

# PATHWAY TO PERMANENCY: ENACT A STATE STATUTE FORMALLY RECOGNIZING INDIAN CUSTODIANSHIP AS AN APPROVED PATH TO ENDING A CHILD IN NEED OF AID CASE

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## ABSTRACT

*Alaska has a disproportionate number of Alaska Native youth in foster care, and an overburdened and understaffed state child welfare agency. This Article argues that Alaska should enact a state statute to provide clear guidance to state child welfare practitioners and state courts that Alaska's state government recognizes an Indian custodianship created through Tribal law or custom as a pathway for Indian children to exit the overburdened state foster care system. Alaska's state government has progressed from initially refusing to recognize Tribal family law to recognizing a Tribal adoption as a pathway for an Indian child to exit the state foster care system. Extending the explicit recognition to Indian custodianships is the next logical step and has the added benefit of reducing the burden on the distressed state child welfare system. A state statute is the best mechanism for achieving this extension because a review of the history of Alaska's executive branch and Tribal recognition shows the problems of determining state-Tribal relations through the executive branch of government alone, and the legislature, vested with the duty to create law, is the appropriate branch to provide legal guidance.*

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## I. INTRODUCTION

Currently, Alaska has far too many children in foster care awaiting permanency and the state child welfare agency is overburdened and understaffed. The Alaska state government authorizes Tribal adoption as a way for an Indian child to exit the state child welfare system. However, the Alaska state government does not explicitly recognize Indian custodianship as a pathway for Indian children to exit the system. As a result, children in foster care remain stuck in the state foster care system unnecessarily and their open case continues to burden the already overwhelmed state child welfare agency.

Consider this example: The State removed Colin, an Indian child, from his parents and placed him with his grandmother, Emily, an Indian person. Colin's parents would consent to Emily becoming Colin's legal primary long-term caregiver. All child welfare professionals assigned to Colin's case and the family believe it is in Colin's best interests for Emily to become Colin's legal primary caregiver.

However, Emily's adult son (Colin's uncle), Benjamin, also lives in the home. While Emily can pass the mandatory background check, Benjamin cannot. The Office of Children's Services (OCS) does not consider Benjamin's failed background check to be a severe enough safety concern to remove Colin from Emily's care. Yet, because of state laws and regulations, OCS cannot provide consent to the state court for Emily to either adopt Colin or become Colin's legal guardian due to Benjamin's failed background check. Thus, Colin remains in foster care "legal limbo": he is in a safe place with family but has no permanency. Further, the fact that his state case remains open creates an unnecessary burden on the state because the agency and other professionals must continue to work with the family even though the case could be closed.

A state statute formally recognizing that Colin could exit the state system through an Indian custodianship created through the Tribal law or custom of Colin's Tribe would allow Colin and his family to have permanency and for OCS to close their case and spend more time with families that actively need assistance. This Article argues that the Alaska legislature should enact such a statute. Explicit recognition of Indian custodianship as a form of permanency is a natural extension of the Alaska state government's evolving recognition of Alaska Native Tribal culture and sovereignty. The Alaska legislature should enact simple and culturally appropriate solutions that can achieve permanency for youth and reduce the agency's workload.

Section II reviews the history of the state and federal governments' practice of separating Alaska Native families. As a response to the separation period, Section II briefly examines the Indian Child Welfare

Act, with a focus on Indian custodianships. Section II also discusses relevant federal child welfare laws and their focus on adoption as the preferred form of permanency for children. Finally, Section II describes Alaska's history of recognizing Tribes as sovereign, with a focus on family and child welfare law.

Section III analyzes Alaska's disproportionately high number of Native youth in care and children in foster care generally. Coupled with this disproportionality, Section III scrutinizes Alaska's overburdened and understaffed child welfare agency and discusses how these two problems exacerbate each other.

Section IV proposes that Alaska enact a state statute formally recognizing Indian custodianship as a form of permanency for child in need of aid cases and reviews why a state statute is the best mechanism. Section IV also explains how the statute should be constructed. Finally, Section IV explains the benefits of creating an Indian custodianship as a form of permanency for Alaska's child protection system.

## II. HISTORY OF ALASKA NATIVE FAMILY SEPARATION AND ALASKA'S RESPONSE TO ALASKA NATIVE TRIBES

This Section provides an overview of the history of Alaska Native families and the related activities of the state and federal governments. First, this Section addresses the assimilation era of boarding schools and the adoption of Alaska Native children by non-Native parents. Second, this Section describes federal child welfare history, focusing on the Indian Child Welfare Act (ICWA), the Adoption and Safe Families Act (ASFA), and the Fostering Connections to Success and Increasing Adoptions Act ("Fostering Connections Act"). Third, this Section reviews the Alaska state government's struggle to accept Alaska Native Tribes with a focus on the long battle for Alaska to respect Tribal sovereignty, specifically the right of Tribes to conduct Tribal adoptions. Finally, this Section discusses the current status of Indian custodianships under Alaska law.

