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May 19, 2015

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

Re: Notice of Proposed Rulemaking – Regulations for State Courts and Agencies in Indian Custody Proceedings – RIN 1076-AF25 – Federal Register (March 20, 2015)

Dear Ms. Appel:

This letter is written on behalf of a group of national organizations, associations, and professors with decades of experience in developing and implementing best practices and policies for child welfare decision-making, including in particular custodial determinations.[1] We write to express our support for the proposed regulations by the Bureau of Indian Affairs to more consistently and effectively apply the Indian Child Welfare Act (ICWA). We believe that ICWA embodies the gold standard for child welfare policies and practices in the United States. Uniform fidelity to the law throughout the United States would advance the interests of Indian children. Because such uniformity is currently lacking,[2] we strongly believe promulgating regulations is an essential step to ensuring full compliance with ICWA.

The signers of this letter work in, advocate for, and teach about child welfare across the spectrum of proceedings in which the relationships of children to their families are affected, from family support and advocacy services, to foster care and kinship placements, to the permanent termination of parental rights, and to the creation of new families through adoption. Through decades of experience, we have found that the cornerstone of an effective child welfare system is the presumption that children are best served by supporting and encouraging their relationship with fit birth parents who are interested in raising them and are able to do so safely, unless and until the parental relationship must be permanently severed or is formally relinquished in a transparent and fully informed process.[3] When children are unable to be raised by their parents, we very strongly believe that their interests are best served by creating policies and

[1] See Appendix 1, Profiles/Biographies of Cosigners.

[2] See Government Accountability Office (2005). *Indian child welfare act: Existing information on implementation issues could be used to target guidance and assistance to states*. (GAO report 05-290). Washington, DC: Author. Retrieved on May 13, 2015 from http://www.nicwa.org/policy/law/icwa/GAO_report.pdf (pointing to inconsistencies in training, lack of standard reporting, and examples of how select states use or misuse the law). See also Casey Family Programs (2015). *A Research and Practice Brief: Measuring Compliance with the Indian Child Welfare Act.* Seattle, WA: Author. Retrieved May 14, 2015 from: http://www.casey.org/media/measuring-compliance-icwa.pdf

[3] See, e.g., Berrick, J. D., Needell, B., Barth, R. B., & Johnson-Reid, M. (1998*). The tender years: Toward developmentally sensitive child welfare services for very young children.* New York: Oxford University Press; Wald, M., Carlsmith, J., & Leiderman, P. (1988*). Protecting abused and neglected children.* Stanford, CA: Stanford University Press; Wald, M., & Martinze, T. (2003). *Connected by 25: Improving the life chances of the country's most vulnerable 14-24 year olds*. William and Flora Hewlett Foundation Working Paper. Retrieved May 17, 2015 from http://betterfutures.fcny.org/betterfutures/connected_by_25.pdf

procedures maximizing the likelihood that they will be raised by relatives. These bedrock principles serve as the cornerstone of our work in child welfare and are applicable to all children.[4]

The unpleasant history in the United States involving the removal of Indian children from their homes properly led to the enactment of ICWA. Although some regard the Act as flawed and ill-suited to serve children's well-being, we believe the law is a crucial element in furthering the rights and needs of Indian children and their communities. In many ways, ICWA parallels child welfare principles and laws applicable for all children. In certain ways, ICWA has created exceptional rules and laws applicable only to Indian children and their families. Some see these exceptional rules as unfair to Indian children. We see the opposite. The principles of ICWA, which realign how Indian children are treated and apply best practices in child welfare, are in our view, the very best principles of child welfare, in any context.

These principles are consistent with a well-established framework of federal and state policy and best practices that are informed by research and experience in the field regarding what works to improve the safety, permanency and well-being of all vulnerable children. For example, existing federal and state policies provide preference for placement with family and extended family networks to preserve the critical connections that help all children thrive. The existing framework of judicial hearings and court documentation supports due process protections for all children and families. And child welfare agencies focus on practices and services that keep children safe within their own families and communities whenever possible. By clarifying ICWA provisions, the proposed regulations will help to ensure that all American Indian children and families have the same protections and opportunities, while also ensuring that tribal customs and sovereignty are honored and the trust relationship of the federal government and tribes is preserved.

We are pleased that the Bureau of Indian Affairs has proposed regulations. This is an extremely important step designed to secure uniform compliance with this important federal law. The regulations will help achieve the goal of improving ICWA application by state courts and local child welfare agencies. There are many examples of states applying ICWA in ways that conflict with other states' application of the same provisions. Because ICWA was enacted by Congress for the express purpose that it be applied uniformly throughout the country, ICWA has long been in need of binding regulations.

We are equally pleased with the proposed regulations themselves. They are the product of a careful review of the discrepant ways states have interpreted ICWA and are well-designed to eliminate ambiguities that ICWA without regulations had spawned. Perhaps the most important example is the regulation's rejection of the so-called

[4] See, e.g., Geen, R. (Ed.) (2003).K*inship care: Making the most of a valuable resource*, Washington, D.C.: Urban Institute Press; Testa, M. F & Slack-Shook, K. (2002). The gift of kinship foster care. *Children & Youth Services Review. 24(1-2),79-108*; National Survey of Children and Adolescent Well-Being (NSCAW) Research Group. (2003). *NSCAW: One year in foster care: Wave 1 data analysis report*. Washington, DC: U.S. Department of Health and Human Services, Administration for Children, Youth and Families. Retrieved March 8, 2015, from www.acf.hhs.gov/sites/default/files/opre/oyfc_report.pdf; And, Barth, R. P. (2002). *Institutions vs. foster homes: The empirical base for a century of action*. Chapel Hill, NC: University of North Carolina at Chapel Hill, School of Social Work, Jordan Institute for Families.

