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## Speaking to Tribal Judges on the Matter of Improving Children's Court Practice in Child Abuse and Neglect Cases in Our Country: A Proposal for a Uniform Children's Code

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# **SPEAKING TO TRIBAL JUDGES ON IMPROVING CHILDREN'S COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES IN OUR COUNTRY: A PROPOSAL FOR A UNIFORM CHILDREN'S CODE**

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*Julian D. Pinkham\**

*Since the 1970s, the responsibilities of the tribal children's courts have increased dramatically. In child welfare cases, tribal courts no longer simply determine whether a child has been abused or neglected. They now also oversee the placement of the child in a shelter, foster care, or a permanent home, as well as determine the parent's treatment or visitation rights. The complexity of the cases causes unacceptable delays in placing Indian children in need of care and hinders the placement of Indian children within the tribal community.*

*Judge Pinkham introduces a proposed solution to the problems of current tribal child welfare cases: a uniform children's code. The proposed code provides a strong framework for tribal nations to solve the problems of delay and non-tribal placement of Indian children. Five goals guided Judge Pinkham as he drafted the uniform children's code: avoiding unnecessary separation of Indian children from their families, reunifying separated families, laying out a procedure for cases in which reunification is not feasible, making timely decisions, and enhancing the oversight role of the tribal courts.*

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## INTRODUCTION

This Proposal for a uniform children's code began as a series of questions. What is the best way for tribal people to deal with differences in tribal children's codes? How should tribal people teach children traditional customs, traditional laws, and the language? How should tribal people preserve valued rites of passage from conception to birth, during the toddler years, in middle childhood, and in adolescence? Families in trouble must be persuaded to seek help from traditional healers. Without this help, families will end up in deeper trouble, possibly resulting in the termination of their parental rights. This is not the way of the tribal people.

Today those questions are being carried by the wind throughout the United States. Tribal people are seeking the reasons families find themselves in trouble, and they are questioning the plight of their children. Why does child abuse and neglect happen? What are the courts doing about this problem? Are laws helping? Why is a law applied differently from one court to another? This Proposal for a uniform children's code is part of the answer. Tribal people need a uniform children's code, for their children are in desperate need of care.

This Proposal will not be the full answer for child abuse and neglect problems in Indian Nations. But if tribes had a uniform children's code, there would be more cooperation among tribes. Tribal members would be persuaded that the law protects their rights and preserves their liberty because each of the parties in the conflict would know the laws under which each of the participating tribes operate. When disputants could not be reconciled, litigation would structure the resolution within a precise set of procedures.

According to the Washington Families for Kids Native Initiative Steering Committee, Indian communities need to find nurturing homes and families for Indian kids. The Committee's goal is to reduce the number of Indian children in state care and to work toward increased compliance with tribal family values through a uniform children's code.

This Proposal is meant to be a short, practical, and straightforward recommendation of one children's court judge. It speaks to a serious debate in academic literature that has significant public policy implications. Tribes should discuss whether to pass a resolution to change their children's court

code. In the discussion, tribes should consider that instituting official symbols of law and order reinforce tribal authority. The idea of a society without courts or a tribe without a children's court code invites trepidation.

Law and litigation also have a darker side. The legal process can be threatening, inaccessible, and exorbitant. Usually, it is all of these for the least powerful people in society.

Part I of this Proposal outlines the need for a uniform children's code. Part II discusses the goals and principles underlying the Proposal: avoiding unnecessary separation of Indian children from their families, reunifying separated families, laying out a procedure for cases in which reunification is not feasible, making timely decisions, and enhancing the oversight role of tribal juvenile and family courts. Part III concludes the introduction to the Proposal and Part IV presents the proposed uniform children's code itself.

Today, my relatives, we answer the song. Naye.<sup>1</sup>

## I. NEED FOR A UNIFORM CHILDREN'S CODE

The Elders spoke about the land, the new foods, and the children. They spoke of the Big River, and of the new fish that were coming. This was long, long ago when the world was very young.

The Elders told stories around the camp fires. After the meals they would drink of the water, for the drinking of water is an old, traditional custom. Like storytelling, it is a way to pass history down to the next generation.

Through the Elders' stories came words of the unwritten laws. The Elders spoke, "You, yes, you young, listen today for one day we will be gone! You will take care of the foods, for they are out there! The fish in the water, they return today for each of us." The children of the tribe and other tribal people of the Big River listened to these stories. The Elders spoke in words, and used body language and different types of objects—wood, rocks, and animals. Each of the words were heard by the children, for the words were in a voice and tone that cared. For the unwritten law is caring for the food and the children, and the children yet unborn.

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1. Translated as "Let it be so" from the language of the Yakama Tribe.

Those days of long ago are still here. Although the Big River has changed, the Elders still tell stories of the unwritten laws. Children need unwritten laws that will speak the messages the Elders would have spoken long ago. The Elders used traditional courts that operated long before the Europeans came.

Today, little people who are victims of abuse and neglect come before tribal children's court judges for protection from further harm and for timely decisions regarding their future. This is no different than Anglo courts. Tribal judges make critical legal decisions and oversee social service efforts to rehabilitate and maintain Indian families, or to provide permanent alternative care for child abuse victims. For instance, the judge oversees the work of tribal and state social service agencies and treatment programs. The judge is responsible for evaluating the effectiveness of drug and alcohol programs and for asking whether the family in question has attended required counseling sessions. These oversight responsibilities require much of the court's attention and resources as the number of reported child abuse cases continues to grow each year.<sup>2</sup>

Tribal governments and their people should not be subject to federal and state intervention into their daily lives. Tribal nations are autonomous, sovereign entities that have the right and responsibility to solve the problems of their children without interference from other governments. Tribes should have the power and the right to establish their own legal systems that reflect Indian cultural concepts.

Tribal and public awareness of the tragedy of physical and sexual abuse of children has led to a recent explosion in court referrals. In the author's experience, this proliferation has been exacerbated by poverty, drug-exposed mothers and infants, HIV, and the continuing dissolution of the family unit. The influx of cases and the responsibility it imposes upon the tribal judge creates the need for a uniform tribal children's code to ensure that a coherent and consistent system exists. Tribal judges need to work together and exchange ideas to better serve Indian children.

In the 1970s, tribal juvenile and family courts were expected to determine only whether a child had been abused or neglected and, if so, whether the child needed to be removed from

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2. See W.K. KELLOGG FOUND., *FAMILIES FOR KIDS OF COLOR: A SPECIAL REPORT ON CHALLENGES AND OPPORTUNITIES* 11 (1993) (on file with the *University of Michigan Journal of Law Reform*).

the home or placed under court or agency supervision.<sup>3</sup> As the result of laws intended to guarantee basic freedoms and processes to individuals who live and work in Indian country, courts are now expected to take a more active role to make sure that a safe, permanent, and stable home is secured for each abused or neglected child. Such laws include the Indian Civil Rights Act of 1968,<sup>4</sup> the Indian Child Welfare Act of 1978,<sup>5</sup> and the Adoption Assistance and Child Welfare Act of 1980,<sup>6</sup> a major piece of federal foster care reform legislation. These laws protect individuals from the inequities of reservation life. Such inequities were created and are perpetuated by a history of colonialism as the federal and state governments attempted to usurp more control over natural resources located on Indian lands, further altering the traditional way of Indian life in the name of progress.

The enactments listed above help tribal governments preserve autonomy and solve their own legal problems in a more traditional forum. For example, the Indian Child Welfare Act allows tribal courts oversee the placement of Indian children who have been neglected or abused.<sup>7</sup> Before its enactment, tribes were rarely informed of their own children's status in the foster care system, and therefore, many children were adopted into non-Indian homes. This was seen by the Indian community as an attempt to assimilate and conquer Native people and their culture.

Other recent changes in tribal, federal, and state law have also led to a far more active role for tribal juvenile and family courts. Cases in which child welfare is an issue are now more complex, and involve more hearings and people.<sup>8</sup> To perform their expanded oversight role, tribal courts need to understand how tribal and public welfare agencies operate and understand what services are available in the Indian community for endangered children and their families.

Unfortunately, many tribal or state courts have neither the ability nor the resources to meet their expanded oversight role. Because the judicial caseloads have risen, and the number of

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3. See generally DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* (3d ed. 1993).

4. 25 U.S.C. § 1301 (1994).

5. 25 U.S.C. § 1901 (1994).

6. Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.).

7. See 25 U.S.C. § 1901 (1994).

8. See generally ANN M. HARALAMBIE, *THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND PROTECTION CASES* (1993).

issues, hearings, and parties involved with each case has increased, the quality of the court process in many tribal courts has suffered gravely. Hearings are often rushed in child abuse and neglect cases. And delays in the timing of hearings and decisions are common, causing children to grow up without permanent homes. Many tribal courts know little about relevant agency operations such as the local department of social services, drug and alcohol treatment programs, and area counseling available for children and families. A uniform children's code would inform tribal judges of these resources and allow them to make more timely decisions on behalf of children.

The increased responsibilities and administrative tasks required by new legislation and newly established common law are sometimes confusing and unworkable in Indian country. Tribal governments and their courts must therefore carefully develop their legal systems in all areas, especially sensitive ones like family and juvenile law. Instead of completely abandoning the old ways of handling these matters, tribal governments should develop them into more workable ways of dealing with Indian families. If new laws and procedures are to be followed, they must come from the people whom they are meant to serve and protect.

This Proposal draws from both traditional Indian customs and contemporary Anglo legal concepts and doctrines. Modern tribal courts and Indian individuals are learning that to fully and fairly develop a unique legal system, tribal governments must draw from both sources. The modern Anglo world and its imperfect legal system encroach daily upon Indian legal systems in culturally dramatic ways. For example, tribal courts are often forced to work with outside social service agencies and treatment facilities that function very differently from traditional tribal institutions. Guidelines are imposed upon the courts in a paternalistic way that usurps their autonomy, harms children, and creates more delay.

The tribal juvenile and family courts need clear guidelines to assist them in fulfilling their responsibilities in child abuse and neglect cases. These guidelines must explain the decisionmaking process for these cases and identify all the necessary resources.

Tribal juvenile and family court judges are the gatekeepers of the Indian Nations' foster care systems. The judges must ultimately decide whether an Indian family in trouble will have its children placed in Indian foster care, or whether

placement can be safely prevented through the reasonable efforts of the social service system. If reasonable efforts to preserve or reunify families are not evaluated and ensured through effective judicial review, then families and children are unnecessarily harmed.

Tribal children's courts need uniform guidelines to help them make timely decisions for Indian children. Tribal courts are currently forced to work within and alongside the non-Indian world and to adhere to outside guidelines that are established without their input or consent. Thus, tribal courts need to establish their own guidelines and create a uniform system for children in need.

## II. KEY PRINCIPLES UNDERLYING THE PROPOSAL

This Part of the Proposal discusses the objectives of the uniform children's code. These objectives include avoiding unnecessary separation of Indian children from their families, reunifying separated families, setting up procedures and policies when reunification is not feasible, making timely decisions in child abuse and neglect cases, and enhancing the oversight role of tribal juvenile and family courts.

### *A. Avoid Unnecessary Separation of Indian Children and Families*

When the tribe or the state is forced to intervene on behalf of abused or neglected children, it is not enough to protect the children from immediate harm. When deciding whether to place Indian children outside the home, the tribe or state must take into account not only the children's safety, but also the emotional effect of separation. Throughout its involvement, the tribe or state must strive to ensure that Indian children are brought up in stable and permanent families, rather than in temporary foster homes under the supervision of the tribe or state.

The need to provide permanent Indian homes for abused Indian children is the fundamental principle behind the Indian



Child Welfare Act of 1978<sup>9</sup> and the Adoption Assistance and Child Welfare Act of 1980.<sup>10</sup> Statutory provisions designed to achieve permanency for abused or neglected children are based on what the author considers to be several widely accepted principles of child development. First of all, stable and continuous caregivers for children are very important to normal emotional growth. Children need secure and uninterrupted emotional relationships with adults who are responsible for their care. Repeatedly disrupted placements and relationships can interfere with a child's ability to form close emotional relationships after reaching maturity. The extended Indian family and the use of the Indian traditional role models of brothers and sisters can benefit children that are in need of care.

