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April 19, 2015

Elizabeth Appel  
Office of Regulatory Affairs &  
Collaborative Action—Indian Affairs  
U.S. Department of the Interior  
1849 C Street N.W., MS 3642  
Washington, DC 20240

Re: Docket ID: BIA–2015–0001; Regulations for State Courts and Agencies in Indian Child Custody Proceedings.

Dear Ms. Appel:

The American Academy of Adoption Attorneys (Academy) submits these comments to Docket ID: BIA–2015–0001; Regulations for State Courts and Agencies in Indian Child Custody Proceedings.\*

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## Who we are

The American Academy of Adoption Attorneys is a not-for-profit organization of attorneys, judges and law professors throughout the United States and Canada, who have distinguished themselves in the field of adoption law and who are dedicated to the highest standards of practice. The Academy’s mission is to support the rights of children to live in safe, permanent homes with loving families, to protect the interests of all parties to adoption, and to assist in the orderly and legal process of adoption. The Academy’s work includes promoting the reform of adoption laws and disseminating information on ethical adoption practices. The Academy regularly conducts seminars on the Indian Child Welfare Act (ICWA) and the rights of birth parents and children for attorneys and the judiciary. The Academy has been and is actively involved in legislative efforts to amend ICWA and to establish federal protections for birth parents.

## Summary of concerns

The Academy believes the proposed rule greatly exceeds the statutory authority granted to the U.S. Department of the Interior (Department) by Congress in 25 U.S.C. § 1952. Congress granted the Department limited rule-making authority to promulgate rules relevant to the re-assumption of tribal jurisdiction under 25 U.S.C. § 1918, and other minor rules relevant to grant-making – not to enact a wholesale takeover of state courts, a takeover previously found to be anathema by the Department. But even if the proposed rules were deemed to be within the jurisdiction of the Department to author, they are contrary to the best interests of Indian children, Indian birth parents, and will only foster increased litigation and constitutional challenges.

The Academy’s comments fall into two sections: the first, concerning the limits of the Department’s jurisdiction to enact any rules regulating state courts; and the second, concerning the merits of proposed subparts.

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**1. The Department of Interior lacks statutory authority to promulgate the proposed rules.**

The authors of the 1979 *Guidelines*, who were intimately involved in the drafting and passage of the federal ICWA, recognized the deference due to state courts in matters respecting child custody and adoption, and recognized the limits of the Department's authority to provide guidance to state courts concerning the application of ICWA to child custody proceedings in state court. Indeed, the Department was emphatic in its view that it lacked authority to commandeer state courts by enacting binding rules:

- **Nothing in the legislative history indicates that Congress intended this department to exercise supervisory control over state or tribal courts or to legislate for them with respect to Indian child custody matters. For Congress to assign to an administrative agency such supervisory control over courts would be an extraordinary step.**

- **Nothing in the language or legislative history of 25 U.S.C. 1952 compels the conclusion that Congress intended to vest this Department with such extraordinary power.**
- **Assignment of supervisory authority over the courts to an administrative agency is a measure so at odds with concepts of both federalism and separation of powers that it should not be imputed to Congress in the absence of an express declaration of congressional intent to that effect.**

Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584 (Nov. 26, 1979).

How times have changed. As noted in the preamble to the proposed rule, the Department has radically changed its view. In an unabashed about-face from the position the Department has consistently taken since ICWA's inception, the Department now states that:

The Department has concluded that these regulations are *now necessary* to effectively carry out the provisions of ICWA. In issuing the guidelines in 1979, the Department found that primary responsibility for interpreting many of ICWA's provisions rests with the State courts that decide Indian child custody cases. See, e.g., 44 FR 67584 (November 26, 1979). At the time, the Department opined that the promulgation of regulations was *not necessary* to carry out ICWA.

Regulations for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 14880, 14881 (Mar. 20, 2015) (emphasis added).

While the Department may believe binding rules are now “necessary,” the Department fails to address the more fundamental question: whether Congress intended to grant it power to enact a rule that is binding on state courts in the first place. The Academy submits it did not.

In the 1979 *Guidelines*, the Department explained that “[p]ortions of the Indian Child Welfare Act do expressly delegate to the Secretary of the Interior responsibility for interpreting statutory language. For example, under 25 U.S.C. 1918, the Secretary is directed to determine whether a plan for re-assumption of jurisdiction is 'feasible' as that term is used in the statute.” 44 Fed. Reg. 67584. The Academy believes Section 1918 is a proper exercise of the Department's authority to promulgate rules necessary to implement re-assumption procedures. Likewise, the Academy does not dispute the Department's authority to develop rules regarding tribal grants or designating agents

for tribal notice, which it did. *See* 25 CFR Part 23. These are matters squarely within the Department's traditional purview and area of expertise.

The same cannot be said regarding the Department's attempt to regulate state courts concerning matters that fall outside its expertise. In stark contrast to other federal agencies that administer subjects within their domain of expertise (such as the Department of Energy, Federal Communications Commission, Internal Revenue Service), the Department, through its Bureau of Indian Affairs, does not and cannot administer or enforce ICWA, which applies in "child custody proceedings" in state and tribal court. It does not adjudicate foster care, termination, or adoption cases. It has no legal expertise in child welfare law. It has no expertise in, or experience with, issues concerning child development, or children's mental health. And it has no *judicial* power in these areas of concern.

Indeed, so thought the Department in 1979, when it stated, "[p]rimary responsibility for interpreting other language used in the Act, however, *rests with the courts that decide Indian child custody cases*. For example, the legislative history of the Act states explicitly that the use of the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child." 1979 Guidelines, 44 Fed. Reg. at 67584 (emphases added). The Department could not have been more clear in its view on the scope of its authority, when it concluded:

*Nothing* in the legislative history indicates that Congress intended this department to exercise supervisory control over state or tribal courts or to legislate for them with respect to Indian child custody matters.

*Id.* (emphasis added).

Although established principles of administrative law require courts to give deference to an agency's interpretations of the statutes they administer, such deference is unwarranted when there is reason to suspect that the agency's interpretation "does not reflect the agency's fair and considered judgment on the matter in question."... This might occur when the agency's interpretation conflicts with a prior interpretation..." (internal citations omitted). *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166, 183 L. Ed. 2d 153 (2012).

The Department's lack of fairness in proposing this rule is demonstrated in the facts leading to the publication of revised Guidelines. The Academy first learned that the Department was considering the possibility of revising the 1979 Guidelines by way of correspondence, dated February 21, 2014, addressed to tribal leaders, from Kevin Washburn, Assistant Secretary-Indian Affairs. His letter, at paragraph 2, states, "In response to the recent critical issues regarding ICWA, I have directed my staff to re-examine the *Guidelines* and respectfully request your input..."

The Academy contacted the BIA and learned that Mr. Washburn's letter to tribal leaders was not sent to adoption agencies or adoption attorneys (on which the proposed rules impose significant obligations), or to any child welfare agencies or other child welfare professionals. The Academy requested permission to comment and was advised that its comments would be accepted. The Academy submitted comments on April 24, 2014, wherein it principally addressed the fact that the *Guidelines* were not binding regulations, and questioned the Department's authority to create federal regulations that would be binding upon state courts.

Shortly thereafter, the Academy was advised that the Department did intend to go forward with its rewriting of the *Guidelines* and was giving serious consideration to the *Guidelines* becoming federal regulations. Since the Fall of 2014, the Academy's ICWA Committee, on a frequent basis, contacted the Bureau of Indian Affairs (BIA) regarding the status of the proposed revisions to the *Guidelines*. Throughout this time period, the BIA advised the Academy that any proposed revisions would be published and available for comment. Despite these continued reassurances, on February 24, 2015, Jay McCarthy, co-chair of the Academy's ICWA Committee, contacted the BIA and was advised that the Undersecretary, Kevin Washburn, would be announcing that the BIA revisions of the *Guidelines* would be effective immediately – and no comment period was allowed. This is not fair-minded and considered agency decision-making.

The proposed rules would make binding the already-effective Guidelines, which were issued without adherence to APA notice and comment procedures, but nevertheless represent the agency's new interpretation of the statute. That interpretation is not entitled to deference, for several reasons: (1) the Department is not charged with administering the statute; (2) the Department's interpretation is not within the range of reasonable interpretations of the statute; and (3) the Department's interpretation would render the statute unconstitutional as applied, for example: when it operates to remove children from fit stable homes without consideration of the child's best interests; places special burdens on children who fall within the statute's purview, based on race, ancestry, or heritage; voids a fit birth mother's decision voluntarily to place her child with an adoptive family of her choosing. In such instances and others, the Department's interpretation of ICWA violates the US Constitution's guarantees of due process and equal protection of the laws.

An agency's interpretation of a federal statute is entitled to deference in certain, limited circumstances:

[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme *it is entrusted to administer*, and the principle of deference to administrative interpretations...“has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a

full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. [citations omitted]...“... If this choice represents a reasonable accommodation of conflicting policies that were *committed to the agency's care by the statute*, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.”

*Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844-45, 104 S. Ct. 2778, 2782-83, 81 L. Ed. 2d 694 (1984) (emphasis added). The Supreme Court has consistently held that “*Chevron* applies to cases in which an agency adopts a construction of a jurisdictional provision of a *statute it administers*.” 1 R. Pierce, *Administrative Law Treatise* § 3.5, at 187 (2010) (quoted in *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1871 (2013)) (emphasis added)).

As indicated in numerous sections within ICWA, Congress intended that *state courts*, not an administrative agency, would interpret and apply ICWA’s terms concurrently with state law. *See, e.g.*, 25 U.S.C. § 1911(b) (concurrent state jurisdiction in any “State court proceeding”); Section 1912 (notice required in “involuntary proceeding in a State court”); Section 1912(f)(discovery requirements in a “proceeding under State law.”); Section 1912(d) (active efforts required in any proceedings “under State law.”); Section 1913(b) (withdrawal of consents in proceedings “under State law.”); Section 1913(d) (no collateral attacks after an adoption has been final two years unless “permitted under State law.”); Section 1914 (petition to invalidate for violations of ICWA in proceedings “under state law.”); Section 1915 (governing adoptive placements “under state law.”). When Congress indicated an intent to pre-empt state law, it plainly said so. 25 U.S.C. § 1916 (establishing procedures for return of Indian child after adoption vacated or set aside, “*Notwithstanding State law to the contrary*”).

The legislative history amply demonstrates Congress’s intent that state law not be preempted or regulated by a federal agency. The House Report states, “[f]irst, let it be said that the provisions of the bill do not oust the state from the exercise of its legitimate police powers in regulating domestic relations.” H.R. Rep. No. 1386, at 17, reprinted in 1978 U.S.C.C.A.N. 7530, 7540. And this: “While the Committee does not feel that it is necessary or desirable to oust the states of their traditional jurisdiction over Indian children falling within their geographic limits, it does feel the need to establish *minimum* federal standards and procedural safeguards in state Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe.” *Id.* at 19, 7541 (emphasis added). In statements made on the Floor of the House prior to passage of the ICWA, Rep. Mo Udall, House Author of ICWA, stated, “where an Indian child is residing or domiciled off an Indian reservation the State has *full jurisdiction* over the child in a child custody proceeding.” 124 Cong. Rec. 38107 (Oct. 14, 1978) (statement of Rep. Udall)

As indicated below, several subparts to the proposed rule purport to pre-empt or displace state law. But “[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.” *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)). Because domestic relations are preeminently matters of state law, the Supreme Court “consistently recognized that Congress, when it passes general legislation, rarely intends to displace state authority in this area.” *Mansell v. Mansell*, 490 U.S. 581, 587 (1989).

