Cherokee Nation's comments on the Proposed Regulations for State Courts and Agencies in Indian Child Custody Proceedings—RIN 1076-AF25—Federal Register (March 20, 2015)

WHO WE ARE:

Cherokee Nation is the largest federally recognized Indian tribe in the United States with more than 315,000 citizens with approximately 123,000 of those citizens residing within the Cherokee Nation. Our tribal headquarters are located in Tahlequah, Oklahoma, and our tribal jurisdiction covers most or all of 14 counties in northeastern Oklahoma. This area is commonly referred to as "Green Country" because of the abundance of trees, water and rolling hills.

The Cherokee Nation has a tripartite form of government and provides a number of services to its citizens. Some of the services offered to tribal citizens and the surrounding communities include police, fire and ambulance services; multiple state of the art health care centers; schools and child care services for children aged birth through twelfth grade, including an immersion school for children from kindergarten through sixth grade that teaches the entire curriculum in the Cherokee language; community and human services that include housing, utility, and general assistance; and robust career training and job placement services.

We also have an Indian Child Welfare Department ("ICW") that consists of 125 employees. These employees handle tribal and state child welfare proceedings; recruit and train foster homes; provide preventative services to families; and investigate reports of child abuse and neglect. In 2014, Cherokee Nation ICW was involved in approximately 1300 state initiated deprived/dependency proceedings involving approximately 2100 Cherokee children in every state in the country.[1] Cherokee Nation also participated in 360 private adoptions and approximately 175 private guardianships.[2] In addition, Cherokee Nation received approximately 9,000 ICWA notices to determine whether the child in question was an Indian child. Given our engagement in the state court systems throughout the United States, the Cherokee Nation may be the single entity most suited to discuss how Indian children and tribes are treated in various jurisdictions.

We also sit within the boundaries of a state that has one of the highest percentages of Native Americans. Despite ICWA, Indian children are still disproportionally represented in state foster care systems. The Oklahoma Department of Human Services recently reported that of the 11,000 children in DHS custody in Oklahoma, 4,300 of them are Indian children. While 39% of all children in custody are Indian children, the most recent Census information reveals that only 11% of Oklahoma's total population is Indian. There is no question that strict adherence to ICWA would reduce the disproportional rate of Indian children in custody in Oklahoma and other states.

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[1] The difference between cases and children is due to sibling groups in the same case.

[2] These are adoptions and guardianships that do not originate from a state initiated deprived/dependency proceeding.

Without a doubt, there are state courts, agencies, social workers and attorneys who follow ICWA. However, there are also many people working in state courts who reject the findings of Congress and embrace the idea that tribal families and tribal value systems are inferior to the families and values of the dominate culture. These people brutalize tribal children and tear Indian families apart, and then portray themselves as the protectors of children's rights. Throughout our comments we have included the experiences of social workers and attorneys who have devoted their lives to protecting Cherokee children, their families and their communities. It is sometimes appalling, 38 years after the passage of ICWA, the comments that we still hear from state employees, attorneys and even judges. We see what works when ICWA is followed and we see the tragedies that occur when it is not followed.

INTRODUCTION:

First, Cherokee Nation would like to thank the Department of the Interior and specifically the Bureau of Indian Affairs for heeding the advice of tribes and their citizens, tribal organizations, and child and family advocates from across the country when they urged the BIA to not only update the State Court Guidelines, but to promulgate federal regulations to ensure the purpose and spirit of ICWA would be fulfilled in state courts across the county.

Cherokee Nation would be remiss to not take this opportunity to recognize what "Baby Veronica" meant to Cherokee Nation and all of Indian Country. Thirty five years after the passage of ICWA, the Cherokee Nation lost one of its young citizens to a non-relative, non-Indian placement half a continent away, through private adoption. The night that the little curly haired girl left the Cherokee Nation, there was an almost palpable wave of grief that washed across Indian Country. Great grandparents were reminded of boarding school days, grandparents were reminded of the "baby scoop" era, and all of Indian Country was reminded of the trauma of our past. We once again cried for what we had lost.

There is no question that had the letter and spirit of ICWA been followed from the beginning of her case, Veronica would have never left the Cherokee Nation. One thing that became abundantly clear during Veronica's case was that despite the seemingly clear language of ICWA, it has always received very different interpretations depending on jurisdiction. We know from the *Holyfield*[3] case "the purpose of the ICWA gives no reason to believe that Congress intended to rely on state law" to determine how to interpret the Act. However, we continue to see Indian children, their families and their tribes treated differently under ICWA depending on the location of their case. The proposed regulations by the BIA will ensure that a Cherokee child, her family and her tribe are treated the same under ICWA whether her case originates in Oklahoma, California, or South Carolina, just as Congress intended with passage of ICWA in 1978.

A very recent case in Oklahoma, *In the Matter of M.K.T., C.D.T., and S.A.W.*, has solidified the need for legally binding federal regulations. In a case where the trial court found that it was in a

[3] *Mississippi Choctaw Indians v. Holyfield*, 490 U.S. 30, 45 (1989)

Cherokee child's best interest to move to a Cherokee home, the Oklahoma Court of Appeals reversed that order in an opinion filled with vitriol.[4] The Court called the new BIA Guidelines a "one size fits all approach" that "bear[s] little resemblance to what is really in the child's best interests, despite the self-serving pronouncements of the BIA."[5] The Court further justified overturning the best interest finding of the trial court judge by insinuating that the child wasn't "Indian" enough to be protected by ICWA or placed in a tribal home. The Court stated S.A.W. was never part of an Indian community. S.A.W.'s blood quantum is 1/128th, and she was not an enrolled tribal member until Nation representatives visited Natural Father in jail to enroll her."[6] The Court of Appeals underlined the child's blood quantum in its opinion in this case in an apparent attempt to emphasize that this child just was not "Indian enough." The Court went on to say that the proposed Cherokee placement was an attempt to "create tribal connection where none existed before."[7] However, the Court ignored that fact that the child's father was an enrolled citizen of Cherokee Nation and had been since he was a child. The Court in this case relied on the specific factors that the Guidelines said they should not consider and simply noted the Guidelines were only persuasive, so they need not be followed. This case exemplifies the need for legally binding regulations to avoid inconsistent application of ICWA. (Interestingly, it seems the Oklahoma Court of Appeals was simply waiting on a case in which it could denounce the new Guidelines. In this case, the trial court judge relied on the old BIA Guidelines and in fact, this case was fully briefed and awaiting a decision before the new BIA Guidelines were announced.)

The proposed regulations, as a whole, clearly represent best child welfare practices under ICWA. As the Amicus brief[8] filed with the United States Supreme Court during Veronica's case by Casey Family Foundation and seventeen other national child advocacy organizations stated, "Congress adopted the gold standard for child welfare policies and practices that should be afforded to all children" when it passed ICWA. Identifying the best practices was the work of the guidelines; it is the work of the proposed regulations promulgated by the BIA to ensure that these "gold standard" practices are mandated in state courts.

Finally, Cherokee Nation understands that the BIA will likely receive opposition to these proposed regulations. It is important to understand the motivations of those who oppose strengthening ICWA. The lines drawn during Veronica's case were especially illuminating. In

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[4] *In the Matter of M.K.T., C.D.T., and S.A.W.*, Case No. 113,110 Oklahoma Court of Civil Appeals, Division III May 1, 2015 (attached).
[5] *Id.* at p. 7.
[6] *Id.* at p. 8.
[7] Id. at p. 8.
[8] *See* Brief of Casey Family Programs, Child Welfare League of America, Children's Defense Fund, Donaldson Adoption Institute, North American Council on Adoptable Children, Voice for Adoption, and Twelve Other National Child Welfare Organizations as Amici Curiae in Support of Respondent Birth Father, *Adoptive Couple v. Baby Girl*, No. 12-399, United State Supreme Court, March 28, 2013.

support of Cherokee Nation, Dusten Brown and Veronica were the above mentioned child welfare organizations as well as professional organizations representing social workers and psychologists; Indian law and Family law professors; religious organizations; Guardian ad litems; members of Congress; state Attorney Generals; adult adoptees; the ACLU, and the U.S. Department of Justice.

The opposition in Veronica's case came from those who have a direct financial interest in adoption. Those who opposed an Indian child staying with her family and tribe where those whose livelihood depends on the availability of adoptable children: the adoption industry. The leader of that opposition, the American Academy of Adoption Attorneys ("AAAA"), has engaged in a PR campaign to falsely lead stakeholders to believe that the proposed regulations ignore the best interests of Indian children; put Indian children at risk of abuse; or make it difficult for Indian children to be placed. In this comment the Cherokee Nation will demonstrate that those allegations are untrue, but a brief examination of this tension between the adoption industry, represented by AAAA, and the tribes is illuminating.

The AAAA's motive for their opposition to the proposed regulations is easy to understand - adoption industry professionals need adoptable children to keep their industry alive. With the proposed regulations in place, more children will stay in the homes of relatives, their adoptions facilitated at low or no cost by tribal courts and social workers. Demand for adoptable children, particularly infants, is high. The Cherokee Nation, too, needs children to survive. It is critical to recognize that Congress found only some of those entities deserved federal protection in ICWA, and it was Indian children, families and tribes, NOT the adoption industry.

It is with this background and experience that Cherokee Nation offers the following comments.

COMMENTS:

The proposed rules are referenced by number and the text of the proposed rule is underlined. Comments from Cherokee Nation follow each section or subsection listed. If a section or sub-section is not listed, it is generally supported.

The BIA has already justified its authority to promulgate the proposed guidelines. It is clear from the text of ICWA, as well as the vast amount of case law available on the authority of the Executive Branch to promulgate rules, that the proposed federal regulations are well within the legal authority of the BIA. Cherokee Nation adopts by reference the discussion of the BIA's authority to promulgate these regulations in the comments submitted by the Association of American Indian Affairs and the Law Professors Comments in Support of the Proposed ICWA Regulations, filed by Kathryn Fort, Indigenous Law and Policy Center, Michigan State University College of Law.

