responsibilities of each party;
- Timing and procedure for the CINA proceedings;
- Findings the court must reach in order to find a child qualified for jurisdiction;
- If appropriate, Title IV-E funding eligibility requirements;
- Conduct of the CINA proceedings;
- Issuance of the court's decision;
- Periodic review hearing;
- Placement of child in approved home;
- Selection of foster parents or other custodians;
- Provision for services to the child and family, in the absence of aggravated circumstances;
- Permanency hearings as required by ASFA;
- Provision regarding when foster placement should end and a more permanent solution such as termination, guardianship, and/or adoption of other permanency alternatives pursued; and
- Alternative dispute resolution, voluntary consent to jurisdiction, informal resolution, temporary resolution, and other issues.

Chapter Units

Unit A: Subsection's Purpose

Unit B: Regular Dependency Petitions

Unit C: Rights of Parties

Unit D: Informal Resolution, Default, and Pretrial Hearings

Unit E: Conduct of the Trial; Ruling of the Court

Unit F: Disposition

A. Subsection's Purpose

Your code likely already has an overall purpose section—to keep families together, preserve and enhance your Nation's community and culture, grow families, and so forth. At the start of the CINA section of your code state the purpose of this unit of a CINA proceeding. Any prior hearing or proceeding has been temporary and tentative, and a firm decision to remove a child from their family until family conditions change and are remedied has not taken place. When a child is placed in care as a result of the dependency (CINA) proceeding, this is the real turning point in a child protection proceeding. In order to protect the child's physical, emotional, and mental health, that child is moving inexorably down the path toward a permanent alternative custody arrangement unless the conduct that led to the removal is changed to the satisfaction of the tribal social services agency and the court.

In this preliminary subsection the Native Nation has the opportunity to set out the purpose and scope of the regular CINA proceeding. For example, the balance of concerns that controlled the preliminary hearing—whether the family needed to be disrupted and how to keep it together under any option—has now shifted to the health and safety of the child. It is necessary to remove the child from the family home on a more permanent basis to protect the child's physical, mental, and/or emotional health. Even though foster care is identified as a "temporary" placement, it is still more permanent in the sense that it continues until the family situation changes in a positive direction. Another likely purpose of this section would be to identify as quickly and specifically as possible the services that the family needs (together, such as housing and child care relief, or individually, such as anger management, parenting, education plan, and counseling) to bring the family back together and end the out-of-home placement of the child, and to specifically identify how each of these services will be accessed in a manner that works for the family.

Selected Tribal Codes

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part A. General and Dependency Provisions
Section 408— Child in Need of Care Proceedings

408.1 Statement of Purpose of Section[108]

(a) The purpose of this section is to set out the procedures for the adjudication and disposition of a child who is found to be a Child in Need of Care. This Code shall be interpreted liberally to achieve the objective of assisting families that need intervention while protecting those children who need to be supervised in or removed from their homes for their own protection.

(b) The procedures in this section are to be used upon a breakdown in the normal tiospaye system. At all times the Children and Family Court and others involved in overseeing the welfare of children within tribal jurisdiction shall allow and encourage traditional processes, as described in Section 405 to develop solutions to problems concerning the safety and development of children. The nontraditional systems described in Section 408 shall be implemented only when the Office of the Attorney General makes a showing to the Children and Family Court that there is clear and convincing evidence that the traditional systems are unable to ensure a child's safety.

(c) The Children and Family Court shall direct the Clerk of the Tribal Court to provide notice of all hearings under Section 408 to the appropriate Tiospaye Interpreter(s) who in turn shall be responsible for notifying the appropriate members of a child's and the child's parent(s)' guardian's, or custodian's Tiospaye. Notice under this paragraph does not relieve the LOWO Division of Child Protective Services from its own notice or collaboration requirements with Tiospaye Interpreters under other provisions of this Code.

(d) Section 408 is also intended comply with the Adoption and Safe Families Act, PL 105-89, relevant provisions codified at 42 USC §§ 671 & 675.

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part III Children in Need of Care

§ 8.026. Adjudicatory Hearing

[sections omitted]

(d) **Purpose of Hearing**—The Court shall conduct the adjudicatory hearing for the purpose of determining if a child is a child-in-need-of-care. The Court shall hear testimony and receive evidence concerning the circumstances that gave rise to the petition.

[108] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part IV: Disposition and Review of Children Found to Be in Need of Care

§ 8.027. Policy

It is the policy of the Tribe that the removal of a child from his or her home for temporary emergency or foster care placement, long-term placement, or termination of parental rights can only result from a judicial determination that continued custody would be contrary to the health and welfare of the child, and that reasonable efforts to prevent removal have been made and have not been successful. Where more than one child is removed from a home, it shall be the Tribe's policy to keep all of the children so removed in a single placement or shelter whenever possible.

This policy shall take precedence over any conflicting placement preferences within this Code. A child shall be placed where possible in the least restrictive setting and in close proximity to the parents' home, unless the best interests, special needs, or health and safety of the child require otherwise. Extended family and relatives shall have first consideration for placement of a child provided that they are able to meet the needs of the child.

Tribal Code Commentary

The Oglala Sioux Child and Family Code indicates that the purpose of the CINA section of its code is to set out procedures for the adjudication and disposition of a child found to be a child-in-need-of-care. It directs the court to interpret the code liberally in order to achieve the objective of assisting families that need intervention while protecting children. The procedures are to be used when there is a breakdown in the normal tiospaye system. Traditional processes to find solutions to problems should be allowed and encouraged. Nontraditional systems should be used when the court finds that traditional systems are unable to ensure a child's safety. Tiospaye notice and involvement continues.

The Siletz Code simply defines the purpose of the hearing as determining whether a child is in need of care. Later, the Siletz Code reiterates that the placement in foster care or continued placement outside the child's home can only be done with a finding by the court that continued custody in the home would be contrary to the health and welfare of the child and that reasonable efforts to prevent removal have been made and were unsuccessful. Keeping children of the same family together in one placement is an important goal, as is finding a placement close to parents. Extended family are to be considered as a first placement option. These are consistent with federal requirements.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Review the purpose section of your Children's Code.
- Review to see if there is a purpose section to the CINA (adjudicatory) proceedings.
- Do you need to consider Title IV-E requirements? Does that impact your purpose?

STEP 2: Establish a Vision for the Future

- Consider whether your Nation desires to change the court's focus or purpose once a case completes the emergency proceedings and reaches the regular court proceeding (CINA proceedings).
- Describe how the purpose may change.

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

B. Regular Dependency Petitions

A new or amended petition is necessary to initiate a regular dependency or CINA proceeding. The temporary or emergency petition was likely more limited in focus; it was likely based on more preliminary or limited information obtained without investigation; and its focus was to protect the immediate health and safety of the child and family while their situation was investigated and their resources and options explored. The regular dependency or neglect petition is more focused on the condition and long-term needs of the child.

In this section, the practicalities of filing the petition are covered:

- Who may file or initiate a petition?
- What elements or allegations must the petition contain to survive legal challenge?
- What notice must be given of the petition and to whom?
- How must the petition be served?

Selected Tribal Codes

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part III Children in Need of Care

§ 8.025. Petition

(a) **Investigation and Petition**—The tribal ICW Program shall review and investigate all reports of suspected child abuse and neglect made pursuant to this Code, and shall file a petition with the Court upon a preliminary determination that a child is a child-in-need-of-care.

The tribal ICW Program may seek the assistance of tribal law enforcement to review the reports.

(1) The form of the petition shall be as follows:

(2) The petition shall state:

(A) The specific sections of this Code which give the Court jurisdiction over the child custody proceeding;

(B) The provisions of this Code under which the child is alleged to be a child-in-need-of-care, or the relevant Court order which is alleged to have been violated;

(C) The name, address, age and tribal status of the child who is the subject of the petition;

(D) The name, address, age and tribal status of the child's parent(s), guardian, or custodian;

(E) The facts upon which any allegations relating to the petition are based, including the date, time, and location where the alleged facts occurred and the names of any alleged witnesses;

(F) The efforts made by the ICW Program to provide services to prevent or eliminate the need for removal of the child from the home; and

(G) If the child is in emergency custody, the time and date that the child was removed from the home, the reasons for that placement, and the efforts made by the ICW Program to reunite the family; and

(H) Whether continued removal of the child is necessary for the health, safety, and welfare of the child.

(b) **Assistance from Tribal Attorney**—The tribal attorney may assist in the preparation of any petition or motion under this Code.

[sections omitted]

§ 8.026. Adjudicatory Hearing

(a) **Time Frame for Adjudicatory Hearing**—The Court shall hold an adjudicatory hearing on the petition within forty-five (45) days after the

petition is filed. Failure to comply with the time limits set out in this section, without good cause shown, shall result in the dismissal of the petition and shall prevent any future filing of a petition based on the same facts; provided, that the Court may take necessary steps in such circumstance to protect the health and safety of the child involved.

(b) **Notice**—Notice of all hearings on the petition or on any matter related to the petition or on any matter related to the petition or the child shall be given to the parties as required by the Tribal Court Rules of Procedure.

(c) **Summons**—Summons on the petition shall be issued and served as required by the Tribal Court Rules of Procedure, and in accordance with the following:

(1) At least five (5) days before the adjudicatory hearing, the Court shall issue a summons to:

(A) The child;

(B) The child's parent(s), guardian, or custodian;

(C) Any person the Court believes is necessary for the hearing; and

(D) Any person the parties believe is necessary for the hearing

(2) The summons shall contain the name of the Court and the date, time, and place of the hearing.

(3) A copy of the petition shall be attached to the summons.

(4) The summons shall be delivered personally by a tribal law enforcement officer or appointee of the Court. If the summons cannot be delivered personally, it may be delivered by certified mail, return receipt requested. If the summons cannot be delivered personally or by certified mail, any other method reasonably designed to give notice to the necessary persons shall be sufficient.

[sections omitted]

§408.2 Petitions to Initiate Actions; Who May File a Petition

(a) Every proceeding under this Code shall be instituted on behalf of the Oglala Sioux Tribe and in the interests of the child and Tribe, but with due regard to the rights of parents, extended family members, guardians, custodians, tiwahe, and tiospaye; and, in every Child in Need of Care proceeding the child shall be protected and cared for as a ward of the Tribe.

(b) The Tribe, through its Office of the Attorney General, shall file petitions under this Code. Petitions shall be confidential and only accessible by authorized tribal court personnel, the LOWO Division of Child Protective Services, the parent(s), guardian, or custodian, the child's Tiospaye Interpreter, and any court appointed advocates or service providers on behalf of the child.

§408.3 Contents of Petition

Any petition filed under this Code must contain the following information:

(1) The name, address, and age of the child and disclosure of the child's tribal affiliation;

(2) The names and addresses (if known) of the natural parents, grandparents, legal guardian, or custodian of the child, and any persons who have adopted the child either through court action or by traditional adoption;

(3) A description of attempts to contact the tiospaye of the child and of the parents prior to the filing of the petition;

(4) A description of whether an informal resolution is suitable in the case;

(5) A statement of the facts known to the petitioner that support the allegation that the child is a Child in Need of Care, or that he or she belongs to a Family in Need of Services. The facts shall be written briefly and in language that is understandable to the parent(s), guardian or custodian, extended family members, and tiospaye members. Legal terms shall be explained. The names of any anonymous reporters shall not be disclosed in the petition. Any DPS or CPS reports or affidavits, or reports or affidavits provided by a Tiospaye Interpreter shall accompany the petition;

(6) A statement whether an emergency removal of the child was made and an explanation of why such a removal was made;

(7) A statement of whether the proceedings may be governed by the Adoption and Safe Families Act, if known;

(8) A statement disclosing whether any other Indian tribe may have an interest in the matter because of prior proceedings in the tribal court of another Indian nation or because of the membership status of the child or the parents of the child; and

(9) To prevent fraud and frivolous filings, the petition shall be verified before a notary public or the Clerk of the Tribal Court.

§408.4 Service of Petition

The petition and supporting documents shall be served, either in person or by registered mail with a return receipt requested, upon the natural or adoptive parents, any guardian or custodian, the appropriate Tiospaye Interpreter(s)and upon the Indian tribe where the child is a member, if not a member of the Tribe that is pursuing the action. In those cases where the natural parents or adoptive parents cannot be located, despite a diligent search, service shall be made by publication in the Tribal newspaper, or other newspaper for legal notices as provided for by a resolution of the Tribe. Notice by publication shall be preceded by a court order approving such notice and the Petitioner shall bear the costs for such publication.

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.480 Petitions alleging that a child is a youth-in-need-of-care.

(1) A dependency case is started by beda?chelh filing a petition, with a sworn declaration, alleging that the child is a youth-in-need-of-care and asking the Court to order:

(a) Emergency pickup of a child and preliminary inquiry hearing; or

(b) Preliminary inquiry hearing; or

(c) Transfer jurisdiction of a child to Tribal Court.

(2) The petition shall set forth, in ordinary and concise language, the following facts as are known:

(a) The full name, residence, date and place of birth, sex of child, and Tribal status;

(b) The names and residences of the child's legal parents, guardians, or custodians. In addition, the names and residences of putative fathers, if any;

(c) The facts upon which the allegations are based, and which, if true, would bring the child within the jurisdiction of the Court as set forth in this chapter. Such recitation shall include, but not be limited to, the date, time, and location where the alleged facts occurred, and the names of any alleged witnesses, as well as all other information upon which the petitioner relies to form a belief that the child is within the jurisdiction of the Court;

(d) Whether, and if so where, there is a custody proceeding involving the child pending in another court; and

(e) If the child is in placement out of parental or guardian care, the time and date the child was placed, the location of the child if not confidential, the reasons the child has been placed out of parental or guardian care, and the active efforts made by beda?chelh to prevent or negate the need for removal of the child.

(3) The petition and supporting documentation must be served on the parent or guardian, and if the child is in custody at the time the child is removed, on the entity with custody other than the parent. Failure to effect service does not invalidate the petition if service was attempted and the parent or guardian could not be found.

(a) Notice shall be served on:

(i) Any person the parties or the Court deems necessary for proper adjudication; and

(ii) If the child is not enrolled in the Tulalip Tribes, any tribe the child is enrolled in or is eligible for enrollment.

(b) Service shall be consistent with TTC 2.10.030(2), with the exception that as a party, beda?chelh may serve the parents or guardians with the pleadings.

(4) Attendance of Parent(s) or Guardian(s). If the child's parent(s) or guardian(s) or custodian are not present at the preliminary inquiry hearing, the Court shall determine what efforts have been made to serve them with the petition and supporting documents. If reasonable efforts have been made, the Court may proceed with the hearing in their absence.

(5) Dismissal of the Petition. The Court may dismiss a petition at any stage of the proceedings with good cause shown. [Res. 2015-101].

Tribal Code Commentary

The Siletz Tribal Code specifically describes the contents of the petition for a child-in-need-of-care and authorizes the tribal attorney to assist in the preparation. Among the requirements are:

- Specify sections of the code that give the court jurisdiction.
- Code provisions under which the child is alleged to be a child-in-need-of-care.
- Name, address, age, and tribal status of the child.
- Name, address, age, and tribal status of parent(s), guardian, or custodian.
- Facts upon which the allegations are based, including date, time, and location of incidents.
- Efforts made by ICW to provide services to prevent or eliminate the need for removal.
- If an emergency custody occurred, time, date the child was removed from the home, reasons, and efforts to reunite.
- Whether continued removal of child is necessary for health, safety, and welfare of the child.

The Siletz Code also clearly states who should receive notice of the hearing, summons, and petition, as well as providing a time frame for when the hearing should be held. It describes the information required in the summons and describes how it should be served.

The Oglala Sioux Nation's Code requires the Office of the Attorney General to file petitions. It requires that the petition be confidential and only accessible by authorized tribal court personnel; LOWO Child Protective Services; the parent(s), guardian, or custodian; the child's Tiospaye Interpreter; and any court-appointed advocates or services providers. The requirements of the petition are similar to those of the Siletz Tribal Code, but they are more extensive and there is recognition of tradition. It requires names and addresses of natural parents, grandparents, legal guardian or custodian, or any persons who have adopted the child through court action or by traditional adoption. It also requires the petition to contain a description of the attempts to contact the tiospaye of the child and parents and a discussion of whether informal resolution is suitable in the case. Reports should accompany the petition. If emergency removal was made, an explanation is required. A statement of whether the proceedings may be governed by the ASFA and a statement disclosing whether any other Native Nation may have an interest in the matter, due to citizenship of the child or parents, is necessary. The petition must be signed before a notary public.

The Tulalip Tribal Code dependency process is started by the beda?chelh filing a petition alleging that the child is a youth-in-need-of-care. The petition requires the name and address of the parents or guardians, including putative fathers. The facts supporting the allegations must be specifically laid out. If the child is in an out-of-parental/guardian placement, the reasons for placement and need for removal must be provided. Petition and supporting documentation are to be served on parents, guardians, and any person the parties or the court deems necessary for proper adjudication. If the child is not enrolled in the Tulalip Nation, then the Nation the child is a member of should be notified.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- What are the requirements of the petition in your current code section?
- Do you have a representative, such as an attorney from the Attorney General's office, to represent the social service agency and prepare the petition and ensure the affidavits are adequate?
- Do you have to meet the requirements of ASFA in your petition?

STEP 2: Establish a Vision for the Future

- Are there family members or tribal members, other than parents and custodians, who should also be notified of the petition because of tradition?
- If you need to meet ASFA, ensure you have a list of the requirements for the petition in your code.

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

C. Rights of Parties

The rights of parties in a CINA proceeding—the child, parents, Native Nation, social services agency, caregivers, relatives, and cultural groups—should be set out in detail in the Children's Code so there is no confusion. Tribal court proceedings are governed by ICRA, 25 U.S.C. § 1302, and by any individual rights provisions in the Nation's constitution. Many Native Nations do not permit, and ICRA does not require, attorneys to be present in child protection proceedings. Limited resources often make it difficult for the Native Nation to have legal representation in civil child protection proceedings. Many social workers present cases rather than attorneys. Use of licensed spokespersons or relatives is often an alternative to attorney appearance by parents or custodians.

The Native Nation should decide and indicate in its code whether to provide for independent representation of the child and the child's interest in a tribal child protection proceeding. Traditionally it is the responsibility of the social services agency to protect the child and represent the child's interests, although the Children's Code can require the tribal social services agency to consider a different controlling standard—such as keeping the family together. States have recently been providing multiple layers of additional representation of the child's interest, including but not limited to guardians ad litem (persons appointed just to represent the best interests of the child) and CASAs (usually lay people appointed to oversee the work of the tribal social services agency to ensure the child's interests are being taken into account). It is up to the Native Nation to decide what level of independent representation, if any, to give to the child's interest in a tribal child protection proceeding.

Whether relatives should be allowed to appear in a tribal child protection proceeding or to have independent legal representation is another issue that should be addressed in the code. States have been giving more rights to persons who have custody of a child, including foster parents, and the Native Nation must decide whether to give any rights to such temporary custodians in tribal child protection proceedings. Sometimes the rights of these caregivers is limited to being able to appear in court and offer their perspective on what is going on with the child.

The specific rights that parties may have—to appear, present witnesses, see reports and evidence, ask questions and cross-examine witnesses, and so forth—should also be spelled out in as much detail as possible. Some parties may have more limited rights than other parties. Such rights, and the justification for providing more or less rights in a tribal child protection court proceeding, should be spelled out in the Children's Code. Title IV-E has a laundry list of people required to be notified, but they are not all parties.

Selected Tribal Codes

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part A. General and Dependency Provisions
Section 408— Child in Need of Care Proceedings

§ 408.8 Rights of Parties to Proceedings—Children's Rights[109]

In addition to rights defined in Section 403.1, explaining Wakanyeja Ta Wowasake, a child involved in Child in Need of Care case shall have a right to each of the following:

(1) A Court-appointed Guardian Ad Litem or CASA volunteer, if such are available to the Children and Family Court;

(2) To be represented by an attorney retained by the child;

(3) To have tiwahe and tiospaye members present at all stages of the proceedings;

(4) To have tiwahe and tiospaye members speak on the child's behalf if the child so requests;

(5) To remain living within the child's tiospaye if at all possible provided the exercise of this right would not cause serious physical or emotional harm to the child;

(6) To know both his or her maternal and paternal tiospaye; and

(7) To continue a relationship with his or her tiospaye even where placement is made outside his or her tiwahe or tiospaye.

§ 408.9 Rights of Parties to Proceedings—Parent and Extended Family Rights

In addition to the rights and responsibilities they may have as members of a child's tiwahe and tiospaye, as defined in Section 403.2, explaining Tiwahe na Tiospaye ta Wowasake, the parent(s), guardian, or custodian shall have the following rights in a Child in Need of Aid proceedings concerning the child:

(1) The right to be apprised of the nature of the allegations that constitute neglect or abuse and the right to admit or deny those allegations;

(2) The right to be represented by counsel of their choice at their own expense, or court-appointed counsel if the Tribe has such counsel available;

(3) The right to be present at all stages of a proceeding and the right to have tiwahe and tiospaye members present and to speak on their behalf should they request the exercise of that right;

(4) The right to offer testimony and evidence regarding the petition and the right to review all evidence upon which the petition is based, provided that the right of an anonymous reporter to remain anonymous shall remain intact;

[109] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

(5) The right to be heard regarding any change of placement of a child in the care of the LOWO Division of Child Protective Services; and

(6) The right to reasonable visitation with any child of the family, tiwahe or tiospaye that has been placed outside the home provided the exercise of visitation would not compromise the child's best interests.

§408.10 Rights of Parties to Proceedings—Tiospaye Rights

In addition to rights and responsibilities they may have as members of a child's tiospaye, as defined in the Section 403.2, explaining Tiwahe na Tiospaye ta Wowasake, extended family members and members of the child's tiospaye shall have the following rights in a Child in Need of Care proceeding concerning that child:

(1) The right to be present at all stages of the proceeding and the right to be heard regarding the best interest of the child;

(2) The right to be considered by The LOWO Division of Foster Care or other placement agency for either a short-term or long-term placement of the child should the child not be able to be safely returned to his parent(s), guardian, or custodian; and

(3) The right to seek a Tribal foster care license provided the applicant is eligible for such a license.

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part I General Provisions

§ 8.006. Parties to Child Custody Proceedings

(a) **Parties**—The following are parties to child custody proceedings conducted pursuant to this Code:

(1) The child;

(2) The child's parent(s), guardian and/or custodian;

(3) The ICW Program;

(4) The guardian ad litem; and

(5) Any other person the Court finds necessary for the proper resolution of the matter.

(b) **Rights of Parties**—Parties to child custody proceedings are entitled to certain rights, with some restrictions and limitations necessary to protect the health, safety and best interests of the child, including the following rights:

(1) To receive notice of the proceedings;

(2) To retain a legal representative of their own choosing and at their own expense;

(3) To appear at hearings, present evidence, and call, examine and cross-examine witnesses;

(4) To request placement and/or custody of child;

(5) To inspect records; and

(6) To request a hearing or to appeal a final order.

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.530 Child's Rights.

A child within the jurisdiction of the Tulalip Tribes has the right to be treated with dignity and respect and to be in a safe and supportive environment free from abuse and neglect. [Res. 2015-101].

4.05.380 Parent or guardian's rights.

Parents and guardians have the right to be treated in a respectful manner at all times. [Res. 2015-101].

4.05.390 Parent or guardian's responsibilities.

(1) **Case Plan**. The Court may order the parent submit to services and other requirements.

(2) **Program Fees, Support and Other Related Costs**. Parents or guardians have an obligation to support or provide support for his or her child at all times unless parental rights or guardianship have been legally terminated or suspended.

(3) **Duty to Keep the Court and beda?chelh Updated on Address Changes**. If the parent or guardian has a change of address during the pendency of proceedings under this chapter, the parent or guardian must inform beda?chelh, the Court and/or the agency involved with the family. [Res. 2015-101].

4.05.400 Rights of parties in court proceedings.

(1) Except as otherwise expressly provided in this chapter, all parties shall be entitled to notice consistent with TTC 2.10.040 and the following rights in every proceeding under this chapter, notice of which shall be provided at each party's first appearance.

(a) The right for each person to have an attorney or spokesperson represent them at the proceeding, but that they may have to pay for such representation.

(b) If a party appears at a proceeding without counsel, the Court shall advise the party of the right to request a continuance of the proceeding in order

to seek counsel, and upon such request, the Court may continue the proceeding for a reasonable period of time.

(c) If it appears that the party cannot pay for counsel, the Court shall inform him or her of any available services which provide representation.

(d) The opportunity to introduce, examine, and cross-examine witnesses.

(e) The opportunity to discover, offer, and inspect evidence.

(f) The opportunity to present arguments and statements.

(g) A party need not be a witness against him/herself if there is a pending criminal case related to the dependency.

(2) There is no right to trial by jury during any proceeding conducted pursuant to this chapter. [Res. 2015-101].

Tribal Code Commentary

The Oglala Sioux Code provides that a child involved in a CINA proceeding has the right to a court-appointed guardian ad litem or CASA volunteer (if available), to an attorney retained by the child, or to have a tiwahe and tiospaye member speak on the child's behalf, if the child requests. A child also has rights to remain living within the child's tiospaye if possible, know both the child's maternal and paternal tiospaye, and continue a relationship with the child's tiospaye even where placement is made outside the tiwahe or tiospaye.

According to the Oglala Sioux Code the parent(s), guardian, or custodian have the right to be apprised of the nature of the allegations that constitute maltreatment and the right to admit or deny these allegations. They have the right to counsel of their choice at their expense, or court-appointed council if the Nation has counsel available. They have the right to present at all stages of the proceedings and to have tiwahe or tiospaye members present or speak on their behalf. They have the right to offer evidence and testimony regarding the petition and to review all evidence upon which the petition is based. (Anonymous reporters remain anonymous.) They have a right to be heard regarding any change of placement. They also have the right to reasonable visitation if the child is placed outside the home, provided visitation would not compromise the child's best interests.

The tiospaye rights include the right to be present at all stages of the proceeding and the right to be heard regarding the best interest of the child. They also are to be considered by the LOWO Foster Care Division for either a short-term or long-term placement of the child should the child not be able to safely return to their parents. They have a right to seek a tribal foster care license, if eligible.

The Siletz Tribal Code indicates parties to a child custody proceeding (child, parents, guardian, or custodian, ICW program, guardian ad litem, and any other person the court deems necessary) have the right to receive notice of proceedings, retain legal representation at their expense, appear at hearing, present evidence, examine and cross-examine witnesses, request placement of custody of the child, inspect records, and request a hearing or appeal an order.

The Tulalip Tribal Code provides similar rights to parents, guardians, or custodians, but also outlines some of their responsibilities to participate in the proceeding. It also states that a child has the right to be treated with dignity and respect and be in a safe supportive environment and indicates that the parents, guardians, and custodians must also be treated with respect. It specifies within its code that no party need testify against themselves, if there is a pending criminal matter. It also places a requirement on the court to notify a party of available services to provide representation, if the party should appear in court without an attorney.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- What rights do participants in a child protection proceeding have in your Nation?
- Do all participants have similar rights? How and why do they differ?
- What options are available for providing representation for the child, parent, or tribal social services in your community?
- Do you have guardians ad litem, CASA advocates, or other advocates in your court system to represent children?

STEP 2: Establish a Vision for the Future

- If you currently do not have representation for children or parents, do you have an interest in any programs, such as lay advocates, guardians ad litem, or CASAs?
- What rights should parties or participants in your proceedings have? Should they be the same or should they differ depending upon their status?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

D. Informal Resolution, Default, and Pretrial Hearings

Many tribal Children Codes provide an opportunity for informal resolution of a dependency proceeding after a petition has been filed. This informal resolution can take place in a variety of forms, often with all relevant stakeholders invited or present, including extended family members. Sometimes this takes the form of a family resource meeting with various professionals and tribal employees present to help achieve a mutually agreed upon solution to a petition. Either the parents may agree to the allegations of the petition so services can begin immediately to help rectify whatever deficiencies the family is experiencing, or the tribal child welfare agency may be able to agree to leave the child in the home with agreed upon support and commitment of the parents and family to access specific services.

In some proceedings the parents may not appear to contest the allegations of a CINA petition, and the code should set out what happens in that situation.

After a petition has been filed and a response or answer to the petition has been filed by the parent(s), it is often useful for the tribal court to set a hearing to discuss how the case and trial will proceed: length of trial, discovery that needs to be provided, expert witnesses, and depositions if necessary, and so forth. This will allow the trial to take place more efficiently and conserve tribal judicial resources. It will also allow the parties, especially parents, to ask questions about their rights and how the case will proceed against them.

Selected Tribal Codes

Informal Resolution Codes

Confederated Tribes of the Grand Ronde Community of Oregon Tribal Ordinances
Children and Families Ordinance (Amended 6/03/15)
Part II Youth-In-Need-Of-Care

[sections omitted]

(h) **Preadjudication Procedures and Services.**

(4) **Family Unity Model**. After the Preliminary Inquiry Hearing, and prior to the Adjudicatory Hearing, CFS shall hold a conference with the parent, guardian, or custodian, and all attorneys and /or spokespersons, and the child, if appropriate, and any other persons who may provide helpful participation, as approved by CFS. For each child and parent, guardian, or custodian willing to work cooperatively with CFS, CFS shall develop an appropriate case plan, using the Family Unity Model, designed to protect the child's health and safety and to reunify the family. The plan will be in place pending adjudication and will be specific as to:

(A) The areas in which the family needs assistance;

(B) The services required to address those needs;

(C) Who will provide those services;

(D) The time lines to which the family and CFS will be held for completion of services; and

(E) How the family's progress, or lack of progress, will be measured.

(5) **Settlement Conference**. A Settlement Conference shall be held on the date and time set by the Court pursuant to Part II(g)(5)(E) at a location agreed to by the parties. If no location can be agreed to by the parties, the Settlement Conference shall be held at the Tribal headquarters in Grand Ronde. All parties, including CFS and the child's parent, guardian, or custodian are required to be present at the Settlement Conference.

(A) **Purpose**. The purpose of the Settlement Conference is for the parties to discuss the allegations in the petition and determine whether the parties can avoid an Adjudicatory Hearing on the allegations in the Petition for Custody by:

(i) Entering into a Family Reunification Agreement pursuant to Part II(h)(6); or

(ii) Amending the allegations in the Petition for Custody so that if the petition is so amended, one or all of the parent, guardian, or custodian will stipulate to the truth of the allegations.

(B) **Report on Need for Trial**. If the parties cannot reach a settlement, the parties will inform the Court at the Pre-Trial Conference.

(6) **Family Reunification Agreement**. At the Settlement Conference, or at another appropriate time and place, a Family Reunification Agreement may be discussed. A Family Reunification Agreement shall be reduced to writing and signed by the parties and shall state the conclusions reached as a result of the conference and specify in detail what is expected of CFS and the parties entering into the agreement. Each party will receive a copy of the signed agreement which should include a statement that the agreement has been read to the parties and that they understand the requirements and consequences of the agreement. If such an agreement is satisfactory to all parties, it will be presented to the Court at the Pre-Trial Conference or at any time prior to the Adjudicatory Hearing. If the Court accepts the Family Reunification Agreement, the following shall apply:

(A) **Time Limit**. The Family Reunification Agreement will be in effect no longer than six (6) **months**, except upon order of the Court. If good cause is shown, the agreement can be extended, but no longer than an additional ninety (90) days.

(B) **Review, Adjudication, or Dismissal**. CFS shall, with the family if possible, review the family's progress at least every thirty (30) days. If, at any time after the initial thirty (30) day period, but before the expiration of six (6) months, CFS concludes that the party entering into the agreement is fully compliant, and it is in the best interests of the child, CFS may move the Court for dismissal of the case. If, at any time after the initial thirty (30) day period, but before the expiration of six (6) months, CFS concludes that the party entering into the agreement is noncompliant, and that continuing the agreement is not in the best interests of the child, CFS may move the Court for termination of the Family Reunification Agreement and entry of an adjudicatory order. If the party entering into the Family Reunification Agreement successfully completes the agreement, CFS will notify the Court, and the Court may dismiss the Petition for Custody as to that party, with or without a hearing, and without prejudice.

(C) **Court Resolution of Disputes**. If there is a dispute as to whether or not the agreement has been successfully completed, a hearing may set prior to the expiration of the agreement and the Court will determine the matter.

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part A. General and Dependency Provisions

§408.13 Informal Resolution[110]

(a) At any time between a Temporary Emergency Custody Hearing and an Adjudicatory Hearing, the Children and Family Court may allow, or may require on its own initiative, referral to an informal resolution process.

[110] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

(b) This process should be considered by the Office of the Attorney General and the LOWO Division of Child Protective Services in those cases where a parent has voluntarily placed a child with the LOWO Division of Child Protective Services because of an expressed inability to provide for the child, not due to the faults or omissions of the parent(s), guardian, or custodian, and in those cases where the child does not meet the definition of a Child in Need of Care, but there has been a breakdown in the family relationship and intervention is needed.

(c) Upon referral to the informal resolution process, the child and family will be summoned into Children and Family Court to meet informally with the judge, the LOWO Division of Child Protective Services, the Tiospaye Interpreter, appropriate members of the child's extended family and tiospaye, and any other person whose presence is necessary for a full and open discussion of the problems facing child and his or her family. At that meeting the group will attempt to achieve a plan to assure that appropriate intervention is made to prevent future court involvement in the family. The parent(s), guardian, custodian, appropriate extended family and tiospaye members, the child, and the LOWO Division of Child Protective Services, shall sign a plan stipulating what each will do to address the problem or crisis facing the family.

(d) Review hearings shall be held every 90 days and the Children and Family Court will review the plan in an informal manner to assure that progress is being made.

(e) Participation in a plan under this section shall not prevent the Office of the Attorney General from filing a neglect or abuse petition or other legal action.

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part III Children in Need of Care

§ 8.022. Voluntary Cases

(a) **When Permitted**—Any time before an adjudicatory hearing on a petition alleging that a child is a child-in-need-of-care, the tribal representative may hold an informal resolution conference with the child or the child's legal representative and the child's parent(s), guardian or custodian to discuss alternatives to filing a petition alleging that the child is a child-in-need-of-care if:

(1) The admitted facts would bring the case within the jurisdiction of the Court;

(2) An informal resolution of the matter would be in the best interests of the child, the child's family and the Tribe; and

(3) The child or the child's legal representative and the child's parent(s), guardian, custodian voluntarily consent to an informal resolution.

(b) **Written Agreement Between Parties**—As a result of the informal resolution conference, the tribal representative may enter into a voluntary service agreement or agreements with the child or the child's legal representative and the child's parent(s), guardian or custodian to provide prevention services and assistance, without formal Court involvement, in a manner designed to promote family unity and social stability. The primary goal of the informal adjustment agreement shall be the child's safety.

(1) If a voluntary service agreement is reached, the tribal representative shall set out in writing both the agreement and the admitted facts that would have brought the case within the jurisdiction of the Court. The family and the ICW Program shall sign the voluntary service agreement.

(2) The agreement may include, but shall not be limited to:

(A) Referrals for the child and the child's parent(s), guardian or custodian to a community agency, service provider, and/or a medical or mental health facility for needed assistance; and

(B) Terms of supervision that regulate the activities of the child and the child's parent(s), guardian or custodian, and are calculated to assist and benefit the family.

(c) **Time Frame**—A voluntary service agreement shall not exceed six (6) months in length, unless the time period is extended by recommendation of the ICW Program based upon its assessment of the family's engagement in and progress in fulfilling their obligations voluntary service agreement, and upon a determination of the Tribal Court that continuation of the voluntary placement is in the best interest of the child.

(d) **Periodic Review of Agreement**—The tribal representative shall review the family's progress every thirty (30) days. If, after the initial thirty (30) day period but before the end of six (6) months, the tribal representative decides that the terms of the agreement as it is being followed are not serving the best interests of the child or that the child's health or safety is in jeopardy, the representative shall file a petition alleging that the child is a child-in-need-of-care pursuant to this Code.

(e) **Closing the Case**—If the parties follow and fulfill the terms of the voluntary service agreement and the tribal representative does not recommend that a petition be filed, at the expiration of the agreement the tribal representative shall close the case.

(f) **Lack of Agreement**—If a voluntary service agreement cannot be reached and it appears that no other alternative will be in the best interests of the child and the Tribe, the ICW Program shall file a petition alleging that the child is a child-in-need-of-care.

(g) **Exclusion of Statements in Future Hearings**—If a petition is filed, no statements made during the course of the informal resolution conference, whether written, oral, or demonstrative, may be used against any of the parties or witnesses. The voluntary service agreement and testimony regarding the

family's compliance with the conditions and terms is admissible in such hearings.

[sections omitted]

Default Codes

Children's Code of the Tohono O'odham Nation (Enacted May 23, 2013)
Title 3—Children
Chapter 1 Children's Civil

Section 1513 Judgment in the Absence of a Parent, Guardian, or Custodian

(A) If the parent, guardian, or custodian fails to appear at an initial or adjudicatory hearing under this Article, the Court may deem the absence of the parent, guardian, or custodian to be an admission to the petition, and make appropriate findings and orders pursuant to Section 1513 of this Chapter. The court must be satisfied that service of notice upon the parent, guardian, or custodian is complete.

(B) If judgment is made in the absence of the parent, guardian, or custodian, the Court shall specify in its written order the facts, grounds, and sections of this Article upon which it relied to make the decision.

Mille Lacs Band Statutes Annotated (Current through February 7, 2014)
Title 8–Children and Families
Chapter 13. Child/Family Protection

Section 3153. Default Judgment

(a) **When Appropriate**. If the parent, guardian or custodian fail to appear for the formal trial, the court may find the parent, guardian or custodian in default, and enter a default order of child/family protection and order necessary intervention and appropriate steps the parents, guardian or custodian must follow to correct the problem.

(b) **Notice Determination**. Prior to finding a parent, guardian, or custodian in default, the court must be satisfied actual notice has been given or that all reasonable steps have been taken to provide notice of the formal trial to the parent, guardian or custodian. The court must also find that the petitioner can prove the elements of the child/family protection petition.

(c) **Written Order**. If the parent, guardian or custodian is found in default, the court shall specify the facts, grounds, and statutory provisions upon which it relied to make the decision.

Tribal Code Commentary

The Grand Ronde Community Ordinance requires that prior to an adjudicatory hearing, CFS holds a conference with the parents, their attorney or spokesperson, and the child, if appropriate, and any other person who may be helpful. The code requires that the Family Unity Model be used to develop an appropriate case plan with the parent willing to cooperate, in order to reunify the family. The plan should specify the areas in which the family needs assistance, the services required to meet the needs, who will provide services, the time lines involved, and how the family's progress or lack of progress is measured. Additionally, a settlement conference is required for the purpose of discussing the allegations and determining whether the parties can avoid an adjudicatory hearing on the allegations by entering into a family reunification agreement or amending the allegations so that a party can stipulate to the truth of the allegations. A family reunification agreement is required to be in writing, signed by the parties. If the court approves of the family reunification agreement, it is in effect no longer than six months. If the parties cannot reach a settlement the court is informed at the pretrial conference. CFS reviews the family's progress every thirty days and if the party is fully compliant the petition may be dismissed by the court. If there is disagreement on full compliance, a hearing is held to determine the matter.

The Oglala Sioux Code also allows for informal resolution between the emergency hearing and the adjudicatory hearing. The informal process may also be used for voluntary placements. The child and family meet informally with the judge, LOWO Division of Child Protective Services, the Tiospaye Interpreter, members of the extended family and tiospaye, and any other person deemed necessary. A plan is developed to assure appropriate intervention. The plan is signed by the parties. Review hearings are held every ninety days. Participation in this process does not prevent the Attorney General from filing a CINA petition or other legal action.

The Siletz Tribal Code allows for informal resolution any time before the adjudicatory hearing, if the court has jurisdiction, if the informal resolution is in the child's best interests, and if the child's legal representative and the child's parents, guardian, or custodian consent to an informal resolution. The agreement must be in writing, signed by the parties. The agreement should not exceed six months. Assessment and supervision should be part of the agreement. Review should take place by a tribal representative every thirty days. No statements made during the informal resolution meeting may be used if there is a future hearing.

The Tohono O'odham Code and the Mille Lacs Code are methods used when the parent, guardian, or custodian fails to appear at the hearing and a default judgement is entered, provided appropriate and adequate service was made.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- What informal resolution process is currently available in your Nation to reach an agreement that safely protects the child and provides the necessary services to the family? Is it adequate? What improvements could be made?
- Do you currently coordinate with state services to expand available options for families or do you have adequate support services?
- Do you currently have a default procedure in your code to use when parties fail to appear? Any changes needed?

STEP 2: Establish a Vision for the Future

- Clearly providing one or more options to resolve child protection disputes saves the courts time and encourages family involvement. What types of options do you want in your code? Who should be involved in this process?
- Is there a traditional resolution process that could be incorporated into your children's civil code? Who should be involved? How would it work with the court system and CPS?
- If a parent fails to appear at a hearing, after notice, do you want/have a procedure for default judgment?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

E. Conduct of the Trial; Ruling of the Court

The Children's Code may contain provisions addressing how the actual trial will be conducted—who goes first, the sequence of the case, whether rebuttal testimony will be allowed, and so forth.

The code should provide for issuance of the court's ruling at the conclusion of the hearing. Some codes provide for the court to issue an oral ruling at the conclusion of the trial and for temporary disposition of the child, pending issuance of a written ruling within a specified period of time. The code should specify what court findings are required.

The court's order is also the time when the court should address the criteria that must be found or stated to qualify a child for Title IV-E funding if applicable. These findings include the following:

- That reasonable efforts have been made to keep the child with the family and these efforts have not been successful;
- Whether aggravated circumstances exist that would allow the tribal social services agency to cease remedial and rehabilitative services to the family;
- Whether it is necessary to proceed with the filing of a petition to terminate parental rights; and
- Whether compelling circumstances exist so as to excuse the filing of a termination petition.

Some Nations differentiate between Title IV-E eligible tribal children and other tribal children in their codes, because of the more stringent Title IV-E requirements, choosing not to apply the Title IV-E criteria to tribal children who will not be eligible for Title IV-E. While there is no reported case law on this issue, such differentiation might be subject to legal challenge on the basis that it discriminates between classes of tribal children.

Selected Tribal Codes

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part III Children in Need of Care

§ 8.026. Adjudicatory Hearing

[sections omitted]

(e) **Findings**—If the Court finds that the child is a child-in-need-of-care, the Court shall make written findings and shall proceed to the dispositional hearing. The Court shall make a determination as part of its findings that reasonable efforts have been made by the ICW Program, and others as appropriate, to prevent the necessity for removal of the child from the family.

(f) **Finality of Court Order**—A finding by the Court that the child is a child-in-need-of-care shall be considered to be a final order for purposes of appeal.

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part A. General and Dependency Provisions

§408.16 Adjudication Hearing—Necessary Findings for Adjudication[111]

In order to sustain a petition alleging that a child is a Child in Need of Care, the Children and Family Court must make the following findings by clear and convincing evidence:

(1) That the Petitioner has proven the allegations contained in the petition, or as modified by the evidence presented during the hearing;

(2) That all required attempts to notify the tiospaye of the child and the parents, guardian, or custodian have been made, and that the case was not susceptible to resolution informally or by traditional dispute methods and that an adjudication is the least restrictive alternative and serves the best interest of the child;

(3) If the paternity of the child involved was not established prior to hearing, a finding of paternity shall be made if there is an admission of paternity during the proceedings or a Children and Family Court adjudication of paternity during the proceedings. Should such a finding necessitate a continuance to permit the biological father and his tiwahe and tiospaye to participate in the proceedings, a continuance shall be granted provided the time restrictions contained in this Code are met; and

(4) The Children and Family Court shall enter findings of fact and conclusions of law in disputed cases.

§408.17 Adjudication Hearing—Finding of Default

[111] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

(1) If the parent(s), guardian or custodian fail to appear for the formal trial, the Children and Family Court may find the parent(s), guardian or custodian in default, and enter a default order of child protection and order necessary intervention and appropriate steps the parent(s), guardian or custodian must follow to correct the underlying problem.

(2) Prior to finding a parent(s), guardian, or custodian in default, the Children and Family Court must be satisfied that actual notice has been given or that all reasonable possible steps have been taken to provide notice of the formal trial to the parent(s), guardian, or custodian. The Children and Family Court must also find that the petitioner can prove the elements of the Child in Need of Care petition.

(3) An adjudication of neglect or abuse by default shall not result in any referral to a State Registry of Abuse and Neglect unless the Tribe has entered into a cooperative agreement specifically consenting to such referrals or unless the Tribe, by enactment of a code or resolution, has agreed to the placement of persons on that Registry.

(4) If the parent(s), guardian or custodian is found in default, the Children and Family Court shall specify the facts, grounds, and code sections upon which it relied to make the decision.

Mashantucket Pequot Tribal Laws (Enacted 2008)
Title V. Child Welfare
Chapter 3. Reporting of Child Neglect and Abuse

§ 6. Court Findings

a. The court shall enter a written order with specific findings of fact and conclusions of law.

b. If the court concludes that removal or continued out of the home placement is not warranted, the child shall be returned immediately to the custody of her parents, custodian/guardian; provided however, that the court may define the terms and conditions for returning the child to her home, continued court jurisdiction and protective supervision.

c. If, pursuant to Section 5(c)(2), the court finds that removal or continued removal is in the best interests of the child, the court shall determine:

(1) the proper placement of the child;

(2) the services or treatment to be provided to the child and the child's family to help address the circumstances underlying the removal; and

(3) the terms and conditions for placement of the child, returning the child to her home, and family visitation.

d. Where the evidence demonstrates that the activities of a particular person in the household are the basis for the court's finding that removal of the child is required, the court may, pursuant to its civil regulatory authority, issue a

restraining order preventing that person from residing in the residence in lieu of removing the child.

e. The expense for any temporary care and custody shall be paid by the parents or guardian/custodian, or if they are unable to pay, by HHS which may seek reimbursement according to tribal law.

Tribal Code Commentary

The Siletz Tribal Code requires that the court make written findings of fact to substantiate that the child is a child-in-need-of-care. It must specifically find that reasonable efforts have been made by the child welfare program to prevent the necessity of removal from the family. This is a final order and is appealable, even though there is a later dispositional hearing.

The Oglala Sioux Tribal Code requires the court to find by clear and convincing evidence that the allegations in the petition were proven; that all required attempts to notify the tiospaye of the child, parents, guardian, or custodian have been made; the case was not susceptible to resolution informally or by traditional dispute methods; and an adjudication was the least restrictive alternative. If paternity had not previously been established, a finding of paternity should be made if there is an admission or adjudication of paternity during the proceedings. The court should enter findings of fact and conclusions of law in disputed cases. If the parent or guardian fails to appear at the trial after proper and actual notice, a finding of default can be entered. An adjudication of neglect and abuse by default shall not result in any referral to a State Registry of Abuse and Neglect unless the Native Nation has entered into a cooperative agreement specifically consenting to such referrals.

The Mashantucket Pequot Tribal Law requires written findings of fact and conclusions of law. If continued removal is unwarranted the court shall immediately return the child to the custody of parents; however, they may provide terms and conditions and continued court jurisdiction and protective supervision. If the court finds continued removal in the best interests of the child, placement of the child should be determined and services or treatment provided to the child and child's family in order to address the circumstances underlying the removal. The expense for any temporary care shall be paid by the parent if he or she is able.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- What are the current requirements relative to findings of fact and conclusions of law in your current code?
- Does the Native Nation desire to be compliant with ASFA (Title IV-E) requirements? Are the current findings sufficient?

STEP 2: Establish a Vision for the Future

- What changes need to be made?
- Do you wish to differentiate between ASFA-eligible tribal children and other tribal children in your code? Why?
- Do you desire to have a follow-up dispositional hearing rather than handle the disposition immediately after the adjudicatory hearing? Why?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

F. Disposition

The Nation's Children's Code must provide for dispositional alternatives at the conclusion of the CINA proceeding, whether that proceeding concludes by default, voluntary agreement, or after a full trial. The social service agency is required to submit a plan describing the alternatives for the child and family with possible options. The parents or other parties may also provide options of disposition to the court. In the dispositional hearing the court decides where the child is placed and what services should be provided to the child and the family. This is discussed in more detail in Chapter 12, Permanency Planning.

Selected Tribal Codes

The Law and Order Code of the Kalispel Tribe of Indians (Enacted 12.2.2015)
Chapter 7 Kalispel Youth Code
Part 2. Youth in Need of Care

7-23.01 Proposing Family Protection Plan

The Indian Child Welfare Worker may prepare a written plan describing all reasonable and appropriate alternatives for caring for the youth and assisting his or her family. It should explain why the plan is necessary and its benefits to the youth and to the family. It should fully explain any recommendations for placement of the youth. The professional opinions of all persons consulted should be included. If a family protection plan is developed, the Indian Child Welfare Worker shall file the report with the Court and provide copies to all parties prior to any hearing on the Plan.

7-23.02 Other Proposed Plans

Any party who is involved with a youth in need of care case may prepare his or her recommendations to the Court in the form of a proposed Family Protection Plan. Copies shall be provided to all parties to the case prior to any hearing on the Plan.

7-23.03 Hearing for Family Protection Plan

A hearing shall be held to decide what plan will best meet the needs of the youth and assist his or her family. This hearing may take place at the end of the Youth in Need of Care Hearing or may take place separately. The Court shall determine the scheduling and shall direct the Court Clerk to notify all parties. The Court shall hear testimony and consider all proposed Family Protection Plans filed. All parties shall be given an opportunity to contest the facts and conclusions presented in each proposed plan.

7-23.04 Court Ordered Family Protection Plan (Disposition)

If a youth has been determined to be in need of care, the Court shall order a Family Protection Plan for his or her protection and well-being. The Plan shall either allow the child to remain with his or her parent(s), guardian, or custodian, subject to any such limitations and conditions the Court may order or the Court may order out-of-home placement subject to the following placement preferences:

(1) Place the youth with an extended family member subject to any limitations and conditions the Court may prescribe;

(2) Place the youth in a foster home which has been licensed or approved by the Tribe, subject to any limitations and conditions the Court may order;

(3) Place the youth in another home or facility which will both meet the particular needs of the youth and will insure that the youth will keep his or her ties to the Kalispel Indian Community and to his or her family.

The Court may make other orders necessary for the protection and well-being of the youth and the family. Such orders may include but are not limited to: evaluation and treatment (including involuntary residential treatment) of substance abuse, mental illness, and emotional disturbance; parenting classes; mandatory school attendance; mediation; visitation orders; restraining orders; and other services or activities for the benefit of the youth and his or her family. The Court may make a particular placement conditional on compliance with any of the above listed orders.

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
PART IV: Disposition and Review of Children Found to Be in Need of Care

§ 8.029. Dispositional Hearing

(a) **Time**—A dispositional hearing may take place immediately following the adjudicatory hearing if the parties agree and the evidence and information is available to the parties and court, or may be held not more than twenty (20) days after the adjudicatory hearing. If the dispositional hearing does not immediately follow the adjudicatory hearing, the time for the dispositional hearing shall be set at the adjudicatory hearing and that announcement shall constitute notice to all parties of the dispositional hearing.

(b) **Purpose**—The Court may hear testimony at the dispositional hearing for the purpose of determining the proper disposition of the child.

(c**) Evidence to the Considered by the Court**—The Court shall consider:

(1) The predispositional report submitted by the tribal ICW Program;

(2) Any alternative predispositional reports submitted for review; and

(3) Any and all evidence presented by any party contesting the factual contents and conclusions of the predispositional reports.

(d) **Final Order**—The dispositional order constitutes a final order for purposes of appeal.

§ 8.030. Disposition of Children-In-Need-Of-Care

(a) **Guiding Principals [*sic*] for Disposition**

In determining the appropriate disposition for a child-in-need-of-care, the court shall take into account the best interest of the child and the child's health, safety, and welfare. A child shall be placed with relatives where possible, and shall be placed in the least restrictive setting in proximity to the parents or custodians, if possible, given the special needs of the child.

(b) **Conditions Upon Parties**—The Court has the authority to impose conditions and limitations upon a child, the child's parent(s), guardian or custodian, and any other party pursuant to this Code in order to protect the safety and best interests of a child found to be a child-in-need-of-care. Conditions and limitations may include, but are not limited to:

(1) Counseling, therapy, and/or participation in services, including restrictions on access to reports generated as part of such counseling, therapy, or evaluations;

(2) Restrictions on visitation and communication with one or both parents;

(3) Payment of support or other necessary costs;

(4) Participation in tribally-sponsored activities;

(5) Restrictions on associations;

(6) Restrictions on use of alcohol or drugs;

(7) Drug testing;

(8) Curfew restrictions;

(9) Restitution for out-of-home care if the child is removed from the home; and

(10) Any other conditions or dispositions that the Court finds are appropriate to protect the best interests of the child.

Tribal Code Commentary

A number of sections of the Kalispel Nation's Law and Order Code provide direction on disposition. A family protection plan, which is a written plan describing all reasonable and appropriate alternatives for caring for the youth and assisting the family, may be provided by the child welfare worker. It should explain why the plan is necessary and how it benefits the youth and family. The family protection plan should be provided to the judge and parties before the dispositional hearing. Any of the parties involved with the youth may file such a plan. At the dispositional hearing it is decided which plan meets the needs of the youth and assists the family.

The dispositional hearing may take place at the end of the adjudicatory hearing or may take place separately. If the youth has been determined to be in need of care, the court requires a family protection plan. The plan could place the child with their parents with some conditions or place the child out of the home, subject to placement preferences established by the Nation. The preference is for placement of the youth with an extended family member subject to conditions; a foster home licensed by the Nation; or in another home or facility that both meets the particular needs of the youth and ensures that the youth keeps ties with the community.

The Siletz Tribal Code allows the dispositional hearing to take place immediately following the adjudicatory hearing if the parties agree there is sufficient information available or within twenty days of the hearing. At the dispositional hearing the evidence should include the predispositional report submitted by the tribal ICW program; any alternative predispositional reports submitted by others; and any and all evidence presented contesting the factual contents and conclusions of the predispositional reports.

The court has a right to impose conditions and limitations upon the child and the child's parents, guardian, or custodian and any other party. Conditions could include:

- Counseling, therapy, and/or participation in services, including restricting access to reports generated;
- Restrictions on visitation and communication with parents;
- Payment of support or other necessary costs;
- Participation in tribally sponsored activities;
- Restrictions on associations;
- Restrictions on alcohol or drug usage;
- Drug testing;
- Curfew restrictions;
- Restitution for out-of-home care; and
- Any other conditions or dispositions that the court finds appropriate to protect the best interests of the child.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- What options are currently available in your community to keep children safe and families supported?
- How are your current dispositional phase options different than the options available after the preliminary or emergency hearing?

STEP 2: Establish a Vision for the Future

- What options would you like the court to have at the time of disposition? Does this differ from your current situation?
- Does your current code give you the option of holding the dispositional hearing immediately or later if there is not sufficient information available? Do you want a time limit on when this should be held?
- Are there additional reports that should be required from your child protection worker for this hearing?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

Additional Resources

Goldman, Jill, et al., A Coordinated Response to Child Abuse and Neglect: The Foundation for Practice, National Clearinghouse on Child Abuse and Neglect, U.S. Department of Health and Human Services, Administration for Children and Families, 2003.
User manual on addressing child abuse and neglect, including discussions of child maltreatment.

National Child Welfare Resource Center for Tribes, Tribal Courts in the Tribal Child Welfare System, web page, National Child Welfare Resource Center for Tribes, 2015.
Web page with multiple information resources on the role of tribal courts in the child welfare system.