Executive Order 13132 (Federalism), which the Department purports to follow, likewise demands specific evidence of intent that Congress intended such phrases as “qualified expert witness,” “good cause” to preempt state law.

*Special Requirements for Preemption.* Agencies, in taking action that preempts State law, shall act in strict accordance with governing law.

- (a) Agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only where *the statute contains an express preemption provision* or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute.

Federalism, 64 Fed. Reg. 43255 (Aug. 10, 1999) (emphasis added). Based on the foregoing, the Academy believes the proposed rule exceeds the grant of authority Congress gave it in the ICWA. Therefore, the proposed rule should be withdrawn by the Department.

**2. Without waiving objection to the proposed rule as being in excess of the Department’s authority, the Academy provides comments to specific subparts as discussed below.**

- a. § 23.2 Definitions:
  - i. “Active efforts”
  - ii. “Continued custody”
  - iii. “Imminent physical damage or harm”
- b. § 23.103 (b) When does ICWA apply? Repudiation of “existing Indian family doctrine.”
- c. § 23.103 (c) Court and Agency duty to inquire if child could be Indian.
- d. § 23.106 When does the requirement for active efforts begin?
- e. § 23.107 What actions must an agency and State court undertake in order to determine whether a child is an Indian child?

- f. § 23.107 (2) Active efforts duty to verify Indian child status
- g. § 23.107 (b) Simultaneous duty to disclose confidential information to tribe and keep information confidential.
- h. § 23.108 Who makes the determination as to whether a child is a member of a tribe?
- i. § 23.109 What is the procedure for determining an Indian child's tribe when the child is a member or eligible for membership in more than one tribe?
- j. § 23.111 What are the notice requirements for a child custody proceeding involving an Indian child?
- k. § 23.114 What are the procedures for determining improper removal?
- l. § 23.115 How are petitions for transfer of proceeding made?
- m. § 23.117: How is a determination of “good cause” not to transfer made?
- n. § 23.120 What steps must a party take to petition a State court for certain actions involving an Indian child?
- o. § 23.121 (a) What are the applicable standards of evidence? (foster care)
- p. § 23.121 (b) What are the applicable standards of evidence? (termination)
- q. § 23.121 (d) What are the applicable standards of evidence? (irrelevant considerations)
- r. § 23.122 Who may serve as a qualified expert witness?
- s. § 23.123 Voluntary proceedings
- t. § 23.127 How is withdrawal of consent to a voluntary adoption achieved?
- u. § 23.128 When do the placement preferences apply?
- v. § 23.131 How is a determination for good cause to depart from the placement preferences made?
- w. § 23.132 What is the procedure for petitioning to vacate an adoption?
- x. § 23.133 Who can make a petition to invalidate an action?

## ACADEMY COMMENTS ON THE MERITS OF THE PROPOSED RULE

### 3. Proposed Rule: §23.2, Definitions

The Academy addresses its comments to language referred to as “proposed rule”. We cite the relevant language (indented), and follow that language with specific concerns captioned “Academy comment.”

**Proposed rule: § 23.2 Definitions.** *“Active efforts means actions intended primarily to maintain and reunite an Indian child with his or her family or tribal community and constitute more than reasonable efforts as required by Title IV-E of the Social Security Act (42 U.S.C. § 671(a)(15)).”*

**Academy comment:** Congress did intend to single out American Indians for additional reunification efforts not available to other Americans. The problem Congress identified at the time of ICWA's enactment was that the remedial efforts made available to parents by the states were not apparently applied equally to Indian families. Thus, the House Report states:

Subsection (d) provides that a party seeking foster care placement or termination of parental rights involving an Indian child must satisfy the court that active efforts have been made to provide assistance designed to prevent the breakup of Indian families. The committee is advised that most state laws require public or private agencies involved in child placements to resort to remedial measures prior to initiating placement or termination proceedings, but that these services are rarely provided. This subsection imposes a federal requirement *in that regard* with respect to Indian children and families.

H.R. Rep. No. 95-1386, at 22 (1978), 1978 U.S.C.C.A.N. 7530, 7545. It would be quite remarkable that Congress intended ICWA to provide additional efforts than are required under Title IV-E of the Social Security Act (42 U.S.C. § 671(a)(15)), given that Title IV-E was not passed until 1980. Such a proposed rule would raise grave equal protection concerns and be tantamount to an agency rewrite of federal statutory terms. Therefore the proposed rule should clarify that active efforts should be defined consistently with "reasonable efforts" under 42 U.S.C. § 671(a)(15)

**Proposed rule: § 23.2 Definitions** "Continued custody means *a pre-existing state of physical and/or legal custody that a parent already has or had at any point in the past.* The biological mother of a child has had custody of a child." (emphasis added.)

**Academy comment:** The phrase "continued custody" is taken from 25 U.S.C. § 1912(e), (f). Congress did not define this term, but the Supreme Court has held:

Section 1912(f) conditions the involuntary termination of parental rights on a showing regarding the merits of "continued custody of the child by the parent." (emphasis added). The adjective "continued" plainly refers to a pre-existing state. As Justice Sotomayor concedes, *post*, at 11 (dissenting opinion) (hereinafter the dissent), "continued" means "[c]arried on or kept up without cessation" or "[e]xtended in space without interruption or breach of connection." Compact Edition of the Oxford English Dictionary 909 (1981 reprint of 1971 ed.) (Compact OED); see also American Heritage Dictionary 288 (1981) (defining "continue" in the following manner: "1. To go on with a particular action or in a particular condition; persist. . . . 3. To remain in the same state, capacity, or place");

Webster's Third New International Dictionary 493 (1961) (Webster's) (defining "continued" as "stretching out in time or space esp. without interruption"); *Aguilar v. FDIC*, 63 F.3d 1059, 1062 (CA11 1995) (*per curiam*) (suggesting that the phrase "continue an action" means "go on with . . . an action" that is "preexisting"). The term "continued" also can mean "resumed after interruption." Webster's 493; see *American Heritage Dictionary* 288. The phrase "continued custody" therefore refers to custody that a parent already has (or at least had at some point in the past). As a result, §1912(f) does not apply in cases where the Indian parent never had custody of the Indian child.

*Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2560 (2013). The Supreme Court's opinion makes clear that the pre-existing "custody" relevant to this inquiry is custody in the legal sense:

[I]t would be absurd to think that Congress enacted a provision that *permits* termination of a custodial parent's rights, while simultaneously *prohibiting* termination of a noncustodial parent's rights. If the statute draws any distinction between custodial and noncustodial parents, that distinction surely does not provide greater protection for noncustodial parents.

*Id.* at 2561.

The Academy is concerned that the proposed rule as written may be interpreted to refer to *any* period of "custody," regardless of how short in duration, that a parent may have had at *any* "point" in the past. Under *Adoptive Couple*, that period of custody must be a "pre-existing state" of custody in the legal sense, and excludes a situation where a non-custodial biological parent has had intermittent physical control of the child. The proposed rule should be limited accordingly.

**Proposed rule: § 23.2 Definitions.** "*Imminent physical damage or harm* means present or impending risk of serious bodily injury or death."

**Academy comment:** This is a shocking definition of imminent damage or harm, for it means lesser state and federal crimes against a child that do not rise to the level of "serious bodily injury" – such as domestic assault, sexual abuse or assault, or injury-causing misdemeanor and gross misdemeanor assault – are not cause for state authorities to intervene to protect an Indian child in an emergency under 25 U.S.C. § 1922. The rule should be deleted, leaving it to state courts to define imminent harm, and so as to not pre-empt state child protection laws. Indian children should have equal *protection* of the laws – they plainly do not under this definition.

#### 4. **Proposed rule: § 23.103, When does ICWA apply?**

“(b) There is no exception to application of ICWA based on the so-called “existing Indian family doctrine” and, the following non-exhaustive list of factors that have been used by courts in applying the existing Indian family doctrine may not be considered in determining whether ICWA is applicable:

- (1) The extent to which the parent or Indian child
  - (i) Participates in or observes tribal customs,
  - (ii) Votes in tribal elections or otherwise participates in tribal community affairs,
  - (iii) Contributes to tribal or Indian charities, subscribes to tribal newsletters or other periodicals of special interest in Indians,
  - (iv) Participates in Indian religious, social, cultural, or political events, or maintains social contacts with other members of the tribe;
- (2) The relationship between the Indian child and his/her Indian parents;
- (3) The extent of current ties either parent has to the tribe;
- (4) Whether the Indian parent ever had custody of the child;
- (5) The level of involvement of the tribe in the State court proceedings; and/or
- (6) Blood quantum.

**Academy comment:** No doubt the Department is well aware of the split in authority amongst the states as to whether ICWA may constitutionally be applied to children who are classified as “Indian” solely because of their heritage, and who have no substantial social, cultural, or political connection to any tribe. The Academy will not rehash the merits of the state court decisions that have applied the “Existing Indian Family Doctrine” as a matter of constitutional avoidance. For present purposes, the Academy’s principal concern is that the Department lacks authority to override a state appellate court’s interpretation of federal constitutional law. The only body that has the power of judicial review of state appellate court proceedings on interpretations of federal law is the United States Supreme Court. The Court’s opinion in *Baby Girl* hinted at the same constitutional concerns that state courts have identified in applying the EIFD, but avoided ruling on this issue by finding the relevant provisions of ICWA inapplicable. The Academy does not view the Supreme Court’s judicial restraint as an invitation for the Department to step in and override state court interpretations with which it disagrees.

**Proposed rule: § 23.103(c).** Agencies and State courts, in every child custody proceeding, must ask whether the child is or *could be* an Indian child and conduct an investigation into whether the child is an Indian child. (emphasis added.)

(d) If there is any reason to believe the child is an Indian child, the agency and State court must treat the child as an Indian child, unless and until it is determined that the child is not a member or is not eligible for membership in an Indian tribe.

**Academy comment:** The Academy's concern is that state courts often view Indian child status as a question of whether the child has any Indian "heritage," not whether the parents are existing members of a tribe and the children are presently eligible for membership. Consequently, state courts routinely require that notices be sent to tribes when a parent has only a vague notion of a distant tribal ancestor. The sending of notices to multiple tribes in which a parent could be eligible is an expensive, time consuming practice that causes undue delay in determining whether ICWA applies – and what procedures must be followed. The Academy notes that many tribes do not require that a parent be a member in order for the child to be deemed eligible.