### A. Assimilation

The United States purchased Alaska from Russia in 1867.<sup>1</sup> Starting in the late 1870s, the United States began sending Alaska Native and Native American children to boarding schools.<sup>2</sup>

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1. Treaty with Russia for the Purchase of Alaska, U.S.-Russia, March 30, 1867, 15 Stat. 539.

2. JIM LA BELLE, NAT'L RES. CTR. FOR AM. INDIAN, ALASKA NATIVE, AND NATIVE HAWAIIAN ELDERS, BOARDING SCHOOL: HISTORICAL TRAUMA AMONG ALASKA'S NATIVE PEOPLE 2 (2005), <https://www.uaa.alaska.edu/academics/institutional->

This educational policy was an attempt to assimilate and acculturate indigenous children into Western culture . . . . Boarding schools needed to be far enough away to discourage families from easily visiting their children, since family members would only hinder and detract from the goals of assimilation.<sup>3</sup>

Authorities frequently told parents that the children must be sent to boarding school.<sup>4</sup> Parents that did not comply were threatened with jail.<sup>5</sup> Reports on the Alaska Native boarding school experience are not as widespread as those of Native Americans or the First Nations peoples of Canada.<sup>6</sup> Though some children had positive experiences at boarding school, many children report that rampant abuse took place in boarding schools.<sup>7</sup> Alaska Natives have come forward to discuss the physical, sexual, and emotional abuse they experienced.<sup>8</sup> Additionally, children reported they were not taught their Native language, culture, or history at boarding school.<sup>9</sup> The boarding school era ran through the 1970s.<sup>10</sup>

Between 1958 and 1967, the Children's Bureau, the Bureau of Indian Affairs, and the Child Welfare League of America facilitated the Indian Adoption Project.<sup>11</sup> The Indian Adoption Project removed Indian children from sixteen western states, including Alaska, and placed the children primarily in eastern states with non-Native American/Alaska Native families.<sup>12</sup> Native American activists challenged the Indian Adoption Project, which non-Natives had championed as a triumph of equality.<sup>13</sup> In 2001, at a National Indian Child Welfare Association (NICWA)

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effectiveness/departments/center-for-advancing-facultyexcellence/\_Documents/boarding-school-historical-trauma-among-alaska-s-native-people.pdf.

3. *Id.*

4. *Id.* at 4.

5. *Id.*

6. DIANE HIRSHBERG & SUZANNE SHARP, INST. OF SOC. & ECON. RESEARCH, UNIV. OF ALASKA ANCHORAGE, THIRTY YEARS LATER: THE LONG-TERM EFFECT OF BOARDING SCHOOLS ON ALASKA NATIVES AND THEIR COMMUNITIES 2 (2005), [https://iseralaska.org/static/legacy\\_publication\\_links/boarding\\_schoolfinal.pdf](https://iseralaska.org/static/legacy_publication_links/boarding_schoolfinal.pdf).

7. LA BELLE, *supra* note 2, at 9.

8. HIRSHBERG & SHARP, *supra* note 6, at 11-13.

9. *Id.* at 9.

10. LA BELLE, *supra* note 2, at 4.

11. Press Release, Bureau of Indian Affairs, Indian Adoption Project Increases Momentum (Apr. 18, 1967), [https://www.bia.gov/sites/bia.gov/files/assets/public/press\\_release/pdf/idc017406.pdf](https://www.bia.gov/sites/bia.gov/files/assets/public/press_release/pdf/idc017406.pdf).

12. *Id.*; see also *The Adoption History Project*, UNIV. OF OREGON, <https://pages.uoregon.edu/adoption/topics/IAP.html> (last updated Feb. 24, 2012).

13. *The Adoption History Project*, UNIV. OF OREGON, <https://pages.uoregon.edu/adoption/topics/IAP.html> (last updated Feb. 24, 2012).

conference in Anchorage, the Child Welfare League of America formally apologized for its participation in the program.<sup>14</sup>

Though the Indian Adoption Project ended in 1967, the Adoption Resource Exchange of North America (ARENA) began in 1966.<sup>15</sup> This program continued to remove Native American and Alaska Native children, in addition to other children, from their parents and place them for adoption in non-Native homes through the early 1970s.<sup>16</sup>

From 1973 to 1976, 1 out of every 29.6 Alaska Native children were adopted.<sup>17</sup> That is a rate 4.6 times higher than for non-Native children.<sup>18</sup> Further, 93% of Alaska Native children were adopted by non-Native families.<sup>19</sup> Additionally, Alaska Native children were three times more likely to be in foster care than non-Native children.<sup>20</sup> The preceding statistics were “calculated on the most conservative basis possible; . . . [and] therefore reflect the most minimal statement of the problem.”<sup>21</sup> Congress studied this problem for several years and held multiple congressional hearings before enacting the ICWA.