§ 23.2 Definitions

Active efforts

Active efforts means actions intended primarily to maintain and reunite an Indian child with his or her family or tribal community and constitute more than reasonable efforts as required by Title IV-E of the Social Security Act (42 U.S.C. 671(a)(15)). Active efforts include, for example:

It is important that the regulations specifically note that "Active efforts" require more than or are greater than the "reasonable efforts" requirements of the Adoption Assistance and Child Welfare Act of 1980.[9] This is obviously best practice and the legal requirement in Oklahoma.[10] The following factors listed as active efforts are particularly important:

- (1) Engaging the Indian child, the Indian child's parents, the Indian child's extended family members, and the Indian child's custodian(s). This provision is particularly important because state child welfare systems seem to focus only on the biological (or legal) parents and the children. This practice often excludes extended family members

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[9] From the Native American Rights Fund ICWA Guide Online (Available at http://www.narf.org/nill/documents/icwa/index.html):
The "'active efforts' standard requires more effort than a 'reasonable efforts' standard does." *In re Nicole B.*, 927 A.2d 1194 (Md. Ct. Spec. App. 2007). A Montana court stated "The term active efforts, by definition, implies heightened responsibility compared to passive efforts." *In re A.N.*, 2005 MT 19, 23, 325 Mont. 379, 384, 106 P.3d 556, 560. An Alaska court cited an ICWA commentator who distinguished between active and passive efforts: "passive efforts entail merely drawing up a reunification plan and requiring the 'client' to use 'his or her own resources to . . . bring . . . it to fruition.'" *A.M. v. State*, 945 P.2d 296, 306 (Alaska 1997) (citing CRAIG J. DORSAY, THE INDIAN CHILD WELFARE ACT AND LAWS AFFECTING INDIAN JUVENILES 157-58 (1984)). "Active efforts, on the other hand, include 'tak[ing] the client through the steps of the plan rather than requiring the plan to be performed on its own.'" Id. A tribe may have an agreement with a state that defines active efforts. *See*, e.g., Minn. Tribal/State Indian Child Welfare Agreement, BULLETIN 99-68-11 (Minn. Dep't of Human Servs., Minn.) Aug. 25, 1999, at 5.

[10] *See In the Matter of E.P.F.L*, 265 P.3d 764 (Father is correct that DHS was required to prove that it met ICWA's active efforts requirement before his parental rights could be terminated. Congress' intended purpose in passing ICWA was to protect Indian children and promote the stability and security of tribes and families by establishing minimum standards for the removal of Indian children from their homes. Id. at ¶ 12, 177 P.3d at 593. The Court noted that the majority of courts considering the issue have concluded that the "active efforts" standard is a higher standard for a social services department than the "reasonable efforts" standard under state laws. Id. at ¶ 14, 177 P.3d at 593. In light of the plain language of § 1912(d) and the policy behind ICWA, including the desire to achieve uniformity among states, the Court declined "to follow the minority and instead join[ed] the majority of other states' courts which have interpreted ICWA and held that the 'active efforts' standard requires more effort than the 'reasonable effort' standard in non-ICWA cases." Id. at ¶ 15, 177 P.3d at 593-94.)

who may have strong bonds with the children and, in tribal cultures, often have child rearing responsibilities equal to those of biological parents.

- (2) Taking steps necessary to keep siblings together. Traditionally, Indian families tend to be large. Often it is not "an Indian child" taken into custody or placed for adoption, but multiple "Indian children" who are siblings. While being separated from parents can be traumatic for children, being able to stay with siblings can lessen that trauma. However, due to lack of foster homes and failure to seek family placements, we often see sibling groups of Indian children separated in state foster care. Specifically listing this as an "active effort" requirement will help ensure that even if children are separated from their parents, they don't lose all familial connection. This is also an example of the "gold standard" in child welfare practices.
- (4) Identifying, notifying, and inviting representatives of the Indian child's tribe to participate. This provision requires the state, court, or agency to do more than simply notify the child's tribe by requiring invitation to participate. This is extremely important when it comes to matters like family team meetings, permanency planning, placement issues, etc. and will ensure that the child's tribe has a voice when decisions are being made.
- (5) Conducting or causing to be conducted a diligent search for the Indian child's extended family members for assistance and possible placement. This requirement will help prevent the breakup of the extended family, will help the state or agency meet its requirement to comply with placement preference and if done early will make it much less likely that a child will have multiple or disruptive placements.
- (11) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or extended family in utilizing and accessing those resources. This provision may be the single most important section of the proposed regulations. The lack of access to the resources listed in this provision are without a doubt the most common cause for family disruption and the most common barriers to family reunification. These are the types of services that Cherokee Nation always advocates are required to meet the "active efforts" requirements of ICWA. Language that states there must be active assistance in helping the family find these resources is critical. Oklahoma case law provides a great analogy when discussing active efforts when the appellate court found that "To use the trial court's metaphor, 'active efforts' requires 'leading the horse to water."[11] The

[11] *See In the Matter of J.S.*, 177 P.3d 590, where the trial court held: "It was in an effort of all parties to be part of the process to do active efforts. And in a case like this, it's not the old saying that 'You can lead a horse to water, but you can't make him drink.' Well, we're not even here to lead the parent to the water. It's we point in the direction and leave it up to the drive, the determination and what should be the actions of the parents to demonstrate their care and concern for their children."

following are examples of creative ways that Cherokee Nation and state agencies have shown courts that they have provided active efforts to assist in family reunification:

- Purchasing a bicycle for mother to ride to and from work when she did not have access to transportation
- A social worker calling mom every evening to simply check in when mom was facing some severe stress factors in her life that could have caused a substance abuse relapse
- Modifying curriculums of parenting classes and other programs to offer to parents with learning disabilities or diminished mental capacity.

- (14) Supporting regular visits and trial home visits of the Indian child during any period of removal, consistent with the need to ensure the safety of the child. This provision may be important for providing increased visitation for Indian families. If the active efforts requirements are greater than the reasonable efforts requirements and a state agency's standard visitation schedule is based on a "reasonable efforts" requirements, the agency will have to show an increased level of visitation for Indian families in order to meet the active efforts requirement.

Child custody proceeding

Child custody proceeding means and includes any proceeding or action that involves:

- (1) Foster care placement, which is any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, although parental rights have not been terminated. The BIA should note that the statutory definition of "foster care placement" specifically includes state court Guardianships even if initiated by a relative other than a biological parent. Even though the text of ICWA is clear and includes "guardian" in the definition of "foster care placement," Cherokee Nation has multiple cases per year where we still have to convince courts and attorneys that ICWA applies to guardianships. Additionally the regulations should clarify that "termination of parental rights" and "adoptive placement" clearly applies to adoptions initiated by a step parent.

Continued Custody

Continued custody means physical and/or legal custody that a parent already has or had at any point in the past. The biological mother of a child has had custody of a child. The regulations should cite *Adoptive Couple v. Baby Girl* and explain how this definition is consistent with the case. The regulations should also clarify *Adoptive Couple v. Baby Girl* only placed limitations on

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Upon reversal, the Oklahoma Court of Civil Appeals held "This interpretation is contrary to the plain and ordinary language in § 1912(d) and thereby undermines congressional policy. To use the trial court's metaphor, 'active efforts' requires 'leading the horse to water.'"

the ICWA protections contained in 25 U.S.C. § 1912(d) and (f) in private adoption cases where a father "abandons an Indian child prior to birth **and** that child has never been in the Indian parent's legal or physical custody" and does not apply to state initiated deprived or dependency cases or any case where the parent "at least had at some point in the past" custody of the child. Those who oppose the regulations may try to expand the holding of *Adoptive Couple v. Baby Girl* beyond the very narrow circumstances mentioned above.

Custody

Custody means physical and/or legal custody under any applicable tribal law or tribal custom or State law. A party may demonstrate the existence of custody by looking to tribal law or tribal custom or State law. See comment as to "continued custody" above

Domicile

Domicile means:

- (1)For a parent or any person over the age of eighteen, physical presence in a place and intent to remain there;
- (2) For an Indian child, the domicile of the Indian child's parents. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child's mother. This definition seems more restrictive than in *Holyfield* and under federal case law. Physical presence is not required for domicile; the "intent to return" should be the main focus regardless of actual physical presence. Also, if the parents are not married, the domicile of the child should be that of the custodial parent, not automatically the mother. Finally, if the child is in the legal custody of a guardian (per tribal or state law) the domicile of the guardian should be the domicile of the child.

Parent

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 an unwed father where paternity has not been acknowledged or established. Although mentioned elsewhere in the regulations, it is important to add the "establish or acknowledge" paternity language to the definition section.

Upon Demand

Upon demand means that the parent or Indian custodians can regain custody simply upon request, without any contingencies such as repaying the child's expenses. It should be made clear that there can be no requirement for any type of court filing and that an "upon demand" request for return of custody must be able to be made informally and the return of custody must be immediate. If these conditions are not present, then the placement shall be deemed a "foster care placement."

Voluntary Placement

Voluntary placement means a placement that either parent has, of his or her free will, chosen for the Indian child, including private adoptions. It should be noted that an agreement by a parent to place a child in the custody of a relative or friend that is conditioned on the parent loosing custody of the child if the placement is not made cannot be considered a "voluntary placement" under ICWA. Often state agencies threaten parents with removal of their children if they do not agree to "voluntarily" place the child in the home of a friend or relative as part of a "safety plan." The state often argues that these are "voluntary placements" under ICWA and the "involuntary" provisions of ICWA are inapplicable.

§ 23.102 Definitions

Agency

Agency means a private State-licensed agency or public agency and their employees, agents or officials involved in and/or seeking to place a child in a child custody proceeding. This important revision will clarify that private adoption agencies are subject to the provisions of ICWA, not just state child welfare agencies. However, the BIA should address whether attorneys, licensed by the state, who participate in private placements are also subject to the "agency" requirements. Oklahoma statute and case law make it clear that even attorneys who are representing adoptive parents have a legal obligation to ensure compliance with the Federal and State Indian Child Welfare Acts.[12]

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[12] 10 O.S. 40.6 states:
The placement preferences specified in 25 U.S.C. § 1915, shall apply to all preadjudicatory placements, as well as preadoptive, adoptive and foster care placements. In all placements of an Indian child by the Oklahoma Department of Human Services (DHS), or by any person or other placement agency, DHS, the person or placement agency shall utilize to the maximum extent possible the services of the Indian tribe of the child in securing placement consistent with the provisions of the Oklahoma Indian Child Welfare Act. This requirement shall include cases where a consenting parent evidences a desire for anonymity in the consent document executed pursuant to Section 60.5 of this title. If a request for anonymity is included in a parental consent document, the court shall give weight to such desire in applying the preferences only after notice is given to the child's tribe and the tribe is afforded twenty (20) days to intervene and request a hearing on available tribal placement resources which may protect parental confidentiality, provided that notice of such hearing shall be given to the consenting parent.