This uncertainty of Indian child status has serious ramifications as to what law should be applied. For instance, if a parent and child's "Indian" status are uncertain, but the parent or child *could*, as defined in the proposed rule, *become* Indian, adoption attorneys are faced with the dilemma of what consent procedures to use: state or federal. If an ICWA consent is used (in court per § 1913), the parent is advised her right to revoke continues to the time of adoption or entry of an order terminating her parental rights; if the tribe later determines the child is *not* eligible for membership, then the parent has been misled as to her revocation rights (which are typically very short under state law). The Academy is aware of several cases where non-Indian parents have disrupted what would have been otherwise secure adoptive placements because the parent never signed a state court consent because of uncertainty over the child's Indian status.

Setting aside the constitutional concerns raised by the way "Indian" status is defined, this uncertainty could be avoided if the Department simply applied the existing definition of Indian child in 25 U.S.C. § 1903(4), which is perfectly clear as written:

(4) "Indian child" means any unmarried person who is under age eighteen and *is* either (a) a member of an Indian tribe or (b) *is* eligible for membership in an Indian tribe and *is* the biological child of a member of an Indian tribe. (emphasis added.)

Unless the parent "is" (in the present tense) a member of a tribe, and the child "is" (in the present tense) eligible for membership, the ICWA does not apply. Congress

expressly limited ICWA to child members or children of existing tribal members – not children of future *potential* members. An expansion of the definition that turns on ethnicity or ancestry would run afoul of basic equal protection principles. *In re A.W.*, 741 N.W.2d 793, 810 (Iowa 2007).

**5. Proposed Rule: § 23.106, When does the requirement for active efforts begin?**

(a) The requirement to engage in “active efforts” begins from the moment the possibility arises that an agency case or investigation may result in the need for the Indian child to be placed outside the custody of either parent or Indian custodian in order to prevent removal.

**Academy comment:** See Academy comments above regarding the proposed definition of “active efforts.” Also, the “active efforts” requirement only applies if the child has actually been in the custody of either parent or an Indian custodian – not before. As the United States Supreme Court has held:

Consistent with the statutory text, we hold that §1912(d) applies only in cases where an Indian family's "breakup" would be precipitated by the termination of the parent's rights. The term "breakup" refers in this context to "[t]he discontinuance of a relationship, "American Heritage Dictionary 235 (3d ed. 1992), or "an ending as an effective entity," Webster's 273 (defining "breakup" as "a disruption or dissolution into component parts: an ending as an effective entity"). See also Compact OED 1076 (defining "break-up" as, *inter alia*, a "disruption, separation into parts, disintegration"). But when an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent's legal or physical custody, there is no "relationship" that would be "discontinu[ed]" and no "effective entity" that would be "end[ed]" by the termination of the Indian parent's rights. In such a situation, the "breakup of the Indian family" has long since occurred, and §1912(d) is inapplicable.

*Adoptive Couple v. Baby Girl*, 133 S. Ct. at 2562. The proposed rule should clarify that active efforts applies to custodial parents, lest it conflict with the holding of *Adoptive Couple*.

**6. Proposed rule: § 23.107, What actions must an agency and State court undertake in order to determine whether a child is an Indian child?**

(a) Agencies must ask whether there is reason to believe a child that is subject to a child custody proceeding is an Indian child. If there is reason to believe that the child is an Indian child, the agency must obtain verification, in writing, from all

tribes in which it is believed that the child is a member or eligible for membership, as to whether the child is an Indian child.

(b) State courts must ask, as a threshold question at the start of any State court child custody proceeding, whether there is reason to believe the child who is the subject of the proceeding is an Indian child by asking each party to the case, including the guardian ad litem and the agency representative, to certify on the record whether they have discovered or know of any information that suggests or indicates the child is an Indian child.

(1) In requiring this certification, courts may wish to consider requiring the agency to provide:

(i) Genograms or ancestry charts for both parents, including all names known (maiden, married and former names or aliases); current and former addresses of the child's parents, maternal and paternal grandparents and great grandparents or Indian custodians; birthdates; places of birth and death; tribal affiliation including all known Indian ancestry for individuals listed on the charts, and/or other identifying information; and/or....

(d) In seeking verification of the child's status, in a voluntary placement proceeding where a consenting parent evidences a desire for anonymity, the agency or court must keep relevant documents confidential and under seal. A request for anonymity does not relieve the obligation to obtain verification from the tribe(s) or to provide notice.

**Academy comment:** A birth parent has the right to privacy under state adoption laws, the United States Constitution, and the Health Insurance Portability and Accountability Act (HIPAA). Information about a birth parent's pregnancy, paternity, or adoption plans may not be disclosed to any person or tribe without consent. Nothing in ICWA compels a parent to waive privacy. Indeed ICWA provides "where a consenting parent evidences a desire for anonymity, the court or agency *shall* give weight to such desire in applying the preferences." 25 U.S.C. § 1915(c). Likewise, nothing in ICWA requires notice of proceedings be provided to tribes in voluntary adoption proceedings. 25 U.S.C. § 1912(a) (notice required only in involuntary proceedings). The rule should thus clarify that in voluntary proceedings, the provision of parental information to tribes is optional and may only be provided to tribes with a signed release of information by the parent.

Requiring genograms or ancestry charts will impose a burden on agencies and biological parents that is greater than reasonably necessary. A vast number of biological parents seeking to voluntarily place their children for adoption rarely have more than basic information about even their biological parents. It is unusual for a biological

parent to know more than simply sketchy information about grandparents or other ancestors. Requiring deep investigation into family history for every biological parent where Indian heritage is suspected will discourage many biological parents from considering an adoption for their child, even when the parent believes adoption is clearly in the child's best interests.

To the extent the foregoing proposed rule requires any kind of information or notice of voluntary child custody proceedings be provided to a child's tribe, the proposed rule is contrary to the plain language of the ICWA and court decisions interpreting the ICWA. 25 U.S.C. § 1913 governs voluntary termination proceedings under the ICWA. Nowhere in that section is there reference to a need to notify the child's tribe or anyone else. Rather, that section simply sets forth the requirements for a valid voluntary consent to termination of parental rights.

Every reported case to have considered the issue of notice has concluded that there is no tribal right of notice for voluntary proceedings. In *Navajo Nation v. Superior Court*, 47 F. Supp. 2d 1233 (E.D. Wash. 1999), the court held that neither the ICWA nor the Constitution requires notice to a tribe in voluntary proceedings.

The plain reading of *section 1913* requires no notice to the tribe for a voluntary relinquishment of custody. A reading with other statutory sections does not reveal inconsistencies. No ambiguity exists. . . .

In addition to the plain language of the statute, the legislative history of the ICWA supports the argument that there is no notice requirement for voluntary adoption proceedings of an Indian child. *Congress has yet to include a notice provision for voluntary adoption proceedings.*

47 F. Supp. 2d at 1238 (emphasis added). The court in *Navajo Nation* cited the legislative history of congressional attempts in 1996 to amend the ICWA to expressly include a tribal right to notice in voluntary proceedings:

"Currently, the Act requires that tribes receive notice of involuntary proceedings but not voluntary proceedings." H.R. Rep. No. 808, 104th Cong., 2d Sess. 4, 18 (1996); *see, e.g., Amendments to the Indian Child Welfare Act, Hearing before the Committee on Indian Affairs, 104th Cong., 2d Sess. 343-344 (1996)* (recognizing that the National Congress of American Indians proposed a new *Section 1913(c) & (d)* which would have required tribal notification in voluntary proceedings); H.R. Rep. No. 808, 104th Cong., 2d Sess. 4, 15 (1996) (recognizing the draft amendments would "for the first

time” entitle tribes “to receive notice when a *voluntary* child custody proceeding is underway”).

*Navajo Nation*, 47 F. Supp. 2d at 1238 (emphasis added). Thus, Congress clearly did not require tribal notice in voluntary proceedings under the ICWA, and Congress did not change the law in 1996 when it considered the issue or anytime thereafter.

The court in *Navajo Nation* concluded that “[n]either § 1913 nor the U.S. Constitution require notice to the Navajo Nation in the circumstances of this case where the adoption was voluntary and the child was not domiciled on the Reservation of the Navajo Nation.” *Id.* at 1239.<sup>1</sup>

In *Catholic Soc. Servs. v. C.A.A.*, 783 P.2d 1159 (Alaska 1989), the Alaska Supreme Court similarly held that Congress did not grant tribes the right to notice of, or to intervene in, *voluntary* termination of parental rights proceedings. That court wrote:

The sole issue presented in this case is whether under the Indian Child Welfare Act an Indian child's tribe is entitled to notice of a proceeding for voluntary termination of parental rights. We answer this question in the negative. Congress explicitly granted intervention rights to tribes in involuntary termination proceedings, but did not do so in voluntary termination proceedings. Compare 25 U.S.C.A. § 1912(a) with 25 U.S.C.A. § 1913 (West 1983)... The legislative history of the Act demonstrates that this was a considered choice by Congress. Witnesses testified on both sides of the question whether notice should be required.

783 P.2d at 1160 (emphasis added).

In *Duncan v. Wiley*, 657 P.2d 1212, 1213 (Okla. Ct. App. 1982), the Oklahoma Court of Appeals held, “[t]he notice requirements of § 1912 are mandatory in involuntary actions. The requirements do not apply to voluntary court proceedings.” See also *In re Baby Girl A*, 230 Cal. App. 3d 1611, 1620-21, 282 Cal. Rptr. 105, 111 (1991) (“section 1913(a) permits an Indian parent or custodian to voluntarily consent to a foster care placement or termination of parental rights *without first notifying the tribe*” (emphasis added)); *In the matter of the petition of Philip A.C.*, 149 P.3d 51, 60 (Nev. 2006) (“a tribe is not entitled to receive notice of adoption actions” (emphasis added)).

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<sup>1</sup> Significantly, the tribe did not appeal the district court’s conclusion about notice, although it appealed other issues. See *Navajo Nation v. Norris*, 331 F.3d 1041 (9<sup>th</sup> Cir. 2003).

Even the Bureau of Indian Affairs previously agreed that notice was not required to tribes in voluntary proceedings. In stating so, the Bureau highlighted a parent's right to confidentiality and anonymity in voluntary proceedings:

*Under the Act confidentiality is given a much higher priority in voluntary proceedings than in involuntary ones. The Act mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones. For voluntary placements, . . . the Act specifically directs state courts to respect parental requests for confidentiality. The most common voluntary placement involves a newborn infant....*

*Confidentiality has traditionally been a high priority in such placements. The Act reflects that traditional approach by requiring deference to requests for anonymity in voluntary placements but not in involuntary ones.*

1979 Guidelines, 44 Fed. Reg. at 67586. The Bureau's position at that time reflected that of the tribe's. For Mr. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians stated: "The ultimate responsibility for child welfare rests with the parents and we would not support legislation which interfered with that basic relationship." *Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong., 2d Sess., 62 (1978).*

Given a parent's unequivocal right to privacy and confidentiality, the language of the ICWA, the legislative history, and the case law, it is clear the Department has no statutory authority to require notice to an Indian child's tribe in voluntary termination of parental rights or adoption proceedings. Where, moreover, a biological parent specifically desires confidentiality and anonymity, objects to notice being given to the tribe, and wants the child placed with an adoptive couple of her own choosing, she has a legitimate expectation of privacy that should not be violated by agencies or courts. If the Department were to require the violation of this expectation of privacy, serious constitutional right of privacy issues are raised.