"existing Indian family" doctrine, which a handful of state courts created, and some even later abandoned. The Department's conclusion that this exception is contrary to the plain language of ICWA is proof of the need for binding interpretation of ICWA because of a residual hostility in some states to a robust implementation of Congress' will. It was, of course, this same hostility to the values of ICWA (primarily that Indian tribes should have deference to determine how their children are raised) that caused Congress in 1978 to enact the law in the first place.

On March 13, 2015, the Administration on Children, Youth and Families (ACYF), Administration for Children and Families (ACF), Department of Health and Human Services (HHS) announced their plan to publish a supplemental notice of proposed rulemaking (SNPRM) which will propose that title IV-E agencies collect and report additional ICWA-related data in the Administration for Adoption and Foster Care Analysis and Reporting System (AFCARS).[5] We strongly encourage the BIA to work closely with ACYF, as ACYF encourages the broader data collection and begins to develop national enforcement policies concerning these programs.

We are aware that many organizations have submitted letters commenting on the proposed regulations. Rather than commenting on all of the proposed regulations, we choose to focus our attention on those proposals with which we have the most experience or which, in our view, merit further attention. Our reasons for supporting certain proposals and recommendations for editing certain proposals follow.

§ 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)).

Among the most important components of a sound child welfare system is the requirement for agencies and others responsible for children's well-being to be vigilant in striving to keep children in their families; to remove them only when necessary to protect them from serious harm; and to work diligently to assist families with overcoming obstacles to children's safe return promptly. Research and experience confirm that when this is feasible, children's interests are best served.[6] Congress has recognized the importance of this principle both in ICWA and in child welfare interventions involving non-Indian children. (42 U.S.C. § 671(a)(15)). This proposed definition properly clarifies that Congress has imposed a special duty that agencies owe to Indian children, as indicated by the particular history of treatment Indian children and families have endured, to undertake these efforts.

Further, the requirement of 23.106 to engage in active efforts early and continuously clarifies the responsibility of the agency and the courts. By clarifying the

[5] Adoption and Foster Care Analysis and Reporting System: Intent to Publish a Supplemental Notice of Proposed Rulemaking. 80 Fed. Reg. 17713. (Apr. 2, 2015) (to be codified at 45 C.F.R. pt. 1355).

[6] See, for example, The Annie E. Casey Foundation. (2015). *EVERY KID NEEDS A FAMILY: giving children in the child welfare system the best chance for success.* A KIDSCOUNT policy report. Baltimore: Author.

requirement to (a)… "engage in active efforts 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," the proposed rules help to ensure that protections for children and families will be proactive. By clarifying that active efforts must begin immediately, the proposed regulations will help to prevent unnecessary removal, to promptly reunify children if temporary placement is necessary, and to ensure that placements comply with the preferences specified.

> **"Continued Custody" means physical and/or legal custody that a parent already has or had at any point in the past. The biological mother of a child has had custody of a child. Custody means physical and/or legal custody under any applicable tribal law or tribal custom or State law. A party may demonstrate the existence of custody by looking to tribal law or tribal custom or State law.**

This is an important definition because it clarifies that parents with legal rights to their child who may never have had physical custody are fully covered by ICWA. This is especially important after the Supreme Court's holding in *Adoptive Couple v. Baby Girl*, 133. S.Ct. 2552 (2013). This definition is consistent with that holding. In *Adoptive Couple*, the Court held that the birth father never acquired rights under ICWA and, for that reason, he was not entitled to benefit from any of its provisions. He had neither legal nor physical custody of the child.

State courts commonly speak in terms of "returning" children to a parent's custody or "removing" them from parents regardless of whether the parent has or ever had physical custody. Thus, courts and agencies "remove" children from hospitals when they are born and courts speak in terms of having "removed" them from their parents' custody, even though they had had not exercised custody of them. Similarly, courts speak in terms of "returning" children to parents (including birth fathers) who never had physical custody. See, e.g., *In re Michael B*., 604 N.E.2d 122, 131 (N.Y. 1992) (agency had duty to employ "reasonable efforts" for a child to "return to the natural home" as applied to a birth father whose identity was unknown when the child was placed in foster care and the child had never lived with him.)

It is worth noting that a major factor in the proposed definition is the consideration of tribal law or tribal custom, in addition to state law. The proposed regulations rightfully recognize a tribe's authority to define custody. This recognition is consistent with the proposed regulations' clarification of tribal authority to determine tribal membership.

> **"Imminent physical damage" or harm means present or impending risk of serious bodily injury or death.**

In several places throughout the proposed regulations, the phrase "imminent physical harm" is used. In ICWA, this language only appears in one section (§ 1922). The proposed regulations discuss "imminent physical harm" and define the term as meaning "present or impending risk of serious bodily injury or death." We recommend limiting the use of the phrase "imminent physical harm" to emergency situations, and otherwise using the phrase "serious emotional or physical damage," for non-emergency situations, which comes from the law itself, § 1912(e).