Second, the author believes that children need the security of parents committed to their care. The lack of parents who provide unconditional love and care profoundly affects a child's self-image. Keeping the Indian child within the Indian extended family ensures continued love and nurturing.

Third, children need predictability. The author believes that having a permanent Indian family adds predictability to a child's life. Foster care, with its inherent instability, can impose great stresses upon an Indian child. Weathering the normal changes of childhood in a permanent Indian family enables a child to have a more secure future.

Finally, the author believes that the child-rearing competence of autonomous Indian families is superior to that of the tribe or the state. Parents are likely to be capable of making the best decisions for a child, while decisions concerning a child in tribal or state-supervised foster care are often fragmented and inconsistent. In addition, Indian families may teach children the rites of passage and customs passed down from earlier generations.

If it is important that Indian children are raised in stable and secure Indian families, it follows that the tribe and state should, when possible, protect the child without removing the child from her home. Preventing unnecessary removal also helps preserve the rights of families from unwarranted tribal and state interference. The tribe and the state must take strong, affirmative steps to assist Indian families so that

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9. See 25 U.S.C. § 1901 (1994).

10. See Pub. L. No. 96-272, 94 Stat. 500 (codified as amended at 42 U.S.C. § 675 (1994)).

removal is not required. Toward this end, federal law requires child welfare agencies to make reasonable efforts to prevent the necessity of foster placement.<sup>11</sup>

### *B. Reunification*

Placing abused and neglected Indian children in permanent homes also includes working toward the reunification of families that have been separated. When there is no way to prevent foster placement, tribes and the state must make reasonable efforts to bring about the safe reunification of Indian children and their families. Reunification efforts include individual written case plans specifying tribal and state efforts to reunify families, placement in the least possible disruptive setting, provision of services pursuant to the case plans, and periodic review of each case to ensure timely progress toward reunification.

### *C. When Reunification is Not Feasible*

Of course, some children in foster care cannot safely be returned home in spite of the tribe's efforts to assist the family. Even the best efforts to assist families do not always improve parental behavior or enable parents to better care for their children. In cases where family reunification is not feasible, the search for a new, permanent home for the child becomes the goal. The decision to place the child in a new home should be made in a timely manner to protect the child's emotional and cultural health.<sup>12</sup>

### *D. The Need to Make Timely Decisions in Child Abuse and Neglect Litigation*

Tribal court delays can be a major obstacle to achieving permanency for abused or neglected children. Even when the

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11. See DONALD N. DUQUETTE, *ADVOCATING FOR THE CHILD IN PROTECTION PROCEEDINGS* 95 (1990).

12. See *infra* Part II.D.

pace of litigation is tightly managed, the decisionmaking process in child abuse and neglect cases can linger for months. When juvenile or family court proceedings are allowed to proceed at the pace of other civil litigation, children can spend years of their childhood awaiting agency and court decisions concerning their future. This delay hurts children because children have a very different sense of time than adults.<sup>13</sup> Short periods of time for adults seem interminable for children, and extended periods of uncertainty exacerbate childhood anxiety. When litigation proceeds at what tribal attorneys and tribal judges regard as a normal pace, children often perceive the proceedings as extending for vast periods of time.<sup>14</sup>

The passage of time magnifies anxiety levels and directly affects Indian children's lives. Three years is not a terribly long period of time for an Indian adult. But for a three-year-old, those three years are the formative stage for feelings of trust and security; for a six-year-old, those three years are half a lifetime; and, for a nine-year-old, three years can mean the difference between finding an adoptive family and failing to find an adoptive family because of his age. Adoptive parents often seek infants. Moreover, older children with emotional or addiction problems are not easily placed with an adoptive family. If too much time is spent in foster care during these formative years, permanent problems may result. It is better for the child if a permanent home is found at an early age so that the child experiences less emotional damage.

This Proposal for a uniform children's code requires courts to make timely decisions for abused or neglected Indian children. Under federal law, a decision concerning the permanent placement of each child should take place within eighteen months after a child is placed into foster care.<sup>15</sup> At least one state has set stricter deadlines.<sup>16</sup> In order to meet such deadlines in making a permanent placement decision for a child,

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13. See Donald N. Duquette, *Developing a Child Advocacy Law Clinic: A Law School Clinical Legal Education Opportunity*, 31 U. MICH. J.L. REFORM 1, 16 n.24 (1997) (describing "the child's sense of time").

14. See *id.*

15. See Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 675(c) (1994).

16. See DONALD N. DUQUETTE, MICHIGAN CHILD WELFARE LAW: CHILD PROTECTION, FOSTER CARE, TERMINATION OF PARENTAL RIGHTS 151 (1994) (citing Michigan as one state which enacted a stricter deadline of 12 months for such decisions).

earlier stages of litigation in tribal courts must also proceed more efficiently.

Efforts to speed litigation in child welfare cases can be successful. Some tribal courts have used case flow management to reduce delays in child welfare litigation. To do so, however, the tribal courts have had to make timely litigation a top priority.

### *E. Enhancing the Oversight Role of the Tribal Juvenile and Family Court*

Indian child welfare cases impose a special obligation when Indian children are placed outside of their homes. The tribal juvenile and family court judges must oversee the progress of the case. The oversight obligation occurs under three sets of circumstances: (1) when tribal court involvement in Indian child welfare cases is simultaneous with agency efforts to assist the Indian family; (2) when the tribal juvenile court is assigned a series of interrelated and complex decisions that shape the course of tribal and state child protective service intervention and determine the future of the Indian child and family; and (3) when a multitude of persons becomes involved in the case, such as the family, extended family, tribal social workers, Indian health services caregivers, state child protective service workers, the tribal police, and attorneys for both the child and the family.

Unlike most litigation, Indian child abuse and neglect cases deal with an ongoing and changing situation. In a criminal case, for example, the trial usually deals with whether specific criminal acts took place at a specified time and place. In a child welfare case, however, the court must focus on agency casework and parental behavior over an extended period of time. When making a decision, the court must take into account the agency's ongoing plan to help the family. At the same time, the court must consider the evolving circumstances and needs of each child. The tribal judge does not simply make one decision concerning the care, custody, and placement of a child, but rather makes a series of decisions over time.<sup>17</sup> In effect, the judge must determine step by step how best to ensure the safe

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17. See DUQUETTE, *supra* note 11, at 47-105 (detailing five stages of the court process, including preliminary and dispositional hearings).

upbringing of the child and oversee the eventual placement of the child in a safe and permanent Indian home.

The decisions that must be made in Indian child welfare litigation are not merely litigation management decisions. They are decisions governing the lives and futures of all of the parties. For example, in a single child welfare case a court may order the child's emergency placement into shelter care, the child's placement into extended foster care, the parent's participation in treatment and revised treatment plans, the parent's submission to evaluation or testing, a schedule for parent-child and sibling visitation, termination of parental rights, and the child's adoption. The length, scope, and continuous nature of these determinations involves the tribal court in the lives of the parties to a degree unlike other court cases. As previously mentioned, the child's sense of time comes into play when the case might take a significant amount of time.<sup>18</sup>

All decisions in an Indian child welfare case are interrelated. Just as the findings at the adjudication stage shape the disposition, subsequent review hearings typically focus on how the parties have reacted to the court's decision. Termination of parental rights proceedings rely heavily upon the court's findings during all earlier stages of the case.

Because its decisions in Indian child welfare cases are interlocking and sequential, the tribal court performs a more managerial and directive function than in other litigation. Tribal court decisions shape the various child welfare agency actions by identifying dangers and directing an agency's approach to each case and its related delivery of services to the Indian child and family. Regular tribal court review of each case redefines agency involvement. Therefore, the tribal judge has a distinct effect on the course of agency relations with each Indian family.

### III. CONCLUSION

Each of the key principles underlying this Proposal for a uniform children's code emphasizes the tremendous responsibility undertaken by tribal judges hearing Indian child abuse and neglect cases. This Proposal addresses a

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18. *See supra* Part II.D.

number of general issues involved in tribal court organization and operation. The most pertinent of these general issues is the changing concept of juvenile and family law in Indian country. This must be fully understood by each respective tribal government. As the understanding of children's development grows, so does the need for a uniform code. As time passes, children's codes need to change. This Proposal should be the beginning of that change.

These concepts must come more from the Indian people than from federal or state arenas. Although juvenile and family law is not always an easy legal area to understand or appreciate, Indian societies are unique in that they are able to withstand frequent and drastic changes in approaches to affairs and legal problems.

This Proposal for a uniform children's code provides a legal model that tribes can use to enact a code that fulfills the legal, cultural and economic needs of the community. In Eastern Washington, several tribes interact with each other through child abuse and neglect cases. If these tribes had a uniform code to follow, these cases would become less chaotic to all involved.

This uniform children's code is intended to educate individuals who wish to make a positive change in the manner in which juvenile and family law is developed and implemented.

Once again, the tribal people are at one of the longhouses of the tribal people that share the Big River, and they have heard an old story come to life again. For the new foods are here, and the children have listened, and once more, the circle continues. For these are not original words, for they have been spoken before. Naye.

**IV. PROPOSED CHILDREN'S CODE**

**[TRIBAL NAME] NATION CHILDREN'S CODE**

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**[TRIBAL NAME] NATION CHILDREN'S CODE****SECTION 1. SHORT TITLE, PURPOSE  
AND DEFINITIONS***A. Short Title*

This code shall be entitled the Children's Code.

*B. Purpose*

The Children's Code shall be liberally interpreted and construed to fulfill the following expressed purposes:

1. to provide for the welfare, care and protection of the children and families within the jurisdiction of the \_\_\_\_\_ Tribe;
2. to preserve unity of the family, preferably in the child's home, by separating the child from his parent(s) or removing the parent(s) from the home only when necessary;
3. to take such actions that will best serve the spiritual, emotional, mental, and physical welfare of the child and serve the best interests of the child to prevent the abuse, neglect, and abandonment of the child;
4. to provide a continuum of services for children and their families, from prevention to residential treatment, with emphasis whenever possible on prevention, early intervention, and community-based alternatives;

5. to secure the rights of and ensure fairness to children, parents, guardians, custodians, and other parties who come before the children's court under the provisions of this Code;
6. to provide procedures for intervention in state court procedures regarding Indian children and procedures for transfer of jurisdiction over Indian children from other tribal and state courts to this tribal children's court;
7. to recognize and strengthen the child's cultural and ethnic identity whenever possible.