The United States Supreme Court has written that the constitutional right of privacy addresses two distinct interests: "one is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 599-600, 51 L. Ed. 2d 64, 97 S. Ct. 869 (1977). The latter interest has most often been applied to the decision to end a pregnancy through an abortion. *See Roe v. Wade*, 410 U.S. 113, 117 (1972). But, privacy interests have also been found by courts in areas such as HIV status, *Herring v. Keenan*, 218 F.3d 1171 (10th Cir. 2000), *cert. denied*, 122 S. Ct. 96, 151 L. Ed. 2d 56 (2001), intimate information contained in a deceased wife's diary, *Sheets v. Salt Lake County*, 45 F.3d

1383, 1387 (1995), and confidential medical records, *A.L.A. v. West Valley City*, 26 F.3d 989, 990-01 (10th Cir. 1994).

The Tenth Circuit in *Sheets* wrote:

[i]nformation falls within the ambit of constitutional protection when an individual has a “legitimate expectation . . . that it will remain confidential while in the state's possession.” The legitimacy of this expectation depends, “at least in part, upon the intimate or otherwise personal nature of the material which the state possesses.”

45 F.3d at 1387 (quoting *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986)). Where the kind of information that would be shared with the tribe in a voluntary placement proceeding—the birth parent’s desire to place a child for adoption and the very identity of the biological parent desiring to do so—is “intimate” and “personal,” the Academy submits that a parent of an Indian child has a legitimate expectation of privacy regarding this information. No compelling interest exists to divulge this information to the tribe because the ICWA does not require notice to the tribe and directs that confidentiality and anonymity be protected.

The United States Supreme Court has also held the Due Process Clause protects the fundamental right of parents to make parenting decisions concerning the care, custody, and control of their children. *Troxel v. Granville*, 530 U.S. 57, 66, 120 S. Ct. 2054, 2060, 147 L. Ed. 2d 49 (2000). “[O]ur constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations. . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.” 442 U.S., at 602, 99 S. Ct. 2493 (alteration in original) (internal quotation marks and citations omitted). *Troxel* 530 U.S. at 68, 120 S. Ct. at 2061.

In discussing a parent’s right to choose their child’s adoptive placement, the Iowa Supreme Court stated, in an ICWA case, that:

The State has no right to influence her decision by preventing her from choosing a family she feels is best suited to raise her child. Moreover, we do not believe the federal ICWA condones state law curtailing a parent’s right in this manner.

*In re the Interest of N.N.E.*, 752 N.W.2d 1, 16 (2008). The Iowa Supreme Court also stated:

Shannon's fundamental right to make decisions concerning the care of her child is *not* lessened because she intended to terminate her rights to Nairobi. (emphasis added).

*Id.* at 17. The importance of a birth parent's constitutional right of privacy preempts any statutory right an Indian tribe may have pursuant to the ICWA. This principal is clearly recognized by the 1979 Guidelines, which were enacted shortly after the passage of the ICWA and (obviously) were drafted by individuals involved in the drafting and passage of the ICWA. The 1979 Guidelines state:

#### F.1. Commentary

The third subsection recommends that the court or agent make an active effort to find out if there are families entitled to preference who would be willing to adopt the child. This provision recognizes, however, that the consenting parent's request for anonymity takes precedence over efforts to find a home consistent with the Act's priorities.

1979 Guidelines, 44 Fed. Reg. at 67594. The Academy believes the proposed rule treats Indian children as property of the tribe, inviting tribal interference with the parent's right to make parenting decisions free from governmental interference. It must be rejected.

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

(2) If there is reason to believe the child is an Indian child, the court must confirm that the agency used active efforts to work with all tribes of which the child may be a member to verify whether the child is in fact a member or eligible for membership in any tribe, under paragraph (a) of this section.

**Academy comment:** The proposed rule misuses the term "active efforts." "Active efforts" are required under Section 1912(d) of the ICWA "to prevent the breakup of the Indian family." Congress did not require "active efforts" to determine whether a child who is the subject of a child custody proceeding is an Indian child. Indeed, courts have held that the burden to prove whether a child is an Indian child falls on the person claiming that the child is an Indian child. The proposed rule would upset decades of law, with no basis in the statute, by putting the burden on an agency to prove the

negative. See *In re Angus*, 655 P.2d 208, 212 (Or. 1982); *In the Matter of Adoption of Baby Boy W.*, 831 P.2d 643 (Okla. 1992); *Quinn vs. Walters*, 881 P.2d 795, 798-799 (Or. 1994).

Requiring an agency to use “active efforts” to work with all tribes of which the child *may* be a member also could violate a biological parent’s right of privacy, due process, confidentiality, and anonymity in a voluntary proceeding, and is inconsistent with the fact that the ICWA does not require notice to Indian tribes of voluntary proceedings. See comments above regarding notice of voluntary proceedings and a biological parent’s reasonable expectation of privacy and due process rights in voluntary ICWA proceedings in response to Proposed Rule § 23.107(a).

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

(b) In seeking verification of the child's status, in a voluntary placement proceeding where a consenting parent evidences a desire for anonymity, the agency or court must keep relevant documents confidential and under seal. A request for anonymity does not relieve the obligation to obtain verification from the tribe(s) or to provide notice.

**Academy comment:** This is a classic Catch-22. The proposed rule directs the agency and the court to keep matters confidential in a voluntary placement proceeding, yet requires verifying membership with the tribe(s) and providing notice.<sup>2</sup> To honor a biological parent’s request for confidentiality and anonymity, if there is any reason to believe a child could be an Indian child, many agencies now simply *assume* (often wrongly) the child is an Indian child to comply with the requirements of the ICWA for a voluntary placement, rather than breach the biological parent’s right of privacy by providing notice to a tribe. A requirement to provide notice to one or more tribes of voluntary placements would lead, variously, to agencies being more likely to assume that a given child is *not* an Indian child, more likely to refuse services to Indian parents, and more likely to refer such cases to overburdened public social service agencies where, in many places, the ICWA will only be honored in the breach. Forcing parents to forfeit privacy comes at a cost.

**7. Proposed Rule: § 23.108, Who makes the determination as to whether a child is a member of a tribe?**

(a) Only the Indian tribe(s) of which it is believed a biological parent or the child is a member or eligible for membership may make the determination whether

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<sup>2</sup> The Academy incorporates by reference its comments regarding notice and a biological parent’s expectation of privacy and due process rights in voluntary placement proceedings as set forth above in response to Proposed Rule § 23.107(a).

the child is a member of the tribe(s), is eligible for membership in the tribe(s), or whether a biological parent of the child is a member of the tribe(s).

(b) The determination by a tribe of whether a child is a member, is eligible for membership, or whether a biological parent is or is not a member, is solely within the jurisdiction and authority of the tribe.

(c) No other entity or person may authoritatively make the determination of whether a child is a member of the tribe or is eligible for membership in the tribe.

(d) The State court may not substitute its own determination regarding a child's membership or eligibility for membership in a tribe or tribes.

**Academy comment:** The Academy does not dispute that a court should defer to a tribe for a determination whether a child is a member of a tribe or eligible for membership in a tribe or whether a biological parent is a member of a tribe. If the issue is first raised by a parent in court proceedings, however, courts have held that the burden to prove the child is an Indian child lies with the parent. *See In re Angus*, 655 P.2d at 212; *In the Matter of Adoption of Baby Boy W.*, 831 P.2d 643; *Quinn vs. Walters*, 881 P.2d at 798-799. If a biological parent fails to prove her child is an Indian child, a state court should be free to determine that the child is not an Indian child.

**8. Proposed Rule: § 23.109, What is the procedure for determining an Indian child's tribe when the child is a member or eligible for membership in more than one tribe?**

(a) Agencies must notify all tribes, of which the child may be a member or eligible for membership, that the child is involved in a child custody proceeding. The notice should specify the other tribe or tribes of which the child may be a member or eligible for membership.

**Academy comment:** The Academy incorporates by reference its comments regarding notice and a biological parent's expectation of privacy in voluntary placement proceedings as set forth above in response to Proposed Rule § 23.107(a). If notice to a tribe is not required in a voluntary proceeding, agencies should not be required to provide notice to multiple tribes as proposed by this rule.

**9. Proposed rule: § 23.111, What are the notice requirements for a child custody proceeding involving an Indian child?**

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

adoptive placement, or any termination of parental or custodial rights) by registered mail with return receipt requested to:

(1) Each tribe where the child may be a member or eligible for membership;...

(i) If the child is transferred interstate, regardless of whether the Interstate Compact on the Placement of Children (ICPC) applies, both the originating State court and receiving State court must provide notice to the tribe(s) and seek to verify whether the child is an Indian child.

**Academy comments:** The proposed rule is contrary to the requirements of the ICWA. Notice of voluntary proceedings will be addressed first, followed by issues regarding notice of involuntary proceedings.

### **There Is No Tribal Right to Notice of Voluntary Proceedings in ICWA.**

As noted in comment to § 23.107, every reported case to have considered the issue of notice has concluded that no tribal right of notice exists for voluntary proceedings. The Academy incorporates those comments herein. To the extent the foregoing proposed rule requires notice to the tribe(s) of voluntary child custody proceedings, they are contrary to the plain language of the ICWA and the vast majority of court decisions interpreting the ICWA. Moreover, 25 U.S.C. § 1913, which governs voluntary termination proceedings makes no reference to a need to notify the child's tribe or anyone else. Rather, that section simply sets forth the requirements for a valid voluntary consent to termination of parental rights. 25 U.S.C. § 1913(a).

### **There is No Tribal Right to Intervention in Voluntary Proceedings.**

To the extent proposed Rule 23.211 requires an Indian tribe or others to be told of a right to intervene in a voluntary adoption proceeding, this requirement is also contrary to the plain language of the ICWA.

The ICWA defines a "child custody proceeding" to include four different kinds of proceedings: "foster care placement," "termination of parental rights," "preadoptive placement," and "adoptive placement." 25 U.S.C. § 1903(1). Each of these is also a defined term that has a specific meaning under the ICWA. *Id.* An "adoptive placement" is defined as "the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption." 25 U.S.C. § 1903(1)(iv).

But 25 U.S.C. § 1911(c) provides that a tribe or Indian custodian may intervene only in "State court proceeding for *the foster care placement of, or termination of parental rights to, an Indian child[.]*" (emphasis added). Congress did not grant tribes the right to intervene in "preadoptive placement," and "adoptive placement" proceedings. The Bureau of Indian Affairs previously recognized Congress's plainly expressed intent on

this point: “[t]he Act mandates a tribal right of . . . intervention in involuntary proceedings, *but not in voluntary ones.*” 1979 Guidelines, 44 Fed. Reg. at 67586.