In interpreting this statute, the Oklahoma Court of Civil Appeals held: This Court holds that **every attorney involved in matters concerning Indian children subject to the Indian Child Welfare Acts is under an affirmative duty to insure full and complete compliance with these Acts.** This Court recognizes that an **attorney who is solely an advocate for prospective adoptive parents** may, in the course of that advocacy, argue that good cause and the best interest of the child favor the adoptive parents. However, this Court further holds that this same attorney,

§ 23.103 When does ICWA apply?

- (b) There is no exception to application of ICWA based on the so-called "existing Indian family doctrine" and, the following non-exhaustive list of factors that have been used by courts in applying the existing Indian family doctrine may not be considered in determining whether ICWA is applicable. Specifically denouncing the "existing Indian family doctrine" is very important. The regulations should cite *Adoptive Couple v. Baby Girl* for the Supreme Court's disavowment of the doctrine. The Supreme Court simply found, in a footnote, that because Dusten Brown was a citizen of Cherokee Nation and Veronica Brown was his biological child and eligible for citizenship that ICWA applied to the case without qualification. The only distinction became whether Dusten Brown was protected by specific termination provisions of ICWA. In addition to the Supreme Court's rejection of "existing Indian family doctrine" the vast majority of states that have considered the doctrine have rejected it.[13]

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while acting solely as an advocate for prospective adoptive parents, qualifies as "any person" under Section 40.6, when the attorney **becomes involved to the extent of being an intermediary between a parent and prospective adoptive parents and then participating in legal proceedings leading to placement of the Indian child**. *In the Matter of the Adoption of Baby Girl B.*, 67 P.3d 359 (emphasis added).

[13] From the Native American Rights Fund ICWA Guide Online (Available at http://www.narf.org/nill/documents/icwa/index.html):
The Existing Indian Family exception (EIF) is a judicially-created exception to the ICWA that originated in *In re Baby Boy L.*, 643 P.2d 168 (Kan. 1982). In that case, the court held that the ICWA did not apply to an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be. The court interpreted the ICWA as being only concerned with removal of Indian children from an existing Indian family unit. *Id.* at 175. Although narrowly interpreted in subsequent cases, a Washington court required that in addition to an Indian child being removed from an Indian family, the child was to be returned to an existing Indian family unit or environment. *In re Crews*, 825 P.2d 305, 310 (Wash. 1992). The Crews decision appears to have been statutorily superseded. *See* WASH. REV. CODE 26.10.034(1), 26.33.040(1), 13.34.040(3) (2004).

The EIF exception has been raised to a constitutional level by two appellate districts of California (Second and Fourth). *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Ct. App. 1996); *In re Santos Y.*, 112 Cal. Rptr. 2d 692 (Ct. App. 2001); *In re Alexandria Y.*, 53 Cal. Rptr. 2d 679 (Ct. App. 1996). These cases hold that the child and his or her parents, and maybe even the extended family when involved, must have a significant social, political and cultural relationship to their tribal culture to uphold the constitutionality of the ICWA under federal law.

The EIF, however, has been implicitly and explicitly rejected by courts and legislatures in a number of states that have addressed the issue.
States rejecting the EIF exception by decision:
Alabama: *S.H. v. Calhoun County Dept of Human Res.*, 798 So. 2d 684 (Ala. Civ. App. 2001)

Alaska: *J.W. v. R.J.*, 951 P.2d 1206 (Alaska 1998); *In re T.N.F.*, 781 P.2d 973 (Alaska 1989); *A.B.M. v. M.H.*, 651 P.2d 1170 (Alaska 1982)
Arizona: *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960 (Ariz. Ct. App. 2000)
California: four of six appellate districts: *In re Lindsay C.*, 280 Cal. Rptr. 194 (Ct. App. 1991) (1st Dist.); *In re Junious M.*, 193 Cal. Rptr. 40 (Ct. App. 1983) (certified for partial publication) (1st Dist.); *In re Crystal K.*, 276 Cal. Rptr. 619 (Ct. App. 1990) (3d Dist.); *In re Hannah S.*, 48 Cal. Rptr. 3d 605 (Ct. App. 2006) (3d Dist.); *In re Desiree F.*, 99 Cal. Rptr. 2d 688 (Ct. App. 2000) (5th Dist.); *In re Alicia S.*, 76 Cal. Rptr. 2d 121 (Ct. App. 1998) (5th Dist.); *In re Vincent M.*, 59 Cal. Rptr. 3d 321 (Ct. App. 2007) (6th Dist.)
Colorado: *In re N.B.*, No. 06CA1325 (Colo. Ct. App. Sept. 6, 2007)
Idaho: *In re Baby Boy Doe (Baby Boy Doe I)*, 849 P.2d 925 (Idaho 1993)
Illinois: *In re S.S.*, 657 N.E.2d 935 (Ill. 1995)
Indiana: *In re D.S.*, 577 N.E.2d 572 (Ind. 1991)
Iowa: *In re R.E.K.F.*, 698 N.W.2d 147 (Iowa 2005)
Michigan: *In re Elliott*, 554 N.W.2d 32 (Mich. Ct. App. 1996)
Montana: *In re Riffle (Riffle II)*, 922 P.2d 510 (Mont. 1996)
New Jersey: *In re Child of Indian Heritage (Indian Child II)*, 543 A.2d 925 (N.J. 1988)
New York: *In re Baby Boy C.*, 805 N.Y.S.2d 313 (App. Div. 2005)
North Carolina: *In re A.D.L.*, 612 S.E.2d 639 (N.C. Ct. App. 2005)
North Dakota: *In re A.B.*, 2003 ND 98, 663 N.W.2d 625
Oklahoma: *In re Baby Boy L.*, 2004 OK 93, 103 P.3d 1099
Oregon: *Quinn v. Walters (Quinn II)*, 881 P.2d 795 (Or. Ct. App. 1994)
South Dakota: *In re Baade*, 462 N.W.2d 485 (S.D. 1990)
Texas: *In re W.D.H., III*, 43 S.W.3d 30 (Tex. App. 2001); *Doty-Jabbaar v. Dallas County Child Protective Servs.*, 19 S.W.3d 870 (Tex. App. 2000)
Utah: *In re D.A.C.*, 933 P.2d 993 (Utah Ct. App. 1997)
States upholding ICWAs constitutionality, including those rejecting the EIF exception
Arizona: *In re Pima County Juvenile Action No. S-903*, 635 P.2d 187 (Ariz. Ct. App. 1981)
California: *In re Vincent M.*, 59 Cal. Rptr. 3d 321 (Ct. App. 2007) (6th Dist.)
Colorado: *In re N.B.*, No. 06CA1325 (Colo. Ct. App. Sept. 6, 2007)
Illinois: *In re Armell*, 550 N.E.2d 1060 (Ill. App. Ct. 1990
Maine: *In re Marcus S.*, 638 A.2d 1158 (Me. 1994)
Michigan: *In re Miller*, 451 N.W.2d 576 (Mich. Ct. App. 1990)
Montana: *In re Riffle (Riffle II)*, 922 P.2d 510 (Mont. 1996)
North Dakota: *In re A.B.*, 2003 ND 98, 663 N.W.2d 625
Oklahoma: *In re Baby Boy L.*, 2004 OK 93, 103 P.3d 1099
Oregon: *In re Angus*, 655 P.2d 208 (Or. Ct. App. 1982)
South Dakota: *In re D.L.L.*, 291 N.W.2d 278 (S.D. 1980)
States rejecting the EIF exception by statute
California: CAL. WELF. & INST. CODE 224(a)(1) (2006); CAL. R. CT. 5.664
Iowa: Iowa Indian Child Welfare Act, IOWA CODE 232B.5(2) (2003)
Minnesota: Minnesota Indian Family Preservation Act, MINN. STAT. 260.751, .755, .761, .765, .771 (1999)
Oklahoma: Oklahoma Indian Child Welfare Act, OKLA. STAT. tit. 10 40.1-.3 (1994)

- (6) Blood quantum – For Cherokee Nation and other tribes that do not use "blood quantum" as a measure of tribal citizenship, the courts should not be allowed to address this topic. Even though the Supreme Court in *Adoptive Couple v Baby Girl* seemed bothered by Veronica's "percentage" of Indian blood, they still found that ICWA applied regardless of her blood quantum. All courts should be instructed (and bound by the Supreme Court finding) to do the same. In the opinion from Oklahoma Court of Appeals in the S.A.W. case mentioned at the beginning of the comments, the court underlined as emphasis a Cherokee child's

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Washington: WASH. REV. CODE 26.10.034(1), 26.33.040(1), 13.34.040(3) (2004) (superseding In re Crews, 825 P.2d 305 (Wash. 1992))

States adopting the EIF exception by decision
California: two of six appellate districts: *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Ct. App. 1996) (2d Dist.); *In re Santos Y.*, 112 Cal. Rptr. 2d 692 (Ct. App. 2001) (2d Dist.); *In re Derek W.*, 86 Cal. Rptr. 2d 742 (Ct. App. 1999) (2d Dist.); *In re Alexandria Y.*, 53 Cal. Rptr. 2d 679 (Ct. App. 1996) (4th Dist.)
Kansas: *In re Baby Boy L.*, 643 P.2d 168 (Kan. 1982)
Kentucky: *Rye v. Weasel*, 934 S.W.2d 257 (Ky. 1996)
Louisiana: *Hampton v. J.A.L.*, 27-869 (La. App. 2 Cir. 7/6/95); 658 So. 2d 331
Missouri: *C.E.H. v. L.M.W.*, 837 S.W.2d 947 (Mo. Ct. App. 1992); *In re S.A.M.*, 703 S.W.2d 603 (Mo. Ct. App. 1986)
Tennessee: *In re Morgan*, No. 02A01-9608-CH-00206, 1997 WL 716880 (Tenn. Ct. App. Nov. 19, 1997)
Washington: *In re Crews*, 825 P.2d 305 (Wash. 1992), superseded by WASH. REV. CODE 26.10.034(1) 26.33.040(1), 13.34.040(3) (2004)
The EIF exception still has vitality in the two California appellate districts (Second and Fourth) that have adopted a constitutionally-based EIF exception and one division within the Second District that has adopted it as an interpretation of ICWA. The exception is followed in Kentucky, Missouri and Tennessee (an unreported decision) which have no federally recognized tribes. In Kansas and Louisiana, whose courts have refused to apply the EIF exception following the one decision upholding it, the validity of the exception may be in doubt. *In re S.M.H.*, 103 P.3d 976 (Kan. Ct. App. 2005); *In re J.J.G.*, 83 P.3d 1264 (Kan. Ct. App. 2004); *In re A.P.*, 961 P.2d 706 (Kan. Ct. App. 1998); *In re H.A.M.*, 961 P.2d 716 (Kan. Ct. App. 1998); *In re H.D.*, 729 P.2d 1234 (Kan. Ct. App. 1986); *Owens v. Willock*, 29-595 (La. App. 2 Cir. 2/26/97); 690 So. 2d 948.