Payne, Diane, et al. Child Abuse Protocol Development Guide, Tribal Law and Policy Institute and Southwestern Center for Law and Policy, 2003.
Intended to help Native Nations and collaborating agencies develop the type of protocol that will serve the needs of the community and the children. The guide is specifically designed to provide direction and information to local CPTs or MDTs toward development of protocols to address their system's response to child abuse and child sexual abuse

Victims of Child Abuse Project, Resource Guidelines, Improving Court Practice in Child Maltreatment Cases, National Council of Juvenile and Family Court Judges, 1995.
The purpose of these resource guidelines is to set forth the essential elements of properly conducted court hearings. The guidelines describe the requirements of juvenile and family courts in fulfilling the role now placed upon them by federal and state laws. These guidelines also describe how court calendars can be efficiently managed to achieve efficiency and avoid delays; explain the court staffing and organization necessary to make the judicial process run smoothly; and clarify costs associated with such reforms. These guidelines are meant to influence future administrative and funding decisions concerning juvenile and family courts. They are intended to help correct the gaping discrepancies that presently exist between legislative demands and judicial resources for child abuse and neglect cases.

Chapter 12: Permanency Planning

A permanency plan places a child in a permanent home with the parent(s), guardian(s), custodian(s) adoptive placement or other permanent home. The permanency plan is typically proposed by the Social Services Department, but other parties involved can offer input and the court makes the final decision.

Permanency planning is intended to prevent a child from being placed in foster care indefinitely or until they age out (reach adulthood). Because permanency is often in the best interest of the child's development it should be pursued in case family reunification is not possible. For Title IV-E programs all children, Title IV-E eligible or not, voluntary placement included, must have permanency hearings.

Status review hearings are required under ASFA. ASFA requires "periodic review" (status review hearings), and the Fostering Connections to Success and Increasing Adoptions Act of 2008 requires status reviews of children by tribal courts or qualifying tribal administrative review bodies at least every six months.

Please note that some Native Nation's codes do not explicitly call for a status review hearing, instead they only have permanency planning hearings and/or permanency planning review hearings every six months. This practice does not necessarily violate ASFA. Native Nations that decide to streamline their code and process by using one "permanency planning review hearing" to meet ASFA and the Fostering Connections to Success and Increasing Adoptions Act of 2008 requirements must be sure that the language and purpose of their hearing includes "status review" as part of its language and purpose. However, we recommend:

- A separate code section for status review hearings—which are explicitly required under the Fostering Connections to Success and Increasing Adoptions Act of 2008 and meet the "periodic review" requirement of ASFA; and,
- A separate code section that covers both permanency planning and permanency planning hearings—which are explicitly required under ASFA.

Recent trends—brought on by the ASFA and the Fostering Connections to Success and Increasing Adoptions Act of 2008—have resulted in better protections for children, namely, status review hearings, permanency planning, and concurrent planning; all topics that will be discussed in this chapter promote better child protection.

It is important to note that there are situations, such as when aggravated circumstances exist, when a CINA case should automatically shift to the creation of a permanency plan that does not include complete family reunification. This will be discussed in the last section of the chapter.

Chapter Units

Unit A: Status Review Hearings
Unit B: Permanency Planning and Permanency Plan Review Hearings
Unit C: Concurrent Planning Requirements
Unit D: Aggravated Circumstances

A. Status Review Hearings

Once jurisdiction has been established over a child, it is important for the court to hold periodic status review hearings. Status review hearings are required under ASFA. ASFA requires "periodic review" (aka status review hearings) and the Fostering Connections to Success and Increasing Adoptions Act of 2008 requires status reviews of children by tribal courts or qualifying tribal administrative review bodies at least every six months. As a result, many Native Nations hold such hearings as a matter of course every six months or whenever requested by one of the parties. The status hearing is important because it gives the court the opportunity to make sure the case isn't languishing.

The main purposes of the status review hearings are to determine:

(1) The safety of the child;

(2) The continuing necessity for and appropriateness of the placement;

(3) The extent of compliance with the case plan;

(4) The extent of the progress that has been made toward alleviating or mitigating the causes necessitating placement in foster care; and

(5) The likely date by which the child might be returned to a safely maintained home, or placed for legal guardianship or adoption.

While status hearings every six months are usual in many CINA cases, it is not necessarily the best fit for every Nation, or every case, and Native Nations should consider making these hearings occur on a more frequent basis. If a Nation limits status review hearings to every six months, it might lose the opportunity to intervene in a case early in the process and correct any mishandling of a case plan.

For example, if parenting classes are required as part of the reunification plan, and a parent misses the first two months of classes, waiting until month six for court intervention is a missed opportunity that results in longer cases for children. Because permanency of some kind is often in the best interest of the child, a status review hearing every two or three months could better combat the effects of a parent that is having trouble with the case plan.

Continuing with the preceding example, the court could intervene at month two and figure out why the parent isn't following the plan—sometimes the problem is as simple as transportation issues, other times it may be that the parent does not intend to follow the case plan. Either way, early intervention through frequent status hearings can help address the issues and ensure the child does not remain in the child welfare system longer than necessary.

Status review hearings are the main mechanism for court involvement in a CINA case before the final permanency planning stage. Because family reunification is typically the main goal of every CINA case, the status hearing allows the court to check in on the family reunification process. If the process is expected to take longer than six months, the status review hearings usually are replaced by the creation of a permanency plan and permanency plan hearings (which may have family reunification as a possible option)—those topics are addressed later in this chapter.

Selected Tribal Codes

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.590 Status review hearings.

(1) Status review hearings shall be held within 60 calendar days of the adjudicatory or case plan hearing, whichever occurs later and at least every four months thereafter so long as a child remains within the jurisdiction of the Tulalip Tribal Court, and a permanent plan for the child has not yet been established by court order.

(2) The Court shall review the compliance of all parties with case plan and shall determine the continuing need for, and appropriateness of, court jurisdiction. Specifically, the status of the child will be reviewed to:

(a) Determine the continuing need for, and appropriateness of, court jurisdiction and of the child's placement;

(b) Determine the extent of compliance by all parties with the case plan;

(c) Determine the extent of progress the parent has made toward eliminating the need for removal of the child from parental care, including, but not limited to, the efforts at compliance with required services, and whether sufficient progress is being made to consider return home likely in the near future;

(d) Consider whether the services provided to the family have been appropriate, accessible, and provided in a timely manner; further consider whether beda?chelh can reasonably provide additional services which will facilitate the return of the child to parental care;

(e) Assess beda?chelh's concurrent case planning, if any, and the program's efforts to effect an alternative permanent plan for the child in the event there is insufficient progress to restore custody;

(f) Determine whether active efforts are being made by beda?chelh to alleviate the need for removal of the child from parental care; and

(g) Project a likely date when the child will be returned to parental care or when an alternative permanent plan will be put into effect. [Res. 2015-101].

4.05.600 Status review reports.

(1) Beda?chelh shall prepare a status review report, which shall be filed, and copies given to all parties or sent to the address on record with the Court 10 calendar days before the hearing, except by order of the Court. Beda?chelh's report shall provide supportive documentation, and shall summarize the history of the case since the last hearing and detail active efforts made to provide services to the child and family.

(2) A party may prepare their own report summarizing his or her history since the last hearing which shall be filed and served on the parties in the manner immediately above.

(3) A party that disputes the content of beda?chelh's report may request a short continuance and provide a written response. [Res. 2015-101]

Confederated Tribes of the Grand Ronde Community of Oregon Tribal Ordinances
Children and Families Ordinance (Amended 6/03/15)
Part II Youth-In-Need-Of-Care

(K) **Status Review Hearings**

(1) **Timing**.

(A) **Required Hearing**. A Status Review Hearing must be held within ninety (90) days of the Dispositional Hearing, and at least every six (6) months thereafter so long as the child remains within the Court's jurisdiction and a permanent plan for the child has not yet been established by court order.

(B) **Requested Hearing**. Any party may request a status review hearing at any time. The Court shall grant the request if there appears to be good cause to do so.

(2) **Notice**. CFS shall make diligent efforts to notify a grandparent of a child in CFS's care of the date and time of all Status Review Hearings.

(3) **Status Review Reports**. CFS shall prepare, and any other party may prepare, a report to the Court for each Status Review Hearing. These reports shall be filed, and copies shall be given to all parties or sent to a place calculated to assure receipt, no later than five (5) days before a Status Review Hearing, except by order of the Court. CFS's report shall provide supportive documentation if appropriate, and shall:

(A) Briefly summarize the history of the case, including the date of removal, the date of adjudication, the date of disposition, the date of the last hearing (if applicable) and the status of the case at the time of the last hearing;

(B) Describe the child's circumstances since the last hearing, including status of placement, family visitation and efforts made to provide services including, without limitation, a description of educational or cultural services provided, or an explanation as to why such services have not been provided;

(C) Describe the parent, guardian, or custodian's circumstances since the last hearing, including efforts made to provide services and compliance with the case plan;

(D) Describe the efforts made to develop a concurrent permanent plan to be implemented in the event the family cannot be reunified, or why a

concurrent permanent plan is not practical at this time, and efforts made to implement that concurrent permanent plan. Unless required by applicable federal law, development of a concurrent permanent plan is not necessary until six (6) months after the Dispositional Hearing;

(E) Describe the status of any financial resources available to the child; and

(F) Include CFS's recommendations on continued jurisdiction, placement, visitation, and services.

Yurok Tribe Children's Code (Current through January 31, 2008)
Chapter 7: Reasonable Efforts

Section 4: Status Review Hearings

A. **Timing**

The status of all children shall be reviewed by the Tribal Court at least every ninety (90) days at a hearing to determine whether court supervision shall continue. In no event shall a status review hearing for children placed in foster care or another out of home arrangement be made less frequently than once every six (6) months from the date the child is considered to have entered foster care.

B. **Purpose and Findings**

(1) A child shall be returned home at the Status Review Hearing unless the Tribal Court find that a reason for removal as set forth above in this Children's Code still exists. The Court may, however, due to unresolved problems in the home, continue court intervention, services and supervision as appropriate.

(2) If appropriate, the Court may refer the matter to the Tribe's Peacemaker Mediation Forum or for Family Unity Conferencing.

(3) The purpose of the Status Review Hearing is for the Tribal Court to:

a. Review the placement and plan for assuring that the child receives safe and proper care;

b. Determine the continuing need for and appropriateness of the placement;

c. Determine the extent of compliance with the case plan;

d. Determine the extent of progress made toward alleviating or mitigating the causes necessitating the placement;

e. Project a likely date by which the child may be returned and safely maintained at home or placed for adoption or placed in another permanent living arrangement;

f. If the child is placed out of state, determine whether the out-of-state placement continues to be appropriate and in the best interest of the child; and

g. In the case of a child who has attained age sixteen (16), determine the services needed to assist the child to make the transition from foster care to independent living.

(4) The Tribal Court, at any Status Review Hearing, held no sooner than twelve (12) months and no later than eighteen (18) months from issuance of the Placement and Services orders, must order a permanent plan, which may include an order that a petition for guardianship, or, only in extreme circumstances, a petition for modification of the parent/child relationship be filed.

Mashantucket Pequot Tribal Laws (Enacted 2008)
Title V. Child Welfare
Chapter 3. Reporting of Child Neglect and Abuse

§ 7. Review of Placement and Supervision

a. The court may exercise continuing jurisdiction over the supervision of such Child custody proceeding for so long as it deems necessary to protect the Child's best interests. The status of all Children who have come within the supervision of the court shall be reviewed by the court at least every three (3) months at a hearing to determine whether or not the placement conditions have been met and whether or not court supervision shall continue.

b . The first review following a formal hearing on the petition shall be held within forty-five (45) business days of the court's decision.

c. If continued court supervision and intervention is necessary, the court shall set forth the following in a written order:

(1) What services have been provided or offered to the parents or guardian/custodian to help address the circumstances underlying the removal;

(2) The extent of the parent or guardian/custodian involvement with the Child or any reason why visitation and/or contact has been infrequent or not otherwise occurred;

(3) Whether or not the parents or guardian/custodian have been cooperative with the court;

(4) Whether or not the parents or guardian/custodian should be required to participate in any additional treatment programs to help correct the underlying circumstances;

(5) Define a time frame in which the family can reasonably expect to be reunited, provided the circumstances underlying the removal have been satisfactorily addressed; and,

(6) Any additional steps the court deems necessary and appropriate.

Tribal Code Commentary

The Tulalip Code requires a status review hearing within sixty days of the adjudicatory or case planning hearing and at least every four months thereafter. The following are required to be reviewed:

- Continuing need for child's placement and court jurisdiction;
- Extent of compliance with case plan;
- Extent of progress of parent toward eliminating need for removal;
- Whether services have been appropriate, accessible, and provided in a timely manner and whether additional services will facilitate the return of child to parental care;
- Beda?chelh's concurrent case planning to review the program's efforts to effect an alternative permanent plan for the child;
- Whether active efforts are being made by beda?chelh to alleviate the need for removal; and
- A likely date when the child will be returned to parental care or an alternative permanent plan will be put into effect.

The beda?chelh is required to prepare a status review report and file and distribute it to all parties ten days before the hearing. A party may prepare their own report and serve it on the parties. A party that disputes the content of the beda?chelh report may request a short continuance and provide a written response.

The Grande Ronde Code requires a status review hearing within ninety days of the dispositional hearing and at least every six months thereafter. However, a party may request a status review hearing at any time. CFS is required to make diligent efforts to notify a grandparent of a child in CFS's care of the date and time of all status review hearings. CFS is required to file a report five days before the hearing, along with supportive documentation. The reports should summarize the history of the case; describe the child's circumstances since the last hearing, including efforts made by parents and services provided; describe efforts to comply with the case plan; and describe the efforts made to develop a concurrent permanent plan. A concurrent permanent plan is not necessary until six months after the dispositional hearing, unless required by federal law.

The Yurok Children's Code requires status review hearings at least every ninety days. A child shall be returned home at the status review hearing unless the court finds that a reason for removal still exists. The court may refer the matter to the tribe's Peacemaker Mediation Forum or for Family Unity Conferencing. The Yurok Nation requires the court to determine the services needed to assist a child who has attained the age of sixteen to transition from foster care to independent living, in addition to other purposes at a status review hearing. The permanent plan must be ordered no sooner than twelve months and no later than eighteen months from issuance of the placement and services orders.

The Mashantucket Pequot Nation requires that the first review hearing be held with forty-five days of the adjudication. Its code lists what must be in the written order following a review hearing. This is similar to what is required to be reviewed by the court in the Tulalip Code and in the Grand Ronde Code.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Examine your current code to determine when the initial review hearing is held and how frequently subsequent hearings must be held. Are these frequent enough?
- What does your code require to be reviewed at the status review hearing?
- Does your code list the purposes of the status review hearing?
- Does your current code require review of the following?
    1. The safety of the child;
    2. The continuing necessity for and appropriateness of the placement;
    3. The extent of compliance with the case plan;
    4. The extent of the progress that has been made toward alleviating or mitigating the causes necessitating placement in foster care; and
    5. The likely date by which the child might be returned to a safely maintained home, or placed for legal guardianship or adoption.

STEP 2: Establish a Vision for the Future

- Do you want to have review hearings more frequently? Do you have the staffing to do this?
- What changes should be made to your code relating to the purposes of the hearing?
- What changes would you make in review hearings to maximize the influence of the court in compliance, to return the child to their home as quickly as possible, or if return is not possible to establish permanency as quickly as possible?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

B. Permanency Planning and Permanency Plan Review Hearings

The goal of permanency planning is to create a plan to place children in permanent homes, whether it be through reunification with their parent(s) or guardian(s) or in an out-of-home placement. AFSA requires that a permanency planning hearing be scheduled within twelve months after a child has entered foster care. Until that time period, status review hearings (discussed in Unit A of this chapter) are the main mechanism for court involvement.

ASFA requires the constant consideration of permanency alternatives even while the child is in foster care and reunification is still the primary focus. A CINA case must move toward permanency if the family is not making progress toward reunification, or if family reunification is not possible. The incarceration or death of the parent(s) or guardian(s) may automatically result in skipping any family reunification discussions. Also, "aggravated circumstances" (discussed in Unit D of this chapter) can remove family reunification from the list of options in a CINA case.

While ASFA requires a permanency plan review hearing within twelve months of the date the child is placed in foster care, Native Nations may adopt a more flexible time line for when this occurs.

Under Title IV-E, if the only option for permanency is long term foster care (called Another Planned Permanent Living Arrangement, APPLA), as the child cannot be adopted, placed in guardianship or other permanent arrangement, some additional requirements apply to permanency hearings. At the hearing (judicial or administrative) the agency must document the efforts it has made to place the child permanently with a parent, relative, or in a guardianship or adoptive placement. These requirements might be included in the code section on the permanency hearing.

The court or administrative body conducting the permanency hearing must:

- Ask the child about his/her desired permanency outcome.
- Make a judicial determination that APPLA is the best permanency plan for the child.
- Find compelling reasons why it's not in the best interest of the child to be placed permanently with a parent, relative, or in a guardianship or adoptive placement.

Additionally, children in foster care should be able to take part in "normal" appropriate childhood activities. At the permanency hearing and review hearings, the agency must document the steps it has taken to ensure that the foster family follows the "reasonable and prudent parent standard" and whether the youth in APPLA has regular opportunities to engage in age or developmentally appropriate activities.[112]

[112] P.L. 113-183 § 475(5)(B), 475A(a)(3).

Reasonable and Prudent Parenting Standard - this is also known as "normalcy". They want children in foster care to be able to take part in "normal" appropriate childhood activities. Therefore, at each permanency hearing and 6-month periodic review, the court or admin body must:

1. Document the steps the agency is taking to ensure that the foster family follows the "reasonable and prudent parent standard," and;

2. Document whether youth in APPLA have regular opportunities to engage in "age or developmentally-appropriate activities." (sections 475(5)(B) 475A(a)(3) of the Act).

Selected Tribal Codes

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.620 Permanent plan/plan for stability for child.

The Court shall conduct a hearing to review its plan 12 months after the child has been taken into custody. The Court shall review whether the parties are complying with the case plan, determine whether to return the child home, to continue out-of-home placement, or whether another planned living arrangement is in the best interests of the child. The Court will also determine if active efforts were made to support the case plan and if modification is necessary to protect the child and strengthen the family. At the permanent plan hearing, the Court shall consider all factors related to the best interest of the child with particular interest to their permanency needs.

The permanent plan options (not in any order of priority) are as follows:

(1) **Return Home**. It is anticipated at this hearing, or in the near future, the child will be returned to a parent or guardian.

(2) **Dependency Guardianship**. The underlying dependency remains open and held in abeyance, but the guardian is considered the long-term parent/guardian until 18 or further court order.

(3) **Long-Term Relative Care**. Placement with a child's relative until 18 or further court order.

(4) **Long-Term Foster Care**. State or Tribal approved foster care placement in the child's best interest until 18 or further court order.

(5) **Independent Living**. For children 16 years or older or children who have volunteered to stay in dependency beyond the age of 18. Services are provided to the child with a focus on developing the child's independent living skills with a goal of transitioning to full independence.

(6**) Termination of Parental Rights and Adoption**. The parent's rights are permanently terminated and the child is made available for legal adoption.

(7) **Termination of Guardianship**. The guardianship is terminated and the original youth-in-need-of-care case resumes; the child could be returned to the care of his or her parent(s) or placed in a new guardianship.

It is anticipated that for any of the above to be completed, that additional hearings will be necessary. If the permanent plan is dependency guardianship, or termination of parental rights and adoption, a new case number will be necessary for that action. [Res. 2015-101].

4.05.630 Permanent plan review hearings.

The Court shall review the permanent plan of a child at least two times per year:

(1) In all other cases in which the child remains a ward of the Court, beda?chelh shall be responsible for submitting a report to the Court 10 days prior to the hearing and is responsible for appearing at and providing information for a permanent plan review hearing of the child's plan.

(2) **Findings Required**. At the permanent plan review hearing conducted by the Court after the establishment of the permanent plan, the Court shall determine:

(a) The continued appropriateness of the placement and the permanent plan;

(b) The extent of compliance with the permanent plan;

(c) The adequacy of services provided to the child and placement;

(d) The compliance of the parents in their court ordered services; and

(e) Whether other services are necessary to support the permanent plan, and if such services can be reasonably provided by the Court or beda?chelh.

(3) **Final Order**. A permanent plan order is a final order for the purposes of appeal. [Res. 2015-101].

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part A. General and Dependency Provisions

§408.24 Permanency Planning Hearing[113]

(a) Each child in foster care under the supervision of the Tribe is entitled to a permanency hearing to be held, in the Children and Family Court, no later than 12 months after the date the child is considered to have entered foster care (as determined under subparagraph (d)) (and not less frequently than every 12 months thereafter during the continuation of foster care), which hearing shall determine the permanency plan for the child.

(b) If reasonable efforts of the type described in Section 408.5 are not made with respect to a child as a result of a determination made by the Children and Family Court in accordance with Section 409.1:

(1) A permanency hearing shall be held for the child within 30 days after the determination; and

(2) Reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child.

[113] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

(c) Reasonable efforts to place a child consistent with subparagraph (e) may be made concurrently with reasonable efforts under Section 408.5. This shall be known as "concurrent planning."

(d) A child shall be considered to have entered foster care on the earlier of:

(1) The date of the first judicial finding that the child is a Child in Need of Care; or

(2) The date that is 60 days after the date on which the child is removed from the home.

(e) The following options are the permanent plans that both the Children and Family Court and the LOWO Division of Child Protective Services shall strive to accomplish within 12 months of the date the child entered foster care:

(1) Restore physical and legal custody of the child to the parent(s), guardian, or custodian, if such a restoration of custody would not harm the best interest of the child;

(2) Place the child with an extended family member, a member of his tiospaye, or other eligible person with that person awarded permanent guardianship;

(3) Certify the completion of a valid traditional adoption of the child;

(4) Place the child in another planned permanent living arrangement; or

(5) In the case of a child who has attained age 16, and where the Children and Family Court determines that it would not harm the best interest of the child to order that he live independently, and where the Children and Family Court orders that the services needed to assist the child to make the transition from foster care to independent living be provided to the child.

(f) When making a recommendation under subsection (c)(2) or (3) above, the LOWO Division of Child Protective Services shall document to the Children and Family Court, why it is not filing a request to terminate parental rights in anticipation of, or with a simultaneous request for a Chapter 5, Subchapter VIII adoption under the OST Juvenile Code, of the child in the case plan. In such cases, LOWO shall also document valid reasons why the child cannot or should not be returned to the home of his or her parent(s).

§409.7 Permanency Plan Options Available to Court

In determining what permanency plan would be in the best interest of a child when a proceeding has been certified under this Code, the Children and Family Court shall consider the following options in order of priority:

(1) Uniting or reuniting the child with a parent who has not committed an aggravated circumstance under this Code;

(2) Placing the child with a tiospaye member or other Indian tiwahe in a permanent guardianship;

(3) Placing the child with another Indian tiwahe and tiospaye on or off the reservation for a traditional adoption; or

(4) Terminating the parental or custodial rights of the parent, guardian or custodian who committed an aggravated circumstance under this Code and placing the child for adoption.

§409.5 Permanency Plan After ASFA Certification

In any case where the Children and Family Court finds that an aggravated circumstance exists for not providing reasonable unification or reunification services under this Code, the Children and Family Court shall conduct a permanency hearing within 30 days after certification at which time the Children and Family Court will determine what type of permanent placement is appropriate for the child. In making this determination, the Children and Family Court need not order the filing of a termination of parental rights petition if reasonable efforts are being made to reunite the child with a parent not subject to this Code or a permanent guardianship or traditional adoption would be in the child's best interest.

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
PART IV: Disposition and Review of Children Found to Be in Need of Care

§ 8.027. Permanency Planning Hearing

(a) **When Permanency Planning Hearing Required**—The Court shall hold a permanency planning hearing to determine the permanent plan for the child. The permanency planning hearing may be combined with the periodic review hearing. The permanency planning hearing shall be held within twelve (12) months from the date that a child enters foster care, or within thirty (30) days after the Court finds that reasonable efforts to reunite the family are no longer required. A child shall be considered to have entered foster care on the earlier of the following two (2) dates:

(1) The date of the adjudicatory hearing finding that the child is a child-in-need-of-care; or

(2) The date that is sixty (60) days after the date the child was removed from the home.

(b) **Notice and Opportunity to be Heard**—Foster parents, relative caregivers, and pre- adoptive parents providing care to a child found to be a child-in-need-of-care pursuant to this Code shall be provided notice of and the opportunity to be heard in a permanency planning hearing concerning the child. The foster parents, relative caregivers, and pre-adoptive parents are not legal parties to the proceedings.

(c) **Permanency Planning Reports**

(1) The ICW Program shall submit a report to the Court no later than five (5) days before the permanency planning hearing. The report shall:

(A) Summarize the history of the case and the efforts made to offer services to the child and the family;

(B) Describe the child's and the family's circumstances, including the case management and services provided by the ICW Program since the last Court hearing;

(C) Describe the extent of compliance by all parties with the case plan;

(D) Describe the parent(s), guardian, or custodian's treatment progress and efforts toward reunification.

(E) Recommend a permanent plan for the child indicating whether, and if applicable when, the child will be returned to the child's parent(s), guardian or custodian or placed with a permanent placement. The report shall include specific reasons why the recommended permanent plan has been chosen, including why that plan meets the child's particular needs and best interests, and why other permanent plans have not been chosen;

(F) Describe the efforts made to develop a concurrent plan for the permanent placement of the child to be put into place if the family cannot be reunited, and the steps taken to find a permanent placement for the child, if necessary; and

(G) Explain the compelling reasons why termination of parental rights is not being recommended as the permanent plan for the child, including the specific reasons why the best interests of the child in question will not be served by termination of parental rights and what advantages and benefits will inure to the child by virtue of the child's parental rights not being terminated.

(2) Any party may submit a separate report to the Court, which shall include his or her own recommendations for consideration by the Court, at least five (5) days before the dispositional hearing.

(3) Copies of all reports shall be served on the ICW Program, the child or his or her legal representative, and the child's parent(s), guardian, or custodian at least five (5) days before the permanency planning hearing.

(d) **Return of the Child**—The Court shall return the child to the physical custody of the child's parent(s), guardian or custodian unless the Court finds, by a preponderance of evidence, that returning the child would cause a substantial risk to the physical or emotional well-being of the child. The burden is on the tribal representative to prove that the child's health or safety will be at risk if returned to his or her parent(s), guardian or custodian.

(e) **Written Findings and Permanent Plan**—The Court shall enter written findings, including:

(1) Whether the tribal ICW Program has made reasonable efforts to reunite the family, or whether reasonable efforts to reunite the family are no longer necessary or productive;

(2) The permanent plan for the child, if the Court determines not to return the child to the child's parent(s), guardian or custodian. The permanent plan may include:

(A) Continuing reunification as the permanent goal for the family and maintaining the child in the current placement if the child's parent(s), guardian or custodian is making progress toward reunification and reunification is likely within a reasonable time based upon the child's needs;

(B) Placing the child with long-term guardian, who shall be appointed by the Court;

(C) Maintaining the child in foster care on a permanent or long-term basis, if the foster care is provided by a relative or compelling reasons for placement exist;

(D) Filing a petition to certify the customary adoption of the child; or

(E) The tribal ICW Program file a petition to terminate parental rights and secure an adoptive placement for the child.

(3) Why the permanent plan chosen is in the best interests of the child, and why other permanent plans were not selected;

(4) The Tribal ICW Program's efforts to develop a concurrent plan for the child in the event that the return of the child is not possible, or if a concurrent plan has not been developed, the reasons why a concurrent plan is not necessary; and

(5) If the permanent plan does not involve the filing of a petition to terminate parental rights, the compelling reasons why termination of parental rights would not be in the best interests of the child and why the alternative selected is in the best interests of the child.

(f) **Permanent Plan Review Hearings**

(1) Where a child remains under the jurisdiction of the Court and in the custody of a foster parent, temporary guardian or other nonpermanent placement, the Court shall review the permanent plan for the child every six (6) months to determine:

(A) The appropriateness of the placement;

(B) The appropriateness of and the extent of compliance with the permanent plan for the child;

(C) The adequacy of services provided to the child and the child's parent(s), guardian or custodian to reunite the family within a reasonable period of time and to find a permanent home for the child in the event that reunification is not possible; and

(D) Whether additional services are necessary to support the permanent plan.

(2) Subsequent permanent plan review hearings need not be held if:

(A) The child has been adopted;

(B) The child is a ward of a permanent guardian; or,

(C) The child has been placed permanently with a relative.

(g) **Continuing Jurisdiction of Court**—For dispositional purposes, jurisdiction over a child under this Code shall continue until he or she reaches eighteen (18) years of age, unless jurisdiction is terminated earlier by order of the Court or extended beyond the child's eighteenth (18) birthday by order of the Court.

Tribal Code Commentary

The Tulalip Code requires that the court hold a permanency planning hearing twelve months after the child is taken into custody. At that hearing the court should determine and consider:

- Whether the parties are complying with the case plan;
- Whether to return the child home;
- Whether to continue out-of-home placement or whether another planned living arrangement is in the best interests of the child;
- Whether active efforts were made to support the case plan and whether modification is necessary; and
- All factors related to the best interests of the child with particular interest to their permanency needs.

These are the permanent plan options provided in the Tulalip Code:

- The child will be returned to the parent/guardian in the near future;
- The dependency remains open, but the guardian is considered the long-term parent/guardian until the child turns eighteen or further order of the court;
- Placement with a relative until the child turns eighteen or further order of the court;
- Long-term foster care placement;
- Child is sixteen or older and may live independently;
- Termination of parental rights and adoption; and
- Termination of guardianship and the original youth-in-need-of-care resumes and the child is returned to parent or new guardian.

The court is instructed to review the permanent plan at least twice per year with beda?chelh providing a report to the court ten days prior to the hearing and appearing and providing information for a permanent plan review. Findings required in these hearings include appropriateness of placement and the permanent plan; the extent of compliance; the adequacy of services provided to the child and placement; compliance of parents; and whether other services are necessary to support the permanent plan.

The Oglala Tribal Code requires a permanency planning meeting no later than twelve months after the date the child is considered to have entered foster care, then every twelve months thereafter. CPS should document why it is not filing a request to terminate parental rights and why the child should not be returned home. The following options should be considered in the permanent plan:

- Restore physical and legal custody to the parents, guardian, or custodian;
- Place the child with extended family member, member of their tiospaye, or other eligible person in a permanent guardianship;

- Certify the completion of a traditional adoption;
- Place in another planned permanent living arrangement; and
- Find an independent living situation if child is over sixteen.

The court is instructed to consider the options in the following priority:

1. Uniting child with a parent who has not committed an aggravated circumstance.
2. Placing the child with a tiospaye member or other Indian tiwahe in a permanent guardianship.
3. Placing the child with another Indian tiwahe and tiospaye on or off the reservation for a traditional adoption.
4. Terminating the parental rights of the parent who committed an aggravated circumstance and placing the child for adoption.

When there is an aggravated circumstance for not providing reasonable unification or reunification services, the court shall conduct a permanency hearing within thirty days.

The Siletz Code requires a permanency planning hearing the earlier of the following dates: twelve months from the date the child enters foster care or within thirty days after the court finds that reasonable efforts to reunite the family are no longer required. The child is considered having entered the foster care system the earlier of these two dates: the date of the adjudicatory hearing or sixty days after the date the child was removed from the home. Foster parents, relative caregivers, and pre-adoptive parents are provided notice and an opportunity to be heard at a permanency hearing.

The Siletz Code requires the ICW program to submit a report to the court no later than five days before the hearing. The report should:

- Summarize the history and efforts made to offer services to the family and child;
- Describe the child's and the family's circumstances;
- Describe the extent of compliance by all parties to the case plan;
- Describe the parent's treatment progress and efforts toward reunification;
- Recommend a permanent plan for the child, indicating when the child will be returned to the parent. Provide specific reasons why that plan meets the child's particular needs and best interest and why other permanent plans have not been chosen;
- Describe the efforts made to develop a concurrent plan for permanent placement of the child and the steps taken to find a permanent placement; and
- Explain compelling reasons why termination of parental rights is not being recommended, including reasons why the best interests of the child in question will not be served by termination of parental rights.

The Siletz Code further specifies the required findings of the court. The court findings' requirements are similar to the requirements of the report required by the ICW program. The permanent plan is to be reviewed every six months to consider the appropriateness of the placement, compliance, and adequacy of services provided to the child and the child's parent; find a permanent home in the event reunification is not possible; and determine whether additional services are necessary. If the child is adopted, is a ward of a permanent guardian, or placed permanently with a relative, no further hearings are necessary. Jurisdiction over the child continues until the child is eighteen, unless jurisdiction is terminated by order of the court or extended by order of the court beyond the child's eighteenth birthday.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- What does your current code require relative to permanency planning?
- How effective has the current process been?
- Is your current process compliant with ASFA and the Fostering Connections to Success and Increasing Adoptions Act of 2008?

STEP 2: Establish a Vision for the Future

- What do you see as the primary purpose for the permanency planning hearing?
- When will a permanency planning hearing taking place?
- When will reviews of the permanency plan take place?
- Identify what topics must be addressed at the permanency planning hearing in the child protection's report, the hearing, and the judge's findings? Do these meet the requirements of ASFA and the Fostering Connections to Success and Increasing Adoptions Act of 2008?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

C. Concurrent Planning Requirements

ASFA mandates shortened time lines for achieving permanency for children in foster care. The shortened time lines created problems for social service agencies that focused on family reunification first—if reunification failed, they would have to scramble to come up with a permanent placement within the ASFA time frame.

This last minute scramble compromises the best interests of the child if reunification efforts fail, because it typically results in social services not having enough time to develop the best option for the child. For example, aggressively recruiting guardians or adoptive parents within the child's Native community takes time and when that placement is found there are usually certification requirements and background checks that must be conducted before the court can approve the placement.[114]

So, in order to pursue family reunification without compromising the best interests of the child if reunification fails, concurrent planning developed. Concurrent planning is a type of permanency planning in which reunification services were provided to the family of a child in out-of-home care while also creating an alternative permanency plan for the child, in case reunification efforts failed. Social services is required to make "reasonable efforts" toward both plans simultaneously and every party involved in the CINA case should have full knowledge of both plans.

For this reason, many Native Nations and states have embraced the idea of concurrent planning or, as it is sometimes referred to, an alternative permanency plan.

[114] Child Welfare Information Gateway, Concurrent Planning for Permanency for Children, Children's Bureau (2012). Available at https://www.childwelfare.gov/pubPDFs/concurrent.pdf.

Selected Tribal Codes

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part A. General and Dependency Provisions

§408.24 Permanency Planning Hearing[115]

[sections omitted]

(c) Reasonable efforts to place a child consistent with subparagraph (e)[116] may be made concurrently with reasonable efforts under Section 408.5. This shall be known as "concurrent planning."

Yurok Tribe Children's Code (Current through January 31, 2008)
Chapter 10: Alternative Permanency Plan

The Department of Tribal Social Services may develop and implement an alternative permanency plan for the child while simultaneously making reasonable efforts to unite or reunite the child with his parent, guardian, or custodian. Such an alternative plan will include a family conferencing plan.

Section 1: Family Conferencing Plan

In all actions in which a substantiated report of child maltreatment is confirmed, the Court shall order Social Services to implement a Family Conferencing Plan as part of the services offered to the family.

---

[115] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

[116] The sectioned referenced states: "(e) The following options are the permanent plans that both the Children and Family Court and the LOWO Division of Child Protective Services shall strive to accomplish within 12 months of the date the child entered foster care: (1) Restore physical and legal custody of the child to the parent(s), guardian, or custodian, if such a restoration of custody would not harm the best interest of the child; (2) Place the child with an extended family member, a member of his tiospaye, or other eligible person with that person awarded permanent guardianship; (3) Certify the completion of a valid traditional adoption of the child; (4) Place the child in another planned permanent living arrangement; or (5) In the case of a child who has attained age 16, and where the Children and Family Court determines that it would not harm the best interest of the child to order that he live independently, and where the Children and Family Court orders that the services needed to assist the child to make the transition from foster care to independent living be provided to the child."

Tribal Code Commentary

The Oglala Sioux Code indicates that concurrent planning for an out-of-home placement may be done at the same time planning takes place for returning the child home.

The Yurok Code indicates that the Tribal Social Services Department may develop and implement an alternative permanency plan for the child while making reasonable efforts to unite or reunite the child with parents, guardian, or custodian. The plan includes a Family Conferencing Plan. This Family Conferencing Plan is required as a part of services offered to the family with a substantiated report of child maltreatment.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Does your current code require or permit concurrent planning?
- Is your current code compliant with ASFA relative to concurrent planning?

STEP 2: Establish a Vision for the Future

- Is concurrent planning consistent with your traditions?
- How do you see concurrent planning implemented in your Nation?
- What do you want to change in your code?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

D. Aggravated Circumstances

Unfortunately, some CINA cases are so egregious that family reunification is clearly not in the best interest of the child. And, occasionally, family reunification is impossible due to long-term incarceration or death. In both instances—egregious or impossible—there is no need to wait for the first status review hearing or conduct concurrent planning, because family reunification is not feasible. Immediately focusing on a permanency plan for the child would be in their best interest. Although this is a Title IV-E requirement, non-Title IV-E Nations may want to include this type of provision for these impossible circumstances so that children do not linger.

Native Nations can draft their code so such cases automatically enter the permanency planning phase at the first full CINA hearing by specifically defining these cases as aggravated circumstances in the Children's Code. For example, a CINA case that results in the removal of a child due to incest may constitute an "aggravated circumstance" under the code and bypass family reunification efforts. A Native Nation is not constrained by a federal definition of *aggravated circumstances* and should carefully review those situations in which it would be appropriate not to attempt reuniting the child with the parent, guardian, or custodian.

For less extreme cases in which aggravated circumstances have been found to exist, it may still be in the best interest of the child to seek family reunification, but the permanency plan might need to respond to the "aggravated circumstances" finding with extra services or protections for the child.

Regardless of application, "aggravated circumstances" and the consequences of such a finding in a CINA case should be clearly defined in the code.

Selected Tribal Codes

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part A. General and Dependency Provisions

§409.1 Aggravated Circumstances Defined[117]

The LOWO Division of Child Protective Services is not required, pursuant to Section 408.5, but may still choose to, provide reunification services to the parent(s), guardian, or custodian of a child where such parent, guardian or custodian has committed one of the following, and where the Children and Family Court judge makes a finding, by clear and convincing evidence, of the presence of one of the following aggravated circumstances:

(1) Committed the crime of murder in the first degree (as defined in the South Dakota Codified Laws at §22-16-4), murder in the second degree (as defined in the South Dakota Codified Laws at §§22-16-7 & 22-16-9), manslaughter in the first degree (as defined in the South Dakota Codified Laws at §22-16-15), manslaughter in the second degree (as defined in the South Dakota Codified Laws at §22-16-20), rape (as defined in the South Dakota Codified Laws at §22-22-1), sexual contact with a related person (as defined in the South Dakota Codified Laws at §22-22-19.1), abuse or punishment of a minor (as defined in the South Dakota Codified Laws at §26-10-1), or kidnapping (as defined in the South Dakota Codified Laws at §22-19-1(5)), or committed conduct described by any of those statutes that violated the law or ordinance of another jurisdiction having elements similar to an offense described by any of those statutes;

(2) Committed the crime of aggravated assault (as defined in the South Dakota Codified Laws at § 22-18-1.1) against the child or another child of such parent, guardian, or custodian or committed conduct described by that section that violated the law or ordinance of another jurisdiction having elements similar to the offense described by that section;

(3) Has been determined by a court by clear and convincing evidence to have subjected the child or another child to torture, sexual abuse, abandonment for at least six months, chronic physical, mental, or emotional injury, or chronic neglect if the neglect was a serious threat to the safety of the child or another child;

(4) Is incarcerated and is unavailable to care for the child during a significant period between the birth of the child and his or her 18th birthday, considering the child's age and the child's need for care by an adult;

(5) Has had parental rights to another child involuntarily terminated by a prior legal proceeding;

[117] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

(6) Has a documented history of neglect and abuse associated with chronic alcohol or drug abuse;

(7) Has exposed the child to or demonstrated an inability to protect the child from substantial harm or the risk of substantial harm, and the child or another child has been removed from the parent's, guardian's or custodian's custody because the removed child was adjudicated neglected and abused by a court on at least one previous occasion;

(8) Has exposed the child to or demonstrated an inability to protect the child from substantial harm or the risk of substantial harm, the child has been removed from the parent's, guardian's or custodian's custody on two separate occasions, and the LOWO Division of Child Protective Services offered or provided family services on each of the two separate occasions the child was removed; or

(9) Has exposed the child to or demonstrated an inability to protect the child from substantial harm or risk of harm resulting from a crime, act, or omission as specified in subdivision (1), (2), or (3) of this section.

§409.4 Impact of Certification on Visitation Rights

The Children and Family Court may deny visitation rights with any child in the custody of the LOWO Division of Child Protective Services to a parent, guardian or custodian who has been found by the Children and Family Court to have committed an aggravated circumstance as defined at Section 409.1 of this Code.

§409.2 Effect of Certification

Should the Children and Family Court certify the existence of one or more of the aggravated circumstances, as defined herein, the LOWO Division of Child Protective Services need not provide reasonable efforts to unite or reunite the neglected and/or abused child with that parent, guardian or custodian unless the Children and Family Court makes a finding, by clear and convincing evidence, that reasonable efforts to unite or reunite are consistent with the permanency plan for said child and would be in the child's best interest and safety. A finding of the existence of an aggravated circumstance with regard to one parent, however, does not impair the right of the other parent to reasonable reunification efforts under this Code.

§409.5 Permanency Plan After ASFA Certification

In any case where the Children and Family Court finds that an aggravated circumstance exists for not providing reasonable unification or reunification services under this Code, the Children and Family Court shall conduct a permanency hearing within 30 days after certification at which time the Children and Family Court will determine what type of permanent placement is appropriate for the child. In making this determination, the Children and Family Court need not order the filing of a termination of parental rights petition if reasonable efforts are being made to reunite the child with a parent

not subject to this Code or a permanent guardianship or traditional adoption would be in the child's best interest.

§409.7 Permanency Plan Options Available to Court

In determining what permanency plan would be in the best interest of a child when a proceeding has been certified under this Code, the Children and Family Court shall consider the following options in order of priority:

(1) Uniting or reuniting the child with a parent who has not committed an aggravated circumstance under this Code;

(2) Placing the child with a tiospaye member or other Indian tiwahe in a permanent guardianship;

(3) Placing the child with another Indian tiwahe and tiospaye on or off the reservation for a traditional adoption; or

(4) Terminating the parental or custodial rights of the parent, guardian or custodian who committed an aggravated circumstance under this Code and placing the child for adoption.

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.580 Accelerated permanent plan.

(1) The Court may make a finding at or after the adjudicatory hearing that beda?chelh need not make reasonable efforts to provide reunification services. The Court may base this finding on proof that beda?chelh has petitioned or is intending to petition for termination of parental rights or if the court finds that the parent has:

(a) Subjected the child to aggravated circumstances including but not limited to torture, chronic abuse, severe neglect or sexual assault;

(b) Committed, aided, abetted, attempted, conspired, or solicited deliberate or mitigated deliberate murder or manslaughter of a child or the sibling or parent of the child;

(c) Committed aggravated assault against a child;

(d) Committed neglect of a child that resulted in serious bodily injury or death; or

(e) Had another child placed in permanent out-of-home placement and the parent has failed to effect significant change in the interim so as to care for another child.

(2) If the Court finds that reunification services are not necessary beda?chelh shall submit a Report to Court within 15 court days of the judicial determination which sets forth a permanency plan. A permanency hearing must be held

within 30 days of that determination and reasonable efforts must be made to place the child and to complete whatever steps are necessary to finalize the permanent placement of the child. [Res. 2015-101].

Tribal Code Commentary

The Oglala Code indicates that CPS is not required to provide reunification services to the parent, guardian, or custodian where that parent, guardian, or custodian has committed one of the following:

1. Committed a crime in the listing of serious criminal offenses.
2. Committed the crime of aggravated assault against the child or another child of the parent, guardian, or custodian.
3. Determined by a court by clear and convincing evidence to have subjected the child or another child to torture; sexual abuse; abandonment for at least six months; chronic physical, mental, or emotional injury; or chronic neglect, if the neglect was a serious threat to the safety of the child or another child.
4. Is incarcerated and is unavailable to care for the child during a significant period between birth and the child's eighteenth birthday.
5. Has had parental rights to another child involuntarily terminated by a prior legal proceeding.
6. Documented history of neglect and abuse associated with chronic alcohol or drug abuse.
7. Has exposed the child to or demonstrated an inability to protect the child from substantial harm or risk of substantial harm and the child or another child has been removed because the removed child was adjudicated neglected and abused by the court on at least one previous occasion.
8. Has exposed the child to or demonstrated an inability to protect the child from substantial harm or the risk of substantial harm and the child has been removed on two separate occasions, and the family has been provided services on each of the two separate occasions.
9. Has exposed the child to or demonstrated an inability to protect the child from substantial harm or risk of harm resulting from a crime, act, or omission as specified in the list of crimes or acts in one through three of this list.

This extensive list in the definition of aggravated circumstances allows CPS to deny visitation and not provide reasonable efforts to unite the child with parent, guardian, or custodian, unless the court finds by clear and convincing evidence that reasonable efforts to unite are consistent with the permanency plan for the child and would be in the child's best interest and safety. A finding of aggravated circumstance with regard to one parent does not impair the right of the other parent to reasonable reunification efforts. Any case finding aggravated circumstance requires a permanency hearing within thirty days. In determining the permanency plan the court should consider the following options in order of priority:

1. Uniting the child with a parent who has not committed an aggravated circumstance;
2. Placing the child with a tiospaye member or other Indian tiwahe in a permanent guardianship;
3. Placing the child with another Indian tiwahe and tiospaye on or off the reservation for a traditional adoption; and

4. Terminating the parental or custodial rights of the parent, guardian, or custodian who committed an aggravated circumstance and placing the child for adoption.

The Tulalip Code defines aggravated circumstances in more limiting terms, but includes:

1. Subjected the child to torture, chronic abuse, severe neglect, or sexual assault;
2. Committed, aided, abetted, attempted, conspired, or solicited deliberate or mitigated deliberate murder or manslaughter on a child, sibling, or parent of a child;
3. Committed aggravated assault against a child;
4. Committed neglect of a child that resulted in serious bodily injury or death; and
5. Had another child placed in permanent out-of-home placement and the parent failed to effect significant change in the interim.

If the court finds that reunification services are not necessary due to a finding of aggravated circumstance, beda?chelh shall submit a report to the court with fifteen court days of the judicial determination, setting forth a permanency plan. The permanency hearing must be held within thirty days of the determination.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- What is the current definition of *aggravated circumstance* in your code, if you have one?
- What has worked or not worked with that definition?
- Are the situations or circumstances you currently use in determining aggravated circumstance too restrictive or not restrictive enough?
- What are the consequences of a finding of aggravated circumstance?

STEP 2: Establish a Vision for the Future

- Identify the changes you want to make in the definition of *aggravated circumstance.*
- Identify any changes you want to make in the process used to determine aggravated circumstance.
- How do you want to define *aggravated circumstance* in your code?
- What will be the consequences of that finding?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

Additional Resources

Child Welfare Information Gateway, Concurrent Planning for Permanency for Children, Children's Bureau, 2012.
This resource discusses concurrent planning, federal law, and different state approaches to implementation of federal requirements.

Child Welfare Information Gateway, Court Hearings for the Permanent Placement of Children, Children's Bureau, 2012.
An extensive guideline on permanency planning hearings and related issues. Discusses applicable federal laws and their appropriate implementation on a local level.

Section IV: Out-of-Home Placements

This section takes on some vast topics, including foster care, termination/suspension of parental rights, and customary adoption. Each of these topics often has substantial and extensive code sections. With such wide-ranging topics, not every issue is addressed, but the guide does provide you with an in-depth discussion of the key issues that impact Native Nations and will lead a code development team through discussions to help in arriving at Children's Code sections that support your Nation and incorporate your traditions.

Four chapters are included in this section and the following is a brief synopsis of each chapter.

Chapter 13. Disposition, Placement, and Visitation

This chapter looks at the disposition (court ruling) in a CINA proceeding. There are multiple dispositions in a CINA proceedings with requirements for each. This chapter reviews the possible language and provisions related to an informal conference disposition, an emergency placement disposition, and the regular CINA disposition. It also addresses visitation and certain prohibitions on placement.

Chapter 14. Foster Care in Native Nations

This chapter reviews the code sections that develop a foster care system within a Native Nation. This includes designating an agency for foster care, review of the foster care application process, the applicant's eligibility, and the process for rejection, review, and disqualification of a foster care license. It also looks at the standards for the home and foster family members.

Chapter 15. Modification of Parental Rights: Termination, Suspension, and Alteration

This chapter discusses federal requirements and examines tribal codes that have suspension of parental rights rather than termination. It will lead a code development team through discussion on what might be entailed in a termination of parental rights, reviewing how some Nations have modified the termination and allowed a parent, child, or extended family to retain some rights. It also has a couple of units on suspension of parental rights examining ways that Native Nations have met requirements of Title IV-E by suspending parental rights rather than terminating rights. Examining tribal tradition is important in this chapter. Laws relative to emancipation are also addressed in this chapter.

Chapter 16. Adoption, Customary Adoption, and Guardianship

This chapter goes hand in hand with the previous one, as suspension or termination of parental rights must be addressed in adoptions. The chapter examines both ways that Native Nations have modified mainstream adoption to meet certain customs of their Nations and ways they have modified customary adoption to meet the requirements of Title IV-E. Adoption law is discussed from the policy and purpose sections through the various hearings and processes, culminating in a final decree. Guardianship is also addressed in this chapter, as it is often seen as an alternative to adoption in Native communities.

Chapter 13: Disposition, Placement, and Visitation

Disposition simply refers to a ruling made by a court or judge. Typically, the term *disposition* refers to a *final* ruling on a matter. However, due to the multiple types of hearings in a CINA case (emergency, initial/preliminary, and regular/full hearing) there may be multiple dispositions in one case—with the latest ruling on an issue controlling. Also, because a CINA case is quite different than any other kind of legal case, disposition in the CINA context typically occurs every time the parties appear before the judge, and the disposition is often changed to reflect the changes of facts.

For this chapter, disposition will refer to any ruling by the court that is intended to be final or last more than one week. Dispositions in CINA cases are usually mandated by law and usually must address issues of placement and visitation. Dispositions generally occur at the end of every

- Informal conference,
- Emergency hearing,
- Initial hearing, and
- Regular CINA hearing.

Generally, the judge issuing the disposition is required to address certain issues but is given a large amount of discretion as to *how* to address the issues. Typically, "best interest of the child" and a "placement preference" order are the only guiding principles that a judge must adhere to during disposition. Native Nations can add provisions to their code that ensure certain topics receive judicial attention at the disposition stage, such as visitation or education.

The major issue addressed during any disposition is that of placement. Upon removal, the child must be placed in an appropriate and safe placement. In making an emergency placement, law enforcement or the Social Services Department must make every attempt to place the child with a suitable family, community member, or alternative placement. At the emergency hearing, the judge will issue a disposition that authorizes or changes the original placement.

For dispositions at an informal conference or regular CINA hearing, the disposition should include a placement order that is based on tribal law, information in a placement plan offered by social services, and any other evidence offered to the court by the parties.

This chapter will discuss disposition with a special focus on how it relates to placement. It will then shift to a fuller discussion of placement issues. Finally, the last part of this chapter addresses visitation, a straightforward issue that is usually addressed at every disposition.

Chapter Units

Unit A: Informal Conference Dispositions

Unit B: Emergency Placement Dispositions

Unit C: Regular Child-in-Need-of-Assistance Disposition and Placement

Unit D: Placement Prohibitions on Secure Detention Facilities

Unit E: Visitation

A. Informal Conference Dispositions

An informal conference is governed by the Children's Code and generally occurs in three situations:

1) The child's parent(s), guardian(s), or family has voluntarily sought the help of social services.
2) Social services have investigated a child abuse report and decided that the situation does not warrant court involvement but want to protect the family with preventative support services.
3) A formal CINA case has begun but the parties agree to suspend the case and pursue a more informal resolution that requires less court involvement

By its nature, the informal conference has lower stakes (e.g., the child is usually not deemed to be in immediate danger of harm) and the disposition for informal conferences tends to be less detailed and touches on fewer issues. Usually a disposition at this stage is just the court signing off on an agreement made between social services and the family in question—adding one layer of oversight that supports social services' efforts to get compliance from families and another layer that protects families from any arbitrary or seemingly unfair decisions made by social services.

Placement and visitation can be topics addressed at the informal disposition, but at this point, the emphasis tends to be on family preservation—so placement is not a major issue. Visitation is not typically an issue unless one of the parent(s) or guardian(s) is outside the home due to arrest, residential treatment, or a domestic violence protection order. If a parent is absent for one of those reasons, the informal disposition should address visitation in a manner that respects the rights of all parent(s) and guardian(s) as well as the best interests of the child.

The informal conference section of any Children's Code should include a disposition section that lays out the issues or decisions that must be addressed by a judge. This disposition section should be in line with the general purpose of the Children's Code and can be tailored to include the particular resources and programs available as well as reflect the cultural concerns of the Nation. An informal conference is an excellent place to include extended family/clan for support if that is the custom and tradition of your Nation and does not violate any individual privacy rights in other sections of your code or constitution.

Selected Tribal Codes

Yurok Tribe Children's Code (Current through January 31, 2008)
Chapter 1: Voluntary Informal Conference

Section 4: Disposition

At the informal conference, Yurok Social Services may:

a. refer the minor and the minor's parent(s), guardian or custodian to an available program or service provider for needed assistance;

b. arrange terms of supervision calculated to assist and benefit the minor, which regulate the minor's activities and which are within the ability of the minor to perform; or

c. recommend that the presenting officer file a petition for removal pursuant to Chapters 5 & 6 of this Code.

Yurok Social Services shall set forth in writing the conclusions reached at the informal conference and the disposition agreed to by the parties for remedying the situation. Any informal adjustment period shall not exceed six (6) months.

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part A. General and Dependency Provisions

§408.13 Informal Resolution[118]

(a) At any time between a Temporary Emergency Custody Hearing and an Adjudicatory Hearing, the Children and Family Court may allow, or may require on its own initiative, referral to an informal resolution process.

(b) This process should be considered by the Office of the Attorney General and the LOWO Division of Child Protective Services in those cases where a parent has voluntarily placed a child with the LOWO Division of Child Protective Services because of an expressed inability to provide for the child, not due to the faults or omissions of the parent(s), guardian, or custodian, and in those cases where the child does not meet the definition of a Child in Need of Care, but there has been a breakdown in the family relationship and intervention is needed.

(c) Upon referral to the informal resolution process, the child and family will be summoned into Children and Family Court to meet informally with the judge, the LOWO Division of Child Protective Services, the Tiospaye Interpreter, appropriate members of the child's extended family and tiospaye, and any other person whose presence is necessary for a full and open discussion of the problems facing child and his or her family. At that meeting the group will attempt to achieve a plan to assure that appropriate intervention is made to prevent future court involvement in the family.

[118] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

The parent(s), guardian, custodian, appropriate extended family and tiospaye members, the child, and the LOWO Division of Child Protective Services, shall sign a plan stipulating what each will do to address the problem or crisis facing the family.