## **B. Federal Child Welfare Laws: ICWA, ASFA, and the Fostering Connections Act**

In 1978, Congress enacted the ICWA.<sup>22</sup> Congress found that state agencies were removing too many Indian children from their families, “often unwarranted,” and placing them in non-Native families and institutions.<sup>23</sup> ICWA defined an Indian as “any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional

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14. DAVID E. SIMMONS, NAT’L INDIAN CHILD WELFARE ASS’N, IMPROVING THE WELL-BEING OF AMERICAN INDIAN AND ALASKA NATIVE CHILDREN AND FAMILIES THROUGH STATE-LEVEL EFFORTS TO IMPROVE INDIAN CHILD WELFARE ACT COMPLIANCE 2 (2014), <https://www.nicwa.org/wp-content/uploads/2016/11/Improving-the-Well-being-of-American-Indian-and-Alaska-Native-Children-and-Families.pdf>; *see also* Shay Bilchik, Executive Director, Child Welfare League of America, Keynote Address at the National Indian Child Welfare Association Conference: Apology from the Child Welfare League of America (Apr. 24, 2001), [https://theacademy.sdsu.edu/elearning/icwa-elearning-bias-media-context/story\\_content/external\\_files/ApologyCWLA.pdf](https://theacademy.sdsu.edu/elearning/icwa-elearning-bias-media-context/story_content/external_files/ApologyCWLA.pdf).

15. UNIV. OF OREGON, *supra* note 12.

16. *Id.*

17. S. REP. NO. 95-597, at 46 (1977).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901–63).

23. *Id.* at § 2(4).

Corporation.”<sup>24</sup> Indian tribes also have a federal definition.<sup>25</sup> ICWA contains many important provisions to protect Indian children, but for the purposes of this Article, this Section highlights Indian custodianship.

Congress recognized the important cultural difference between Alaska Native/Native American families and the predominant Western culture of the United States: that many Alaska Native/Native American families utilize an “Indian custodian” to care for their children.<sup>26</sup> Congress defined an Indian custodian as “any Indian person who has legal custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody, and control has been transferred by the parent of such child[.]”<sup>27</sup> The addition of this Section prevents state agencies from removing Indian children from a safe Indian custodian if the Indian custodian has established that their guardianship over the child flows from the three grounds authorized under ICWA. For example, under the third ground (“temporary care, custody, and control”), a state agency cannot remove an Indian child from the child’s Indian grandparent solely because the grandparent is not the parent of the Indian child if the child’s parent designated the grandparent as a caregiver.

In 1997, Congress enacted the Adoption and Safe Families Act (ASFA).<sup>28</sup> ASFA’s purpose was to promote state adoptions of children in foster care.<sup>29</sup> ASFA included a monetary incentive for states that exceeded a yearly base number of foster child adoptions.<sup>30</sup> ASFA also included a provision that if a child has been in foster care for fifteen of the last twenty-two months, the State must file a petition for termination of parental rights.<sup>31</sup> ASFA provided three exceptions for the requirement: first, at the option of the State, if a relative was caring for the child; second, if the State documented a compelling reason why termination was not in the child’s best interests and made the documentation available for court review; and third, if the State had not made reasonable efforts with the

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24. *Id.* at § 4(3).

25. *See* 25 U.S.C. § 1903(8) (2018) (defining Indian Tribe as “any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village. . .”).

26. 25 U.S.C. § 1901(5) (2018) (“[T]hat the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.”).

27. *Id.* at § 4(6).

28. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C.).

29. *See id.* (“An Act to Promote the Adoption of Children in Foster Care.”).

30. *Id.* at § 201.

31. *Id.* at § 103(a)(3).

family.<sup>32</sup> Though the focus of the Act was achieving permanency through termination of the birth parents' rights followed by an adoption, ASFA also formally recognized two other pathways to permanency: legal guardianship<sup>33</sup> and another planned permanent living arrangement (APPLA).<sup>34</sup> However, ASFA did not provide monetary incentives for these alternatives.<sup>35</sup>

In 2008, Congress enacted the Fostering Connections to Success and Increasing Adoptions Act ("Fostering Connections Act").<sup>36</sup> The Fostering Connections Act created several major changes to child welfare law related to guardianships, adoptions, and Tribes. The Fostering Connections Act authorized states and Tribes to pay relatives who become guardians of children.<sup>37</sup> The funding is provided through Title IV-E of the Social Security Act ("Title IV-E").<sup>38</sup> The Fostering Connections Act also emphasized adoption by extending the adoption incentives for states and doubling the financial incentive for the adoption of special needs youth and older youth.<sup>39</sup>

