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Culture and Law: Preliminary Findings in a Review of 100+ Tribal Welfare Codes

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Before European settlement, U.S.-based tribes cared for children and supported families through informal child welfare practices.¹ These practices—which were deeply embedded in the fabric of families, clans, and communities—protected children and ensured each tribe’s future.² Post colonization, assimilative federal Indian policies replaced traditional tribal child welfare practices.³ These policies’ legacy of harm continues to be a central challenge for tribal child welfare systems today.⁴ In response, and in accordance with federal trust responsibility, Congress passed the Indian Child Welfare Act of 1978 (ICWA).⁵ Through ICWA, Congress recognizes tribe’s long-standing authority to regulate and care for member children.⁶ Because ICWA “assumes that a tribal code is the governance mechanism by which a tribe establishes and implements its jurisdiction over all aspects of child well-being,”⁷ the Act also supports tribes’ reclamation of self-determination over child welfare through lawmaking.

Over the last 35 years numerous tribes have created their own child welfare standards. By crafting child welfare codes that balance traditional culture and contemporary needs, tribes both protect member children (and their families) in culturally appropriate ways and reaffirm their sovereign authority.

Working in a research partnership, the Native Nation Institute at the University of Arizona (NNI) and the National Indian Child Welfare Association (NICWA) have reviewed 107 tribal child welfare codes. The sample includes codes from tribes of varying sizes, locations across the United States, and varying time periods. This NNI-NICWA study is the most comprehensive child welfare code review ever conducted. The review has revealed several common components of tribal child welfare codes. These components are not very different from provisions in state codes. For example, tribal child welfare codes typically include a purpose statement, definitions of terms, a statement about the tribe’s jurisdictional authority over child welfare, and language that identifies child abuse and neglect. Also similar to state courts, many tribal child welfare codes include procedures for the emergency removal of children from a home, placement in foster or kinship care, termination of parental rights, guardianship, and adoption.

The most obvious differences between tribal and state child welfare codes arise from the fact that tribes incorporate unique customs, tradition, and culture into their codes. For example, some tribal codes refer to customary law. A tribe’s customary law is part of its common law and is a living expression of the rules practices that emanate from the community’s culture. Nearly one-fifth of the codes reviewed incorporate customary law into court processes or draw on it as a source of court authority.

Some tribes also incorporate culture into their definitions of the “best interest of the child.” The “best interest of the child” test is one that is deeply culturally bound. Courts use this standard to assess: what services, actions, or orders best serve a child, and who is in the best position to provide care. Twenty-three percent of tribal codes included a clear statutory definition of best interest, and of those, 69 percent explicitly included cultural considerations in their definition of best interest of the child. In many instances, the tribal definition reflects the intertwined nature of the child’s and the tribe’s best interest. For example, a child may be understood to belong to her family, kin, and tribe, but the tribe, kin, and family also belong to the child.

The definition of “extended family” is similarly culturally bound and particularly important. Because ICWA requires that state courts defer to a tribe’s definition of extended family when working with ICWA-eligible children,⁸ tribes’ codification of this term is relevant in both tribal and state child welfare proceedings. In the absence of a tribal definition, ICWA defines extended family as: “a person who has reached the age of eighteen and who is the Indian child’s grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second

cousin, or stepparent.⁹ Sixty percent of tribal codes reviewed include definitions of family that vary from ICWA's definition. Most of these use the ICWA definition but also add other family members, fictive kin or customary family,¹⁰ or both. Significantly, however, a quarter of tribal codes with alternative extended family definitions which introduced a completely unique statutory definition of extended family.

States also must defer to tribal law concerning placement preferences.¹¹ Tribal placement preferences typically favor homes in which a child's connections to culture, community, and tribal government can be maintained. Roughly half of the tribal codes reviewed included foster care and adoption placement preferences. Of these, half mirrored ICWA, the other half provide unique foster care placement preference schemes. Of these, more 60 percent included unique adoption placement preference schemes, the remaining reflected ICWA.

A final example of the integration of custom and tradition into tribal child welfare codes is the inclusion of custom in alternative permanency plans. Traditionally, many tribes provided permanent alternative care for children.¹² These arrangements rarely cut a child off from parents, family, and community the way that western termination of parental rights (TPR) and adoption practices do.¹³ Cultural practice are especially evident in the fact that 15 percent of tribal codes reviewed include no adoption provision -- instead, they include guardianship or other permanency plans in lieu of adoption. Thirteen percent provide for customary adoption and conventional adoption provisions, and two percent replace conventional adoption with customary adoption provisions. A third of the tribal codes reviewed provide for TPR only as a solution of last resort, and seven percent make no provision for TPR at all. Nine percent include a termination alternative (variously referred to as modification of parental rights, cessation of parental rights, or suspension of parental rights). Tribal child welfare codes are sophisticated governing documents intended to guide tribal and state child welfare practices. They are a reflection of tribes' inherent sovereignty over their citizens and cultural practices and values. Most importantly, they provide a safety net for tribe's most vulnerable citizens, providing needed protections for tribal children in need of care.

Footnotes:

¹ CROSS, T. L., CROSS-CULTURAL SKILLS IN INDIAN CHILD WELFARE: A GUIDE FOR THE NON-INDIAN 3-5 (2004)

² Id.

³ COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 829-36 (Nell Jessup Newton ed. 2012).

⁴One study has found that, due in large part to the systematic bias still present in the state child welfare systems, where abuse has been reported AI/AN children are 2 times more likely to be investigated, 2 times more likely to have allegations of abuse substantiated, and 4 times more likely to be placed in foster care than white children. HILL, R. B. CASEY-CENTER FOR THE STUDY OF SOCIAL POLICY ALLIANCE FOR RACIAL EQUITY IN CHILD WELFARE, RACE MATTERS CONSORTIUM WESTAT. AN ANALYSIS OF RACIAL/ETHNIC DISPROPORTIONALITY AND DISPARITY AT THE NATIONAL, STATE, AND COUNTY LEVELS, 1-2 (2007).

⁵ 25 U.S.C. § 1901 et seq.

⁶ 25 U.S.C. § 1911 (a)-(b).

⁷ CROSS, T.L. & MILLER, R.J., THE INDIAN CHILD WELFARE ACT OF 1978 AND IT'S IMPACT ON TRIBAL SOVEREIGNTY AND GOVERNANCE in FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT AT 30 235-244 (Fletcher, L.M., Singel, W.T., & Fort, K.E. Eds., 2009).

⁸ 25 U.S.C. § 1903(2).

⁹ Id.

¹⁰ These terms describe those individuals who are not related by blood but still considered family because of their relationship to the child and/or family.

¹¹ 25 U.S.C. § 1915(c).

¹² CROSS, T. L. supra note 1.

¹³ Id.

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