

# MEMORANDUM

## State of Alaska Department of Law

TO: Jay Livey, Commissioner  
Department of Health and Social Services

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TELEPHONE: (907) 465-2133

SUBJECT: *In the Matter of C.R.H.*

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On August 31, 2001, the Alaska Supreme Court issued a decision recognizing the viability of tribal jurisdiction over Child In Need of Aid proceedings involving tribal children. *In the Matter of C.R.H.*, 29 P.3d 849 (Alaska 2001). The Department of Health and Social Services ("DHSS") has asked for an opinion that answers the following questions:

1. What factors determine whether a tribe in Alaska has exclusive versus concurrent jurisdiction over child custody proceedings involving its children?
2. Does *C.R.H.* affect state recognition of tribal actions regarding adoptions?

### DISCUSSION

Prior to its decision in *C.R.H.*, the Alaska Supreme Court had held<sup>1</sup> that tribes in Alaska lacked authority over child custody proceedings involving tribal children unless the tribe first reassumed its "divested" jurisdiction pursuant to § 1918 of the Indian Child Welfare Act.<sup>2</sup> In *C.R.H.*, the court overruled this holding. Thus, state law now

<sup>1</sup> *Native Village of Nenana v. State of Alaska*, 722 P.2d 219 (Alaska 1986), cert. denied, 479 U.S. 1008 (1986), *In the Matter of K.E.*, 744 P.2d 1173 (Alaska 1987), and *In the Matter of F.P.*, 843 P.2d 1214 (Alaska 1992), cert. denied, 508 U.S. 950 (1993).

<sup>2</sup> 25 U.S.C. §§ 1901 *et seq.* The term "child custody proceeding" includes any action removing the child from its parent or Indian custodian where the parent or Indian custodian cannot have the child returned upon demand but where parental rights have not been terminated, termination of parental rights, pre-adoptive placement or adoptive placement. 25 U.S.C. § 1903(1).

recognizes that tribes in Alaska have authority over child custody matters involving tribal children and need not petition the Secretary of the Interior to reassume jurisdiction before exercising their authority.

**I. What Factors Determine Whether A Tribe In Alaska Has Exclusive Rather Than Concurrent Jurisdiction Over Child Custody Proceedings Involving Its Children?**

Tribal jurisdiction with regard to a particular child may be either exclusive or concurrent (shared) with that of the state, depending upon the circumstances of the particular case and child. The threshold question in any analysis regarding tribal jurisdiction over a particular child custody proceeding is whether the child is either a member or eligible for membership in the tribe seeking to exert its jurisdiction. Assuming that the child meets one of these membership requirements, the child's tribe<sup>3</sup> may exercise its jurisdictional authority over the child in one of two circumstances.

First, the tribe may initiate child custody proceedings in tribal court pursuant to tribal law.<sup>4</sup> Where the tribe initiates proceedings and makes the child a ward of its court before the state court issues an order regarding the child, tribal jurisdiction over those proceedings becomes exclusive, in which case the state lacks any authority over the child at issue. 25 U.S.C. § 1911(a).

Alternatively, if neither the tribe nor the state has initiated child custody proceedings, tribal jurisdiction is concurrent with that of the state, in which case the tribe and the state simultaneously share authority and either government may take the steps necessary to protect a child who may be at risk. If the state initiates judicial proceedings before the tribe has either removed the child for placement or initiated tribal court proceedings, the state has jurisdiction over the child. However, even if the state exercises its jurisdiction before the tribe does so, the case may be transferred to the jurisdiction of the tribal court, at which point the tribe's jurisdiction over those particular proceedings becomes exclusive so long as the child remains a ward of the tribal court.

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<sup>3</sup> ICWA defines an Indian child's tribe as the Indian tribe in which the child is a member or eligible for membership. If the child is eligible for membership in more than one tribe, the Indian tribe with which the child has more significant contacts is the child's tribe. 25 U.S.C. § 1903(5).

<sup>4</sup> Tribal law in this regard may derive from tribal constitutions, codes, statutes, resolutions or other written law, or may derive from tradition and cultural practice, which will not necessarily be found in a body of written law.

### A. Exclusive Tribal Jurisdiction

Under federal law, a tribe has exclusive jurisdiction over a child custody matter affecting one of its children in one of three circumstances. First, if the tribe has a reservation over which it exercises exclusive authority, and the child is either domiciled or residing within the reservation, the tribe has exclusive jurisdiction over the child custody matter. 25 U.S.C. § 1911(a). There are only two exceptions to this rule: (1) if there is a state-tribal agreement that provides for state jurisdiction; or (2) if the child is temporarily off-reservation and an emergency arises, in which case the state may act temporarily on behalf of the child to alleviate the emergency. 25 U.S.C. §§ 1919, 1922.

At this juncture, no tribe in Alaska may exercise exclusive jurisdiction over its children based on either residency or domicile within the tribe's reservation. The Metlakatla Indian Community is the only tribe in Alaska that occupies a reservation (the Annette Islands Reserve). Although the tribe could have exercised exclusive jurisdiction over the Annette Islands Reserve, the Metlakatla Indian Community expressly petitioned the Secretary of the Interior for concurrent, rather than exclusive, jurisdiction and the Secretary granted that request. Thus, even within the Annette Islands Reserve, the Metlakatla Indian Community shares concurrent jurisdiction with the state.