This substitution of language will require defining what constitutes "serious emotional damage." We recommend that the definitional section for "serious emotional damage" be clarified to state that, "to find that a child is suffering from serious emotional harm, the child must display specific symptoms such as severe anxiety, depression or withdrawal and there must be a finding that the parent is unwilling to provide treatment for the child."

"Voluntary placement" means a placement that either parent has, of his or her free will, chosen for the Indian child, including private adoptions).

We are pleased that the regulations clarify that private adoption placements made voluntarily by parents are covered by ICWA. This is an important clarification properly designed to safeguard the rights Congress intended to afford to Indian children and their communities. Nothing in the Supreme Court's *Adoptive Couple* holding is inconsistent with this definition.

§ 23.103 When does ICWA apply

There is no exception to application of ICWA based on the so-called "existing Indian family" doctrine.

We agree with the analysis put forth by the Association on American Indian Affairs (AAIA) that the so-called "existing Indian family" doctrine (EIF), a court-created method to bypass ICWA that has been followed in just seven states and affirmatively opposed in 19 others, was not adopted by the United States Supreme Court in *Adoptive Couple v. Baby Girl*. Rather, the Court held that ICWA is triggered any time an Indian child is involved in a child custody proceeding – the antithesis of the EIF.

Finally, we wish to comment on one substantive component of the proposed rules, involving "good cause" to depart from placement preferences set forth in proposed rule § 23.131.

§ 23.131(c)(3) Good cause to depart from placement preferences.

The extraordinary physical or emotional needs of the child, such as specialized treatment services that may be unavailable in the community where families who meet the criteria live, as established by testimony of a qualified expert witness; provided that extraordinary physical or emotional needs of the child does not include ordinary bonding or attachment that may have occurred as a result of a placement or the fact that the child has, for an extended amount of time, been in another placement that does not comply with ICWA.

The Department's decision to define "good cause" is within its authority. It is also a vital clarification for courts. The proposed rule explains that the length of time a child is

in a placement is irrelevant when courts are deciding what remedy to employ for a non-compliant placement. This rule is consistent with best practices in child welfare.[7]

We strongly support the regulation that "ordinary bonding or attachment" resulting from a non-compliant placement shall not become the sole basis for a court refusing to return a child to his or her family or otherwise to undo an initial temporary placement.[8] Some have criticized this proposed rule on the grounds that placement determinations should be made in a child's best interests, arguing that best interests are heavily determined by ordinary (or expected) bonding and attachment. This is an alluring, but false, criticism.[9] The scenario addressed by this rule contemplates a narrow set of circumstances: cases in which ICWA has been circumvented – intentionally or not – and which are out of compliance with placement preferences. Keeping in mind that "active efforts" require continual attempts to seek ICWA-compliant placement, the rule proposed in §23.131(c)(3) is an important safeguard against the incentive to cut corners when placing children and depend on a court forgiving noncompliance by the time the matter is reviewed because, by then, the cost of disrupting a child's placement may be said to be greater than allowing them to remain in a placement that was out of compliance in the first place.

The American Academy of Adoption Attorneys has objected to this proposed rule asserting that it is inconsistent with *Adoptive Couple v. Baby Girl*. This claim is groundless. It is true, as the Adoption Academy states, that *Baby Girl* held that ICWA's preferences set forth in 25 U.S.C. § 1915(2) are inapplicable when no one has sought to adopt the child. But nothing in the proposed regulation conflicts with that proposition. All the proposed regulation addresses is what should happen when the applicable placement preferences are not being met. The Adoption Academy's characterization that this proposed regulation is "perhaps the most glaring example of the proposed regulations being contrary to the language and history of the ICWA" should not be taken seriously.

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[7] See, for example, Center on the Developing Child at Harvard University (2007). *A Science-Based Framework for Early Childhood Policy: Using Evidence to Improve Outcomes in Learning, Behavior, and Health for Vulnerable Children.* Boston, MA: Author. Retrieved September 26, 2007 from: http://www.developingchild.harvard.edu. And, The Annie E. Casey Foundation. (2015). *EVERY KID NEEDS A FAMILY: giving children in the child welfare system the best chance for success.* A KIDSCOUNT policy report. Baltimore: Author; Weinfield, N. S., Ogawa, J. R., & Sroufe, L. A. (1997). Early attachment as a pathway to adolescent peer competence. *Journal of Research on Adolescence, 7*(3), 241-265; Doyle, J. (2007). Child Protection and Child Outcomes: Measuring the Effects of Foster Care. *The American Economic Review*. 1583-1610 retrieved May 14, 2015 from: http://www.mit.edu/~jjdoyle/fostercare_aer.pdf; Hayduk, I. (2014). *The Effect of Kinship Placement on Foster Children's Well-Being*. Retrieved May 15, 2015 from: https://research.stlouisfed.org/conferences/moconf/2014/Hayduk_paper.pdf.

[8] See Appendix 2, Bonding & Attachment: Further Research.

[9] A variety of research exists both discussing the significance of attachment theory, and also revealing some serious flaws in the use of bonding and attachment as practical tools in real-life child placement determinations by state courts, as well as supporting the notion that children can and do form multiple attachments and that having at least one secure attachment "buffers" a child from further developmental issues. See, for example, Arrendondo, D.E. & Edwards, L.P. (2000). *Attachment, Bonding, and Reciprocal Connectedness*, J. CENTER FOR FAM., CHILD. & CTS. 109 (2000); Emery, R.E., et al., (2005). A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System, 6 *PSYCHOLOGICAL SCIENCE IN THE PUBLIC INTEREST*, 1.