### *C. Definitions*

As used in this Code:

1. "adult" is a person eighteen (18) years of age or older, or otherwise emancipated by order of a court of competent jurisdiction;
2. "child" is a person who is less than eighteen (18) years old and has not been emancipated by order of a court of competent jurisdiction;
3. "child born out of wedlock" is a child conceived and born to a woman who is unmarried from the conception to the birth of the child, or a child determined by judicial notice or otherwise to have been conceived or born during a marriage but is not the issue of that marriage;
4. "child in need of care" is a child
  - a. who has no parent(s), guardian, or custodian available and willing to care for him/her;
  - b. who has suffered or is likely to suffer a physical injury inflicted upon him/her by other than accidental means, which causes or creates a substantial risk of death, disfigurement, or impairment of bodily function;
  - c. whose parent(s), guardian, or custodian has not provided adequate food, clothing, shelter, medical care, education, or supervision necessary for his/her safety, health, and well-being;
  - d. who has been sexually abused;
  - e. who has been sexually exploited;

- f. who has committed delinquent acts as a result of parental pressure, guidance, approval, or failure to properly supervise;
  - g. who has been neglected; or
  - h. who was born addicted to alcohol or exposed to a controlled substance or any drug harmful to physical or mental welfare;
5. "child protection team" is a team established to involve and coordinate the child protection services of various agencies as set forth in Section 8 of this Code;
  6. "child protective services worker" includes the child protective services worker, social services worker, law enforcement personnel, or any person who performs the duties and responsibilities set forth in Sections 2 through 6 of this Code;
  7. "children's court counselor" is an officer of the court who investigates, reports, and recommends to the court as prescribed by this Code;
  8. "controlled substance" is cocaine, heroin, phenylidone, methamphetamine, marijuana, alcohol, nicotine, inhalants, tobacco, and over-the-counter drugs, as well as the illicit drugs categorized as opiates, depressants, sedatives, stimulants, hallucinogens, cannabis, and designer drugs, amphetamines, or their derivatives;
  9. "court" or "children's court" is the children's court of the \_\_\_\_\_ Tribe having exclusive jurisdiction to hear dependency and delinquency concerning children under the age of eighteen (18);
  10. "court-appointed special advocate" or "CASA" is a person who is typically a nonlawyer volunteer appointed by the court to represent the interests of a child who is before the court;
  11. "custodian" is a person, other than a parent or guardian, to whom legal custody of the child has been given;
  12. "domicile" is a person's permanent home, legal home or main residence. On the \_\_\_\_\_ Reservation or tribal land, the domicile of a child is that of the custodial parent, guardian, or custodian. Domicile includes the

- place where the parent, guardian, or custodian intends to establish a permanent home, or the place which the parent, guardian, or custodian considers to be his/her permanent home;
13. “emancipation” means released from parental care and responsibility and free from restraint, control, or the power of the parent and having full legal rights and capacity;
  14. “extended family” is a person who is the child’s grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or step-parent;
  15. “father” is
    - a. a man married to the mother at any time from a minor’s conception to the minor’s birth unless the minor is determined to be a child born out of wedlock;
    - b. a man who legally adopts the minor; or
    - c. a man whose paternity is established in one of the following ways, when applicable, set by the court pursuant to this subchapter:
      - i. the man and the mother of the minor acknowledge that he is the minor’s father in writing, executed, notarized, and filed in the tribal or state court;
      - ii. the man and the mother file a joint written request for a correction of the birth certificate pertaining to the minor that results in issuance of a substituted certificate recording the birth;
      - iii. the man acknowledges the minor, without the acknowledgment of the mother, with the approval of the court; or
      - iv. a man who by order of filiation or by judgment of paternity is determined to be the father of the minor;
  16. “guardian” is a person assigned by a court of law, other than a parent, having the duty and authority to provide care and control of a child as set forth in Sections 22 through 25 of this Code;

17. "guardian ad litem" is a person appointed by the court to represent the best interests of a child who is before the court;
18. "Indian" is any enrolled member of the \_\_\_\_\_ Tribe or any federally recognized Indian tribe, band or community, Alaska Natives and descendants, or a person considered by the community to be Indian, by traditions, customs and culture of the \_\_\_\_\_ Nation;
19. "Indian child" is a child who is a member of a tribe or band that is acknowledged to exist as a tribe or band by the United States Secretary of the Interior, or a child who is eligible for such membership or who is the natural child of at least one parent who is a member or eligible for membership under this Code;
20. "least restrictive alternative" is the placement alternative which is the least restrictive in terms of restrictions to be placed upon the child and family;
21. "parent" is a person who is legally responsible for the control and care of the minor, including a mother, father, guardian, or custodian, including a natural or adoptive parent, but not including persons whose parental rights have been terminated, nor does it include the unwed father whose paternity has not been acknowledged or established;
22. "party" is a petitioner, child, respondent parent, or other parent, or guardian in a protective proceeding;
23. "power of attorney" is a document granting parental powers to another for a limited period of time;
24. "public defender" is an attorney appointed by the court to represent the child, parent, custodian, or those responsible for the support of the child who are found financially unable to retain an attorney;
25. "sexual penetration" means sexual intercourse, cunnilingus, fellatio, or intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body. The emission of semen is not required.



## SECTION 2. JURISDICTION OF THE CHILDREN'S COURT

### *A. Creation of the \_\_\_\_\_ Tribal Children's Court*

There is hereby established for the \_\_\_\_\_ Tribe of the \_\_\_\_\_ Reservation a court to be known as the \_\_\_\_\_ Indian Nation Children's Court. The primary jurisdiction of the Children's Court shall be dependency and delinquency in nature and shall include the right to issue all orders necessary to ensure the safety and well-being of children who have been declared to be wards of the Children's Court. The Children's Court shall have the power to enforce subpoenas and orders of restriction, fines, contempt, confinement, and other powers as appropriate.

### *B. Exclusive Jurisdiction*

The Children's Court shall have exclusive jurisdiction of abuse and neglect cases. That jurisdiction, however, may be concurrent with the jurisdiction of the federal court over the following persons:

1. an enrolled member of the \_\_\_\_\_ Tribe under the age of eighteen (18) years;
2. a person under the age of eighteen (18) years who is eligible for enrollment in the \_\_\_\_\_ Tribe;
3. child of enrolled members of the tribe or other Indians, as defined in Section 1(19) of this Code, including adopted children;
4. a non-Indian child residing within the exterior boundaries of the \_\_\_\_\_ Reservation in the home of an enrolled member of either the \_\_\_\_\_ Tribe or any other Indian tribe; and
5. an Indian woman who is under eighteen (18) years old or a non-Indian who is married to an enrolled tribal member or other Indian residing on the \_\_\_\_\_ Reservation who is pregnant and abusing alcohol or controlled substances.

### *C. Jurisdiction over Extended Family*

1. Where the Children's Court asserts exclusive jurisdiction over a person under Section 2(A) or (B) above,

the Court shall also have jurisdiction over the person's extended family residing in the household whenever that Court deems it appropriate.

2. The Children's Court shall have jurisdiction over any adult whose behavior causes or tends to cause the child to come within or remain within the jurisdiction of the Court. Jurisdiction requires that such person be provided notice and opportunity for hearing.

#### *D. Continuing Jurisdiction*

Once the Court asserts jurisdiction over a person under Section 2 (A), (B), or (C), the Court shall retain jurisdiction over that person even if he leaves the physical boundaries of the \_\_\_\_\_ Reservation.

### SECTION 3. TRANSFER OF JURISDICTION

#### *A. Application of the Indian Child Welfare Act*

The Children's Court may apply the policies of the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963, where they do not conflict with the provisions of the \_\_\_\_\_ Nation Children's Code. The procedures for state courts in the Indian Child Welfare Act shall not be binding upon the \_\_\_\_\_ Children's Court except where specifically provided for in this Code.

#### *B. Transfer to Other Tribal Court or State Court*

In any proceeding before the Children's Court, the Court may transfer the proceeding to an appropriate tribal or state court where the state or the other Indian tribe has a significant interest in the child and the transfer would be in the best interest of the child.

#### *C. Transfer from Other Courts*

The Children's Court may accept or decline, where reciprocity shall be considered under the procedures set forth in this Code, transfers of child welfare cases from other tribal, state or federal courts.

*D. Procedures for Transfer from Other Courts*

1. **Receipt of Notice:** The tribal agent for service of notice of other tribal and state court child custody proceedings, as required by the Indian Child Welfare Act, shall be the tribal prosecutor, the tribal Indian child welfare/foster placement agency, and the Children's Court.
2. **Intervention:** The tribal prosecutor, if directed by the tribal Indian child welfare/foster placement agency, the Children's Court, and/or a parent, shall cause a motion to intervene to be filed with the state or other tribal court without delay.
3. **Investigation and Pre-Transfer Report:** The tribal Indian child placement agency shall conduct an investigation and file a written report with the tribal prosecutor.
4. **Decision to Transfer:** The tribal Indian child placement agency shall make written recommendations to the \_\_\_\_ tribal prosecutor on whether or not the tribe should petition for transfer from the state or other tribal courts. The tribal Indian child welfare/foster placement agency shall consider these factors:
  - a. the best interests of the child;
  - b. the best interests of the tribe;
  - c. availability of services for the child and his/her family; and
  - d. the prospects for permanent placement for the child.
5. **Petition for Transfer:** The tribal petition for transfer shall be filed by the tribal prosecutor without delay upon receipt of recommendations. The Children's Court should not be involved at this phase of the proceeding, but may consider jurisdictional issues once the petition is challenged in court. If there is no tribal prosecutor, the tribal Indian child placement agency shall file the petition for transfer.
6. **Acceptance of Transfer:** The Children's Court has discretion whether to accept or deny transfer and

may accept a transfer from other tribal or state court if:

- a. a parent or Indian custodian's petition to other tribal or state court for transfer is granted; or
  - b. the tribe's petition to other tribal and state court for transfer is granted.
7. Hearing(s): Upon receipt of transfer of jurisdiction from other tribal or state court, the tribal Children's Court shall hold appropriate hearing(s) in accordance with this Code.

### *E. Full Faith and Credit*

1. Court Orders of Other Tribal and State Courts: Court orders of other tribal and state courts involving children over whom the Children's Court could take jurisdiction may be recognized by the Children's Court after the Court has determined:
  - a. that the other courts exercised proper subject matter and personal jurisdiction over the parties;
  - b. that due process was accorded to all interested parties participating in the other court proceedings;
  - c. that the provisions of the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963, were properly followed; and
  - d. that the other court proceeding did not violate the public policies, tribal customs, or common law of the tribe.
2. Tribal Interest: Because of the vital interest of the tribe in its children and those children who may become members of the tribe, the statutes, regulations, public policies, tribal customs and common law of the tribe shall control in any proceeding of the Children's Court.

## SECTION 4. PROCEDURES AND AUTHORIZATIONS

### *A. Rules of Procedure*

The procedures in the Children's Court shall be governed by the rules of procedure for the tribal court which are not in conflict with this Code.

### *B. Social Services*

**Tribal Indian Child Placement Agency and Social Services:** The Children's Court shall utilize such social services as may be furnished by any tribal, federal, or state DSHS/DCFS (CPS) agency provided that it is economically administered without unnecessary duplication and expense.

## SECTION 5. CHILDREN'S COURT PERSONNEL

### *A. Children's Court Judge*

1. **Appointment:** A Children's Court judge shall be appointed in the same manner as a tribal court judge.
2. **Qualifications:** The general qualifications for a Children's Court judge shall be the same as the qualifications for a tribal court judge. In addition, the Children's Court judge shall adequately understand:
  - a. the Indian Child Welfare Act of 1978;
  - b. both the human services and justice system contexts;
  - c. the ethical dilemmas, pretrial preparation, hearing-related issues, and underlying child development, parental bonding, child protection, and permanency planning principles;
  - d. the child welfare agencies that are caregivers to children; and
  - e. the state child protection and foster care services.
3. **Powers and Duties:** In carrying out the duties and powers specifically enumerated under this Code, a judge of the Children's Court shall have the same

duties and powers as a judge of the tribal court, including, but not limited to, the contempt powers, the power to issue arrest or custody warrants, and the power to issue search warrants, and conduct inquiries in children's matters.

4. **Disqualification or Disability:** The rules on disqualification or disability of a Children's Court judge shall be the same as those rules that govern a tribal court judge.

### *B. Tribal Prosecuting Attorney*

1. **Definition and Qualification:** The tribal prosecuting attorney shall be licensed to practice law and shall act for the tribe in Children's Court.
2. **General Duties:** On request of the court, the prosecuting attorney shall review the petition for legal sufficiency and shall appear at any child protective proceeding.
3. **Duties—Child Protective Proceedings:**
  - a. The tribal prosecuting attorney shall act as a legal consultant on request of the tribal Indian child placement agency and state department of social services or on request of an agent under contract with the department at all stages of a child protective proceeding.
  - b. The tribal prosecuting attorney shall participate in every child protective proceeding of the tribal Indian placement agency and state department of social services.
4. The tribal prosecuting attorney shall also:
  - a. file petitions with the court as provided in this case;
  - b. represent the tribe in all proceedings under this Code and perform such other duties as the Court may order;
  - c. participate in Children's Court and give competent legal advice to petitioning agencies and *ex parte* petitioners in child protection cases;

- d. represent the \_\_\_\_\_ Tribe and petitioner's interest and safeguard the legal rights of parents and the child;
- e. intervene in tribal and state court actions as appropriate;
- f. have a good understanding of the reasonable efforts that can be taken to protect the child and family;
- g. have a good understanding of rehabilitation services for the biological parents; and
- h. understand both tribal and state social services departments and child development issues.