The courts have consistently agreed. In *Catholic Soc. Servs. v. C.A.A.*, 783 P.2d 1159 (Alaska 1989), the Alaska Supreme Court based part its holding that a child’s tribe is not entitled to *notice* of a voluntary proceeding on its conclusion that “Congress explicitly granted intervention rights to tribes in involuntary termination proceedings, but did not do so in voluntary termination proceedings.” *Id.* at 1160. That court, in an earlier case, had analyzed 25 U.S.C. § 1911(c) and concluded that an automatic tribal right of intervention is only granted in “termination of parental rights” and “foster care placement” proceedings, but not in “preadoptive” or “adoptive placements.” In *re J.R.S.*, 690 P.2d 10, 15-16 (Alaska 1984) (“The Act . . . distinguishes between ‘adoptive placement’ and ‘termination of parental rights’; only in the latter case does § 1911(c) support intervention.”); <sup>3</sup> *Welfare of the Child of R.S.*, 805 N.W.2d 44, 49 (Minn. 2009) (tribal right to intervene only in involuntary proceedings).

### **Notice in Interstate Placements**

Regarding interstate placements, the proposed rule states, “(i) If the child is transferred interstate, regardless of whether the Interstate Compact on the Placement of Children (ICPC) applies, both the originating State court and receiving State court must provide notice to the tribe(s) and seek to verify whether the child is an Indian child.”

The proposed rule in subsection (i) would require notice to tribes by courts in both states of an interstate placement. For the reasons stated above regarding notice of voluntary placement proceedings, notice cannot be required in such proceedings by the courts of either state. Regarding involuntary proceedings, notice should only be required in the state where the actual court proceeding is pending.

### **10. Proposed rule: § 23.114, What are the procedures for determining improper removal?**

(a) If, in the course of any Indian child custody proceeding, any party asserts or the court has reason to believe that the Indian child may have been improperly

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<sup>3</sup> A different result was reached on the intervention issue in *In the matter of the petition of Philip A.C.*, 149 P.3d 51 (Nev. 2006). There, while the court expressly recognized that the child’s tribe did not have a right to notice of a voluntary termination proceeding, the court held that the tribe had independent standing under 25 U.S.C. § 1914 to challenge the parent’s consent that had been taken under 25 U.S.C. § 1913(a). 149 P.3d at 60 and n.44. While the adoptive parent in *Philip A.C.* argued that intervention by the tribe was not allowed in adoption proceedings, the court viewed the challenge by the tribe as a challenge to a voluntary termination proceeding, not an adoption proceeding.

removed from the custody of his or her parent or Indian custodian, or that the Indian child has been improperly retained, such as after a visit or other temporary relinquishment of custody, the court must immediately stay the proceeding until a determination can be made on the question of improper removal or retention, and such determination must be conducted expeditiously.

(b) If the court finds that the Indian child was improperly removed or retained, the court must terminate the proceeding and the child must be returned immediately to his or her parents or Indian custodian, unless returning the child to his parent or custodian would subject the child to imminent physical damage or harm.

**Academy comment:** The Academy incorporates by reference its Comment to Proposed Rule § 23.113. Rather than the deplorable standard of “imminent physical damage or harm,” as defined in § 23.2, the standard should be the best interests of the child.

#### **11. Proposed rule § 23.115, How are petitions for transfer of proceeding made?**

(a) Either parent, the Indian custodian, or the Indian child's tribe may request, orally on the record or in writing, that the State court transfer each distinct Indian child custody proceeding to the tribal court of the child's tribe.

(b) The right to request a transfer occurs with each proceeding.

(c) The right to request a transfer is available at any stage of an Indian child custody proceeding, including during any period of emergency removal.

**Academy comment:** The Academy believes paragraph (a), which authorizes transfer of any “child custody proceeding”, exceeds the grant of authority from Congress to regulate the transfer of pre-adoptive and adoptive placement proceedings. Under 25 U.S.C. § 1911(a) only two types of proceedings are subject to transfer: foster care and termination proceedings. *Welfare of the Child of R.S.*, 805 N.W.2d at 50 (provision of ICWA permitting transfer of termination of parental rights cases to tribal court did not permit transfer of pre-adoptive placement proceedings to tribal court).

Congress did not intend that ICWA allow for transfer of all placement proceedings as contemplated under the proposed rule. Indeed Congress rejected a prior version of ICWA, which allowed for transfer of all “placements”:

The act statutorily defines the respective jurisdiction of State and tribal governments in matters relating to child placements. To the extent that the act provides jurisdictional division between the States and tribes, it is declarative of existing law as developed by judicial decisions. However, there are new provisions too. The act provides that tribes may request

transfers of *placement cases* from State to tribal courts and that in the absence of good cause to the contrary such transfers shall be ordered....

S. Rep. No. 95-597, at 10 (1977) (emphasis added). This 1977 Senate Report indicates that Congress had in fact considered the interpretation proposed by the Department – that all off-reservation “placement cases” be transferable. A “placement case” was very broadly defined under S. 1214 to include “*any* proceedings, judicial, quasi-judicial, or administrative, voluntary or involuntary...in which the child is removed from his parent or parents...” As can be seen by the 1978 House Report and the current language of Section 1911 (b), Congress *rejected* this broader definition and instead specifically included only foster care and termination cases as being subject to transfer. The Department has no jurisdiction to reject Congress’ policy choices set into statute.

Providing for the transfer of adoption proceedings to tribal court would also subject non-Indian adoptive parent petitioners to a jurisdiction foreign to them, violating Supreme Court precedent limiting tribal jurisdiction over nonmembers. *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 210 (1978) (holding that tribes did not have inherent sovereignty to try nonmembers); *Montana v. United States*, 450 U.S. 544, 566, 101 S. Ct. 1245, 67 L.Ed.2d 493 (1981) (tribe lacked inherent power to regulate activities of non-tribal members on non-Indian land). Nor could it be said the parent would have any right to object to transfer, since in many adoption cases parental rights are already terminated before adoption proceedings commence.

**12. Proposed rule § 23.117: How is a determination of “good cause” not to transfer made?**

The proposed rule exceeds the agency’s jurisdiction by limiting the state court’s right to apply “good cause” to bar “advanced stage” transfer requests. This proposed rule states:

...

(c) In determining whether good cause [to deny transfer] exists, the court may not consider whether the case is at an advanced stage or whether transfer would result in a change in the placement of the child.

**Academy comment:** this proposed rule represents a radical departure from the BIA’s prior guidelines, which authorized “good cause to deny transfer”. The 1979 Guidelines enumerated four different non-binding factors state courts should consider in determining whether good cause exists to deny transfer:

(i) The proceeding was at an *advanced stage* when the petition to transfer was received and the petitioner did not file the petition promptly after

receiving notice of the hearing;

(ii) The Indian child is over twelve years of age and objects to the transfer;

(iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without *undue hardship* to the parties or the witnesses; or

(iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

1979 Guidelines, 44 Fed. Reg. at 67591 (emphasis added). The 1979 Guidelines state that where the proceeding is at an "advanced stage" when the petition to transfer is received and the petitioner did not file the petition *promptly* after receiving notice of the hearing, good cause to deny the petition exists. 44 Fed. Reg. at 67590. These Guidelines provided reasonable guidance to state courts on the meaning of "good cause".

The 1979 Guidelines implemented two different policy goals in the advanced stage factors: (1) preventing forum shopping and (2) preventing harm to the child. The 1979 Guidelines explained, "[a]lthough the Act does not explicitly require transfer petitions to be timely, it does authorize the court to refuse to transfer a case for good cause. When a party who could have petitioned earlier waits until a case is almost complete to ask that it be transferred to another court and retried, good cause exists to deny the request." 44 Fed. Reg. at 67590. The "timeliness" criteria, according to the commentary, "is a proven weapon of the courts against disruption caused by negligence or obstructionist tactics on the part of counsel. If a transfer petition must be honored at any point *before judgment*, a party could wait and see how the trial is going in state court and then obtain another trial if it appears the other side will win....The Act was not intended to authorize such tactics and the 'good cause' provision is ample authority for the court to prevent them." 44 Fed. Reg. at 67590 (emphasis added). *Cf. In re Welfare of Children of R.M.B.*, 735 N.W.2d 348, 354 (Minn. App. 2007) (upholding a trial court order to transfer where the court found the tribe was not moving to transfer for fear of how the case would come out in state court). The 1979 Guidelines also properly recognized, "[l]ong periods of uncertainty concerning the future are generally regarded as harmful to the well-being of children." 44 Fed. Reg. at 67591.

The Academy believes the proposed rule is without statutory authority, as it provides state courts with no leeway to guard against the very abuses the former 1979 Guidelines tried to prevent: forum shopping and the child placement instability that inevitably occurs when a tribes makes a late-stage transfer request.

The Department's proposed rule is also inconsistent with the Adoption and Safe Families Act of 1997 (ASFA) which mandates permanency deadlines in the states, Pub.L. 105-89, 111 Stat. 2115 (1997) (codified primarily, but not exclusively at 42 U.S.C. § 670 et. seq. (2000)). ASFA does not exempt tribes from permanency guidelines. As the

Minnesota Supreme Court has stated, “[i]n ascertaining whether this case was at an advanced stage of the proceedings when the motions to transfer were filed and whether the parties seeking transfer acted promptly after receiving notice, we look next to the federal Adoption and Safe Families Act of 1997.” *In re Welfare of Child of: T.T.B. & G.W.*, 724 N.W.2d 300 (Minn. 2006) (motion to transfer filed after a six-month permanency hearing was an “advanced stage” of the proceeding).

This proposed rule undermines permanency policy established by appellate courts in dozens of states, which have relied on federal mandated permanency guidelines to interpret “good cause” under advanced stage principles. *See, e.g., In the Interest of J.W.*, 528 N.W.2d 657, 660 (Iowa App. 1995) (good cause to deny a transfer existed when the tribe filed the petition to transfer on the morning that permanency hearings were scheduled to begin); *In the Interest of A.T.W.S.*, 899 P.2d 223, 226-227 (Colo. App. 1994) (trial court had good cause to deny the transfer of jurisdiction after a permanency planning and custody hearing had been scheduled); *In re Maricopa Co. Juvenile Action*, 828 P.2d 1245,1251 (Ariz. App. 1991) (denying transfer when the tribe had received notice of the proceedings two years before filing the petition to transfer); *In re Robert T.*, 246 Cal. Rptr. 168, 171 (Cal. App. 1988) (holding a 16-month delay between the time that permanency planning began and the tribe’s expression of intent to intervene constituted good cause not to transfer); *In the Matter of Wayne R.N.*, 757 P.2d 1333, 1336 (N.M. App. 1988) (indicating that a petition filed six months after notice of the hearing weighed against transfer). An Indian child has the same right to permanency as a non-Indian child. Allowing transfers of proceedings at *any time* will mean Indian children will likely see their cases transferred to tribal court at the 11<sup>th</sup> hour of termination proceedings. Equal protection of the law means Indian children must have the same right to permanency as other children.

**13. Proposed Rule: § 23.120, What steps must a party take to petition a State court for certain actions involving an Indian child?**

- (a). Any party petitioning a State court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court that prior to, and until the commencement of, the proceeding, active efforts have been made to avoid the need to remove the Indian child from his or her parents or Indian custodians and show that *those* efforts have been unsuccessful.

**Academy comment:** This proposed rule contains an “active efforts” standard that is different from the standard contained in Section 1912(d). That section provides “[a]ny party seeking to *effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made.*” The plain language of Section 1912 (d) requires that active efforts be made prior to “effecting” a foster care placement or termination adjudication — such efforts need not have been provided prior to the *commencement* of such proceedings. The proposed rule

makes active efforts the precondition for commencing a proceeding, meaning Indian children would be subjected to continued harm until such time state authorities could demonstrate active efforts have been provided. Accordingly, the Academy believes the Department is without statutory authority to rewrite Section 1912 (d).