The Adoption Academy's claim that such a rule violates a child's constitutional rights and violates *Palmore v. Sidoti*, 466 U.S. 429 (1984) also should not be taken seriously. To the contrary, the proposed rule is necessary to ensure fidelity to the rule of law. Without it, lawyers and agencies who participate in placing Indian children for adoption have an incentive to cut corners and place children with adoptive families without full ICWA compliance. The rule is an important tool to ensure that each Indian child's best interests, as defined by Congress, are advanced. The rule is grounded in reasoning articulated by the Supreme Court in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 53-54 (1989). As the Court explained in that case:

> We are not unaware that over three years have passed since the twin babies were born and placed in the [adoptive] home, and that a court deciding their fate today is not writing on a blank slate in the same way it would have [three years ago]. Three years' development of family ties cannot be undone, and a separation at this point would doubtless cause considerable pain.... Had the mandate of the ICWA been followed [three years ago], of course, much potential anguish might have been avoided, and in any case the law cannot be applied so as automatically to 'reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation.' (citation omitted)). Thus, the bonding that occurred during litigation, without more, cannot form the basis for terminating Father's parental rights.

In addition, the regulation is consistent with best practices in all child welfare proceedings. The purpose of the regulations is to ensure that courts apply the well-considered ICWA law as it was intended, without introducing personal or emotional bias, or most critically, cultural bias. The regulation will require that when ICWA-compliant placement is made available, such placement shall be ordered absent good cause. Agencies and courts will therefore be encouraged to actively seek and identify appropriate placement from the outset, and not encouraged to continue prevailing practices of simply placing a child without legitimate active efforts to satisfy the intent of the ICWA.

As the Utah Supreme Court explained, "[t]he adoptive parents argue that we should consider the bonding that has taken place between themselves and Jeremiah in reaching a decision in this matter. . . . [This] would reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation." *Matter of Halloway*, 732 P.2d 962, 971-72 (Utah 1986). New York's highest court has similarly written "[t]o use the period during which a child lives with a foster family, and emotional ties that naturally eventuate, as a ground for comparing the biological parent with the foster parent undermines the very objective of voluntary foster care as a resource for parents in temporary crisis, who are then at risk of losing their children once a bond arises with the foster families." *Matter of Michael B.*, 604 N.E.2d 122, 130 (N.Y. 1992).

By applying the rule of law in each case, we advance the rights of children when the law itself was promulgated with their rights in mind. Congress enacted ICWA "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902. It is a key best practice to require courts to follow pre-established, objective rules that operate above the charged emotions of

individual cases and presume that preservation of a child's ties to her biological parents is in her best interests. This proposed regulation is properly designed to ensure that the law accomplishes this goal.

Calls to allow courts to ignore violations of ICWA that resulted in an unlawful placement of a child are little more than a disguised disagreement with the substantive law thoughtfully enacted by Congress. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 44-45 (1989) ("Congress perceived the States and their courts as partly responsible for the problem [ICWA] intended to correct."); *see also In re C.H.*, 299 Mont. 62, 997 P.2d 776, 784 (2000) ("[T]he best interests of the child ... is an improper test to use in ICWA cases because the ICWA expresses the presumption that it is in an Indian child's best interests to be placed in accordance with statutory preferences. To allow emotional bonding – a normal and desirable outcome when, as here, a child lives with a foster family for several years – to constitute an 'extraordinary' emotional need [comprising good cause to deviate from the preferences] would essentially negate the ICWA presumption.").

Thank you for the opportunity to comment on these regulations.

Casey Family Programs

Donaldson Adoption Institute

Indian Child and Family Resource Center

National Alliance of Children's Trust and Prevention Funds

National Native American Bar Association

Tribal Law and Policy Institute

Shay Bilchik, Professor at Georgetown University, McCourt School of Public Policy

Dr. Eddie Brown, Professor at Arizona State University, School of Social Work

Martin Guggenheim, Professor at New York University, School of Law

Dr. Art Martinez, Clinical Psychologist

Appendix 1

Profiles/Biographies of Cosigners

Casey Family Programs

Casey Family Programs is the nation's largest operating foundation focused on safely reducing the need for foster care and building Communities of Hope for children and families across America. Founded in 1966, we work in 50 states, the District of Columbia and Puerto Rico to influence long-lasting improvements to the safety and success of children, families and the communities where they live. Casey Family Programs has provided direct family services to children and families involved in public and tribal foster care systems for more than forty years. We work in partnership with tribes, with public child welfare agencies across the country, with individual courts and state court organizations, and with national organizations that represent child welfare system stakeholders. These partnerships are focused on improving outcomes for all children.

Donaldson Adoption Institute

The Donaldson Adoption Institute (DAI) is a national non-profit organization whose mission is to provide leadership that improves laws, policies, and practices in order to better the lives of everyone touched by adoption. To achieve these goals, DAI conducts research; offers education to inform public opinion; promotes ethical practices and legal reforms; and works to translate policy into action.