### *C. Public Defender*

The public defender is an attorney appointed by a court or employed by a tribal government or a private agency whose work consists primarily in defending indigent defendants in children's cases.

### *D. Counsel for Parents*

At their own expense, parents may be represented at each stage of proceedings under this act by an attorney or lay advocate. It is prudent and advisable for the parents to have representation.

### *E. Children's Court Service Counselor*

The court service counselor shall identify and develop resources on or off the reservation or within the service area designed to enhance each tribal minor's potential as a viable member of the tribal community.

### *F. Child Advocate*

1. At every stage of the proceedings conducted under this Code, the Children's Court may appoint an advocate for the child who may be a lawyer or a Court Appointed Special Advocate (CASA). A person may serve as a CASA only if certified by the \_\_\_\_\_ Indian Nation Tribal Court Administrator of Justice Service.

2. The duty of the child's advocate, both CASA and the child's lawyer, is to represent the interests of the child. A child fourteen (14) years of age or older is presumed capable of determining what is in his or her best interests. It is the duty of the child's advocate to represent the child's wishes in such cases. For children less than fourteen (14) years of age, the child's advocate shall make a determination as to the best interests of the child regardless of whether that determination reflects the wishes of the child. However, the wishes of the child are always relevant to the determination of best interests and shall be weighed according to the competence and maturity of the child.
3. The child's advocate shall perform the following duties:
  - a. appear at all hearings to represent competently the interests of the child in proceedings before the court;
  - b. conduct an independent investigation, including interviewing the child, parents, social workers, and other persons to properly ascertain the facts and circumstances underlying the allegation that the child is a minor in need of care within the jurisdiction of the Court;
  - c. ascertain the interests of the child, taking into consideration the child's wishes according to the competence and maturity of the child;
  - d. provide a written report of findings and recommendations to the Court at each hearing held before the Court;
  - e. urge that specific and clear orders are entered for evaluation, assessment, services and treatment for the child and the family;
  - f. monitor implementation of case plans and disposition orders to determine whether services ordered by the Court are actually provided in a timely manner and are accomplishing their desired goal;
  - g. inform the Court if the services are not being made available to the child and/or family, if the family fails to take advantage of such services,



- or if such services are not achieving their purposes;
- h. identify the common interests among the parties and, to the extent possible, act as mediator to promote resolution of the matter;
  - i. consult with other professionals liberally in identifying the child's interests, current and future placement needs, and necessary services;
  - j. advocate for the interests of the child in mental health, educational, juvenile justice, and other community systems when related to the circumstances causing the child to come within the minor in need of care jurisdiction of the Children's Court; and
  - k. attend training programs at their own expense as prescribed in the personnel manual, and as needed for upgrading skills.
4. The Children's Court may appoint a guardian ad litem or CASA for a party if the Court finds that the welfare of the party requires it.

### *G. Confidentiality*

All records and information acquired or reviewed by a tribal prosecuting attorney, court service counselor, court clerk, public defender, attorney, or child advocate, and all reports prepared by them, are confidential and shall be disclosed only pursuant to this Code and other \_\_\_\_ tribal law.

## SECTION 6. CHILD PROTECTIVE SERVICES WORKERS

### *A. Power and Duties*

1. Child protective services workers shall be employed by the tribal Indian child placement agency, or they shall come from the State of \_\_\_\_ Department of Child Protective Services.
2. The tribal Indian child placement agency shall cooperate with such state DCFS/CPS and community agencies as necessary to achieve the purposes of this Code. The department may negotiate working

agreements with other jurisdictions. Such agreements shall be subject to ratification by the \_\_\_\_\_ Tribal Law and other committees or the tribal administrator.

3. A child protective services worker shall:
  - a. receive from any source, oral or written, information regarding a child who may be a child in need of care;
  - b. upon receipt of any report or information under Subsection 3(a), within 24 hours initiate a prompt and thorough investigation which shall include a determination of the nature, extent, and cause of any condition which is contrary to the child's best interests and the name, age, and condition of other children in the home;
  - c. seek the assistance of and cooperate with law enforcement officials without delay after becoming aware that one or more of the following conditions exist:
    - i. abuse or neglect is suspected in the child's death;
    - ii. the child is the victim of suspected sexual abuse or sexual exploitation;
    - iii. abuse or neglect results in severe physical injury to the child which requires medical treatment or hospitalization. For purposes of this Subsection, "severe physical injury" means brain damage, skull or bone fracture, subdural hematoma, dislocation, sprains, internal injuries, poisoning, burns, scalds, severe cuts, or any other physical injury that seriously impairs the health or physical well-being of a child; or
    - iv. law enforcement intervention is necessary for the protection of the child, the protective services worker, or another person involved in the investigation;
  - d. take a child into temporary custody if necessary pursuant to Section 10. Law enforcement officials shall cooperate with social services personnel to remove a child from the custody of

- his/her parents, guardian, or custodian when necessary;
- e. after investigation, evaluate and assess the home environment of the child or children in the same home and the risk to such children if they continue to be subjected to the existing home environment, and all other facts or matters found to be pertinent;
  - f. substantiate whether there is probable cause to believe that the child is a child in need of care;
  - g. offer, to the family of any child believed to be a child in need of care, appropriate services which may include, but shall not be restricted to, protective services;
  - h. after a referral of a potential child in need of care, submit a written report of his investigation and evaluation which shall be included in the files maintained by the tribal Indian child placement agency and shall include a determination as to whether the report was substantiated or unsubstantiated;
  - i. upon completion of the investigation by the local law enforcement agency or the child protective services worker, the law enforcement agency or child protective services worker may inform the person who made the report as to the disposition of the report.
4. Law enforcement officials shall cooperate with the child protective services worker and the tribal Indian child welfare/foster placement agency in conducting child protection service investigations pursuant to this Section.
  5. If child protective services, the tribal Indian child placement agency, or the Indian Health Services receives a report which alleges a pregnant woman's abuse of alcohol or a controlled substance, protective services shall arrange an appropriate assessment and offer services indicated under the circumstances. Services offered may include, but are not limited to, a referral for chemical dependency assessment, a referral for chemical dependency treatment, and a referral for prenatal care. Child protective services

may also seek court-ordered services under Section 19. Child protective services shall seek court-ordered treatment under Section 19 if the pregnant woman refuses recommended voluntary services or fails recommended treatment. The prosecutor shall prosecute under tribal law any pregnant woman who abuses alcohol or drugs.

*B. Limitations of Authority; Duty to Inform*

1. Before offering protective services to a family, a child protection services worker shall inform the family that he has no legal authority to compel the family to receive such services.
2. If the family declines the offered services, the child protection services worker may request authorization of the tribal prosecutor to initiate a child protection petition in Children's Court alleging that the child is a child in need of care.
3. Nothing in this Section limits the authority of child protection services workers to act in emergency situations pursuant to Section 10 or to obtain a medical evaluation of the child pursuant to Section 8.

**SECTION 7. LOCAL INDIAN CHILD WELFARE  
COMMITTEE/CHILD PROTECTION TEAM**

*A. Purpose*

The local Indian child welfare committee/child protection team is technical and advisory in nature, formed in order to ensure that the Indian Child Welfare Act is being fully implemented. It is not intended to replace the authority and responsibility of the tribal Indian child placement agency, individual agencies (DCFS/CPS), or the \_\_\_\_ Tribal Children's Court. It is designed to promote cooperation, communication, and consistency among agencies. The local Indian child welfare committee/child protection team shall facilitate the decision-making process. Confidentiality shall be maintained by all local Indian child welfare committee/child protection team members.

### *B. Duties*

The Local Indian Child Welfare Committee/Child Protection Team shall:

1. monitor all Indian child placements to ensure that the Indian Child Welfare Act (ICWA) is followed;
2. ensure services for children in culturally relevant Indian homes;
3. provide a forum for debating what actions would best promote the well-being of Indian children;
4. assist in identifying extended Indian families for placement of Indian children;
5. promote enforcement of the ICWA; and
6. maintain confidentiality of information.

### *C. Facilitating Services*

The Local Indian Child Welfare Committee/Child Protection Team shall:

1. identify available community resources, programs and services;
2. provide recommendations to various pertinent agencies;
3. promote cooperation, communication, and consistency among agencies in Indian child placement practices;
4. monitor child abuse and neglect activities to ensure that adequate preventive, protective, and corrective services are provided;
5. develop procedures to provide effective and efficient preventive, protective, and corrective child abuse and neglect services; and
6. identify danger signs which prompt intervention and/or preventive action.

*D. Review and Make Recommendations for Specific Families*

The Local Indian Child Welfare Committee/Child Protection Team shall review and make recommendations for all child abuse and neglect cases which have been referred. Referrals to the team shall be made by the tribal Indian child placement agency, DSHS, DCFS/CPS, a child protective services worker, and/or the court. If requested, the team shall investigate cases to determine whether the best interests of the child are being met.

**SECTION 8. DUTY TO REPORT CHILD ABUSE AND NEGLECT***A. Duty to Report*

Any person, parent and child who has a reasonable cause to suspect that a child is a child in need of care shall immediately make a report to the tribal Indian child placement agency, the tribal law enforcement department, or the state department of child protective services. Those persons reporting, except those specified in Subsection B below, may remain anonymous.

*B. Persons Specifically Required to Report*

1. Any physician, nurse, dentist, optometrist, or any other medical or mental health professional including a community health representative, volunteers working with families, school principal, school teacher, school officials, social workers, child day care center workers, or other child care staff who has reasonable cause to suspect that a child may be a child in need of care, shall make immediately an oral report of the suspected condition to the tribal Indian child placement agency, the tribal law enforcement department, or the state child protection services department.

2. A person mandated to report under Section 8(B)(1) shall immediately report to the tribal Indian child placement agency, state child protection services, and the tribal prosecutor if the person knows or has reason to suspect that a woman who is pregnant has abused alcohol, or used a controlled substance for a nonmedical purpose during the pregnancy.

3. Immediately after making the oral report, the person mandated to report under this Section shall file a written report as required in this Code. If the reporting person is a member of a hospital, agency, or school, the reporting person shall notify the person in charge of the hospital, agency, or school of his or her finding and that the report has been made, and shall make a copy of the written report available to the person in charge. One report from a hospital, agency, or school shall be considered adequate to meet the reporting requirement. A member of the staff of a hospital, agency, or school shall not be dismissed or otherwise penalized for making a report required by this Section or for cooperating with an investigation.

#### *C. Immunity from Liability*

All persons or agencies complying in good faith with the provisions of this Act shall be immune from civil liability and criminal prosecution for such actions.

#### *D. Abrogation of Privilege*

Any legally recognized privileged communication, except that between attorney and client, is abrogated and shall neither constitute grounds for excusing a report otherwise required to be made, nor for excluding evidence in a civil child protective proceeding resulting from a report made pursuant to this Code.

#### *E. Penalty for Not Reporting*

Any person mandated to report under Section 8(B) who knowingly fails to do so or willfully prevents someone else from doing so shall be subject to a charge of civil contempt with a penalty of up to 90 days in jail and/or a fine of up to \$5,000.

#### *F. Abuse and Neglect Reports*

Those persons mandated to report shall include the following information in a written report:

1. names, addresses, and tribal affiliation of the child and his parents, guardian, or custodian;

2. the child's age;
3. the nature and content of the child's abuse or neglect;
4. previous abuse or neglect of the child and his siblings;
5. the name, age, and address of the person alleged to be responsible for the child's abuse or neglect; and
6. the name and address of the person or agency making the report.

### *G. Medical Examinations*

1. The tribal Indian child placement agency or state DCFS/CPS department may request a court order for a medical evaluation of a child pursuant to Section 10 of this Code. The departments shall have a medical evaluation done without a court order if the child's health is seriously endangered and a court order cannot be obtained.
2. When a child *suspected* of being a child in need of care is seen by a physician, the physician shall make the necessary examinations, which may include physical examinations, x-rays, photographs, laboratory studies, and other pertinent studies.
3. The physician shall immediately report the results of the evaluation to the child protection services, tribal prosecutor, law enforcement, and the Children's Court, if requested to do so. The physician's written report to the department shall contain summaries of the evaluation.