At the Federal level, the Supreme Court in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), implicitly rejected the EIF exception when it interpreted the ICWA to apply to Indian children who were placed for adoption and who never physically lived in an Indian home or on an Indian reservation prior to being placed with non-Indian prospective adoptive parents. *Id.* at 54. The Court made a threshold determination that the ICWA applied to these children. *Id.* at 42. It found that the state court proceeding at issue was an adoptive placement as defined by 1903(1)(iv) of the Act and that the children involved were Indian children as defined by 1903(4) of the Act even though they had never lived in an Indian home or on an Indian reservation. The Court relied on the plain language of the ICWA in its application to the facts.

blood quantum in an apparent voice of displeasure that this child was an Indian child. For tribes that do not use blood quantum as a measure of membership, repeated reference to it by supposedly learned members of the judiciary is puzzling and shows disregard for tribal decision-making to determine tribal membership.

- (c) Agencies and State courts, in every child custody proceeding, must ask whether the child is or could be an Indian child and conduct an investigation into whether the child is an Indian child. If the "active efforts" definitions are the most important provisions of the regulations, this provision may be the second most important. Requiring courts to ask, and therefore making it reversible error if they do not, in EVERY child custody proceeding whether the child is an Indian child will first, emphasize to courts and agencies the seriousness of complying with ICWA and the accompanying regulations from the beginning of the case and second, alleviate the need to "re-do" parts of a case or change placement because it is discovered a year into the case that the child subject to the proceeding is an Indian child. This regulation is an example of one that is important to every stakeholder involved in ICWA cases. The court and agencies will avoid costly mistakes; Indian children, their families and tribes will be protected by ICWA from the beginning of a case, and prospective placements will not have Indian children taken from their homes because of non-compliant placement. If this regulation is followed, it will eliminate much of the "negative" outcomes that those who oppose ICWA so often mention.
- (d) If there is any reason to believe the child is an Indian child, the agency and State court must treat the child as an Indian child, unless and until it is determined that the child is not a member or is not eligible for membership in an Indian tribe. Much like the provision above, strict adherence to this regulation will eliminate disrupted placements; prolonged ICWA cases; and lack of involvement by tribes.

§ 23.105 How does this subpart interact with State laws?

- (b) In any child custody proceeding where applicable State or other Federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Act, ICWA requires that the State court must apply the higher standard. It should be clarified that "law" includes statute, case law, regulations, policy and procedure, executive orders, tribal/state MOUs, etc. Further, if a law offers higher levels of protection to *tribes* in addition to those of parents or Indian custodians, those higher levels of tribal protections should apply. For example, the Oklahoma Indian Child Welfare Act states: "It shall be the policy of the state to cooperate fully with Indian tribes in Oklahoma in order to ensure that the intent and provisions of the federal Indian Child Welfare Act are enforced." 10 O.S. § 40.1 This is an example of *tribes* having a higher standard of protection under state law.

§ 23.106 When does the requirement for active efforts begin?

- (a) The requirement to engage in "active efforts" begins from the moment the possibility arises that an agency case or investigation may result in the need for the Indian child to be placed outside the custody of either parent or Indian custodian in order to prevent removal. This sentence is a bit confusing, it should be rearranged to read: "The requirement to engage in "active efforts" in order to prevent removal begins from the moment the possibility arises that an agency case or investigation may result in the need for the Indian child to be placed outside the custody of either parent or Indian custodian."

§ 23.107 What actions must an agency and State court undertake in order to determine whether a child is an Indian child?

- (b) State courts must ask, as a threshold question at the start of any State court child custody proceeding, whether there is reason to believe the child who is the subject of the proceeding is an Indian child by asking each party to the case, including the guardian ad litem and the agency representative, to certify on the record whether they have discovered or know of any information that suggests or indicates the child is an Indian child. It is extremely important that the inquiry be "certified" and "on the record." Cherokee Nation has been involved in countless case where we hear phrases like "I thought I asked if anyone was Indian" or a box is checked on a form that indicates parents were asked about Indian heritage. The requirement that this inquiry be on the record will hold those responsible for the inquiry more accountable.
- (d) In seeking verification of the child's status, in a voluntary placement proceeding where a consenting parent evidences a desire for anonymity, the agency or court must keep relevant documents confidential and under seal. A request for anonymity does not relieve the obligation to obtain verification from the tribe(s) or to provide notice. This is an important clarification. Especially in private adoptions, agencies and attorneys often argue that some type of request for "anonymity" by a parent relieves the agency or attorney from the duty of complying with ICWA. It is also insulting to tribes that agencies and attorneys do not believe that tribes possess the ability to keep inquires confidential. Cherokee Nation (and many other tribes) has laws at least on par with those of states in protecting confidential information in juvenile proceedings. A request for anonymity can be appropriately protected by tribes while still giving tribes the right to verify Indian status, intervene in proceedings and offer preferred placement resources.

§ 23.111 What are the notice requirements for a child custody proceeding involving an Indian child?

- (a) When an agency or court knows or has reason to believe that the subject of a voluntary or involuntary child custody proceeding is an Indian child, the agency or court must send notice of each such proceeding (including but not limited to a temporary

custody proceeding, any removal or foster care placement, any adoptive placement, or any termination of parental or custodial rights) by registered mail with return receipt requested to. Requiring notification in voluntary (as well as involuntary) child custody proceedings is supported by the text of ICWA. ICWA specifically says what type of notice "must" be made in "involuntary" proceedings. However, because tribes, parents and family members have enforceable rights even in "voluntary" cases, requiring notice in those cases is in line with the text of the statute. Some may argue that this requirement is burdensome and unworkable but the Oklahoma Indian Child Welfare Act has required notice in "voluntary" proceedings since 1982 with little to no issue.[14] Further, the Oklahoma Supreme Court has directly addressed the constitutionality of notice in voluntary proceedings and found that "[i]t would be difficult indeed to enforce the right to intervene in the [voluntary] proceeding without receiving notice of it [15] Notice in "voluntary" proceedings will also help ensure compliance with placement preferences.

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[14] *See* 10 O.S. 40.4:
In all Indian child custody proceedings of the Oklahoma Indian Child Welfare Act, **including voluntary court proceedings and review hearings**, the court shall ensure that the district attorney or other person initiating the proceeding shall send notice to the parents or to the Indian custodians, if any, and to the tribe that is or may be the tribe of the Indian child, and to the appropriate Bureau of Indian Affairs area office, by certified mail return receipt requested. The notice shall be written in clear and understandable language and include the following information:
1. The name and tribal affiliation of the Indian child;
2. A copy of the petition by which the proceeding was initiated;
3. A statement of the rights of the biological parents or Indian custodians, and the Indian tribe:
a. to intervene in the proceeding,
b. to petition the court to transfer the proceeding to the tribal court of the Indian child, and
c. to request an additional twenty (20) days from receipt of notice to prepare for the proceeding; further extensions of time may be granted with court approval;
4. A statement of the potential legal consequences of an adjudication on the future custodial rights of the parents or Indian custodians;
5. A statement that if the parents or Indian custodians are unable to afford counsel, counsel will be appointed to represent them; and
6. A statement that tribal officials should keep confidential the information contained in the notice

[15] *See Cherokee Nation v. Nomura*, 60 P.3d 967) Agency contends the Oklahoma Act's requirement of notice to the Tribe in "voluntary" adoptions is unconstitutional because in the Federal Act, under 25 U.S.C. §1912(a), notice is only required for involuntary state court proceedings. But *see* 25 U.S.C. §1913(c) which provides, "In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption. . . ." [emphasis added]. Clearly, the Federal Act contemplates voluntary proceedings. *See* also 25 U.S.C. §1911(c), which provides "In any State court proceeding for . . . termination of parental rights to, an Indian child, . . . the Indian child's tribe shall have a right to

- (i) If the child is transferred interstate, regardless of whether the Interstate Compact on the Placement of Children (ICPC) applies, both the originating State court and receiving State court must provide notice to the tribe(s) and seek to verify whether the child is an Indian child. If this regulation (and the rest of the notice requirements) had been in place and followed when Veronica Brown was born and transported to South Carolina when she was mere days old, there is no doubt that Cherokee Nation would have been properly notified, could have intervened and offered placement and reunification assistance much sooner and the anguish that later befell Veronica, her family, her tribe and even the adoptive couple could have been avoided.

§ 23.112 What time limits and extensions apply?

- (d) The court should allow, if it possesses the capability, alternative methods of participation in State court proceedings by family members and tribes, such as participation by telephone, videoconferencing, or other methods. Cherokee Nation supports this provision. In 2014, Cherokee Nation participated in cases in all 50 states. Allowing tribal attorneys, social workers, family members and others to participate via telephone or videoconferencing can increase the level of participation by all stakeholders which ultimately results in a better outcome for the child. However, we suggest that this provision be moved up higher in the regulations and be made applicable to all stages of all proceedings instead of repeating it several times throughout. Courts should make an effort at every stage of every proceeding to allow for participation by alternative means.

§ 23.113 What is the process for the emergency removal of an Indian child?

- (b) If the agency that conducts an emergency removal of a child whom the agency knows or has reason to believe is an Indian child, the agency must:
    - (2) Conduct active efforts to prevent the breakup of the Indian family as early as possible, including, if possible, before removal of the child. This provision and the understanding that "active efforts" must begin immediately, even in an emergency, is supported by case law in Oklahoma.[16]
    - (5) Take all practical steps to notify the child's parents or Indian custodians and Indian tribe about any proceeding, or hearings within a proceeding, regarding the emergency removal or emergency placement of the child. This provision is important and one example that often already happens in Oklahoma is a call or email from a state agency worker in addition to formal notice that is required per ICWA.

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intervene at any point in the proceeding." [emphasis added]. It would be difficult indeed to enforce the right to intervene in the proceeding without receiving notice of it.)