(d) Review hearings shall be held every 90 days and the Children and Family Court will review the plan in an informal manner to assure that progress is being made.

(e) Participation in a plan under this section shall not prevent the Office of the Attorney General from filing a neglect or abuse petition or other legal action.

Tribal Code Commentary

The Yurok Children's Code briefly sets out the objectives of the informal conference in its disposition section. Social services may refer the minor or the minor's parent(s), guardian, or custodian to an available service provider for assistance; arrange supervision to assist and benefit the child; or may recommend the filing of a petition. The agreement between social services and the parent, guardian, or custodian should be in writing and not extend beyond six months.

The Oglala Sioux Tribal Code indicates that an informal resolution may take place anytime between a temporary emergency custody hearing and an adjudicatory hearing. It should be considered in cases in which the parent has voluntarily placed a child with CPS and in cases in which the child does not meet the definition of a child-in-need-of-care, but there has been a break down in the family relationship and intervention is needed. Upon referral the child and family are summoned into the court to meet informally with the judge, CPS, Tiospaye Interpreter, appropriate members of the child's extended family, and tiospaye and any other person whose presence is necessary for a full open discussion of the problems facing the child and family. The group will attempt to achieve a plan that is appropriate to prevent future court involvement in the family. A written signed agreement is achieved to address the problems. Review hearings take place every ninety days to assure progress is being made.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- What current informal process does your Nation have in place to resolve the problems that lead to intervention by CPS?
- Are there requirements for disposition in your current code?
- What works and doesn't work in this process?

STEP 2: Establish a Vision for the Future

- What changes are needed to improve or increase the usage of the informal disposition?
- Are there ways to make this more effective?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

B. Emergency Placement Dispositions

Whenever there is an emergency removal an emergency or initial hearing must occur. (See Chapters 9 and 10 for further discussion on emergency removal and the preliminary hearing.) Because a removal necessarily means that a child has been found to be in danger—either by the court or government official in charge of the removal—the disposition at the later hearing will need to be more detailed and must thoroughly address placement issues. Disposition at this stage is merely the court issuing a ruling as to the next steps that must be taken in the case, which can range from affirming the emergency removal and setting a full hearing or dismissing the case entirely and returning the child to the custody of their parent(s) or guardian(s).

ICWA established placement preferences for Indian children placed by state courts. For instance, in ICWA, foster care or preadoptive placements are prioritized from the least restrictive Indian placement to the least restrictive non-Indian placement. Prior to that act, placement was left to various state officials and judges and most states exercised placement discretion in such a fashion as to deprive Indian children of Indian homes. Now, many placement decisions are made with ICWA preferences in mind.

Although ICWA was meant to create a framework for states, the preferences were generalized and simplified and not culturally specific for any one Native Nation. Instead they were designed to stop the flow of children out of Indian homes—a flow that was generated by state action. ICWA standards were never intended to become the definitive standards for all Native Nations and need not be followed by Native Nations making placement decisions for their own child-citizens. ICWA provides for the preferences outlined in the act to be preempted by preferences enacted by Native Nations.

It is important that each Native Nation examine the cultural and historical patterns of its Nation as it relates to child-rearing practice. Specifically, how was a substitute care provider selected when a parent was not able to function as an everyday parent? Once that practice is identified, the emergency placement (and subsequent long-term placement, if necessary) presumptions may be drafted to reflect the cultural practices of the Nation as they relate to substitute child care. The persons who historically had the responsibility to provide substitute child care should be acknowledged in the Nation's child placement preference law.

Selected Tribal Codes

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part A. General and Dependency Provisions

§406.7 Emergency Removal of Child—Authorization and Placement[119]

(a) In any case where a child is in immediate danger due to the actions or omissions of the parent(s), guardian or custodian, or due to the child's own actions or omissions, the Department of Public Safety or the LOWO Division of Child Protective Services may immediately remove the child from his/her home and place the child in an appropriate placement.

(b) In the event that the designated Tiospaye Interpreter(s) have not come to know and/or have not worked with members of the child's tiospaye to handle child neglect and/or abuse pursuant to Section 405.2(d), in making an emergency placement, DPS and CPS must make every attempt to notify the child's Tiospaye Interpreter and place the child with a suitable tiospaye member if possible.

(c) If such placement is not possible the child may be placed in an alternative placement provided the child is not removed from the reservation unless adequate emergency services cannot be provided on the reservation.

(d) Placement of children who are members of the Oglala Sioux Tribe or who are eligible for membership should be in accordance with Section 408.20 of this Code describing Temporary Dispositional Alternatives.

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part III Children in Need of Care

§ 8.023. Emergency Custody

[sections omitted]

(d) **Emergency Placement**

(1) A child who has been taken into emergency custody shall be placed, pending a preliminary inquiry hearing, with one of the following, in order of priority:

(A) Extended family members who will be able to protect the health and safety of the child;

(B) A private family home, located within the Siletz Service Area, which has been certified as a foster home by the ICW Program;

(C) A foster care facility, located within the Siletz Service Area, which has been licensed or approved by the ICW Program;

[119] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

(D) A shelter care facility, located within the Siletz Service Area, which has been approved by the ICW Program;

(E) A foster home, located outside the Siletz Service Area, which has been approved by the ICW Program;

(F) A shelter care facility, located outside the Siletz Service Area, which has been approved by the ICW Program.

(2) In all emergency placements, the placement shall expressly consent in writing to the continuing jurisdiction of the Tribal Court for all matters related to the placement and the child before the placement is made.

(3) A child who has been taken into emergency custody may be taken to a medical facility if the child is believed to be in need of immediate medical attention.

(4) No child who is alleged or determined to be a child-in-need-of-care shall be detained in a detention facility or a jail because of their status as a child-in-need-of-care.

Yurok Tribe Children's Code (Current through January 31, 2008)
Chapter 6: Emergency Custody Hearing

Section 14: Possible Emergency Custody Hearing Outcomes

(a) **Disposition on Finding of Probable Cause**: If the court determines there is probable cause to believe the child is a Child in Need of Care, the court may:

(1) Continue the Petition for Emergency Custody and grant emergency custody of the child to the Tribe, and place the child in the physical custody of the parent(s), guardian, or custodian pending the adjudicatory hearing; and set an adjudicatory hearing; or

(2) Continue the Petition for Emergency Custody and grant emergency custody of the child to the Tribe, and place the child in the physical custody of another appropriate person, or in shelter or foster care; and set an adjudicatory hearing; or

(3) Affirm any other reasonable plan recommended by the Tribal Social Services Department and/or stipulated to by the parties, including but not limited to the postponement of proceedings; and

(4) Order such restrictions on contact or visitation that the court deems appropriate; and

(5) Set additional preliminary inquiry hearings or other hearings as necessary.

(b) **Dismissal of the Petition**:

If the court determines there is no probable cause to believe the child is a Child in Need of Care, the Petition for Emergency Custody shall be dismissed without prejudice, and the child released from emergency custody.

Section 17: Emergency Placement

A child taken into emergency custody may be placed, pending a court hearing and at the recommendation of Yurok Social Services, in one of the following placements, listed in order of priority:

1. With family or extended family members who will be able to protect the health and safety of the child;
2. With the family of a member of the tribe on the Reservation;
3. In a private foster home on the Reservation;
4. In a foster care facility on the Reservation;
5. In a shelter care facility on the Reservation; or
6. In foster home, foster care facility, or shelter care facility in the County of residence in the State of residence as the Court finds appropriate.
7. With an Indian custodian designated and approved by the court.
8. With any adult known to the child who offers a secure placement to the child and is willing to submit to receiving a clearance for the purposes of placement and supervision of said placement and is further willing to seek emergency certification as a foster placement.

Tribal Code Commentary

The Oglala Sioux Code requires CPS to make every attempt to notify the child's Tiospaye Interpreter and place the child with a tiospaye member, if possible, when an emergency placement occurs. If such placement is not possible, then the child may be alternatively placed provided the child is not removed from the reservation unless adequate emergency services cannot be provided on the reservation.

The Siletz Code establishes the following priority for emergency placement:

- Extended family members;
- Private family foster home located within the Siletz Service Area;
- Foster facility within the Siletz Service Area;
- Foster home outside the Siletz Service Area; and
- Shelter care facility located outside the Siletz Service Area.

In all placements, the parties to the placement must consent in writing to the continuing jurisdiction of the tribal court. A child could also be taken to a medical facility if necessary. No child shall be detained in a detention facility.

The Yurok Code requires the following decisions be made relative to placement at the emergency or preliminary hearing:

- Emergency custody to the tribe and physical custody with the parent, guardian, or custodian, pending an adjudicatory hearing, and set the date of hearing.
- Emergency custody to the tribe and place child in physical custody of another appropriate person or in shelter or foster care and set the adjudicatory hearing.
- Affirm any reasonable plan recommended by social services or stipulated to by the parties.
- Order restrictions on contact or visitation.
- Set additional preliminary inquiry hearing.
- Dismiss the petition if the court finds no probable cause to believe the child is a child-in-need-of-care.

The following placement priorities are set out in the Yurok Code:

1. Family or extended family.
2. Family of a member of the Nation on the reservation.
3. Private foster home on the reservation.
4. Foster care facility on the reservation.
5. Shelter care facility on the reservation
6. Foster home, foster care facility, or shelter care facility in the county of residence in the state of residence.
7. An Indian custodian designated and approved by the court.
8. Any adult known to the child who offers a secure placement and is willing to submit to receiving a clearance for purposes of placement and supervision and is willing to seek emergency certification as a foster placement.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- What are the placement options in your community for an emergency placement?
- What decisions and options does your current code require at the preliminary hearing?
- Have you had problems with the court losing jurisdiction if a child is placed off the reservation?

STEP 2: Establish a Vision for the Future

- Are there changes needed in the current placements that would better meet your customs?
- Are there changes needed in the current placements to better ensure the safety of the child?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

C. Regular Child-in-Need-of-Assistance Disposition and Placement

Like the dispositions made in an emergency or initial hearing, dispositions in a regular CINA hearing must pay special attention to placement issues. However, the disposition at a regular CINA hearing is intended to be a lasting, if not final, plan for the case and must address a large number of issues. This disposition tends to be more detailed than any of the dispositions discussed earlier in this chapter.

Ideally, the final disposition in a regular CINA hearing will result in either family reunification or a short-term placement that allows the family time to comply with a plan set out by social services that allows for the safe return of the removed child.

Unfortunately, the practical reality is that CINA cases can last for years and dispositions must be adapted to make sure the child's best interests are protected even when the case falls low on the priority list of social services or the family. So, in addition to placement, the regular CINA disposition should address matters such as visitation, per capita/trust accounts, education, and permanency plans.

Selected Tribal Codes

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part IV: Disposition and Review of Children Found to Be in Need of Care

§ 8.027. Policy

It is the policy of the Tribe that the removal of a child from his or her home for temporary emergency or foster care placement, long-term placement or termination of parental rights can only result from a judicial determination that continued custody would be contrary to the health and welfare of the child, and that reasonable efforts to prevent removal have been made and have not been successful. Where more than one child is removed from a home, it shall be the Tribe's policy to keep all of the children so removed in a single placement or shelter whenever possible. This policy shall take precedence over any conflicting placement preferences within this Code. A child shall be placed where possible in the least restrictive setting and in close proximity to the parents' home, unless the best interests, special needs, or health and safety of the child require otherwise. Extended family and relatives shall have first consideration for placement of a child provided that they are able to meet the needs of the child.

§ 8.028. Predispositional Report

(a) **Contents**—The Court shall order the Tribal ICW Program to file a predispositional report with the Court at least five (5) days before the dispositional hearing. The report shall:

(1) Contain a specific case plan for the care of the child and the assistance to be provided to the child and/or his or her parent(s), guardian or custodian that is calculated to resolve the problems presented in the petition and address the needs of the family to prevent further abuse or neglect of the child. The case plan shall include short-term and long-term goals for reuniting the family, and shall be designed to achieve placement in the least restrictive, or most family-like, placement available. Cultural and traditional elements shall be included in the case plan wherever appropriate. The case plan shall include, at a minimum, identify services necessary to reunite the family, a detailed list of the services to be provided to the child and family, which agency will provide those services, the time frame in which the services will be provided, what standard will be considered compliance with the services, and the respective responsibilities of the ICW Program, the family, and the child in making the services available and in taking advantage of the services. (The case plan shall also include all requirements of the Social Security Act of 1980, as amended, for case plans where the child is receiving foster care maintenance payments from federal or state funds. The case plan shall include: (1) a description of the placement, including a discussion about its safety and appropriateness; (2) a plan for ensuring that the child is receiving safe and proper care and describes the services that will be provided to reunite the child and family or move the child toward an alternative permanent placement; (3) the health and

education records of the child; (4) a written plan to assist foster children over the age of 16 to transition from foster care to independent living; (5) documentation of efforts to find a permanent placement if the goal is not reunification; (6) a description of the steps taken and findings made if a decision is made to place the child in a relative guardianship (findings include (a) that returning the child home and adoption are not appropriate options; (b) the child has a strong attachment to the proposed guardian (and has been consulted about the guardianship if 14 years of age or older); (c) the guardian has a strong commitment to permanently caring for the child; and (d) the child was eligible for foster care maintenance payments for six consecutive months while living in the home of the guardian); (7) a plan for ensuring the educational stability of the child in foster care; and (8) discussion of the frequency and content of caseworker visits, including a minimum requirement of a visit at least once a month.;

(2) Contain a detailed explanation showing the need for the proposed case plan and the benefits to the child and the child's parent(s), guardian or custodian under the plan;

(3) If the representative recommends placement of the child with someone other than the child's parent(s), guardian or custodian, the report shall contain specific reasons for not recommending placement of the child with his or her parent(s), guardian or custodian.

(b) **Reports Offered by Parties**—Any party may submit a separate predispositional report to the Court, which shall include his or her own recommendations for consideration by the Court, at least five (5) days before the dispositional hearing.

(c) **Reports to be Served**—Copies of all predispositional reports shall be served on the child or his or her legal representative, the child's parent(s), guardian, or custodian, and the ICW Program at least five (5) days before the dispositional hearing.

§ 8.029. Dispositional Hearing

(a) **Time**—A dispositional hearing may take place immediately following the adjudicatory hearing if the parties agree and the evidence and information is available to the parties and court, or may be held not more than twenty (20) days after the adjudicatory hearing.

If the dispositional hearing does not immediately follow the adjudicatory hearing, the time for the dispositional hearing shall be set at the adjudicatory hearing and that announcement shall constitute notice to all parties of the dispositional hearing.

(b) **Purpose**—The Court may hear testimony at the dispositional hearing for the purpose of determining the proper disposition of the child.

(c) **Evidence to the Considered by the Court**—The Court shall consider:

(1) The predispositional report submitted by the tribal ICW Program;

(2) Any alternative predispositional reports submitted for review; and

(3) Any and all evidence presented by any party contesting the factual contents and conclusions of the predispositional reports.

(d) **Final Order**—The dispositional order constitutes a final order for purposes of an appeal.

§ 8.030. Disposition of Children-In-Need-Of-Care

(a) **Guiding Principles for Disposition**

In determining the appropriate disposition for a child-in-need-of-care, the court shall take into account the best interest of the child and the child's health, safety, and welfare. A child shall be placed with relatives where possible, and shall be placed in the least restrictive setting in proximity to the parents or custodians, if possible, given the special needs of the child.

(b) **Conditions Upon Parties**—The Court has the authority to impose conditions and limitations upon a child, the child's parent(s), guardian or custodian, and any other party pursuant to this Code in order to protect the safety and best interests of a child found to be a child-in-need-of-care. Conditions and limitations may include, but are not limited to:

(1) Counseling, therapy, and/or participation in services, including restrictions on access to reports generated as part of such counseling, therapy, or evaluations;

(2) Restrictions on visitation and communication with one or both parents;

(3) Payment of support or other necessary costs;

(4) Participation in tribally-sponsored activities;

(5) Restrictions on associations;

(6) Restrictions on use of alcohol or drugs;

(7) Drug testing;

(8) Curfew restrictions;

(9) Restitution for out-of-home care if the child is removed from the home; and

(10) Any other conditions or dispositions that the Court finds are appropriate to protect the best interests of the child.

(c) **Written Findings Required for Removal**—Where a child is removed from the home or placed in an out-of-home placement, the Court shall make written findings that continued custody by the parents or custodian or in the home would be contrary to the health and welfare of the child and that removal from the home is in the best interests of the child.

(f) **Notice to Parties and Court of Changes**—The parties and the Court shall be notified of any changes in the child's placement, or of any determination

from a court of competent jurisdiction affecting a parent(s), guardian or custodian's legal right to custody of the child.

(g) In all cases in which a child is placed in a non-Siletz home, the ICW Program will provide mandatory cultural training to the family and provide information and support to the family to facilitate participation in cultural events and activities with the child.

§ 8.031. Review of Dispositional Order

(a) **Time Frame for Court's Review**—The Court shall schedule periodic review hearings to review dispositional orders at its discretion; provided, however, that within six (6) months of the original dispositional hearing and every six (6) months thereafter so long as the child remains within the jurisdiction of the Court and a permanent plan for the child has not yet been established by Court order, the Court shall conduct a hearing to review the status of the child to:

(1) Determine the continuing need for and appropriateness both of the Court's continuing jurisdiction over the child and of the placement;

(2) Determine the extent of compliance with the case plan;

(3) Determine the extent of progress the child's parent(s), guardian or custodian has made toward improving the situation that initially required the child to be removed from the home;

(4) Determine whether the ICW Program is making reasonable efforts to provide the services needed to return the child to the home, or whether reasonable efforts to reunite the family are no longer required;

(5) Assess the ICW Program's concurrent case planning, if any, and the efforts to find a permanent home for the child if the family cannot be reunited, including but not limited to a requirement that the ICW Program identify a proposed permanent placement alternative within twelve (12) months of the Tribal Court assuming jurisdiction over the child unless the Court has determined that reunification is still a viable option and is likely to occur within a reasonable period of time, given the child's age and needs; and

(6) Project a likely date by which the child may be returned home or when an alternative permanent plan will be put into effect.

(b) **Review Hearing Upon Written Request**—The Court shall conduct a review hearing upon the written request of any party.

(c) **Recommendation by Tribal ICW Program**—The tribal ICW Program shall monitor the disposition throughout its term and shall recommend long-term placement options for a child-in-need-of-care within the jurisdiction of the Court. At least five (5) days before any review hearing, the tribal ICW Program shall submit a report to the Court discussing:

(1) The family's compliance with the case plan;

(2) The long-term prospects of reuniting the child with his or her family within a reasonable period of time, from the child's perspective; and

(3) The ICW Program's effort to find a permanent home for the child, and to develop a permanency plan for the child either as a concurrent plan or, within twelve months of jurisdiction or within thirty (30) days after the Court determines that reunifications efforts for the family are no longer appropriate.

(d) **Notice and Opportunity to Be Heard**—Foster parents, relative caregivers, and preadoptive parents providing care to a child found to be a child-in-need-of-care pursuant to this Code shall be provided notice of and the opportunity to be heard in any review hearing concerning the child. The foster parents, relative caregivers, and preadoptive parents are not legal parties to the proceedings.

(e) **Modification of Dispositional Order**—The Court may modify a dispositional order at any time upon a showing of good cause. Any of the following persons may initiate the motion to modify a dispositional order:

(1) The child or the child's legal representative;

(2) The child's parent, guardian or custodian;

(3) The tribal representative; or

(4) The Court.

(f) **If Reasonable Efforts Are No Longer Required**—If the Court determines that reasonable efforts to reunite the family are no longer required, a permanency planning hearing shall be held within thirty (30) days and the ICW Program shall make reasonable efforts to place the child in a permanent placement according to the placement preferences set in § 8.030 (d) in a timely manner.

§ 8.032. Permanency Planning Hearing

(a) **When Permanency Planning Hearing Required**—The Court shall hold a permanency planning hearing to determine the permanent plan for the child. The permanency planning hearing may be combined with the periodic review hearing. The permanency planning hearing shall be held within twelve (12) months from the date that a child enters foster care, or within thirty (30) days after the Court finds that reasonable efforts to reunite the family are no longer required. A child shall be considered to have entered foster care on the earlier of the following two (2) dates:

(1) The date of the adjudicatory hearing finding that the child is a child-in-need-of-care; or

(2) The date that is sixty (60) days after the date the child was removed from the home.

(b) **Notice and Opportunity to Be Heard**—Foster parents, relative caregivers, and preadoptive parents providing care to a child found to be a child-in-need-

of-care pursuant to this Code shall be provided notice of and the opportunity to be heard in a permanency planning hearing concerning the child. The foster parents, relative caregivers, and preadoptive parents are not legal parties to the proceedings.

(c) **Permanency Planning Reports**

(1) The ICW Program shall submit a report to the Court no later than five (5) days before the permanency planning hearing. The report shall:

(a) Summarize the history of the case and the efforts made to offer services to the child and the family;

(b) Describe the child's and the family's circumstances, including the case management and services provided by the ICW Program since the last Court hearing;

(c) Describe the extent of compliance by all parties with the case plan;

(d) Describe the parent(s), guardian, or custodian's treatment progress and efforts toward reunification.

(e) Recommend a permanent plan for the child indicating whether, and if applicable when, the child will be returned to the child's parent(s), guardian or custodian or placed with a permanent placement. The report shall include specific reasons why the recommended permanent plan has been chosen, including why that plan meets the child's particular needs and best interests, and why other permanent plans have not been chosen;

(f) Describe the efforts made to develop a concurrent plan for the permanent placement of the child to be put into place if the family cannot be reunited, and the steps taken to find a permanent placement for the child, if necessary; and

(g) Explain the compelling reasons why termination of parental rights is not being recommended as the permanent plan for the child, including the specific reasons why the best interests of the child in question will not be served by termination of parental rights and what advantages and benefits will inure to the child by virtue of the child's parental rights not being terminated.

(2) Any party may submit a separate report to the Court, which shall include his or her own recommendations for consideration by the Court, at least five (5) days before the dispositional hearing.

(3) Copies of all reports shall be served on the ICW Program, the child or his or her legal representative, and the child's parent(s), guardian, or custodian at least five (5) days before the permanency planning hearing.

(d) **Return of the Child**—The Court shall return the child to the physical custody of the child's parent(s), guardian or custodian unless the Court finds, by a preponderance of evidence, that returning the child would cause a substantial risk to the physical or emotional well-being of the child. The burden is on the

tribal representative to prove that the child's health or safety will be at risk if returned to his or her parent(s), guardian or custodian.

(e) **Written Findings and Permanent Plan**—The Court shall enter written findings, including:

(1) Whether the tribal ICW Program has made reasonable efforts to reunite the family, or whether reasonable efforts to reunite the family are no longer necessary or productive;

(2) The permanent plan for the child, if the Court determines not to return the child to the child's parent(s), guardian or custodian. The permanent plan may include:

(A) Continuing reunification as the permanent goal for the family and maintaining the child in the current placement if the child's parent(s), guardian or custodian is making progress toward reunification and reunification is likely within a reasonable time based upon the child's needs;

(B) Placing the child with long-term guardian, who shall be appointed by the Court;

(C) Maintaining the child in foster care on a permanent or long-term basis, if the foster care is provided by a relative or compelling reasons for placement exist;

(E) Filing a petition to certify the customary adoption of the child; or

(F) The tribal ICW Program file a petition to terminate parental rights and secure an adoptive placement for the child.

(3) Why the permanent plan chosen is in the best interests of the child, and why other permanent plans were not selected;

(4) The Tribal ICW Program's efforts to develop a concurrent plan for the child in the event that the return of the child is not possible, or if a concurrent plan has not been developed, the reasons why a concurrent plan is not necessary; and

(5) If the permanent plan does not involve the filing of a petition to terminate parental rights, the compelling reasons why termination of parental rights would not be in the best interests of the child and why the alternative selected is in the best interests of the child.

(f) **Permanent Plan Review Hearings**

(1) Where a child remains under the jurisdiction of the Court and in the custody of a foster parent, temporary guardian or other nonpermanent placement, the Court shall review the permanent plan for the child every six (6) months to determine:

(A) The appropriateness of the placement;

(B) The appropriateness of and the extent of compliance with the permanent plan for the child;

(C) The adequacy of services provided to the child and the child's parent(s), guardian or custodian to reunite the family within a reasonable period of time and to find a permanent home for the child in the event that reunification is not possible; and

(D) Whether additional services are necessary to support the permanent plan.

(2) Subsequent permanent plan review hearings need not be held if:

(A) The child has been adopted;

(B) The child is a ward of a permanent guardian, or,

(C) The child has been placed permanently with a relative.

(g) **Continuing Jurisdiction of Court**—For dispositional purposes, jurisdiction over a child under this Code shall continue until he or she reaches eighteen (18) years of age, unless jurisdiction is terminated earlier by order of the Court or extended beyond the child's eighteenth (18) birthday by order of the Court.

§ 8.030. Disposition of Children-In-Need-Of-Care

(d) **Placement Preference**—When a child found to be a child-in-need-of-care requires an out of home placement, the placement preferences shall take into account the best interests of the child and the child's health, safety, and welfare, shall be followed:

(1) Permit the child to remain with his or her parent(s), guardian or custodian under protective supervision, subject to such limitations and conditions as the Court may prescribe;

(2) Place the child with a grandparent within the Service Area, under protective supervision, subject to such limitations and conditions as the Court may prescribe;

(3) Place the child with an extended family member or other relative within the Service Area, under protective supervision, subject to such limitations and conditions as the Court may prescribe;

(4) Place the child in a foster home that has been licensed or approved by the Tribe within the Service Area, under protective supervision, subject to such limitations and conditions as the Court may prescribe;

(5) Place the child in a shelter care or residential facility within the Service Area, under protective supervision, subject to such limitations and conditions as the Court may prescribe;

(6) Place the child in a foster home or extended family member's home that has been approved by the Tribe, outside the Service Area, subject to such limitations and conditions as the Court may prescribe;

(7) Transfer legal custody of the child to an agency responsible for the care of children-in-need-of-care, or to an extended family member or other person who the Court finds to be qualified to receive and care for the child, subject to such limitations and conditions as the Court may prescribe;

(8) Recommend that full or partial emancipation be ordered;

(9) Place the child in a long-term permanent placement, considering long-term guardianship as an alternative to the termination of parental rights based upon the individual circumstances and best interests of the child;

(10) Recommend the initiation of proceedings for certification of a customary adoption; and/or

(11) Recommend the initiation of proceedings for the termination of parental rights.

(12) The ICW Program and Court shall take all available steps to ensure that the placement selected is and remains subject to the jurisdiction of the Tribal Court, including but not limited to having the placement expressly consent in writing to the continuing jurisdiction of the Tribal Court for all matters related to the child.

(e) **Party Receiving Custody Shall Submit to Tribal Court Jurisdiction—** Whenever the child within the jurisdiction of the court is placed in a home or facility located outside of the Siletz Service Area, the Court shall retain jurisdiction over the child and require the party receiving custody of the child to sign an agreement that:

(1) The child will be returned to the Court upon order of the Court; and

(2) The party receiving custody of the child consents to the jurisdiction of the Tribal Court.

Absent such a signed agreement, any person or institution accepting placement of a child pursuant to this Code shall be deemed to have consented to Tribal Court jurisdiction for purposes of determination of the child's placement, and to return the child to the Court upon request or order of the Court.

[sections omitted]

The Law and Order Code of the Kalispel Tribe of Indians (Enacted 12.2.2015)
Chapter 7 Kalispel Youth Code
Part 5. Youth in Need of Care

7-31.11 Placement Preferences in General

The Court shall be guided by the following placement preferences in deciding whether an adoption will be granted. The Court may deny the adoption if the petitioner(s) does not fall into one of these categories:

(1) A member of the youth's extended family;

(2) A member of or person eligible for enrollment in the Kalispel Tribe of Indians;

(3) A member of another Indian tribe; or

(4) If this order of placement preference cannot be met, for good cause shown, then placement may be made with any person who has knowledge of and a desire to foster the youth's tribal affiliation and any potential special needs.

7-23.05 Placement Contingent on Consent to Jurisdiction

Placement of a youth with anyone who does not reside within the jurisdiction of the Kalispel Tribe of Indians shall be contingent on the person's written agreement to accept the jurisdiction of the Tribal Court and to cooperate fully with the Indian Child Welfare Worker and law enforcement.

7-31.12 Placement Preference for Siblings

When applying the preferences listed in Section 7-31.11 the Court shall, when possible:

(1) Whenever more than one sibling is to be placed, place siblings together or in close proximity, unless the placement would cause serious physical or emotional harm to one or more of the children; and

(2) Place the youth in a manner assuring maximum opportunity for maintenance of a sibling relationship.

7-23.04 Court Ordered Family Protection Plan (Disposition)

If a youth has been determined to be in need of care, the Court shall order a Family Protection Plan for his or her protection and well-being. The Plan shall either allow the child to remain with his or her parent(s), guardian, or custodian, subject to any such limitations and conditions the Court may order or the Court may order out-of-home placement subject to the following placement preferences:

(1) Place the youth with an extended family member subject to any limitations and conditions the Court may prescribe;

(2) Place the youth in a foster home which has been licensed or approved by the Tribe, subject to any limitations and conditions the Court may order;

(3) Place the youth in another home or facility which will both meet the particular needs of the youth and will insure that the youth will keep his or her ties to the Kalispel Indian Community and to his or her family.

The Court may make other orders necessary for the protection and well-being of the youth and the family. Such orders may include but are not limited to: evaluation and treatment (including involuntary residential treatment) of substance abuse, mental illness, and emotional disturbance; parenting classes; mandatory school attendance; mediation; visitation orders; restraining orders; and other services or activities for the benefit of the youth and his or her family. The Court

may make a particular placement conditional on compliance with any of the above listed orders.

Mashantucket Pequot Tribal Laws (Enacted 2008)
Title V. Child Welfare
Chapter 3. Reporting of Child Neglect and Abuse

§ 8. Placement Preferences

a. Whenever the court has adjudged a child to be in need of protective or foster care, the child shall be placed in the least restrictive setting which most approximates a family and in which her special needs, if any, may be met. The child shall also be placed within reasonable proximity to her home, taking into account any special needs of the child. A placement preference shall be given, in the absence of good cause to the contrary and taking into consideration the child's age and maturity, to a placement with:

   (1) Members of the child's family or extended family;

   (2) Other members of the Mashantucket Pequot Tribe;

   (3) A tribally approved Foster Home or facility for children which has a program suitable to meet the child's needs;

   (4) Other Indian families.

b. Where a child is placed outside of the tribal community, the tribal court shall include in its order provisions for continuing contact between the child and the tribal community.

Tribal Code Commentary

The Siletz Code has extensive provisions relative to placement restrictions and specific requirements for reports necessary for disposition, review hearings, and permanency planning. Section 8.027 lays out key policy in all placements, such as keeping all children removed together in a single placement if at all possible and using the least restrictive placement in close proximity to the parent, guardian, or custodian, unless the special needs or health and safety of the child require otherwise. Extended family and relatives have first consideration for placement. The policy is important as at times there are conflicts on placement priorities that can be resolved by review of the policy.

The Siletz Code requires that a predispositional report be prepared five days before the dispositional hearing or if the hearing is a permanent plan review hearing that the permanent plan be provided five days before the hearing. The permanent plan is discussed in more detail in Chapter 12. In addition to specific findings required in the court order after either a dispositional hearing or a permanent plan hearing, the court always reviews the adequacy of the placement. Review of dispositional orders are required every six months. The Siletz Code is a good example of a code meeting federal requirements under Title IV-E.

The placement preferences in the Siletz Nation include, in the following order:

1. Remain with parent, guardian, or custodian under protective supervision.
2. Placement with a grandparent within the service area under protective supervision.
3. Placement with an extended family member or relative within the service area under protective supervision.
4. Placement in a foster home that has been licensed or approved within the service area, under protective supervision.
5. Placement in shelter care or residential facility within the service area, under protective supervision.
6. Placement in a foster home or extended family member's home that has been approved by the Nation, outside the service area.
7. Transfer legal custody to an agency or extended family member or other person who the court finds qualified.
8. A full or partial emancipation.
9. A long-term permanent placement, considering long-term guardianship as an alternative to the termination of parental rights based upon individual circumstances.
10. Customary adoption.
11. Termination of parental rights.
12. Take steps necessary to ensure that the tribal court continues to have jurisdiction over the placement in all situations.

The Siletz Nation attempts to avoid termination of parental rights if there are other alternatives, using guardianship and customary adoption. It also makes every effort to retain jurisdiction.

The Kalispel Code requires that, anytime siblings are placed, the court should attempt to place them together or in close proximity, unless the placement would cause serious physical or emotional harm to one or more of the children. Any placement outside the jurisdiction of the Kalispel Nation requires that a written agreement consenting to jurisdiction and agreeing to fully cooperate with the tribal welfare worker and law enforcement. A family protection plan is required to be filed with the court. The plan either allows the child to remain with their parent, guardian, or custodian subject to limitations or conditions or provides for an out-of-home placement subject to the following preferences:

1. Placement with extended family.
2. Placement in foster care.
3. Placement in another home or facility that meets the particular needs of the youth and ensures that the youth is able to keep ties to the Kalispel Indian community and family.

The Mashantucket Pequot Code requires that the child be placed in the least restrictive setting possible, which most approximates a family in which the child's special needs can be met. Placement preferences include:

1. Placement with family or extended family.
2. Placement with members of the Mashantucket Pequot Tribe.
3. Tribally approved foster home or facility suitable to meet the child's needs.
4. Other Indian families.

When a child is placed outside the community, the court includes provisions for continuing contact between the child and the tribal community in its order.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Do you currently have placement preferences in your code? Do they reflect your traditions and culture?
- Do you have adequate placement options within your service area? How do you currently ensure that the tribal court maintains jurisdiction over the placement, if placed outside the service area?
- Highlight the possible hearings currently required by your code. Do they provide for adequate review of placements?

STEP 2: Establish a Vision for the Future

- What changes do you believe are necessary in your current code to:
  - Protect the child;
  - Keep siblings together;
  - Provide for visitation with the parent, guardian, custodian, extended family, and tribal community; and
  - Comply with Title IV-E, if desired?
- What type of dispositions do you anticipate at the different stages of the process? How will they differ?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

D. Placement Prohibitions on Secure Detention Facilities

It is very important that a child alleged to be maltreated is *not* detained in a jail or other facility intended or used for the incarceration of adults charged with criminal offenses or for the detention of children alleged to be juvenile offenders. Evidence shows that placing a child in a secure detention facility is harmful: "the lack of alternatives and diversion programs force the system to use detention as shelter. This is a poor response as younger inmates have higher rates of victimization by youth and staff."[120]

In addition to preventing harm, this type of provision is necessary to comply with the requirements of the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPA). JJDPA as amended (PL 96-509) provides that:

1. Juvenile status offenders and nonoffenders are not to be placed in secure detention facilities;
2. Suspected or adjudicated juvenile delinquents are not to be detained or confined in facilities allowing regular contact with incarcerated adults; and
3. No juvenile is to be detained or confined in any jail or lockup for adults except in low population density areas or where appropriate facilities are unavailable.

Many tribal juvenile justice systems have had difficulty meeting the act's requirements.[121] The specific provisions of the act are as follows:

Section 223(a) (12)(A) providing that juveniles who are status offenders or nonoffenders such as dependent or neglected children "shall not be placed in secure detention facilities or secure correctional facilities";

Section 223(a)(13) providing that juveniles suspected or judged to be delinquent according to Section 223(a)(12)(A) "shall not be detained or confined in any institution in which they have regular contact with adult persons incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges"; and

Section 223(a)(14) providing that within five years of the Juvenile Justice Amendments of 1980 becoming law, that "no juvenile shall be detained or confined in any jail or lockup for adults, except that the Administrator shall promulgate regulations which (A) recognize the special needs of areas characterized by low population density with respect to the detention of juveniles; and (B) shall permit the temporary detention in such adult facilities of juveniles accused of serious crimes against persons, subject to the provisions of paragraph (13), where no existing acceptable alternative placement is available."

---

[120] D. Cooley, "Criminal Victimization in Male Federal Prisons," *Canadian Journal of Criminology* 35 (1993): 479–95.
[121] For more information about this requirement, check with a designated state agency and state juvenile justice specialists. Visit: https://www.ojjdp.gov/statecontacts/resourcelist.asp to find your state's designated agency and specialist(s).

If a Native Nation has no choice but to place a child in a detention facility, in no case shall the court continue an emergency placement of a child in a jail or other detention facility unless it is demonstrated that the child constitutes a severe danger to him- or herself or others and that the jail or detention facility is the safest and least restrictive alternative under the circumstances. If the court continues a placement in a detention facility, the court shall require the removing agency to demonstrate every attempt to find a less restrictive alternative. A child detained in a jail or other detention facility must be segregated from other persons in the jail.

Selected Tribal Codes

Yurok Tribe Children's Code (Current through January 31, 2008)
Chapter 6: Emergency Custody Hearing

Section 18: Secure Detention Prohibited

No child who is in emergency custody or who is determined to be a Child In Need of Aid ("CINA") shall be detained in a secure juvenile detention facility, jail, or prison for any amount of time under this statute.

Pascua Yaqui Tribe Tribal Codes
Title 5 Civil Codes
Chapter 7 Juveniles (Amended February, 2015)

Section 360 Restrictions on Placement (5 PYTC § 7-360)

A child alleged to be neglected or abused shall not be detained in a jail or other facility intended or used for the incarceration of adults charged with criminal offenses or for the detention of juveniles alleged to be juvenile offenders, but may be detained in the following community-based shelter care facilities:

(A) A licensed foster home or a home otherwise authorized under the law to provide foster care, group care, protective services, etc.;

(B) A facility operated by a licensed child welfare services agency; or

(C) With a relative of the child who is willing to guarantee to the Court that the child will not be returned to the alleged abusive or negligent parent, guardian or custodian, or to the residence where the alleged abuse occurred, without the prior approval of the Court; or

(D) Any other suitable place, other than the facility for the care and rehabilitation of Juvenile offenders to which children adjudicated as juvenile offenders may be confined and which meets the standards for shelter-care facilities established by the Social Services Department.

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part A. General and Dependency Provisions

§406.9 Emergency Removal of Child—Temporary Emergency Custody Hearing[122]

[sections omitted]

(d) In no case shall the Children and Family Court continue an emergency placement of a child in a tribal jail or other detention facility based upon a petition unless it is demonstrated to the Children and Family Court that the

[122] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

child constitutes a severe danger to himself or others and that the jail or detention facility is the least restrictive alternative under the circumstances.

(e) If the Children and Family Court continues a placement in a detention facility it shall require the LOWO Division of Child Protective Services to demonstrate that every attempt to find a less restrictive alternative has been made and shall monitor the placement every 48 hours. A child detained in the tribal jail or other detention facility shall be segregated from other persons in the jail by sight and sound.

§406.16 Criteria for Holding a Child Expectant Mother in a Secure Detention Facility

A child expectant mother may be held in a secure detention facility if the intake worker determines that one of the following conditions applies:

(1) The child expectant mother consents in writing to being held in order to protect her from an imminent physical threat from another and such secure custody is ordered by the judge in a protective order; or

(2) Probable cause exists to believe that the child expectant mother, having been placed in nonsecure custody by an intake worker or by the Children and Family Court, has run away or committed a delinquent act and no other suitable alternative exists.

§406.17 Criteria for Holding a Child Expectant Mother in Jail

Subject to the provisions of Section 406.16, a tribal jail may be used as a secure detention facility if there is no other secure detention facility approved by the Tribe which is available and:

(1) The jail meets the standards for secure detention facilities established by the U.S. Department of Corrections;

(2) The child expectant mother is held in a room separated and removed from incarcerated adults;

(3) The child expectant mother is not held in a cell designed for the administrative or disciplinary segregation of adults;

(4) Adequate supervision is provided; and

(5) The Children and Family Court reviews the status of the child expectant mother every 3 days.

Tribal Code Commentary

The Yurok Children's Code strictly prohibits any child in emergency custody or who has been determined to be a CINA to be detained in a secure juvenile detention facility for any amount of time.

The Pascua Yaqui Nation prohibits a child alleged to be abuse or neglected from being detained in a jail or facility for detention of adults or juveniles, but approved the following facilities: a foster home, group care home, or a protective services home, as well as a facility operated by a licensed child welfare service agency, a relative, or any other facilities that meet the standards for shelter-care facilities.

The Oglala Tribal Code prohibits placement of a child in a tribal jail or other detention facility unless it is demonstrated to the Children and Family Court that the child constitutes a severe danger to him- or herself or others and that the detention facility is the least restrictive alternative under the circumstances. CPS must demonstrate that every attempt to find a less restrictive alternative has been made and must monitor the placement every forty-eight hours. The child is to be segregated for all other persons by sight and sound.

An expectant mother can be held in a secure detention facility in the Oglala Sioux Nation if the intake worker determines that the mother consents to being held in order to protect her from an imminent physical threat from another and it is ordered by the judge in a protective order. Placement is also allowed if there is probable cause to believe that the child expectant mother having been placed in a nonsecured facility has run away or committed a delinquent act and no other suitable alternative exists. Certain standards must be met such as the jail meeting standards established by the U.S. Department of Corrections; the child expectant mother is held in a room separated and removed from incarcerated adults; the cell is not designed for the administrative or disciplinary segregation of adults; and adequate supervision is provided and the status is reviewed every three days.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Review your current code to examine the prohibitions on placement of children-in-need-of care in secure detention.
- Do your current code and procedures meet the standards required by JJDPA?
- Review records to determine if any child-in-need-of-care has been placed in your Nation's secure detention facility in the last five years. Review these cases to understand their circumstances.

STEP 2: Establish a Vision for the Future

- If your goal is to never have a child-in-need-of-care placed in your detention facility:
  - What action must be taken to ensure alternative placements are available in your community?
  - Are there out-of-community placements that could be considered?
  - What prohibitions should you include in your code?
  - After reviewing options available, are there certain circumstances under which placement in a secure facility might be necessary for child safety? Describe and decide how the exception should be worded in your code.

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

E. Visitation

Visitation is an important aspect of any disposition issued by a court and should be addressed at every dispositional hearing. Because separation from family is such a traumatic event, and because reunification is often the goal for most CINA cases, visitation provisions at every dispositional hearing preserve this important tool for families and social services.

For those cases in which visitation with the parent(s) or guardian(s) is not in the best interest of the child, visitation with siblings and extended family members should still be considered. A title IV-E agency must make reasonable efforts to place siblings removed from their home in the same foster care, adoption or guardianship placement, or to facilitate frequent visitation or ongoing interactions (for example, letters, phone calls, text, email and other electronic communication) for those that cannot be placed together, unless it is contrary to the safety or well-being of any of the siblings to do so.[123]

Finally, for children that are placed outside of their Native communities, dispositions related to visitation requirements and required opportunities for them to participate in their home communities' social and cultural events are especially important because they serve to maintain and foster a connection to the child's Native identity and citizenship.

[123] Fostering Connections Act, P.L. 110-351 § 206 (2008).

Selected Tribal Codes

Yurok Tribe Children's Code (Current through January 31, 2008)
Chapter 6: Emergency Custody Hearing

Section 4: Disposition

(a) Responsibilities and Rights of Parents; Right to Visitation

Whenever a child is temporarily or permanently removed from the custody of one or both parents, each parent shall have the right to reasonable and frequent visitation, provided that the parent's rights have not been terminated but such visitation will be subject to limitations imposed by the court for the child's protection.

(b) Responsibilities and Rights of Extended Family Members; Right to Visitation Any member of a child's extended family has the right to reasonable visitation with that child if necessary for the best interests of the child.

(c) Effect on Visitation Rights of a Finding of Aggravated Circumstances. After a finding of the existence of an aggravated circumstance with regard to a parent, guardian or custodian, caretaker, or extended family member, the court may deny that parent, guardian or custodian, caretaker, or extended family member visitation rights with respect to any child who has been adjudicated a Child in Need of Aid ("CINA").

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.540 Court ordered case plan.

[sections omitted]

(c) **Visitation**. Beda?chelh shall make every effort to facilitate frequent and consistent visitation with parent or guardian, whether in person, on the phone, over Skype, or by text. Visitation should be in the least restrictive means possible so long as it is safe for the child. Visitation will be suspended if it is not in the best interest of the child. If the child is placed out of parental or guardian care, beda?chelh will provide visitation between the child, siblings and relatives or persons with significant familial ties, as appropriate. [Res. 2015-101].

4.05.610 Change in placement or visitation.

The parties and placement shall be provided with written notice of any change in the child's placement or visitation unless such notice could be harmful to the child or the parent or guardian has failed to participate in the court proceedings. The notice provided to the parent or guardian may be limited to the type of placement or that the child has been moved if information must remain confidential to protect the child or placement.

Beda?chelh shall provide the notice as soon as practicable, unless the child's health or safety would be endangered by delaying the proposed change, or the current placement gave notice the child must be removed immediately. If the parent or guardian is represented by an attorney, the notice shall be served on him or her.

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part A. General and Dependency Provisions

§408.9 Rights of Parties to Proceedings—Parent and Extended Family Rights[124]

[sections omitted]

(6) The right to reasonable visitation with any child of the family, tiwahe, or tiospaye that has been placed outside the home provided the exercise of visitation would not compromise the child's best interests.

§408.22 Dispositional Hearing—the LOWO Division of Child Protective Services Reporting required

(a) In all cases, the LOWO Division of Child Protective Services shall provide the following information to the Children and Family Court prior to a Dispositional Hearing:

[sections omitted]

(5) Proposed arrangements for visitation;

(6) Placement of any siblings, and if siblings are to be placed apart from one another, proposed arrangements for them to visit one another;

§408.23 Dispositional Hearing- Findings and Conclusions by the Court

[sections omitted]

(8) Specify the terms of parental visitation;

§409.4 Impact of Certification on Visitation Rights

The Children and Family Court may deny visitation rights with any child in the custody of the LOWO Division of Child Protective Services to a parent, guardian or custodian who has been found by the Children and Family Court to have committed an aggravated circumstance as defined at Section 409.1 of this Code.

[124] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

§414.5 Foster Care Parent Responsibilities

[sections omitted]

(h) **Discipline**—

(D) The foster care parent shall not deprive the child in foster care of meals, mail or family visits as a method of discipline;

Tribal Code Commentary

The Yurok Code provides the right of frequent and reasonable visitation between the child and parent, guardian, or custodian, when the child is placed outside their home, provided parental rights have not been terminated and subject to limitations imposed by the court. Extended family members also have the right to visitation. If there is a finding of aggravated circumstances relative to a parent, guardian, custodian, or extended family member, the court may deny visitation.

The Tulalip Tribal Code requires the beda?chelh to make every effort to facilitate frequent and consistent visitation with parent or guardian, whether in person, on the phone, over Skype, or by text. Visitation should be in the least restrictive means possible so long as it is safe for the child. If visitation is not in the best interests of the child, it may be suspended. Visitation should also be provided between siblings, relatives, or persons with significant familial ties and the child. If the child is moved, the parent or guardian are provided notice, unless notice could be harmful to the child or the parent/guardian has failed to participate in the proceedings.

In the Oglala Sioux Nation, the family of the child-in-need-of-care, tiwahe, and tiospaye are provided reasonable visitation provided it is not contrary to the child's best interests. In the dispositional hearing CPS is required to propose arrangements for visitation, including sibling visitation if they are not placed together. Visitation may be denied to a parent, guardian, or custodian, if the court finds they have committed an aggravated circumstance. Depriving family visits may not be used as a method of discipline of the child.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Review your current code to examine provisions related to visitation with parents, guardians, and custodians. What requirements are there in the code that ensures visitation when it is not contrary to the child's best interests?
- Do you have a provision regarding denial of visitation when an aggravated circumstance is proven?
- What type of provisions do you have for visitation by extended family or visitation in the community?
- If visitation needs supervision does your community have a place to easily supervise visits? How does your community manage visitation?

STEP 2: Establish a Vision for the Future

- What changes in your code need to be made in to ensure reasonable and frequent visitation takes place in order to minimize harm to the family relationship?
- Do you want to encourage visitation with extended family? How will you do that in your code?
- What provision do you want on visitation between siblings?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

Additional Resources

Blomquist, Martha-Elin, and Mimari Akatsu Hall, Improving Compliance with the Indian Child Welfare Act: A Guide for Juvenile and Family Courts, National Council of Juvenile and Family Court Judges, 2007.
This technical assistance bulletin provides juvenile and family courts with practice recommendations and tools to improve compliance with the letter of ICWA as well as with the "spirit of ICWA" through services and supports. The first, most critical, and ongoing step is to develop respectful and authentic relationships with tribes to fully implement ICWA and best serve Native children. Following the development of relationships, courts should collaborate to examine practice, build understanding through training, develop an action plan, and monitor the action plan to ensure accountability and progress. Judges and child welfare workers must commit to a course of action that is inclusive of tribal voices and that leads to real and sustainable change for Native children and families. The National Council of Juvenile and Family Court Judges can assist courts in achieving full ICWA compliance.

Haight, Wendy, et al., "Making Visits Better: The Perspective of Parents, Foster Parents, and Child Welfare Workers," *Child Welfare* 81 (2) (2001): 173–202.
This resource highlights the importance of recognizing different expectations for visits and of coaching birth and foster parents about coping with children's responses.

National CASA Association and National Council of Juvenile and Family Court Judges, Family Visitation of Children and Youth in Foster Care, *The Judge's Page Newsletter*, 2006.
Highlights how courts can make appropriate and effective visitation decisions for children in foster care, their siblings, and parents.

Office of Juvenile Justice and Delinquency Prevention (OJJDP), State Contacts, 2016.
Webpage on OJJDP's main website that contains an interactive map that can be used to find state representatives and organizations that administer many OJJDP programs. This webpage can be used to find OJJDP Juvenile Justice Specialists.

Chapter 14: Foster Care in Native Nations

Foster care is one of the many types of placements that can occur as a result of a CINA case. The label *foster care* does not have to refer to a nonrelative placement, instead, it usually refers to the fact that the placement home, and the supervising adults that live there, have undergone a process that resulted in a foster care license. In order to receive funds through Title IV-E, the foster home must meet certain standards.

While relative or kinship placements can sometimes occur without going through the strict foster care license approval process, this section will address the foster licensing of both relative and nonrelative foster homes.

The actual foster licensing standards *do not* have to be in the Children's Code. Even so, Native Nations should still consider whether to codify, and thereby reinforce, the designated agency's chosen process for some or all of the licensing standards. For example, clearly stating in the Children's Code who is ineligible for a foster care license can save time by limiting confusion and administrative appeals.

Even if your Nation opts to exclude specific foster care licensing provisions from your code (choosing to, instead, include them in rules or regulations), it is important to comply with the following federal requirements for *all* Native Nations, regardless of the existence of a Title IV-E program, which include:

- Conducting applicant background checks;
- Finger-printing based criminal record checks;[125]
- Checking all child abuse and neglect registries maintained by a state or Native Nation;[126]
- Creating confidentiality safeguards to protect applicant information from being used for any purpose other than the licensing approval; and
- Rejecting applications from any adult that:
  - Has been convicted of a felony for child abuse or neglect, spousal abuse, or crime against children,
  - Has been convicted of a drug-related offense within the last five years, and
  - Has been convicted of a crime involving violence.

Note the assault or battery exception—Applicant *can* be approved if the assault or battery was committed more than five years before the date of application.

[125]It is mandatory to use the National Crime Information Center and Interstate Identification Index databases, including the Interstate Identification Index.

[126] Child abuse and neglect registries must be checked for all jurisdictions in which any adult living in the home has resided in the last five years.

Standards for foster homes "must be reasonably in accord with standards recommended by national organizations."[127]

Title IV-E Considerations

Native Nations considering a Title IV-E programs should consider recommending, or mandating, that relatives undergo the licensing process in order to receive Title IV-E funds. Although Native Nations can place children in unlicensed homes, they cannot claim Title IV-E funds for that placement. However, nonsafety waivers of the Title IV-E standards for relative foster homes are allowed.[128] Considering nonsafety waivers for all programs is advisable, considering the small pool of Native foster homes.

The relevant Title IV-E sections require Native Nations to:

- Designate a governmental department or entity with the specific task of developing standards for foster family homes;[129] and
- Deny the foster parent, adoptive parent, and guardianship applications of individuals that have committed certain crimes.[130]

Chapter Units

Unit A: Designate an Agency Responsible for Foster Care

Unit B: Foster Care Application Process

Unit C: Foster Care Applicant Eligibility

Unit D: Standards for Other Household Members

Unit E: Foster Care Home Standards

Unit F: Foster Parent Responsibilities

Unit G: Rejection, Review, or Disqualification of Foster Care License

[127] 42 U.S.C. § 671(a)(10); 42 U.S.C. § 679c(c)(2).
[128] 42 U.S.C. § 671(a)(10).
[129] Ibid.
[130] 42 U.S.C. § 671(a)(20)(A).

A. Designate an Agency Responsible for Foster Care

Deciding on the agency responsible for foster care licensing is an important decision. The scope of work requires the licensing of homes and foster parents in your Nation according to your Nation's established standards and requirements. The Nation's code may provide those standards or the agency, the legislative body, or another entity may be responsible for establishing the specific requirements. It is important that the agency's authorization and scope of responsibility be clearly included in the code. The authorization should be clear as to the agency's responsibilities, which may include licensing and regulating foster parents and homes and supervising the foster care placement of a child.

Title IV-E requires the following relative to designation of an agency:

> **42 U.S.C. §671 (a)(10) Requisites for State Plan**. provides for the establishment or designation of a State authority or authorities which shall be responsible for establishing and maintaining standards for foster family homes and child care institutions which are reasonably in accord with recommended standards of national organizations concerned with standards for such institutions or homes, including standards related to admission policies, safety, sanitation, and protection of civil rights, provides that the standards so established shall be applied by the State to any foster family home or child care institution receiving funds under this Unit or Unit B of this subchapter, and provides that a waiver of any such standard may be made only on a case-by-case basis for non-safety standards (as determined by the State) in relative foster family homes for specific children in care;

Selected Tribal Codes

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part B. Foster Care Provisions Section

§413.1 Creation of LOWO Foster Care Division[131]

This Code hereby establishes the LOWO Division of Foster Care. The Tribe vests the LOWO Division of Foster Care with all powers necessary and proper to carry out the duties and functions described under Section 413.2.

§413.2 Duties and Functions

(a) **Promulgation of Rules**—Subject to the provisions of this Code and applicable federal, state or tribal law, the LOWO Division of Foster Care shall establish and implement rules, policies and procedures to license individuals and homes for foster care, to place children in foster care, and to establish standards for foster care.

White Earth Band of Ojibwe Child/Family Protection Code (Last accessed November 20, 2015)
Title 4: Children and Families
Chapter XXIV. Foster Home Licensing Procedures

Section 1. Inspection and Licensing Procedures

a) The White Earth Social Services Department shall be responsible for licensing all tribal foster homes according to the standards approved by the White Earth Tribal Council.

[sections omitted]

---

[131] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

Tribal Code Commentary

The Oglala Sioux Tribal Code (OSTC) creates a new Division of Foster Care and vests the division with all of the powers needed to carry out its responsibilities. The division is responsible for establishing and implementing rules, policies, and procedures to license homes and individuals; place children in foster care; and establish standards for foster care. However, the OSTC provides very extensive direction relative to requirements and procedure.

The White Earth Nation's code designates the social service agency as the licensing authority, leaving the standards to the legislative body, the White Earth Tribal Council. More direction in the code may be helpful.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- If you currently have a foster home licensing agency designated, are there any problems or conflicts with that designation?
- If no agency is currently designated, what are the main considerations in establishing a division or delegating the responsibility to an existing agency?