Moreover, any rule containing the “active efforts” standard needs to be consistent with the holding of the United States Supreme Court in *Adoptive Couple v. Baby Girl*, which held:

Consistent with the statutory text, we hold that §1912(d) applies only in cases where an Indian family's "breakup" would be precipitated by the termination of the parent's rights. The term "breakup" refers in this context to "[t]he discontinuance of a relationship," American Heritage Dictionary 235 (3d ed. 1992), or "an ending as an effective entity," Webster's 273 (defining "breakup" as "a disruption or dissolution into component parts: an ending as an effective entity"). See also Compact OED 1076 (defining "break-up" as, *inter alia*, a "disruption, separation into parts, disintegration"). But when an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent's legal or physical custody, there is no "relationship" that would be "discontinu[ed]" and no "effective entity" that would be "end[ed]" by the termination of the Indian parent's rights. In such a situation, the "breakup of the Indian family" has long since occurred, and §1912(d) is inapplicable.

*Adoptive Couple v. Baby Girl*, 133 S. Ct. at 2562.

#### **14. Proposed Rule: § 23.121, What are the applicable standards of evidence?**

(a). The court may not issue an order effecting a foster care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody with the child's parents or Indian custodian is likely to result in serious physical damage or harm to the child.

**Academy comment:** The standard of harm stated in the proposed rule regarding “continued custody” is deplorable and conflicts with the standard of harm in Section 1912 (e). That section provides that a foster care placement can only be ordered upon a finding that “the continued custody of the child by the parent or Indian custodian is likely to result in serious *emotional or physical damage* to the child.” This rule rewrite of the statute means that that Indian parents and custodians have a right to inflict emotional harm on their children. The Academy submits the Department is without jurisdiction to delete the term “emotional harm” Congress wrote into Section 1912 (e) to protect Indian children.

Because Section 1912(e) also discusses “continued custody” of the Indian child, it should be interpreted consistently with the holdings of *Adoptive Couple v. Baby Girl*, 133 S. Ct. at 2552, regarding Sections 1912(d) and 1912(f), and should not be applied to situations where a parent has never had custody of the Indian child.

**Proposed rule: § 23.121, What are the applicable standards of evidence?**

(b). The court may not order a termination of parental rights unless the court's order is supported by evidence beyond a reasonable doubt, supported by the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious physical damage or harm to the child.

**Academy comment:** The Academy incorporates by reference its Comment regarding Proposed Rule § 23.121 (a).

**Proposed rule: § 23.121 What are the applicable standards of evidence?**

(d) Evidence that only shows the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical-damage to the child.

**Academy comment:** The Academy believes the Department has created a straw man argument, dressed up as a rule: that state courts routinely remove children *solely* on the basis of “community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior.” This rule is a solution in search of a problem. The rule is unnecessary.

**15. Proposed rule: § 23.122 Who may serve as a qualified expert witness?**

(a) A qualified expert witness should have specific knowledge of the Indian tribe's culture and customs.

(b) Persons with the following characteristics, in descending order, are presumed to meet the requirements for a qualified expert witness:

(1) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.

(2) A member of another tribe who is recognized to be a qualified expert witness by the Indian child's tribe based on their knowledge of the delivery of child and family services to Indians and the Indian child's tribe.

(3) A layperson who is recognized by the Indian child's tribe as having substantial experience in the delivery of child and family services to Indians, and knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.

(4) A professional person having substantial education and experience in the area of his or her specialty who can demonstrate knowledge of the prevailing social and cultural standards and childrearing practices within the Indian child's tribe.

**Academy comment:** Of preeminent concern is that nowhere in this proposed rule does the Department acknowledge the relevance or importance of expert testimony going to the best interests of the child. Yet, the primary policy underlying the passage of the ICWA was “to protect the best interests of Indian children.” 25 U.S.C. § 1902. Experts who can speak to the best interests of the children involved in the specific proceeding should be given priority in such proceedings, regardless of whether the expert may be from the child’s tribe or another Indian tribe. Many Indian children, moreover, have no connection to their tribe, their tribe’s reservation, or their tribal community, and they have never been involved with tribal customs or culture. Suggesting that only experts with experience in such things are competent witnesses in an ICWA child custody proceeding is simply wrong and does not protect the best interests of the Indian children involved.

This proposed rule also inappropriately attempts to commandeer state courts by telling them who may or may not serve as an expert witness in state proceedings involving an Indian child. Doing so takes over the role of the judge in determining what proposed expert testimony is credible and reliable and may be received by the court.

Most state courts have adopted rules of evidence similar to the Federal Rules of Evidence. Rule 702 of the Federal Rules of Evidence governs expert testimony. It provides simply that:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999), set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court are (1) whether the expert's technique or theory can be or has been tested; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. The Court in *Kumho* held that these factors might also be applicable in assessing the reliability of nonscientific expert testimony, depending upon "the particular circumstances of the particular case at issue." 119 S. Ct. at 1175.

Other cases have recognized that not all of the specific *Daubert* factors can apply to every type of expert testimony. In addition to *Kumho*, 119 S. Ct. at 1175, see *Tyus v. Urban Search Management*, 102 F.3d 256 (7th Cir. 1996) (noting that the factors mentioned by the Court in *Daubert* do not neatly apply to expert testimony from a sociologist). See also *Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 809 (3d Cir. 1997) (holding that lack of peer review or publication was not dispositive where the expert's opinion was supported by "widely accepted scientific knowledge").

Telling a court what experts will have evidence that is relevant, reliable, and credible in the context of any case improperly invades the authority of state courts in violation of the US Constitution. In the context of a child custody proceeding where best interests of the child are paramount, it also implicates the child's constitutional due process rights.

Numerous courts have held that specialized knowledge of Indian culture is not necessary for a person to be qualified as an expert in an ICWA case and state law controls who is recognized by the court to be an expert. See *In re K.A.B.E.*, 325 N.W.2d 840, 843-844 (S.D. 1982); *D.W.H. v. Cabinet of Human Services*, 706 S.W.2d 840, 843 (Ky. App. 1986); *Matter of D.C.*, 715 P.2d 1, 2 (Alaska 1986); *Maricopa Juvenile Action No. JS-8287*, 828 P.2d 1245 (Ariz. App. 1991); *In re Interest of C.W.*, 479 N.W.2d 105 (Neb. 1992).

Courts have also held that when cultural bias is not clearly implicated, the necessary proof may be proved by an expert witness who does *not* possess specialized knowledge of Indian culture. See *State ex. rel. Dept. vs. Tucker*, 710 P.2d 793, 798-799 (Or. 1986); *Rachel S. v. Arizona Department of Economic Security*, 958 P.2d 459, 461-462 (Ariz. App. 1998); *In the Interest of A.N.W.*, 976 P.2d 365, 368 (Colo. App 1999); *L.G. v. Department of*

*Health and Social Services*, 14 P.3d 946 (Alaska 2000); *Brenda O. v. Ariz. Dept. of Economic Security*, 226 Ariz. 137 (Ariz. App. 2010).

Finally, the Academy believes the qualified expert witness rule conflicts with established rules of evidence providing that questions of a bias and prejudice go to the *weight*, not admissibility of evidence. See 27 Charles A. Wright & Victor J. Gold, *Federal Practice and Procedure: Evidence* § 6095 (1990). To the extent that a party in an Indian child custody proceedings believes an expert is biased due to failure to understand or appreciate tribal child rearing practices, such concerns can be addressed through impeachment in cross examination. There is no evidence Congress intended that the Department rewrite federal and state traditional rules of evidence in its use of the phrase “qualified expert witness” in Sections 1912(e),(f). As such, the Department is without jurisdiction to create such a rule.

#### **16. Proposed rule: § 23.123, Voluntary Proceedings**

Voluntary ICWA proceedings are governed by the ICWA, 25 U.S.C. §1913. The proposed federal rules governing voluntary proceedings, §23.123, page 14891 of the Federal Register, and state in pertinent part:

(b) Agencies and State courts must provide the Indian tribe with notice of the voluntary child custody proceedings, including applicable pleadings or executed consents, and their right to intervene under § 23.111 of this part.

**Academy comment:** The Academy opposes this rule, as it violates a parent’s constitutional rights and the plain language of the ICWA. As noted in comments to § 23.107(a), which are incorporated here in their entirety by reference, every reported case to have considered the issue of notice has concluded that no tribal right of notice exists for voluntary proceedings. To the extent the foregoing proposed rule requires notice of voluntary child custody proceedings, they are contrary to the plain language of the ICWA, the constitutional rights of birth parents, and the vast majority of court decisions interpreting the ICWA.

#### **17. §23.127, How is withdrawal of consent to a voluntary adoption achieved?**

The Academy opposes the language in the proposed rule §23.127, at page 14892 of the Federal Register which states,

(a) *A consent to termination of parental rights or adoption may be withdrawn by the parent at any time prior to entry of a final decree of voluntary termination or adoption whichever occurs later.* To withdraw consent, the parent must file, in the court where the consent is filed, an instrument executed under oath asserting his or her intention to withdraw such consent. (Emphasis added)

**Academy comment:** The proposed rule is contrary to the plain language of the ICWA. Section 1913(c) provides that “the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, *as the case may be.*” Nowhere is “whichever is later” found in the statute. Once either of these orders is entered, the parent is then only allowed to revoke their consent if they could prove fraud or duress. Courts that have interpreted Section 1913(c) have uniformly found a parent’s right to withdraw consent is cut off by the entry of a final order terminating parental rights, even if an adoption decree has not been entered. The Alaska Supreme Court held in *In re J.R.S.*, 690 P.2d 10 (Alaska 1984), that where the birth mother had consented to entry of an order terminating parental rights, and an order had been entered terminating parental rights, the birth mother lost her right to revoke under Section 1913(c), even though an adoption decree had not been entered. 690 P.2d at 13-14 (Section 1913(c) does not allow “a parent to withdraw a voluntary relinquishment of parental rights after a final order terminating those rights has been entered.”). *See also B.R.T. v. Exec. Director*, 391 N.W.2d 594, 599 (N.D. 1986) (“B.R.T.’s right to withdraw her consent to the termination under § 1913(c) expired when the order terminating parental rights became final.”); *In re: Kiogima*, 472 N. W. 2d 13, 14-154 (Mich. App. 1991); *In re: M.D.*, 42 P.3d 424, 430-431 (Wash. App. 2002).

The proposed regulation ignores the clear language of the ICWA and allows a parent to withdraw their consent even after an order terminating parental rights has been entered by the court. This regulation is not supported by the clear language of the ICWA.

**18. Proposed rule: §23.128, When do the placement preferences apply?**

**Proposed Rule:** (a) In any preadoptive, adoptive or foster care placement of an Indian child, ICWA's placement preferences apply; except that, if the Indian child's tribe has established by resolution a different order of preference than that specified in ICWA, the agency or court effecting the placement must follow the tribe's placement preferences.