Indian Child and Family Resource Center

The Indian Child and Family Resource Center, based in Helena, MT, has been providing training and technical assistance for Tribal child welfare agencies for more than ten years. Governed by a board which includes tribal leadership as well as social work professionals, ICFRC has provided extensive child welfare technical assistance services nationwide. A focus of ICFRC has been the provision of tribal child welfare organizational assessments upon tribal request which are designed to support systems improvement by listening to the voice of the agency as well as the tribal community.

National Alliance of Children's Trust and Prevention Funds

The National Alliance of Children's Trust and Prevention Funds is a national leader in preventing child abuse and neglect and strengthening families. Its mission includes efforts to promote and support a system of services, laws, practices and attitudes that supports families by enabling them to provide their children with safe, healthy, and nurturing childhoods. It is the only national organization that supports all aspects of the work of state children's trust and prevention funds, which are special funds established in state law, funded by a variety of revenue sources or donations, and dedicated to preventing child maltreatment in all its forms. The Alliance provides training, technical assistance, and publications that support effective prevention strategies and child welfare practices throughout the Country, including a 14-hour online training in how to

help families build protective factors that have been shown to increase the health and well-being of children and families.

National Native American Bar Association

NNABA was founded in 1973 and serves as the national association for Native American attorneys, judges, law professors and law students. NNABA strives to be a leader on social, cultural, political and legal issues affecting American Indians, Alaska Natives, and Native Hawaiians. NNABA shares many of the same goals of diversity and increased understanding of our communities' unique cultural and legal issues with minority bar associations. However, most of our lawyers are both U.S. citizens and citizens of their respective Tribal nations. Our members, therefore, also share the communal responsibility, either directly or indirectly, of protecting the governmental sovereignty of the more than 560 independent Native American Tribal governments in the United States.

NNABA is co-signing this letter because many of the NNABA's members are child welfare advocates, and NNABA supports the clarity and framework for efficient, just results for children that the draft regulations provide.

Tribal Law and Policy Institute

The Tribal Law and Policy Institute (TLPI) is a 100% Native American owned and operated non-profit corporation organized to design and deliver culturally engaged education, research, training and technical assistance (T/TA) programs and publications which promote the enhancement of community justice in Indian country and the health, well-being, and culture of Native peoples. www.TLPI.org TLPI's vision is "to empower Native communities to create and control their own institutions for the benefit/welfare of all community members now and for future generations." TLPI's mission is "to enhance and strengthen tribal sovereignty and justice while honoring community values, protecting rights, and promoting well-being."

Shay Bilchik, JD
Founder and Director – Center for Juvenile Justice Reform, Georgetown University, McCourt School of Public Policy

Shay Bilchik is a Research Professor and the founder and Director of the Center for Juvenile Justice Reform at Georgetown University's McCourt School of Public Policy. The Center's purpose is to advance a balanced, multi-systems approach to reducing juvenile delinquency that promotes positive child and youth development, while also holding youth accountable. This work is carried out through the dissemination of papers on key topics; the sponsorship of symposia; Certificate Programs at Georgetown providing leaders with intensive learning opportunities and ongoing support in their systems improvement efforts; and multi-site demonstration projects. Prior to joining McCourt on March 1, 2007, Mr. Bilchik was the President and CEO of the Child Welfare League of America, a position he held from February of 2000. Prior to his tenure at CWLA, Shay headed up the Office of Juvenile Justice and Delinquency Prevention (OJJDP) in the U.S. Department of Justice, where he advocated for and supported a balanced and multi-systems approach to attacking juvenile crime and addressing child

victimization. Before coming to the nation's capital, Mr. Bilchik was an Assistant State Attorney in Miami, Florida from 1977-1993, where he served as a trial lawyer, juvenile division chief, and Chief Assistant State Attorney. Mr. Bilchik earned his B.S. and J.D. degrees from the University of Florida. He and his wife Susan are the proud parents of two young adults, Melissa and Zach, and proud grandparents of Skylar.

Dr. Eddie Brown, DSW
Executive Director – American Indian Policy Institute

Eddie F. Brown is a Professor within the American Indian Studies Program and School of Social Work at Arizona State University and serves as Executive Director of the American Indian Policy Institute, College of Liberal Arts and Sciences. He is Yaqui and O'odham and is an enrolled member of the Pascua Yaqui Tribe.

Dr. Brown has a unique administrative background in that he has been a political appointee and served as a cabinet member at the highest administrative levels within federal, state and tribal governments. He has served as the Assistant Secretary of Indian Affairs, United States Department of Interior, Washington, DC (1989-1993); Executive Director of the Tohono O'odham Department of Health and Human Services (1993-1996); and Director of Arizona Department of Economic Security (DES) (1987-1989).

Dr. Brown has served as principal and co-principal of various training, research, and demonstration grants related to the impact of welfare reform on American Indian families and children, mental health assessment of American Indian youth, diabetes prevention in tribal communities, Title IV- E state/tribal agreements, and state ICWA compliance issues, and is nationally recognized for his knowledge and skills in working with tribal governments and community programs.

He currently serves as Co-Chair of the National Congress of American Indians National Research Center's Advisory Board, Washington D.C. and is a Member of the Board of Directors for the Tohono O'odham Nation's Gaming Enterprise, Tucson, Arizona.