STEP 2: Establish a Vision for the Future

- Determine which agency will conduct the foster home and applicant vetting process.
- Is there adequate staffing and funding?
- Determine which entity will be responsible for establishing policies, procedures, rules, and forms. How much direction will be provided by the Nation's legislative body?
- How will you make it clear in the code section that the entity has sufficient authority to meet its responsibilities?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

B. Foster Care Application Process

The process from the initial application for a foster care license through the final approval or disapproval needs to be comprehensive and professional. Keeping in mind as you develop the process that Native children placed in foster care have already been traumatized, and that removal from their home is another traumatic event, may help in focusing on a process that ensures safety and well-being of Native children in foster care. In this section we focus on the process, not the requirements, for a foster parent or foster home. A systematic process, consistently used (even though in many small communities, people may think they know everything about everybody) will help in finding safe foster homes that serve the well-being of Native foster children.

Some Native Nations may have different foster care requirements or standards for relatives of the child. A relative approved as a foster care provider receives the same financial assistance as a nonrelative foster care home. If the relative foster care home does not meet the Nation's foster care standards, the Nation may not receive federal assistance, unless there is a waiver of nonsafety requirement, which can be made on a case-by-case basis.[132] Careful consideration of the pros and cons of two different standards, one for nonrelatives and one for relatives is required of each Nation. Title IV-E requires preference be given to relative foster care home.[133]

In order to be eligible for any federal funding and to ensure the safety of foster children, the process of vetting a foster care applicant should include a background check, including finger printing based criminal checks in national databases, and a check of all child abuse and neglect registries maintained by a state or Native Nation. Safeguards should be built into the system to ensure the confidentially of the applicant and that the information is not used for any purpose other than licensing approval.

[132] 42 U.S.C. § 671 (a)(10).
[133] 42 U.S.C. § 671 (a)(20).

Selected Tribal Codes

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part V Out-Of-Home Placement Alternatives

§ 8.034. Foster Care

[sections omitted]

(b) **Relative Care**

(1) A child may be placed in the foster care of a relative after the ICW Program completes the following steps:

(A) Verification of the family relationship;

(B) A criminal background check of the prospective foster parent and a check into the prospective foster parent's driving record and vehicle insurance status; and

(C) A home visit to assess the safety of the home and the placement.

(2) To receive foster care payments under Title IV-E of the Social Security Act, a relative providing foster care for a child must meet the licensing standards established by the Tribe and be tribally approved as a foster home for the child.

(c) **Non-Relative Foster Care Placements**—Foster care licensing standards shall be used to determine the appropriateness of nonrelative foster care placements. Any person seeking to provide foster care for children who are not family members shall be formally licensed and certified in accordance with this Code and the Tribe's foster care licensing procedures.

(f) **Approving Tribal Foster Homes**

(1) Any person wishing to serve as a tribal foster parent shall apply in writing to the ICW Program. Each applicant shall furnish the ICW Program with a written application, which shall include the reasons the applicant wishes to become a foster parent, and at least four (4) personal references.

(2) The ICW Program shall perform a criminal background check on all persons residing in the applicant's home and check of the applicant's driving record and insurance, and shall conduct a home study. The home study shall include a personal interview with the applicant and the applicant's family, and an inspection of the applicant's home. The ICW Program shall complete a written report of his or her findings and recommendations concerning the applicant's suitability as a foster parent.

The report shall describe:

(A) The number of persons who reside in the applicant's home, including the age, sex and relationship of each person to the applicant;

(B) The number of beds in the applicant's home, and their location and suitability for a foster child;

(C) The availability of space for a foster child to sleep, study and store clothing and personal effects, as appropriate to the child's age and needs;

(D) The availability of adequate indoor and outdoor areas where a child can play safely;

(E) Whether potentially dangerous items such as guns, drugs or poisons are stored in the applicant's home and if so, whether adequate safeguards exist to prevent a child from coming into contact with the items; and

(F) Whether special arrangements are necessary to contact the applicant in the event of an emergency.

(3) In addition to the information provided under subsection (2), the ICW Program may, with the applicant's consent, request:

(A) Information concerning the suitability of the applicant as a foster parent from other sources, including neighbors, employers or agencies who have had contact with the applicant and the applicant's family;

(B) Information concerning the applicant's physical and mental health; and

(C) Inspections by authorized fire and safety and public health officials to ensure that the home is adequately protected from hazards

[Omitted section on applicant requirements. Discussed in next part]

(5) Within ninety (90) days of receiving a complete application from a prospective foster parent, the ICW Program must complete its review of the application and issue a foster care certificate to each applicant who meets the standards set forth by the Tribe and who agrees to accept foster children referred by the ICW Program.

(A) Each foster care certificate shall specify the maximum number of children that the foster home can care for at any one time.

(B) Subject to renewal upon an updated review by the ICW Program, each foster care certificate shall expire two (2) years after the date the certificate is issued, unless revoked by the ICW Program or cancelled by the Court.

(C) The ICW Program may issue a provisional certificate to any applicant who cannot satisfy the standards in these rules if the Program finds that the deficiencies will not affect a foster child's physical health, safety or emotional well-being and that the applicant can take corrective steps within a reasonable period of time. A provisional certificate shall expire within ninety (90) days, unless cancelled by the ICW Program

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part B. Foster Care Provisions

§414.2 Completion of Application Form Required[134]

(a) An individual wishing to apply for a foster parent license must apply on forms provided by the LOWO Division of Foster Care. The individual must sign the application form.

(b) The application shall include a statement that submission of a signed application by the applicant constitutes consent to investigation of the applicant's and his or her household members' criminal history and character.

[sections omitted]

§414.4 Foster Care License Application Process

(a) The foster care license application process will consist of the following steps:

(1) Initial inquiry;

(2) Orientation;

(3) Application & Background Screening;

(4) Assessment;

(5) Training (initial and ongoing);

(6) Licensure;

(7) Placement/Monitoring; and

(8) Renewal.

(b) **Foster Care Home Assessment**—Before issuing a foster care license, the LOWO Division of Foster Care shall conduct a foster home assessment, including:

(1) Interviews with each member of the family including children and other adults living in the home, individually, and a joint interview with both parents, if a two-parent home;

(2) Interviews with provided character references; and

(3) Assessment of the home and applicant foster family, in order to determine that the potential foster home meets the requirements set forth in Sections 414.1, 414.2, and 414.3. Each interview and assessment shall be documented for future review.

(c) **Foster Care License**—Approval or denial of the application shall be decided within 120 days of the receipt of the foster care application. After an application for a foster care license is approved, a foster care license shall be issued only for the licensee foster parent(s) and residence(s) described in the

[134] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

license. Any proposed changes in residence or household composition, as well as acceptance of additional children in foster care from the LOWO Division of Foster Care, must be reported to the LOWO Division of Foster Care, prior to such change. Failure to report such change may result in revocation of the foster care license. The foster care license is valid for one year from the date of receipt.

(d) **Foster Care License Renewal**—Renewal of a license will be based on a home visit interview with the foster family and an evaluation of the previous year. This evaluation includes review of incident reports and associated corrective actions. License renewal will be granted on an annual basis, upon continued compliance with all licensing standards and a demonstrated willingness to cooperate with the LOWO Division of Foster Care.

(e) **Denial of License**—The decision to issue a license will be based upon a written evaluation of the foster care applicant and potential foster home and family. A LOWO Division of Foster Care decision to refuse a foster care license must be based on a written assessment showing that the applicant does not meet LOWO Division of Foster Care foster care standards. Denied applicants shall receive a written notice fully stating the reasons for denial and the procedure for appeal. Applicants may reapply when the necessary changes have occurred.

Tribal Code Commentary

The Siletz Juvenile Code provides different criteria for a relative foster care home. In the case of a relative placement it requires the ICW program to:

- Verify the family relationship;
- Conduct a criminal background check and check the foster parent's driving record and vehicle insurance; and
- Conduct a home visit to assess the safety of the home and placement.

The code then states that in order to receive foster care payment under Title IV-E that the tribal requirements for foster care must be met.

The usual process according to the Siletz Juvenile Code requires an applicant to complete a written application with four personal references. The code requires a criminal background check and a home study. The home study includes personal interviews with the applicant and the applicant's family and an inspection of the home. It is quite specific on the information that should be gathered from the home study and included in the report. The ICW program may also seek information from other sources such as neighbors, employers, or other agencies with the applicant's approval. It may seek information on the applicant's mental or physical health and have the home inspected by fire and public safety agencies.

Within ninety days of receiving the application, the ICW program must complete its review of the application and issue a foster care certificate, provided the applicant meets the Nation's standards. The certificate indicates the number of children authorized and is good for two years.

The Oglala Sioux Code requires an applicant to apply to the LOWO Division of Foster Care. A signed application constitutes consent to the investigation of the applicants' and household members' criminal history and character. The process consists of the following steps, which are laid out in the code:

1. Initial inquiry,
2. Orientation,
3. Application and background screening,
4. Assessment,
5. Training (initial and ongoing),
6. Licensure,
7. Placement/monitoring, and
8. Renewal.

Interviews with each member of the family, including children and other adults living in the home, must take place. Interviews with character references and assessment of the home and family to ensure requirements are met are required. Each interview must be document. The process must be completed within 120 days. License renewal is on an annual basis.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Examine the current foster care licensing process, if any, and determine what is working and not working.
- Identify the changes needed.

STEP 2: Establish a Vision for the Future

- If you currently have no foster care licensing process, consider the following:
  - What is the key information needed in the application? Will you have an initial screening?
  - How will you conduct the background check and character check? Who will conduct it?
  - What information is needed in the home study and who will be interviewed?
  - How much time will be allotted for review?
  - How will you ensure that the information obtained is confidential?
- Determine what information should be in the Nation's code and what would be more appropriate for agency rules or regulations.

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

C. Foster Care Applicant Eligibility

The foster parent, if approved, is responsible for the daily care of a traumatized child. Careful consideration of needed skills, characteristics, and training ensures that the foster parent is prepared to handle the challenge and provide a safe and nurturing home. Additionally, there may be considerations related to the jurisdiction of the court, closeness to family, and proximity to foster care monitors.

Requirements certainly vary from location to location, but certain consideration may be helpful:

- Prohibitions of criminal convictions of certain crimes,
- Prohibitions of past child maltreatment,
- Age,
- Health (physical and mental),
- Training and experience considerations,
- Residency or proximity, and
- Financial ability to care for family.

Selected Tribal Codes

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part B–Foster Care Provisions

§414.1 Foster Care Applicant Eligibility[135]

(a) An applicant must meet the requirements set forth in Sections 414.1, 414.2, and 414.3 of this Code before the applicant may be licensed, or relicensed, as a foster care parent. Failure to comply with these provisions and any other rules promulgated by the LOWO Division of Foster Care may result in denial or revocation of license.

(b) **Applicant Age**—An applicant must verify that he or she is at least 21 years of age. The age of the applicant should be considered in relation to the physical condition, flexibility, vitality, maturity and ability to supervise and physically care for the specific Child in Need of Care.

(c) **Applicant Residency**—An applicant must verify that he or she resides in South Dakota.

(d) **Applicant Motivation and Ability for Foster Care Parenting**—

(1) The applicant must demonstrate the ability to provide care to a child, which includes a basic understanding of the child's physical, mental and emotional development and the ability to fulfill the child's needs. The applicant must demonstrate the ability to offer continuing care and guidance to a child throughout the stages of development in a manner consistent with the social, cultural and spiritual heritage of the child. The applicant's ability shall be determined by the capacity to provide the following:

(A) An understanding of, and encouragement and emotional support to, the child;

(B) Social and recreational activities and opportunities for participation of the child in community activities;

(C) Assistance to the child in coping with daily living experiences;

(D) Supervision of the client.

(2) The applicant shall also be able to participate with the LOWO Division of Foster Care or a responsible party in devising and executing a case service plan for a child.

(3) The applicant must be able to continue meeting the needs of their other children, if any.

(e) **Applicant Family Composition**—The applicant's family composition, needs and relationships must be found to not adversely affect the child in foster care.

[135] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

(f) **Mental Health of Applicant**—The LOWO Division of Foster Care must determine that an applicant's mental health will not interfere with his or her ability to provide a Child in Need of Care with appropriate care. The LOWO Division of Foster Care will consider prior and current alcohol, tobacco, or drug use, and psychiatric histories including suicide attempts, diagnosis of serious mental illness, success of treatment, and likelihood of relapse. In the case of an applicant who has a medical history of drug or alcohol abuse or addiction, the applicant must show that he or she has been sober for at least one year before a foster care license may be granted.

(g) **Physical Health of Applicant**—

(1) An applicant must have had a physical examination within the 12 months preceding the date of the application to show that he or she is physically capable of providing appropriate care to a child. The physical must have been completed by a medical doctor, physician's assistant or certified nurse practitioner. If the applicant has any communicable diseases, including sexually transmitted diseases, any form of hepatitis or AIDS, the LOWO Division of Foster Care will provide special counseling regarding their impact on foster care, but will not discriminate against applicants on the basis of these diseases.

(2) The applicant must also present evidence to the LOWO Division of Foster Care that he or she has been immunized against rubella, mumps, whooping cough, diphtheria, tetanus and polio. Moreover, the applicant must have a Mantoux tuberculin test prior to initial licensure. Applicants who react to the testing but are without disease and who do not complete a preventive course of Isoniazid (INH) must annually demonstrate evidence of no active disease by a physical evaluation completed by a medical doctor in order to obtain or retain a foster care license. Applicants who have been infected by tuberculosis and have completed a minimum six-month course of INH and individuals who do not react to the test prior to licensure are exempt from further tuberculin evaluation. A copy of the tuberculin test reports and physical evaluations must be kept by the LOWO Division of Foster Care. The LOWO Division of Foster Care may request additional medical statements when a situation, such as a change in the health of applicant or another household member, indicates that an additional medical statement is desirable.

(h) **Applicant Income**—The applicant must have sufficient income to meet the basic needs of the existing family, independent of the foster care payment, if any. If it is found that the income of the applicant family is insufficient to meet the family's basic needs, the application shall be denied. This, however, does not automatically disqualify applicants whose income is low according to tribal, state, or federal standards.

(i) **Applicant's Support Obligations**—The applicant cannot owe more than $1,000 in child support payments.

(j) **Applicant Background Information**—

(1) An applicant must pass background and character investigations consistent with this subsection and any other applicable laws.

(2) The LOWO Division of Foster Care shall secure a criminal records check for applicants and all foster household members age eighteen and over to detect convictions for crimes involving harm to children, including crimes of violence, sex crimes, convictions for spousal abuse, drug related crimes, or any felony conviction within the past five years, which would disqualify a person from licensure. If the LOWO Division of Foster Care does determine that a person in the household has such a conviction, or a household member admits to the involvement in any of the above, the LOWO Division of Foster Care shall deny the application and notify the household of the denial.

(3) Records Check of Persons with a History of Child Neglect or Abuse

(A) The LOWO Division of Foster Care shall secure a records check for applicants and all foster household members age ten years and over to detect persons in the household with a history of child neglect or abuse, if the LOWO Division of Foster Care does determine that a person in the household has such a history, the LOWO Division of Foster Care shall deny the application and notify the household of the denial.

(B) The LOWO Division of Foster Care shall screen an applicant and foster household members who are at least ten years old, to determine if the individual has been involved in any substantiated incidents of child abuse or neglect. The individual may not have a substantiated report of child abuse or neglect. Substantiated reports of child abuse or neglect include the occurrence of any of the following:

(i) The LOWO Division of Child Protective Services has investigated and substantiated a report of abuse or neglect involving the individual;

(ii) The individual has admitted to abusing or neglecting a child;

(iii) There has been an adjudication of abuse or neglect;

(iv) The individual has been found guilty of child abuse or neglect; or

(v) The individual has been found guilty of a sex offense under the OST Law and Order Code.

(C) If a screening locates a substantiated report on an individual listed in this section and the individual has not already been given due process on the substantiation, the LOWO Division of Foster Care shall notify the individual in writing that the individual may request a review of the information found.

(D) The LOWO Division of Foster Care may waive substantiated reports of child abuse or neglect to allow an individual to be

licensed, if the substantiated report is at least seven years old and a review determines that the individual has taken actions to eliminate the risk that the individual would abuse or neglect a child.

(4) The LOWO Division of Foster Care shall secure a central registry for substantiated reports of neglect and/or abuse, and criminal convictions, for applicants and household members for use in records checks.

(5) Prior to initial licensure, an applicant shall be fingerprinted and shall sign a declaration under penalty of perjury regarding any prior criminal conviction. The LOWO Division of Foster Care shall submit these fingerprints to the Department of Public Safety, the South Dakota Division of Criminal Investigation and the Federal Bureau of Investigation Identification Division prior to licensure. If it is determined that the foster parent has been convicted of a crime specified under Section 414.1(j)(2), the LOWO Division of Foster Care shall deny a request for a new license, or revoke an existing foster care license. Submission of an application for a foster care license shall be deemed consent to background investigation.

(k) **Applicant References**—Prior to initial licensure, each applicant must provide the LOWO Division of Foster Care with three references, including names, addresses and other contact information if any; at least two of which may not be an extended family member. These references must attest to the applicant's qualifications and fitness to become a foster care parent. The LOWO Division of Foster Care's initial evaluation of the applicant based on references includes reference checks and personal interviews, to be conducted before licensure.

(l) **Completion of Foster Care Parent Orientation and Training**—An applicant must satisfactorily complete 30 hours of orientation and training provided by the LOWO Division of Foster Care before receiving a foster care license. Training will include:

(1) Foster Parent Orientation;

(2) Human Growth & Development;

(3) Attachment & Loss;

(4) Protecting, Nurturing and Meeting Needs through Discipline;

(5) Intergenerational Grief;

(6) Effects of Addiction on Children;

(7) Child Neglect/Abuse & Sexual Abuse;

(8) Promoting Permanency Outcomes;

(9) Kinship Care & Self Esteem; and

(10) We Are All Related.

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
PART V: Out-Of-Home Placement Alternatives

§ 8.034. Foster Care

[sections omitted]

(3) In addition to the information provided under subsection (2), the ICW Program may, with the applicant's consent, request:

(A) Information concerning the suitability of the applicant as a foster parent from other sources, including neighbors, employers or agencies who have had contact with the applicant and the applicant's family;

(B) Information concerning the applicant's physical and mental health; and

(4) To be approved as a foster parent, each applicant shall:

(A) Have child-rearing practices and attitudes that will serve the best interests of a foster child;

(B) Provide a stable, harmonious home and a healthy environment for rearing children;

(C) Be a responsible person and a positive adult role model who exercises sound judgment and displays the ability to provide good care for children;

(D) Respect the cultural values of the Tribe and the religious preferences of foster children;

(E) Have sufficient income to meet the needs of his or her family without any supplementary payment for a foster child's care and apply any foster care payments towards the foster child's care;

(F) Comply with the directions of the Court concerning the care of a foster child and maintain the confidentiality of information about the child and child's family;

(G) Provide adequate supervision by a responsible adult at all times when the foster child is in the home;

(H) Provide the foster child with a well-balanced and nutritious diet. If unpasteurized milk is used in the foster home, the foster parent shall furnish the Court with a signed statement from a licensed veterinarian verifying that TB and brucellosis tests within the previous year were negative;

(I) Not require a foster child to do work that presents a health or safety hazard to the child or that interferes with the child's education;

(J) Not administer corporal punishment to the child; and

(K) Not have been convicted of child abuse or neglect, spousal abuse, a crime against children (including child pornography), a crime involving violence, including rape, sexual assault or homicide but not including other physical assault or battery at any time, or a felony conviction for physical assault, battery or a drug-related offense in the last five years.

Tribal Code Commentary

The Oglala Sioux Code requires the applicant for foster care to reside in South Dakota, be at least twenty-one years of age, and have the physical ability to care for a child. The applicant must be able to provide emotional support and understanding, provide assistance in coping with daily living experiences, participate in devising and executing a case service plan for a child, and continue to meet the needs of their other children, if any. The family composition, needs, and relationships must not adversely affect the child. The applicant's mental health must not interfere with the ability to provide a child with appropriate care. If there is a history of alcohol or drug abuse, the applicant must show sobriety for at least a year. The applicant must have had a physical within the last twelve months that demonstrates the ability to physically care for a child and have appropriate immunizations. There must be sufficient income in the home to meet the basic needs of the existing family, independent of the foster care payment. The applicant cannot owe more than $1,000 in child support payments.

A background and character investigation of the applicant and other household members over the age of eighteen must show no convictions of crimes involving harm to children or crimes of violence, sex crimes, spousal abuse, drug-related crimes, or any felony conviction within the past five years. LOWO Division of Foster care shall secure a records check for the applicant and household members age ten and over to detect persons in the household with a history of child neglect or abuse or substantiated child abuse or neglect, and if found the household is to be denied a license. However, the Division of Foster Care may waive substantiated reports of child abuse or neglect and allow licensing, if the report is at least seven years old and review determines that the individual has taken actions to eliminate the risk of abuse or neglect.

The applicant must be fingerprinted and sign a declaration under penalty of perjury regarding any prior criminal convictions. The fingerprints are submitted to the Department of Public Safety, the South Dakota Division of Criminal Investigation, and the Federal Bureau of Investigation Identification Division prior to licensure. Licensure is denied or revoked if the applicant is found to have been convicted of a crime indicated in the statute.

In addition, the Oglala Sioux Code requires three references who can attest to the applicant's qualification and fitness. Reference checks and personal interviews are conducted before licensure.

The applicant must complete thirty hours of training provided by the LOWO Division of Foster Care before receiving a license. The topics are listed in the statute and include such subjects as:

- Foster parent orientation;
- Human growth and development;
- Attachment and loss;
- Protecting, nurturing, and meeting needs through discipline;
- Intergenerational grief;
- Effects of addiction on children;

- Child neglect, abuse, and sexual abuse;
- Promoting permanency outcomes;
- Kinship care and self-esteem; and
- We Are All Related training.

The Siletz Code has the ICW program request information from a variety of sources, including neighbors, employers, or agencies who have had contact with the applicant and the applicant's family. It requests information concerning the applicant's physical and mental health. In order to be approved as a foster parent the applicant must:

- Have child-rearing practices and attitudes that serve the foster child.
- Provide a stable, harmonious home and a healthy environment.
- Be a responsible person and a positive role model.
- Respect the cultural values of the tribe and religious preferences of children.
- Have sufficient income to meet the needs of their family without foster care payments.
- Provide adequate supervision by a responsible adult at all times.
- Provide a well-balanced and nutritious diet.
- Not require a foster child to do work that presents a health or safety hazard or that interferes with the child's education.
- Not administer corporal punishment.
- Not have been convicted of child abuse or neglect, spousal abuse, a crime against children (including pornography), a crime involving violence, including rape, sexual assault, or homicide, but not including other physical assault or battery at any time, or a felony conviction for physical assault, battery, or a drug-related offense in the last five years.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- What are the current statutory requirements for a foster care applicant?
- Is the background check currently used sufficient to ensure the child's safety?
- Examine any situation that failed to properly screen a foster parent in order to determine if a change in procedure might have made a difference.

STEP 2: Establish a Vision for the Future

- Make a list of the characteristics, skills, and qualities of an ideal foster parent.
- What crimes or activities of the applicant or household member would place a foster child at risk?
- What methods may you use to do a background check—criminal and otherwise?
- What should be in the law and what should be in your protocols and/or policies?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

D. Standards for Other Household Members

There may be other family members or other unrelated people living in the foster home. It is imperative that anyone living in, or frequently visiting, the foster home not pose a threat to the foster child. Generally, when someone applies for a foster care license, a background check is done of everyone, except small children. Develop standards to ensure that the foster care agency has sufficient information about others in the home to be able to make a knowledgeable decision about whether the home should be licensed.

Selected Tribal Codes

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part B–Foster Care Provisions

§414.1 Foster Care Applicant Eligibility[136]

[sections omitted]

(j) **Applicant Background Information—**

(1) An applicant must pass background and character investigations consistent with this subsection and any other applicable laws.

(2) The LOWO Division of Foster Care shall secure a criminal records check for applicants and all foster household members age eighteen and over to detect convictions for crimes involving harm to children, including crimes of violence, sex crimes, convictions for spousal abuse, drug related crimes, or any felony conviction within the past five years, which would disqualify a person from licensure. If the LOWO Division of Foster Care does determine that a person in the household has such a conviction, or a household member admits to the involvement in any of the above, the LOWO Division of Foster Care shall deny the application and notify the household of the denial.

(3) Records Check of Persons with a History of Child Neglect or Abuse

(A) The LOWO Division of Foster Care shall secure a records check for applicants and all foster household members age ten years and over to detect persons in the household with a history of child neglect or abuse, if the LOWO Division of Foster Care does determine that a person in the household has such a history, the LOWO Division of Foster Care shall deny the application and notify the household of the denial.

(B) The LOWO Division of Foster Care shall screen an applicant and foster household members who are at least ten years old, to determine if the individual has been involved in any substantiated incidents of child abuse or neglect. The individual may not have a substantiated report of child abuse or neglect. Substantiated reports of child abuse or neglect include the occurrence of any of the following:

(i) The LOWO Division of Child Protective Services has investigated and substantiated a report of abuse or neglect involving the individual;

(ii) The individual has admitted to abusing or neglecting a child;

(iii) There has been an adjudication of abuse or neglect;

(iv) The individual has been found guilty of child abuse or neglect; or

[136] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

(v) The individual has been found guilty of a sex offense under the OST Law and Order Code.

(C) If a screening locates a substantiated report on an individual listed in this section and the individual has not already been given due process on the substantiation, the LOWO Division of Foster Care shall notify the individual in writing that the individual may request a review of the information found.

(D) The LOWO Division of Foster Care may waive substantiated reports of child abuse or neglect to allow an individual to be licensed, if the substantiated report is at least seven years old and a review determines that the individual has taken actions to eliminate the risk that the individual would abuse or neglect a child.

(m) **Household Members—**

Generally—All household members and regular visitors, ten years of age or older, must consent to screening for reports of child abuse and neglect that are substantiated.

The applicant's children, if any, must be willing to accept the Child in Need of Care as member of the family.

If any household member has received treatment for drug or alcohol abuse or severe medical or emotional problems, the applicant must show that the problems have been adequately resolved to make the household fit for foster care.

The applicant must present evidence to the LOWO Division of Foster Care that each household member under the age of 18 is currently immunized against rubella, mumps, whooping cough, diphtheria, tetanus and polio. Each household member aged one year and above must have a Mantoux tuberculin test prior to initial licensure. Individuals who react to the testing but are without disease and who do not complete a preventive course of Isoniazid (INH) must annually demonstrate evidence of no active disease by a physical evaluation completed by a medical doctor in order to obtain or retain a foster care license.

Individuals who have been infected by tuberculosis and have completed a minimum six-month course of INH and individuals who do not react to the test prior to licensure are exempt from further tuberculin evaluation. A copy of the tuberculin test reports and physical evaluations must be kept by the LOWO Division of Foster Care.

The LOWO Division of Foster Care may request additional medical statements when a situation, such as a change in the health of applicant or another household member, indicates that an additional medical statement is desirable.

(n) **Adult Household Members—**

Each adult household member must be stable, emotionally mature, reputable, and capable of providing good care for children. If questions arise during the

application process or during the period of licensure regarding the emotional stability of a household member, a psychological evaluation and medical records related to that condition may be required. Adult household members must consent to such evaluations, or prospective licensees must expel the household member before licensure.

All adult household members must have had a physical examination within the 12 months preceding the date of the application to show that they are physically capable of providing appropriate care to a child. The physical must have been completed by a medical doctor, physician's assistant or certified nurse practitioner.

Each adult household member must pass a background check.

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part V Out-Of-Home Placement Alternatives

§ 8.034. Foster Care

[sections omitted]

(f) **Approving Tribal Foster Homes**

(2) The ICW Program shall perform a criminal background check on all persons residing in the applicant's home and check of the applicant's driving record and insurance, and shall conduct a home study. The home study shall include a personal interview with the applicant and the applicant's family, and an inspection of the applicant's home. The ICW Program shall complete a written report of his or her findings and recommendations concerning the applicant's suitability as a foster parent.

Tribal Code Commentary

The Oglala Sioux Code requires all household members and regular visitors ten years of age or older to consent to screening for reports of abuse and neglect that are substantiated when seeking a foster care license. A criminal background check of the applicant is conducted on any household members ten years of age and older. If any household member has received treatment for drug or alcohol abuse, or has severe medical or emotional problems, the applicant must demonstrate that the problems have been resolved. The current household members must be willing to accept a foster child. They also must be immunized. Additional medical statements may be requested depending upon the situation. All adults in the household must be stable, emotionally secure, and good with children. If there is doubt about the emotional stability of a household member, a psychological evaluation may be requested. If stability is not shown the adult member must be excluded from the household before the application is approved. Physical examinations are required of adult household members to show that they are physically able to care for a child.

The Siletz Code requires the ICW program to perform a criminal background check of all persons residing in the applicant's home. A home study is required, which includes personal interviews with the applicant's family.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Examine your current code to see what is required of household members and what type of background check is done of other household members for a foster care application.
- Examine any policy or protocol you may have on what should be done to ensure that no household member poses a threat to a foster child.

STEP 2: Establish a Vision for the Future

- What requirements should you have in your code relative to household members? Are the requirements different for adults or children?
- What processes will you use to ensure the background of household members have been checked?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

E. Foster Care Home Standards

While it is perhaps most important that the people living with the foster child do not pose any threat to the child's well-being, it is also critical that the home environment poses no safety hazards. Health and safety of the child is paramount, and inspections need to assure that there is adequate space for the child and no unusual hazards to their safety. The home may be inspected by social service workers, but it also may need inspection by experts on fire safety requirements or building code requirements. Concerns relative to where poisonous materials and firearms are stored must be addressed.

Selected Tribal Codes

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part B–Foster Care Provisions

§414.3 Foster Care Home Standards[137]

[sections omitted]

(a) A foster care home must meet the minimum requirements of this Code and the rules promulgated by the LOWO Division of Foster Care. Failure to comply with these provisions and any other rules promulgated by the LOWO Division of Foster Care may result in denial or revocation of license.

(b) **Oglala Sioux Tribe Building Code**—The foster care home must comply with Oglala Sioux Tribe Building Code. The foster care home and premises must present no unusual hazards to safety.

(c) **Lighting**—The home shall have appropriate lighting in all areas to assure safety.

(d) **Doors and Windows**—Doors and windows regularly used for outside ventilation must have screens.

(e) **Railings**—Floor and wall openings, open-sided areas, or platforms 30 inches or more above the adjacent ground level must be guarded by a standard railing at least 40 inches high.

(f) **Electrical System**—

(1) The foster care home must not contain bare or exposed electrical wires;

(2) In foster care homes caring for children aged four years and younger, all unused electrical outlets within 36 inches from the floor must be covered by a U.L. approved electrical safety cap.

(g) **Heating Plant**—The foster care home must have a working heating system. The foster parent must maintain the temperature of the foster care home between 65 degrees Fahrenheit and 72 degrees Fahrenheit during waking hours with a temperature no lower than 50 degrees Fahrenheit at night.

(h) **Access to Hazardous Items**—

(1) Firearms, including pellet guns and BB guns, ammunition, archery bows, arrows, matches, and lighters must be inaccessible to a child in foster care unless under adult supervision. Firearms must be kept unloaded, in a locked cabinet, and separate from their ammunition.

(2) Hazardous cleaning solutions, chemicals and poisons shall be labeled and kept in an enclosed cabinet that is not accessible to children.

(3) The LOWO Division of Foster Care may require the removal or correction of other hazardous conditions or circumstances not covered in

[137] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

this section, if it considers the conditions or circumstances to have the potential to cause injury or illness to the child in care.

(i) **Space Requirements**—The foster care home must have adequate and appropriate sleeping space, consistent with the need for privacy, to comfortably accommodate the child in foster care as well as the foster care family. Space shall be provided for the child's personal possessions. Bedrooms may not be accessible only by means of a ladder, folding stairs, or trap door.

(j) **Sanitation**—

Generally—The family foster home shall be kept clean, neat, and free of litter and rubbish.

Rodent and Insect Control—The foster care home must be free of rodents and insects that are a health hazard or detriment to the cleanliness of the area.

Garbage and Refuse Disposal—Garbage and refuse must be kept in durable, easily cleanable containers that neither leak nor absorb liquids. Garbage and refuse must be disposed of often enough to prevent the development of odor and the attraction of insects and rodents.

Sewage Disposal—Sewage must be disposed of by means of public sewage disposal, a septic system or an outdoor toilet facility. Means of sewage disposal may not contaminate food, equipment, or utensils or otherwise create an unsanitary condition or nuisance anywhere on the premises.

(k) **Water**—Water must be derived from a community water system or from a water system that is tested at least annually by the relevant Tribal department or agency or a laboratory certified by the Tribe to conduct such tests. The water must be tested for bacteria and nitrate levels and must be safe for consumption. The foster parent must maintain written documentation of the test results. The volume of water must be sufficient to meet the needs of the home.

(l) **Emergency Safety**—

(1) The foster family must have access to emergency services in case of crisis.

(2) The foster care home must be equipped with a working smoke detector on each level which can adequately be heard above the home's normal noise level.

(3) The home must have two remote exits on each level used for the care of children. Each exit shall provide unobstructed travel to the outside. One of these exits must be a door or stairway which provides an unobstructed means of travel to the outside of the building at ground level. The other exit may be a window that: (i) can be easily and quickly opened from the inside without the use of tools, and (ii) provides a safe and unobstructed opening with a minimum dimension of 22 inches and a minimum of five square feet in area.

(4) The foster care home must have an evacuation plan which will be taught to each child in foster care. The foster care parent will conduct a fire drill

each time a new child is placed in the home to ensure the child understands the evacuation procedure.

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
PART V: Out-Of-Home Placement Alternatives

§ 8.034. Foster Care

[sections omitted]

(f) **Approving Tribal Foster Homes**

(1) Any person wishing to serve as a tribal foster parent shall apply in writing to the ICW program. Each applicant shall furnish the ICW Program with a written application, which shall include the reasons the applicant wishes to become a foster parent, and at least four (4) personal references.

(2) The ICW Program shall perform a criminal background check on all persons residing in the applicant's home and check of the applicant's driving record and insurance, and shall conduct a home study. The home study shall include a personal interview with the applicant and the applicant's family, and an inspection of the applicant's home. The ICW Program shall complete a written report of his or her findings and recommendations concerning the applicant's suitability as a foster parent. The report shall describe:

(A) The number of persons who reside in the applicant's home, including the age, sex and relationship of each person to the applicant;

(B) The number of beds in the applicant's home, and their location and suitability for a foster child;

(C) The availability of space for a foster child to sleep, study and store clothing and personal effects, as appropriate to the child's age and needs;

(D) The availability of adequate indoor and outdoor areas where a child can play safely;

(E) Whether potentially dangerous items such as guns, drugs or poisons are stored in the applicant's home and if so, whether adequate safeguards exist to prevent a child from coming into contact with the items; and

(F) Whether special arrangements are necessary to contact the applicant in the event of an emergency

(3) In addition to the information provided under subsection (2), the ICW Program may, with the applicant's consent, request:

(C) Inspections by authorized fire and safety and public health officials to ensure that the home is adequately protected from hazards.

Tribal Code Commentary

The OSTC is quite specific on what must be inspected in the prospective foster home. It provides minimum requirements that include:

- The home must comply with the OST's building code.
- Lighting must be adequate to assure safety.
- Doors and windows must have screens.
- Railings must be provided for open-sided areas or platforms.
- Electrical systems must have no bare/exposed wires and unused electrical outlets must be covered if foster children are four or under.
- The home must have a working heating system that maintains a temperature between 65 and 72 degrees during waking hours.
- Firearms, matches, and lighters must be inaccessible to a child. Firearms must be kept unloaded, in a locked cabinet, and separate from their ammunition.
- Hazardous cleaning solution, chemicals, and poisons must be labeled and kept where not accessible to children.
- The home must have adequate space and appropriate sleeping space.
- The home must be clean, neat, and free of litter and rubbish.
- The home must be free of rodents and insects.
- Sewage must be disposed of by means of public sewage disposal septic system or an outdoor toilet facility.
- Water must be derived from a community water system or a system tested annually.
- The home must have access to emergency services.
- The home must be equipped with a working smoke detector on each level.
- The home must have two remote exits on each level used for care of children.
- The home must have an evacuation plan that will be taught to each child.

The Siletz Code requires the ICW program to determine if there are sufficient beds in the home and if their location is suitable for a foster child; whether there is adequate space for play and study; and whether dangerous items such as guns, drugs, or poisons are stored with adequate safeguards. In addition, the program will request inspections by authorized fire and safety and public health officials to ensure the home is adequately protected from hazards.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Examine your current code section and any policy you may have relative to standards required in foster homes.
- Are there any changes needed to the current standards? If so, explain.

STEP 2: Establish a Vision for the Future

- What minimum standards should be required of foster homes in your community?
- What experts could inspect for fire safety or building safety in your area?
- What space requirements are adequate?
- What requirements will you have on firearms, drugs, and hazardous materials?
- Based on the socioeconomic status and community standards of living, will your proposed regulations present a large obstacle for prospective tribal foster homes? Are there resources or agencies designated to helping families become compliant with foster health and safety standards in order to gain their license?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

F. Foster Parent Responsibilities

The foster parent responsibilities of any Native Nation probably work best as provisions of the Children's Code. Because failure to meet the foster parent responsibilities may lead to a revocation of the foster license or criminal charges, both of which are handled in court, it helps to have a set code section to work with, as opposed to an agency's policies or procedures document.

This section of the Children's Code is an excellent place to include the traditional and contemporary cultural practices of a Native Nation. Most of the provisions are "musts" for the foster parent; however, Nations can also use this section to prohibit certain behaviors that are not valued by the community or Nation. For example, the code can designate a foster parent as responsible for the discipline of the child, an affirmative duty, while setting limits on the type of discipline to be employed.

Selected Tribal Codes

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
PART V: Out-Of-Home Placement Alternatives

§ 8.034. Foster Care

(a) **Duties of Foster Parent**—Foster care is designed to enhance the overall health and welfare of Indian children. A foster parent shall:

(1) Provide a safe, healthy and caring environment for foster children;

(2) Serve as a role model to children for cultural and spiritual growth and encourage children to be motivated to learn and respect themselves, their family, their Tribe and Elders;

(3) Promote consistent and fair discipline through guidance and a structured environment;

(4) Assist children by listening to their needs, concerns and fears; and

(5) Participate in foster care training and activities including tribal activities in the hope of restoring the overall health of Siletz children and families

[sections omitted]

(d) **Foster Parent Agreement**—Before a child is placed in foster care, a foster parent agreement shall be established in writing and shall be signed by the foster parent(s) and the tribal ICW Program. The foster care agreement shall state the roles and responsibilities of the foster parent(s) and the tribal ICW Program, consent to tribal jurisdiction for all matters arising from the foster parents' relationship and regarding the child, and shall outline any payments that will be made for the support and care of the child.

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part B–Foster Care Provisions

§414.5 Foster Care Parent Responsibilities[138]

(a) Once the LOWO Division of Foster Care grants a foster care license to the applicant and a Child in Need of Care has been placed in the licensee's home in accordance with Section 415, the foster care parent must adhere to the following rules. Failure to comply with these provisions and any other rules promulgated by the LOWO Division of Foster Care may result in denial or revocation of license.

(b) **Basic Program Requirements**—A foster parent shall comply with the following:

[138] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

(1) Shall provide daily activities designed to promote the individual physical, social, intellectual, and emotional development of the child in the foster parent's home;

(2) Shall take part in case planning for the child and shall cooperate in the preparation, preplacement, and visiting plans for a child placed in the foster parent's home; and

(3) Shall demonstrate respect for the foster child's own family and shall agree to maintain a working relationship with the child's family members as indicated in the child's case service plan.

(c) **Cultural Heritage/Spirituality**—The foster family shall recognize, encourage and support the religious beliefs, ethnic heritage and language of the child and the child's birth family. Foster parents shall arrange transportation to religious services or traditional events for a child whose beliefs and practices are different from their own and shall not coerce children to participate in religious activities or traditional events against their will.

(d) **Health of Child**—All foster children shall receive a complete medical exam within two months of coming into LOWO Division of Foster Care custody. The foster family, in consultation with the child's CPS Worker, will ensure that a child receives all annual check-ups and other medical treatment recommended by a doctor, including scheduling of additional appointments and obtaining necessary medication.

(e) **Emergency Reporting**—Foster care parents shall report any suspected child neglect or abuse to the LOWO Division of Child Protective Services and/or the Department of Public safety within 24 hours. Incidents of runaway, fire, death, serious healthcare concerns, child and family incompatibility, serious injury or illness must be reported to the LOWO Division of Foster Care within 24 hours. All changes that affect the foster care parent's ability to comply with licensing standards must be reported to the LOWO Division of Foster Care within 24 hours of the change.

(f) **Nutrition of Child**—The foster care parent shall provide a child in foster care with at least three meals a day. The meals must be of sufficient quantity and provide a balanced diet adjusted to the age, special needs and physical development of the child. The foster parent must adhere to special diets prescribed for the foster child by a physician or dietitian. The foster care parent should be aware of and provide culturally appropriate meals and have knowledge of the traditional diet and sacred foods, such as buffalo, elk, wasna berries, Indian corn and timpsila.

(g) **Food Quality and Storage**—Food shall be free from spoilage and contamination and safe for human consumption. Fluid milk and fluid milk products used or served shall be pasteurized. Unless a bulk food (e.g. cooking oil, salt, sugar, flour) is unmistakably identifiable, it must be stored in its original container or an appropriately labeled container.

(h) **Discipline**—

Discipline used by a foster care parent shall provide for positive guidance, redirection, and setting of clear-cut limits while helping a child in foster care to develop self-control, self-esteem, and respect for the rights of others. Any discipline or control must be appropriate to the child's age and developmental level.

[sections omitted]

(2) The foster care parent and the child's CPS Worker, or similar personnel from other agencies, shall discuss appropriate methods of discipline. Such methods will be made a part of the negotiated Foster Care Agreement. A discipline policy will be signed upon licensing and reviewed upon renewal. The Foster Care Agreement must contain the following provisions:

(A) The foster care parent shall guide and discipline the child in foster care with kindness and understanding;

(B) The foster care parent shall not subject, or allow others to subject, the child in foster care to verbal abuse, derogatory remarks about the child or the child's relatives;

(C) The foster care parent shall not threaten to expel the child in foster care from the foster care home;

(D) The foster care parent shall not deprive the child in foster care of meals, mail or family visits as a method of discipline;

(E) The foster care parent shall neither inflict corporal punishment on a child in foster care nor any other form of punishment that is humiliating or degrading;

(F) The foster care parent shall not allow a child or group of children to punish another child as a form of discipline; and

(G) The foster care parents shall not delegate disciplinary duties to older children or peers in foster care. A discipline policy will be signed upon licensing and reviewed upon renewal.

(i) **Transportation**—A vehicle used for transportation may not carry more people than its stated passenger capacity so that there is a seatbelt available for every passenger. When children under the age of five years are transported, they must be secured in a child passenger restraint system appropriate to their age and weight.

(j) **Record Keeping**—A record shall be maintained by the foster parent on each foster child. That record shall include the child's name, date of placement, date of removal, special needs, the names and telephone numbers of the child's social worker, doctor, dentist, parent, or person to contact in the event of an emergency, and any other information required by the LOWO Division of Foster Care or desired by the foster parent.

(k) **Confidentiality**—The foster care parent and all other household members must keep all files, records, and other information regarding the child or children in their care and their tiwahe and tiospaye relatives confidential.

(l) **Disclosure of Information to a Child in Foster Care for Indian Tribe Enrollment or for Determination of Member Rights or Benefits**—If the child in foster care is age 18 or over and not currently enrolled as a member of the Oglala Sioux Tribe, upon the request of the child, the foster care parent shall disclose such information as may be necessary **for** the enrollment of the child in the Tribe or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent(s) requesting anonymity, the U.S. Secretary of the Interior and/or the LOWO Division of Foster Care shall certify to the Tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by the Oglala Sioux Tribe.

(m) **Ongoing Training**—All foster parents must receive no less than six hours of training per year. All foster parents shall receive training in the parenting skills needed to raise a foster child. No foster parent's license may be renewed unless they have received the requisite number of hours of training.

(n) **Boarders**—A foster home may not have adult boarders unrelated to the foster parents without the express permission of the LOWO Division of Foster Care. The foster parents shall keep the LOWO Division of Foster Care informed about all persons living in the home and all others having regular contact with the foster child in the foster home. Additional individuals in the home must meet the licensing standards. Violation of these requirements may result in revocation or denial of license.

(o) **Completion of Hunter Safety Course Requirements**—A child in foster care may not use firearms for hunting without having completed a gun safety course approved by the OST in compliance with applicable state law.

(p) **Sleeping Arrangements**—

(1) The foster care family shall provide the child in foster care with clean and adequate bed linens, pillows and blankets;

(2) Children of different sexes over the age of six may not sleep in the same room; and

(3) Children over the age of three may not share the same bed with an adult.

Tribal Code Commentary

The Siletz Code outlines the primary duties of a foster parent, which incorporates a traditional perspective:

- Provide a safe, healthy, and caring environment.
- Serve as a role model to children for cultural and spiritual growth.
- Encourage children to be motivated to learn and respect themselves, their family, and their tribe and elders.
- Promote consistent and fair discipline through guidance and a structured environment.
- Assist children by listening to their needs, concerns, and fears.
- Participate in foster care training and activities, including tribal activities in hope of restoring the overall health of Siletz children and families.

The foster parent will enter into a written agreement with the ICW program that further states the parent's roles and responsibility and consents to tribal jurisdiction. Additional responsibilities and duties may appear in the policy.

The OSTC is much more extensive in its description of the foster parent duties and responsibilities. It has strict rules that must be adhered to or the foster license is revoked. The rules include:

- Shall provide daily activities to promote growth.
- Shall participate in case planning for the child and cooperate in visitation and other plans.
- Shall demonstrate respect for the foster child's family and agree to work with the family members as indicated in the case plan.
- Shall encourage, recognize, and support religious beliefs, ethnic heritage, and language of the child and the child's family.
- Shall ensure the child receives the required and appropriate medical checkups.
- Shall report any suspected child neglect or abuse within twenty-four hours. Any incidents involving the child or changes in household, must be reported within twenty-four hours.
- Shall provide three meals a day: a balanced diet adjusted to age, special needs, and physical development. Knowledge of traditional diet and sacred food is required.
- Shall store food properly and provide food of good quality.
- Must discipline in compliance with a lengthy section of the OSTC.
- Must meet transportation guidelines and requirements.
- Must provide certain record keeping.
- Must keep all files, records, and information confidential.

- May disclose certain information for purposes of enrollment.
- Must attend trainings.
- May not have adult boarders without express permission of the Division of Foster Care.
- Must require the child to complete a hunter safety course before using firearms.
- Shall meet certain requirements related to the child sleeping space.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Examine your current code to determine the current foster parent responsibilities.
- Examine your current policy to determine the current foster parent responsibilities.
- Are they adequate?

STEP 2: Establish a Vision for the Future

- Provide a list of all foster parent responsibilities.
- What foster parent responsibilities do you want listed in the code?
- What foster parent responsibilities do you want in the policy?
- Are there certain customs, foods, and traditions that you want to refer to in your list of responsibilities?
- Does your Nation have the structure, resources, or programs that are easily accessible to applicants so they may gain any specific cultural competency that you wish to require?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

G. Rejection, Review, or Disqualification of Foster Care License

A foster care program must provide regular reviews of its foster home and families to ensure continued compliance with the program requirements. Generally, a foster care license expires after a set period of time, requiring a new application or a renewal application. The process is meant to ensure that the standards continue to be met. This may require all of the background checks, references, and inspections that were originally required during the application process, or there may be some modification depending upon the circumstances. Safety and well-being of the foster child need to be the primary focus.

If a foster care license is denied or revoked, there should be a process by which the applicant may have the decision reviewed. This is generally an administrative process. Including this information in the tribal code helps all understand the importance of the decision.

Selected Tribal Codes

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part V: Out-Of-Home Placement Alternatives

§ 8.034. Foster Care

[sections omitted]

(5) Within ninety (90) days of receiving a complete application from a prospective foster parent, the ICW Program must complete its review of the application and issue a foster care certificate to each applicant who meets the standards set forth by the Tribe and who agrees to accept foster children referred by the ICW Program.

(B) Subject to renewal upon an updated review by the ICW Program, each foster care certificate shall expire two (2) year after the date the certificate is issued, unless revoked by the ICW Program or cancelled by the Court.

(C) The ICW Program may issue a provisional certificate to any applicant who cannot satisfy the standards in these rules if the Program finds that the deficiencies will not affect a foster child's physical health, safety or emotional well-being and that the applicant can take corrective steps within a reasonable period of time. A provisional certificate shall expire within ninety (90) days, unless cancelled by the ICW Program.

(6) Any foster care certificate shall be cancelled automatically if the foster parent moves or otherwise changes residence, until such time as the ICW Program has evaluated the new home and issued an updated certificate.

(7) Any foster care certificate if a material change that would disqualify the parent from being certified occurs in the foster parent's family or home. Examples of material changes that might justify cancellation of a certificate include a change in the parent's marital or employment status, a change in the condition of the foster home, or the foster parent's repeated refusal to accept foster children referred by the ICW Program.

(h) **Appeal of Denial or Revocation of Foster Home Certification**. Applicants for foster home certification whose applications have been denied and foster care providers whose certification has been revoked have the right to appeal the ICW Program's decision pursuant to the provisions of the Administrative Appeals Ordinance, 2.700 et seq.

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part B–Foster Care Provisions

§414.4 Foster Care License Application Process[139]

[sections omitted]

(c) **Foster Care License**—Approval or denial of the application shall be decided within 120 days of the receipt of the foster care application. After an application for a foster care license is approved, a foster care license shall be issued only for the licensee foster parent(s) and residence(s) described in the license. Any proposed changes in residence or household composition, as well as acceptance of additional children in foster care from the LOWO Division of Foster Care, must be reported to the LOWO Division of Foster Care, prior to such change. Failure to report such change may result in revocation of the foster care license. The foster care license is valid for one year from the date of receipt.

(d) **Foster Care License Renewal**—Renewal of a license will be based on a home visit interview with the foster family and an evaluation of the previous year. This evaluation includes review of incident reports and associated corrective actions. License renewal will be granted on an annual basis, upon continued compliance with all licensing standards and a demonstrated willingness to cooperate with the LOWO Division of Foster Care.

(e) **Denial of License**—The decision to issue a license will be based upon a written evaluation of the foster care applicant and potential foster home and family. A LOWO Division of Foster Care decision to refuse a foster care license must be based on a written assessment showing that the applicant does not meet LOWO Division of Foster Care foster care standards. Denied applicants shall receive a written notice fully stating the reasons for denial and the procedure for appeal. Applicants may reapply when the necessary changes have occurred.

(f) **Voluntary Withdrawal of License**—A licensed foster parent, by 30 days written notice, may notify the LOWO Division of Foster Care of intent to discontinue foster parenting. Prior to licensure, applicants may withdraw their application at any time by providing oral or written notice to the LOWO Division of Foster Care.

(g) **Revocation of Foster Care License**—

(1) Any foster care license may be revoked by the LOWO Division of Foster Care for violation of any licensing standard. Written notice fully stating the grounds for revocation of the foster care license and a corrective action plan, if appropriate, shall be given to the foster parent(s). A foster parent who has been served with such notice will have no more than 30 days to comply with licensing standards. If danger to the life, health or safety of the child in foster care exists, a foster care license may be revoked

[139] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

immediately without notice. If a foster care license is revoked, the licensee may not reapply for at least one year after the date of revocation.

(2) If a license is revoked, any children in foster care shall be placed in emergency shelter care until the conditions have been remedied or until other appropriate housing have been found for the child.

(3) Even without officially revoking the foster care license, the LOWO Division of Foster Care may remove the foster care child from the foster home at any time, upon finding that such reversal is in the best interests of the child.

(h) **Appeals**—Any applicant who has been denied a license or a renewal or has had his or her license revoked has the right to appeal in writing to the director of the LOWO Division of Foster Care, within 10 days of receipt of the denial. The director shall give the appealing party an opportunity to be **heard** on the appeal in an informal proceeding. The Director shall render a decision in writing. If an aggrieved party seeks further review, that party can appeal to the Children and Family Court.

(i) **On-Site Foster Care Review**—To determine continuing compliance with this Code and LOWO Division of Foster Care rules and to evaluate the quality of foster care, the **LOWO** Division of Foster Care shall conduct a minimum of one on-site visit to each foster care home per year. Application for a foster care license shall be deemed permission for the LOWO Division of Foster Care, or its representative, to visit the premises of the foster care home to make such a determination.

Tribal Code Commentary

A foster care license in the Siletz Nation expires two years after the date the certificate is issued, unless revoked, and may be renewed. Any foster care license is automatically canceled if the foster parent moves, until such time as the new home is evaluated. If a material change occurs in the foster home that would disqualify the parent from being certified, this might justify cancellation of a certificate. This could include marital status, employment status, a change in condition of the home, or repeated refusal to accept foster children. Applicants whose applications have been denied or revoked have the right to appeal the ICW program decision pursuant to the Administrative Appeals Ordinance.

The foster care license approval or denial in the Oglala Sioux Nation must occur within 120 days of receipt of the application. Any changes in residence of household composition must be report to the Division of Foster Care prior to such change. Failure to report may result in revocation of the foster care license. The foster care license is valid for one year. The renewal of a license is based on a home visit interview with the foster family and an evaluation of the previous year. Renewal is granted on an annual basis.

The Division of Foster Care's denial of a license must be based on a written assessment showing that the applicant does not meet foster care standards. Applicants receive written notice stating the reasons for denial and the procedure for appeal. Applicants may reapply when the necessary changes occur. A foster parent may discontinue foster parenting by providing thirty days' notice. Any license may be revoked for a violation of any licensing standard. Written notice fully stating the grounds for revocation of the license and a corrective action plan, if appropriate, is given. If served with notice, the foster parent has no more than thirty days to comply. Any applicant denied a license or a renewal, or who had their license revoked, has the right to appeal in writing to the director of the LOWO Division of Foster Care within ten days of receipt of the denial. An informal proceeding provides the appealing party an opportunity to be heard. The party may seek further review by appeal to the Children and Family Court.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Examine your current code to see when and how an application for foster care licensed is denied.
- Examine your current code to see how frequently licenses are renewed and under what conditions a renewal may be denied or a license may be revoked.
- What appeals process currently exists for a denial or revocation of a foster care license?
- What changes if any need to be made?

STEP 2: Establish a Vision for the Future

- How will you ensure that there are regular reviews of foster parents and regular inspections of foster homes?
- What process will you have available to ensure an applicant may appeal a rejection or revocation of their foster care license? Do you already have an administrative appeals process that may be used?
- Does your appeals process include free representation (either through a guardian ad litem, lay advocate, or attorney) for those appealing? If not, should one be provided?
    - If so, should the representation be allowed on all types of appeals? For license revocations? Denied renewals? Initial applications?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

Additional Resources

Austin, Lisette, Serving Native American Children in Foster Care, *The Connection*, 2000. Discusses services for Native American children in foster care. Intended for CASAs, this newsletter addresses the prevalence of Native American children in foster care, provisions of ICWA, CASA tribal programs, and the variations among tribes. Also provides a long resource list on issues relating to foster care.