[16] *See In the Matter of M.S.*, 315 P.3d 1030

- (d) A petition for a court order authorizing emergency removal or continued emergency physical custody must be accompanied by an affidavit containing the following information:
    - (7) A specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the child to take that action;
    - (9) A statement of the specific active efforts that have been taken to assist the parents or Indian custodians so the child may safely be returned to their custody; and
- (f) Temporary emergency custody should not be continued for more than 30 days. Temporary emergency custody may be continued for more than 30 days only if:
    - (1) A hearing, noticed in accordance with these regulations, is held and results in a determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert witness, that custody of the child by the parent or Indian custodian is likely to result in imminent physical damage or harm to the child; or
    - (2) Extraordinary circumstances exist. The provisions listed in (d) and (f) mirror the requirements of the Oklahoma Indian Child Welfare Act.[17] These provisions constitute best practices and are the "gold standard." Cherokee Nation, speaking from experience, can say that when these requirements are followed by state agencies and courts, the result is faster identification of Indian children, streamlined tribal involvement, faster placement in preferred homes and less time out of the home for the child.
- (i) The court should allow, if it possesses the capability, alternative methods of participation in State court proceedings by family members and tribes, such as participation by telephone, videoconferencing, or other methods. We again note that we support this provision applying to all stages and all proceedings of ICWA cases and comment here only to reiterate that moving this provision to the beginning of the regulations and making it applicable to all stages of all "child custody proceedings" in ICWA cases may be helpful.

§ 23.115 How are petitions for transfer of proceeding made?

- (a) Either parent, the Indian custodian, or the Indian child's tribe may request, orally on the record or in writing, that the State court transfer each distinct Indian child custody proceeding to the tribal court of the child's tribe. The ability to orally request a transfer to tribal court is extremely important. First, it allows parents who may not be represented by counsel to state on the record that they wish for their case to be transferred to their tribal court. Second, it allows tribal representatives to be able to request a transfer without having to be represented by counsel in order to file a Petition to transfer. Attorneys for

[17] *See* 10 O.S. 40.5

Cherokee Nation have had to seek *pro hac vice* admission in cases in other states simply to request a transfer to tribal court. This provision would alleviate such costly and time consuming requirements to simply request a transfer to the preferred[18] forum to adjudicate Indian child custody proceedings.

- (b) The right to request a transfer occurs with each proceeding.
- (c) The right to request a transfer is available at any stage of an Indian child custody proceeding, including during any period of emergency removal. The provisions in sub sections (b) and (c) are important to clarify that a transfer to tribal court can be requested at any stage of each proceeding. This clarifies that neither the parents nor the tribe somehow waive the right to request transfer if it is not requested at the beginning of a "child custody proceeding."
- (d) The court should allow, if possible, alternative methods of participation in State court proceedings by family members and tribes, such as participation by telephone, videoconferencing, or other methods. We again note that we support this provision applying to all stages and all proceedings of ICWA cases and comment here only to reiterate that moving this provision to the beginning of the regulations and making it applicable to all stages of all "child custody proceedings" in ICWA cases may be helpful.

§ 23.116 What are the criteria and procedures for ruling on transfer petitions?

- (a) Upon receipt of a petition to transfer by a parent, Indian custodian or the Indian child's tribe, the State court must transfer the case unless any of the following criteria are met: The regulations should clarify that objection by a parent to transfer is not an absolute bar. Although the statute says the state court "must" transfer absent the objection of a parent, the converse of that is not true: the state court is not prohibited from transferring a case to the tribal court simply because a parent objects. An objection by a parent should be treated as just that, an objection. The other parent or tribe should be allowed to present rebuttal and the court should then determine, as a matter of good cause, whether the objection by a parent is a reason to deny transfer.

§ 23.117 How is a determination of "good cause" not to transfer made?

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[18] *See In re M.S.*, 10 OK 46 where, when discussing transfer to tribal court, the Oklahoma Supreme Court, quoted the U.S. Supreme Court: [I]t is precisely in recognition of this relationship [between Indian tribes and Indian children], however, that the ICWA designates the tribal court as the exclusive forum for the determination of custody and adoption matters for reservation-domiciled Indian children, and the preferred forum for nondomiciliary Indian Children. [State] abandonment law cannot be used to frustrate the federal legislative judgment expressed in the ICWA that the interests of the tribe in custodial decisions made with respect to Indian children are as entitled to respect as the interests of the parents. *Holyfield*, 490 U.S. 30, 52-53, 109 S.Ct. 1597, 1610, quoting *In re Adoption of Halloway*, 732 P.2d 962, 969-970 (Utah, 1986). *In re M.S.*, 10 OK at ¶ 15. (emphasis in original).

- (b) Any party to the proceeding must have the opportunity to provide the court with views regarding whether good cause to deny transfer exists. This provision is important because it provides due process to all stakeholders (parents, placements, children, family, the state, etc.).
- (c) In determining whether good cause exists, the court may not consider whether the case is at an advanced stage or whether transfer would result in a change in the placement of the child. This is an important provision because "objections" to transfer are often based on a perceived change of placement that may result if the case is transferred to tribal court. However, tribal courts are just as (if not more) capable of making placement (and other) decisions as state courts. A ruling on a petition to transfer should not be based on placement (or other best interest factors) because the issue is not what is best for the child, the issue in a Petition to Transfer is simply **who** should be making decisions about what is best for a child. A presumption by state courts that a tribal court can't or won't act in a child's best was a primary reason for the initial passage of ICWA. Finally, we saw in the *Holyfield* case, when the tribal court allowed the twins to remain in their non-Indian placement, that tribal courts obviously take the best interest of Indian children very seriously.
- (d) In addition, in determining whether there is good cause to deny the transfer, the court may not consider:
    - (2) Socio-economic conditions or any perceived inadequacy of tribal or BIA social services or judicial systems. We still face perceived inadequacy and bias concerns when it comes to tribal courts. Cherokee Nation has a robust court system[19] with district courts and a Supreme Court, our judges are law trained and we have modern codes and interpretive case law. However, in the last month an attorney for a non-Indian placement of an Indian child candidly stated that she was going to "object" to transfer to tribal court because she was "afraid her client would not get a fair hearing." Cherokee Nation social workers and attorneys have heard comments like:
        - "Do you have real judges?"
        - "Do you have a court house?"
        - "Your honor but the home study was done by the tribe. Are you sure it's a good family?"

      It is clear that tribes still face bias and perceived inadequacy of their social service, legal and judicial systems.

[19] We must note that whether tribes have modern, English based court systems or more traditional, peace-keeping based systems is an irrelevant factor that should not be considered, we simply note the status of our system and the frustration we feel when it is continually questioned.

- (e) The burden of establishing good cause not to transfer is on the party opposing the transfer. The regulations should include that the burden of proof for showing good cause to deny transfer to tribal court is clear and convincing evidence.[20]
- The regulations should include language from the new Department of Interior, Bureau of Indian Affairs Guidelines for State Courts and Agencies in Indian Child Custody Proceedings ("new BIA Guidelines"), Federal Register Vol. 80 No. 37, February 25, 2015, p. 10146 that directs that an independent best interest analysis is not appropriate

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[20] *See In re M.S.*, 237 P.3d 161 (Okla. S.Ct. 2010):
While Holyfield is factually distinguishable in its application to reservation-domiciled Indian children under §1911(a), it is instructive here because of the Court's emphasis on "concurrent but presumptively tribal jurisdiction" in cases under §1911(b). Holyfield, 490 U.S. 30, 36, 109 S.Ct. 1597, 1601-1602. Because of the importance of Indian children to Indian tribes, as recognized by the Congressional ICWA policy statement, we will affirm a denial of transfer of jurisdiction to tribal court only upon a showing of "good cause to the contrary."

While this Court has not decided the issue of the standard of proof required to prove "good cause to the contrary" in §1911(b) cases, and it is not designated in §1911, we have recognized the right of a parent "to the care, custody, companionship and management of his or her child is a fundamental right protected by the state and federal constitutions." *In the Matter of the Adoption of L.D.S.*, 2006 OK 80, ¶11, 155 P.3d 1, 4. In parental termination cases, "clear and convincing evidence" is the standard by which the termination-seeking claimant must prove the potential for harm to the child caused by a parent's abuse or neglect. *In the Matter of C.G.*, 1981 OK 131, ¶17, 637 P.2d, 66, 70-71. The nature of the parent-child bond requires proof more substantial than that afforded by the clear weight of the evidence or abuse of discretion standards approved by COCA in this case. It places an appropriately heavy burden upon the State to overcome the law's policy which identifies the child's best interest with that of his or her natural parents. Id.
"Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegation sought to be established." *In the Matter of the Adoption of L.D.S.*, 2006 OK 80, ¶11, 155 P.3d 1, 4, quoting In re C.G., 1981 OK 131, ¶17, n. 12, 637 P.2d 66, 71 n. 12. This standard of proof "balances the parents' fundamental freedom from family disruption with the state's duty to protect children within its borders." *Matter of Adoption of L.D.S.*, 155 P.3d 4, ¶11, 155 P.3d at 4, quoting In re C.G., 1981 OK 131, ¶17, 637 P.2d at 70.

We acknowledge this case does not require us to decide whether parental rights were terminated by the appropriate "clear and convincing" evidence standard. However, we see a similarity in the potential for harm to the relationship between an Indian child and the child's tribe if the standard of proof required for "good cause" not to transfer is inadequate. It could allow a state court to sever the relationship between child and tribe and to determine the future course of Indian children's lives without consideration of the "unique values of Indian culture" being reflected in their ultimate placement. See §1902, n. 10, supra. The "clear and convincing" standard is the appropriate standard to use here. To the extent *In the Matter of J.B.*,1995 OK CIV APP 91, 900 P.2d 1014, is inconsistent with our holding, it is expressly overruled.

when determining whether there is "good cause" to deny transfer to tribal court because a transfer to tribal court is presumed to be in the Indian child's best interest.

§ 23.118 What happens when a petition for transfer is made?

- (a) Upon receipt of a transfer petition the State court must promptly notify the tribal court in writing of the transfer petition and request a response regarding whether the tribal court wishes to decline the transfer. The notice should specify how much time the tribal court has to make its decision; provided that the tribal court must be provided 20 days from the receipt of notice of a transfer petition to decide whether to accept or decline the transfer. If the Petition to Transfer is made by the tribe, the state court should be instructed to follow any procedures dictated by the tribe. For example, when Cherokee Nation petitions to transfer a case to tribal court we file a Motion to Accept Transfer and set if for hearing in Cherokee Nation District Court after a state court judge has signed an order transferring the case to tribal court "pending tribal court acceptance." This is done through the Office of the Attorney General and the Indian Child Welfare Department. This example is provided to show that especially when the tribe is the party requesting transfer, state courts should follow the tribe's lead on procedurally involving the tribal court.

§ 23.120 What steps must a party take to petition a State court for certain actions involving an Indian child?