## SECTION 9. DRUG ABUSE DURING PREGNANCY

- A. The Children's Court may have jurisdiction over a pregnant woman who has engaged in abuse of alcohol or a controlled substance upon a showing by preponderance of the evidence that the woman is pregnant and abusing alcohol or controlled substances.
- B. Upon assuming jurisdiction, the Court may enter orders requiring the woman to refrain from drug abuse, submit to reasonable measures to



assure her nonuse, and comply with community-based or in-patient treatment programs. Such court orders may be enforced through the Court's civil contempt power.

- C. Information made available pursuant to a Children's Court order regarding a woman's drug use during pregnancy may be used in criminal prosecution against the woman.

## SECTION 10. INVESTIGATION AND EMERGENCY REMOVAL

### *A. Investigative Orders; Orders for Examination*

Upon a showing of probable cause that a child is a child in need of care, which may be done *ex parte* if supported by signed affidavits, the Court may order further investigation and discovery including, but not limited to, taking of photographs, gathering physical evidence, and ordering examinations or evaluations of a child, parent, guardian, or custodian by a physician, dentist, psychologist, or psychiatrist.

### *B. Authority to Remove*

Upon application by any person, which may be *ex parte*, if the court finds probable cause to believe the minor is a child in need of care and that the conditions in which the child is found present a substantial risk of harm to the child's life, physical health or mental well-being, the Court may order the child to be taken into custody. The Court may include in such an order:

1. an authorization to enter specified premises to remove the child; and
2. a directive to place the child in protective custody pending preliminary hearing.

### *C. Emergency Removal Without a Court Order*

1. A child may be taken into protective custody without a court order by a law enforcement officer, the tribe's Indian child placement agency, or the state office of child protection services worker if such persons have

probable cause to believe the child is a child in need of care, and

- a. failure to remove the child may result in a substantial risk of death, serious injury, or serious emotional harm; or
  - b. the parent, guardian, or custodian is absent and it appears from the circumstances that the child is unable to provide for his own basic necessities of life, and no satisfactory arrangements have been made by the parent, guardian, or custodian to provide for such necessities and no alternative arrangements except removal are available to protect the child.
2. If grounds for removal are corrected, the prosecutor shall make a written motion to dismiss the case, and the child may be returned to the parent by the person originally authorizing removal or the child protective services worker.

## SECTION 11. NOTICE OF REMOVAL

### *A. Notice to the Children's Court*

After a child is removed from his home, the person who removed the child shall immediately contact the Children's Court. The contact shall be documented. Actual notice to the Court shall be made by the removing person no later than the next judicial day, excluding Saturday, Sundays, holidays, or any administrative closures of the Court.

### *B. Notice to the Parent, Guardian, or Custodian*

The person removing the child shall make all reasonable efforts to notify the parents, guardian, or custodian immediately after the child's removal. Reasonable efforts shall include personal telephone and written contacts at their residence, place of employment, or other location which the parent, guardian, or custodian is known to frequent with regularity. If the parent, guardian or custodian cannot be found, notice shall be given to members of the extended family of the parent, guardian or custodian, or the extended family of the child. Notice

may be posted in a conspicuous place at the residence where the child was removed.

*C. Notice to Child's Tribe if Different from Tribe Whose Court Is Exercising Jurisdiction*

If the Children's Court asserts jurisdiction over a person who is a member of an Indian tribe other than the \_\_\_\_\_ Tribe, the tribal court, the tribal prosecutor, or the tribal Indian child placement agency shall notify the other tribal court of the member over which jurisdiction has been asserted.

SECTION 12. PLACEMENT OF CHILDREN

*A. Restrictions*

A child alleged to be a child in need of care shall not be placed in a jail or other facility intended or used for the incarceration of adults charged with criminal offenses or for the detention of children alleged to be juvenile offenders.

*B. Placement Priorities*

A child may be placed in the following community-based shelter care facilities listed in order of preference:

1. members of the child's extended family;
2. an Indian family of the same tribe as the child, which is licensed as a foster home, or an Indian family otherwise authorized by law to provide care for the child;
3. a facility operated by a licensed child welfare services agency; or
4. any other suitable placement which meets the standards for shelter care facilities established by the \_\_\_\_\_ tribal government.

*C. Least Restrictive Setting*

If a child cannot be returned to his/her parents, the child shall be placed in the least restrictive setting which most approximates a family and in which his/her special needs, if any,

may be met. The child shall also be placed in reasonable proximity to his/her home, taking into account any special needs of the child.

## SECTION 13. FILING CHILD PROTECTION PETITION

### *A. Authorization to File Petition*

1. Upon authorization by the tribal Indian child placement agency, or the state department of child protection services workers, the \_\_\_\_ tribal prosecutor shall initiate formal child protection proceedings by filing a child protection petition on behalf of the tribe in the best interests of the child.
2. Any family member or extended family member may file a petition with the Children's Court alleging that a child is a child in need of care. Before filing the petition with the Children's Court, the petitioner shall bring the petition to the prosecutor for approval. If the prosecutor approves the petition, the petitioner may proceed with the *ex parte* proceeding unless the prosecutor decides to take the case. If the prosecutor does not approve the petition, the petitioner may still proceed, but notice must be given to the family.
3. Nothing in this Section shall preclude law enforcement or child protective services personnel from taking emergency action under this Code.

### *B. Time Limitations*

If a child has been removed from the home, then a child protection petition shall be filed with the Children's Court no later than the next judicial day following the removal, excluding Saturdays, Sundays, holidays, and any administrative closures of the Court.

### *C. Contents of Petition*

The child protection petition shall set forth the following with specificity:

1. the name, birth date, sex, residence, and tribal affiliation of the child;
2. the basis for the Court's jurisdiction;
3. the specific allegations which identify the child as a child in need of care;
4. a plain and concise statement of the facts upon which the allegations of the child in need of care are based, including the date, time, and location when the alleged facts occurred;
5. the names, residences, and tribal affiliation of the child's parents, guardians, or custodians, if known; in addition, if the child is in a foster home, the agency involved shall be notified;
6. the names, relationship, and residences of all known members of the child's extended family and all former caregivers, if known; and
7. if the child is placed outside of the home, where the child is placed, including the facts necessitating the placement, and the date and time of the placement.

## SECTION 14. NOTICE AND SERVICE OF SUMMONS

### *A. Generally*

Unless a party must be summoned as provided in Subsection (B), a party shall be given notice of a proceeding in Children's Court in any manner authorized by this Code or the laws of the tribal court.

### *B. Summons*

1. In a Children's Court proceeding, the summons shall be issued and served on the parent or the person with whom the child resides, if other than a parent or a court-ordered custodian, directing such person to appear with the child for fact-finding. Any notice for fact-finding shall be by personal service or certified mail. All other notices may be in person or by standard mail. The parents or custodians are responsible for keeping the parent's or custodian's

mailing addresses current. The court may direct that the child's appearance in Court is unnecessary.

2. In a proceeding for termination of parental rights, the summons must be issued and served on the parent or the person with whom the child resides, if other than the parent or a court-ordered custodian, for a hearing on a petition seeking the termination of parental rights. All notices for termination of parental rights are to be personally served or served by certified mail. Notice by publication shall be authorized by the Court. The Court may direct that the child's appearance in court is unnecessary.
3. Contents: The summons shall direct the person to whom it is addressed to appear with the child (unless the child's appearance has been excused) at a date, time, and place specified by the Court and must:
  - a. identify the nature of the hearing;
  - b. include a prominent notice that the hearing could result in termination of parental rights; and
  - c. have a copy of the petition attached to the summons.
4. Manner of Serving Summons
  - a. A summons for fact-finding or termination of parental rights required under this Section must be served by delivering the summons to the party personally.
  - b. If personal service of the summons for fact-finding or termination of parental rights are impracticable, the Court may direct that it be served by certified mail addressed to the last known address of the party, return receipt requested, and restricted to the addressee. Notice of termination of parental rights may also be published with permission of the Court. All other hearings may be sent by standard mail.
  - c. If the Court finds service cannot be made because the whereabouts of the person to be summoned has not been determined after reasonable effort, the Court may direct any manner of substituted service, including publication.

- d. If personal service of the summons is impracticable, the Court may direct that it be served in a manner reasonably calculated to provide notice.
5. **Timing of Service**
    - a. A summons shall be served at least:
      - i. ten (10) days before adjudication; or
      - ii. fourteen (14) days before hearing on a petition to terminate parental rights.
    - b. If the summons is served by registered mail, it must be received and accepted at least ten (10) days before the hearing.
    - c. If service is by publication, the published notice, which does not require publication of the petition itself, shall appear in a tribal newspaper where the respondent lives, or in a newspaper in the county where the party resides, if known, and if not, in the county where the action is pending. The published notice must appear two times within fourteen (14) days before the hearing. An affidavit by the publisher that the notice was published and when it was published shall be filed with the Court as proof of notice.

### *C. Notice of Hearing*

1. **Persons Entitled to Notice:** The Court shall ensure that the following persons are notified of each hearing:
  - a. the parent or parents;
  - b. the attorney for the parents;
  - c. the child or the advocate for the child;
  - d. the legal guardian or custodian other than the parent, if any;
  - e. the petitioner;
  - f. the responsible child placing agency, if different from the petitioner;
  - g. the guardian ad litem of a party appointed pursuant to this Code; and
  - h. any other person the Court may direct to be notified.

2. Generally: Notice of hearing must be given in writing, which may be on the record or mailed to the last known address at least ten (10) judicial days prior to the hearing, except as otherwise provided in these rules.
3. Preliminary Hearing: When a child is removed or placed, reasonable efforts shall be made to notify the parents of the child or extended family pursuant to this Code as soon as the hearing is scheduled. The notice may be in person, in writing, on the record, or by telephone. This hearing shall be limited to the sufficiency of the petition and whether the petition contains adequate facts to go forward with the petition.
4. Termination Proceedings: Notice of a hearing on a petition to terminate parental rights must be given in writing or on the record at least fourteen (14) judicial days before the hearing.
5. Party Fails to Appear: When a party fails to appear in response to a notice of hearing, and if a party needs a person's appearance or believes that appearance may not occur, a subpoena must be requested before the hearing. If a key witness fails to appear, after noting that they have been served, the petition should either be dismissed or the Court shall issue dependency by default.

#### *D. Subpoenas*

1. The attorney for a party or the Court on its own motion may cause a subpoena to be served on a person whose testimony or appearance is desired.
2. It is not necessary to tender advance fees to the person served a subpoena in order to compel attendance.

#### *E. Waiver of Service*

A person may waive notice of hearing or service of process. The waiver shall be in writing. When a party waives service of a summons, the party must be advised.



### *F. Subsequent Notices*

After a party's first appearance before the Court for purposes of fact-finding or termination of parental rights, subsequent notice of proceedings and pleadings shall be served by standard mail.

### *G. Putative Fathers*

If the court determines that the minor has no father as defined in this Code, the Court shall take appropriate action as described in this subsection.

1. The Court shall take initial testimony on the tentative identity and address of the natural father. If the Court finds probable cause to believe that an identifiable person is the natural father of the minor, the Court shall direct that notice be served on that person in the manner as provided in this section. The notice shall include the following information:
  - a. that a petition has been filed with the court;
  - b. the date, time, and place of the hearing at which the natural father is to appear to express his interest, if any, in the minor; and
  - c. a statement that failure to attend the hearing will constitute a denial of interest in the minor, a waiver of notice for all subsequent hearings, a waiver of a right to appointment of an attorney, and could result in termination of any parental rights.
2. Following notice to the putative father, the Court may conduct a hearing.
  - a. If the Court determines the putative father has been personally served or served in some other manner which the court finds to be reasonably calculated to provide notice to the putative father, the Court may proceed in the absence of the putative father.
  - b. If a preponderance of the evidence establishes that the putative father is the natural father of the minor, the Court may determine the justice

- requires that he be allowed fourteen (14) days to establish his relationship according to this Code. However, if the court decides the interest of justice so requires, it shall not be necessary for the mother of the minor to join in an acknowledgment. The Court may extend the time for good cause.
- c. If the Court determines that there is probable cause to believe that another identifiable person is the natural father of the minor, the Court shall proceed with respect to the other person in accordance with this Subsection (G).
  - d. After diligent inquiry, the Court may determine that the identity of the natural father cannot be determined. If so, the Court shall publish notice at least once in a manner calculated to alert a person who may be the father of the child. If no person comes forward, the Court shall terminate the parental rights of the unknown father and proceed without further notice or court-appointed attorney for the unidentified person.
3. The Court may find that the natural father waives all rights to further notice, including the right to notice of termination of parental rights, and the right to legal counsel if:
- a. he fails to appear after proper notice; or
  - b. he appears, but fails to establish paternity within the time set by the court.