Morgan, Nancy, Resource Guide for Parents, Caregivers, and Service Providers Working with Alaska Native Children, Alaska CARES, 2005.
In Alaska Native communities, nearly everyone is impacted in some way by child sexual abuse in the past or currently. This resource was designed to provide useful and practical information, ideas, and tips to help with some of the difficult parts of this crime to support a healing process.

National Child Welfare Resource Center for Tribes, Foster Care Resources, web page, 2015.
This web page provides a listing of resources specific to Native foster care, including youth issues.

Chapter 15: Modification of Parental Rights: Termination, Suspension, and Alteration

Termination of parental rights historically has meant not only the termination of the relationship with the Native birth parent, but a termination of the relationship with the child's extended family and Native Nations. This is contrary to most, if not all, tribal spiritual and traditional beliefs of family and child raising. Many Native Nations have struggled with termination of rights, which has been tied to federal funding. Some Nations have simply refused termination and others have found ways not only to meet federal requirements but also to maintain traditional beliefs.

This chapter reviews termination of parental rights, including some of the provisions that retain certain rights. Suspension of rights has also become common in Native Nations in conjunction with customary adoption and guardianships. A suspension of parental rights may suspend the rights to care, custody, and control of a child during their minority and allow adoption by another. However, the suspension may also have some flexibility in the type of parental rights that are suspended and in the child's rights to fully participate in their tribal culture. Suspension of certain parental rights does not have to impact the continuance of cultural practices that require the participation of biological parents.

Chapter Units

Unit A: Termination of Parental Rights: Purpose and Policy

Unit B: Mandatory Termination of Parental Rights

Unit C: Voluntary Termination of Parental Rights

Unit D: Involuntary Termination of Parental Rights

Unit E: Petition for Termination of Parental Rights

Unit F: Notice and Reports

Unit G: Hearing and Disposition

Unit H: Effect on the Child's Rights—Enrollment, Inheritance, and Other Rights

Unit I: Suspension of Parental Rights: Petition and Hearing

Unit J: Suspension of Parental Rights: Final Order

Unit K: Emancipation

A. Termination of Parental Rights: Purpose and Policy

The termination of parental rights is a very serious undertaking in any court and should be approached with caution because it can have such a large impact on the life of children and families; this is especially true in Indian country. For many Native Nations, the termination of parental rights[140] is contrary to traditional and/or contemporary cultural practices, religion, and law. However, this belief in preserving parental rights can conflict with:

- The common belief that children are sacred and should be protected, and
- Practical concerns, such as funding requirements under Title IV-E.

As such, the general purpose and policy statements that preface a new code section are particularly important for any "Termination of Parental Rights" section of a Children's Code. This can add guidance to the process and operate as an expression of culture and sovereignty—especially for those Nations using federal funds for their CINA proceedings and related matters. For example, as seen later in this unit, the Oglala Sioux Nation's code strongly states its cultural and spiritual beliefs against the termination of parental rights—stating that termination is, in fact, impossible according to the Nation's worldview. However, later in that section of its code, the practical realities of receiving federal funds still allows for one exception to the Nation's stance on termination of parental rights.

[140] Whether voluntary or involuntary termination occurs.

Selected Tribal Codes

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part V: Out-Of-Home Placement Alternatives

§ 8.038. Termination of Parental Rights

(a) **Purpose**—The purpose of this section is to:

(1) Provide a process for the Court to order the termination of parental rights in voluntary and nonvoluntary situations;

(2) Provide meaningful and clear standards to be applied to termination of parental rights proceedings; and

(3) Ensure competent, stable, and on-going care of children through prompt and final adjudications.

(b) **Policy**—Nonvoluntary termination of parental rights to a child is a serious matter.

(1) The Court shall order the termination of parental rights only after all attempts to maintain the safety and stability of the family and child or to maintain a minimum level of positive contact between the child and the child's family, including extended family, have been exhausted and where the termination of parental rights would be in the child's best interests.

The Law and Order Code of the Kalispel Tribe of Indians (Enacted 12.2.2015)
Chapter 7 Kalispel Youth Code
Part 5. [Termination of Parental Rights]

7-30.01 Purpose

The Kalispel Tribe has not traditionally provided for the termination of a parent's rights. It is currently the custom of the Tribe to view involuntary termination of a parent's rights as a last resort. While the Tribe recognizes parental rights are entitled to protection, it also recognizes those rights must be balanced against those of the Tribal youth. Where parental rights and the rights of youth conflict, the child should be protected. A child has a right to proper care. Further, the parents have a duty to honor that right. Where it is evident that a youth is not receiving proper care, due to the negligent treatment or abuse of the youth by his or her parent(s), The Tribe may take extreme steps to protect the rights of the youth including involuntary termination of parental rights. This chapter also addresses termination of parental rights by consent of the parent(s) for adoption.

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.870 Termination of parental rights and adoption.

Purpose: The Tulalip Tribes have not traditionally supported termination of a parent's rights. It is currently the custom of the Tribes to view involuntary termination of a parent's rights as a last resort and a process to be used only when an adoption has been arranged in a step-parent adoption, or when one of the parents has committed a heinous act against another person. This chapter addresses both involuntary termination of a parent's rights and termination of parental rights by consent of the parent in the course of an adoption. [Res. 2015-101].

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part A—General and Dependency Provisions

§405.1 Preference for Traditional Resolution of Child and Family[141]

There is hereby established a preference for traditional resolution of child and family issues, in accordance with the traditions of the Oyate as described throughout this Code. At all times the Children and Family Court and others involved in overseeing the welfare of children within tribal jurisdiction shall allow and encourage traditional processes to develop solutions to problems concerning the safety and development of children. The nontraditional systems described in sections 406 to 411 of this Code shall be implemented only when the Office of the Attorney General makes a showing to the Children and Family Court that there is clear and convincing evidence that the traditional system is unable to ensure a child's safety.

§405.2 Description of Traditional Resolution of Child and Family Issues

[sections omitted]

(d) **Incidences of child neglect, abandonment, or abuse follow the same procedures and protocol**. Parents of the parents, aunts and uncles of the parents, other relatives in that order have the responsibility to address these issues. In cases where the safety of children is at stake, the responsible adults have the right to separate the children from their parents. Conditions can then be established for corrective action on the part of the parents. Children can be returned to their parents once the conditions are met and it has been determined that the children will no longer be threatened. Tiospaye, or other individuals or programs, cannot terminate parental rights because that falls in the spiritual realm of traditional tiospaye life. The union of man and woman to raise children are spiritual occurrences, and only Wakan Tanka has the authority to terminate parental rights.

[141] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

Tribal Code Commentary

The Siletz Code provides a process for voluntary and involuntary termination of parental rights. Termination of rights is an option of last resort; it is used only after all attempts to maintain the safety and stability of the family and child and to maintain a minimum level of positive contact with the family, including extended family, have been exhausted.

The Kalispel Nation indicates that traditionally it has not provided for termination of parental rights. The current custom is to incorporate termination only as a last resort. It recognized that the rights of the child and rights of the parents must be balanced. The youth must be protected and a child has a right to proper care; in this case, termination of parental rights may be considered.

The Tulalip Tribes have not traditionally supported termination of a parent's rights and currently only considers it as a last resort and a process to be used only when an adoption has been arranged in a stepparent adoption or when one of the parents has committed a heinous act again another person.

The OSTC references a preference for traditional resolution of child and family issues. The nontraditional system shall not be used unless there is clear and convincing evidence that the traditional system is unable to ensure a child's safety. Termination of parental rights is not recognized traditionally.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Did your Nation traditionally allow for termination of parental rights?
- Does your code allow for termination of parental rights?
- If there is currently a purposes section related to the termination of parental rights, review that section to identify problems and strengths.

STEP 2: Establish a Vision for the Future

- How can you make the section on termination of parental rights consistent with your Nation's custom and traditions?
- Are there certain situations when termination of parental rights may be useful or necessary to protect the child?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

B. Mandatory Termination of Parental Rights

Under ASFA Native Nations seeking to obtain or maintain Title IV-E funding must include a provision regarding the mandatory termination of parental rights. The termination must be sought when the child has been in foster care for fifteen of the last twenty-two months. The relevant law states:

> **42 U.S. Code § 675 - Definitions**
>
> [sections omitted]
>
> (5) The term "case review system" means a procedure for assuring that—
>
> (E) in the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months, or, if a court of competent jurisdiction has determined a child to be an abandoned infant (as defined under State law) or has made a determination that the parent has committed murder of another child of the parent, committed voluntary manslaughter of another child of the parent, aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter, or committed a felony assault that has resulted in serious bodily injury to the child or to another child of the parent, the State shall file a petition to terminate the parental rights of the child's parents (or, if such a petition has been filed by another party, seek to be joined as a party to the petition), and, concurrently, to identify, recruit, process, and approve a qualified family for an adoption, unless—
>
> (i) at the option of the State, the child is being cared for by a relative;
>
> (ii) a State agency has documented in the case plan (which shall be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the child; or
>
> (iii) the State has not provided to the family of the child, consistent with the time period in the State case plan, such services as the State deems necessary for the safe return of the child to the child's home, if reasonable efforts of the type described in section 671(a)(15)(B)(ii) of this title are required to be made with respect to the child;

In order to comply with the federal law, the Children's Code provision must:

- Require at least one official file a petition to terminate parental rights when certain circumstance arise;
- Require social services to document an exception in the case plan that avoids termination of parental rights; or
- A combination of the two preceding options.

Native Nations have been increasingly creating policies and laws that comply with termination requirements of Title IV-E, yet are more in keeping with their traditional values than comparable

state codes. Such "hybrid" codes are generally termed *customary adoptions* (see Chapter 16 and the sections in this chapter on suspension of parental rights) and are typically identifiable by characteristics such as:

- Establishing a permanent legal relationship between a child and adoptive parent(s);
- Allowing for continued contact between the child and the original parent/family instead of terminating parental rights; and
- Ordering a permanent suspension of the rights of the birth parent to provide for the care, custody, and control of their child.

This part discusses the circumstances in which the responsible official is required to file a petition to terminate parental rights and to concurrently start the adoption process for a child. Under 42 U.S.C. 675(5)(E), Native Nations wishing to access Title IV-E funds need to have laws that require a designated agent to file a petition to terminate parental rights:

- When a child has been in foster care for the designated amount of time (at least fifteen of the previous twenty-two months);
- Where a court has determined that the child is abandoned; or
- When the parent has committed a designated crime that constitutes "aggravated circumstances"

Of course, there are exceptions to the termination of parental rights requirement that still allow for the continued receipt of federal funds under Title IV-E. These exceptions are triggered when

- A child is being cared for by a relative who meets the placement requirements in other sections of the code;
- The Native Nation has documented a compelling reason for not seeking the termination of parental rights; Or
- The Native Nation has failed to provide the family and child with the services necessary to return the child to their home.

The federal Children's Bureau stresses that the filing of a termination of parental rights petition is mandated by federal law with no exceptions for Native Nations. However, it also stresses that Native Nations may use the exceptions, including defining under tribal law what constitutes the legal grounds for termination of parental rights, and when such grounds have not been met. The use of the exceptions is key to the Native Nation continuing to receive Title IV-E funding, yet complying with its own traditions relating to the termination of parental rights.

Selected Tribal Codes

Oglala Sioux Tribe Law and Order Code
Chapter 4. Child and Family Code, Wakanyeja Na Tiwahe Ta Woope
Part A—General and Dependency Provisions

§408.7 ASFA Mandated Petitions to Terminate Parental Rights or to Document Exception[142]

(a) The Office of the Attorney General shall either file a petition to terminate parental rights of the child's parent(s) or the LOWO Division of Child Protective Services must document in the case plan that an exception from doing so is present where:

(1) A child has been in foster care under the responsibility of the Tribe for 15 of the most recent 22 months;

(2) A court of competent jurisdiction has determined a child to be an abandoned infant; or

(3) A court of competent jurisdiction has made a determination that the parent has committed murder of another child of the parent, committed voluntary manslaughter of another child of the parent, aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter, or committed a felony assault that has resulted in serious bodily injury to the child or to another child of the parent.

(b) Where subsection (a) applies, the Office of the Attorney General shall file a petition to terminate the parental rights of the child's parent(s) (or, if such a petition has been filed by another party, seek to be joined as a party to the petition), and, concurrently, to identify, recruit, process, and approve a qualified family for an adoption, unless:

(1) The child is being cared for by a relative;

(2) The LOWO Division of Child Protective Services has documented in the case plan (which shall be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the child; or

(3) The Tribe has not provided to the family of the child, consistent with the time period in the case plan, such services as the Tribe deems necessary for the safe return of the child to the child's home, if reasonable efforts of the type described in Section 408.5 are required to be made with respect to the child.

[142] The Oglala Sioux Tribe Law and Order Code is on file with the Tribal Law and Policy Institute.

Yurok Tribe Children's Code (Current through January 31, 2008)
Chapter 8: Termination of Parental Rights

Section 2: Mandated Petitions to Terminate Parental Rights

(a) The Tribal Prosecutor (or other designated official) shall either file a petition to terminate parental rights of the child's parent(s) or the Tribal Social Services Department must document in the case plan that an exception from doing so is present where:

(1) A child has been in foster care under the responsibility of the Tribe for 15 of the most recent 22 months;

(2) A court of competent jurisdiction has determined a child to be an abandoned infant; or

(3) A court of competent jurisdiction has made a determination that the parent has committed murder of another child of the parent, committed voluntary manslaughter of another child of the parent, aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter, or committed a felony assault that has resulted in serious bodily injury to the child or to another child of the parent.

(b) Where subsection (a) applies, the Tribal Prosecutor, or other designated official, shall file a petition to terminate the parental rights of the child's parent(s) (or, if such a petition has been filed by another party, seek to be joined as a party to the petition), and, concurrently, to identify, recruit, process, and approve a qualified family for an adoption pursuant to the provisions of the Protective

Parent and Adoption Sections above unless:

(1) The child is being cared for by a relative;

(2) The Tribal Social Services Department has documented in the case plan (which shall be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the child; or

(3) The Tribe has not provided to the family of the child, consistent with the time period in the case plan, such services as the Tribe deems necessary for the safe return of the child to the child's home, if reasonable efforts are required to be made with respect to the child.

In any case, no adoption of a Yurok child shall occur in this court unless and until the birth parent(s) of said child have consented to said adoption. If said birth parents are not available to consent by reason of their death or incompetence or a reasonable and diligent search does not result in the location of such parent the court may consider a request for termination of parental rights and adoption accompanied by an affidavit or testimony that the surviving/remaining family of the parent(s) support the termination of parental rights and adoption of the minor child by the applicant.

A protective parent(s) shall be named when this court has terminated the parental rights and responsibilities of a parent or guardian. The protective parent shall permanently have all the rights and responsibilities of the former parents. The former parents however shall maintain their identity as parents and the relationship of the child shall be maintained with the extended family of the identity parents. Specifically include are all rights of enrollment and inheritance from the identity parent and family.

A protective parent may be appointed with or without the consent of the identity parent.

Tribal Code Commentary

The OST lifts the ASFA-mandated petition requirements and inserts it into its code. Keep in mind that this section of the code does not define termination of parental rights, which could also impact how a termination proceeding is considered and managed. The code section indicates when filing a petition for termination of parental rights is mandatory. It also lists the exceptions to filing a petition consistent with ASFA:

- The child is with a relative.
- CPS has documented in the case plan compelling reasons to determine that filing such a petition would not be in the best interests of the child.
- The family has not been provided the services deemed necessary for a safe return of the child, if reasonable efforts are required.

The Yurok Children's Code requires the tribal prosecutor to file a petition to terminate parental rights of the child's parent or the Social Service Department must document in the case plan an exception to filing. This wording is consistent with ASFA. It also provides the same exceptions listed in the OSTC and ASFA. However, it requires that any adoption occurring in the Yurok Court take place only with the consent of the birth parent. If the birth (identity) parent is unavailable, the court could consider termination with the support of the surviving or remaining family of the parent. The court appoints a "protective parent" when it has terminated the parental rights and responsibility of a parent. The protective parent has all the rights and responsibilities of the former parent. The former parent maintains their identity as parent and the relationship of the child shall be maintained with the extended family of the "identity parent." All rights of enrollment and inheritance from the identity parent are maintained. A protective parent may be appointed with or without the consent of the identity parent.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Under what circumstances does your current code require filing of a petition for termination of parental rights?
- What are the exceptions of the requirement to file a petition for termination of parental rights?

STEP 2: Establish a Vision for the Future

- What changes need to be made to the current code section to ensure that it complies with the ASFA requirement of mandatory filing of termination proceedings in some situations?
- Are your current code exceptions to the requirement to file adequate to meet the ASFA requirements? Are they adequate to ensure traditions may still be followed? If not, what changes need to be made?
- How can you adequately protect traditional practices as well as meet the ASFA requirements of commencing termination proceedings?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

C. Voluntary Termination of Parental Rights

There are a number of situations that can lead a parent(s) or guardian(s) to terminate their parental rights. The actual judicial process is usually comparable to that of an involuntary termination—hearings, evidence, and final disposition are all the same. However, because the termination is voluntary, this type of termination creates issues not present in the involuntary termination process. The largest concerns are usually around the area of a knowledgeable consent.

Whenever a voluntary termination occurs, a robust code requires the court to make sure that the parent is actually consenting to the termination and fully understands the effects of that action. Generally, there is a short waiting period after the birth of a child in order to ensure the parent has overcome the emotional and physical trauma of the birth and has thoroughly considered the consequences of termination. Some codes have requirements of counseling not only to assure comprehension, but also to understand the availability of services to aid the parent and child.

Selected Tribal Codes

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
PART V: Out-Of-Home Placement Alternatives

§ 8.038. Termination of Parental Rights

[sections omitted]

(k) **Voluntary Termination of Parental Rights**

(1) The Court may terminate the parental rights of any parent who desires to voluntarily give up his or her parental rights to a child. The Court shall require that:

(A) No voluntary termination of parental rights shall be accepted by the Court before ten (10) days after the birth of the child to whom the parent seeks to give up his or her parental rights;

(B) No voluntary termination shall occur until a written report has been submitted to the Court by the Tribal ICW Program indicating that social services and counseling have been offered to the parent, that the consequences of the parent's actions have been fully explained to the parent, that the parent understands the consequences of their actions, what is the planned placement for the child and that it complies with Siletz law, and that the termination of parental rights is in the best interests of the child; and

(C) If a parent chooses to waive his or her right to appear at the termination of parental rights hearing, the waiver shall be in writing, signed before the Court, and knowing and voluntary.

(2) If the Court has reasonable doubt concerning the emotional state of mind of the parent seeking to give up his or her parental rights, or of the parent's ability to fully understand the consequences of his or her decision, the Court shall place the child in the legal custody of the ICW Program for a period not to exceed thirty (30) days, in order to allow the parent to consider his or her decision. The Court may order legal and psychological counseling for the parent in order to assure that the parent understands the consequences of his or her decision. A report indicating that counseling has been offered and the results of such counseling shall be made to the Court. Immediately after the end of the thirty (30) days period, the Court shall conduct a hearing and shall:

(A) Return custody of the child to the parent;

(B) Process the petition for voluntary termination of parental rights; or

(C) Extend the period for no more than thirty (30) additional days to allow further counseling. At the expiration of the thirty (30) days, the Court shall resume the hearing and proceed pursuant to this Code.

Pascua Yaqui Tribe Tribal Codes
Title 5 Civil Codes
Chapter 7 Juveniles (Amended February, 2015)

Section 420 Voluntary Termination of Parental Rights (5 PYTC § 7-420)

Parental rights may be relinquished voluntarily by a parent in writing, if signed by the parent in the presence of the Court and with approval of the Court. Relinquishment shall not be accepted or acknowledged by the Court prior to ten days after the birth of the child. The Court shall ensure that the parent understands the consequences of the voluntary termination prior to approving it. A parent who wishes to relinquish his/her parental rights shall be provided an interpreter if she/he does not understand English.

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.880 Petition for termination of parental rights—Who may file.

Any person at least 18 years old may file a petition to ask the court to voluntarily terminate their parental rights. Only a representative of the Tulalip Tribes or a petitioner with the Tulalip Tribes' approval may file a petition for involuntary termination of a parent's rights. [Res. 2015-101].

4.05.960 Consent.

Consent of a parent to terminate his or her rights to a child is not valid unless:

(1) The parent is at least 18 years old;

(2) The parent has received counseling from an appropriate professional who has explained the consequences of terminating his or her rights, has explored all available services to help the parent care for the child (such as parenting classes and substance abuse treatment), and has explored alternatives to termination and adoption, such as guardianship;

(3) The parent orally explains his or her understanding of the meaning of termination of parental rights to the judge and the judge certifies that the terms and consequences of the consent were fully explained and were fully understood by the parent; and

(4) The consent was given no sooner than 30 days after the birth of the child. This does not mean the child cannot be placed with the prospective adoptive parents or other caregiver during the 30 day period. Any consent may be withdrawn prior to the entry of a final decree of adoption and, if no other grounds exist for keeping the child from the parent, the child shall be returned to the parent. [Res. 2015-101].

Tribal Code Commentary

The Siletz Court does not accept a voluntary termination of parental rights:

- Until at least ten days after the birth of the child.
- Until a written report has been submitted to the court by the tribal ICW program, which includes the following information:
    - That counseling and services have been offered.
    - That the consequences of the parent's actions have been fully explained.
    - The planned placement for the child, which complies with Siletz law.
    - That termination is in the best interests of the child.

If the parent chooses to waive the right to appear at the termination hearing, the waiver must be in writing, signed before the court.

If the court has reasonable doubt concerning the emotional state of the parent or of the ability of the parent to fully understand the consequences of the decision, the court is required to place the child in legal custody of the ICW program for a period not to exceed thirty days in order to provide time for the parent to consider the decision. The court may also order legal and psychological counseling for the parents to ensure understanding of the decision to voluntarily terminate rights. A report relative to the counseling is provided to the court.

In the Pascua Yaqui Nation, the relinquishment of parental rights must be in writing signed in the presence of the court with the approval of the court. Relinquishment is not accepted by the court prior to ten days after birth of the child. The court is required to ensure that the parent understands the consequences of voluntary termination.

The Tulalip Code actually requires that the parent receive counseling from an appropriate professional who has explained the consequences of termination of parental rights and has explored all available services to help the parent care for the child. The parent is required to explain their understanding of termination of parental rights to the judge, and the judge certifies that the terms and consequences of the consent were fully explained and understood by the parent. The consent cannot be given until thirty days after the birth of the child. Although, the child may be placed with the adoptive parents or other caregiver during the thirty-day period. Consent may be withdrawn prior to the entry of a final decree of adoption.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Review your current code on voluntary relinquishment of parental rights.
- Are there sufficient safeguards to ensure that the parent fully understands the consequences of termination of parental rights?

STEP 2: Establish a Vision for the Future

- What waiting period after the birth of a child is adequate to allow for consideration of consequences? Should there be a waiting period when it is not a newborn?
- Determine what safeguards you want in your code to ensure that the parent fully understands the consequences of termination of parental rights. For example:
  - Counseling (legal and psychological);
  - Signing before the court, with a requirement that the court is assured that the parent understands the consequences;
  - Appointment of an attorney; and
  - Advised of services available to the parent and child.

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

D. Involuntary Termination of Parental Rights

The involuntary termination of parental rights is a very serious matter that usually occurs as a result of particularly dire circumstances. Because many Native Nations view involuntary termination of parental rights as incompatible with their traditional and contemporary culture, it is not frequently used. However, because the growing trend is for Native Nations to exercise their sovereignty over child welfare proceedings in Native courts—and federal laws/funding are usually controlling factors—most Native Nations that manage child welfare cases have code provisions for the involuntary termination of parental rights. The Nations may also have involuntary suspension of parental rights or, as an alternative to termination, in conjunction with customary adoption. Suspension of parental rights is a serious matter and is discussed more fully in parts of this chapter.

Involuntary termination of parental rights usually occurs in the following circumstances:

- Failure to comply with a case plan in a CINA proceeding to the detriment of the child's best interests;
- Egregious abuse of the child or their sibling;
- Long-term child abandonment;
- The parent is subject to an extended prison sentence that makes termination in the best interest of the child; and
- The parent has been convicted of certain crimes that are incompatible with the Native Nation's expectations of parental fitness.

However, Nations can choose to codify a variety of circumstances that would constitute grounds for the involuntary termination of parental rights. As discussed earlier in this chapter, in order to comply with ASFA and Title IV-E funding requirements, involuntary termination of parental rights must be included in the code in some way. If involuntary termination is not contrary to the contemporary values of the community and government, this section of the code can be quite expansive—limited only by the citizenship rights bestowed upon the parent through their Native Nation and the United States.

Selected Tribal Codes

The Law and Order Code of the Kalispel Tribe of Indians (Enacted 12.2.2015)
Chapter 7 Kalispel Youth Code
Part 5. [Termination of Parental Rights]

7-30.10 Grounds for termination and burden of proof

The Court may order involuntary termination of a parent's rights only if the Tribe proves by clear and convincing evidence of any of the following:

(1) That the parent has:

(A) Abused the youth physically or sexually

(B) Abandoned the youth,

(C) Chronically neglected the youth, or

(D) Chronically emotionally maltreated the youth;

(E) Been criminally convicted in the death of a sibling of the youth at issue by any of the above; *and*

(2) That termination of the parent's rights is in the best interest of the youth and of the tribal community;

(3) That the Tribe has offered or helped arrange for appropriate resources to help the parent care appropriately for the youth; and

(4) That it is unlikely that the parent will be able to care appropriately for the youth.

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.950 Grounds for termination and burden of proof.

The Court may order termination of a parent's rights only when an appropriate adoptive home is available and adoption proceedings have been filed in conjunction with the termination proceedings. In addition, the Court must first approve the parent's consent as provided in this chapter or in cases of involuntary termination the petitioner must prove by clear and convincing evidence each of the following:

(1) **The parent**:

(a) Subjected the child to aggravated circumstances including but not limited to abandonment, torture, chronic abuse, severe neglect or sexual abuse or exploitation;

(b) Committed, aided, abetted, attempted, conspired, or solicited deliberate or mitigated deliberate murder or manslaughter of a child or the sibling or parent of the child;

(c) Committed aggravated assault against a child;

(d) Committed a heinous crime against another person; or

(e) Committed neglect of a child that resulted in serious bodily injury or death;

(2) That termination of the parent's rights and adoption are in the best interest of the child and of the Tribal community;

(3) That the Tribes have offered or helped arrange for appropriate resources to help the parent care appropriately for the child; and

(4) That it is unlikely that the parent will be able to care appropriately for the child.

Pascua Yaqui Tribe Tribal Codes
Title 5 Civil Codes
Chapter 7 Juveniles (Amended February, 2015)

Section 410 Involuntary Termination (5 PYTC § 7-410)

(A) **Grounds for Involuntary Termination**.

(1) **ABANDONMENT**—If the parent has not contacted the child, by telephone, letter or in person or provided any financial support for more than one year without a break, or have had only marginal contacts for 24 out of the last 48 months, a presumption shall exist that there is no parental relationship existing. The burden shall be upon the parent to provide evidence that such a relationship does exist. The evidence necessary to rebut this presumption may include, but shall not be limited to information about efforts to maintain the parent/child relationship, including a showing of regular visits, telephone calls, letters, or other contacts or monetary support.

(2) **PHYSICAL INJURIES**—Willful and repeated physical injuries to the child.

(3) **SEXUAL ABUSE**—Willful and repeated acts of sexual abuse or sexual exploitation.

(4) **EMOTIONAL HARM**—The return of the child may result in serious permanent emotional damage as supported by the best evidence available in the field of child development.

Tribal Code Commentary

The Kalispel Nation allows the court to order involuntary termination of a parent's rights in a variety of circumstances if there is clear and convincing evidence that the parent abused the child physically or sexually; abandoned the youth; chronically neglected the youth; emotionally maltreated the youth; or has been criminally convicted in the death of a sibling of the youth.

The Tulalip Code allows the court to terminate only when an appropriate adoptive home is available and adoption proceedings have been filed in conjunction with the termination proceedings. The court must also find by clear and convincing evidence that the parent:

- Subjected the child to aggravated circumstances including but not limited to abandonment, torture, chronic abuse, severe neglect, or sexual abuse or exploitation;
- Committed deliberate murder or manslaughter of a child or sibling or parent of the child;
- Committed aggravated assault against a child;
- Committed a heinous crime against another person; or
- Committed neglect of a child that resulted in serious bodily injury or death.

Further it is required that the termination be in the best interest of the child and the tribal community. Services must have been offered for appropriate resources to help the parent care appropriately for the child. It also must be unlikely that the parent will be able to care appropriately for the child.

The Pascua Yaqui Nation provides the following grounds for termination of parental rights:

- Abandonment—specifically defined;
- Physical injuries—willful and repeated;
- Sexual abuse—willful and repeated acts; and
- Emotional abuse—return of the child will result in serious permanent emotional damage.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Examine your current code to determine under what circumstances termination is permitted.
- Identify any problem areas in your current statute.
- Is your current code consistent with tradition? Identify problem areas.
- Is your current code sufficient to meet Title IV-E requirements? Identify problem areas.

STEP 2: Establish a Vision for the Future

- Explain clearly under what circumstances an involuntary termination of parental rights may be appropriate in your Nation.
- If you desire Title IV-E funds, do you have the necessary requirements?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

E. Petition for Termination of Parental Rights

Whether the petition for termination of parental rights is voluntary, involuntary, or mandatory, the petition should take on a standardized form that includes specifics on:

- Who can file the petition (this usually varies depending on petition type);
- The timing of the filing (unless the Children's Code already has standardized civil procedure rules for all petitions in a CINA case); and
- The contents of the petition.

Some Nations include the "who" in other sections of the code. For example, if the code includes a provision for voluntary termination of parental rights—only a parent or their legal representative could file that petition. The timing (aka civil procedure) provisions need only be included if your Children's Code does not have a set civil procedure process for petitions or your Nation wishes to diverge from its standard petition process. As such, the first two considerations are relatively easy to create or update.

The *contents* of the petitions, however, need more attention. The contents of the petition should include the standard information your Nation requires on most CINA documents and address the grounds for termination, burden of proof, and specific facts necessary for the court to make a ruling on a termination of parental rights as stated in other sections of your Children's Code.

Selected Tribal Codes

Yurok Tribe Children's Code (Current through January 31, 2008)
Chapter 8: Termination of Parental Rights

Section 1: Termination of Parental Rights

(a) PROCEDURE FOR FILING A PETITION TO TERMINATE PARENTAL RIGHTS:

The Tribal Prosecutor is not required to file a Petition to Terminate Parental Rights if the Court has entered written findings that:

The Tribal Department of Social Services has not provided to the family of the child, consistent with the time period in the case plan, such services as the Department deems necessary for the safe return of the child to parental care.

The Tribal Prosecutor is required to file a Petition to Terminate Parental Rights if; The Tribal Social Services department has made written recommendations of services for the family and, those services have been provided and, the Court issues a finding that the Tribal Social Services Department has made reasonable efforts to prevent removal of the child from parental care, and if removal could not have been prevented, and the Department has made reasonable efforts to alleviate and eliminate the need for removal of the child from parental care, the Court, in support of its determination of whether or not reasonable efforts have been made by the Department, shall enter a description of what preventive and reunification efforts were made and why further efforts could or could not have prevented or shortened the separation of the family;

Any filing of any such petition shall be consistent with the Protective Parent and Adoption Sections above.

The Law and Order Code of the Kalispel Tribe of Indians (Enacted 12.2.2015)
Chapter 7 Kalispel Youth Code
Part 5. [Termination of Parental Rights]

7-30.03 Petition—Contents

A petition for termination of a parent's rights shall include:

(1) The name, birthdate, residence, and tribal status of the youth who is the subject of the petition;

(2) The name, birthdate, residence, and tribal status, if known, of the youth's parent(s), guardian, or custodian;

(3) If the youth is residing with someone other than a parent, the location and length of time the youth has resided at that location, unless such information would jeopardize the safety of the youth; and

(4) A statement by the petitioner (whether the petitioner is the Tribe or a parent) of the facts and reasons supporting the request.

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.880 Petition for termination of parental rights—Who may file.

Any person at least 18 years old may file a petition to ask the court to voluntarily terminate their parental rights. Only a representative of the Tulalip Tribes or a petitioner with the Tulalip Tribes' approval may file a petition for involuntary termination of a parent's rights.

4.05.890 Petition—Contents.

A petition for termination of a parent's rights shall include:

(1) The name, birth date, residence, and Tribal status of the child who is the subject of the petition;

(2) The name, birth date, residence, and Tribal status, if known, of the child's parent(s), guardian(s), or custodian(s);

(3) If the child is residing with someone other than a parent, the location and length of time at that location; and

(4) A statement by the petitioner of the facts and reasons supporting the request.

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
PART V: Out-Of-Home Placement Alternatives

§ 8.038. Termination of Parental Rights [sections omitted]

(c) **Initiation of Termination of Parental Rights Proceedings**—A termination of parental rights proceeding shall be initiated when the tribal ICW Program files a petition seeking the nonvoluntary termination of parental rights, or the parent of a child files a petition seeking to voluntarily terminate their parental rights to the child. The petition shall include:

(1) The name, address, age and tribal status of the child who is the subject of the petition;

(2) The names, addresses, age and tribal status, if known, of the child's parent(s), guardian or custodian;

(3) A citation to the specific section of this Code that gives the Court jurisdiction over the termination of parental rights proceedings;

(4) A brief and concise statement of the facts and circumstances supporting the request for the termination of parental rights; and

(5) A plan for the care, custody, and control of the child if parental rights are terminated.

Tribal Code Commentary

The Yurok Tribe requires the Tribal Prosecutor to file a petition for termination if the Social Services Department has made written recommendations for services for the family and those services have been provided and the court issues a finding that the Department of Social Services has made reasonable efforts to alleviate and eliminate the need for removal of the child. The court should enter a description of what preventive and reunification efforts were made and why further efforts could or could not have prevented removal. Any filing must be consistent with the protective parent and adoption sections. The Yurok Petition is very basic and includes information on the youth, parent, and the current custodian and length of time in that location. The facts and reasons supporting the termination are the bulk of the petition.

The Tulalip Code allows any person at least eighteen years of age to ask the court to voluntarily terminate their parental rights. Only a representative of the Tulalip Tribes or a petitioner with approval of the Tulalip Tribes may file a petition to involuntarily terminate parental rights. The petition contains basic identification information on the child and parent and the facts and reasons supporting the termination.

The Siletz Code requires the petition contain the identification information; the facts and circumstances supporting the termination; and a plan for the care, custody, and control of the child, if the parental rights are terminated.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Who may file a petition for involuntary termination of parental rights under your current law?
- What information is required in your current petition for termination of parental rights?
- Are there problems with the current petition?

STEP 2: Establish a Vision for the Future

- Who should be authorized to file a petition for involuntary termination of parental rights in your Nation?
- What information must be in the petition to assure the court has sufficient information on the termination?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

F. Notice and Reports

Like any other cause of action, the filing of a petition to terminate parental rights must be accompanied by notice to person(s) whose rights may be impacted. Because the termination of parental rights is such a serious matter, ensuring that that the key parties receive notice of the filing of the petition is extremely important.

Reports are another issue common to many parental termination cases. If your Nation's petition requirements do not require a great deal of substantive content that explains the reasons for seeking a termination of parental rights, it is likely that reports are necessary. For Nations that wish to include provisions on reports for their termination of parental rights process, it is important to consider

- Contents required, or allowed, in the reports;
- Who can submit a report to the court;
- Notice and accessibility of reports to other parties; and
- Process for submitting reports to the court and other parties.

The most important thing to consider when creating, or omitting, a reports section for your Children's Code is whether your termination of parental rights code sections, as a whole, offer enough information for the court to make a well-informed decision that is in the best interest of the child and Native Nation.

Selected Tribal Codes

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
PART V: Out-Of-Home Placement Alternatives

§ 8.038. Termination of Parental Rights

[sections omitted]

(e) **Notice of Termination of Parental Rights Hearing**

(1) A hearing on a petition to terminate parental rights shall be held within forty-five (45) days after a petition to terminate parental rights has been filed.

(2) The Court shall give notice of the hearing on the petition to terminate parental rights to the following persons at least ten (10) days before the hearing:

(A) The child if the child is fourteen (14) years old or older;

(B) The child's parent(s), guardian or custodian, if any; and

(C) Any other persons who the Court deems appropriate.

(3) The Court shall issue a summons, which shall include a copy of the petition to terminate parental rights, and shall deliver a copy of the summons to all of persons listed in subsection (2).

(h) **Reports Pertaining to the Termination of Parental Rights**

(1) At least ten (10) days before any hearing on a petition to terminate parental rights, the tribal ICW Program in consultation with the Child Protection Team, shall prepare and present a written report to the Court. The report shall contain:

(A) The findings, opinions and recommendations, if any, of all professionals consulted regarding the termination of parental rights and who will be available to testify at hearings regarding termination of parental rights;

(B) The social history of the parent and the child, and the history of child custody proceedings involving the family;

(C) The proposed adoptive or other permanent placement for the child; and

(D) Any and all other facts that are necessary and related to the proposed termination of parental rights.

The report shall be served upon the parent whose parental rights may be terminated and the child's legal representative, if any, at least twenty (20) days before the termination of parental rights hearing.

(2) A parent who is the subject of a termination of parental rights hearing may submit a report to the Court at least ten (10) days before the hearing on

the petition to terminate parental rights. The Court shall provide the ICW Program and the child's legal representative, if any, with a copy of any reports filed with the Court pursuant to this subsection.

(3) The Court may, in its discretion, order other persons or agencies to submit written reports to the Court concerning the proposed termination of parental rights. The Court shall provide the parent who is the subject of the hearing, the tribal ICW Program and the child's legal representative, if any, with a copy of any additional reports filed with the Court pursuant to this subsection. The Court also has the discretion to condition the release of these reports to the parties by releasing the reports only the legal representatives of the parents and child with the directive that the legal representative may review and discuss the contents of the report with their respective client but they are not allowed to give copies of the report to the client. The Court may also require the party providing the reports to redact information from the report including but not limited to: the identity of confidential reporters, a person's social security number, or a victim's contact information.

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.900 Notice of hearing on petition.

Upon the filing of a petition, the Court shall schedule a hearing to be held within 45 and 60 days. If publication is necessary, such notice shall be consistent with TTC 2.10.030. The petition and notice shall be served on the parents, the guardian, who is required to join in the petition and beda?chelh so they can prepare a report, and anyone who may have an interest in the proceedings or be of assistance to the Court in adjudicating the petition.

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.910 Pretermination report—Preparation.

The petitioner shall arrange to have a pretermination report prepared by beda?chelh or by a beda?chelh approved agency who shall consult with all health, education, and social service personnel who have had prior professional contacts with the child and any criminal justice agencies who may have had contact with the parent(s); and with the petitioner(s) to determine whether termination of the parent's rights would be in the best interest of the child. In addition, the report preparer shall investigate the biological parents' family health history either through direct consultation with the parent or other family member to provide the adoptive family with health information. The report shall be in writing and contain the professional opinions of all persons consulted. The pretermination report for a parent who is asking the court to allow them to voluntarily terminate their parental rights shall include the requirements listed in TTC 4.05.960, Consent.

4.05.920 Pretermination report—Service.

Whoever prepares the report shall file and serve the pretermination report with the Court at least 10 calendar days before the hearing.

4.05.930 Additional reports.

Any party may file with the Court a report which shall include his or her recommendations regarding the proceeding. The party shall provide copies of the report to all other parties prior to the hearing.

Tribal Code Commentary

The Siletz Code requires that notice of a hearing to terminate parental rights be held within forty-five days of the filing of the petition. Notice shall be served on the child, if fourteen years of age or older; the parent, guardian, or custodian; and any other person the court deems appropriate at least ten days before the hearing.

In the Siletz Nation the ICW program is required to prepare and present a written report to the court ten days before the hearing. The report contains the findings, opinions, and recommendations of all professionals consulted regarding the termination. The professionals should be available to testify. The report should also include the social history of the parent and child and the history of the child custody proceedings involving the family. The proposed adoptive or other permanent placement should be included in the report, along with any other facts related to the proposed termination. The reports must be served upon the parent whose parental rights may be terminated and the child's legal representative twenty days before the hearing on the petition to terminate. The court has the authority to request additional reports.

The Tulalip Code requires a hearing to be scheduled between forty-five to sixty days of the filing of the petition to terminate parental rights. Notice is served on the parent or guardian and beda?chelh, so that beda?chelh can write a report. Beda?chelh is to contact all of the social service and criminal agencies that may have had contact with the child and parent. The report preparer should also investigate and provide the biological parents' family health history. The requirements differ somewhat if it is a voluntary termination. The report is to be provided to the court and served ten days before the hearing.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Examine your current code sections relating to notice of the hearing for termination of parental rights. What problems need to be corrected?
- Review to see if a report is required for the hearing and what is currently required to be in the report. What is missing?

STEP 2: Establish a Vision for the Future

- What is adequate notice for a termination hearing? Does this provide sufficient time for the preparation of a report and sufficient time for the parent to respond appropriately?
- What should be required to be in the report provided to the court? What are all of the facts a judge should have information on before making this important decision?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

G. Hearing and Disposition

Like any other CINA or CINA-related proceeding, filing a termination of parental rights triggers a hearing. Children's Codes must be very specific on what is required to be proven at this hearing, in order to result in a termination of a parent's rights to the child. The standard of proof should be a high standard, that is, reasonable doubt or clear and convincing evidence.

The results of the hearing should be set forth in a disposition (final order). The disposition should be carefully planned to specifically lay out the consequences if the court allows a termination. This is especially true when the court is only modifying or suspending parental rights. Also, a court may rule in favor of a termination of parental rights but explicitly preserve any child support, clanship, or citizenship rights of the child.

Rights of the child are discussed in Unit I of this chapter. For now, keep in mind that a child's rights can be preserved in the disposition at a termination of parental rights hearing or in the Children's Code.

Selected Tribal Codes

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
PART V: Out-Of-Home Placement Alternatives

§ 8.038. Termination of Parental Rights

[sections omitted]

(j) **Termination of Parental Rights Hearing**—The Court shall conduct a hearing to determine whether the parent's rights to the child should be terminated. In considering the proposed termination of parental rights, the Court shall give primary consideration to the child's health, safety and best interests.

(1) A finding that parental rights should be terminated shall be supported by evidence beyond a reasonable doubt that:

(A) The parent abandoned the child or is otherwise unable to care for the child within a reasonable period of time from the child's perspective, after the offer of services designed to remedy the conditions or circumstances that make the parent unable to care for the child;

(B) The parent willfully and repeatedly caused physical or emotional injuries to the child, which caused or created a substantial risk of death, disfigurement or impairment of bodily functions;

(C) The parent willfully and repeatedly committed acts of sexual abuse on the child, or permitted another person to commit the same; or

(D) The parent has voluntarily agreed to terminate his or her parental rights.

(2) In making a determination pursuant to subsection 8.038(j)(1) the Court shall consider, but is not limited to considering whether:

(A) The parent has an emotional illness, mental illness, or mental deficiency that makes the parent unable to care for the ongoing physical, mental and emotional needs of the child;

(B) The parent has abused or neglected the child and the severity of the abuse or neglect;

(C) The parent has repeatedly consumed excessive amounts of intoxicating liquors, illegal substances or drugs affecting the ability of the parent to provide a safe home and appropriate care for the child;

(D) The parent will be imprisoned for more than one (1) or more years;

(E) The parent has been convicted of intentionally, recklessly, willfully or wantonly caused the death of or injury to the child's sibling;

(F) The parent has failed to maintain regular visitation or other contact with the child as set forth in a plan to reunite the child with the parent,

and has failed to attempt to remedy any problems that may have prevented the parent from doing so;

(G) The parent has failed to visit or contact the child on a regular basis over a period of two (2) or more years, and that failure is not the result of interference or intimidation by any other person;

(H) Attempts by the ICW Program and other social service agencies to aid the parent in treatment or rehabilitation efforts have been unsuccessful, and the parent has not made any substantial progress toward recovery or rehabilitation on his or her own; or

(I) The child was left alone, the identity of the parent is unknown and cannot be discovered after careful searching, and the parent has not come forward to claim the child within six (6) months after the date on which the child was found.

(f) **Subpoenaing Witnesses**

(1) The Court may, in its discretion, subpoena experts who have knowledge of the parent-child relationship that is the subject of the hearing, including physicians, psychiatrists, mental health professionals, social workers, and any other person from the community who has knowledge of the family or the traditional child-rearing methods and attitudes of the Tribe.

(2) The Court may subpoena the presence of any other witnesses or persons who the Court determines have a direct interest in the case.

(3) If proposed witnesses are not subject to tribal subpoena, the Court may request that the witnesses appear and testify, or may seek aid from the nearest court with jurisdiction over the witnesses in obtaining a subpoena.

(g) **Court-Appointed Legal Representative for the Child**—In any proceeding for nonvoluntary termination of parental rights, or any rehearing or appeal involving the nonvoluntary termination of parental rights, the Court may appoint a legal representative to represent the child if the Court determines that the interests of the child will not be represented by any of the parties to the proceeding.

(l) **Order Terminating Parental Rights**

(1) If the Court orders the termination of a parent's rights to a child, the Court shall issue written order explaining the reasons for the decision. The Court may terminate all parental rights to a child, or may modify only the parent's legal and physical custodial rights so that the parent may continue to have contact with the child.

(2) The Court shall make an order for the permanent custody of the child, including that:

(A) The child be placed with an extended family member;

(B) The child be placed with a permanent guardian or a customary adoptive parent; or

(C) The child be placed in a foster care or shelter care facility that has been approved by the Tribe, on a temporary basis, while a permanent placement is sought; and/or,

(D) The case proceeds pursuant to the adoption provisions of this Code.

(3) An order terminating parental rights is a final order for purposes of appeal.

The Law and Order Code of the Kalispel Tribe of Indians (Enacted 12.2.2015)
Chapter 7 Kalispel Youth Code
Part 5. [Termination of Parental Rights]

7-30.09 Termination Hearing—Conduct

The hearing shall be private and closed. The Court shall hear testimony to determine whether termination of parental rights is in the best interest of the youth and the tribal community. The Court shall consider all termination reports submitted for review. All parties shall be given the opportunity to contest the factual contents and conclusions of the termination reports.

7-30.13 Disposition

If the petition is denied, the Court shall specify the reasons for the denial and shall designate who shall have custody of the youth. If parental rights are not terminated, but sufficient grounds for finding the youth is in need of care have been proved to the Court, the Court may make a disposition consistent with the youth in need of care or guardianship provisions of this Code.

Tribal Code Commentary

The Siletz Code requires the following to be proven *beyond a reasonable doubt* in order to terminate a parent's rights:

- The parent has abandoned the child or is otherwise unable to care for the child within a reasonable period of time, after an offer of services designed to remedy the condition;
- The parent willfully and repeatedly caused physical or emotional injuries to the child, which caused a substantial risk of death, disfigurement, or impairment of bodily functions;
- The parent willfully and repeatedly committed acts of sexual abuse on the child or permitted another to do so; or
- The parent voluntarily agreed to terminate parental rights.

The court shall consider the following in making its determination:

- Whether the parent has an emotional illness, mental illness, or mental deficiency that makes the parent unable to care for the ongoing physical, mental, and emotional needs of the child.
- Whether the parent has abused or neglected the child and the severity of the abuse.
- Whether the parent has repeatedly consumed excessive amounts of intoxicating liquors, illegal substances, or drugs affecting the ability of the parent to provide a safe home and appropriate care.
- Whether the parent will be imprisoned for more than one year.
- The parent has been convicted or intentionally, recklessly, willfully, or wantonly caused the death of or injury to the child's sibling.
- Whether the parent has failed to maintain regular visitation or other contact with the child as set forth in a plan to reunite the child with the parent and has failed to attempt to remedy any problems that may have prevented the parent from doing so.
- Whether the parent has failed to visit or contact the child on a regular basis over a period of two or more years, and if that failure is not the result of interference or intimidation by any other person.
- Attempts by the ICW program to aid the parent in treatment or rehabilitation efforts have been unsuccessful, and the parent has not made any substantial progress toward recovery on their own.
- Whether the child was left alone, the parent is unknown and cannot be discovered after careful searching, and the parent has not come forward to claim the child within six months after the date on which the child was found.

The Siletz Court may subpoena witnesses who have knowledge of the parent-child relationship to appear and testify. If the petition is granted, the court's order should explain the reasons for the decision and may terminate all parental rights or may modify only the parent's legal and physical

custodial rights so that the parent may continue to have contact with the child. The Court shall make an order for permanent custody placing the child with an extended family member, a permanent guardian, or customary adoptive parent; place the child in a foster care or shelter care facility approved by the tribe temporarily; or continue to adoption.

The Kalispel Youth Code requires that the termination hearing be private and closed. The court may hear testimony to determine whether it is in the best interest of the youth and tribal community to terminate parental rights. It shall consider termination reports. All parties have an opportunity to contest factual contents and conclusion of the termination reports. If the petition is denied the court shall specify the reasons. If parental rights are not terminated, but sufficient grounds for finding the youth is in need of care have been proven, the court may make a disposition consistent with the youth in need of care or guardianship provision of the code.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Examine your current code sections relative to the hearing and disposition in a termination of parental rights proceedings.
  - What is the standard of proof?
  - What must be proven to substantiate a termination of parental rights?
  - What changes if any need to be made?

STEP 2: Establish a Vision for the Future

- What is the standard of proof for your termination proceeding?
- What must be proven at the hearing?
- What evidence is the court required to consider?
- Is the court required to terminate all parental rights or are there some rights that could survive the termination?
- How can you develop a termination proceeding that is consistent with current traditions of your Nation and also consistent with Title IV-E?
- What happens if there is not sufficient proof to termination, but the child is a CINA?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

H. Effect on the Child's Rights—Enrollment, Inheritance, and Other Rights

Native Nations may be concerned about the child's rights to continue to be a part of their Nations. Termination of rights in state courts has often meant the termination of the child's relationships with their tribe, culture, and extended family. Ensuring that the child is still eligible for citizenship in their Native Nation and, in fact, facilitating the application in conjunction with the termination of parental rights may take place. Additional consideration of the extended family's rights is important to Native Nations; many have code provisions that allow for continued legal relationships with extended family, even though the parent's rights may terminate.

Inheritance is another important consideration. Because termination of all parental rights may cut off the child's right to inherit from the birth parent or relative of the parent and vice versa Native Nations can use special inheritance provisions to preserve the child's inheritance.

Selected Tribal Codes

Mille Lacs Band Statutes Annotated **(Current through February 7, 2014)**
Title 8–Children and Families
Chapter 13. Child/Family Protection
Subchapter 7—Termination of Parental Rights

Section 511. Enrollment status or degree of blood quantum
No adjudication of termination of parental rights shall affect the minor's enrollment status as a member of any Band or the minor's degree of blood quantum of any Band.

Tulalip Tribal Code **(Current through May 6, 2016)**
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.970 Enrolment prior to termination.

If a child is not enrolled but is eligible for membership in the Tulalip Tribes, beda?chelh shall assist in making an application for membership or enrollment of the child.

The Law and Order Code of the Kalispel Tribe of Indians **(Enacted 12.2.2015)**
Chapter 7 Kalispel Youth Code
Part 5. [Termination of Parental Rights]

7-30.11 Enrollment Prior to Termination

If a youth is eligible for enrollment in the Kalispel Tribe of Indians, the Indian Child Welfare Worker shall assist the parent in making application for enrollment of the youth to the Kalispel Enrollment Clerk. The parent may file an objection to enrollment in the Kalispel Tribe of Indians, in writing, with the Court.

White Earth Band of Ojibwe Child/Family Protection Code
Title 4: Children and Families
Chapter XXVI. Termination of Parental Rights

Section 13. Child's Continued Right to Benefits.

An order terminating the parent-child relationship shall not disentitle a child to any benefit due the child from any third person, agencies, state or the United States, nor shall any action under this code be deemed to affect any rights and benefits that the child derives from the child's descent from a member of a federally recognized Indian tribe.

Yurok Tribe Children's Code **(Current through January 31, 2008)**

Definitions:

Protective Parent:
A protective parent(s) shall be named when this court has terminated the parental rights and responsibilities of a parent or guardian. The protective parent shall permanently have all the rights and responsibilities of the former parents. The former parents however shall maintain their identity as parents and the relationship of the child shall be maintained with the extended family of the identity parents. Specifically included are all rights of enrollment and inheritance from the identity parent and family.
A protective parent may be appointed with or without the consent of the identity parent.

Laws of the Confederated Salish and Kootenai Tribes (Revised March, 2013)
Title III, Chapter 2. Children
Part 8. Termination of Parental Rights

3-2-803. Inheritance and Residual Rights.[143]

The termination of parental rights shall not adversely affect the child's rights and privileges as an Indian, nor as a member of any tribe to which the child is entitled to membership, nor shall it affect the child's enrollment status with the child's tribe, nor shall it interfere with child's cultural level and traditional and spiritual growth as a member of the Indian community.

(1) If the court terminates parental rights, the court shall include in its order that the court has considered the question of inheritance and residual parental rights, and the court shall determine as follows:

(a) Consideration of inheritance rights:

(i) that the inheritance rights of the child and natural parents have been terminated; or

(ii) that the inheritance rights of the child or natural parents, or both, shall be continued, with such conditions as the court may place; and

(b) Determination of parental rights:

(i) that all of the natural parents' rights to the child have been terminated; or

(ii) that the natural parents may enjoy certain residual parental rights. Such parental right may include:

(A) the right to communication;

(B) the right to visitation;

(C) the right or obligation to contribute to support or education;

[143] The Laws of the Confederated Salish and Kootenai Tribes is on file with the Tribal Law and Policy Institute.

(D) the right to be consulted regarding the child's religious affiliation, major medical treatment, marriage, or other matters of major importance in the minor child's life; or

(E) such other residual rights as the court may deem appropriate, considering the circumstances.

(2) The court may grant similar residual rights to extended family members upon the termination of parental rights.

(3) Nothing in this Code shall prohibit a parent whose parental rights have been terminated under judicial process to petition the court to restore the parent to certain residual parental rights.

Tribal Code Commentary

The Mille Lacs Code simply states that no adjudication of termination of parental rights shall affect the child's enrollment status or blood quantum. This would include an adjudication in a state or court of another Native Nation.

The Tulalip Code requires that if a child is eligible for membership in the Tulalip Tribes, beda?chelh assists in the application for membership. The Kalispel Code has a similar requirement, although it indicates that a parent may object to the enrollment in writing with the court.

White Earth's code indicates that terminating a parent-child relationship shall not disentitle a child to benefit due from any third person, agencies, state or the United States or affect any rights or benefits from being a member of a federally recognized tribe.

The Yurok Code indicates that the child still maintains a relationship with the extended family of the parents whose rights have been terminated. This includes the right of enrollment and inheritance from the parent or family.

The Confederated Salish and Kootenai have specific considerations for the court to consider in every termination of parental rights. The list includes inheritance rights, rights of the parents, and rights of the extended family. It also states that it shall not affect enrollment status or interfere with the child's cultural level and traditional spiritual growth as a member of the community.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Does your current code have a provision that ensures a child's right to citizenship in your Nation is not eliminated by the termination of parental rights?
- What current protection do you have for extended family member's rights?
- What current provisions do you have relating to the child's right to inherit once parental rights are terminated?
- What changes do you see that should be made?