(b) The agency seeking a preadoptive, adoptive or foster care placement of an Indian child must always follow the placement preferences. If the agency determines that any of the preferences cannot be met, the agency must demonstrate through clear and convincing evidence that a diligent search has been conducted to seek out and identify placement options that would satisfy the placement preferences specified in §§ 23.129 and 23.130 of these regulations, and explain why the preferences could not be met. A search should include notification about the placement proceeding and an explanation of the actions that must be taken to propose an alternative placement to:

(1) The Indian child's parents or Indian custodians;

(2) All of the known, or reasonably identifiable, members of the Indian child's extended family members;

(3) The Indian child's tribe;

(4) In the case of a foster care or preadoptive placement:

(i) All foster homes licensed, approved, or specified by the Indian child's tribe; and

(ii) All Indian foster homes located in the Indian child's State of domicile that are licensed or approved by any authorized non-Indian licensing authority.

(c) Where there is a request for anonymity, the court should consider whether additional confidentiality protections are warranted, but a request for anonymity does not relieve the agency or the court of the obligation to comply with the placement preferences.

(d) Departure from the placement preferences may occur only after the court has made a determination that good cause exists to place the Indian child with someone who is not listed in the placement preferences.

(e) Documentation of each preadoptive, adoptive or foster care placement of an Indian child under State law must be provided to the State for maintenance at the agency. Such documentation must include, at a minimum: The petition or complaint; all substantive orders entered in the proceeding; the complete record of, and basis for, the placement determination; and, if the placement deviates from the placement preferences, a detailed explanation of all efforts to comply with the placement preferences and the court order authorizing departure from the placement preferences.

**Academy comment:** The proposed rule completely ignores the most recent interpretation of 25 U.S.C. § 1915(a) in *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, where the Court held, “§ 1915(a)’s preferences *are inapplicable* in cases where no alternative party has formally sought to adopt the child. This is because there simply is no ‘preference’ to apply if no alternative party that is eligible to be preferred under § 1915(a) has come forward.” 133 S. Ct. at 2564. The Department cannot override this interpretation of ICWA by administrative rule.

The Academy objects to §23.128 because, as more fully set forth above, in the comments to proposed rule §23.107(a), notice should not be required to be provided to identifiable members of the Indian child’s extended family, or to the child’s tribe. The ICWA, when enacted, clearly delineated between notice being mandatory in involuntary proceedings

(such as abuse/neglect cases) but not required in voluntary proceedings. Yet, to apply the preference provisions in a voluntary placement proceeding would require notice to the Indian child's extend family and tribe, contrary to the language of the ICWA and the parent's constitutional rights.

**19. Proposed rule: §23.129, What placement preference apply in adoptive settings?**

**Proposed Rule:** §23.129(b): "The court should, where appropriate, also consider the preference of the Indian child or parent."

**Academy comment:** This section is poorly worded, and should use the word "shall" instead of should, consistent with Section 1915. Furthermore, as set forth previously in response to proposed rule §23.107(a), the constitutional rights of a parent to make an appropriate placement for their child would be violated if the court does not give great deference to the parent's desires. It should only be if a request of a parent is clearly harmful to the child should that a court not approve the request of a parent for a deviation of the placement preferences.

**20. Proposed rule: §23.131, How is a determination for "good cause" to depart from the placement preferences made?**

**Proposed Rule §23.131:**

(a) If any party asserts that good cause not to follow the placement preferences exists, the reasons for such belief or assertion must be stated on the record or in writing and made available to the parties to the proceeding and the Indian child's tribe.

(b) The party seeking departure from the preferences bears the burden of proving by clear and convincing evidence the existence of good cause to deviate from the placement preferences.

(c) A determination of good cause to depart from the placement preferences must be based on one or more of the following considerations:

(1) *The request of the parents*, if both parents attest that they have reviewed the placement options that comply with the order of preference.

(2) The request of the child, if the child is able to understand and comprehend the decision that is being made.

(3) *The extraordinary physical or emotional needs of the child*, such as specialized treatment services that may be unavailable in the community where families who meet the criteria live, as established by testimony of a qualified expert witness; provided that extraordinary physical or emotional needs of the child

does not include ordinary bonding or attachment that may have occurred as a result of a placement or the fact that the child has, for an extended amount of time, been in another placement that does not comply with ICWA.

(4) The unavailability of a placement after a showing by the applicable agency in accordance with § 23.128(b) of this subpart, and a determination by the court that active efforts have been made to find placements meeting the preference criteria, but none have been located. For purposes of this analysis, a placement may not be considered unavailable if the placement conforms to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

(d) The court should consider only whether a placement in accordance with the preferences meets the physical, mental and emotional needs of the child; and may not depart from the preferences based on the socio-economic status of any placement relative to another placement. (Emphasis added)

**Academy comment:** This section is the most glaring example of the proposed regulations being contrary to the language and legislative history of the ICWA. The Academy strongly opposes this section becoming a rule.

First, the Supreme Court of the United States, moreover, in the case of *Adoptive Couple v. Baby Girl*, held that the ICWA adoption placement preferences, 25 U.S.C. §1915(a), are *inapplicable* in cases where there is only a single petition to adopt the child:

§ 1915(a)'s preferences are inapplicable in cases where no alternative party has formally sought to adopt the child. This is because there simply is no "preference" to apply if no alternative party that is eligible to be preferred under § 1915(a) has come forward.

*Adoptive Couple v. Baby Girl*, 133 S. Ct. at 2565.

Some critics of the *Adoptive Couple* decision note that it did not address the provision of the Bureau of Indian Affairs' ICWA 1979 Guidelines that require a diligent national search of potential adoptive families within the preference placement order. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. at 67594. Yet the specter of requiring a fit birth parent, or an adoption agency acting on her behalf, to conduct a national search for an Indian adoptive family, when the mother has already selected a couple to adopt her child, raises troubling due process concerns and ignores the holding of the case. It has long been established that parenthood and child-rearing fall within the most basic and fundamental liberties protected by substantive due process. *Troxel v. Granville*, 530 U.S. at 65-66.

The Supreme Court in *Adoptive Couple* endorsed this argument, holding “[a]s the State Supreme Court read §§ 1912(d) and (f), a biological Indian father could abandon his child in utero and refuse any support for the birth mother – perhaps contributing to the mother's decision to put the child up for adoption – and then could play his ICWA trump card at the eleventh hour to *override the mother's decision* and the child's best interests... Such an interpretation would raise equal protection concerns.” *Adoptive Couple*, 133 S. Ct. at 2565 (emphasis added). In the voluntary adoption context, this paternalistic search requirement cannot be applied without trampling on Indian birth parents’ freedom to choose who will raise their children. If an absent parent has no right to override the mother’s decision, it is unclear why the Department thinks it has such a right. Imposing these onerous search requirements upon agencies to do wide-ranging searches for families meeting the placement preferences is a clear repudiation of the Supreme Court’s binding ruling in *Adoptive Couple*.

When Section 1915 *does* apply, ICWA states a state court can deviate from the ICWA placement preferences upon a showing of “good cause.” 25 U.S.C. § 1915 (a), (b). The proposed federal regulations mandate a narrow definition of “good cause” that will restrict a state court’s ability to receive all information necessary to make an informed decision regarding a child’s placement. The proposed federal regulations will have the effect of sweeping aside thirty-seven years of state appellate decisions by imposing mandatory federal rules. Congress has not authorized such sweeping changes regarding the ICWA.

The proposed rule is also contrary to the 1978 legislative history regarding ICWA. As set forth in the 1979 *Guidelines*, the Department stated:

Primary responsibility for interpreting other language used in the Act, however, rests with the courts that decide Indian child custody cases. For example, the legislative history of the Act states explicitly that use of the term “good cause” was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child. S. Rep. No. 95-597, 95 Cong., 1<sup>st</sup> Sess. 17 (1977).

1979 Guidelines, 44 Fed. Reg. at 67584. The proposed rule brazenly strips that authority from state courts.

The proposed rule also states that the length of time a child is in a placement is irrelevant and the court should not consider bonding and attachment between the child and the primary adults with whom he or she resides. This violates the child’s constitutional rights. In *Palmore v. Sidoti*, 466 U.S. 429, 104 S. Ct. 1879, 80 L. Ed. 2d 421 (1984), the U.S. Supreme Court struck down as unconstitutional a Florida Court of Appeals decision which had affirmed a trial court’s ruling removing a child from his mother’s custody and awarding custody to the father solely because mother had

remarried a member of a minority race. The Supreme Court stated that the goal of the Florida law is to mandate custody determinations based upon the best interests of the child, and as such, that is indisputably a substantial governmental interest for purposes of the Equal Protection Clause. The Supreme Court found the Florida court rulings had violated the mother and child's constitutional rights of equal protection pursuant to the Fourteenth Amendment. *Id.* at 433.

Likewise, the Academy is dismayed that the Department would propose – in its updated “Guidelines for State Courts and Agencies in Indian Child Custody Proceedings” – that “[t]he good cause determination does not include an independent consideration of the best interest of the Indian child because the preferences reflect the best interests of an Indian child in light of the purposes of the Act.” 80 Fed. Reg. at 10158. While this repudiation of a bedrock principle of domestic relations law is not to be found in the proposed rule, the Academy is concerned that the difference between the guidelines and proposed rule regarding the relevancy of a child's best interests will become blurred and cause serious confusion in state courts. To clarify that the Department does not intend to usurp a state court's right to make “best interest of the child” findings, the Department should promulgate a rule affirmatively stating that.

Any rule declaring the best interests of the child irrelevant would be a breathtaking encroachment on the of authority of state courts. A majority of courts have held that the “best interests” of the Indian child must be considered in determining whether or not “good cause” exists. *See, In re Interest of Bird Head*, 331 N.W.2d 785 (Neb. 1983); *Matter of Appeal in Maricopa County Juvenile Action No. A-25525*, 667 P.2d 228, 234 (Ariz. App. 1983); *Matter of Adoption of T.R.M.*, 525 N.E.2d 298, 307-308 (Ind.1988); *Matter of Adoption of M.*, 832 P.2d 518, 522 (Wash. App. 1992); *Matter of Adoption of F.H.*, 851 P.2d 1361,1363-1364 (Alaska 1993); *In re Interest of A.E., J.E., S.E., and X.E.*, 572 N.W.2d 579, 583-585 (Iowa 1997); *People ex. rel. of A.N.W.*, 976 P.2d 365, 369 (Colo. App. 1999); *In re Interest of C.G.L.*, 63 S.W.3d 693, 697-698 (Mo. App. 2002); *C.L. v. P.C.S.*, 17 P.3d 769, 773 (Alaska 2001); *In the Matter of the Adoption of Baby Girl B.*, 67 P.3d 359, 370-371 (Ok. App. 2003); *In the Matter of B.B.A.*, 224 P.3d 1285 (Okla. Civ. App. 2009).