#### SECTION 15. PRELIMINARY HEARING

- A. If the child has been released to his/her parent, guardian, or custodian, the court shall conduct a preliminary hearing within forty-five (45) days after filing the petition.
- B. If the child is placed in out-of-home placement, the Court shall conduct a preliminary hearing or shelter care hearing as soon as possible, or on the earliest court date within ten (10) days following the placement for the purpose of determining:

1. whether reasonable cause exists to believe the child is a child in need of care; and
  2. whether the home conditions continue to present a substantial risk of harm to the child's life, physical health, or mental well-being, and whether any alternatives except removal of the child are reasonably available to adequately safeguard the child from such risk.
- C. If the child's parent, guardian, or custodian is not present at the preliminary hearing, the Court shall make an inquiry into what efforts have been made to notify and to obtain the presence of the parent, guardian, or custodian. If it appears that further efforts are likely to produce the child's parent, guardian, or custodian, the Court shall recess the scheduled hearing for not more than ten (10) days and direct the petitioner to make continued effort to obtain the presence of the child's parent, guardian, or custodian. The preliminary hearing may be conducted in the parent's absence.
- D. The tribal prosecutor shall read or cause to be read the allegations stated in the petition in open court, unless waived, and shall advise the parent of the right to have counsel represent them, at their own expense, and their right to a trial on the allegations in the petition. The Court shall allow the parent to deny or admit the allegations and make a statement of explanation.
- E. The Court shall hear testimony concerning the circumstances that gave rise to the petition, and the need for continued placement.
- F. If probable cause to believe the child is a child in need of care is not found, the petition shall be dismissed and the child shall be released.
- G. If the Court finds that probable cause exists to believe the child is a child in need of care, the Court:
1. shall order the parent, guardian, or custodian to appear at a fact-finding hearing on a date and time set by the Court;
  2. may release the child in the custody of either the child's parents, guardian, or custodian under such reasonable terms and conditions as are

- necessary for either the physical or mental well-being of the child; or
3. may order placement of the child with someone other than a parent, guardian, or custodian if the Court, after hearing, determines that both of the following conditions are alleged:
    - a. custody of the child with a parent, guardian, or custodian presents a substantial risk of harm to the child's life, physical health, or mental well-being and no provision of service or other arrangement except removal of the child is reasonably available to adequately safeguard the child from such risk; and
    - b. conditions of custody of the child away from a parent, guardian, or custodian are adequate to safeguard the child's health and welfare.

#### SECTION 16. FACT-FINDING HEARING

- A. The court shall conduct a fact-finding hearing for the purpose of determining whether the child is a child in need of care.
- B. The fact-finding hearing shall commence as soon as possible, but not later than forty-five (45) days after the petition is filed with the Court.
- C. Continuances of a fact-finding hearing may be granted by the Court, but only:
  1. upon stipulation of the parties;
  2. where process cannot be completed;
  3. the Court finds that the testimony of a presently subpoenaed and unavailable witness is needed;
  4. upon a showing of good cause, one time only, for up to fourteen (14) days at a parent's request for parents to obtain counsel; or
  5. for good cause shown.
- D. The general public shall be excluded from the proceedings and only the parties, their counsel, witnesses, the child advocate, and other persons

determined necessary or useful to the proceedings by the Court shall be admitted.

- E. Evidentiary matters will be handled as follows:
1. The formal rules of evidence shall apply at these proceedings. All relevant and material evidence which is reliable and trustworthy may be admitted at the trial and may be relied upon by the Court to the extent of its probative value. Any evidence that is material, probative, and will serve justice is admitted into evidence upon notice to the Court and adverse parties.
  2. The parties shall be afforded an opportunity to examine and controvert written reports received by the Court and shall be allowed to cross-examine individuals who made the reports when those individuals are reasonably available.
- F. If the allegations of the petition are sustained by a standard of clear and convincing evidence, the court shall find the child to be a child in need of care and schedule a disposition hearing. The Court may also enter orders of further discovery, evaluation and assessment, and other orders to protect the child.
- G. The Court may, at any time after conducting a preliminary hearing at which reasonable cause to proceed upon petition is alleged, order any involved child, parent, or guardian to undergo a physical, mental, or psychological examination by a qualified professional.
- H. If the allegations of the petition are not sustained, the Court shall dismiss the matter and release the minor. The dismissal shall constitute *res judicata*.

## SECTION 17. DISPOSITIONAL HEARING

### *A. Purpose*

A dispositional hearing is conducted to determine measures to be taken by the Court with respect to a child properly within its jurisdiction and, when applicable, against any adult once the Court has determined, following trial, plea of admission, or no contest, that the child comes within its jurisdiction.

### *B. Timing*

The disposition hearing may be held immediately after the fact-finding. The interval, if any, between the fact-finding hearing and the disposition hearing is within the discretion of the Court. When the child is in placement, the interval may not be more than ten (10) days except for good cause. If the disposition hearing is not held immediately after the fact-finding, notice of hearing may be given by scheduling it on the record in the presence of the parties or in accordance with this Code.

### *C. Proposed Case Plan*

1. The tribal Indian child placement agency, or its delegate, shall prepare a written report describing all reasonable efforts and appropriate alternative dispositions, including reports of the child protection team and protective services worker. The report shall contain a specific plan for the care of and assistance to the minor and the minor's parent(s), guardian, or custodian designed to resolve the problems presented in the petition.
2. The report shall contain a detailed explanation of the necessity for the proposed disposition plan and its benefits to the minor.
3. If the report recommends placement of the child somewhere other than with the child's parent, guardian, or custodian, it shall state the specific reasons underlying its placement recommendation.
4. The tribal Indian child placement agency, or its delegate, shall present the case plan to the Court, the parent, the child advocate, and the presenting officer at least three (3) days before the disposition hearing.

### *D. Evidence*

1. All relevant and material evidence, including oral and written reports, may be received and may be relied on to the extent of its probative value, even though such evidence may not be admissible at trial. The Court shall consider the case service plan and

any report by an agency responsible for the care and supervision of the child concerning reasonable efforts to prevent removal, or to rectify conditions that caused removal of the child from the home.

2. The parties shall be given an opportunity to examine and controvert written reports so received and may be allowed to cross-examine individuals making reports when such individuals are reasonably available.
3. No assertion of an evidentiary privilege, other than the privilege between attorney and client, shall prevent the receipt and use, at the dispositional phase, of materials prepared pursuant to a court-ordered examination, interview, or course of treatment.

#### *E. Disposition Orders*

1. The Court shall enter an order of disposition after considering the case service plan and other evidence offered bearing on disposition. The Court shall approve a case service plan, may order compliance with all or part of the case service plan, and may enter such orders as it considers necessary and in the best interests of the child. The order of disposition shall state whether reasonable efforts have been made to rectify the conditions that caused the child's removal from his home.
2. If a child has been found to be a child in need of care, the Court may make the following dispositions which are listed by priority:
  - a. permit the child to remain with his/her parent(s), guardian, or custodian, subject to such conditions as the Court may prescribe;
  - b. place the child with a relative within the primary service area of the tribe, subject to such conditions as the Court may prescribe;
  - c. place the child in a licensed Indian foster home within the primary service area of the \_\_\_\_\_ Tribe, subject to such conditions as the Court may prescribe;
  - d. place the child in an Indian foster home, or home of a relative, outside of the primary service area

- of the tribe, subject to such conditions as the Court may prescribe;
- e. place the child in an Indian group home or Indian residential care facility designated by the Court;
  - f. place the child in a licensed foster home, Indian or non-Indian, within the primary service area of the child, subject to such conditions as the Court may prescribe; or
  - g. direct the \_\_\_\_\_ tribal prosecutor to file a petition to terminate parental rights for placement in permanent custody or guardianship, under this Code.
3. If a child remains under the jurisdiction of the Court, an order may be amended or supplemented within the authority granted to the Court in this Code at any time the Court considers necessary and proper and in the best interests of the child.

## SECTION 18. DISPOSITIONAL REVIEW HEARING

Following a child's placement in foster care, the court is required to conduct regular hearings to assess the progress made in efforts to rehabilitate the family. The dispositional order is to be reviewed every six (6) months. The case plan, developed for and reviewed at the dispositional hearing, becomes the central and organizing tool in the ongoing review process.

1. Notice of the review hearing shall be provided on the record or by ordinary mail as provided in this Code.
2. Timing: So long as the child remains in foster care, the dispositional order is to be reviewed at intervals as follows:
  - a. no later than ninety-one (91) days for the first year following entry of the original order of disposition;
  - b. no later than every 182 days after the first year following entry of the original order of disposition (the calculation to commence from the date of the first permanency planning hearing); and



- c. no later than every ninety-one (91) days for the first year after placement of a child in foster care following a dispositional review hearing or a hearing under this Code and every 182 days thereafter.
3. At a review hearing, the Court shall review on the record the compliance with the case service plan prepared pursuant to the previous orders of the Court including:
  - a. services provided or offered to the child and his or her parent, guardian, or custodian and whether the parent, guardian, or custodian has complied with and benefited from those services; and
  - b. visitation with the child; if visitation did not occur or was infrequent, the court shall determine the cause.
4. After review of the case service plan, the Court shall determine the extent of progress made toward alleviating or mitigating the conditions that caused the child to become and to remain a child in need of care. The Court may modify any part of the case plan including, but not limited to, the following:
  - a. prescribing additional services that are necessary to rectify the conditions that caused the child to become or to remain a child in need of care; and
  - b. prescribing additional action to be taken by the parent, guardian, or custodian to rectify the conditions that caused the child to become or remain a child in need of care, and reducing the actions or eliminating services that are not available or unworkable.
5. At a review hearing, the Court shall determine the continuing necessity and appropriateness of the child's placement and shall order the return of the child to the custody of the parent, continue the dispositional order, modify the dispositional order, or enter a new dispositional order.
6. If the child remains in placement, the Court shall determine at the dispositional hearing and at each review hearing whether the cause should be reviewed

before the next review hearing required under this Section. In making this determination, the court shall consider factors including but not limited to the following:

- a. the parent's ability and motivation to make necessary changes to provide a suitable environment for the child; and
  - b. whether there is a reasonable likelihood that the child may be returned to his or her home prior to the next review hearing required by this Section.
7. Unless waived, if not less than seven (7) days notice is given to all parties prior to the return of a child to his or her home, and no party requires a hearing within the seven (7) days, the Court may issue an order without a hearing permitting the agency to return the child to his home.
  8. An agency report filed with the Court shall be accessible to all parties to the action and shall be offered into evidence.
  9. Irregularly scheduled hearings: At the initial dispositional hearing, and at every regularly scheduled dispositional review hearing, the Court must decide whether it will conduct the next dispositional review hearing before what would otherwise be the next regularly scheduled dispositional review hearing as provided in this Code. In deciding whether to shorten the interval between review hearings, the Court shall, among other factors, consider:
    - a. the ability and motivation of the parent to make changes needed to provide the child a suitable home environment; and
    - b. the reasonable likelihood that the child will be ready to return home earlier than the next scheduled dispositional review hearing.
  10. Notice: The Court shall ensure that notice of a dispositional review hearing is given to the appropriate persons in accordance with this Code, or by scheduling a hearing on the record at the previous hearing.