STEP 2: Establish a Vision for the Future

- Do you want the child's right to inherit from their birth parent or other relative to survive the termination of parental rights? In all cases?
- What, if any, changes do you need in your code to ensure that the child continues to have the right to citizenship and all rights that entails?
- Are there other rights that should survive termination of parental rights?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

I. Suspension of Parental Rights: Petition and Hearing

Native Nations find that suspension (or modification) of parental rights is generally more in line with their traditions than the termination of parental rights. Suspension of parental rights is common in customary adoptions. It generally is a permanent suspension of the rights of the birth parents to provide for care, custody, and control of their child, but definitions may vary from Nation to Nation. It keeps other familial relationships intact and is consistent with Title IV-E requirements.

Suspension of parental rights usually occurs before a customary adoption and can also occur before a permanent guardianship. In some cases, certain parental rights may not be altered and, in other cases, the parental rights are suspended until the child reaches the age of majority. This should not impact the child's rights to inherit, if the parent should die.

This unit discusses the requirements of the petition and hearing. Unit J of this chapter discusses the consequences and requirements of the order, resulting from a suspension of parental rights.

Selected Tribal Codes

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.720 Customary adoption and suspension of parental rights.

Purpose: Customary adoption within the Tulalip Tribes is a two-step process. The first step involves suspension of parental rights until the child turns 18, but does not require judicial termination of parental rights. The second step is a ceremonial and legal process in which another family or community member assumes parental responsibilities through customary adoption. Customary adoption is intended to provide permanence to a child. There is a presumption that suspension of parental rights is in the child's best interest if the following has occurred:

(1) **For Youth-in-Need-of-Care Guardianships**.

(a) The child has been adjudicated a youth-in-need-of-care;

(b) The parent was given the requisite time period to reunify with the child;

(c) The permanent plan for the child was changed from return home to a permanent plan of guardianship; and

(d) The child has been in legal guardianship with the same person a minimum of three continuous years.

(2) **For Non-Youth-in-Need-of-Care Guardianships**.

(a) The parents have consented to suspension of parental rights and cultural adoption and the child has been in the legal guardianship in a non-youth-in-need-of-care guardianship with the same person a minimum of three continuous years.

Scope: This section of the code shall be liberally interpreted and construed as an exercise of the inherent sovereign authority of the Tulalip Tribes to embody and promote the basic traditional values of the Tulalip Tribes regarding the protection and care of the Tribes' children.

4.05.730 Petition to suspend parental rights.

Any adult who has had legal guardianship of the child for more than three year(s) may request beda?chelh file a petition with the Court seeking an order suspending the parental rights of the biological parents.

4.05.740 Petition–Contents.

(1) The suspension of parental rights petition filed by beda?chelh shall include:

(a) The name, birth date, residence, and Tribal status of the child who is the subject of the petition;

(b) The name, birth date, place and duration of residence, and Tribal status of the person(s) who has guardianship of the child;

(c) The name, birth date, residence, and Tribal status of the parent(s);

(d) The relationship, if any, of the guardian(s) to the child;

(e) A description of all previous known court proceedings involving the child;

(f) A statement that no similar action is pending in a Tribal or State Court having jurisdiction over the child;

(g) A statement as to the basis for the request for the suspension of parental rights, supported by medical, psychiatric, or psychological reports, or family members or others that have knowledge relevant to this proceeding.

(2) The petitioner shall sign the petition and shall affirm under oath that the contents are true and correct except as to those matters based upon belief and as to those matters the petitioner reasonably believes them to be true.

4.05.750 Notice of hearing on petition.

At the time of filing, the Court shall schedule a hearing to be held within 45 and 60 days. If publication is necessary, such notice shall be consistent with TTC 2.10.030. The Court shall cause written notice of such hearing to be served upon the petitioner, the parent(s) and beda?chelh. [Res. 2015-101].

4.05.760 Suspension of parental rights hearing.

A suspension of parental rights hearing is not a hearing in which a birth parent has the opportunity to request return home of the child or to change the permanent plan for the child. [Res. 2015-101].

4.05.780 Voluntary consent to suspension of parental rights.

A parent may voluntarily agree to suspend his or her parental rights if the consent has been signed by the parent(s) in front of a Tribal Court judge with the judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent.

White Earth Band of Ojibwe Child/Family Protection Code
Title 4a: Customary Adoption Code

4a-2 Civil Jurisdiction

The Court shall have civil jurisdiction to hear and adjudicate petitions seeking a suspension of parental rights order or a customary adoption for protection of a child or; to issue temporary and permanent orders for protection of a child, including ex parte orders if an emergency exists; and to issue such other orders as may be just and reasonable and designed to carry out the intent and purposes of this title, including use of the civil contempt powers of the court as set forth in Chapter II of the Judicial Code.

4a-3 Rights of Parties in Suspension of Parental Rights Proceedings

In addition to any other rights afforded under the Indian Civil Rights Act, 25 U.S.C. Sections 1301-03 (1968), as amended, or enumerated within the Judicial Code, petitioners, and other parties have the following rights:

1. A biological parent has the right to refuse services provided by any social services agency, however, their refusal to accept services may have a significant impact on their ability to have contact with their child;
2. The petitioner and respondent have the right to have reasonable notice and to attend any hearing arising out of the filing of a petition for suspension of parental rights pursuant to this Title. 4a. The biological parents and the petitioner have the right to be represented by counsel at their own expense at all proceedings;
3. The biological parents and the petitioner have the right to summon and cross-examine witnesses.
4. The biological parents and the petitioner have the right to seek independent medical, psychological or psychiatric evaluations of the child at their own expense.

4a-4 Petition to Suspend Parental Rights.

A. Any adult or agency possessing custody of a minor child may file a petition with the Court Administrator seeking an order for the permanent suspension of the parental rights of a parent of a child. The petition shall contain the following information:

   1. The name, address and telephone number of the child's tribe;
   2. The name, address, telephone number and age of the child's parent whose parental rights are to be suspended;
   3. The name, address, and telephone number of the petitioner and the petitioner's relationship, if any; to the child;
   4. The name, address, and telephone number of any other relatives who may have an interest in the care, custody and control of the minor child;
   5. A statement as to why an order for the suspension of parental rights of the parent is in the best interests of the child and the child's tribe.
   6. A statement as to basis for the request for the suspension of parental rights, supported by medical, psychiatric, child protection worker, family member and/or psychological reports or testimony;
   7. A statement that no similar action is pending in a state or other tribal court having jurisdiction over the child.

B. The petitioner shall sign the petition in the presence of the Court Administrator or a notary public and shall affirm under oath that the contents are true and correct except as to those matters based upon belief and, as to those matters, the petitioner reasonably believes them to be true.

4a-5 Notice of Hearing on Petition to Suspend Parental Rights

Upon the filing of a petition seeking an order for the suspension of parental rights, the Court Administrator shall schedule a hearing to be held thereon and shall cause written notice of such hearing to be served upon the petitioner; the child's tribe; the child's parent(s); family members; caretaker, if any; and appropriate agencies of the Band which may either have an interest in the proceedings or be of assistance to the court in adjudicating the matter. Such notice shall be served in the manner provided for in the White Earth Rules of Civil Procedure.

4a-6 Hearing.

A. **Attendance at hearing**.

1. The parents, family members, agencies and petitioner shall be present at the hearing in person or by telephone unless he or she has waived the right to appear in a writing executed before the Court Administrator or a notary and filed with the court or unless the parent is unable to attend by reason of a medical condition as evidenced by a written statement from a licensed physician or other appropriate professional.
2. The petitioner shall be present at the hearing. The petitioner's failure to appear shall be grounds for dismissal of the petition.
3. The parent(s) named in the petition shall also be present. The parent(s) failure to appear shall not prevent the issuance of an order for suspension of parental rights.

B. **Conduct of the hearing**.

1. The court shall inform the parent of their rights under this code and of the nature and consequences of the proceedings.
2. The court shall further inform all other parties of their rights under the Judicial code and pursuant to the Indian Civil Rights Act, 25 U.S.C., Section 1301-03 (1968), as amended, including the right to summon and cross-examine witnesses.
3. The rules of evidence of the Tribal Court shall apply.
4. The burden of proving the allegations of the petition shall be upon the petitioner and the standard of proof shall be clear and convincing evidence. There shall be a legal presumption of the parent's ability to parent until proven otherwise.
5. The court may continue the hearing, upon a showing of good cause, at the request of any party to the proceeding and enter such temporary orders, if any, as may be deemed just and reasonable to carry out the purposes of this Title.

C. **Record of proceedings**. In all proceedings the court shall take and preserve an accurate stenographic or recording of the proceedings.

D. **Findings**.

1. In all cases, the court shall make specific written findings of fact, state separately its conclusions of law, and enter an appropriate judgment or order.
2. The court may make findings that it is in the child's best interests that a final order suspending the parental rights be entered and the court shall specify the basis of those findings.

Tribal Code Commentary

The Tulalip Code requires suspension of parental rights prior to a customary adoption. It indicates that the section on suspension is considered an exercise of its inherent sovereign authority to embody and promote the basic traditional values of the Tulalip Tribes regarding protection and care of the tribes' children. The code creates a *presumption* that suspension of parental rights is in the best interests of the child in two situations:

1. Option one:
   a) The child has been adjudicated a youth-in-need-of-care.
   b) The parent has been given the requisite time period to reunify with the child.
   c) The permanent plan has changed from return home to a permanent plan for guardianship.
   d) The child has been in legal guardianship with the same person a minimum of three continuous years.
2. Option two:
   a) The parent has consented to suspension of parental rights and cultural adoption.
   b) The child has been in the legal guardianship in a non-youth-in-need-of-care guardianship with the same person a minimum of three continuous years.

An adult who has had legal guardianship of a child for more than three years may request the beda?chelh file a petition seeking an order to suspend the parental rights of the biological parents. The petition, in addition to identification information of all parties (including tribal status), requires a description of all previous court proceedings involving the child; assurance that no similar action is pending in another jurisdiction; and a statement as to the basis of the request for suspension, supported by medical, psychiatric, or psychological reports or family members or others with knowledge relevant to the proceeding.

A hearing according to the code is to be held within forty-five to sixty days of the filing with notice to the be served on the petition, the parents, and beda?chelh. The suspension hearing is not an opportunity for the birth parent to request a return home.

A parent in the Tulalip Nation may voluntarily consent to the suspension of their parental rights, but the consent must be signed in front of a tribal court judge with the judge's certificate that the terms and consequences of the consent were fully explained and were understood by the parent.

The White Earth Nation had a section outlining the rights of the parties at a suspension hearing. In addition to any rights under ICRA the following rights are mentioned:

- A biological parent has the right to refuse services provided by social services; however, their refusal may have a significant impact on their ability to have contact with their child.
- The petitioner and respondent have the right to reasonable notice and the right to attend any hearing arising out of filing of a petition for suspension of parental rights. The biological parents and petitioner have the right to be represented by counsel at their own expense.

- The petitioner and biological parents have the right to common witnesses and to cross-examine witnesses.
- The petitioner and biological parents have the right to seek independent medical, psychological, or psychiatric evaluations of the child at their own expense.

Any adult or agency possessing custody of a minor child may file a petition for suspension of parental rights of a parent of the child. The petition should include:

- Identification and contact information, including tribal affiliation.
- Name, address, and telephone of any other relatives who may have an interest in the care, custody, and control of the minor child.
- A statement explaining why suspension is in the best interests of the child.
- Supporting reports or testimony by medical, psychiatric, child protection worker, and family members.
- Assurance that no similar action is pending in any other jurisdiction.

A hearing shall be scheduled upon the filing of the petition and notice of the hearing served upon the petitioner, the child's tribe, the child's parents, family members, caretaker, and agencies that may have an interest in the proceedings or be of assistance to the court in adjudicating the matter.

The parents, family members, agencies, and petitioner are to be present at the hearing in person or by telephone, unless there is a waiver of the right to appear in a writing executed before the Court Administrator or notary and filed with the court or unless a medical condition prevents attendance. If the petitioner fails to attend, the petition is dismissed. The parent's failure to attend shall not prevent the issuance of an order of suspension.

At the hearing the judge informs the parent of their rights and the nature and consequence of the proceedings. All other parties are to be informed of their rights. The rules of evidence of the tribal court are applied. The burden of proving the allegations is on the petitioner and the standard of proof is clear and convincing evidence. There exists a presumption that the parent can parent.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Examine your current statutes relating to termination or suspension of parental rights.
- Discuss any problems with the current laws that you want to correct.

STEP 2: Establish a Vision for the Future

- What do you desire to accomplish by developing or improving your suspension of parental rights statutes?
- Do you want to create a legal presumption that suspension of rights is in the best interests of the child? (See Tulalip's code.)
- What rights do the parent, child, and others have in the suspension proceeding?
- What should be required of a parent who desires to consent to suspension of their rights?
- Are there certain procedures that should be followed at the hearing?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

J. Suspension of Parental Rights: Final Order

A suspension of parental rights seriously alters the parent(s)'s relationship and involvement with the child and has a serious impact on the child as well. The Native Nation may be interested in ensuring that the order complies with the requirements of Title IV-E's requirements. Thus, it is important that the order clearly includes the appropriate findings of fact and conclusions of law. Some important findings include:

- That it is in the child's best interests to enter an order for suspension of parental rights.
- That the parent received notice of the proceedings.
- That the right to care, custody, and control is permanently suspended.
- If an agreement exists relative to visitation, contact, no contact, or other matters, it should be noted and incorporated into the findings.

Selected Tribal Codes

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.770 Final order for suspension of parental rights.

If the Court determines by clear and convincing evidence that it is in the best interests of the child, it shall issue a final order for a suspension of parental rights. The final order shall make specific written findings of fact, state separately its conclusions of law, and enter an appropriate judgment or order. The Court shall make findings that it is in the child's best interests that a final order for suspension of parental rights be entered and the Court shall specify the basis of those findings.

(1) Such an order for the suspension of parental rights shall include, but is not limited, to the following:

(a) A determination that the parent(s) received notice of the proceedings that advised them of their rights;

(b) Because the child has been in a guardianship with the same guardian for a minimum of three years prior to beda?chelh filing a petition to suspend the parental rights of the child's biological parents, there is a rebuttable presumption that the suspension of parental rights is in the best interest of the child;

(c) A permanent suspension of the parental rights of the parent including the suspension of the right to the care, custody and control of the minor child and allowing the child to be customarily adopted.

(2) In addition the order may contain provisions that include:

(a) An order that the biological parent(s) are restrained from contacting the minor child or the child's adoptive parent(s), including contact in person, by mail, by telephone or through third parties. Or the order may allow for a contact agreement, agreed upon by the parties, to be ordered by the Court;

(b)`Ordering that any prior court order for custody, visitation or contact with the minor child is hereby terminated, unless there is an existing order for siblings who are placed in a customary adoption or guardianship with different families or grandparents who have maintained an ongoing relationship with the child;

(c) The biological parents' obligation to pay child support, except for arrearages, is terminated; or that a child support obligation continues until the age of majority, or continues or is modified according to an agreed schedule.

(3) Final orders for the suspension of parental rights may be reviewed by the Court at the request of the parent, beda?chelh or the prospective adoptive parent only if one of the following occurs:

(a) The child is not adopted after a period of one year after the entry of the final order suspending parental rights;

(b) The adoption of the child fails; or

(c) The adoptive parent is deceased.

Notice of this review shall be provided to all parties to the hearing at which the final order was issued. [Res. 2015-101].

White Earth Band of Ojibwe Child/Family Protection Code
Title 4a: Customary Adoption Code

4a-7 Final Order for Suspension of Parental Rights

A. If the court determines that it is in the best interests of the child and the child's tribe, it shall issue a final order for a suspension of parental rights. Such an order for the suspension of parental rights may include, but is not limited, to the following:

1. A permanent suspension of the parental rights of the parent including the suspension of the right to the care, custody and control of the minor child and allowing the child to be adopted;
2. A permanent suspension of the right of the parent to have contact with the minor child including contact in person, by mail, by telephone or through third parties or the order may allow for a contact agreement agreed upon by the parties to be ordered by the court;
3. Restraining a parent from contacting the minor child, the child's foster parent, the child's adoptive parent and/or the social services agency or agencies possessing information regarding the minor child;
4. Ordering that the biological parents' obligation to pay child support, except for arrearages, is hereby terminated;
5. Ordering that any prior court order for custody, visitation or contact with the minor child is hereby terminated;
6. The parent shall have no standing to appear at any future legal proceedings involving the child;
7. The suspension of parental rights does not sever or affect in any way a child's relationship to his/her tribe or any rights of inheritance from the biological parent(s);
8. Shall contain a statement regarding why it is in the best interests of the child and the child's tribe to enter this order;

B. Copies of any order for suspension of parental rights shall be served upon the parent and the agency or agencies having legal custody of the child and any other parties as directed by the court.

C. Final orders for the suspension of parental rights may be reviewed by the court at the request of the biological parent, the agency or agencies possessing custody of the child only if one of the following occurs: if there is no final permanency order in effect after a period of one (1) year after the entry of the final order suspending parental rights; the adoption of the child fails; or the adoptive parent is deceased. Notice of this review shall be provided to all parties to the hearing at which the final suspension of parental rights order was issued.

Tribal Code Commentary

At Tulalip, the court must find by *clear and convincing evidence* that it is in the best interests of the child to issue an order for suspension of parental rights. Clear and convincing evidence means evidence indicating that the thing to be proved is highly probable or reasonably certain—this is a greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials.[144] The order is required to have specific written findings of fact and separate conclusions of law, along with the appropriate entry of judgment or order. The findings must include:

- The parent received notice of the proceedings that advised them of their rights.
- That the child has been in a guardianship with the same guardian for a minimum of three years prior to beda?chelh filing a petition to suspend parental rights, and that this raises a rebuttal presumption that the suspension is in the best interests of the child.
- A permanent suspension of parental rights includes the right to the care, custody, and control of the minor child and allowing the child to be customarily adopted.

The order *may* include the following:

- An order restraining the biological parent from contacting the minor child or the child's adoptive parent, including contact in person, by mail, by telephone, or through third parties or it could include a contact agreement between the parties.
- Terminate any previous agreement or order relative to custody, visitation, or contact with the child, unless there is an existing agreement for siblings who are placed with other families or grandparents who have maintained an ongoing relationship.
- The biological parents' obligation to pay support is terminated, except for arrearages or a child support obligation that continues to the age of majority or as agreed by the parties.

Final orders for suspension may be reviewed by the court at the request of the parent, beda?chelh, or the prospective adoptive parent only if:

- The child is not adopted after a period of one year after the order suspending rights is entered.
- The adoption of the child fails.
- The adoptive parent dies.

Final orders are appealable, according to the procedures of the Tulalip Nation.

White Earth Nation's order for suspension of parental rights is issued when it is in the best interests of the child and the child's tribe. The order may include:

[144] "Evidence," *Black's Law Dictionary* (10th ed., 2014).

- A permanent suspension, which includes the suspension of rights to care, custody, and control of the minor child.
- A permanent suspension on the right to have contact with the minor child or the order may allow a contact agreement by the parties.
- A restraining provision, prohibiting the parent from contacting the child, the child's foster parent, adoptive parent, or social service agency.
- Terminating the parent's responsibility to pay child support.
- Terminating any prior order relative to custody or support.
- Terminating the parent's standing to appear in any court proceeding involving the child.
- A provision indicating that suspending the parental rights in no way impacts the child's right to inheritance from the parent or the relationship with their tribe.
- A statement regarding why it is in the best interests of the child and the child's tribe.

The order must be served upon the parent and the agency with legal custody and any other parties directed by the court. The order may be reviewed by the court only in certain situations, such as when the adoption fails to go through.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Review your current requirements for orders suspending parental rights or terminating parental rights.
- Note any problems with the current code section.
- Note any provisions that must also be in the new code section.

STEP 2: Establish a Vision for the Future

- Review the petition section of your new code to ensure the petition section and the order section are consistent with one another.
- Discuss the following topics for possible inclusion in the court order:
  - Will you use the best interest of the child standard and require a statement explaining why suspension is in the child's best interest?
  - What does suspension of parental rights mean relative to a parent's right to care, custody, and control of a child?
  - Will there be a provision restraining the parent from contact with the child, adoptive parent, agency, or others?
  - Will you allow agreements relative to visitation or contact?
  - How will it affect the child's rights to inheritance from the parent?
  - How will it affect the child's rights with their tribe?
  - How will it affect the child's relationship with extended family?
  - What impact does it have on the previous order relating to custody or child support?
  - Is there a possibility of continued child support or will that be terminated?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

K. Emancipation

Depending on the circumstances, emancipation of a minor may be the best option for a child that may otherwise end up in foster care. Emancipation is a surrender and renunciation of the correlative rights and duties concerning the care, custody, and earnings of a child; it is the act by which a parent (historically a father) frees a child and gives the child the right to their own earnings. This act also frees the parent from all legal obligations of support. Emancipation may take place by agreement between the parent and child, by operation of law (as when the parent abandons or fails to support the child), or when the child gets legally married or enters the armed forces.[145] The degree and terms of the emancipation may vary depending upon the jurisdiction. If a Native Nation chooses to provide that option, the process, terms, and effect of emancipation should be clearly spelled out in the Children's Code.

There are currently no Title IV-E requirements implicated by emancipation. There has previously been Title IV-E assisted living or self-sufficiency payments for emancipated minors whose case meets all of the Title IV-E provision; however, these programs are no longer available.

[145] Emancipation," *Black's Law Dictionary* (10th ed., 2014).

Selected Tribal Codes

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part VI: Emancipation

§ 8.040. Requirements for Emancipation

(a) **When Permitted**—The Court may declare a child emancipated after a hearing on a petition for emancipation, or as a dispositional alternative for a child found to be a child-in-need-of-care.

(b) **Eligibility**—To be eligible for emancipation, a child must:

(1) Be at least sixteen (16) years of age;

(2) Be self-supporting;

(3) Understand the consequences and responsibilities that result from being free from parental control and protection; and

(4) Present the Court with an acceptable plan for independent living.

§ 8.041. Initiation of Emancipation Hearing

(a) **Initiation of Emancipation Hearing**—An emancipation hearing shall be initiated by:

1. A petition by the child;
2. A petition by the ICW Program; or
3. A motion by the Court.

(b) **Petition for Emancipation**—A petition for emancipation shall state:

1. The name, address, age and tribal status of the child;
2. The name and address of each living parent of the child;
3. The name and address of the child's guardian or custodian, if any;
4. A description of the ways in which the child is currently self-supporting;
5. The child's plan for independent living;
6. The general or limited purposes for which emancipation is sought; and
7. The reasons why emancipation would be in the best interests of the child.

§ 8.042. Consent

A child petitioning for emancipation shall obtain the consent of each living parent and any guardian or custodian having control of the person or property of the child. If a person who is required to consent to the emancipation of a child is unavailable or his or her whereabouts are unknown, or if a parent, guardian or custodian unreasonably withholds consent, the Court, acting in the best interests of the child, may waive the consent requirement.

§ 8.043. Legal Representative

The Court may appoint a legal representative to represent the best interests of the child at the emancipation hearing.

§ 8.044. Power of an Emancipated Child

The Court may emancipate a child and remove the disabilities of minority if emancipation is found to be in the best interests of the child. Emancipation may be for general or limited purposes. Except for specific constitutional and statutory age requirements for voting and the use of alcoholic beverages, a child who has been emancipated for general purposes has the power and capacity of an adult, including but not limited to:

(a) The right to be domiciled where he or she desires;

(b) The right to receive and control all earnings;

(c) The power to sue and be sued; and

(d) The power to enter into contracts.

The Law and Order Code of the Kalispel Tribe of Indians (Enacted 12.2.2015)
Chapter 7 Kalispel Youth Code
Part 4. Emancipation

7-29.01 Purpose
The purpose of this chapter is to provide a process for young people to petition the Tribal Court for the removal of the legal disabilities that accompany the status of being a minor.

7-29.02 Who May Petition

Any youth may petition the Tribal Court for an order of emancipation provided the following requirements are met:

(1) The youth is a member of the Kalispel Tribe of Indians; or the youth resides or is domiciled within the jurisdiction of the Kalispel Tribe of Indians; and

(2) The youth is living separate and apart from his or her parent(s), guardian, or custodian; or the youth has special needs; or there exist special circumstances necessitating emancipation; and

(3) The youth is capable of arranging for his or her own support and the management of his or her own financial affairs.

7-29.03 Youth May File On Own Behalf

A youth may file a petition for emancipation in his or her own name.

7-29.04 Contents of The Petition

The petition for emancipation shall include:

(1) The name, date of birth, address and tribal status of the youth;

(2) The name, date of birth, address and tribal status of each living parent;

(3) The name and address of the youth's custodian or guardian, if any;

(4) The reasons emancipation would be in the best interest of the youth; and

(5) The purposes for which emancipation is sought.

7-29.05 Consent

The youth must obtain the consent of each living parent, guardian, or other custodian of the youth who has control of the youth's person or property. If the person whose consent is required is unavailable or his or her whereabouts is unknown, or if a parent, guardian or custodian unreasonably withholds consent, the Tribal Court, acting in the best interests of the youth, may waive the requirement for that particular parent, guardian, or custodian.

7-29.06 Guardian Ad Litem

The Tribal Court may appoint a guardian ad litem to represent the interest of the youth in an emancipation proceeding.

7-29.07 Notice

Notice of the date, time, and place of the emancipation hearing shall be given by the Court Clerk to the parties, to the Indian Child Welfare Worker, to the Presenting Officer, and to those from whom consent is required under Section 7-29.05, at least five (5) days before the hearing.

7-29.08 Recommendation of The Indian Child Welfare Worker

The Indian Child Welfare Worker may file a recommendation with the Court on any petition for emancipation. A copy of the recommendation shall be provided to the youth, his or her parent(s), guardian, or custodian, and the Presenting Officer.

7-29.09 Notice of Prior or Pending Court Actions

The Indian Child Welfare Worker shall notify the Court if he or she is aware of any court orders or legal actions, in any jurisdiction, involving the youth and which may be relevant to the emancipation proceedings (such as juvenile criminal proceedings, sentencing orders, parole, or dependency proceedings). No emancipation shall be ordered if it would circumvent a valid criminal sentence ordered by any court of competent jurisdiction.

7-29.10 Applicable Standard

The Tribal Court may emancipate a youth if it is in his or her best interest. Emancipation may be ordered for general or limited purposes, and the Order of Emancipation shall specifically state the extent of the emancipation. A copy of the order shall be provided to the youth; his or her parent(s), guardian, or custodian;

and to the Indian Child Welfare Worker, to the Presenting Officer, and Tribal Law Enforcement.

7-29.11 Rights of an Emancipated Youth

Except for limits placed by the Court and specific constitutional and statutory age limits such as voting and use of alcoholic beverages, a youth who has been emancipated has the rights and capacities of an adult, including but not limited to the right to control himself or herself, to be domiciled where he or she desires, to receive and control his or her earnings, to sue and be sued and to enter into contracts.

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.1170 Requirements

The Court may declare a Tulalip child emancipated either pursuant to a petition or as a dispositional alternative if the child wishes to be free from parental control and protection and no longer needs that control and protection, or the child is a youth-in-need-of-care as defined by this chapter; and all of the following exist:

(1) The child is 16 years of age or older;

(2) Living separate from his or her parent(s), guardian, or custodian;

(3) Is self-supporting;

(4) Understands the consequences of being free from parental control and protection; and

(5) Has an acceptable plan for independent living. [Res. 2015-101].

4.05.1180 Procedure for emancipation.

(1) **Petition**.

(a) Who May Petition.

(i) A minor who is at least 16 years of age may petition the Court for a declaration of full or partial emancipation.

(ii) A child's parent, guardian or custodian.

(b) The petition shall be verified and shall state:

(i) The name, date of birth and address of the child who is the subject of the petition;

(ii) The name and address of each living parent of the child who is the subject of the petition;

(iii) The name and address of the child's guardian or custodian, if any;

(iv) The reasons why the emancipation would be in the best interests of the child;

(v) The purposes for which emancipation is sought;

(vi) The proposed plan for the child supporting him/herself;

(vii) The proposed educational plan; and

(viii) The name, address and relationship to the child of the person filing the petition.

(c) Service of the Petition for Emancipation, Summons and Notice of Hearing.

(i) Such notices shall be served consistent with TTC 2.10.030.

(2) **Findings**. If the Court finds that the requirements of subsection (1) of this section are met, the Court may grant all or part of the petition, unless, after having considered all of the evidence, it finds that emancipation would not be in the best interests of the child.

(3) **Declaration**. If the Court grants all or part of the petition, it shall immediately issue a declaration of emancipation.

(4) **Purpose for Emancipation**. An emancipated minor shall be considered an adult over the age of 18 for all purposes.

(5) **Per Capita**. The emancipated minor shall be eligible to receive the same amount of per capita that a parent or guardian would on his or her behalf, and shall otherwise remain subject to Tribal laws and rules governing the disbursement of Tribal monetary benefits. [Res. 2015-101].

Tribal Code Commentary

The Siletz Code permits emancipation when a child is sixteen, self-supporting, understands the consequences of emancipation, and presents the court with an acceptable plan for independent living. An emancipation proceeding may be commenced by a child, by the ICW program, or by a motion of the court. The petition in addition to identification information should provide:

- A description of the way in which the child is currently self-supporting.
- The general or limited purposes for which emancipation is sought.
- The independent living plan.
- The reasons why emancipation is in the best interests of the child.

Consent of the parent(s), guardian(s), or custodian(s) is generally required, but the court may waive consent under certain circumstances. The court may appoint a legal representative for the child.

When a child is emancipated in the Siletz Nation, the child has the right to be domiciled where desired, the right to receive and control earnings, the right to sue and be sued, and the power to enter contracts. The child does not have the right to vote or use alcoholic beverages until permitted by age.

The Kalispel Nation permits a young person to file a petition for emancipation provided the youth is a member of the Kalispel Nation; resides or is domiciled within its jurisdiction; is living separate from parents, guardian, or custodian; or there are special circumstances necessitating emancipation and the youth is capable of supporting and managing financial affairs. The parents' consent is required, unless the court finds that it is withheld unreasonably or they are unavailable. A guardian ad litem may be appointed to represent the interests of the youth. The ICW worker may file a recommendation with the court relative to the emancipation. The court may emancipate a youth if it is in the youth's best interests. The emancipation may be general or limited.

The Tulalip Nation may emancipate a youth if the child wishes to be free of parental control and protection, no longer needs that control and protection, and all of the following exist:

- The youth is sixteen or older;
- The youth lives separate from parents, guardian, or custodian;
- The youth understands the consequences of emancipation; and
- The youth has an acceptable plan for independent living.

The court must find that the emancipation would be in the child's best interests. The emancipated minor shall be eligible to receive the same per capita payment that a parent or guardian would on behalf of the youth.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Examine any law you currently have that permits emancipation of a minor.
- Review the situation in which it has been used, if possible.
- Identify any problems with the current law.

STEP 2: Establish a Vision for the Future

- At what age should a minor be permitted to emancipate from parents?
- Under what circumstances do you imagine it might be in the child's best interests to emancipate?
- What will the child need to prove to the court in order to emancipate?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

Additional Resources

National Child Welfare Resource Center for Tribes, Tribal Customary Adoption, web page, 2015.
This web page is a central location for several resources on tribal child welfare systems

Chapter 16: Adoption, Customary Adoption, and Guardianship

Many Native Nations use traditional adoption processes to incorporate individuals into existing families. This is what is often referred to as "traditional adoption" or "customary adoption." In addition to the traditional or customary processes, many Native Nations have enacted statutory law setting out processes for tribal court-ordered adoptions including termination of parental rights (referred to as mainstream adoptions in this chapter) and for tribal court certifications of traditional or customary adoptions.

In Native communities, adoptive parents are also likely to be biological or ceremonial relatives of the adopted child. The legal processes for adoption are often hybrids of processes for establishing legal guardianships and/or for creating and recognizing both open and closed adoptions. To simplify here, we tend to characterize statutory adoption processes as either "court-ordered" or "court-certified." A court-ordered adoption process would typically set out a full petition and hearing process with requisite adoptive parent home studies and background checks. In a court-certified adoption process, the tribal court judge is primarily concerned with determining whether a traditional or customary adoption has already occurred and officially certifying that it has, in fact, occurred.

Tribal Adoptions and Title IV-E—Under current federal law, Native Nations engaged in a tribal-state Title IV-E agreement or a direct tribal-federal Title IV-E agreement can use federal funds for three types of payments:

1. Foster care maintenance payments to foster parents;
2. Kinship guardianship assistance payments to kin guardians; and
3. Adoption assistance payments to adoptive parents.

In all three cases, the Native Nation and the fund recipients need to comply with many applicable federal requirements. Home studies and background checks are common requirements for Title IV-E funds. These requirements have significant impact on whether

- A child is placed with a foster kin placement;
- A child is placed in a guardian kin placement;
- A child is placed in an adoptive kin placement; and
- To use a court-ordered process versus a court-certified process.

State Adoptions and Tribal Children—At least one state, California, has adopted a set of statutory provisions setting out requirements for the recognition of customary adoptions. The purpose of the law is to override any requirement to have parental rights terminated and to provide customary adoption as a permanent placement option under state law. It is instructive to note California's list of minimum requirements for customary adoptions, as these may be followed by other jurisdictions. These include:

- A customary adoptive home study prior to final approval of the customary adoptive placement (the standard for evaluation is the prevailing social and cultural standard of the child's Native Nation);
- An in-state check of the Child Abuse Central Index as it applies to prospective parents and adult members of the household;
- A state and federal criminal background check of prospective parents and adult members of the household;
- No approval will be granted where a prospective adoptive parent or other adult household member has a listed felony conviction; and
- The Native Nation has executed a customary adoption order and an approved home study. The tribal court customary adoption order must include a description of the modification of the legal relationship of the birth parents or Indian custodian and the child, contact, the rights and inheritance of the child, and the child's legal relationship with their Native Nation. It appears that once the state has recognized the customary adoption it will be treated like a closed adoption with limited or no access to sealed records.[146]

The chapter is primarily focused on customary adoption, rather than codes that model mainstream adoptions. However, many of the adoption statutory provision are the same for mainstream adoptions and have been modified to respect the Nation's traditions. Therefore, the chapter is helpful in developing a mainstream adoption statute as well. Guardianship is described in Unit K of this chapter. The previous chapter (Chapter 15) is also pertinent to adoption and should be reviewed for information on suspension of parental rights and termination of parental rights. Some of the sections in Chapter 15 are also discussed in this chapter with a slightly different focus. However, if you are revising your adoption laws, we recommend using both Chapter 15 and this chapter as tools.

Chapter Units

Unit A: Policy and Purpose

Unit B: Adoption Jurisdiction

Unit C: Customary Adoption

Unit D: Legal Relationships and Rights of the Adoptee

Unit E: Placement of Minor for Adoption—Who May Adopt?

Unit F: Consent and Relinquishment

Unit G: Preplacement Evaluation

Unit H: Petition for Customary Adoption

Unit I: Hearing and Decree

Unit J: Records—Open or Closed?

Unit K: Guardianship

[146] For more information, including the legislative text, please visit http://www.courts.ca.gov/12569.htm.

A. Policy and Purpose

Native Nations tend to include a policy and purpose section at the beginning of their adoption codes. These provisions aid in the interpretation of the code as well as provide an understanding of the intentions of the drafters and the policies that the Nation requires.

In this section of the code the Native Nation should explain its policies regarding adoption. For example, this is a great place to state whether one type of adoption is favored over another. It is also worth noting how the adoption chapter interacts with the Native Nations' views on guardianship, for example, whether guardianships are favored over any type of adoption.

Selected Tribal Codes

White Earth Band of Ojibwe Judicial Code
Title 4a: Customary Adoption Code

4a-1 B. Declaration of Policy

1. It is the fundamental belief of the White Earth Band of Ojibwe that its children are the sacred responsibility of the Tribe.
2. One of the White Earth Band of Ojibwe's basic inherent sovereign rights is the right to make decisions regarding the best interests of its children including who should provide for the care, custody and control of its children. This code is intended to assure a safe, stable, nurturing and permanent environment for the tribe's children and to provide for the protection of our children, our people and our way of life.
3. The principles that shall guide decisions pursuant to this code are: protection of the child's safety, well-being and welfare and their sense of belonging; preservation of the child's identity as a tribal member and member of an extended family and clan; preservation of the culture, religion, language, values, clan system and relationships of the Tribe.
4. As an exercise of its inherent sovereignty the White Earth Band has the authority and jurisdiction to formally delegate the authority to its Children's Court to adjudicate its own customary practices regarding child rearing and child custody.

4a-1 C. Purpose

The customary adoption code shall be liberally interpreted and construed as an exercise of the inherent sovereign authority of the White Earth Band of Ojibwe to fulfill the following express purposes:

1. To embody and promote the basic traditional values of the White Earth Band of Ojibwe regarding the protection and care of the tribe's children. The White Earth Band of Ojibwe believes that it is the responsibility of the tribe, the tribal communities and extended families to protect, care for and nurture our children.
2. To promote the belief of the White Earth Band of Ojibwe that children deserve a sense of permanency and belonging throughout their lives and at the same time they deserve to have knowledge about their unique cultural heritage including their tribal customs, history, language, religion and values.
3. To provide for the best interests of the tribe, tribal communities and the tribe's children.
4. To afford judicial processes which allow for formal adjudications that address the issues of the rights, responsibilities, care, custody and control of minor children when the biological parents are unable or unwilling to provide a safe, stable, nurturing and permanent environment for their children by conferring

jurisdiction upon the White Earth Children's Court to hear and adjudicate such matters.

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part IV: Disposition and Review of Children Found to Be in Need of Care

§ 8.039. Adoption

(a) **Policy**—It is the policy of the Siletz Tribe that its children should be adopted, aside from customary adoption, only as a matter of last resort, and that an alternative long-term placement that maintains the connection between the child, the child's parent(s), the child's family, and the Tribe, such as a guardianship or customary adoption, shall be considered first. A decree of adoption shall not terminate the legal relationship between the child and the child's biological extended family members, except by order of the Court.

[sections omitted]

§ 8.037. Customary Adoption

(a) **Purpose**—The Tribe recognizes that nonbiological parents may assume parental responsibilities for children by tribal custom without the need to terminate parental rights of the parents of a child. If the arrangement is permanent according to tribal custom, it may be certified by the Tribal Court as a customary adoption. This section sets forth the legal process for the legal certification of a customary adoption and the modification of parental rights, in order to assign some parenting responsibilities to a suitable nonbiological parent(s) by law.

[sections omitted]

Pokagon Band of Potawatomi Indians Child Protection Code

Section 31. Adoption[147]

Purpose. The purpose of this Section is to create new substitute relationships in a manner which protects the rights and the welfare of Indian children, natural parents, and adoptive parents. It is the policy of the Pokagon Band to promote the adoption of Pokagon Children by members of the Band.

---

[147] This Code is on file with the Tribal Law and Policy Institute.

Tribal Code Commentary

The White Earth Ojibwe's code focuses on the sovereign rights and responsibilities of the Nation relative to children, principles guiding decisions, and the purposes behind the code. It states that one of the White Earth Nation's sovereign rights is the right to make decisions regarding the best interest of its children. Another is the inherent authority to formally delegate the authority to its Children's Court in order to adjudicate its own customary practices regarding child rearing and custody. The principles that should guide decisions under the code are protection of the child's safety, well-being and welfare, and sense of belonging; preservation of the child's identity as a tribal member and member of an extended family and clan; and preservation of the culture, religion, language, values, clan system, and relationships of the Nation.

The purposes under the White Earth Customary Adoption Code include the promotion of basic traditional values of the White Earth Band regarding the protection and care of the tribe's children. They also promote the belief that children deserve a sense of permanency and belonging throughout their lives and at the same time deserve to have knowledge about their unique cultural heritage, including tribal customs, history, language, religion, and values.

The policy of the Siletz Nation requires the use of tribal (mainstream) adoptions only as a last resort. For permanency a customary adoption or guardianship is preferred, as it maintains the connection between the child, the child's parent, the child's family, and the Siletz Nation. A decree of adoption in the Siletz Nation does not terminate the legal relationship between the child and the child's biological extended family, except by order of the court.

The objective of the Pokagon Band of Potawatomi Adoption Code is to promote adoption of Pokagon children by band members. It also promotes the welfare of Indian children and protects the rights of parents, both natural and adoptive.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Do you have both a customary adoption code and a mainstream adoption code? If so, examine the policy and/or purpose sections of each.
- Does the current purpose section represent your Nation's values and beliefs relative to adoptions?
- Does your current purpose section recognize the sovereignty of your Nation to make decisions relative to your children?

STEP 2: Establish a Vision for the Future

- What values and traditions would you like to be included in the purpose section of the adoption code?
- Will you have a separate code for customary adoption and mainstream adoption? If so, which will you give priority?
- What policies will you require when using either the customary or mainstream adoption?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

B. Adoption Jurisdiction

A court's subject matter jurisdiction designates when a court has the authority to hear and decide certain kinds of cases.[148] In the case of adoption, a Nation would want to consider the situations and people over which it would allow a court to exercise jurisdiction in an adoption case. Some possible people to consider would be:

- A minor who is eligible for membership or is a member.
- Whether one of the prospective parents is a member or eligible for membership.
- One of the prospective parents is a member of another Native Nation and the other parent agrees to jurisdiction of the court.

Some possible situations would be if:

- The minor lived in the Nation with a parent, guardian, or prospective adoptive parent for a stated period of time before the commencement of the adoption.
- The agency that placed the child for adoption is located within a reasonable proximity of the Nation or in the state, and it is in the best interest of the minor that the tribe assume jurisdiction as the minor and minor's parents have a significant connection with this tribe.
- The minor is physically present in the Nation and has been abandoned or it is necessary in an emergency to protect the child.
- It appears that no state or other tribe would have jurisdiction or a state or tribe has declined jurisdiction.

[148] See Chapter 4 for more information on subject matter jurisdiction.

Selected Tribal Codes

White Earth Band of Ojibwe Judicial Code
Title 4a: Customary Adoption Code

4a-2 Civil Jurisdiction

The Court shall have civil jurisdiction to hear and adjudicate petitions seeking a suspension of parental rights order or a customary adoption for protection of a child or; to issue temporary and permanent orders for protection of a child, including ex parte orders if an emergency exists; and to issue such other orders as may be just and reasonable and designed to carry out the intent and purposes of this title, including use of the civil contempt powers of the court as set forth in Chapter II of the Judicial Code.

Cheyenne-Arapaho Tribes of Oklahoma [Law and Order Code]
Juvenile Procedure Act of 1988
Chapter Seven—Adoptions

Section 701. Jurisdiction Over Adoptions

(A) The Juvenile division of the District Court shall have exclusive jurisdiction regarding the adoption of any person who resides or is domiciled within the jurisdiction of the Court, is unmarried, less than eighteen years of age, and 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, or

(3) Whose case has been transferred to the Juvenile Division of the District Court from the courts of a state, or Tribe which has assumed jurisdiction over said child.

(4) The adoption of any adult Indian who resides or is domiciled within the jurisdiction of the Court.

(B) The Juvenile Division of the District Court shall have concurrent jurisdiction with the courts or any other sovereign having lawful authority regarding the adoption by or of any other child or adult who is:

(1) A bona fide resident of or domiciled within the jurisdiction of the Court, or

(2) Between two adults who submit to the jurisdiction of the Court regardless of residence or domicile, or

(3) A member of the Tribe.

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.270 Jurisdiction.

There shall be a preference for beda?chelh to engage families outside of the court process through voluntary intervention processes such as FAR. If court intervention or removal is necessary, beda?chelh shall work towards returning the child as soon as is practical and safe for the child. A parent may also voluntarily consent to court intervention.

(1) The Tulalip Tribal Court shall have jurisdiction over any proceeding arising under the Juvenile and Family Code and actions arising under the customs and traditions of the Tulalip Indian Tribal community affecting family or child welfare which involve:

(a) Any Indian child who resides or is domiciled on the Tulalip Reservation;

(b) Any child who is a member of, or is eligible for membership in, the Tulalip Tribes, regardless of the child's residence or domicile;

(c)Any Indian child who has been placed in temporary care on the Tulalip Reservation or in any care facility licensed by the Tribes for placement of an Indian child; or

(d) Any child whose parent is an enrolled member of the Tulalip Tribes.

(2) The Tulalip Tribal Court shall have jurisdiction over adults in furtherance of its powers under this code. The Court may issue orders as are necessary for the welfare of children and families.

(3) Whenever State, Federal, or other tribal courts have jurisdiction over any of the matters provided for in this code, the Court shall have concurrent jurisdiction over the same matters, to the extent consistent with Federal law.

(4) The limitations on jurisdiction contained in this section are not intended to reflect the Tribes' view as to the legally permissible limits of jurisdiction. [Res. 2015-101].

Tribal Code Commentary

The White Earth Code defines the subject matter jurisdiction of the court by describing the types of actions over which the court has authority. The court has the right to hear and adjudicate petitions seeking a suspension of parental rights order or a customary adoption for protection of a child, or may issue temporary and permanent orders for protection of a child and such orders designed to carry out the purposes of the Customary Adoption Code.

The Cheyenne-Arapaho Code provides the Juvenile Court with exclusive subject matter jurisdiction over any child who resides in the court's jurisdictional area and is a member of an Indian tribe or eligible for membership. Additionally, the court has concurrent jurisdiction regarding the adoption by or of any other child or adult who is a resident or domiciled within the jurisdiction of the court or a member of the tribe, regardless of residence.

The Tulalip Code states in its jurisdiction section that there is a preference for beda?chelh to handle cases voluntarily, outside of the court jurisdiction. A parent can voluntarily submit to the jurisdiction of the court. The Juvenile and Family Court has jurisdiction over any action arising from custom and traditions affecting the family and child welfare of:

- Any Indian child who resides or is domiciled on the Tulalip Reservation;
- Any child who is a member or is eligible for membership, regardless of domicile;
- Any child who is placed in temporary care on the Tulalip Reservation or any care facility licensed by the Tulalip Tribes; and
- Any child whose parent is an enrolled member of Tulalip.

And that jurisdiction would extend to any adults in furtherance of the court's power. It also indicates that the court would have concurrent jurisdiction in some cases with state and federal courts.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Review your code's current jurisdictional requirements.
- Is this jurisdiction expansive enough? Too expansive?
- What changes should be made?

STEP 2: Establish a Vision for the Future

- Who are the children that should be considered and covered under your adoption code (members, those eligible for membership, residents, Indian/non-Indian)?
- Who are the prospective parents or birth parents that should be considered and covered under your adoption code?
- Should your tribal court's subject matter jurisdiction be defined by the child, the adoptive parent, the type of action, or all or some of these topics?
- What consideration should be given to where the children live or their domicile in establishing jurisdiction?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

C. Customary Adoption

Customary adoptions,[149] where parental rights are not terminated, provides a vehicle through which a more culturally appropriate permanency can take place in the child welfare systems of Native Nations. Native Nations have been creatively writing their own adoption practices into their laws—usually modifying them in ways to meet the requirements of Title IV-E.

Permanency planning that involves the termination of parental rights is a common occurrence in non-Native child welfare systems. Specifically, this occurs in cases in which a parent cannot meet mandated time lines to provide a safe environment for their child to return home. Non-Native child welfare systems rarely consider the impact termination of parental rights has on a child's relationship with their extended family. Non-Native termination of parental rights also terminates the extended families' rights to the child, which contradicts many Native cultural norms.

In contrast, permanency planning within Native Nations has as much to do with keeping a child connected to their extended family, clan, and Nation, as it does keeping a child with parents. While permanency is valued in most Native communities, finding permanency without terminating parental rights is often the goal. In many Native cultures, the extended family, clan, and Nation have responsibilities and obligations toward the child and could provide the child a sense of connection and belonging.

There are at least three paths that exist for customary adoption:

1. **Customary Law Adoptions**: Where a code sets out the rules for judges to follow in carrying out a customary adoption;
2. **Nondiscretionary Judicial Certifications**: Where the Native Nation's judge certifies the occurrence of a traditional adoption *with little to no exercise of judicial discretion*; and
3. **Discretionary Judicial Certification**: Where the Native Nation's judge certifies the occurrence of a customary adoptions *and* the code gives the judge varying degrees of discretion to recognize or modify the effect of a customary adoption for various reasons. For example, whether the proper traditional process was followed or whether some element of the customary adoption is in the best interest of the child.

Those Nations that choose a "Customary Law Adoptions" path should

- Codify a court process for the customary law adoption or explicitly state the process and rules of civil procedure that are to be followed in a CINA case;
- Codify how the adoption interacts with parental rights;
- Codify the effects the adoption has on the child and their new customary law parent; and
- Consider what the final court order should state in order to preserve, alter, or enhance the child's enrollment, inheritance, citizenship, clan, and other rights originally gained through their relationship with the biological parent.[150]

[149] Sometimes known as "traditional adoptions."

[150] These issues are discussed at length in Unit D of this chapter.

Nations that prefer a judicial certification path should clearly state the bounds of that judicial discretion. And, the resulting final court order should also make statements clarifying, altering, and protecting the child's rights.

Selected Tribal Codes

Examples of Customary Law Adoption Statutes

White Earth Band of Ojibwe Judicial Code
Title 4a: Customary Adoption Code

4a-7 Final Order for Suspension of Parental Rights

A. If the court determines that it is in the best interests of the child and the child's tribe, it shall issue a final order for a suspension of parental rights. Such an order for the suspension of parental rights may include, but is not limited to, the following:

1. A permanent suspension of the parental rights of the parent including the suspension of the right to the care, custody and control of the minor child and allowing the child to be adopted;
2. A permanent suspension of the right of the parent to have contact with the minor child including contact in person, by mail, by telephone or through third parties or the order may allow for a contact agreement agreed upon by the parties to be ordered by the court;
3. Restraining a parent from contacting the minor child, the child's foster parent, the child's adoptive parent and/or the social services agency or agencies possessing information regarding the minor child;
4. Ordering that the biological parents' obligation to pay child support, except for arrearages, is hereby terminated;
5. Ordering that any prior court order for custody, visitation or contact with the minor child is hereby terminated;
6. The parent shall have no standing to appear at any future legal proceedings involving the child;
7. The suspension of parental rights does not sever or affect in any way a child's relationship to his/her tribe or any rights of inheritance from the biological parent(s);
8. Shall contain a statement regarding why it is in the best interests of the child and the child's tribe to enter this order;

4a-11 Final Order for Customary Adoption

A. If the court determines that it is in the best interests of the child and the child's tribe, it shall issue a final order for a customary adoption. Such an order may include, but is not limited, to the following:

1. A statement that the child has been adopted by the petitioner(s) and that the parent-child bond is hereby established and that all of the rights and responsibilities of that relationship shall exist upon the entry of such a final order;
2. A notice regarding the new name of the child, if any

Example of Court Certification of a Customary Adoption

White Earth Band of Ojibwe Judicial Code
Title 4a: Customary Adoption Code

4a-12 Certification of a Customary Adoption

1. A customary adoption, conducted in a manner that is a long-established, continued, reasonable process and considered by the people of the White Earth Band to be binding and authentic, based upon the testimony of an expert witness, may be certified by the Children's Court as having the same effect as an adoption order issued by this court so long as it is in the best interests of the child and the child's tribe.
2. A decree certifying a customary adoption has the same effect as a decree or final order of customary adoption issued by this court.

Tulalip Tribal Code **(Current through May 6, 2016)**
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.790 Petition for customary adoption.

(1) Any adult who has been the legal guardian of a child for more than three years, and the parental rights of that child's biological parents have been suspended, may file a petition with the Court seeking an order for the customary adoption of the minor child. The petition shall contain the following information:

(a) The name, address, telephone number and age of the child to be adopted;

(b) The name, address, and telephone number of the petitioner(s) and the petitioner's relationship, if any, to the child. If the petitioner is married, his or her spouse must also be at least 18 years old and shall join in the petition, unless the spouse's whereabouts is unknown or unless waived by the Court;

(c) The proposed name of the adoptee after the entry of the final order of customary adoption. The child's birth surname cannot be removed as part of these proceedings, but the adoptive family's name may be added to the child's legal name;

(d) Attach a copy of the final order suspending the parental rights of the biological parent(s);

(e) A statement as to why a final order for customary adoption is in the best interests of the child and the best interests of the Tribes;

(f) A statement or evidence as to basis for the customary adoption;

(g) A statement that no similar action is pending in a Tribal or State Court having jurisdiction over the child. [Res. 2015-101].

4.05.800 Customary adoption report–Preparation.

The petitioner(s) shall arrange to have a preadoption report prepared by beda?chelh. The customary adoption report shall be in writing and contain the professional opinions of all persons consulted. Beda?chelh shall conduct a complete home study including all information concerning:

(1) The physical and mental condition of the child, petitioner(s) and persons living in the petitioner's home;

(2) The circumstances of the suspension of the parents' rights to the child or of the parents' death;

(3) The home environment, family life, access to health services, and resources of the petitioner(s);

(4) The child's and petitioner's cultural heritage and Tribal status;

(5) The marital status of the petitioner(s);

(6) The names and ages of the petitioner's children and of any other persons residing with the petitioner(s);

(7) Information from health, education, and social service personnel who have had prior professional contacts with the child and petitioner(s);

(8) A check of the criminal records, if any, of the petitioner(s) shall be requested from State and Tribal law enforcement authorities;

(9) Any evidence of alcohol and drug abuse in petitioner's household;

(10) The recommendation, if any, of the Tulalip Tribes regarding the customary adoption;

(11) The opinion of the child if he or she is over the age of nine, and whether he or she should be given an opportunity to provide this opinion in person to the Court in chambers; and

(12) Any other facts and circumstances relating to whether or not the adoption should be granted.

If beda?chelh has previously prepared a guardianship home study, they shall provide an update that includes the additional information above. In addition beda?chelh shall apply for adoption support if requested. [Res. 2015-101].

4.05.810 Additional reports.

Any party may file with the Court a report which shall include his or her recommendations regarding the customary adoption. The party shall provide copies of the report to all other parties prior to the hearing. [Res. 2015-101].

4.05.820 Customary adoption hearing–Conduct.

(1) The hearing on customary adoption shall be ceremonial and shall be private and closed. Only beda?chelh, the petitioner(s), anyone there on behalf of the petitioner(s) and any family members invited by petitioner(s) or who have maintained an ongoing relationship with the child, including siblings, shall be permitted to attend.

(2) The burden of proving the allegations of the petition shall be upon the petitioner and the standard of proof shall be by a preponderance of evidence. [Res. 2015-101].

4.05.830 Grounds for entering decree of customary adoption.

The Court may enter a decree of customary adoption if it finds that:

(1) Customary adoption is in the best interest of the child and the Tribal community; and

(2) That the petitioner(s) can provide appropriate and adequate parental care for the child; and

(3) That the Tulalip Tribes does not oppose the customary adoption. [Res. 2015-101].

4.05.850 Additional hearings postadoption.

Final orders of a customary adoption may be reviewed by the Court only if a substantial change of circumstance occurs, such as the adoptive parent is deceased without the appointment of a legal guardian and there are no provisions within a will providing for the care and custody of the child. Notice of this review shall be provided to all parties to the hearing at which the final order was issued. [Res. 2015-101].

4.05.860 Appeals.

Orders suspending the parental rights and issuing a customary adoption are final orders for purposes of appeal. [Res. 2015-101].

Law and Order Code of the Rosebud Sioux Tribe
Title Two—Domestic Relations
Chapter Two–Adoption

§ 2-2-7 Ecagwaya or Traditional Adoption

Means according to Tribal custom, the placement of a child by his natural parent(s) with another family but without any Court involvement. After a period of two years in the care of another family, the Court upon petition of the adoptive parents, will recognize that the adoptive parents in a custom or traditional adoption have certain rights over a child even through parental rights of the natural parents have never been terminated. Traditional adoption must be attested to by two reliable witnesses. The Court, in its discretion, on a case by case basis, shall resolve any questions that arise over the respective rights of the natural parent(s) and the adoptive parent(s) in a custom adoption. The decision of the Court shall be based on the best interests of the child and on recognition of where the child's sense of family is. Ecagwaya is to raise or to take in as if the child is a biological child.