The proposed rule would also restrict a single parent's right to make a placement decision, when it limits “good cause” to deviate to “[t]he request of the *parents*, if both parents attest that they have reviewed the placement options that comply with the order of preference.” Under existing case law, a single parent's request to deviate from the placement preferences can constitute good cause. *See In re Baby Girl A.*, 230 Cal. App.3d 1611, 282 Cal. Rptr. 105, 110-111 (Cal. App. 1991); *Adoption of M.*, 832 P.2d 518, 522 (Wash. App 1992); *Matter of Adoption of F.H.*, 851 P.2d 1361, 1364-1365 (Alaska 1993); *In the Matter of Baby Boy Doe*, 902 P.2d 477, 487 (Id. 1995); *In the Matter of the Adoption of Bernard A.*, 77 P.3d 4, 10 (Alaska 2003); *In re Adoption of Keith M.W.*, 79 P.3d 623, 630-631 (Alaska 2003); *In the Matter of the Adoption of B.G.J.*,\* 133 P.3d 1, (Kan. 2006); *In re*

*Adoption of T.R.M.*, 525 N.E.2d 298, 313 (Ind. 1988); *In the Matter of B.B.A.*, 224 P.3d 1285 (Okla. Civ. App. 2009).

The Department limits the right of a parent by requiring that an absent parent also express a preference. No doubt in cases where both parents may be deemed “custodial,” the preferences of both parents may be required to justify deviation from the placement preferences – assuming they apply. But the Academy believes, as the *Adoptive Couple* decision made clear, if a non-custodial parent may not invoke 1912 to thwart an adoption, such a parent has no right to be heard on the placement preferences. A parent’s request to deviate from the placement preferences should always be sufficient evidence of “good cause.”

A child’s sibling relationship is an important consideration which should be considered in determining if “good cause” exists to deviate from the ICWA placement preferences. *Fresno County Department of Children and Families Services v. The Superior Court of Fresno County*, 122 Cal. App.4th 626, 19 Cal. Rptr.3d 155 (Cal. App. 2004); *In re N.M.*, 174 Cal. App.4th 328, 94 Cal. Rptr. 3d 220 (Cal. App. 2009).

If the limited ground of §23.131 becomes the basis for a “good cause” finding, it will have a devastating impact on children. As an example, there are many cases where siblings are together and unfortunately, do not have parents who are capable of parenting, or their parents’ parental rights have been terminated. In a recent case, two children who were fourteen (14) months apart in age had the same mother, who was Caucasian. One child’s father was Cherokee and Caucasian. The other child’s father was Caucasian and Hispanic. If these regulations become mandatory and the law of the land, courts would be prohibited from considering the children’s significant sibling relationship. Because their parents’ rights had been terminated, the children’s relationship to each other was more important than most sibling groups. This proposed federal rule would allow one of these children to be removed and separated from their sibling who is not a Native American. This would be devastating for these children.

**21. Proposed rule: § 23.132, What is the procedure for petitioning to vacate an adoption?**

(a). Within two years after a final decree of adoption of any Indian child by a State court, or within any longer period of time permitted by the law of the State, a parent who executed a consent to termination of paternal rights or adoption of that child may petition the court in which the final adoption decree was entered to vacate the decree and revoke the consent on the grounds that consent was obtained by fraud or duress, or that the proceeding failed to comply with ICWA.

**Academy comment:** The inclusion of the phrase at the end of subsection (a) which states “or that the proceeding failed to comply with ICWA” is contrary to the language

of Sections 1913(d) and 1914(a) of the ICWA. Section 1913(d) only allows a collateral attack on a voluntary adoption proceeding for fraud or duress. These must be brought within two years, or within a longer period allowed by State law. Congress stated the grounds for collateral attack – the Department is not free to add more.

For other challenges brought alleging other violations of the ICWA, state statutes of limitations apply, including if they are shorter than two years. *In re adoption of Erin G.*, 140 P.3d 886, 891-92 (Alaska 2006) (applying Alaska’s one-year limitations period to challenges to adoption decrees not based on fraud or duress), *cert. denied sub nom., Daniel L. v. Grant*, 549 U.S. 1036, 127 S. Ct. 591 (2006).

The Alaska court wrote in *Erin G.* that “Congress did not include a generally applicable statute of limitations in ICWA. It specified a two-year statute of limitations for one class of ICWA claims, those brought under § 1913(d).” 140 P.3d at 891. The court also wrote:

Obtaining a parent's consent to termination by fraud or duress is arguably one of the most egregious placement practices addressed by ICWA. Congress’s decision to adopt a minimum limitations period only for fraud and duress claims suggests that it was comfortable with the possibility that shorter state limitations periods would govern claims brought under other ICWA provisions. Conversely, it is unlikely that Congress would have limited the time for bringing claims under § 1913(d) if it intended that other § 1914 claims would be subject to no time limits.

*Id.* at 892-93. Further, noting the “‘development of lasting and powerful psychological ties between adoptive parents and children, especially young children,’” the court wrote that “‘at some point adoptions must become final.’” *Id.* at 893 (quoting *Hernandez v. Lambert*, 951 P.2d 436, 441-42 (Alaska 1998) and *In re Adoption of T.N.F.*, 781 P.2d 973, 980 (Alaska 1989)).

The court in *In re Adoption of T.N.F.*, 781 P.2d 973 (Alaska 1989),<sup>1</sup> wrote that while “Section 1914 seeks to enforce important federal procedural rights contained in ICWA,” “this interest must be balanced against the adoptive family’s interests. At some point, the adoptive child’s relations with his or her adoptive parents needs protection from further disruption.” 781 P.2d at 980. It refused to allow the adoption decree in that case to be set aside because the challenge was brought after the one-year Alaska statute of limitations. *See also In re Petition of Phillip A.C.*, 149 P.3d 51, 60 n. 44 (2006) (noting that “a voluntary proceeding that violates § 1913(a) is merely voidable, not automatically

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<sup>1</sup> *In re Adoption of T.N.F.* was a plurality opinion, but its reasoning was expressly adopted by the Alaska Supreme Court in *Erin G.* 140 P.3d at 891.

void” because a challenge that is untimely should not be allowed); *In re Adoption of A.B.*, 2010 UT 55 (ICWA does not provide a time frame for appealing decisions in adoption matters, so state appeal deadline applied).

**Proposed rule: § 23.132 What is the procedure for petitioning to vacate an adoption?**

(d) Where the court finds that the parent's consent was obtained through fraud or duress, the court must vacate the decree of adoption, order the consent revoked and order that the child be returned to the parent.

**Academy comment:** Importantly, if the court invalidates an adoption decree for reasons other than fraud or duress, Section 1916(a) of the ICWA requires consideration of the best interests of the child before determining to return the child, yet the proposed rule makes no mention of this. Section 1916(a) provides:

whenever a final decree of adoption of an Indian child has been vacated or set aside . . . a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

**22. Proposed rule: § 23.133 Who can make a petition to invalidate an action?**

(a) Any of the following may petition any court of competent jurisdiction to invalidate an action for foster care placement or termination of parental rights where it is alleged that ICWA has been violated:

(1) An Indian child who is the subject of any action for foster care placement or termination of parental rights;

(2) A parent or Indian custodian from whose custody such child was removed; and

(3) The Indian child's tribe.

(b) Upon a showing that an action for foster care placement or termination of parental rights violated any provision of 25 U.S.C. 1911, 1912, or 1913, the court must determine whether it is appropriate to invalidate the action.

(c) There is no requirement that the particular party's rights under ICWA be violated to petition for invalidation; rather, any party may challenge the action based on violations in implementing ICWA during the course of the child custody proceeding.

(d) The court should allow, if it possesses the capability, alternative methods of participation in State court proceedings by family members and tribes, such as participation by telephone, videoconferencing, or other methods.

**Academy comment:** If a voluntary adoption of an Indian child has been completed based on the consent of the parent, under Section 1913(d) only the *parent* may seek to withdraw his or her consent, and then only on the basis of fraud or duress. The parent, moreover, must do so within two years of the finalization of the adoption.

Other challenges asserting violations of the ICWA must be brought under Section 1914, and must allege violations of Sections 1911, 1912, or 1913 alone. These claims are subject to state statutes of limitations. *In re adoption of Erin G.*, 140 P.3d 886, 891-92 (Alaska 2006) (applying Alaska's one-year limitations period to challenges to adoption decrees not based on fraud or duress), *cert. denied sub nom., Daniel L. v. Grant*, 549 U.S. 1036, 127 S. Ct. 591 (2006); *In re Adoption of T.N.F.*, 781 P.2d 973 (Alaska 1989). See also *In re Petition of Phillip A.C.*, 149 P.3d 51, 60 n.44 (2006) (noting that "a voluntary proceeding that violates § 1913(a) is merely voidable, not automatically void" because a challenge that is untimely should not be allowed); *In re Adoption of A.B.*, 2010 UT 55 (ICWA does not provide a time frame for appealing decisions in adoption matters, so state appeal deadline applied).

Subsection (c) of the proposed rule purports to grant standing to any party mentioned under the ICWA to raise violations of the ICWA, even if that party has no personal injury or stake in the outcome ("no requirement that the particular party's rights under ICWA be violated to petition for invalidation"). It is a fundamental principle of American jurisprudence, however, that someone seeking relief in the courts must have standing to sue. In federal courts, the United States Supreme Court has held that:

...the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, see *Allen v. Wright*, 468 U.S. 737, 756 (1984); *Warth v. Seldin*, 422 U. S. 490, 508 (1975); *Sierra Club v. Morton*, 405 U. S. 727, 740-741, n. 16 (1972);<sup>11</sup> and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" *Whitmore v. Arkansas*, 495. U.S. 149, 155 (1990) (quoting *Los Angeles v. Lyons*, 461 U. S. 95, 102 (1983)). Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Simon v. Eastern Ky. Welfare 561\*561 Rights Organization*, 426 U. S. 26, 41-42 (1976). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id.*, at 38, 43.

The Department, however, purports to convey standing by rule on those who do not have a personal stake in the controversy. There is no evidence Congress intended to grant the Department authority to rewrite constitutional standing requirements.

### **23. Conclusion**

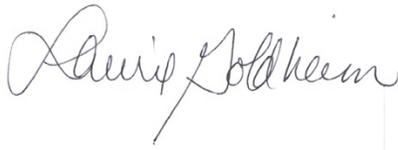
The Indian Child Welfare Act was enacted to help preserve the cultural identity and heritage of Indian tribes. *Adoptive Couple v. Baby Girl*, 133 S. Ct. at 2566. The Academy embraces that goal, and believes the language of ICWA, as it is written, provides state courts with the flexibility to preserve culture, but not at the expense of the very children and parents ICWA was designed to protect. The Department would commit grave error in trying to take that authority away. If the Supreme Court of the United States made anything clear in *Adoptive Couple*, it is that it will reverse interpretations of “the Act [that] would put certain vulnerable children at a great disadvantage solely because an ancestor – even a remote one – was an Indian.” *Adoptive Couple*, 133 S. Ct. at 2565.

The proposed rule disadvantages Indian children. It must be rejected.

Respectfully submitted,

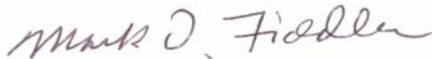
**The American Academy of Adoption Attorneys**

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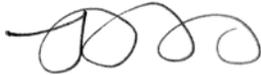
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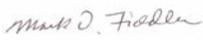
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