**SECTION 19. PERMANENCY PLANNING HEARING***A. Purpose*

When a child in need of care within the jurisdiction of the Court under this Code remains in foster care for an extended time and without parental rights to the child having been terminated, the Court shall conduct a post-disposition permanency planning hearing. At the hearing, the Court may determine that the child is to return home, that the child is to continue in foster care for a limited specified time or on a long-term basis, or that the agency failed to demonstrate that initiating the termination of parental rights to the child is clearly not in the best interest of the child.

*B. Review Status*

A permanency planning hearing shall be conducted to review the status of the child and the progress being made toward the child's return to his natural parents or to some other permanent home.

*C. Timing*

The Court must conduct the permanency planning hearing no later than 364 days after entry of the original order of disposition. The interval between the original order of disposition and the permanency planning hearing shall be no later than 364 days while the child remains in foster care. The Court may combine the permanency planning hearing with a disposition review hearing.

*D. Notice*

Notice of a permanency planning hearing shall be given as provided in this Code. The notice must include a brief statement of the purpose of the hearing, such as to review the status of the child, the progress made toward returning the child home, or why the child should not be placed in permanent custody of the Court.

*E. Rights Not Terminated*

If parental rights to the child have not been terminated and the Court determines at a permanency planning hearing that the return of the child would not cause a substantial risk of harm to the child's life, physical health, or mental well-being, the Court shall order the child returned to his or her parent. In determining whether the return of the child would cause a substantial risk of harm to the child, the Court shall view the failure of the parent to substantially comply with the terms and conditions of the case service plan and dispositional orders of the Court as evidence that return of the child to his or her parent would cause a substantial risk of harm to the child's life, physical health, or mental well-being.

*F. Court Determines Permanency Plan*

If the Court determines at a permanency planning hearing that the child should not be returned to his or her parent, the tribal Indian child placement agency, or the state department of child protection services shall propose one of the following alternative permanent placement plans:

1. the child be placed permanently with a relative within the primary service area of the \_\_\_\_\_ Tribe;
2. the child be placed permanently with a relative who is outside the primary service area of the \_\_\_\_\_ Tribe;
3. the child remain in a long-term Indian foster or Indian residential care;
4. a petition for guardianship under this Code be filed by the current caretaker of the child, the child, the extended family, or the tribal Indian child placement agency services. If the petitioners are non-Indians, the petitioners must have a favorable vote from the \_\_\_\_\_ Tribal Council before filing their petition; or
5. a petition to terminate parental rights under this Code may be filed by the tribal Indian child placement agency, the department of children and family services, or the child protection services department.

### *G. Evidence*

At the permanency planning hearing all relevant and material evidence, including oral and written reports, may be received by the Court and relied upon to the extent of its probative value. The parties are to be afforded an opportunity to examine and controvert written reports so received and may be allowed to cross-examine individuals who made the reports when those individuals are reasonably available. The Court is required to consider any written or oral information concerning the child from the child's parent, guardian, custodian, foster parent, child caring institution, or relative with whom the child is placed, in addition to any other evidence offered at the hearing.

## SECTION 20. TERMINATION OF PARENTAL RIGHTS

### *A. Purpose*

The purpose of this Section is to provide for the voluntary and involuntary termination of the parent-child relationship and for the substitution of parental care and supervision by judicial process. This Section shall be construed in a manner consistent with the philosophy that the family unit is of most value to the community and the individual family members when that unit remains united and together, and that termination of the parent-child relationship has such vital consequences that it should be used only as a last resort when, in the opinion of the Court, all reasonable efforts have failed to avoid termination and it is in the best interests of the child concerned to proceed under this Section.

### *B. Grounds for Involuntary Termination*

The Court may terminate the parental rights of a parent to a child that is deemed a child in need of care where there are foster parents, guardians and adoptive parents available, if the Court finds beyond a reasonable doubt, one or more of the following:

1. the child has been abandoned under either of the following circumstances:

- a. the parent of a child is unidentifiable and has deserted the child for forty (40) or more days and has not sought custody of the child during that period. For purposes of this Section, a parent is unidentifiable if the parent's identity cannot be ascertained after reasonable efforts have been made to locate and identify the parent; or
  - b. the parent of the child has abandoned the child without provision for his support or without communication for a period of at least forty (40) or more days. The failure to provide support or to communicate for a period of at least (40) or more days shall be presumptive evidence of the parent's intent to abandon the child;
2. the child or a sibling of the child has suffered physical injury, or physical or sexual abuse under either of the following circumstances:
- a. a parent's act caused the physical injury, or physical or sexual abuse, and the Court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home; or
  - b. a parent who had the opportunity to prevent the physical injury, or physical or sexual abuse, failed to do so and the Court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home;
3. the parent was a respondent in a proceeding brought under this Code, twelve (12) or more months have elapsed since the issuance of an initial dispositional order, and the Court finds either of the following:
- a. the conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the age of the child; or
  - b. other conditions exist that cause the child to be a child in need of care, the parent received recommendations to rectify those conditions, the conditions have not been rectified by the parent

after the parent received notice, a hearing, and a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the age of the child;

4. a parent is unable to provide proper care and custody for a period in excess of one (1) year because of mental deficiency or mental illness, without a reasonable expectation that the parent will be able to assume care and custody of the child within a reasonable length of time considering the age of the child;
5. the parent of the child is convicted of a felony that proves the unfitness of the parent to have future custody of the child, or if the parent is imprisoned for over two (2) years and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the age of the child;
6. parental rights to one or more siblings of the child have been terminated due to serious and chronic neglect, or physical or sexual abuse, and prior attempts to rehabilitate the parent have been unsuccessful.

### *C. Termination at Initial Disposition*

If a petition to terminate parental rights to a child is filed under this Code, the Court may enter an order terminating parental rights under Subsection (B) at the initial dispositional hearing.

### *D. Quality of Evidence*

The same rules of evidence which apply at adjudication under Subsection 16(E) shall apply in termination of parental rights proceedings. The petition of dependency, fact-finding, individual case plans, and dispositional orders shall be admitted as evidence to terminate parental rights.

### *E. Termination of Parental Rights Order*

An order terminating parental rights under this Code may not be entered unless the Court makes findings of fact, stated

on the record with its conclusions of law, and includes the statutory basis for the order. Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient. The Court may state the findings and conclusions on the record or include them in a written opinion.

#### *F. Voluntary Relinquishment of Parental Rights*

Parental rights may be voluntarily terminated by a parent in writing, if signed by the parent in the presence, and with approval, of the Court. Relinquishment shall not be accepted or acknowledged by the Court prior to ten (10) days after birth of the child. The Court shall ensure that the parent understands the consequences of the voluntary termination prior to approving it. A parent who wishes to relinquish his parental rights shall be provided an interpreter if he/she does not understand English.

#### *G. Child's Continued Right to Benefits*

An order terminating the parent-child relationship shall not disentitle a child to any benefit due the child from any third persons, agencies, states, or the United States government, nor shall any action under this Code be deemed to affect any rights and benefits that the child derives from the child's descent from a member of a federally recognized Indian tribe.

#### *H. Advisement of Right to Appeal*

Immediately upon entry of an order terminating parental rights, the Court shall advise the respondent parent orally or in writing that the parent is entitled to appellate review of the order. Appellate review shall be by right. The clearly erroneous standard shall be used in reviewing the findings of the Children's Court on appeal from an order terminating parental rights.

#### *I. Post-Termination Review Hearings*

If a child remains in foster care following the termination of parental rights to the child, the Court shall conduct a review hearing, not more than 182 days after termination of parental rights and at least every 182 days thereafter to review the child's placement in foster care and the progress being made



toward the child's permanent custody placement, guardianship, adoption, or other placement. The Court is required to make findings on whether reasonable efforts have been made to establish a permanent placement for the child, and may enter such orders as it considers necessary in the best interest of the child.

#### SECTION 21. AUTHORIZATION OF MEDICAL TREATMENT

- A. At any time, regardless of whether a child is under the authority of the Court, the Court may authorize medical or surgical care for a child when:
  - 1. a parent, legal guardian, or custodian is not immediately available and cannot be found after reasonable effort in the circumstances of the case; or
  - 2. a physician informs the Court orally or in writing that in his professional opinion, the life of the child would be endangered without certain treatment and the parent, guardian, or custodian refuses or fails to consent. If time allows in a situation of this type, the Court shall cause every effort to be made to grant the parent, guardian, or custodian an immediate informal hearing, but this hearing shall not be allowed to further jeopardize the child's life or health.
- B. In making its order, the Court shall give due consideration to any treatment being given the child by prayer through spiritual means alone or through other methods approved by tribal customs, traditions, or religions, if the child or his parent, guardian, or legal custodian are adherents of an established religious denomination that relies on this form of treatment in lieu of medical treatment, or practices the tribal customs, traditions, or religion which is relied upon for such treatment of the child.
- C. After entering any authorization under this Section, the Court shall reduce the circumstances, findings, and authorization to writing and enter it in the records of the Court and shall cause a copy of the

authorization to be given to the appropriate physician, hospital, or both.

- D. Oral authorization by the Court is sufficient for care or treatment to be given and shall be accepted by any physician or hospital. No physician or hospital nor any nurse, technician, or other person under the direction of such physician or hospital shall be subject to criminal or civil liability in the Court for performance of care or treatment in reliance on the Court's authorization, and any function performed thereunder shall be regarded as if it were performed with the child's and the parent's authorization.

## SECTION 22. EMANCIPATION

### *A. Purpose*

Emancipation may be an appropriate legal strategy for a minor seventeen (17) years or older who wishes to live independently, is able to live independently, and who does not wish to work toward reunification with his/her family. The effect of emancipation is to allow the minor to acquire a domicile separate from the parents, and to allow the minor to control his/her own money. In some cases, the minor may be able to make a gradual transition to independence by paying room and board to a family.

### *B. Emancipation by Law*

An emancipation occurs by operation of law when a minor is validly married or when a person reaches the age of eighteen (18) years.

### *C. Petition for Emancipation*

A minor seeking emancipation by court order is required to file a petition for emancipation under this Code in the tribal court where the minor resides. The petition shall be signed and verified by the minor, and shall include all of the following information:

1. the minor's full name and birth date, and the tribe, county, and state where the minor was born;
2. a certified copy of the minor's birth certificate;
3. the name and last known address of the minor's parents, guardian, or custodian;
4. the minor's parent's address and length of residency at that address; and
5. a declaration by the minor indicating that he/she has demonstrated the ability to manage his/her financial affairs, and his/her personal and social affairs. The minor may include any information he/she considers necessary to support the declaration.

#### *D. Entering Emancipation Order*

The Court may enter an order of emancipation if it determines that emancipation is in the best interest of the child.

### SECTION 23. POWER OF ATTORNEY

Under this Code, a parent, legal custodian, or guardian including tribal Indian child placement agency, by a properly executed power of attorney, may delegate to another person for a period not exceeding six (6) months, any of the parent's, legal custodian's, or guardian's powers regarding care, custody, or property of the child, except the power to consent to marriage or adoption of a child.

### SECTION 24. GUARDIANSHIP

#### *A. Purpose*

The Children's Court, under this Code, when it appears necessary or convenient, may appoint guardians for the persons and/or property of children under the Court's jurisdiction. Unless otherwise specified by the Court, a guardian shall have the custody and care of the education of the child and the care and management of his property until such child arrives at the age of eighteen (18), marries, dies, is

emancipated by the court under Section 22 of this Code, or until the guardian is legally discharged.

### *B. Limited Guardianship*

The Children's Court shall appoint a limited guardian under such terms and conditions of a voluntary placement plan as the Court sets forth in the written order. A limited guardianship may be terminated if the Court determines that it is in the best interests of the child to change custody from the limited guardian to a new guardian or to return the child to the parent, guardian, or custodian. The parent and the child's extended family shall be granted liberal visitation rights unless deemed inappropriate by the Court. A limited guardianship shall be established by parental consent only, and shall be revocable by the Court upon parental request in a hearing.