- (a) Any party petitioning a State court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court that prior to, and until the commencement of, the proceeding, active efforts have been made to avoid the need to remove the Indian child from his or her parents or Indian custodians and show that those efforts have been unsuccessful. This would be a good place for the regulations to clarify that "active efforts" requirements apply to the parents of an Indian child, not simply Indian parents. Parties seeking "foster care" and "termination" still sometimes argue that the heightened parental protections of ICWA only apply to "Indian parents" when the correct phrase for parental protections is "parents of Indian children" regardless of an individual's status as an Indian.

§ 23.121 What are the applicable standards of evidence?

We believe that a clerical error has resulted in the removal of the word "emotional" from the phrase "serious physical or emotional damage." The text of ICWA, § 1912 (e) and (f) clearly addresses both physical and emotional harms and the proposed regulations should include the word "emotional" in this section and every place the "serious physical damage" is used.

§ 23.122 Who may serve as a qualified expert witness?

The regulations should clarify that the state or agency social worker regularly assigned to the case cannot, under any circumstance, be the "qualified expert witness," ("QEW"). This provision of ICWA was added to require states to meet a higher burden than simply providing testimony from a social worker regularly assigned to a case. The original requirement of QEW, in addition to testimony by an agency worker, was to combat the bias of state courts. If courts allow the regularly assigned worker to testify, even if they may have some knowledge of tribal child rearing practices, the bias protection of ICWA is eliminated.

§ 23.123 What actions must an agency and State court undertake in voluntary proceedings?

Requiring notification in voluntary (as well as involuntary) child custody proceedings is supported by the text of ICWA. ICWA specifically says what type of notice "must" be made in "involuntary" proceedings. However, because tribes, parents and family members have enforceable rights even in "voluntary" cases, requiring notice in those cases is consistent with the plain language of the statute. Some may argue that this requirement is burdensome and unworkable but the Oklahoma Indian Child Welfare Act has required notice in "voluntary" proceedings since 1982 with little to no issue.[21] Further, the Oklahoma Supreme Court has directly addressed the constitutionality of notice in voluntary proceedings and found that "[i]t would be difficult indeed to enforce the right to intervene in the [voluntary] proceeding without receiving notice of it.[22] Notice in "voluntary" proceedings will also help ensure compliance with placement preferences.

§ 23.124 How is consent obtained?

- (a) A voluntary termination of parental rights, foster care placement or adoption must be executed in writing and recorded before a court of competent jurisdiction. Regulations should note that a "court of competent jurisdiction" is not necessarily where the "child custody proceeding" takes place. This allows some flexibility in consent cases, especially if a child is placed in another state.
- (b) Prior to accepting the consent, the court must explain the consequences of the consent in detail, such as any conditions or timing limitations for withdrawal of consent and, if applicable, the point at which such consent is irrevocable. It is especially important that Judges understand that when they explain to a parent that consent can be withdrawn any time prior to a final decree or order terminating rights that they also explain when and how the decree or order is filed. Sometimes those orders or decrees are filed

[21] See FN. 4, *supra*.

[22] See FN 5, *supra*.

simultaneously with the consent, other times they are not. The court must ensure that the parent truly understands when their right to revoke consent will end.

§ 23.125 What information should a consent document contain?

- (a) The consent document must contain the name and birthdate of the Indian child, the name of the Indian child's tribe, identifying tribal enrollment number, if any, or other indication of the child's membership in the tribe, and the name and address of the consenting parent or Indian custodian. If there are any conditions to the consent, the consent document must clearly set out the conditions. The consent should also list the parents' tribal enrollment numbers, if any. Especially in the case of newborns, the child may not have an enrollment number. Including tribal enrollment information for the parents will ensure the child (or their placement) has the needed information to enroll the child in the tribe.

§ 23.126 How is withdrawal of consent achieved in a voluntary foster care placement?

- (a) Withdrawal of consent must be filed in the same court where the consent document was executed. Specifying that the withdrawal of consent must be "filed" obviously means the withdrawal must be in writing, but there are no other requirements contained in the proposed regulations. The regulations should make clear that the what is required to "file" a withdrawal is minimal and requires nothing more than an affirmative showing in writing that the parent wishes to withdraw his/her previous voluntary consent.

§ 23.127 How is withdrawal of consent to a voluntary adoption achieved?

- (a) A consent to termination of parental rights or adoption may be withdrawn by the parent at any time prior to entry of a final decree of voluntary termination or adoption, whichever occurs later. To withdraw consent, the parent must file, in the court where the consent is filed, an instrument executed under oath asserting his or her intention to withdraw such consent. Again, the regulations should clarify what has to be filed and explain that the threshold for content of the document is minimal.
- (b) The clerk of the court in which the withdrawal of consent is filed must promptly notify the party by or through whom any preadoptive or adoptive placement has been arranged of such filing and the child must be returned to the parent or Indian custodian as soon as practicable. The regulations should just use the word "court." Using "court clerk" may be too specific depending on how courts are structured. Some of these types of notices may come directly from a Judge, a "court coordinator," state prosecutors or other similar parties.

§ 23.128 When do the placement preferences apply?

It is extremely important to address the timing of placement preferences and "good cause" throughout the following sections of the regulations. Anytime an Indian child is not placed in the home of an "extended family member" An immediate finding of "good cause" to deviate should be made before moving on to subsequent placement preferences. Often a child is in a placement for months (or unfortunately even years) before the court ever has a "good cause hearing." However, the statute and regulations make clear that the child should have never been in that home without a finding of "good cause" to deviate from placement preferences.

This seems to be an area that the opposition is very vocal about, specifically the provisions on the role of bonding and attachment. However, if ICWA and the regulations are followed, the court should never get to the point where it is removing an Indian child from a secure attachment. If relative and tribal home searches are done immediately and diligently and the child is placed within ICWA's preferences at the beginning of a case, the court will never be faced with moving a child who could arguably be harmed because of bonding and attachment issues.

Finally, the regulations should include information, which addresses the holding in *Adoptive Couple v. Baby Girl* on how a preferred party under ICWA must "formally [seek] to adopt the child. This is because there simply is no "preference" to apply if no alternative party that is eligible to be preferred under § 1915(a) has come forward." The regulations must address what a preferred party has to do to "come forward," while specifically clarifying that the U.S. Supreme Court did not say a party has to "file a formal adoption petition." Alaska has recently addressed this issue in emergency regulations issued by the Governor's Office.[23] Those regulations should be instructive here.

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[23] *See* Memorandum from Scott Meriwether to Triptaa Surve, April 15, 2015 Re: Filed Emergency Regulations: Petition of Adoption of children in state custody, which adds a new regulation in Alaska that states:

For Indian children who are in the custody of the state where the department's permanency goal for the child is adoption, the department will consider the following to constitute a proxy for a formal petition for adoption:

(1) The request of a relative, tribal members or other Indian family interested in immediate placement and adoption of a child at any court hearing in the Child in Need of Aid matter; or
(2) The request of a relative, tribal members or other Indian family interested in immediate placement and adoption of a child, conveyed to the department by phone, mail, fax, electronic mail or in person; or
(3) The request by the child's Tribe or tribe in which the child is eligible for enrollment to the department on behalf of a relative or tribal member who the Tribe has confirmed is requesting immediate placement and adoption of a child.

- (b) The agency seeking a preadoptive, adoptive or foster care placement of an Indian child must always follow the placement preferences. If the agency determines that any of the preferences cannot be met, the agency must demonstrate through clear and convincing evidence that a diligent search has been conducted to seek out and identify placement options that would satisfy the placement preferences specified in §§ 23.129 and 23.130 of these regulations, and explain why the preferences could not be met. A search should include notification about the placement proceeding and an explanation of the actions that must be taken to propose an alternative placement to. If this regulation is followed from the beginning of a case, the types of issues we see with disruptive placements will be virtually eliminated.
- (c) Where there is a request for anonymity, the court should consider whether additional confidentiality protections are warranted, but a request for anonymity does not relieve the agency or the court of the obligation to comply with the placement preferences. This provision is extremely important in private adoptions. The adoption bar has convinced themselves that if they simply state in a notice to tribes that mom is "requesting anonymity" they have established good cause by clear and convincing evidence to deviate from the placement preferences, which is certainly not the case. Oklahoma law specifically addresses how courts should handle requests for anonymity by allowing the tribe to present placement options that would maintain a parent's anonymity.[24] Also, the regulations should define anonymity. It seems clear that what is meant here is that a parent wishes to have a "closed" adoption. However, Cherokee Nation has been involved in multiple private adoptions where a mother has "requested"[25] anonymity in the consent or other documents yet talked about her "open adoption" agreement as the reason she wishes to choose a specific placement. While tribes and everyone else involved in adoptions should certainly respect true requests for anonymity, those requests are few and far between and should be legitimate requests to be given any weight.
- (d) Departure from the placement preferences may occur only after the court has made a determination that good cause exists to place the Indian child with someone who is not listed in the placement preferences. Again, it is important that the regulations recognize

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[24] 10 O.S. 40.6 (If a request for anonymity is included in a parental consent document, the court shall give weight to such desire in applying the preferences only after notice is given to the child's tribe and the tribe is afforded twenty (20) days to intervene and request a hearing on available tribal placement resources which may protect parental confidentiality, provided that notice of such hearing shall be given to the consenting parent.)

[25] Requested is quoted because obviously if mom is seeking an "open" adoption where she (and sometimes other family members) have a relationship with the child and adoptive family, she is not "requesting" to remain anonymous. Instead, adoption attorneys insert this word in consent, and other documents, in an attempt to avoid ICWA placement preference after they have already "matched" an Indian child with a non-ICWA placement.

that a finding of good cause must be made before an Indian child is placed outside of the preferences. If this occurs, placement disruption due to ICWA's placement preferences will be almost non-existent.

§ 23.131 How is a determination for "good cause" to depart from the placement preferences made?

The language from the new BIA Guidelines stating that the placement preferences are presumed to be in an Indian child's best interest and that the court should not engage in an independent best interest analysis, separate from the overall best interest, should be include in the regulations. As mentioned in the introduction, a recent Oklahoma Court of Civil Appeals case rejected the language from the new BIA Guidelines that states: "provided that extraordinary physical or emotional needs of the child does not include ordinary bonding or attachment that may have occurred as a result of a placement or the fact that the child has, for an extended amount of time, been in another placement that does not comply with the Act. The good cause determination does not include an independent consideration of the best interest of the Indian child because the preferences reflect the best interests of an Indian child in light of the purposes of the Act." If the regulations do not include this language, state courts will continue to use bonding that has occurred in violation of ICWA and arbitrary "best interest" arguments to violate the placement preferences of ICWA that Congress determined to be in the best interest of Indian children.