Second, a tribe in Alaska may exercise exclusive jurisdiction over its children if it has petitioned the Secretary of the Interior for exclusive jurisdiction over specific territory other than a reservation, as defined within the petition, and the Secretary has granted that petition.

At this time, the Secretary has granted petitions filed by two tribes to reassume exclusive jurisdiction over their children – the Native Village of Barrow and the Native Village of Chevak.<sup>5</sup> The Native Village of Barrow is not yet exercising exclusive jurisdiction. The tribe has entered an interim agreement with DHSS that provides for concurrent state and tribal jurisdiction until such time as Barrow decides it is prepared to exercise its authority exclusive as to the state. The Native Village of Chevak is exercising exclusive jurisdiction over its children who reside or are domiciled within the village. A tribe exercising exclusive jurisdiction under these circumstances may also

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<sup>5</sup> See 64 Fed. Reg. 36,391 (July 6, 1999).

enter into an agreement with the state authorizing the state to exercise jurisdiction over tribal children under specified circumstances.<sup>6</sup>

Third, a tribe has exclusive jurisdiction over a specific child custody proceeding once the child becomes a ward of the tribal court.<sup>7</sup> The tribal court then retains exclusive jurisdiction over the child custody proceeding until the tribal court dismisses the proceedings.

If DHSS receives a report of harm about a child it knows is already a ward of a tribal court, DHSS lacks authority even to investigate the report, unless, as set out above, there is a state-tribal agreement that covers the situation or the child is temporarily off-reservation. If, however, DHSS receives information that the child may be at risk of harm, it would be appropriate, to the extent permitted by law, for DHSS to forward this information promptly to the tribe to ensure that the tribe is fully aware of all circumstances that might affect the child's safety and welfare.

#### **B. Concurrent or Shared Tribal-State Jurisdiction**

A spectrum of scenarios may occur where the state and tribe share concurrent jurisdiction. The scenarios may range from those cases where the tribe has begun an investigation but not yet removed the child to those cases where the tribe has not yet investigated a report of harm. State authority and responsibility under any of these scenarios will be fact-dependent.

Whenever DHSS receives a report of harm, the division's focus must always be on the safety of the child, consistent with ICWA and state law. If DHSS receives a report of harm regarding a child and the child's tribe has neither removed the child for placement nor initiated a child custody proceeding in tribal court, DHSS should investigate the report under its state mandate and take any necessary and appropriate action under state law. AS 47.17.025, .030. Under these circumstances, if DHSS knows or has reason to know the child's tribal affiliations, contact with the tribes to determine the child's membership status is an appropriate investigatory step.

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<sup>6</sup> Children of either tribe who reside and are domiciled outside their respective villages are subject to concurrent state and tribal jurisdiction.

<sup>7</sup> 25 U.S.C. § 1911(a). However, if a child is already within the custody of the state the child's tribe does not obtain jurisdiction over a particular child simply by making the child a ward of the tribal court. Under these circumstances, the tribe obtains exclusive jurisdiction only if the case is transferred to tribal court.

If, however DHSS receives a report of harm and the child's tribe has removed the child for placement or initiated tribal court proceedings, the state may not pursue protective action on behalf of that child. Thereafter, the state may only take protective measures on behalf of the child if the tribal court formally dismisses the child custody proceedings. It would, however, be appropriate, to the extent permitted by law, for DHSS to promptly forward the information contained in the report of harm to the tribe to ensure that the tribe is fully aware of all circumstances that might affect the child's safety and welfare.

## II. Does *C.R.H.* Affect Recognition of Tribal Actions Regarding Adoptions?

Since the early 1980's the Division of Vital Statistics ("DVS") has recognized what has become known as tribal cultural or customary adoptions, whereby a relative adopts a child under tribal custom and tradition. The family arranges these adoptions, the practice of which occurs outside of any judicial or administrative arena. DVS promulgated a regulation to reflect state recognition of this customary practice. 7 AAC 05.700(b). The regulation requires parental approval of the adoption. Where a cultural adoption has occurred, DVS acknowledges the legitimacy of that adoption and issues a new birth certificate to acknowledge the role of the adoptive parents.

While DVS has acknowledged adoptions that are cultural in nature and implemented regulatory changes to reflect these cultural traditions, DVS has not recognized adoptions resulting from tribal court actions – a nuance required, until recently, by the *Nenana* line of cases. *C.R.H.* removed all impediments that historically prevented DVS from recognizing tribal court adoptions.

Adoptions are child custody proceedings within the ambit of the ICWA: "the term 'child custody proceeding' shall mean and include... 'adoptive placement' which shall mean 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). Section 1911(d) of ICWA requires DVS to give full faith and credit to tribal court orders regarding child custody proceedings to the same extent that such entities give full faith and credit to judicial proceedings of any other entity. DVS must, then recognize tribal court adoption orders to the extent that it recognizes such orders from sister states and other foreign orders.

Tribal courts will vary from tribe to tribe. A tribal court need not be a distinct judicial body. Rather, "a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings" may constitute a tribal court. 25 U.S.C. § 1903(12). Thus, a tribal council or other governing body of a tribe may serve as a tribal court. ICWA explicitly recognizes that tribal governmental bodies that are not distinctly judicial may conduct child custody proceedings and that actions taken by these governmental bodies, such as adoption orders, are entitled to the same recognition as if the body were a state court.

DJG:lb