Tribal Code Commentary

The White Earth Customary Adoption Code has both a process to court certify a traditional adoption and a court process leading to customary adoption. The court process includes such things as a background check of adoptive parents and home studies. Background checks of prospective parents and home studies are likely required for Title IV-E compliance.

The Tulalip Code is an example of a court-processed customary adoption. It allows an adult who has been a legal guardian for more than three years to customarily adopt a child if the biological parent's rights have been suspended. The requirements relating to investigation of the background of the adoptive parents is the same as is commonly required in mainstream adoptions. The final hearing on the adoption, however, is ceremonial, private, and closed.

The Rosebud Code provides an example of certification of a traditional adoption. Placement of a child by the natural parent with another family without court involvement by custom results in a customary adoption after a period of time. Specifically, if a child is in the care of another family for at least two years, that family can petition the court to recognize a traditional adoption, which gives the adoptive parents certain rights. This occurs even though the biological parent's rights are not terminated.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- When and how do traditional adoptions occur in your Nation?
- Many tribes have a traditional way of adoption, where a natural parent is unable to care for a child, and where an extended family member or another person assumes an ongoing, dominant caretaking role for a child. What factors give rise to a traditional adoption in your community?
- If you currently have a statute on customary adoption, examine the statute.
- Is your current statute consistent with your traditions?
- Does your current statute meet the requirements of Title IV-E?

STEP 2: Establish a Vision for the Future

- What is your purpose in developing a revised or new customary adoption statute?
- Are you interested in developing an entire court process for customary adoptions?
- Do you want court certification of a customary adoption?
- Is Title IV-E a key consideration?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

D. Legal Relationships and Rights of the Adoptee

In developing any adoption code (customary or otherwise), a Nation must determine what happens to the child's rights and legal relationships as a result of the adoption. A Native child has not only a relationship to their birth parents, but also rights to clan or extended family, as well as rights to citizenship in a Native Nation. Considering the impact of adoption on the following rights and relationship is important:

- Legal relationship between adoptee and adoptive parent after adoption.
- Legal relationship between adoptee and former parent after adoption.
- Other rights and duties. Including rights and duties in a customary adoption.
- Tribal citizenship.
- Legal relationship between adoptee and extended family after adoption.

For those Nations with gaming operations or other profitable economic development projects—the effects an adoption has on the child's inheritance and/or per capita should also be noted. For further information on this topic, see Chapter 15, Unit H: Effects on the Child's Rights.

Selected Tribal Codes

Grand Traverse Band Code (Current through November 13, 2009)
Title 10 Children, Families & Elders
Chapter 1. Children's Code Revised

§ 129. Adoption

[sections omitted]

(m) **Effect of the Final Adoption Order**.

(1) **Parent and Child Relationship**. After the final adoption order is entered, the relationship between the adoptive parent(s) and adoptee shall be vested with all rights, duties and other legal consequences of a relationship between natural parents and a child and shall thereafter exist between the adoptee and the adoptive parent(s).

(2) **Tribal Status Not Affected**. The status of an adoptee as a member of the Tribe shall not be affected by adoption. An adoptee who is eligible for membership in the Grand Traverse Band shall be enrolled as a tribal member prior to the finalization of the adoption.

(3) **Natural Parents Relieved of Parental Responsibilities**. After the final decree of adoption is entered, the natural parents, except a natural parent who is the spouse of an adoptive parent, shall be relieved of all parental responsibilities for such adoptee and have no right regarding the adoptee or right to inherit his/her property by descent or distribution.

(4) **Assumption of Surname**. Minors adopted by order of the Court shall assume the surname of the person(s) by whom they are adopted, unless the Court orders otherwise.

(5) **Rights of Adoptees**.

(A) Adoptees shall be entitled to the same rights of person and property as natural children or heirs of the adoptive parents.

(B) Adoptees shall be entitled to the society and companionship of their natural siblings.

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.840 Per Capita.
The adopting parent shall receive current Tribal member per capita on behalf of the child in accordance with Chapter 5.20 TTC. [Res. 2015-101].

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part V. Out-Of-Home Placement Alternatives

§ 8.039. Adoption

[sections omitted]

(n) **Alteration of Birth Certificate**—Within five (5) days after the Court has entered the final decree of adoption, the Clerk of the Court shall notify the Division of Vital Statistics of the State Board of Health of the state that issued the child's original birth certificate that the adoption has taken place. The Clerk of the Court shall provide the Division of Vital Statistics with a certified copy of the final decree of adoption and the full name, sex, birthday and names of the child's biological parents, so that a new birth certificate, including the name(s) of the adoptive parent(s) and the new name of the child, if any, can be recorded. The ICW Program will pay the fee required to obtain an amended birth certificate for the child.

(o) **Child Assumes Adoptive Surname**—A child who is adopted by order of the Court may assume the surname of the adoptive parent(s), unless the Court orders otherwise.

(p) **Rights of Adopted Child**—An adopted child shall be entitled to the same rights as a biological child of the adoptive parent(s), except that adoption does not confer tribal membership status on an adopted child who is not otherwise eligible for membership in the Siletz Tribe. Adoption does not terminate the legal rights of biological extended family members of the child, except by order of the Court.

(q) **Visitation**—Adoptive parents shall be encouraged to help the child maintain positive relationships with the child's biological extended family, unless the Court orders otherwise. The adoptive parents shall have the exclusive right to determine the terms, if any, of contact by any person with the child, unless the Court orders otherwise

§ 8.037. Customary Adoption

(d) **Rights of Customarily Adopted Child**—A certification of customary adoption creates a relationship between the adopted child and the customary adoptive parents that would have existed if the child were the biological child of the customary adoptive parents, unless the Court orders otherwise. A customarily adopted child shall be entitled to the same rights as a biological child of adoptive parent(s), except that adoption does not confer tribal membership status on an adopted child who is not otherwise eligible for membership. Adoption does not terminate the rights of biological extended family members of the child, unless the Court orders otherwise. A customary adoption does not sever a child's right to any inheritance from a birth relative. A customary adoption does sever the child's biological parents and relatives right to inherit from the child.

Tribal Code Commentary

The Grand Traverse adoption statute indicates that the adoptive parent gains the same rights, duties, and obligation through adoption as was held by the birth parent. Tribal status is not affected by the adoption, and enrollment takes place before the finalization of the adoption. The birth parents are relieved of their parental responsibilities, unless it is a stepparent adoption, in which case the spouse of an adoptive parent is not relieved of their rights and responsibilities. Adoptees have the same rights as natural children of the adoptive parents. Adoptees are entitled to the society and companionship of their natural siblings.

The Tulalip Nations permits the adopting parent to receive current per capita payments on behalf of the child.

Both the Siletz customary and mainstream adoption sections are provided in the previous section. The mainstream adoption practice is similar to mainstream codes where the child assumes the same rights as a biological child of the adoptive parents and may assume their surname. The birth certificate is changed to remove the birth parents and add the adoptive parents. The birth parent's rights have already been terminated. A couple of differences exist between this code and most mainstream adoption codes, however. Tribal membership is not changed by adoption. The adoptive parents are encouraged to help the child maintain positive relationships with the child's biological extended family, unless the court orders otherwise. The extended family's legal rights are not terminated.

In the Siletz customary adoption, adoption establishes the same rights toward the adoptive parents as a biological child, unless the court orders otherwise. Tribal membership is not affected. The customary adoption does not sever the rights to inheritance from a birth relative, but does sever the child's biological parents' and relatives' right to inherit from the child.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Examine the code sections of your customary adoption and/or mainstream adoption statute to determine the impact of a decree of adoption on the rights of the child, biological parent(s), and adoptive parents.
- What changes should be made, if any?
- Does your current statute describe the impact on tribal citizenship?

STEP 2: Establish a Vision for the Future

- Determine the desired impact of a customary/mainstream adoption on the:
  - Legal relationship between adoptee and adoptive parent after adoption;
  - Legal relationship between adoptee and former parent after adoption;
  - Other rights and duties—including rights and duties in a customary adoption;
  - Tribal citizenship; and
  - Legal relationship between adoptee and extended family after adoption.

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

E. Placement of Minor for Adoption—Who May Adopt?

Generally, this resource considers placement by a social service agency or by a parent or relative. It does not deal with placement by adoption agencies.[151] In this unit we discuss who can file a petition for adoption and what preferences on placement are common. Frequently, preferences for adoption may be similar to preferences for placement in a CINA proceeding.

[151] Although it is wise for Native Nations to develop laws or strategies relative to adoption agencies, those issues are beyond the scope of this resource.

Selected Tribal Codes

White Earth Band of Ojibwe Judicial Code
Title 4a: Customary Adoption Code

4a-8 Petition for Customary Adoption.

A. Any adult may file a petition with the Court Administrator seeking an order for the customary adoption of a minor child. The petition shall contain the following information:

[sections omitted]

Mashantucket Pequot Tribal Laws **(Enacted 2008)**
Title V. Child Welfare
Chapter 7. Adoption

§ 4. Who May File an Adoption Petition

Any adult may file a petition to adopt an Indian minor residing within the Mashantucket Pequot Tribal lands, or a minor tribal member not residing on the Mashantucket Pequot Tribal lands. The court may also hear petitions transferred from state courts pursuant to 25 U.S.C. 1911(b). In the case of married persons maintaining a home together, the petition shall be the joint petition of husband and wife except that if one of the spouses is the biological parent of the child to be adopted, the biological parent shall not be required to join in the petition.

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 **(Amended 7/16/10)**
Part V: Out-Of-Home Placement Alternatives

§ 8.039. Adoption

[sections omitted]

(c) **Who May File a Petition to Adopt a Child**

(1) Any adult may file a petition to adopt a child.

(2) Married persons or domestic partners who maintain a home together shall both petition for adoption. If one of the spouses is the biological parent of the child to be adopted, the biological parent shall not be a party to the petition.

(3) A person who is legally separated from his or her spouse may petition to adopt a child without the consent of his or her spouse.

(d) **Preference in Adoption**—Preference for the adoption of a child shall be given in the following order:

(1) Any member of the child's extended family who is a member of or eligible for membership in the Siletz Tribe, or any couple, one of whom meets the requirements of this subsection;

(2) Any member of the child's extended family;

(3) Any member of the child's extended family who is a member of or eligible for membership in any other Indian tribe or cultural group, or any couple, one of whom meets the requirements of this subsection;

(4) If this order of preference cannot be met, placement may be permitted with tribal approval and for good cause shown, with:

(A) Any person who has a desire to foster the child's tribal affiliation and special needs;

(B) A non-Indian married couple or a non-Indian couple in a domestic partnership; or

(C) A non-Indian person.

Tribal Code Commentary

The White Earth Customary Adoption Code permits any adult to file a petition for customary adoption.

The Mashantucket Pequot Nation allows any adult to file a petition to adopt an Indian minor residing with the Mashantucket Pequot lands or a minor tribal member not residing on tribal lands.

The Siletz Code allows any adult to file a petition to adopt a child. A married person or domestic partner who maintain a home together must both file a petition, unless one is the biological parent. However, preferences for adoption are provided in the Siletz Code in the following order:

1. Any member of the child's extended family who is a member of or eligible for membership in the Siletz Tribe.
2. Any member of the child's extended family;
3. Any member of the child's extended family who is a member of or eligible for membership in any other Indian tribe or cultural group, or any couple, one of who meets requirements;
4. If the preceding preference cannot be met, placement may be permitted with tribal approval and for good cause shown,
    - With any person who has a desire to foster the child's tribal affiliation and special needs;
    - A non-Indian married couple or a non-Indian domestic partnership; or
    - A non-Indian person.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Who is permitted to adopt in your tribal court?
- Are there priorities set in your current code relating to adopting in tribal court?

STEP 2: Establish a Vision for the Future

- What changes do you want to make?
- How can you create priorities for adoption that would be consistent with tribal culture and your Nation's policies?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

F. Consent and Relinquishment

Generally speaking, for adoptions—non-Native or mainstream—the biological parents must relinquish their parental rights before an adoption can proceed or the rights may be involuntarily terminated. Either situation terminates the biological parents' relationship with the child (see Chapter 15). It is vital that Native Nations create laws and policies that ensure that the biological parents understand their rights and understand the consequences of consenting to the adoption and relinquishing their parental rights. This includes the rights of the biological father.

In customary adoptions, parental rights may be permanently suspended. Suspension of rights may have different meanings depending upon the Nation's code and adoption process. The birth parents must agree to suspend their rights, and it is extremely important that they have a full understanding of the consequences of suspension, consent, and relinquishment of parental rights. Because a customary adoption may retain some parental rights, the court must ensure that there is a clear understanding of the birth parent's rights and duties after adoption.

Adoption codes generally have a period of time after the adoption hearing when consent and relinquishment may be withdrawn. In both customary and mainstream adoptions, there are circumstances in which consent and relinquishment is not required, and that should be addressed in the code. The most obvious would be a situation in which the parental rights have been terminated or suspended in a CINA hearing. More information on this topic appears in other chapters of this resource.

Selected Tribal Codes

Pit River Tribe Tribal Ordinance
Title 8. Family/Children's Code, Chapter 5. Adoption
Article III. Consent to Adoption

Section 301. When Consent Is Required

(A) Written consent to adoption is required of:

(1) Each biological, adoptive and acknowledged parent whose parental rights have not been involuntarily terminated, who has not voluntarily terminated his or her parental rights or has not been declared incompetent. A minor parent may consent to an adoption provided the parents of the minor parent concur. The Court may waive consent by the minor's parents if it finds that their withholding of such consent is unreasonable;

(2) The guardian or custodian, if empowered to consent;

(3) The Court, if the guardian or custodian is not empowered to consent; and

(4) The child, if twelve years of age or older, provided that the Court may waive this requirement, if it deems it necessary for the best interests of the child.

(5) If both parents be deceased, or if their parental rights have been terminated by judicial decree, then the traditional custodian having physical custody of said child for the preceding six (6) month period, or a person or the executive head of an agency having custody of the child by judicial decree with the specific authority, granted by the Court, to consent to the adoption of the child.

(B) Consents to adoption shall be acknowledged before an officer duly authorized to take acknowledgments and witnessed by a representative of the Court.

(C) Where any parent or Indian custodian voluntarily consents to an adoption, or termination of parental rights, such consent shall not be valid unless executed before a judge of a court of competent jurisdiction and accompanied by the judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent of Indian custodian. The court shall certify that the parent or Indian custodian either fully understood the explanation in English, or that it was interpreted into a language that the parent or Indian custodian understood.

(D) Any consent given prior to or within ten days after the birth of a child shall not be valid.

Section 302. Withdrawal of Consent

(A) Any consent given for the adoption of, or termination of parental rights to a child may be withdrawn at any time prior to the entry of a final decree of

adoption or termination as the case may be and the child shall be returned to the parent.

(B) Written consent cannot be withdrawn after the entry of a final order of adoption. Consent may be withdrawn prior to the final order of adoption upon showing a preponderance of evidence at a hearing before the Court that consent was obtained by fraud, duress or coercion, or the best interests of the child require the consent to adoption be voided.

(C) The Court shall not grant permission to withdraw consent unless it finds that the best interests of the child will be served by such withdrawal. The entry of an order of adoption renders any consent irrevocable.

Section 303. When Consent Is Not Required

(A) Written consent to an adoption is not required if:

(1) The parent's rights have been involuntarily terminated;

(2) The parent has voluntarily terminated his or her parental rights; or

(3) The parent has been declared incompetent.

(4) The parent has abandoned his or her child; or

(5) The parent has relinquished his or her parental rights.

(B) Adoption of a child may be decreed without the consent required by Section 301 of this Chapter only if the parents, or the traditional custodians having custody if the parents be deceased, have:

(1) Had their parental or custodial rights terminated by a decree of a Court of competent jurisdiction, or

(2) Been adjudicated incompetent by reason of mental disease, defect, or injury, or by abuse of alcohol or drugs, and it appears by a preponderance of the evidence that such person will be unable to provide the necessary care and control of said child for a significant period of time prior to the child reaching majority, or

(3) For a period of twelve months immediately preceding the filing of the petition for adoption, willfully failed, refused, or neglected to provide and contribute to the support of their child either:

a. In substantial compliance with any decree of a Court of competent jurisdiction ordering certain support to be contributed, or

b. If no court order has been ordering certain support, then within their available means through contribution of financial support, physical necessities such as food, clothing, and shelter contributions, or by performing labor or other services for and at the request of the person or agency having custody.

(4) Been finally adjudicated guilty of a felony and sentenced to death or to a term of imprisonment which is likely to prevent release of the parent for a period such that the parent will be unable to provide the necessary care

and control of said child for a significant period of time prior to the child reaching majority.

(5) In such cases, it shall not be necessary to obtain the consent of such parent, or to terminate the parental rights of such parent prior to adoption of the child.

Section 304. Voluntary Relinquishment

Any parent, legal custodian, traditional custodian, or other guardian of a child may relinquish, subject to the terms of Section 301, any rights they may have to the care, custody, and control of a child. A relinquishment shall be made by filing a petition in the Children's Court with notice to the Tribal Department, District Attorney, traditional custodians, and the Parent(s) not a petitioner. The traditional custodians may intervene in said action. The petition may relinquish generally in which case the Court shall assume jurisdiction over the child, or specially to a particular person for adoption. A relinquishment shall be valid only upon approval and decree of the Court.

Section 305. Procedure for Signing the Consent to Adopt

(A) Written consents, where required by this Code, shall be attached to the petition for adoption. Written consent to an adoption shall be signed and acknowledged before a Notary Public. Consent shall not be accepted or acknowledged by the Court unless signed and acknowledged more than ten (10) days after birth of the child, except by order of the Court. An interpreter shall be provided if required by the Court. The Court shall have authority to inquire as to the circumstances behind the signing of a consent under this section.

(B) Consent shall not be accepted or acknowledged by the Court prior to ten (10) days after birth of a child.

Section 306. Consent of Child

Whenever a child be a sufficient maturity and understanding the Court may, and in every case of a child over ten years of age the Court shall, require the consent of the child, expressed in such form as the Court shall direct, prior to the entry of a decree of adoption. Whenever possible, the Court should interview such child in private concerning the adoption prior to approving the child's consent.

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.780 Voluntary consent to suspension of parental rights.

A parent may voluntarily agree to suspend his or her parental rights if the consent has been signed by the parent(s) in front of a Tribal Court judge with the judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent. [Res. 2015-101].

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part V: Out-Of-Home Placement Alternatives

§ 8.039. Adoption
[sections omitted]

(g) **Written Consent Required**

(1) Except as set out below in subsection (i); written consent to an adoption is required of the following persons:

(A) The child's biological or current adoptive mother;

(B) The child's biological, acknowledged, or current adoptive father;

(C) The child's legal guardian or custodian, if he or she is empowered to consent; and

(D) The child, if he or she is fourteen (14) years of age or older.

(2) Where required by this section, consent shall be in writing and attached to the petition for adoption. Written consent to an adoption shall be signed and acknowledged before a Notary Public or the Court.

(A) Consent shall not be accepted or acknowledged by the Court unless the consent is signed and acknowledged more than ten (10) days after the birth of the child, unless the Court orders otherwise.

(B) An interpreter shall be provided if required by the Court.

(C) The Court shall have the authority to inquire into the circumstances surrounding the granting of consent under this subsection. Additionally, the Court has authority to accept or reject such consent based on the best interests of the child.

(h) **Withdrawal of Consent**—Written consent to an adoption may not be withdrawn after the entry of a decree of adoption. Consent may be withdrawn before the decree of adoption after a hearing before the Court and a showing, by a preponderance of the evidence, that the consent was obtained by fraud, duress or coercion, or that the best interests of the child require that the consent to the adoption be voided.

(i) **When Written Consent Not Required**—Written consent to an adoption is not required if:

(1) The parent's rights to the child have been voluntarily or involuntarily terminated;

(2) A court has declared the child's parent to be mentally incompetent; or

(3) The child's parent has abandoned the child and cannot be located. The petitioner shall provide the Court with proof of efforts to locate the child's parent. The Court shall order that a citation to show cause why the

adoption of the child should not be decreed be served upon the child's parent by publication.

§8.037. Customary Adoption

(d) **Grounds for Certification of Customary Adoption**

(1) In determining whether to certify the customary adoption, the Court shall consider all reports submitted for review and the testimony of all parties.

(2) The Court may accept the consent of the child's biological parent(s) if:

(A) The parent orally explains his or her understanding of the terms of the customary adoption and modification of parental rights to the Court, and the Court certifies that the terms and consequences of the consent were fully understood by the parent; and

(B) The consent was given no sooner than ten (10) days following the birth of the child.

(3) Consent of a biological parent of the child to the certification of the customary adoption is not required as set out above, or if the Court finds that the parent has:

(A) Abandoned the child;

(B) Physically or sexually abused the child; or

(C) Exposed the child to chronic neglect or emotional mistreatment.

(4) The Court may approve the certification of the customary adoption if the Court finds that the customary adoption and the modification of parental rights is in the best interests of the child and the Tribe.

Tribal Code Commentary

The Pit River's code requires consent to adoption by each mentally competent biological, adoptive, or acknowledged parent, unless their rights have been involuntarily or voluntarily terminated. A minor parent must have the consent of their parents. The child must also consent if he or she is ten years of age or older. If the birth parents are deceased or their rights terminated, then the *traditional custodian* having physical custody for the preceding six-month period or the executive head of an agency with custody of the child must consent. The consents must be acknowledged before an officer duly authorized to take acknowledgments and witnessed by a representative of the court.

If a parent or Indian custodian voluntarily consents to an adoption or termination of parental rights, such consent must be executed before a judge of a court of competent jurisdiction and accompanied by the judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. Valid consent cannot be given within ten days of the birth of the child.

The Tulalip Code allows a parent to voluntarily agree to suspend their parental rights if the consent is signed by the parent in front of a Tribal Court Judge and the judge certifies that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent.

The Siletz Code requires written consent to an adoption from the following persons:

- The child's biological or current adoptive mother.
- The child's biological, acknowledged, or current adoptive father.
- The child's legal guardian or custodian, if empowered to consent.
- The child, if fourteen years of age or older.

A written consent cannot be withdrawn after the entry of a decree of adoption, but may be withdrawn before that time with a hearing before the court and a showing that the consent was obtained by fraud, duress, or coercion or that the best interests of the child require that the consent to the adoption be voided. A consent to a suspension of rights in a customary adoption can be satisfied if the parent orally explains their understanding of the terms of the customary adoption and modification of parental rights to the court and the court certifies that the terms and consequences of the consent were fully understood by the parent.

Consent to the adoption is not required if the parents' rights have been terminated, if the parent is mentally incompetent, or if the parent has abandoned the child and cannot be located.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Review your current code to determine:
  - Who must consent to an adoption?
  - How must consents to adoption be presented to the court?
  - Is there a difference between consents in mainstream adoptions and customary adoptions?
- What needs to be changed?

STEP 2: Establish a Vision for the Future

- Who must consent to the adoption of a child?
- At what age does the child need to consent?
- How will your code handle the consent of a minor parent?
- If you have mainstream adoption and customary adoption, how will the consent requirements differ?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

G. Preplacement Evaluation

Preplacement evaluation, usually known as a "home study," is normally required in any adoption. This generally includes all of the information that a judge may need in determining whether an adoption is in the child's best interests. A criminal background check of the petitioner and others in the petitioner's home is often a requirement. An actual visit to the home of the petitioner with an assessment of the home may also be required. The report would normally contain information on the history of the child and the petitioner. The recommendations of the social service agency are also important to the court.

If this is a customary adoption, meeting the investigative requirements of Title IV-E may be important to consider because Title IV-E funds can be used for costs related to the adoption process *and* guardianship assistance.

The information in Chapter 15, Unit F: Notice and Reports may also be helpful on this topic.

Selected Tribal Codes

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
PART V: Out-Of-Home Placement Alternatives

§ 8.037. Customary Adoption

[sections omitted]

(j) **Investigation and Report**

(1) Within sixty (60) days of the filing of a petition for adoption, the tribal ICW Program shall investigate the petitioner and the child. The investigation shall include a criminal background check of the petitioner and a check into the petitioner's driving record and vehicle insurance status; The report shall also include information about how the petitioner fits within the placement preferences of this Chapter.

(2) The tribal ICW Program shall file a written report, including the ICW Program's recommendation whether the adoption is in the best interests of the child, at least ten (10) days before the adoption hearing. A copy of the report shall be served on the petitioner and the child's legal representative, if any.

White Earth Band of Ojibwe Child/Family Protection Code
Title 4: Children and Families
Chapter XXVIII: Adoptions

Section 8. Homestudies

When a petition for the adoption of a child is filed with the court, the court shall immediately request that the social services department or other qualified agency conduct a homestudy on the petitioner and report on the child. The homestudy and report shall relate the circumstance of the home, the petitioner and his or her ability, both physical and mental, to assume the responsibilities of a parent of the child. The homestudy shall contain other pertinent information designed to assist the court in determining the best placement for the child. The homestudy will also address the issue of whether or not the home most closely resembles that of the child's culture, identity, and where applicable, his or her tribal affiliation. The homestudy or report shall not be required where the proposed adoptee is an adult.

No determination can be made on a petition for adoption until the homestudy and report has been completed and submitted to and considered by the court. The homestudy shall be submitted to the court no later than ten (10) days before the hearing. The homestudy and report may be consolidated into one document. The court may order additional homestudies or reports as it deems necessary.

Skokomish Youth Code (Amended July 25, 2001)
Adoption
3.02.174 Indian Child Welfare Report

For every adoption petition, the Indian Child Welfare worker shall provide the Court, or arrange for the Court to be provided, with a complete preadoption, home study report including, but not limited to, the following:

(a) The physical and mental condition of the youth, petitioner(s) and persons living in the petitioners' home;

(b) The circumstances of the voluntary or involuntary termination of the parents' rights to the child or of the parents' death;

(c) The home environment, family life, access to health services, and resources of the petitioner(s);

(d) The youth's and petitioners' cultural heritage and tribal status;

(e) The marital status of the petitioner(s);

(f) The names and ages of the petitioners' children and of any other persons residing with the petitioner(s);

(g) Information from health, education, and social service personnel who have had prior professional contacts with the youth and petitioner(s);

(h) The results of a criminal background check of the petitioner(s);

(i) Any evidence of alcohol and drug abuse in petitioners' household;

(j) Any other facts and circumstances relating to whether or not the adoption should be granted.

The Indian Child Welfare Worker shall file and serve the preadoption report, as provided in S.T.C. 3.02.017(d).

Tribal Code Commentary

In a customary adoption, the Siletz Code requires that the tribal ICW program investigates the petitioner and the child within sixty days of filing a petition. A criminal background check of the petitioner and a check into the petitioner's driving record and vehicle insurance status is required. The report must also apply the adoption preference guidelines to the petitioner. The ICW files a written report including recommendations on whether the adoption is in the best interests of the child at least ten days before the adoption hearing.

When a petition for adoption is filed in the White Earth Nation, the court immediately requests that social services or other qualified agency conduct a home study on the petitioner and create a report on the child. The home study and report should relate to the circumstances of the home, the petitioner, and the petitioner's ability to assume responsibilities of a parent to the child. The report should contain pertinent information designed to assist the court in determining the best placement for the child. The home study should address whether or not the home most closely resembles that of the child's culture, identity, and any tribal affiliation. The home study must be submitted to the court no later than ten days before the hearing.

The Skokomish Nation requires that the following information be included in a report for the ICW worker with a complete preadoption, home-study report.

- Physical and mental condition of the child, petitioner, and persons living in the petitioner's home.
- Circumstance of the voluntary or involuntary termination of parent's rights.
- Home environment, family life, access to health services, and resources of the petitioner.
- Youth's and petitioner's cultural heritage and tribal status.
- Marital status of petitioner.
- Names and ages of petitioner's children and any other person residing with the petitioner.
- Results of a criminal background check of the petitioner.
- Alcohol and drug abuse in petitioner's household.
- Any other facts and circumstances relating to adoption.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- What are the current requirements of a background check and home study in adoptions? Are they the same for both the customary and mainstream adoption?
- What changes should be made?

STEP 2: Establish a Vision for the Future

- Make a list of all the information that a judge would need for an adoption.
- Would the requirements for a customary or mainstream adoption be the same? Would there be certain circumstances where the information would not need to be as extensive?
- Who will perform this home study or report?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

H. Petition for Customary Adoption

Petitions for a certification of a customary adoption, petitions for a customary adoption, and petitions for mainstream adoption will vary in some regards, but there is certain information that will be required in all the petitions. The following are a list of items that would generally be required in all of the previously mentioned petitions:

- Name, address, age, and tribal enrollment status of the child.
- Name, address, and tribal enrollment status of the parent(s), guardian(s), or custodian(s).
- Name, address, and tribal enrollment status of the proposed customary adoptive parent(s).
- A brief state of facts and circumstances supporting the adoption.
- A statement that the adoption is in the best interests of the child.

In the case of a customary adoption there may be an agreement to retain some parental rights, or a plan to modify those rights, that should be specified in the petition. There may be code requirements as well that the child has lived with the customary adoptive parent for a period of time. There may be requirements to attach certain documents verifying information in the affidavit or a requirement that a preplacement home study be completed before filing a petition.

The code section on the petition should be specific and comprehensive, laying out everything the Nation requires in its particular customary adoption. A Nation's code section for customary adoptions should be similar to the regular adoption code in many ways, but can differ greatly on some issues based on the different tribal legal requirements, federal legal requirements, and funding sources.

Selected Tribal Codes

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part V: Out-Of-Home Placement Alternatives

§ 8.037. Customary Adoption

[sections omitted]

(b) **Initiation of Certification of Customary Adoption by Petition** - The ICW Program or the customary adoptive parent may file a petition for certification of a customary adoption. The petition shall include:

(1) The name, address, age and tribal status of the child who is the subject of the petition;

(2) The names, addresses and tribal status, if known, of the child's parent(s), guardian or custodian;

(3) The name, address and tribal status of the child's proposed customary adoptive parent(s);

(4) A brief and concise statement of the facts and circumstances supporting the request for certification of the customary adoption including why it is preferable to termination of parental rights and adoption; and

(5) A plan for the modification of parental rights, which shall include:

(A) A description of which parental rights should be assigned to the customary adoptive parent and the reasons for the proposed assignment of those rights, and which parental rights of the existing parent or parents will be modified;

(B) A plan for visitation or other contact with the child's biological parents and/or extended family, if any; and

(C) The monitoring to be provided to the family by the ICW Program, if any.

§8.039 Adoption

(e) **Petition to Adopt a Child**—Any person(s) wishing to adopt a child shall file a petition, under oath, with the Tribal Court. The petition shall contain:

(1) The name, age, address and tribal status of the child to be adopted, and documentary proof of the date and place of the birth of the child;

(2) Documentary proof of the child's membership in the Tribe, eligibility for membership in the Tribe, or membership status with another Tribe, if such proof exists;

(3) The name, address, age, tribal status and occupation of the petitioner, a statement of the petitioner's relationship to the child, and documentary proof of the petitioner's tribal status or Indian heritage;

(4) Written proof of the consent to the adoption required in subsection (g);

(5) The names and addresses, if known, of all persons whose consent to the adoption is required but who have not consented, and the facts and circumstances surrounding the lack of consent;

(6) The names and addresses of all persons who have or claim a right of custody to or visitation with the child, or who are required to pay for the support of the child; and

(7) The reasons the petitioner desires to adopt the child.

Native Village of Barrow Iñupiat Traditional Government Tribal Children's Code
4-5 Voluntary Proceedings
4-5-5 Iñuguuq [Traditional Adoption]

4-5-5 C. Petition[152]

Proceedings under this Subchapter shall commence when a petition for adoption is filed with the court. A petition for adoption shall contain:

1. A citation to the specific Section of this Code giving the court jurisdiction over the proceedings;
2. The full name, residence, place of birth, date of birth, and sex of the child, with attached documentary proof of the date and place of birth;
3. Documentary proof of the child's membership status in the Tribe, if such proof exists;
4. A written statement by the prospective adoptive parent stating her full name, residence, date and place of birth, occupation, and relationship to the child, with attached documentary proof of marital status, provided this not be interpreted to prohibit single parent adoptions, and tribal membership status;
5. Written statement of consent from all persons whose consent is required by Section 4-5-5 D;
6. A written statement by the birth parent specifying the reasons why the birth parent cannot or does not want to raise the child;
7. An agreement by the prospective adoptive parent of the desire that a relationship of parent and child be established;
8. A full description and statement of value of all property owned, possessed, or held in trust by and for the child;
9. A report by the Social Services Department indicating the results of the home study conducted pursuant to Section 4-5-5 I; and
10. A brief and concise statement of the facts which may aid the court in its determination.

[152] This Code is on file with the Tribal Law and Policy Institute.

White Earth Band of Ojibwe Judicial Code
Title 4a: Customary Adoption Code

4a-8 Petition for Customary Adoption

A. Any adult may file a petition with the Court Administrator seeking an order for the customary adoption of a minor child. The petition shall contain the following information:

1. The name, address and telephone number of the child's tribe;
2. The name, address, telephone number and age of the child to be adopted;
3. The name, address, and telephone number of the petitioner and the petitioner's relationship, if any; to the child;
4. The name, address, and telephone number of any other relatives who may have an interest in the care, custody and control of the minor child;
5. The proposed name of the adoptee after the entry of the final order of customary adoption;
6. A statement or a copy of the final order suspending the parental rights of the biological parent(s);
7. A statement as to why a final order for customary adoption is in the best interests of the child and the best interests of the child's tribe.
8. A statement as to basis for the customary adoption supported by a home study, medical, psychiatric, child protection worker, family member and/or psychological reports or testimony;
9. A statement that no similar action is pending in a tribal or state court having jurisdiction over the child.

4a-9 Notice of Hearing on Petition for Customary Adoption

Upon the filing of a petition seeking an order for a customary adoption of a minor child, the Court Administrator shall schedule a hearing to be held thereon and shall cause written notice of such hearing to be served upon the petitioner; the child's tribe; appropriate family members, if any; caretaker, if any; and appropriate agencies of the Band which may either have an interest in the proceedings or be of assistance to the court in adjudicating the matter. Such notice shall be served in the manner provided for in White Earth Rules of Civil Procedure.

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.790 Petition for customary adoption.

(1) Any adult who has been the legal guardian of a child for more than three years, and the parental rights of that child's biological parents have been suspended, may file a petition with the Court seeking an order for the customary adoption of the minor child. The petition shall contain the following information:

(a) The name, address, telephone number and age of the child to be adopted;

(b) The name, address, and telephone number of the petitioner(s) and the petitioner's relationship, if any, to the child. If the petitioner is married, his or her spouse must also be at least 18 years old and shall join in the petition, unless the spouse's whereabouts is unknown or unless waived by the Court;

(c) The proposed name of the adoptee after the entry of the final order of customary adoption. The child's birth surname cannot be removed as part of these proceedings, but the adoptive family's name may be added to the child's legal name;

(d) Attach a copy of the final order suspending the parental rights of the biological parent(s);

(e) A statement as to why a final order for customary adoption is in the best interests of the child and the best interests of the Tribes;

(f) A statement or evidence as to basis for the customary adoption;

(g) A statement that no similar action is pending in a Tribal or State Court having jurisdiction over the child. [Res. 2015-101].

Tribal Code Commentary

The first two code sections are a section from the Siletz Nations Customary Adoption Code and a section from the Siletz Nation's mainstream adoption code. As you can see the basic content requirements are similar. The code provisions regarding the customary code, however, requires a plan for modification of parental rights that includes a description of which parental rights should be assigned to the customary adoptive parent and the reasons for the proposed assignment of those rights, and which parental rights of the existing parent will be modified. It also includes a plan for visitation or other contact with the biological parents and/or extended family, if any, and the monitoring to be provided to the family by social services.

The Native Village of Barrow requires the following information to be included in the petition in addition to standard requirements:

- The required consents;
- A written statement from the birth parent specifying reason why the parent does not want or cannot raise the child;
- An agreement to establishing a parent/child relationship with the prospective adoptive parent;
- A full statement of value of property owned or possessed by the child; and
- A social services home study.

The White Earth Code, in addition to the standard requirements of a petition, requires a statement as to why a final order for customary adoption is in the best interests of the child and the best interests of the child's tribe. It also requests that the statement be supported by a home study, as well as medical, psychiatric, child protection worker, family member, and/or psychological reports or testimony.

The Tulalip Customary Adoption Code, in addition to standard petition requirements, also indicates that a child's surname cannot be removed as part of these proceedings, but the adoptive family name may be added. It requires that a copy of the order suspending the parental rights be attached to the customary adoption order.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Review your current statutory requirements for adoption petitions, both customary and mainstream.
- Identify any changes needed in the current statute.
- Review the timing requirements for filing the petition.

STEP 2: Establish a Vision for the Future

- What are the requirements you desire to establish for a customary adoption? (These requirements should appear in the petition.)
- Are there traditions or customs relative to customary adoption that should be included as a requirement?
- Are the adoption practices adequately safeguarding for the child?
- Does the adoption practice meet Title IV-E requirements?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

I. Hearing and Decree

This section deals with the hearing and final decree of adoption. There are generally only a few differences between the notification requirements of customary and mainstream adoption. Either type may also be private or open, depending upon the desires of the Native Nation. Some customary adoptions may incorporate a traditional ceremony, but it is also possible for some mainstream adoptions proceedings to incorporate traditional ceremonies as well, either at the hearing or following the hearing.

There are several situations that can exist at the time of the hearing. For example,

- The rights of the birth parents may have previously been terminated, so they are not involved;
- The birth parent's rights may have been suspended prior to the adoption proceeding, and if they have retained some rights there may be some involvement; or
- If the birth parents have consented to the adoption, there may be a need to ensure that the consent in informed, but this generally takes place outside the hearing on the petition.

The focus of the adoption hearing is on the establishment of the new parent-child relationship. It is important that the adoptive parents understand their parental rights and responsibilities. There are a number of considerations relative to the hearing, among them:

- Who must be notified and the amount of effort required when giving notice (i.e., posting in a newspaper vs. personal service).
- Who is required to attend the hearing?
- Will the rules of evidence apply?
- Will there be a record of the hearing?

The decree of adoption establishes a new parental relationship toward a child and generally involves a new name. A decree of adoption would have standard findings of fact and is the final disposition for the adoption.

Selected Tribal Code

White Earth Band of Ojibwe Judicial Code
Title 4a: Customary Adoption Code

4a-9 Notice of Hearing on Petition for Customary Adoption

Upon the filing of a petition seeking an order for a customary adoption of a minor child, the Court Administrator shall schedule a hearing to be held thereon and shall cause written notice of such hearing to be served upon the petitioner; the child's tribe; appropriate family members, if any; caretaker, if any; and appropriate agencies of the Band which may either have an interest in the proceedings or be of assistance to the court in adjudicating the matter. Such notice shall be served in the manner provided for in White Earth Rules of Civil Procedure.

4a-10 Hearing on Petition for Customary Adoption.

A. **Attendance at hearing**.

1. The child who is the subject of a petition for customary adoption, agencies, petitioner and any appropriate family members including siblings may be present at the hearing in person or by telephone
2. The petitioner shall be present at the hearing. The petitioner's failure to appear shall be grounds for dismissal of the petition.

B. **Conduct of the hearing**.

1. The court shall inform the parties of their rights under this code and of the nature and consequences of the proceedings.
2. The court shall further inform all other parties of their rights under the Judicial Code and pursuant to the Indian Civil Rights Act, 25 U.S.C., Section 1301-03 (1968), as amended, including the right to summon and cross-examine witnesses.
3. The rules of evidence of the Tribal Court shall apply.
4. The burden of proving the allegations of the petition shall be upon the petitioner and the standard of proof shall be clear and convincing evidence.
5. The court may continue the hearing, upon a showing of good cause, at the request of any party to the proceeding and enter such temporary orders, if any, as may be deemed just and reasonable to carry out the purposes of this Title.

C. **Record of proceedings**.

In all proceedings the court shall take and preserve an accurate stenographic or recording of the proceedings.

D. **Findings**.

1. In all cases, the court shall make specific written findings of fact, state separately its conclusions of law, and enter an appropriate judgment or order.
2. The court may make findings that it is in the child's best interests that a final order for a customary adoption be entered and the court shall specify the basis of those findings.

4a-11 Final Order for Customary Adoption

A. If the court determines that it is in the best interests of the child and the child's tribe, it shall issue a final order for a customary adoption. Such an order may include, but is not limited, to the following:

1. A statement that the child has been adopted by the petitioner(s) and that the parent-child bond is hereby established and that all of the rights and responsibilities of that relationship shall exist upon the entry of such a final order;
2. A notice regarding the new name of the child, if any.

Sault Ste. Marie Tribe of Chippewa Indians Tribal Code (Updated 12/03/14)
Chapter 30: Child Welfare Code
Subchapter VII: Adoption

30.708 Hearing on Adoption Petition.

(1) **Tribal Court Initial Hearing**: Within ten (10) days of the receipt of the petition for adoption the Tribal Court shall schedule a hearing on the petition of adoption.

(a) **Notice**. The adoptee, adopting parent(s), and all other interested parties shall be given notice of the hearing.

(b) **Appearance Mandatory**. The adoptee and adopting parent(s) shall appear in person at the initial hearing.

(2) **Waiver of Trial Custody Period**: If the adoptee has been in the custody of the adoptive parent(s) for more than six (6) months and the Child Welfare Committee recommends adoption at the initial hearing, the Tribal Court, upon a motion by the presenting officer, may waive the trial custody period and the final adoption decree may be entered at the initial hearing.

(3) **Final Hearing if Trial Custody Period Not Waived**: Not less than ninety (90) days, nor more than one hundred twenty (120) days, after the adoptee has been in the custody of the adoptive parent(s), the adoptive parent(s) shall appear before the Tribal Court. The Tribal Court shall hear testimony about the welfare of the adoptee and the current status of the adoptive home, and the desire of the adoptive parent(s) to finalize the adoption.

(4) **Adoption Decree; Extension of Trial Custody Period**: If the Tribal Court is satisfied that the interests of the adoptee are best served by the proposed adoption, the final adoption decree may be entered. The Tribal Court may

order, or adoptive parent(s) may request, a six (6) month extension of the trial custody period, after which a final adoption decree must be entered or the adoptee returned to the custody of the Tribal Court.

Skokomish Youth Code (Amended July 25, 2001)
Adoption

3.02.173 Setting the Hearing

When the Court receives the petition for adoption it shall set a hearing date, which shall not be more than forty (40) days after the Court receives the petition, unless continued for good cause shown. Service of the Notice of Hearing shall be as provided in S.T.C. 3.02.017(g). The Secretary of the Skokomish Tribal Council shall be a necessary party to all adoption proceedings before the Skokomish Youth Court.

3.02.176 Adoption Hearing—Conduct

The hearing shall be private and closed. Only those persons the Court finds to have a legitimate interest in the proceedings may attend. The Court shall consider all adoption reports submitted for review. All parties shall be given the opportunity to testify.

3.02.177 Grounds for Entering Decree of Adoption

The Court may enter a decree of adoption if it finds that:

(a) The youth is available for adoption as provided in S.T.C. 3.02.172.

(b) The adoption is in the best interest of the youth and the Skokomish Indian Tribe; and

(c) The petitioner(s) can provide appropriate and adequate parental care for the youth.

3.02.180 Decree of Adoption

If the Court grants the petition for adoption, the Court shall enter Findings of Fact and Conclusions of Law and a separate Decree of Adoption. The Decree shall include:

(a) A finding that the youth is available for adoption;

(b) An order that the youth is, for all intents and purposes, the child, legal heir, and lawful issue of the petitioner(s);

(c) A finding as to the marital status of the petitioner(s);

(d) An order changing the name of the youth and the full name of the youth upon adoption, if such an order has been requested;

(e) Orders directing the Court Clerk to forward a certified copy of the decree to the appropriate Bureau of Vital Statistics for the purpose of obtaining a corrected birth certificate when the adoption becomes permanent;

(f) An order that the records of the proceeding shall remain sealed unless otherwise ordered by the Court.

3.02.181 Effect of Decree of Adoption

A decree of adoption has the following effect: it creates the relationship between the adopted child and the petitioner(s) and all relatives of the petitioner(s) that would have existed if the youth were a legitimate, blood descendant of the petitioner(s). This relationship shall be created for all purposes including inheritance and applicability of statutes, documents, and instruments, whether executed before or after entry of the adoption decree, that do not expressly exclude an adopted person by their terms. The decree does not override any tribal enrollment laws or requirements nor does it affect the youth's enrollment status as a member of any Tribe.

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.820 Customary adoption hearing–Conduct.

(1) The hearing on customary adoption shall be ceremonial and shall be private and closed. Only beda?chelh, the petitioner(s), anyone there on behalf of the petitioner(s) and any family members invited by petitioner(s) or who have maintained an ongoing relationship with the child, including siblings, shall be permitted to attend.

(2) The burden of proving the allegations of the petition shall be upon the petitioner and the standard of proof shall be by a preponderance of evidence. [Res. 2015-101].

4.05.830 Grounds for entering decree of customary adoption.

The Court may enter a decree of customary adoption if it finds that:

(1) Customary adoption is in the best interest of the child and the Tribal community; and

(2) That the petitioner(s) can provide appropriate and adequate parental care for the child; and

(3) That the Tulalip Tribes does not oppose the customary adoption. [Res. 2015-101].

4.05.850 Additional hearings postadoption.

Final orders of a customary adoption may be reviewed by the Court only if a substantial change of circumstance occurs, such as the adoptive parent is deceased without the appointment of a legal guardian and there are no provisions within a will providing for the care and custody of the child. Notice of this review shall be provided to all parties to the hearing at which the final order was issued. [Res. 2015-101].

4.05.860 Appeals.

Orders suspending the parental rights and issuing a customary adoption are final orders for purposes of appeal. [Res. 2015-101].

Tribal Code Commentary

The White Earth Customary Adoption Code requires the court administrator to have notice of the hearing served on petitioner, the child's tribe, appropriate family members, the caretaker, and appropriate agencies. The term *all interested parties* appropriately provides leeway to serve extended family members or siblings and any agency that is involved with the family or could provide information to the court. There is a great deal of flexibility in the notice requirements. These parties may be present or attend using a telephone. The petitioner is required to be present or the petition may be dismissed.

The following requirements relate to the conduct of the hearing:

- Court informs parties of their rights and of the consequences of hearing.
- Rules of evidence apply.
- The burden of proving the allegations is on the petitioner.
- The standard of proof is clear and convincing evidence.
- A record of the proceeding is required.

The final decree of customary adoption in the White Earth Nation includes a finding that the adoption is in the best interests of the child and the child's tribe. It may include a statement that the child has been adopted by the petitioner and that the parent-child bond is established and that all the rights and responsibilities of that relationship shall exist upon the entry of the final order. If there is a new name for the child, it is in the adoption decree.

The Sault Ste. Marie Adoption Code (which follows a kind of mainstream approach) has similar notice provisions to the White Earth Customary Adoption Code. It uses the general term *all other interested parties* to include others who may have a legal interest or other type of interest in the adoption proceeding, in addition to the petitioner and adoptee. Sault Ste. Marie has a six-month trial custody period in adoptions, which may be waived if the child has been in the custody of the adoptive parent that length of time at the initial hearing.

The Skokomish Youth Code requires that the adoption hearing be held no more than forty days after the court receives the petition (another mainstream approach). The Secretary of the Skokomish Tribal Council is a necessary party to all adoption proceedings. The hearing is private and closed and only those with a legitimate interest in the proceedings may attend. The court considers the reports submitted, and parties are given the opportunity to testify. If the court finds that the youth is available for adoption, that the adoption is in the best interest of the youth and the Skokomish Nation, and that the petitioner can provide appropriate and adequate care the adoption is granted. The decree of adoption contains the following:

- A finding that the youth is available for adoption;
- An order that the youth is the child, legal heir, and lawful issue of the petitioner;
- A finding as to the marital status of the petitioner;

- An order changing the name of the youth, if requested;
- Order directing the clerk to forward a certified copy of the decree to the Bureau of Vital Statistics for the purpose of obtaining a corrected birth certificate; and
- An order sealing the records of the proceeding, unless otherwise directed.

The Tulalip Customary Adoption Hearing is ceremonial, private, and closed. Only beda?chelh, the petitioner, representative of the petitioner, and any family members invited by petitioner (including siblings) shall be permitted to attend. The burden of proving the allegations are on the petitioner and the standard of proof is a preponderance of evidence.

The Tulalip Court may enter a decree of customary adoption if it finds that:

- Customary adoption is in the best interests of the child and the tribal community.
- That the petitioner can provide appropriate and adequate parental care.
- That the Tulalip Tribes does not oppose the customary adoption.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Review your current statutory requirements for adoption petitions, both customary and mainstream.
- Identify any changes needed in the current statute.
- Review the timing requirements for filing the petition.

STEP 2: Establish a Vision for the Future

- What are the requirements you desire to establish for a customary adoption? (These requirements should appear in the petition as allegations.)
- Are there traditions or customs relative to customary adoption that should be included as a requirement?
- Are the adoption practices adequately safeguarding the child?
- Do you want or need both a mainstream adoption and a customary adoption? How will they differ? Are the hearing and decree requirements similar?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

J. Records—Open or Closed?

Adoption records in a mainstream adoption historically were always confidential and the records were sealed. Access to the information in the file was restricted to certain agencies that must have access to the records to complete their duties, such as the Bureau of Indian Affairs or the Bureau of Vital Statistics. Additionally, it is common for there to be some process by which the adoptee can access their adoption records once an adult. Additionally, medical reasons have also justified breaking the adoption seal. With the advent of open adoption where the birth parent chose the adoptive parent, and may retain some right to contact the child throughout their life, there may not be the same justification to seal records in all cases. In customary adoptions the parent may continue to have contact with the birth parent, extended family, or sibling, so the value of concealing certain information in the court record may not make sense.

Selected Tribal Codes

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.1140 Adoption records.
All records, reports, proceedings, and orders in adoption cases are confidential and shall not be available for release or inspection except:

(1) The Bureau of Indian Affairs may have access to such information as is necessary to protect inheritance rights or enrollment status of the adopted child (and his or her descendants);

(2) A copy of the decree of adoption, but not the findings of fact and conclusions of law, may be given to a Bureau of Vital Statistics as provided in this chapter; and

(3) An adopted child may petition the Court, upon reaching 18 years of age, for release of specifically requested information, limited to: the biological parents' names, addresses, Tribal status and Social Security numbers; and the names and relationship to the child of relatives, for the purpose of medical need or medical history information or to assist in making a relative placement of a child of the adoptive child. [Res. 2015-101].

Keweenaw Bay Indian Community Tribal Code
Title Five. Adoptions
Chapter 5.8 Order of Adoption

§5.805 Rights of Child and Extended Family

[sections omitted]

B. **Release of Identifying Information**:

1. A parent or guardian who places, or releases a child for adoption, or consents to adoption, has the right, at any time prior to the child's eighteenth (18th) birthday, to file with the applicable agency or the Tribal Court, a denial of release of identifying information. The denial of release of identifying information shall state the following:

   a. Name of child placement in adoption;

   b. Name of the biological parents at the time of the termination of parental rights; and

   c. The most recent address of the biological parents.

2. A denial of release of identifying information may be revoked at any time by filing a revocation with the same agency or Tribal Court

3. If a denial of release of identifying information is not filed, or if a previously filed denial of release of identifying information is revoked, the information in

subsection (B)(1) will be released upon request of the child after he or she attains the age of eighteen (18) years, unless the other biological parent has filed a denial of release of identifying information which has not been revoked.

Pascua Yaqui Tribe Tribal Codes
Title 5 Civil Codes
Chapter 7 Juveniles (Amended February, 2015)

Section 440 Open Adoptions (5 PYTC § 7-440)

Adoptions under this subchapter shall be in the nature of "open adoptions." The purpose of such open adoptions is not to permanently deprive the child of connections to, or knowledge of, the child's natural family. The purpose of adoptions shall be to give the adoptive child a permanent home. To this end, the following shall apply and be contained in all adoptive orders and decrees.

A. The adoptive parents and adoptive child shall be treated under the law as if the relationship was that of a natural child and parent, except as forth herein.

B. The adoptive child shall have an absolute right, absent a convincing and compelling reason to the contrary, to information and knowledge about his natural family and his tribal heritage.

C. The adoptive child and members of the child's natural extended family (including parents) may have the right to reasonable visitation, subject to reasonable controls of the adoptive parents, unless otherwise restricted by the Court for a compelling reason.

D. Adoption shall not serve to prevent an adoptive child from inheriting from a natural parent in the same manner as any other natural child. The natural parents shall not be entitled to inherit from an adoptive child in the same manner as parents would otherwise be entitled to inherit. An adoptive child shall be entitled to inherit from adoptive parents and vice versa in the same manner as if natural parents and child.

Tribal Code Commentary

The Tulalip Code requires that all records, reports, proceedings, and orders in adoption cases remain confidential. The Bureau of Indian Affairs may access the information as is necessary to protect inheritance rights or enrollment status of the adopted child and descendants. A copy of the decree, but not the findings, may be given to the Bureau of Vital Statistics. An adopted child may petition the court upon reaching eighteen years of age for release of specifically requested information limited to the biological parent's names, addresses, tribal status, Social Security numbers, and the names and relationship to the child of relatives for the purpose of medical need or medical history information or to assist in making a relative placement of a child of the adoptive child.

The Keweenaw Bay Indian Community Tribal Code allows a parent or guardian who places or releases a child for adoption the right at any time prior to the child's eighteenth birthday to file a denial of release of identifying information with the agency or the tribal court. The denial of release may be revoked at any time. If no denial of release is filed, the name of the child, and the biological parent's name and most current address may be provided upon request of the child at age eighteen or older.

The Pascua Yaqui Nation provides for an open adoption in its code. The purpose of an open adoption is to allow the child to have knowledge and maintain connection to their natural family. The adoptive child has an absolute right under the statute to information and knowledge about the natural family and tribal heritage, absent a convincing and compelling reason to the contrary. The child and the members of the natural extended family may have the right to visitation, subject to reasonable controls of the adoptive parents.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Review your current statutory requirements on confidentiality or sealing records for adoption petitions, both customary and mainstream.
- Identify any changes needed in the current statute.
- If you have a customary adoption code, are the confidentiality requirements the same?
- How can an adoptee currently access information about birth parents?

STEP 2: Establish a Vision for the Future

- Discuss how the confidentiality requirements relating to an adoption file could be different in a mainstream adoption, an open adoption, and a customary adoption? Arrive at a decision on what makes sense for each type.
- What access should an adoptee have to the basic parent/family identification information? When should they have access?
- Should a birth parent have a right to deny the adoptee access to identifying information? If so, by what process?
- What agencies must have access to all adoptions?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

K. Guardianship

Title IV-E foster care maintenance payments are available for children that meet certain income requirements—based upon the income and assets of the home they are removed from—and who are placed in foster care with a relative, under certain conditions. Such payments are designated as "kinship guardianship assistance payments." Native Nations are most likely to prefer kinship placements, and their accompanying assistance payments, for two reasons:

1. In Native communities, children tend to belong to large extended families making the availability of appropriate and preferred kin placements greater.
2. Many Native Nations have cultural objections to terminating parental rights, thus precluding Western-style adoption and requiring the establishment of other legal relationships such as traditional adoption, kinship care, and/or guardianship.