- (c) A determination of good cause to depart from the placement preferences must be based on one or more of the following considerations:
    - (1) The request of the parents, if both parents attest that they have reviewed the placement options that comply with the order of preference. It should be noted that parental preference does not automatically show good cause to deviate from placement preferences, and should only be a consideration. The Kansas Supreme Court recently held that:

> In any event, in light of the text of 25 U.S.C. § 1915(c), BIA Guidelines F.1. and F.3., and the commentary to both of those guidelines, we are persuaded that the "parental preference" referred to in §1915(c) was not intended to permit a biological parent's preference for placement of a child with a non-Indian family to automatically provide "good cause" to override the adoptive placement preferences of 25 U.S.C. §1915(a). Instead, a parent's request for anonymity with respect to placement of the child must be considered along with other relevant factors, including the best interest of the child, in deciding whether to modify the order of consideration of ICWA's placement references. *See B.G.J.*, 281 Kan. at 565, 133 P.3d 1 (holding that "[t]he best interest of the child remains the paramount consideration, with ICWA preferences an important part of that consideration"). *See In re T.S.W.*, 276 P.3d 133 (Kan. 2012).

ICWA states "Where appropriate, the preference of the Indian child or parent shall be considered." The regulations must note that courts shall consider, but are not bound by parental preference. In no child placement, ICWA or otherwise, is parental preference the sole determining factor. There are statutory requirements that include child safety, age, marital status, etc., that are all factored into the placement of a child. In no state does parental preference override statutory considerations for child placement and ICWA should not be the exception to that.

- (2) The request of the child, if the child is able to understand and comprehend the decision that is being made. The regulations have to set some baseline age, otherwise, you will have attorneys for non-ICWA complaint placements arguing that a 2 year old is "able to understand and comprehend the decision being made." For example, in Oklahoma a 12 year old child is presumed competent to state a preference when it comes to which parent they want to live with in a divorce proceeding.[26] On the other hand, South Carolina has found that a 3 year old child is competent to testify in a court of law in both criminal and state initiated deprived and dependency proceedings.[27] If the regulations do not set a minimum age at which a child is presumed "to understand and comprehend the decision being made," then this is an area where we will see starkly different treatment of the Indian child based on jurisdiction.
- (3) The extraordinary physical or emotional needs of the child, such as specialized treatment services that may be unavailable in the community where families who meet the criteria live, as established by testimony of a qualified expert witness; provided that extraordinary physical or emotional needs of the child does not include ordinary bonding or attachment that may have occurred as a result of a placement or the fact that the child has, for an extended amount of time, been in another placement that does not comply with ICWA. The Cherokee Nation understands that the opposition will strongly oppose this provision. They will say that it goes against a child's best interest, treats a child as property or completely ignores bonding and attachment. There will be those that argue that this provision will lead to RAD (Reactive Attachment Disorder) and other emotional problems. The reasoning behind this provision is simplistic; one cannot violate the law then

[26] *See* Oklahoma law 43 O.S. § 113 which states when dealing with parental custody "There shall be a rebuttable presumption that a child who is twelve (12) years of age or older is of a sufficient age to form an intelligent preference."

[27] *See State v. Cooper*, 353 S.E.2d 451 (S.C.1987) where a 3 year old was allowed to testify in a criminal sexual abuse trial via closed circuit television and *South Carolina Department of Social Services v. Doe*, 355 S.E.2d 543 (S.C. 1987) where the court reversed the trial court's decision to allow admission of a three year old child's sexual abuse disclosure as an exception to hearsay, upon reversal the court said, "unlike the judge, we think the child should have been called as a witness if her testimony was critical."

rely on that violation to justify the end result he seeks. There is only one area of law where one can openly flout the law for an extended period of time then rely on that violation to prevail: property law. So in fact, when you allow a placement to use the argument "well, we have illegally had the child for X, so we should get to keep her," that is the definition of treating a child as property. Several courts have had to face the issue of placement of an Indian child who has been in a non-ICWA compliant placement where bonding has occurred and they have all handled the placement decisions with integrity:

- In *Choctaw v. Holyfield* the U.S. Supreme Court held:

> We are not unaware that over three years have passed since the twin babies were born and placed in the Holyfield home, and that a court deciding their fate today is not writing on a blank slate in the same way it would have in January 1986. Three years' development of family ties cannot be undone, and a separation at this point would doubtless cause considerable pain.
>
> Whatever feelings we might have as to where the twins should live, however, it is not for us to decide that question. We have been asked to decide the legal question of who should make the custody determination concerning these children - not what the outcome of that determination should be. The law places that decision in the hands of the Choctaw tribal court. Had the mandate of the ICWA been followed in 1986, of course, much potential anguish might have been avoided, and in any case the law cannot be applied so as automatically to "reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation." (citation omitted) It is not ours to say whether the trauma that might result from removing these children from their adoptive family should outweigh the interest of the Tribe - and perhaps the children themselves - in having them raised as part of the Choctaw community. Rather, "we must defer to the experience, wisdom, and compassion of the [Choctaw] tribal courts to fashion an appropriate remedy."

- The trial court Judge in the Veronica case held:

> Though the adoptive couple have had this child in their care for two years, a child the right to custody cannot ripen simply by virtue of passage of time. When the child was but four months old, the [Adoptive Parents] knew her natural father wanted custody of his daughter and he was contesting the adoption both in Oklahoma

and in South Carolina. However, they elected to pursue adoption over his objection. Custody and parental rights cannot be gained by adverse possession.

- The South Carolina Supreme Court in the Veronica case held:

  From the outset, rather than seek to place Baby Girl within a statutorily preferred home, Mother sought placement in a non-Indian home. In our view, the ensuing bond that has formed in the wake of this wrongful placement cannot be relied on by Appellants and the dissent to deviate from the ICWA's placement preferences.

  While the best interests of the child standard is always a guiding consideration when placing a child, any attempt to utilize our state's best interests of the child standard to eclipse the ICWA's statutory preferences ignores the fact that the statutory placement preferences and the Indian child's best interests are not mutually exclusive considerations. Instead, the ICWA presumes that placement within its ambit is in the Indian child's best interests. *See In re C.H.*, 997 P.2d 776, 784 (Mont. 2000) ("[T]he best interests of the child . . . is an improper test to use in ICWA cases because the ICWA expresses the presumption that it is in an Indian child's best interests to be placed in accordance with statutory preferences. To allow emotional bonding—a normal and desirable outcome when, as here, a child lives with a foster family for several years—to constitute an 'extraordinary' emotional need [comprising good cause to deviate from the preferences] would essentially negate the ICWA presumption." (emphasis added)). Therefore, "the unfettered exercise of [state] discretion poses a real danger that the ICWA preferences will be overridden upon the slightest evidence favoring alternative placement." Barbara Ann Atwood, *Flashpoints under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 Emory L.J. 587, 645 (2002). Thus, the bonding that has occurred between Appellants and Baby Girl has not satisfied this Court that custody with Father is against Baby Girl's best interests. For this reason, under these facts, we cannot say that bonding, standing alone, should form the basis for deviation from the statutory placement preferences.

- <u>(4) The unavailability of a placement after a showing by the applicable agency in accordance with § 23.128(b) of this subpart, and a determination by the court that</u>

active efforts have been made to find placements meeting the preference criteria, but none have been located. For purposes of this analysis, a placement may not be considered unavailable if the placement conforms to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties. We suggest "active efforts" be replaced with a similar phrase. "Active efforts" is a term of art in ICWA and has specific statutory application. Using it when referring to "good cause" to deviate from placement preferences may lead to confusion. "Diligent search" is a term used in Oklahoma and by Cherokee Nation when talking about efforts to find a placement that complies with ICWA

§ 23.133 Who can make a petition to invalidate an action?

- (c) There is no requirement that the particular party's rights under ICWA be violated to petition for invalidation; rather, any party may challenge the action based on violations in implementing ICWA during the course of the child custody proceeding. This important provision clarifies that certain provisions of ICWA cannot be "waived" by one party because any party may challenge an action based on violations of any other party's rights. This will also allow a party with greater experience and resources, for example a tribe represented by counsel knowledgeable about ICWA, to raise violations that others may not be aware of. This provision also ensures that a party's absence from a hearing or proceeding does not mean that his rights won't be protected.
- (d) The court should allow, if it possesses the capability, alternative methods of participation in State court proceedings by family members and tribes, such as participation by telephone, videoconferencing, or other methods. Again, Cherokee Nation adamantly supports this provision, but believes that it would be more effective if moved to the top of the regulations with clear instruction that it applies at every stage of every proceeding. This would eliminate the need of repeating the provision in multiple sections.

CONCLUSION

"There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children" and Cherokee Nation thanks the BIA for their willingness to see that ICWA is applied and implemented to protect our children. We support the proposed regulations as a whole and hope that the BIA will consider some of our suggested changes. The proposed regulations will lead to uniform application and implementation of ICWA across all jurisdictions and "protect the best interests of Indian children and [] promote the stability and security of Indian tribes and families" just as Congress intended when it passed ICWA in 1978.

ATTACHMENT

THIS OPINION HAS BEEN RELEASED FOR PUBLICATION
BY ORDER OF THE COURT OF CIVIL APPEALS

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION III

IN THE MATTER OF M.K.T., C.D.T., and S.A.W., DEPRIVED CHILDREN:	)	
STATE OF OKLAHOMA,	)	
Petitioner/Appellant,	)	
vs.	)	Case No. 113,110
TRACEY NICOLE PIGG (Natural Mother), CLAYTON WILLBOURN (Natural Father),	)	
Respondents/Appellants, and	)	
PATTY DUCKWORTH (Foster Mother),	)	
Appellant, and	)	
S.A.W.,	)	
Appellant, and	)	
CHEROKEE NATION,	)	
Intervenor/Appellee.[1]	)	

[1] The parties erroneously list the trial judge, Hon. Wilma Palmer, as the Appellee on their various appellate filings. The only Appellee in this case is the Cherokee Nation (the Nation).

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE WILMA PALMER, JUDGE

REVERSED

Larisa Grecu-Radu, Assistant District Attorney, Tulsa, Oklahoma,	For Petitioner/Appellant, State of Oklahoma,
Delorus Crawford, Tulsa, Oklahoma,	For Respondent/Appellant, Natural Mother,
Brian Wilkerson, Tulsa, Oklahoma,	For Respondent/Appellant, Natural Father,
Becki A. Murphy, MURPHY FRANCY PLLC, Tulsa, Oklahoma,	For Appellant, Foster Mother,
Kacie Cresswell, Owasso, Oklahoma,	For Appellant, S.A.W.,
Robert Garcia, Assistant Attorney General, Cherokee Nation, Tahlequah, Oklahoma,	For Intervenor/Appellee, Cherokee Nation.