Prior service has included two terms as a member of the President's White House Board of Advisors on Tribal Colleges and Universities; Board of Directors for the Heard Museum, Phoenix, Arizona; Member, National Academy of Public Administration and Bureau of Indian Affairs (BIA) Central Office, Washington, D.C.; Member, Mathematica Policy Research, Inc. and Support Services International, Inc., Washington, D.C.; Member, W.K. Kellogg Foundation and University of Maryland, Scholar-Practitioner Program, D.C.; Member, National Board of Directors, Kids Voting USA; Member, Governor's Unmarked Human Burial Consultation Committee, Jefferson City, MO.

Martin Guggenheim, JD
Fiorello LaGuardia Professor of Clinical Law, New York University School of Law

One of the nation's foremost experts on children's rights and family law, Martin Guggenheim has taught at NYU School of Law, where he now co-directs the Family Defense Clinic, since 1973. From 1998 to 2002, he was director of Clinical and Advocacy Programs. Guggenheim has been an active litigator in the area of children and

the law and has argued leading cases on juvenile delinquency and termination of parental rights in the US Supreme Court. He is also a well-known scholar, having published more than 50 articles and book chapters, plus five books, including What's Wrong with Children's Rights (2005). His research has focused on adolescent abortion, First Amendment rights in schools, the role of counsel for children in court proceedings, and empirical research on child welfare practice, juvenile justice, and family law. As a student at NYU Law, he was an Arthur Garfield Hays Civil Liberties Scholar. After law school, Guggenheim worked at the Juvenile Rights Division of New York's Legal Aid Society and later for the Juvenile Rights Project of the American Civil Liberties Union Foundation.

Art Martinez, PhD
Clinical Psychologist, forensic expert, generalist clinical competencies, expertise in Indian Child Welfare issues and child abuse forensics

As a Native American, of the Chumash tribe, and a clinical psychologist, Dr. Martinez shares a unique melding of cultural and clinical experiences. He has served as an expert witness in most all superior courts within California. He currently serves as the clinical psychologist and Head of Service of the Shingle Springs Tribal Health Project, in Shingle Springs, California. In the past he was the executive and clinical director of The Child and Family Institute, one of the principal Mental Health contractors for Sacramento County Child Protective and Children's Mental Health Services. He previously founded and directed the Washoe Family Trauma Healing Center in Gardnerville, Nevada. This center served as the primary provider of mental health and child assessments for dependency matters for Tribal court jurisdictions in the State of Nevada. He has served as a trainer and consultant in culturally competent evaluation and program development. In that capacity he served on many technical expert groups for the three centers of SAMHSA.

In 1999, Dr. Martinez was appointed by the Secretary of Health and Human Services to the National Advisory Council for SAMHSA and the Center for Mental Health Services. His doctoral research and dissertation focused upon the use of traditional Native American health approaches within clinical interventions with Native American families, and his Master of Arts degree thesis specifically addressed the salient issues of Indian Child Welfare in America.

Over the past thirty years Dr. Martinez has worked for tribal governments and organizations in the development and provision of services to children and families. He has taught over 50 courses and seminars involving the dynamics of children's mental health, substance abuse and Mental Health issues in Native communities. He is the past Director of the department of Marriage, Child and Family therapy at the San Diego Campus of Alliant University as well as Director of Counseling and Psychological Services for UC Merced. Dr. Martinez has served as a nationally known consultant in issues involving Native Americans, Native American Family Dynamics, Indian Child Welfare, Native American Child Development, and Native American Traditional values and health interventions.

Appendix 2

Bonding & Attachment: Further Research

Overview

Section 23.131 of the proposed Regulations for State Courts and Agencies in Indian Child Custody Proceedings states that the "extraordinary physical or emotional needs of the child" may qualify as "good cause" to depart from the ICWA placement preferences, "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…"

In the ICWA Guidelines issued in February, the Bureau of Indian Affairs (BIA) explained its rationale for this provision. It noted that "'good cause' has been liberally relied upon to deviate from the placement preferences in the past." It noted that state courts have not applied the placement preferences in circumstances where an Indian child has spent significant time with a family, even though the placement was made in violation of ICWA. Thus, this provision is included to "prevent such circumstances from arising…"

The proposed section acts as a preventive measure to encourage compliance with ICWA. Without this provision, those advocating for the departure from the placement preferences may be rewarded for the attachment or bonding that occurs from intentional or unintentional noncompliance with ICWA. Congress has determined that placing Indian children with their families, tribal members or other Indian families is in their best interest in most cases. If significantly more Indian children are placed in preferred placements by reason of this proposal, then many more children will have been placed consistent with their best interests.

Some adoption advocates are arguing that failing to consider attachment or bonding in ICWA cases will lead to decisions that are not in the best interests of Indian children. This argument is flawed in several respects:

1. It fails to acknowledge the problem that the BIA is seeking to address with the provision. Specifically, agencies and attorneys have sometimes thwarted ICWA's placement preferences -- which Congress has found advance the best interests of Indian children -- by placing Indian children with non-preferred families, resisting efforts to move the child for an extended period even when a family member is available, and then justifying the initial improper placement by arguing bonding or attachment. When these arguments are successful, they incentivize non-compliance with the law and therefore promote placement insecurity for Indian children.

2. The adoption advocates' argument assumes that the use of bonding and attachment is essential for a court to make decisions based upon the best interests of the child. This ignores two salient facts:

    a. Attachment theory (which is the underlying basis for the bonding/attachment criteria used by courts) is based squarely on Western (i.e., Euro-American) cultural norms. The viability of its application outside that context, particularly in the context of

indigenous cultures, has been questioned by a number of researchers and social scientists.

b. There has been increasing criticism of the use of bonding and attachment in child custody proceedings and serious questions raised about how probative such evaluations are for all children, not just Indian children.