However, there will be a number of obstacles for Native Nations to clear before they can access Title IV-E funds. Title IV-E requires

1. That the child must be eligible—the income and assets of the home-of-removal must have been under $10,000.
2. That the placement is executed by a voluntary placement agreement or a judicial determination and order.
3. That the kin placement is a licensed foster parent.
4. That the placement is be done under the responsibility of a public agency, such as the Nation's Social Services Department.

Most states use third-party subcontractors to determine the income/asset eligibility necessary in order to receive to federal reimbursement. Native Nations that use this strategy need to research these vendors and costs when determining if money gained from being compliant with Title IV-E is worth the limitations it places on the Children's Code.

Also, many Nations lack foster parent licensing standards and laws. Laws on these issues will need to be drafted and adopted with the kin foster parent in mind as these relatives will be held to these standards for the Native Nation to obtain a Title IV-E reimbursement.[153]

[153] See "Considerations for Indian Tribes, Indian Tribal Organizations or Tribal Consortia Seeking to Operate a Tribal Title IV-E Program, Part III—Guardianship Assistance," 22–3, available at: http://www.acf.hhs.gov/sites/default/files/cb/tribal_considerations.pdf

Selected Tribal Codes

Confederated Tribes of Siletz Indians Tribal Ordinances
Siletz Juvenile Code §8.001 (Amended 7/16/10)
Part V: Out-Of-Home Placement Alternatives

§ 8.035. Permanent Guardianships

(a) **Policy**—It shall be the policy of the Siletz Tribe to prefer permanent guardianships as a long-term placement option for tribal children over adoption or long-term foster care, in order to maintain the children's contacts with family, relatives, tribal community, and culture as appropriate. It shall further be the policy of the Tribe to prefer guardianships that maintain and preserve the child's connection to the child's family and the Tribe. The permanent guardianship provided for under this Chapter is different than a non-dependency guardianship as provided for by law. The permanent guardianship may only be established for a child(ren) already within the jurisdiction of the Court pursuant to the provisions of the Siletz Juvenile Code.

(b) **Authority to Appoint**—The Court has the power to appoint a guardian, as the permanent plan for child found to be a child-in-need-of-care or when a petition for guardianship is filed pursuant to this section.

(c) **Initiation of Guardianship Proceeding**—A guardianship proceeding may be initiated by:

(1) A petition by the ICW Program; or

(2) A petition by a child if the child is fourteen (14) years of age or older; or

(3) A motion by the Court.

[sections omitted]

(g) **Standard**—In appointing a guardian, the Court shall be guided by the best interests of the child. If the child is fourteen (14) years of age or older, the Court shall consider the child's preference in appointing a guardian.

(h) **Review of Guardianship**

(1) Guardians appointed pursuant to this section must file an annual report with the Court detailing the child's conditions and circumstances. The ICW Program must also file an annual report with the Court on guardianships created under this Section.

(2) The ICW Program, the child, or the child's guardian, may petition the Court at any time to review the permanent guardianship established under this section. Only the ICW Program shall have the authority to petition the Court to terminate a permanent guardianship established under this Section and to return the child to the child's parents. The Court shall have the power to remove a child's guardian and appoint a replacement guardian whenever necessary to protect the best interests of the child, as established by clear and convincing evidence.

(i) **Guardianship as Part of a Permanent Plan**—If a guardianship is ordered as part of a permanent plan for a child, the Court may relieve the ICW Program from ongoing case management responsibilities except as provided in Section 8.030 (h)(1). A permanent guardianship for a child is presumed to continue until the child is eighteen (18) years of age unless otherwise ordered or found by the Court by clear and convincing evidence.

Tulalip Tribal Code (Current through May 6, 2016)
Title IV. Youth, Elders and Family
Chapter 4.05 Juvenile and Family Code

4.05.660 Legal Guardianship.
Purpose: For all guardianship cases, a guardianship should provide permanence, a stable home, and a responsible and emotionally supportive caregiver to the child without terminating a parent's rights.

For youth-in-need-of-care, there is a presumption that guardianship is in the child's best interest if the following has occurred:

(1) The child has been adjudicated a youth-in-need-of-care;

(2) The parent was given the requisite time period to reunify with the child;

(3) The permanent plan for the child was changed from return home to a permanent plan of guardianship.

Scope: This section applies to both adjudicated youth-in-need-of-care and private guardianships. An adjudicated youth-in-need-of-care guardianship may impose additional requirements or consideration and will be specified. A private guardianship cannot be considered if the child is a court-adjudicated youth-in-need-of-care. [Res. 2015-101].

4.05.670 Procedures for filing a petition for guardianship–All cases.

(1) **Who May File a Petition for Guardianship and Standing**.

(a) Any person petitioning for legal guardianship must be an adult and establish:

(i) He or she is a relative or family member, or has established a significant familial-type relationship as defined within this chapter; and

(ii) The petitioner has custody or placement of the child by a court order or by agreement of the parent(s).

(2) **Contents of the Petition**. A petition for guardianship shall be verified under oath by the petitioner(s) **and** shall contain the following information:

(a) The full name, residence, date and place of birth and sex of the child, with attached documentary proof of the date and place of the birth of the child;

(b) The names of the persons with whom the child has lived, the residences at which the child has lived, for the previous year, and the length of time the child has lived with each person and at each residence;

(c) The names and residences of the child's legal parents, guardians, or custodians. In addition, the names and residences of putative fathers or if any;

(d) Documentary proof of the child's membership status in the Tribes;

(e) The full name, residence, date and place of birth, occupation of the petitioner(s), statement of relationship to the child, and proof of petitioner's Tribal membership, if applicable. The petitioner can request that the address be confidential and use beda?chelh's address consistent with current policies;

(f) A statement by petitioner(s) of the desire that a relationship of legal guardian and child be established between petitioner(s) and the child;

(g) A plan and an agreement to maintain ties with the Tribes and where appropriate with extended family members; and

(h) A citation to the specific section of this chapter giving the Court jurisdiction of the proceedings.

(3) **Summons and Notice of Hearing**.

(a) The Court Clerk shall set a preliminary hearing within 30 days and issue summons and notice of the preliminary hearing upon filing the petition. Notice shall include:

(i) The date, time, and place of the hearing and a copy of the petition for guardianship; and

(ii) A statement to the effect that the rights of the parent(s) may be affected, that certain persons are proposed to be appointed as guardian(s) in the proceedings, and that if the parent(s) fail to appear at the time and place specified in the summons, the Court may appoint those persons as guardian(s) and take any other action that is authorized by law.

(4) **Service of the Petition, Summons and Notice of Hearing for Guardianship**.

(a) Guardianship petitioners shall be responsible to have the petition, summons and notice of hearing for guardianship personally served on:

(i) The child's parent(s);

(ii) The child who is the subject of the petition for guardianship if he or she is 14 years of age or older;

(iii) beda?chelh or the Office of the Reservation Attorney;

(iv) Any person the parties or the Court deems necessary for proper adjudication; and

(v) If the child is not enrolled in the Tulalip Tribes, any tribe the child is enrolled in or is eligible for enrollment.

(b) If any party who is required to be personally served is not within the exterior boundaries of the Reservation service shall be by certified mail, return receipt requested, or by any other means reasonably designed to give summons and notice.

(c) If any party's current address is unknown, the petition shall be published in a regularly published newspaper of the last known area the party resided in or in the See-Yaht-Sub pursuant to TTC 2.10.030.

(d) Service shall be made by any person over the age of 18 who is not a party to the proceedings.

(e) As soon as practicable, proof of service shall be filed with the Clerk of Court indicating the date, time, and place of service. [Res. 2015-101].

4.05.680 Guardianship hearings.

(1) At the preliminary guardianship hearing the following will occur:

(a) **Determination of standing of petitioner**.

(b) **Order that beda?chelh prepare a guardianship report**. Beda?chelh shall investigate any party to be appointed as a guardian, conduct a complete home study, and shall prepare and submit a written report to the Court no later than 10 calendar days before the guardianship hearing.

(i) The report shall contain beda?chelh's recommendation regarding the guardianship, and whether beda?chelh believes that such guardianship will be in the best interests of the child consistent with established policies.

(ii) A copy of the report shall be served on the petitioner(s).

(c) Set provisions as necessary for temporary custody pending the guardianship hearing.

(2) **Child's Preference for Guardian**. When the child who is the subject of the petition for guardianship is 14 years of age or older, the Court shall consider his or her preference in appointing a guardian.

(3) **Guardianship Hearing**.

(a) **Procedure at Hearing**. Petitioner(s) and beda?chelh shall appear personally at the hearing if the petition involves a youth-in-need-of-care child.

(b) **Judicial Determination**. The Court shall inquire of the parties appearing as to whether the best interests of the child will be promoted by the guardianship. At the conclusion of the guardianship hearing, the Court shall make written findings as to whether, by a preponderance of evidence, the guardianship is in the best interests of the child.

(c) **Order**. An order establishing guardianship shall be considered a final order for the purposes of appeal. [Res. 2015-101].

4.05.690 Terms and rights of guardian.

(1) A guardian appointed by the Court shall have the custody of, and be responsible for the care of the child and the following additional duties:

(a) Safeguarding the care and management of his/her property from the date of the guardianship's establishment until the child reaches the age of 18, marries, is emancipated by the Court, or until the guardian is legally discharged, or dependency over the child is terminated, or custody is transferred back to beda?chelh; provided, that the guardian shall not have the authority, without express consent of the Court, to dispose of any real property or Tribal member benefits of the child in any manner.

(i) **Out-of-Court Guardianship Review**. Beda?chelh shall create a guardianship division and create rules and procedures for reviewing guardianship cases no less than semiannually for a period of three years. If any concerns are noted by the guardianship review team the review period may be extended past three years.

(ii) **Standing**. Beda?chelh shall have the ability to file motions in guardianship cases to request judicial review of a case to address any concerns that may arise. The Court may order the guardian(s) to participate and comply with services to alleviate such concerns.

(b) The guardian shall also have the authority to consent to the medical care and treatment of the child, and to otherwise have those rights of a parent of the child.

(c) If the guardian is not a member of the child's family or the Tulalip Tribes, then a cultural and family plan will be required and incorporated as an attachment to the court order.

(d) The Court may order a guardian to let the parents visit or contact the child, but the Court may also put limits or other conditions on the visitation, such as requiring that any visitation be supervised. The time and frequency of parental visitation is often up to the guardian (or the Court) to decide. Parents may, in some cases, regain custody of their child in the future if the Court determines the guardianship is no longer in their child's best interests.

(e) **Per Capita**. The Court shall issue an order that all monies held in a judicially blocked account be transferred into the minor trust account and be distributed in accordance with Chapter 5.20 TTC. Guardians shall receive current Tribal member per capita on behalf of the child in accordance with Chapter 5.20 TTC. [Res. 2015-101].

4.05.700 Termination of guardianship.

(1) **Termination of the Guardianship Order**.

(a) **Relinquishment of Guardianship**. A guardian may motion the Court for relinquishment of guardianship of a child. The Court will determine whether good cause exists and if relinquishment is in the best interest of the child.

(b) **Dismissal of Guardianship by Parent(s)' Motion**. In a youth-in-need-of-care guardianship, a parent who has complied with the services required from the adjudicatory and case plan or otherwise can demonstrate a substantial change of circumstances, may move for dismissal of the guardianship. In all other cases there must be shown a substantial change of circumstances as a preliminary matter.

(i) The parent must provide documentation of completed services and requirements. The Court will review these documents and the underlying dependency in chambers to determine if there is prima facie evidence to substantiate the setting of a hearing. Guidelines to guide the Court shall be set by court rule. If the evidence is sufficient, then a hearing shall be set and the guardian and beda?chelh shall be served with the court date, motion and supporting evidence. If the child was placed out of the home as a result of a drug or alcohol issue, then the parent must demonstrate one year of documented sobriety of clean urinalysis results or treatment records before visitation or return home will be considered.

(ii) The presumption at this hearing is that the child should remain with his or her guardian if the child has been in the guardian's care for over three years or a majority of the child's life based on their developmental, emotional and physical needs.

(iii) To overcome this presumption the parent must show by clear and convincing parent's expense.

(c) **Dismissal of Guardianship on Beda?chelh's Motion**. Beda?chelh may motion the Court to dismiss the guardianship on the grounds that there has been a substantial change of circumstances and dismissal is in the best interest of the child. The standard of proof shall be clear and convincing evidence.

(2) **Upon Relinquishment or Dismissal**.

(a) If the child has previously been adjudicated as a youth-In-need-of-care, the child's permanent plan order will remain in effect, including all required services previously ordered of the parents.

(i) Beda?chelh shall be responsible for placing the child and reviewing the permanent plan order.

(ii) A permanent plan review hearing will be held within 30 days of the dismissed guardianship. A beda?chelh report to court for a permanent plan review shall be filed 10 days prior to the hearing.

(b) For a non-youth-in-need-of-care guardianship, the Court shall set subsequent hearings, with the first to be held within 30 days to establish

hearing schedule for the child. The Court shall notify beda?chelh if there is no parent or other guardian willing or able to care for the child.

(c) The child's per capita shall be held and placed into a judicially blocked account pending further court order. [Res. 2015-101].

4.05.710 Continuing Court jurisdiction.

After guardianship is granted, beda?chelh and the Court retain jurisdiction until the child turns 18 or is adopted but no further Court review is required unless there is a change of circumstances or a request for Court review is made by the beda?chelh guardianship team. If siblings are placed in guardianship with different families, any child may request a visitation plan with his or her siblings, or grandparents who have maintained an ongoing relationship with the child may request visitation. Beda?chelh shall be required to assist with evaluating the request and provide recommendations for visitations. If a voluntary plan cannot be created or implemented, then the Court may impose a plan.

Moving out of Tulalip Tribes Area. Forty-five days prior to moving beyond 60 miles from the Reservation, the guardian shall notify beda?chelh and Enrollment of the move, the reason for the move and the plan the guardian has in place for maintaining the child with his or her family and culture. If the family fails to notify beda?chelh, a hearing may be set to determine whether the child should be allowed to move with the guardian or be returned to beda?chelh. [Res. 2015-101].

4.05.720 Customary adoption and suspension of parental rights.

Purpose: Customary adoption within the Tulalip Tribes is a two-step process. The first step involves suspension of parental rights until the child turns 18, but does not require judicial termination of parental rights. The second step is a ceremonial and legal process in which another family or community member assumes parental responsibilities through customary adoption. Customary adoption is intended to provide permanence to a child. There is a presumption that suspension of parental rights is in the child's best interest if the following has occurred:

(1) **For Youth-in-Need-of-Care Guardianships**.

(a) The child has been adjudicated a youth-in-need-of-care;

(b) The parent was given the requisite time period to reunify with the child;

(c) The permanent plan for the child was changed from return home to a permanent plan of guardianship; and

(d) The child has been in legal guardianship with the same person a minimum of three continuous years.

(2) **For Non-Youth-in-Need-of-Care Guardianships**.

(a) The parents have consented to suspension of parental rights and cultural adoption and the child has been in the legal guardianship in a non-youth-

in-need-of-care guardianship with the same person a minimum of three continuous years.

Scope: This section of the code shall be liberally interpreted and construed as an exercise of the inherent sovereign authority of the Tulalip Tribes to embody and promote the basic traditional values of the Tulalip Tribes regarding the protection and care of the Tribes' children. [Res. 2015-101].

Sault Ste. Marie Tribe of Chippewa Indians Tribal Code (Updated 12/03/14)
Chapter 30: Child Welfare Code
Subchapter VIII: Power of Attorney and Guardianship

30.802 Limited Guardianship.

The Tribal Court may appoint a temporary guardian under such terms and conditions as the Tribal Court sets forth in a written order. A temporary guardianship may be terminated if the Tribal Court determines that it is in the best interests of the child to change custody from the temporary guardian to a new guardian or to return the child to the parent, guardian, or custodian.

The parent and child's extended family shall be granted liberal visitation rights unless deemed inappropriate by the Tribal Court. A temporary guardianship shall be established by parental consent only, and shall be revocable by the Tribal Court upon parental request.

30.803 Full Guardianship.

The Tribal Court, when it appears necessary or convenient, may appoint guardians for persons under the Tribal Court's jurisdiction. Unless otherwise specified by the Tribal Court, a guardian appointed shall be responsible for the care, custody and education of the child until such child arrives at the age of eighteen (18) years, dies, is emancipated by the Tribal Court, or until the guardian is legally discharged.

(1) **Grounds**: The Tribal Court may appoint a guardian for a child if either of the following circumstances exist:

(a) Parental rights of both parents or of the surviving parent, have been terminated or suspended by prior Tribal Court order, by judgment of divorce or separate maintenance, by death, by judicial determination of mental incompetence, by disappearance, abandonment, or by confinement in a place of detention; or

(b) The appointment is necessary for the immediate physical well-being of the child.

(2) **Who May File**: Any person, including Anishnabek Community and Family Services may file a petition for guardianship. The petition shall be initiated either by the proposed guardian or by the child if at least fourteen (14) years of age.

(3) **Parental appointment of guardian for child**: The parent of an unmarried child may appoint a guardian for the child by will or by another writing signed

by the parent and attested by at least two (2) witnesses if both parents are dead or have been adjudged to be legally incapacitated or the surviving parent has no parental rights or has been adjudged to be legally incapacitated. A parental appointment becomes effective when the guardian's acceptance is filed in the Tribal Court in which a nominating instrument is probated or, in the Tribal Court at the place where the child resides or is present. If both parents are dead, an effective appointment by the parent who died later has priority.

(4) Upon acceptance of appointment, the guardian shall give written notice of acceptance to the child and to the person having the child's care or the child's nearest adult relative.

(5) **Objection by child of fourteen (14) years or older to parental appointment**: A child fourteen (14) years of age or older who is the subject of a parental appointment may prevent an appointment or cause it to terminate by filing with the Tribal Court in which the nominating instrument is filed a written objection to the appointment before it is accepted or within twenty-eight (28) days after its acceptance. An objection may be withdrawn. An objection does not preclude appointment of the parental nominee or another suitable person by the Tribal Court in a proper proceeding.

(6) **Tribal Court appointment of guardian of child and priority of child's nominee**. The Tribal Court may appoint as guardian a person whose appointment serves the child's welfare, including a professional guardian. If the child is fourteen (14) years of age or older, the Tribal Court shall appoint a person nominated by the child, unless the Tribal Court finds the appointment contrary to the child's welfare.

(7) **Notice**: Before appointing a guardian, the Tribal Court must give reasonable notice to all interested parties, including but not limited to, custodians, agencies and person having the care of the child, to the child, and to other relatives of the child as the Tribal Court may deem proper.

(8) **Contents of Petition**: The petition for guardianship shall include the following to the best of the petitioner's knowledge, information and belief:

(a) The full name, sex, date and place of birth, residence and tribal affiliation of the proposed ward.

(b) The full name, address, tribal affiliation, relationship, if any, to the child, and interest in the proceeding of the petitioner.

(c) The names and addresses of the child's parents, if living, and of other persons known to have an interest in the petition for appointment of guardian; the name and date of death of the child's deceased parent or parents, if appropriate.

(d) The basis for the Tribal Court's jurisdiction.

(e) The name and address of the person or agency having legal or temporary custody of the proposed ward.

(f) A statement of the reason that the appointment of a guardian is sought and whom the petitioner recommends to have appointed as guardian.

(g) A full description and statement of value of the child's assets and liabilities with an estimate of the value of any property owned, possessed, or in which the proposed ward has an interest, including any income and accounts receivable to which the proposed ward is entitled.

(h) Tribal identification verification.

(10) **Certified Petition**: All petitions must be dated, signed, and certified by the petitioner and notarized or witnessed by a clerk of the Tribal Court. It is not necessary to have the prosecutor sign a petition for guardianship.

30.804 Powers and Duties of Guardian.

(1) To the extent that it is not inconsistent with the terms of any order of the Tribal Court, a guardian has the following powers and duties:

(a) The guardian is entitled to custody of the ward and shall make provisions for the ward's care, comfort, and maintenance, and shall, as appropriate to the ward's needs, arrange for the ward's training, education, employment, and rehabilitation. The guardian shall take reasonable care of the ward's clothing, furniture, vehicles, and other personal effects that are with the ward.

(b) In arranging for a place of abode, the guardian shall give preference to places within the Tribal Lands over places not on the Tribal Lands, if both on Tribal Lands and off Tribal Lands places are substantially equivalent.

(c) The guardian shall have authority to consent to any medical, legal, psychological, or other professional care, counsel, treatment, or service for the ward. The guardian may give any other consent or approval in the ward's best interest. The guardian may petition the Tribal Court for approval of the consent or approval.

(d) By accepting a parental or Tribal Court appointment as guardian, a guardian submits personally to the Tribal Court's jurisdiction in a proceeding relating to the guardianship that maybe instituted by an interested person. The petitioner shall cause notice of a proceeding to be delivered to the guardian or mailed to the guardian by first-class mail at the guardian's address listed in the Tribal Court records and to the address then known to the petitioner. Letters of guardianship must indicate whether the guardian was appointed by Tribal Court order or parental nomination.

30.805 Reimbursement.

The guardian is entitled to be reimbursed out of the ward's estate for reasonable and proper expenditures incurred in the performance of his/her duties. The Tribal Court may order monthly reimbursement payments to the guardian upon request, subject to the availability of funds.

Tribal Code Commentary

The Siletz Code provides a policy that prefers permanent guardianships as a long-term placement option for children over adoption or long-term foster care. The permanent guardianship makes it easier for the children to maintain contacts with family, relatives, tribal community, and culture. The Siletz Nation policy also prefers guardianships that maintain and preserve the child's connection to the child's family and tribe. The permanent guardianship established in the Siletz Code is different from a non-dependency guardianship. The permanent guardianship may only be provided for children already in the jurisdiction of the court. The court has the power to appoint a guardian, as the permanent plan for the child found to be a child-in-need-of-care or when a petition for guardianship is filed.

A permanent guardianship may be initiated by the ICW program, by a child fourteen years or older, or by motion of the court. The court is guided by the best interests of the child, and, if the child is fourteen or older, the court shall consider the child's preference.

Permanent guardians in the Siletz Nation are required to file an annual report detailing the child's conditions and circumstances. The ICW program must also file and annual report. The ICW program may petition the court at any time to review the permanent guardianship. Only the ICW program will have the authority to petition the court to terminate a permanent guardianship and return the child to their parent. A permanent guardianship for a child is presumed to continue until the child reaches the age of eighteen.

The purpose of the guardianship provisions of the Tulalip Code is to provide permanence, a stable home, and a responsible and emotionally supportive caregiver to the child without terminating a parent's rights. There is a presumption that guardianship is in the child's best interests in the following situations:

- The child has been adjudicated a youth-in-need-of-care.
- The parent was given the requisite time period to reunite with the child.
- The permanent plan for the child was changed from return home to a permanent plan of guardianship.

Any person who is a relative or family member or has established a significant familial-type relationship and has custody or placement of the child by court order may file for guardianship. Specific requirements of the petition are set out in the statute. At the preliminary guardianship hearing in the Tulalip Nation the court will determine or order the following:

- Determine if the petitioner has standing.
- Order the beda?chelh prepare a guardianship report including an opinion as to whether the guardianship is in the child's best interests.
- Set provision as necessary for temporary custody pending the guardianship hearing.
- Consider the child's preference for guardian if the child is fourteen years of age or older.

At the Guardianship Hearing the petitioner and beda?chelh (if involving a youth-in-need-of-care) must personally appear. The Court makes a determination as to whether the best interests of the child is promoted by the guardianship. The standard of review is a preponderance of evidence.

A guardian appointed by the Tulalip Court shall have custody and be responsible for the care of the child and will:

- Safeguard the care and management of the child's property from the date of the guardianship establishment until the child reaches the age of eighteen, marries, is emancipated by the court or until the guardian is legally discharged or dependency over the child is terminated or custody transferred back to beda?chelh.
- Beda?chelh shall create a guardianship division and create rules and procedures for reviewing guardianship cases no less than semiannually for a period of three years.
- Beda?chelh may file motions in guardianship cases to request judicial review of a case to address any concerns that may arise.
- The guardian has the authority to consent to medical care and treatment and to otherwise have those rights of a parent of the child.
- If the guardian is not a member of the child's family or the Tulalip Tribe, then a cultural and family plan is required and incorporated as an attachment to the court order.
- The court may order to let the parents visit or contact the child, but may also put limits or other conditions on the visitation, such as requiring supervision.
- The court shall issue an order that all monies held in a judicially blocked account be transferred into the minor trust account and be distributed in accordance with the code. Guardians shall receive current tribal member per capita on behalf of the child.

A parent who has complied with the services required from the adjudicatory and case plan, or otherwise can demonstrate a substantial change of circumstances, may move for dismissal of the guardianship. The parent must provide documentation of completed services and requirements. If guardianship continues for three years, there is a presumption that the suspension of parental rights is in the child's best interest. This is the first step in a customary adoption.

The Sault Ste. Marie Nation provides for a limited/temporary guardianship, which may be terminated if the court determines that it is in the best interests of the child to change custody. The parent and child's extended family may be granted liberal visitation rights. A temporary guardianship is with parental consent only.

The guardian is responsible for the care, custody, and education of the child until the child turns eighteen, dies, or is emancipated or until the guardian is legally discharged. A guardian may be appointed when the parental rights have been terminated or suspended or the appointment is necessary for the immediate physical well-being of the child.

The guardian's powers and duties include:

- Custody of the child.

- Making provisions for the care, comfort, and maintenance of the child and, as appropriate, arrange for training, education, employment, and rehabilitation.
- Taking reasonable care of the child's clothing, furniture, vehicles, and other personal effects.
- Arranging for a place of abode with preference to places within tribal lands.
- Consenting to medical, legal, psychological, or other professional care, counsel, treatment, or service for the child.
- Petitioning the court for approval of the consent.
- Submitting to the jurisdiction of the Sault Ste. Marie Court in a proceeding relating to the guardianship.

A full guardianship may be established in either of the following circumstances in the Sault Ste. Marie Court:

1. Parental rights of both parents or the surviving parent have been terminated or suspended by prior tribal court order, judgment of divorce, death, judicial determination of mental incompetence, disappearance, abandonment, or confinement in a place of detention; or
2. The appointment is necessary for the immediate physical well-being of the child.

Exercises

The following exercises are meant to guide you in writing this section of your Children's Code.

STEP 1: Examine the Current Situation

- Review your current guardianship statute.
- Does your current code adequately provide for a permanent guardianship for a child-in-need-of-care?

STEP 2: Establish a Vision for the Future

- What priority in the placement process should guardianship have? Why?
- Is your guardianship statute an adequate permanent placement to meet Title IV-E requirements?
- Do your customary adoption law and guardianship law work together to establish stability for a child-in-need-of-care?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft the key points for this section of your Children's Code.

Additional Resources

Children's Bureau, Considerations for Indian Tribes, Indian Tribal Organizations or Tribal Consortia Seeking to Operate a Tribal Title IV-E Program, Part III—Guardianship Assistance, 2009.
Technical assistance guide for implementing a direct tribal Title IV-E program.

National Child Welfare Resource Center for Tribes, Title IV-E Program Funding, web page, 2015.
This web page is a central location for multiple resources on Title IV-E programs and funding.

National Child Welfare Resource Center for Tribes, Tribal Customary Adoption, web page, 2015.
This web page is a central location for multiple resources on customary adoption.

National Indian Welfare Association, Customary Adoption, web page, 2015.
Web page that provides a short description of customary adoption and a comprehensive reading list on issues relating to customary adoption.

Pianko, Pat, and Jenn Zanella, Tribal IV-E and the Fostering Connections to Success and Increasing Adoptions, Presentation, 2011.
This PowerPoint presentation was adapted for the Fostering Connection Tribal Gathering in Seattle and explains how the Fostering Connections law interacts with Title IV-E. This resource pays particular attention to reimbursements under Title IV-E.

Schwarzenegger, Arnold, All County Letter NO. 10-17, State of California Health and Human Services Agency Department of Social Services, 2010.
This letter provides an overview of California's law on tribal customary adoptions.

Glossary

A

Appeal: The process by which a legal party formally objects to a final decision of a court on a matter.

B

Band Relatives: Comprised of nuclear families that join the husband's or wife's family on a seasonal basis—traditionally to hunt or gather.

Burden of Proof: The requirement or obligation of a party to prove a fact to a judge or jury.

C

Ceremonial Relatives: People who are selected, or who come to be, relatives for ceremonial purposes.

Concurrent Planning: Concurrent planning is a type of permanency planning in which reunification services were provided to the family of a child in out-of-home care while also creating an alternative permanency plan for the child, in case reunification efforts failed.

Child Protection Team (CPT): The purpose of CPTs varies from jurisdiction to jurisdiction and may be as limited as providing community education and outreach with respect to system services and responses to child maltreatment in general. Sometimes, a CPT's purpose is to ensure child safety and healing by coordinating services to that child and their family in specific child maltreatment cases.

Civil Procedure Rules: Rules that describe the required practice and procedure to be used by parties in a civil court proceeding.

Clan Relatives: Comprised of a permanent social unit whose members say they have an ancestor(s) in common. Membership is determined at birth and is lifelong.

Current Practice: Current, generally accepted ways of doing things that may become custom and tradition over time.

Customary Adoption: An adoption based in the customary/traditional law of a tribal community.

D

Discretionary Judicial Certification: Where the Native Nation's judge certifies the occurrence of a customary adoptions and the code gives the judge varying degrees of discretion to recognize or modify the effect of a customary adoption for various reasons. For example, whether the proper traditional process was followed or whether the customary adoption is in the best interest of the child.

Disposition: Any ruling by the court that is intended to be final.

E

Emancipation: The surrender and renunciation of the rights and duties concerning the care, custody, and earnings of a child; the act by which a child is freed from their parent(s).

Extended Family: The term *extended family* is used in tribal communities to mean close kin outside the nuclear family, including band relatives, clan relatives, and so forth.

F

Forensic Interview: A structured conversation with a child intended to elicit detailed information about a possible event(s) that the child may have experienced or witnessed.

G

Generally Accepted Practice: A set of rules or procedures that are common practice within a profession.

Guardian Ad Litem: Person appointed to represent a child's best interest at all stages of a CINA case.

H

Hearsay Evidence: An out-of-court statement, made by a person that is not testifying before the court, that is offered as true for the purposes of court evidence.

I

ICWA Intervention: The process of a Native Nation exerting a legal interest in a state court ICWA case. If a Native Nation decides to intervene in a state ICWA case, it becomes a party with all the rights and privileges of any other party.

ICWA Transfer: The process by which an ICWA case in state court is transferred to tribal court.

Inconclusive Report: A report, *not* unfounded, in which the findings are inconclusive.

Informal Resolution: The process for closing a CINA case with less court involvement. Once the CINA petition has been filed, all relevant parties can meet outside of court and create an informal resolution.

Interlocutory Appeal: Appeals that occur during an intermediate stage of a legal case.

J

Jurisdiction: The authority of a court over a legal case and its parties.

K

Kin Terms: The words used for different relatives in the Native language.

Kin Types: Genealogical kin types such as biological father (F), mother (M), son (S), daughter (D), brother (B), sister (Z), child (C), and husband (H) and wife (W).

L

Legal Levels: Legal norms vary with different, traditional, and secular legal levels, that is, the custom law may be different for various villages, clans, bands, and so forth within one tribe. The written tribal law (constitution, codes, resolutions, tribal court opinions, and orders) may also deal differently with people from various villages, clans, bands, and so forth.

Legal Norm: A felt standard of proper behavior backed by official recognition or sanction.

M

Mandatory Reporter: Person, usually a professional, who is required to report child maltreatment to the appropriate agency.

Matrilineal Descent: A person is born into the mother's group automatically at birth. That group is considered close family.

Memorandum of Understanding (MOU): A type of intergovernmental agreement between a Native Nation and a state or federal government.

Modern Secular Authority: Constitutionally or statutorily recognized leaders or other leaders elected or appointed by the community.

Multidisciplinary Team (MDT): Team of professionals comprised of representatives from the social services agency, law enforcement agency, prosecutor's office, medical facility, mental health providers, and victims' advocate agency. The primary task of the MDT is to coordinate investigations and to make recommendations to the prosecuting attorney in a criminal proceeding and in postplea/conviction proceedings.

N

Natural or Biological Parent(s): The parent(s) that produced the ovum (egg cell) and sperm that produced the child.

Nondiscretionary Judicial Certification: Where the Native Nation's judge certifies the occurrence of a customary/traditional adoption with little to no exercise of judicial discretion.

Nuclear Family: A kin group consisting only of parents and children.

P

Patrilineal Descent: A person is born into the father's group automatically at birth. That group is considered close family.

Permanency Plan: A permanency plan is a judicially approved plan that places a child in a permanent home once it is determined that reunification with the parent(s), guardian(s), or custodian(s) is no longer appropriate

Personal Jurisdiction: Jurisdiction over specific people. Substantial contacts between the individual and the Nation is generally required for a court to assert personal jurisdiction.

Preliminary Hearing: A pretrial hearing that is used to determine whether a full CINA hearing is necessary. This hearing usually has a lower bar for evidence and more relaxed civil procedure.

Protection Order: A protection order is a legal order issued by a court to protect a certain person or persons from potential abuse from another, stated, party.

Protocol: A written process that provides employees of an agency or government department with specific steps that must be taken upon the occurrence of a particular event.

R

Rules of Evidence: Court rules that govern who may present evidence and under what circumstances the presentation may be made.

S

Severability Clause: A code provision that ensures that if one part of a code is struck down by the courts, it is "severed" from the rest of the code and the rest of the code remains valid.

Social Norm: A felt standard of proper behavior.

Sovereign Immunity: The legal principle that governments may not be sued in their own courts, unless they voluntarily waive or surrender that privilege.

Standard of Proof: The level, or amount, of proof that must be reached when presenting evidence. "Probable cause," "reasonable cause," and "sufficient cause" are examples of standards of proof.

Subject Matter Jurisdiction: Jurisdiction over a particular type of case.

Substantiated Report: A report deemed to be based upon some credible evidence that child maltreatment occurred.

T

Third Parent Status: Those kin, designated by specific kin terms, who are understood to have parent-like duties, obligations, and privileges (rights) with respect to a child(ren) they are kin to.

Tradition: Old values or ways of doing things.

Traditional Authority: The old offices or respected leaders.

U

Unfounded Report: A report deemed to be false, be inherently improbable, involve an accidental injury, or not to constitute child maltreatment and there is insufficient evidence to determine whether child maltreatment has occurred.

Additional Resources

Abinanti, Abby, Passports for Native Children: Best Practice Approach for Tribal Advocates Working with Native Children Who Have Suffered Abuse, Tribal Law and Policy Institute, 2006.
This suggests an approach to evaluating the needs of the children who enter the child protection system and a context for the evaluation that is culturally consistent with most tribal child-rearing philosophies.

Andrews, Mark, "'Active' Versus 'Reasonable' Efforts: The Duties to Reunify the Family under the Indian Child Welfare Act and the Alaska Child in Need of Aid Statutes," *Alaska Law Review* 19 (2002): 85–118.
In this article, the author analyzes recent decisions of the Alaska Supreme Court pertaining to the duties imposed upon the Alaska Department of Health and Social Services to make efforts to reunify the family after a child is taken into state custody. The article analyzes the distinction between "active efforts" as required under ICWA and "reasonable efforts" as required under Alaska's CINA statutes. The article begins with a discussion of these statutory duties and continues with a summary of the legal history and development of the two legislative "efforts" standards. The author argues that despite a few aberrations, the Alaska Supreme Court has consistently applied a single standard for both active and reasonable efforts.

Austin, Lisette, Serving Native American Children in Foster Care, *The Connection*, 2000.
Discusses services for Native American children in foster care. Intended for CASAs, this newsletter addresses the prevalence of Native American children in foster care, provisions of ICWA, CASA tribal programs, and the variations among tribes. Also provides a long resource list on issues relating to foster care.

Blomquist, Martha-Elin, and Mimari Akatsu Hall, Improving Compliance with the Indian Child Welfare Act: A Guide for Juvenile and Family Courts, National Council of Juvenile and Family Court Judges, 2007.
This technical assistance bulletin provides juvenile and family courts with practice recommendations and tools to improve compliance with the letter of ICWA as well as with the "spirit of ICWA" through services and supports. The first, most critical, and ongoing step is to develop respectful and authentic relationships with tribes to fully implement ICWA and best serve Native children. Following the development of relationships, courts should collaborate to examine practice, build understanding through training, develop an action plan, and monitor the action plan to ensure accountability and progress. Judges and child welfare workers must commit to a course of action that is inclusive of tribal voices and that leads to real and sustainable change for Native children and families. The National Council of Juvenile and Family Court Judges can assist courts in achieving full ICWA compliance.

Bubar, Roe, Basic Guidelines for Forensic Interviewers in Child Sexual Abuse Cases in Indian Country and Alaska Native Communities, Tribal Law and Policy Institute, 2000.
This short resource provides an overview of the primary considerations for the interview process when allegations of child sexual abuse arise in Indian country and Alaska Native communities. Forensic interviews are an important part of the investigative process, but require specialized training. This document outlines three areas of particular concern: training for interviewers, cultural competence, and core components of the child interview.

California Indian Legal Services Staff, California Judges Bench Guide: Indian Child Welfare Act, California Indian Legal Services, 2012.
Judges bench guide that explains ICWA proceedings and related matters. Contains separate chapters on jurisdiction under ICWA and interventions.

Child Welfare Information Gateway, About CAPTA: A Legislative History, U.S. Department of Health and Human Services, 2011.
Brief fact sheet on the legislative history of the Child Abuse Prevention and Treatment Act.

Child Welfare Information Gateway, Concurrent Planning for Permanency for Children, Children's Bureau, 2012.
This resource discusses concurrent planning, federal law, and different state approaches to implementation of federal requirements.

Child Welfare Information Gateway, Court Hearings for the Permanent Placement of Children, Children's Bureau, 2012.
An extensive guideline on permanency planning hearings and related issues. Discusses applicable federal laws and their appropriate implementation on a local level.

Child Welfare Information Gateway, Definitions of Child Abuse and Neglect: Summary of State Laws, U.S. Department of Health and Human Services, 2014.
This publication presents state civil laws that define the conduct, acts, and omissions that constitute child abuse or neglect that must be reported to child protective agencies. The types of maltreatment defined include physical abuse, neglect, emotional abuse, and sexual abuse. Summaries of laws for all states and U.S. territories are included.

Chill, Paul, "Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings," Family Court Review 41 (4) (2003): 457–70.
This article examines the tendency of emergency child-removal decisions—by social workers, police officers, and judges—to become self-reinforcing and self-perpetuating in subsequent child protective proceedings. This "snowball effect," as one court has referred to it, is widely acknowledged by juvenile court lawyers and judges but is largely unknown outside their circles. The article explores the causes and consequences of this phenomenon in the age of ASFA2 (the 1997 federal Adoption and Safe Families Act), which converts every day that a child spends in foster care into one more tick of the clock in a countdown toward termination of parental rights. The article provides some background on the law and practice of emergency child removal in the United States today; analyzes the factors that make initial removals outcome determinative in many child

protection cases; considers the implications of this phenomenon in light of ASFA; and identifies possible solutions.

Clifford-Stoltenberg, Chey, et al., Indian Child Welfare Glossary and Flowchart, National Indian Child Welfare Association, 2005.
Provides a flow chart of the ICWA process and contains a glossary of relevant terms.

Cornell University Law School, Federal Rules of Civil Procedure, Legal Information Institute, 2015.
The federal rules of civil procedure are the standard rules of procedure, created by branches of the U.S. government, which are frequently copied and/or slightly modified by states and Native Nations.

Cornell University Law School, Federal Rules of Evidence, Legal Information Institute, 2015.
The federal rules of evidence are the standard rules of evidence, created by branches of the U.S. government, which are frequently copied and/or slightly modified by states and Native Nations.

Cruz, Caroline M., Tribal Best Practices: There Are Many Pathways, Presentation, 2015.
This culturally based PowerPoint's objectives are to create an understanding of the challenges Native Americans and minorities face with evidence-based practices and provide an understanding of work in process with current culturally validating practices based on evidence for Native American communities.

Echo-Hawk, Holy, Evidence-Based Practices and Minority Families and Consumers, Presentation, 2006.
PowerPoint presented at the 19th Annual Research and Training Center for Children's Mental Health Conference held in Tampa, Florida.

Education Development Center, Inc. Massachusetts Child Exploitation Network, Child Sexual Exploitation: Improving Investigations and Protecting Victims, A Blueprint for Action, Education Development Center, 1995.
This document was designed to serve as a national prototype guiding collaboration among federal, state, and local agencies that are involved in investigating and prosecuting child pornography or prostitution cases and providing services to the young victims of these crimes.

Evensen, Kimber, Pathway to Hope: Healing Child Sexual Abuse, Tribal Law and Policy Institute, 2007.
Guidebook and video that presents the voices of more than forty Native people, many of whom are survivors of child sexual abuse. The Community Facilitator's Guidebook provides a step-by-step process for tribal communities to end silence about child sexual abuse, support child victims, and promote healing of those who suffered childhood abuse.

Goldman, Jill, et al., A Coordinated Response to Child Abuse and Neglect: The Foundation for Practice, National Clearinghouse on Child Abuse and Neglect, U.S. Department of Health and Human Services, Administration for Children and Families, 2003.
User manual on addressing child abuse and neglect, including discussions of child maltreatment.

Governor's Task Force on Children's Justice and Family Independence Agency, Forensic Interviewing Protocol, State of Michigan, Department of Human Services, 2011.
Provides a thorough introduction to forensic interviewing protocols and provides a series of examples, reference materials, and "Quick Guides" for trained professionals.

Grant, Jamie, and Teresa Brown, Cultural Diversity Resource Manual—American Indian and Alaska Native Resource Manual, National Voice on Mental Illness, 2003.
This manual covers the need for AI/AN outreach, the importance of cultural competence and how to develop it, create AI/AN outreach plan, evaluate your efforts, and share your experience with others.

Haight, Wendy, et al., "Making Visits Better: The Perspective of Parents, Foster Parents, and Child Welfare Workers," *Child Welfare* 81 (2) (2001): 173–202.
This resource highlights the importance of recognizing different expectations for visits and of coaching birth and foster parents about coping with children's responses.

Hegland, Susan, and Kere Hughes, Ten Evidence-Based Practices for Home Visiting Programs, Department of Human Development and Family Studies.
Highlights ten evidence-based practices for home visiting programs, including implementation recommendations and research articles that correspond with each practice.

Marcynyszyn, Lyscha A., Stuart Eskenazi, Erin J. Maher, and Peter J. Pecora, Traditions Renewed: The Mille Lacs Band of Ojibwe Improves Its Indian Child Welfare, Casey Family Programs, 2013.
This research chronicle describes how one tribal Nation, the Mille Lacs Band of Ojibwe, came together to address the high number of children placed in non-Native foster care and residential settings through an innovative redesign of its child welfare programs.

Morgan, Nancy, Resource Guide for Parents, Caregivers, and Service Providers Working with Alaska Native Children, Alaska CARES, 2005.
In Alaska Native communities, nearly everyone is impacted in some way by child sexual abuse in the past or currently. This resource was designed to provide useful and practical information, ideas, and tips to help with some of the difficult parts of this crime to support a healing process.

National CASA Association and National Council of Juvenile and Family Court Judges, Family Visitation of Children and Youth in Foster Care, *The Judge's Page Newsletter*, 2006.
Highlights how courts can make appropriate and effective visitation decisions for children in foster care, their siblings, and parents.

National CASA Association and the Tribal Law and Policy Institute, A Guide to Establishing a Tribal Court CASA Program Board of Directors or Advisory Committee, National CASA Association, 2008.
A general guide on how to create a board of directors and/or advisory committee for tribal court CASA programs.

National Child Welfare Resource Center for Tribes, Family Engagement, Family Preservation, and Support, web page, 2015.
This web page contains multiple resources on prevention resources tailored to American Indian and Alaska Native communities.

National Child Welfare Resource Center for Tribes, Foster Care Resources, web page, 2015.
This web page provides a listing of resources specific to Native foster care, including youth issues.

National Child Welfare Resource Center for Tribes, Tribal Courts in the Tribal Child Welfare System, web page, National Child Welfare Resource Center for Tribes, 2015.
Web page with multiple information resources on the role of tribal courts in the child welfare system.

National Child Welfare Resource Center for Tribes, Title IV-E Program Funding, web page, 2015.
This web page is a central location for multiple resources on Title IV-E programs and funding.

National Child Welfare Resource Center for Tribes, Tribal Customary Adoption, web page, 2015.
This web page is a central location for multiple resources on customary adoption.

National Indian Law Library, ICWA Guideline Topic 6. Emergency Removal, NARF, 2015.
Provides a break down and explanation of the legal issues related to emergency removals under ICWA, including placement preferences.

National Indian Welfare Association, Customary Adoption, web page, 2015.
Web page that provides a short description of customary adoption and a comprehensive reading list on issues relating to customary adoption.

National Resource Center for Child Protective Services, Safety Intervention Policy Standards and Agency Self-Assessment, National Resource Center for Child Protective Services, 2007.
Self-assessment tool for child welfare agencies to use in order to update and/or understand their safety policies in removal situations. Designed to help identify gaps between policy and practice.

National Resource Center for Community Based Grants for Child Abuse and Prevention, Home Visiting Programs: A Brief Overview of Selected Models, National Resource Center for Community Based Grants for Child Abuse and Prevention, 2008.
Provides a synopsis of several home visiting programs.

National Resource Center for Permanency and Family Connections and the National Child Welfare Resource Center for Tribes, Healing Footsteps: Digital Stories from Two-Spirit/LGBTQ People, online video.
The National Resource Center for Permanency and Family Connections and the National Resource Center for Tribes partnered with the Two-Spirit community in Minneapolis, Minnesota, to develop these digital stories. These digital stories were created by Lenny, Jason, and Joseph—Two-Spirit people whose lives were impacted by the child welfare system. The term Two Spirit is a universal Native American concept that relates to gender identity and sexual orientation. Generally, the term Two Spirit means that the individual's body houses both a masculine and a feminine spirit. Different Native Nations have different definitions of what it means to be Two Spirit.

Office of Juvenile Justice and Delinquency Prevention (OJJDP), Main Website, 2016.
The main website for OJJDP, a component of the Office of Justice Programs, U.S. Department of Justice, which accomplishes its mission by supporting states, local communities, and tribal jurisdictions in their efforts to develop and implement effective programs for juveniles. The Office strives to strengthen the juvenile justice system's efforts to protect public safety, hold justice-involved youth appropriately accountable, and provide services that address the needs of youth and their families. Through its components, OJJDP sponsors research, program, and training initiatives; develops priorities and goals and sets policies to guide federal juvenile justice issues; disseminates information about juvenile justice issues; and awards funds to states to support local programming. All OJJDP resources, including the **OJJDP Tribal Youth Program**.

Office of Juvenile Justice and Delinquency Prevention (OJJDP), State Contacts, 2016.
Webpage on OJJDP's main website that contains an interactive map that can be used to find state representatives and organizations that administer many OJJDP programs. This webpage can be used to find OJJDP Juvenile Justice Specialists.

Office of Juvenile Justice and Delinquency Prevention (OJJDP), OJJDP Tribal Youth Program , 2016.
Website resource for those tribal recipients of OJJDP's Tribal Youth Program (TYP) and Tribal Juvenile Accountability Discretionary (T-JADG) grants and all Federally recognized tribes seeking to prevent and control delinquency and improve tribal juvenile justice systems. Grantees and Federally recognized tribes can also request web-based resources, individualized technical assistance, or on-site training or technical assistance through this website.

Payne, Diane, Tips for Non-Native Medical Providers Working in Alaska Native Communities, Tribal Law and Policy Institute, 2008.
Provides information to assist non-Native medical personnel in responding appropriately to Native children and families when there are allegations or disclosures of child abuse and child sexual abuse.

Payne, Diane, et al., Child Abuse Protocol Development Guide, Tribal Law and Policy Institute and Southwestern Center for Law and Policy, 2003.
Intended to help Native Nations and collaborating agencies develop the type of protocol that will serve the needs of the community and the children. The guide is specifically designed to provide direction and information to local CPTs or MDTs toward development of protocols to address their system's response to child abuse and child sexual abuse.

Pianko, Pat, and Jenn Zanella, Tribal IV-E and the Fostering Connections to Success and Increasing Adoptions, Presentation, 2011.
This PowerPoint presentation was adapted for the Fostering Connection Tribal Gathering in Seattle and explains how the Fostering Connections law interacts with Title IV-E. This resource pays particular attention to reimbursements under Title IV-E.

Richland, Justin B., and Sarah Deer, Introduction to Tribal Legal Studies, 3rd ed. Lanham, MD: Rowman and Littlefield, 2015.
As one of the only comprehensive introductions to tribal law, this book covers the history and structure of tribal justice systems; the scope of criminal and civil jurisdictions; and the various means by which the integrity of tribal courts is maintained. Provides an overview of tribal legal studies, including chapters on jurisdiction, tribal courts, and ICWA.

Schechter, Susan, and Jeffrey Edleson, Effective Intervention in Women Battering and Child Maltreatment Cases: Guidelines for Policy and Practice: Recommendations from the National Council of Juvenile and Family Court Judges Family Violence Department, The National Council of Juvenile and Family Court Judges, 1999.
This book is intended to offer communities a guiding framework to develop interventions and measure progress as they seek to improve their responses to families experiencing domestic violence and child maltreatment. Chapter 1 articulates an overall principle of safety, well-being, and stability for all victims of family violence and the need to hold batterers accountable for their violence. In Chapter 2, a series of principles are developed to guide communities in structuring their responses to families experiencing dual forms of violence. Chapters 3, 4, and 5 focus on specific recommendations for the child protection system, the network of domestic violence service providers, and the juvenile and other trial courts with jurisdiction over child maltreatment cases.

Schwarzenegger, Arnold, All County Letter NO. 10-17, State of California Health and Human Services Agency Department of Social Services, 2010.
This letter provides an overview of California's law on tribal customary adoptions.

Sekaquaptewa, Pat, Roe Bubar, and JoAnne Cook, A Victim-Centered Approach to Crimes Against American Indian and Alaska Native Children, Tribal Law and Policy Institute, 2008.
This resource guide and workbook aims to provide a process for enacting a culturally appropriate criminal code that addresses the victimization of tribal children. This resource attempts to balance the goals of protecting the sacredness of children while also assuring due process protections for the accused.

Sekaquaptewa, Pat, Abby Abinanti, Maureen White Eagle, and Chia Halpern Beetso, Tribal Legal Code Resource: Juvenile Justice Guide for Drafting or Revising Tribal Juvenile Delinquency and Status Offense Laws, Tribal Law and Policy Institute, 2015.
A guide for drafting juvenile laws; contains one chapter on drafting evidence laws that includes tribal code examples and commentary.

Tribal Law and Policy Institute (in conjunction with the National CASA Association), Tribal Court CASA: A Guide to Program Development, Tribal Law and Policy Institute, 2000.
A general guide to CASA program development using examples from tribal and nontribal CASA programs.

Trope, Jack F., Title IV-E: Helping Tribes Meet the Legal Requirements, National Congress of American Indians Policy Research Center, 2010.
This guidebook was designed to provide Native Nations with information for running child welfare programs in compliance with federal law, with a particular focus on Title IV-E.

U.S. Department of Health and Human Services, The Child Abuse Prevention and Treatment Act (CAPTA) as amended by CAPTA Reauthorization of 2010, 2011.
This booklet presents CAPTA as amended by the CAPTA Reauthorization Act of 2010. The booklet also contains the Adoption Opportunities program and Abandoned Infants Assistance Act, as amended.

U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, Law Enforcement Response to Child Abuse, Office of Justice Programs, 2001.
This guide is designed to assist those working to help protect children from being victimized and to improve the investigation of child abuse cases. Pertinent consideration and helpful investigatory protocols are provided. Other useful materials include suggestions on working with physicians, responding to domestic disturbance calls, and placing children in protective custody.

U.S. Government Accountability Office, Foster Care: HHS Needs to Improve the Consistency and Timeliness of Assistance to Tribes, 2015.
This report examines (1) obstacles facing tribes interested in directly operating a title IV-E program and (2) the assistance HHS has provided. GAO interviewed officials from 17 tribes, 11 of which were currently developing title IV-E programs. These tribes were selected to achieve variation in progress toward developing a title IV-E program, size of the tribe, and HHS region. While this information is non-generalizable, it provides examples of tribes' experiences with the program. GAO also interviewed HHS and Bureau of Indian Affairs officials, and child welfare experts.

Victims of Child Abuse Project, Resource Guidelines, Improving Court Practice in Child Maltreatment Cases, National Council of Juvenile and Family Court Judges, 1995.
The purpose of these resource guidelines is to set forth the essential elements of properly conducted court hearings. The guidelines describe the requirements of juvenile and family courts in fulfilling the role now placed upon them by federal and state laws. These guidelines also describe how court calendars can be efficiently managed to achieve efficiency and avoid delays; explain the court staffing and organization necessary to make the judicial process run smoothly; and clarify costs associated with such reforms. These guidelines are meant to influence future administrative and funding decisions concerning juvenile and family courts. They are intended to help correct the gaping discrepancies that presently exist between legislative demands and judicial resources for child abuse and neglect cases.

Walker, Joe, Maria Scannapieco, Mary Iannone, and Jhon Goes In Center, Webinar Supporting the Use of Culturally Based Practices in Tribal Child Welfare, National Child Welfare Resource Center for Tribes, 2012.
This is the second in a series of webinars focusing upon the recommendations of the needs assessment. This second webinar focuses upon the findings of the NRC4T needs assessment, how to access free technical assistance through the T/TA Network, organizational assessments, as well as one tribal child welfare agency's experiences in receiving an assessment.

Walker, Nancy E., "Children as Victims and Witnesses in the Criminal Trial Process: Forensic Interviews of Children: The Components of Scientific Validity and Legal Admissibility," 65 *Law and Contemporary Problems* 149 (2002).
The problems associated with assessments of children's reports of victimization in criminal proceedings came to national attention during the 1980s and 1990s in a series of highly publicized trials of daycare staff. Walker describes information that professionals need to know if they are to conduct valid interviews of children in forensic contexts.

Wasserman, Eidell, Understanding the Effects of Childhood Trauma on Brain Development in Native Children, Tribal Law and Policy Institute, 2005.
Compiled to assist victim advocates who work with children and their caretakers in order to understand how trauma affects child development when abuse has occurred—especially when it occurs early in the child's life. This article should also be helpful to Native Nations and tribal agencies seeking to develop programs and services that promote healing and wellness for tribal children.

Weaver, Hilary N., "Native Social Work—Indigenous People and the Social Work Profession: Defining Culturally Competent Services," *Social Work* 44 (3) (1999): 217–25.
Discusses the challenges and opportunities when providing social work services in Indigenous communities.

White Eagle, Maureen, Bonnie Clairmont, and Lonna Hunter, Responses to the Co-Occurrence of Child Maltreatment and Domestic Violence in Indian Country, Tribal Law and Policy Institute, 2011.
This looks at the issues specific to Indian country relative to the co-occurrence of domestic violence and child maltreatment and highlights those practices that seem to be moving toward Native-specific promising practices.

Yellow Horse, Susan, and Maria Yellow Horse Brave Heart, Native American Children, University of Denver, 2004.
Literature review of articles and books related to evidence based and/or culturally appropriate practices in AI/AN communities.