### *C. Temporary Guardianship*

If necessary to protect the child, the Court under this Code may appoint a temporary guardian for six (6) months. In such an appointment where immediate decisions affecting the child's health or welfare are required (e.g., regarding necessary medical treatment), or where the child's placement must be secured pending a full hearing on a guardianship petition, the temporary guardian has all the powers and duties of a limited guardian, except that the appointment expires after six (6) months.

### *D. General Guardianship*

1. General guardianship does not require parental consent.
2. The Court may appoint a guardian for an unmarried minor if any of the following circumstances exist:
  - a. the parental rights of both parents or the surviving parent have been terminated or suspended by prior court order, by judgment of divorce or separate maintenance, by death, by judicial determination of mental incompetency, by disappearance, or by confinement in a place of detention; or

- b. the appointment is necessary for the immediate physical well-being of the minor.

#### *E. Who May File*

1. A person interested in the welfare of a minor, or a minor, if fourteen (14) years of age or older, may petition for the appointment of a guardian of the minor. The Court may order the department of tribal Indian child placement agency services, the department of social services, or an employee to conduct an investigation of the proposed guardianship and file a written report of the investigation.
2. Before appointing a guardian, the Court must give reasonable notice to any person having the care of the child, to the child himself, to each parent and to other Indian relatives of the child as the Court may deem proper.

#### *F. Contents of Guardianship Petition*

1. The petition for guardianship shall include the following, to the best information and belief of the petitioner:
  - a. the full name, sex, date and place of birth, residence, and tribal affiliation of the proposed ward;
  - b. the full name, address, tribal affiliation, relationship, if any, to the minor, and interest in the proceeding of the petitioner;
  - c. the names and addresses of the minor's parents, if living, and of other persons known to have an interest in the petition for appointment of a guardian; also the name and date of death of the minor's deceased parent(s);
  - d. the basis for the Court's jurisdiction;
  - e. the name and address of the person or agency having legal or temporary custody of the proposed ward;
  - f. a statement of the reason or reasons that the appointment of a guardian is sought; whether the petitioner seeks the appointment of a

- guardian of the person, a guardian of the estate, or both; and whom the petitioner recommends or seeks to have appointed as such guardian(s); and
- g. a full description and statement of value of the minor's assets and liabilities with an estimate of the value of any property owned, possessed, or in which the proposed ward has an interest, including any income and receivables to which the proposed ward is entitled.
2. All petitions must be signed and dated by the petitioners, and must be notarized or witnessed by a clerk of the court.

### *G. Guardianship Report*

1. Under this Code, upon the filing of a guardianship petition, the Court shall immediately request that the tribal Indian child placement agency or other qualified agency conduct a guardianship report on the proposed guardian and a report on the proposed ward. The guardianship report shall contain all pertinent information necessary to assist the Court in determining the best interests of the proposed ward.
2. No determination can be made on a petition for guardianship until the report has been completed, submitted to, and considered by the Court. The guardianship report shall be submitted to the Court no later than ten (10) days before the hearing. The Court may order additional reports as it deems necessary.

### *H. Powers and Duties of Guardian of the Person*

1. To the extent that it is not inconsistent with the terms of any order of the Court, a guardian of the person has the following powers and duties:
  - a. the guardian of the person is entitled to custody of the person of his or her ward and shall make provision for his or her ward's care, comfort, and maintenance, and shall, as appropriate to the ward's needs, arrange for his or her training, education, employment, rehabilitation or

habilitation. The guardian of the person shall take reasonable care of the ward's clothing, furniture, vehicles, and other personal effects that are with the ward;

- b. in arranging for a place of abode, the guardian of the person shall give preference to places within the \_\_\_\_\_ tribal reservation over places not in the reservation, if both in-reservation and out-of-reservation locations are substantially equivalent. The guardian also shall give preference to places that are not treatment facilities. If the only available and appropriate places of domicile are treatment facilities, the guardian shall give preference to \_\_\_\_\_ tribal-based treatment facilities, such as group homes over treatment facilities that are not tribal-based; and
  - c. the guardian of the person shall have authority to consent to any medical, legal, psychological, or other professional care, counsel, treatment, or service for the person. The guardian of the person may give any other consent or approval on the ward's behalf that may be required or is in the ward's best interest. The guardian of the person may petition the Court for concurrence in the consent or approval.
2. A guardian of the person is entitled to be reimbursed out of the ward's estate for reasonable and proper expenditures incurred in the performance of his or her duties as guardian of the ward's person.
  3. A guardian of the person, if he/she has acted within the limits imposed on him/her by this Code or the order of appointment or both, shall not be liable for damages to the ward or the ward's estate, merely by reason of the guardian's:
    - a. giving consent or approval necessary to enable the ward to receive legal, psychological, or other professional care, counsel, treatment, or service, in a situation where the damages result from the negligence or other acts of a third person; or

- b. authorizing medical treatment or surgery for his or her ward, if the guardian acted in good faith and was not negligent.

### *I. Guardianship of Estate*

1. The Court may appoint a guardian of property of a ward under such terms and conditions as the Court sets forth in the written order. The guardianship may cover all property or it may be limited to only specific property or a specific legal action as set forth in the written order. A limited guardianship of the person may also include guardianship of the ward's property if set forth in the written order. The guardian of the property has the power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, and use of the child's estate to accomplish the desired result of administering the child's property legally and in the child's best interest, including but not limited to the following specific powers:
  - a. to take possession, for the child's use, of all of the child's estate;
  - b. to receive assets due the child from any source;
  - c. to maintain any appropriate action or proceeding, to recover possession of any of the child's property, to determine the title thereto, or to recover damages for any injury done to any of the child's property; also, to compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle any other claims in favor of or against the child;
  - d. to abandon or relinquish all rights in any property when, in the guardian's opinion, acting reasonably and in good faith, it is valueless, or is so encumbered or is otherwise in such condition that it is of no benefit or value to the child or his or her estate;
  - e. to insure the child's assets against damage or loss, at the expense of the child's estate;



- f. to pay taxes, assessments, and other expenses incident to the collection, care, administration, and protection of the child's estate;
- g. to expend estate income on the child's behalf and to petition the Court for prior approval of expenditures from estate principal, provided neither the existence of the estate or guardian's authority to make expenditures therefrom shall be construed as affecting the legal duty that a parent or other person may have to support and provide for the child;
- h. to pay from the child's estate necessary expenses of administering the child's estate, and to petition the court for prior approval of expenditures;
- i. to continue any business operation in which the child was engaged, where such continuation is reasonably necessary or desirable to preserve the value, including goodwill, of the child's interest in such business;
- j. without a court order to lease any of the child's real estate, within the B.I.A. Leasing Department guidelines or rules, for a term of not more than five years, or to sell, lease, or exchange any of the child's personal property, including securities, provided that the aggregate value of all items of the child's tangible personal property sold without court order over the duration of the estate shall not exceed five thousand dollars (\$5,000);
- k. a guardian who is required under this Code to do so shall, and any other guardian who so desires may, by motion in the cause, request the Court to issue him/her an order to lease any of the child's real estate or to sell, within the B.I.A. Leasing Department guidelines or rules, any item or items of the child's personal property. Notice of the motion and of the date, time, and place of a hearing thereon shall be served upon all parties of record and upon such other persons as the clerk may direct, and the Court may issue the order after hearing and upon such conditions as the Court may require, provided that the

power granted in this subsection shall not affect the power of the guardian to petition the Court for prior approval of expenditures from estate principal under this Code;

- l. to foreclose, as an incident to the collection of any bond, note or other obligation, any mortgage, deed of trust, or other lien securing such bond, note or other obligation, and to bid in the property at such foreclosure sale, or to acquire the property by deed from the mortgagor or obligor without foreclosure; and to retain the property so bid in or taken over without foreclosure; and
- m. to execute and deliver all instruments that will accomplish or facilitate the exercise of the powers vested in the guardian.

#### *J. Resignation*

1. Any guardian who wishes to resign may apply in writing to the court, setting forth the circumstances of the case. If a guardian of the estate or a guardian both of the estate and of the person, at the time of making the application, also exhibits his or her final account for settlement, and if the Court is satisfied that the guardian has fully accounted, the Court may accept the resignation of the guardian and discharge him/her and appoint a successor guardian, but the guardian so discharged and his/her sureties are still liable in relation to all matters connected with the guardianship before the discharge.
2. A guardian of both the estate and of the person who wishes to resign as guardian of the estate of the ward but continue as guardian of the person of the ward may apply for the partial resignation by petition as provided under the Code.

#### *K. Appointment of Successor Guardian*

Upon the removal, death, or resignation of a guardian, the Court shall appoint a successor guardian following the same criteria that would apply to the initial appointment of a guardian.

**SECTION 25. CHILD PROTECTION RECORDS***A. Children's Court Records*

A record of all hearings under this Code shall be made and preserved. All Children's Court records shall be confidential and shall not be open to inspection to any but the following:

1. the child;
2. the child's parent, guardian, or custodian;
3. the prospective adoptive parent(s);
4. the child's counsel or court-appointed special advocate;
5. the Children's Court personnel directly involved in the handling of the case; or
6. any other person by order of the Court having legitimate interest in the particular case or the work of the Court.

*B. Law Enforcement and Social Services Records*

Law enforcement records and files concerning a child shall be kept separate from the records and files of adults. All law enforcement and social services records shall be confidential and shall not be open to inspection to any but the following:

1. the child;
2. the child's parent, guardian, or custodian;
3. the child's counsel or court-appointed special advocate;
4. law enforcement and human services personnel, including the tribal Indian child placement agency, and child protection services, directly involved in the handling of the case;
5. the Children's Court personnel directly involved in the handling of the case; or
6. any other person by order of the Court having legitimate interest in the particular case or the work of the Court.

## SECTION 26. REHEARINGS

### *A. Timing and Grounds*

A party may seek a rehearing or new trial by filing a written motion stating basis for the relief sought within fourteen (14) days after decision of disposition or supplemental disposition. The Court may entertain an untimely motion for good cause shown. A motion will not be considered unless it presents a matter not previously presented to the Court, or presented but not previously considered by the Court, which, if true, would cause the Court to reconsider the case.

### *B. Making the Request*

All parties must be given notice of the motion and any response by parties must be in writing and filed with the Court and parties within seven (7) days after notice of the motion.

### *C. Procedure*

The judge may affirm, modify, or vacate the decision previously made, in whole or in part, on the basis of the record, the memoranda prepared, or a hearing on the motion, whichever the Court in its discretion finds appropriate for the case.

### *D. Response by Parties*

Any response by parties must be in writing and filed with the Court and opposing parties within seven (7) days after notice of the motion.

### *E. Hearings*

The Court need not hold a hearing before ruling on a motion. Any hearing conducted shall be in accordance with the rules for dispositional hearings; and, at the discretion of the Court, may be assigned to the person who conducted the hearing. The Court shall state the reasons for its decision on the motion on the record or in writing.

### *F. Stay*

The Court may stay any order pending a ruling on the motion.

## SECTION 27. CHILDREN'S COURT APPEALS

### *A. Who Can Appeal*

Any party to a Children's Court hearing may appeal a final Children's Court order to the \_\_\_\_ Tribal Court of Appeals. The following orders are appealable by right:

1. an order of disposition placing a minor under the supervision of the Court or removing the minor from his or her home;
2. an order terminating parental rights; and
3. any order required by law to be appealed to the Court of Appeals.

### *B. Time Limit for Appeal*

Any party seeking to appeal a final Children's Court order shall file a written notice of appeal with the Court within fifteen (15) judicial working days of the final order.

### *C. Review Standard*

The clearly erroneous standard shall be used in reviewing the findings of the Children's Court on appeal.

### *D. Record*

For purposes of appeal, a record of proceedings shall be made available to the child, his parent, guardian or custodian, the child's counsel, and others upon court order. Costs of obtaining this record shall be paid by the party seeking the appeal.

*E. Stay of Appeal*

A court order may be stayed upon order of the appellate court.

*F. Conduct of Proceedings*

All appeals shall be conducted in accordance with the tribal code and tribal court rules of procedure as long as those provisions are not in conflict with the provisions of this Children's Code.