3. The provision prevents consideration of "ordinary" bonding and attachment. Presumably, this would mean if there is some extraordinary situation above and beyond the usual relationship formed by a caregiver and child, this could be considered by a court.

Purpose of the Proposed Regulation – Legal Basis

As described above, the purpose of the provision is as a preventive measure to increase compliance with the ICWA. The United States Supreme Court has recognized bonding and attachment cannot be grounds to override the larger purposes that the Act which has been crafted to advance the best interests of Indian children. In *Mississippi Band of Choctaw Indians v. Holyfield*, the Court overturned a state court adoption three years later, stating that "[h]ad the mandate of the ICWA been followed in 1986, of course, much potential anguish might have been avoided, and in any case the law cannot be applied so as automatically to 'reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation.'"[10]

Bonding and Attachment in child welfare cases

Application of Bonding and Attachment theory in the Context of Non-Western Cultures

The theoretical assumptions and considerations in regard to attachment theory apply mainly to and were derived from studies of middle-class European and Euro-American parents from the twentieth century.[11] Indeed, much of the traditional attachment research has often overlooked or downplayed the role of culture.[12]

While studies are limited, those that have taken place have "reported inconsistencies of attachment security across cultures." [13] For example, scholars have questioned "the relevance of attachment theory to (Canadian) Aboriginal parents who do not adhere to the mother-infant dyad as the sole contributor to the child's sense of

[10] 490 U.S. 30, 53-54 (1989).
[11] Cara Flanagan, *Early socialization: sociability and attachment* (1999); John W. Berry et al., *Cross-Cultural Psychology: Research and Applications* (1992).
[12] Fred Rothbaum et al., *Attachment and culture: Security in the United States and Japan*, 55 AMERICAN PSYCHOLOGIST 1093 (2000).
[13] Annemarie Huiberts et al., *Connectedness with parents and behavioural autonomy among Dutch and Moroccan adolescents*, 29 ETHNIC AND RACIAL STUDIES 315 (2006); Chia-Chih D. Wang & Brent S. Mallinckrodt, *Differences between Taiwanese and US cultural beliefs about ideal adult attachment*, 53 J. COUNSELING PSYCHOLOGY 192 (2006); Maureen E. Kenny et al., *Self-image and parental attachment among late adolescents in Belize*, 5 J. ADOLESCENCE 649 (2005); Fred Rothbaum et al., *Attachment and culture: Security in the United States and Japan*, 55 AMERICAN PSYCHOLOGIST 1093 (2000).

security."[14] Instead, those cultures emphasize a "multi-layered" set of bonds and a "dense network of relationships".[15] Studies have been made of similar cultures, including Australian aborigines and tribal people in Nigeria, which have concluded that an attachment network approach would be preferable in evaluating the quality of a child's emotional health, as opposed to one basis upon a dyadic perspective.[16]

Caution in using bonding and attachment as a basis for making decisions about the long-term well-being of Indian children is confirmed by a study of resilience among American Indian adolescents in the Upper Midwest. For children who have been placed in foster care or adoptive placement, resilience is often a key quality that determines their successful transition. Resilience is the "capacity to face challenges and to become somehow more capable despite adverse experiences."[17] This study found that although higher levels of maternal warmth had a positive impact on resilience, the "strongest predictor of higher levels of resilience [for American Indian adolescents] was enculturation", i.e., greater engagement with traditional culture.[18] "The level of community support for pro-social outcomes" was also significantly associated with resilience, confirming earlier studies highlighting the importance of individuals such as community leaders and teachers.[19]

These studies are confirmed by the Indian children who have been separated from their biological parents. American Indian children placed out of home, alumni of the foster care system and adult adoptees describe their experiences as a search for a connection to their culture, language and relatives during and after out of home placement, a search essential to developing positive self-esteem.

In short, the research on how attachment theory should be applied in different cultures is limited. Given that the theory is based almost entirely upon Western values and subjects, it must be employed in the context of Indian children with great caution. Studies such as the resilience study confirm that the framework for security in American Indian cultures is often based on an independency of family, culture, nature and spirituality. "Evidence-based" practices that may have shown promising results in one context do not automatically translate to positive results when applied to Indian children and families.

Limitations in the Application of the Attachment Theory in general

Even aside from concerns about the application of attachment theory to American Indian children specifically, the scientific literature has raised concerns about the over-reliance on concepts of ordinary bonding or attachment in child custody proceedings in general. While there is certainly considerable literature about the significance of attachment theory, there is also significant research and scholarship which (1) reveals serious flaws in the use of bonding and attachment as practical tools in real-life child placement determinations by state courts; and (2) supports the notion that

[14] Raymond Neckoway et al., *Is Attachment Theory Consistent with Aboriginal Parenting Realities?*, 3 FIRST PEOPLES CHILD & FAM. REV. 65 (2007).
[15] *Id.*
[16] Soo See Yeo, *Bonding and Attachment of Australian Aboriginal Children*, 12 CHILD ABUSE REV. 292 (2003).
[17] T.D. LaFromboise et al., *Family, Community, and School Influences on Resilience Among American Indian Adolescents in the Upper Midwest*, 34 J. COMMUNITY PSYCHOLOGY 193 (2006).
[18] *Id.*
[19] *Id.*

children can and do form multiple attachments and that having at least one secure attachment "buffers" a child from further developmental issues.