Opinion by Bay Mitchell, Presiding Judge:

¶1 In this case, we consider whether the trial court properly ordered the transfer of minor child S.A.W. from a traditional foster placement into a Cherokee Nation foster home. Petitioner/Appellant State of Oklahoma (the State), Respondents/Appellants Tracey Nicole Pigg (Natural Mother) and Clayton Willbourn (Natural Father), Appellant

Patty Duckworth (Foster Mother), and Appellant S.A.W. (collectively, Appellants) claim, among other things, that they presented clear and convincing evidence of good cause to deviate from the Indian Child Welfare Act (ICWA) placement preferences. We agree.

¶2 In May 2013, the State placed two-year-old S.A.W. and her two older siblings in emergency protective custody and filed a petition to adjudicate the children as deprived due to neglect, lack of supervision and exposure to substance abuse. All of the children belong to Natural Mother, who is not a member of any Native American tribe, but each child has a different father. Natural Father was incarcerated at the time S.A.W. was taken into protective custody and he was, at least at some point, a member of the Cherokee Nation.[2] S.A.W. was placed in a "traditional" (*i.e.*, non-ICWA-compliant) placement with Foster Mother, and the older children were placed in another foster home.

¶3 For the next nine months, the Department of Human Services (DHS) contacted extended family of Natural Mother and Natural Father in an effort to find an ICWA-compliant placement for S.A.W. Each family member was either unsuitable or not

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[2] When the Nation was notified of the deprived proceeding they went to the jail where Father was incarcerated with paperwork to get S.A.W. enrolled as a member of the tribe. The parties dispute whether S.A.W. and Natural Father are still members of the Nation. When Natural Father learned of the Nation's desire to take custody of S.A.W. and move her to an ICWA foster home he executed documents to relinquish his and S.A.W.'s memberships in an attempt to circumvent ICWA. The Nation denies receiving the paperwork and claims Natural Father and S.A.W. are still enrolled members. The parties do not address whether Natural Father may legally relinquish S.A.W.'s membership along with his own or whether such relinquishment would be sufficient to circumvent ICWA. Because these issues are unnecessary to our decision, we do not address them.

interested in placement. DHS also sought help from the Nation in finding an ICWA-compliant placement for S.A.W. The Nation, however, indicated it did not have a placement available for S.A.W.

¶4 In February 2014, the Nation located an ICWA-compliant placement for S.A.W. with a Cherokee family. On May 6, 2014, exactly one year after S.A.W. was removed from Natural Mother's home, the Nation filed a motion to transfer S.A.W. to an ICWA-compliant foster home. The State, Natural Mother, Natural Father, Foster Mother, and S.A.W. filed a joint combined objection to the removal and asked the court to find good cause to deny the change in placement. Following a hearing, on July 21, 2014, the court found that Appellants failed to demonstrate good cause to deviate from the ICWA placement preferences and found that it was in S.A.W.'s best interest to move her pursuant to a transition plan.

¶5 On appeal, Appellants claim the trial court erred by (i) violating Natural Mother and Natural Father's fundamental right to participate in the care, custody, and maintenance of their child; (ii) failing to find good cause to deviate from ICWA's placement preferences and ordering removal of S.A.W. from Foster Mother's home; and (iii) failing to address whether S.A.W. was an "Indian child" for purposes of ICWA and applying ICWA where Natural Father relinquished his and S.A.W.'s tribal memberships. We reverse on Appellants' second proposition of error.

¶6 The Oklahoma Indian Child Welfare Act, 10 O.S. 2011 §40.6, provides that the placement preferences of the federal ICWA, 25 U.S.C.A. §1915, "shall apply to all pre-adjudicatory placements, as well as pre-adoptive, adoptive and foster care placements." Section 1915 provides priority for placement of Indian children with:

> (i) a member of the Indian child's extended family;
>
> (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
>
> (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
>
> (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

25 U.S.C.A. §1915(b).

¶7 Section 1915 allows for deviation from the placement preferences where "good cause" exists to do so. *See id.* The question of whether there is good cause to deviate from the preferences is a factual issue to be decided by the trial court. The party seeking to avoid the placement preferences bears the burden of demonstrating by clear and convincing evidence that good cause exists. *In re Adoption of Baby Girl B.*, 2003 OK CIV APP 24, ¶58, 67 P.3d 359, 370. Likewise, we will apply the same test on review – whether there was clear and convincing evidence of good cause to overcome the presumption favoring an ICWA-compliant placement.

¶8 ICWA does not define what constitutes "good cause" to deviate from the statutory scheme, and courts disagree whether the child's best interests is an independent factor to be considered in the good cause determination. Some courts hold that ICWA does not override the traditional best interests of the child test but acknowledge that ICWA may alter the rule's focus. *Id.*, at ¶62, 67 P.3d at 371. Other courts "take the approach that the Act's scheme and design incorporate the child's best interests [and] deem the Act to be a presumptive statement of the child's best interests." *Id.* at ¶63, 67 P.3d at 371. Still others take a "more expansive approach" and consider the child's best interests along with other factors to determine whether good cause exists. *Id.* at ¶64, 67 P.3d at 371. The Court of Civil Appeals in *Baby Girl B.* reviewed relevant Oklahoma case law and concluded that "a child's best interest is a criterion to consider, albeit not the sole criterion, because other factors, including those set forth in the statutes and the Guidelines must also be considered." *Id.* at ¶68, 67 P.3d at 372.

¶9 Until recently, the Bureau of Indian Affairs (BIA) Guidelines were silent on this issue. On February 25, 2015, the BIA released updated Guidelines in an effort to "clarify the minimum Federal standards, and best practices, governing implementation of [ICWA.]" Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146, 10,150 (Feb. 25, 2015). The Guidelines now provide, in pertinent part:

> (c) A determination of good cause to depart from the placement preferences must be based on one or more of the following considerations:
>
> (1) The request of the parents, if both parents attest that they have reviewed the placement options that comply with the order of preference.
>
> (2) The request of the child, if the child is able to understand and comprehend the decision that is being made.
>
> (3) The extraordinary physical or emotional needs of the child, such as specialized treatment services that may be unavailable in the community where families who meet the criteria live, as established by testimony of a qualified expert witness; provided that extraordinary physical or emotional needs of the child does not include ordinary bonding or attachment that may have occurred as a result of a placement or the fact that the child has, for an extended amount of time, been in another placement that does not comply with the Act. *The good cause determination does not include an independent consideration of the best interest of the Indian child <u>because the preferences reflect the best interests of an Indian child</u> in light of the purposes of the Act.*

Id. at 10,158 (emphasis added).

¶10 We disagree that the good cause determination should not include an independent consideration of the child's best interests. The Act itself recognizes that it is this country's policy "to protect the best interests of Indian children[.]" See 25 U.S.C.A. §1902. We also disagree that a court should disregard the length of time the child has spent in a non-ICWA placement and the typical bonding that the child experiences. Ordinarily, the specific circumstances of a child's background and those factors that surround a child's removal and placement would be highly relevant and very important. The BIA Guidelines' intentional disregard of these factors results in a

one-size-fits-all approach to the placement of children with any tribal affiliation. That result may bear little resemblance to what is really in the child's best interests, despite the self-serving pronouncements in the BIA Guidelines.

¶11 This case demonstrates why the BIA approach fails to satisfy congressional intent. In passing ICWA, Congress found "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions." 25 U.S.C.A. §1901(4). ICWA thus articulates a "federal policy that, where possible, an Indian child should *remain* in the Indian community[.]" *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37, 109 S.Ct. 1597, 1602, 104 L.Ed.2d 29 (1989) (emphasis added) (quoting H.R. Rep. No. 95-1386, at 24 (1978)).

¶12 ICWA has been interpreted and applied in a manner that far exceeds its original purpose. Children who do not have any tribal connection other than biology, oftentimes through distant ancestry, are transferred from stable homes in order to create a tribal connection *where none existed before*. This often occurs, as in the case at hand, at the expense of the child's best interest. S.A.W. was never part of an Indian community. S.A.W.'s blood quantum is 1/128th, and she was not an enrolled tribal member until Nation representatives visited Natural Father in jail to enroll her. This, of course, was after the State initiated the deprived case. She was removed from the only stable

home she had ever known solely because of her distant biological link to the Nation. We do not believe this to be Congress' intent.

¶13 The BIA Guidelines are not binding and are instructive only. *See In re: T.S.*, 2013 OK CIV APP 108, ¶50 n.25, 315 P.3d 1030, 1046 n.25 (citing *Adoptive Couple v. Baby Girl*, ____ U.S. ____, 133 S.Ct. 2552, 2561, 186 L.Ed.2d 729 (2013)). Accordingly, in Oklahoma we will continue to consider the child's best interests as a very important factor when deciding whether good cause exists to deviate from the ICWA placement preferences.

¶14 In the instant case, transferring S.A.W. to another foster home after one year did not serve her best interests. The Nation's only objection to the first foster home was that it was not ICWA-compliant. Everyone involved (except Nation representatives) wanted the first foster home placement to continue. By all accounts S.A.W. was doing very well there. S.A.W. experienced a pattern of severe neglect before she was taken into DHS' custody. She displayed aggressive behavior at daycare and had trouble trusting others. However, she had bonded deeply with Foster Mother and was thriving under Foster Mother's care. Foster Mother maintained S.A.W.'s connection with her siblings and fostered S.A.W.'s relationships with Natural Mother and Natural Father.[3] Additionally, Foster Mother testified that she had relationships with numerous

[3] Natural Mother and Natural Father both expressed a strong desire for S.A.W. to remain in foster care with Foster Mother and said they wanted Foster Mother to adopt S.A.W. if their parental rights were terminated.

members of the Cherokee Nation and would make efforts to expose S.A.W. to tribal customs and activities. S.A.W.'s therapist testified that, if S.A.W. were moved from Foster Mother's home, she would likely experience a secondary trauma stemming from the neglect and removal she had already experienced. She said that S.A.W. would likely experience this trauma and would have difficulty attaching even if the transition took place over a period of time.

¶15 BIA Guidelines notwithstanding, we find it was in S.A.W.'s best interest to remain in Foster Mother's home and that Appellants presented unrebutted clear and convincing evidence of good cause to deviate from the ICWA placement preferences. Accordingly, we reverse the trial court's Order. S.A.W. should be returned immediately to the care and custody of Foster Mother.

¶16 REVERSED.

HETHERINGTON, C.J., and JOPLIN, J., concur.