Use of Attachment Theory in Practice

Serious questions have been raised concerning the use of bonding and attachment to make child custody determinations. The concepts have been viewed by some judges and agency professionals as having "limitations" and "pitfalls" and of "limited use in juvenile and family court."[20] Some of the reasons for these conclusions are that

- the terms are used loosely and have different meanings for mental health care professionals, attorneys, experts, and judges;
- attachment theory tends to divide child and caregiver relationships into a limited number of types (gradations in attachment exist but some view it as present or not with no middle ground);
- the terms do not explicitly address the issue of different child and caregiver temperaments;
- over-reliance on signs of attachment can result in social workers mistaking dependence for developmental progress;
- attachment and bonding focus on security-seeking aspects of a child's relationship to a caregiver and disregard other important developmental needs;
- bonding studies assume that the bond with one adult does not change as the child develops, and
- the theory assumes that one primary attachment is the normative concept as opposed to recognizing that having several attachments may be healthier for the child.[21]

They note also that when recommendations are made, often a distinction is not made (but should be) between "temporary emotional pain" and "permanent emotional damage."[22]

These observations are supported by the findings of researchers who have concluded that the "use of attachment-related assessments provides no improvement in the scientific foundation of child custody evaluation." [23] The researchers note that the use of attachment theory in practice has passed from the hands of researchers to "inexperienced users who in many cases believe that there is far more evidence about attachment than actually exists."[24] In essence, many judicial decisions are based upon "misunderstandings of attachment theory and research" and "simplistic approaches to this complex aspect of development."[25] This "popularized" version can lead to analyses that tie all behavioral issues back to early childhood experiences, rather than recognizing behavior as an ongoing process of adaptation.

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[20] David E. Arrendondo & Leonard P. Edwards, *Attachment, Bonding, and Reciprocal Connectedness*, J. CENTER FOR FAM., CHILD. & CTS. 109 (2000).
[21] *Id.*
[22] *Id.*
[23] Mercer, 7 SCI. REV. MENTAL HEALTH 37 (2009).
[24] *Id.*
[25] *Id.*

Another researcher described the best interests test as "vague" and the system as "deeply flawed" in part because of the "limited science" supporting these determinations.[26] The researcher further noted that the vagueness of the best interest concept leads to a "low scientific standard" for expert testimony.[27]

It is also worth noting that there is evidence that babies can and do form more than one attachment relationship.[28] As discussed previously, in indigenous communities it is often normal to have multiple attachments and for less reliance to be placed upon an attachment with a single caregiver. In addition, research shows that a secure attachment with at least one caregiver in early childhood buffers a child from the poor development that might otherwise follow with insecure attachment.[29] Thus, such children are better able to deal with change in a placement than children who have never had such an attachment.

Thus, while it is certainly true that there is some support for bonding and attachment as bases for child custody decisions in the literature, it is incorrect to think of these principles as sacrosanct. Indeed, there is reason to question about how often (as currently practiced in the courtroom) the decisions that are based upon bonding and attachment are actually in the long-term best interests of the children before the court, and specifically whether there is over-reliance by courts upon a short-term evaluation of the quality of the child's relationship with his or her caregiver when making decisions with long-term implications for the child. Certainly, broad generalizations regarding the impact of attachment and bonding theory upon a large population of children should be viewed with great skepticism.

Application of the Regulation

The regulation prohibits the consideration of the ordinary attachment or bonding that develops between a family and a child. If there is some extraordinary circumstance, e.g., a child with special medical needs, the regulation does not preclude consideration of that extraordinary circumstance. Thus, it is a carefully crafted regulation which balances the findings of the literature above, the intent of the Indian Child Welfare Act as defined by Congress, and the needs of Indian children.

Conclusion

The Bureau of Indian Affairs has proposed a regulation that would preclude classifying "ordinary bonding and attachment" occurring in a non-preferred placement as being the basis for a finding that the child has "extraordinary needs" that would justify a finding of "good cause" to place a child outside of the placement preferences. It has done this to encourage compliance with the placement preferences in the Act which Congress and the BIA have concluded will promote the best interests of Indian children in the vast majority of cases. This is an appropriate preventive measure that will result in more decisions in the best interests of Indian children, not fewer.

[26] Robert E. Emery et al., *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6 PSYCHOLOGICAL SCIENCE IN THE PUBLIC INTEREST 1 (2005).
[27] *Id.*
[28] Eleanor Willemson & Kristen Marcel, *Attachment 101 for Attorneys: Implications for Infant Placement Decisions*, 36 SANTA CLARA L. REV. 439 (1996).
[29] *See id.*

In addition, the literature suggests that the scientific validity of bonding and attachment as a component of the best interests test is weak, particularly as it is utilized in practice in the courtroom. Moreover, even if the test is viewed as having some probative value in the context of Caucasian children who are in family court, its application outside of the Euro-American culture from which it was derived has been seriously questioned as concepts of healthy emotional child development can vary significantly between cultures. For example, Native cultures tend to emphasize multiple caregivers, as opposed to the mother-infant dyad which is the focus of attachment theory.

For all of these reasons, the BIA's proposed regulation in terms of bonding and attachment is defensible as a mechanism to promote compliance with the ICWA.