The Fostering Connections Act made major changes to how child welfare is handled regarding Indian children. In addition to the monetary support for guardianships, Tribes can now apply to receive Title IV-E funds directly from the federal government for foster care and adoption.<sup>40</sup> Tribes can also apply for a grant to develop a Title IV-E program.<sup>41</sup> Finally, the Department of Health and Human Services is required to provide technical assistance to Tribes seeking to operate a Title IV-E program.<sup>42</sup>

### C. Indian Adoption in Alaska After ICWA

Alaska currently recognizes Tribal adoptions of Indian children who are in foster care as a pathway to achieving permanency.<sup>43</sup> This policy is

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32. *Id.*

33. *Id.* at § 101(b); *see also id.* at § 302.

34. *Id.* at § 107; *see also id.* at § 302.

35. *Id.* at §§ 201-02. Federal funding for guardianship would not be available until the passage of the Fostering Connections Act in 2008. *See* Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949 at § 101 (states), § 301 (Tribes).

36. Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949 at § 101 (states), § 301 (Tribes).

37. *Id.* at § 101 (states), § 301 (Tribes).

38. *Id.*

39. *Id.* at Title IV.

40. *Id.* at § 301(a).

41. *Id.* at § 302.

42. *Id.*

43. ALASKA OFFICE OF CHILDREN'S SERVS., DEP'T OF HEALTH & SOC. SERVS.,

a result of several major steps in the legal progression of Alaska's state government recognizing Tribes and Tribal sovereignty. In 1990, Alaska formally recognized that Alaska Tribes exist.<sup>44</sup> However, this recognition was revoked less than a year later.<sup>45</sup> Contemporaneously, Tribes were suing Alaska in federal court for Alaska to recognize Tribal adoptions.<sup>46</sup> The United States Court of Appeals for the 9th Circuit decided in 1991 that, under ICWA, Alaska must provide full faith and credit to adoption decrees issued by Tribal courts.<sup>47</sup>

Because Alaska did not recognize Tribes, the federal decision did not resolve the status of Tribal adoptions in Alaska. In 1993, the Bureau of Indian Affairs (BIA) released for the first time a list of federally recognized Alaska Tribes.<sup>48</sup> Alaska initially challenged this decision.<sup>49</sup> In 1996, however, Alaska withdrew its challenge and the state attorney general issued an opinion delineating the status of Tribes in Alaska.<sup>50</sup> In 1999, the Alaska Supreme Court also recognized Tribes and Tribal sovereignty.<sup>51</sup> In 2001, the Alaska Supreme Court recognized a Tribe's concurrent jurisdiction in ICWA custody cases, overruling previous Alaska case law that held that Alaska Tribes had to complete additional steps before seeking transfer.<sup>52</sup>

Contemporaneous to the Alaska Supreme Court cases, the governor issued an order in 2000 unequivocally stating that Alaska recognizes

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CHILD PROTECTIVE SERVS. MANUAL § 3.20.3 (2007), <http://dhss.alaska.gov/ocs/Documents/Publications/CPSManual/cps-manual.pdf>; see also *State v. Native Vill. of Tanana*, 249 P.3d 734 (Alaska 2011).

44. OFFICE OF GOVERNOR, ALASKA ADMIN. ORDER NO. 123 (1990), <https://gov.alaska.gov/admin-orders/administrative-order-no-123/>. Prior to this order, the Alaska Supreme Court held that "[t]here are not now and never have been tribes of Indians in Alaska as that term is used in federal Indian law." *Native Vill. of Stevens v. Alaska Mgmt. & Planning*, 757 P.2d 32, 36 (Alaska 1988).

45. OFFICE OF GOVERNOR, ALASKA ADMIN. ORDER NO. 125 (1991), <https://gov.alaska.gov/admin-orders/administrative-order-no-125/>.

46. See, e.g., *Venetie I.R.A. Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991).

47. *Id.*

48. *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 538 Fed. Reg. 54,364 (Oct. 21, 1993).

49. See *Venetie I.R.A. Council v. Alaska*, Nos. F86-0075 CIV (HRH), F87-0051 CIV (HRH), 1994 WL 730893, at \*7 (D. Alaska, Dec. 23, 1994).

50. 1996 OP. ATT'Y GEN. No. 1 (Jan. 11, 1996), <http://www.law.state.ak.us/pdf/opinions/opinions1996/96001663960521.pdf>.

51. See *John v. Baker*, 982 P.2d 738, 749 (Alaska 1999) ("If Congress or the Executive Branch recognizes a group of Native Americans as a sovereign Tribe, we 'must do the same.'").

52. *In re C.R.H.*, 29 P.3d 849, 854 (Alaska 2001). Prior to this decision, the Alaska Supreme Court held that Alaska Tribes must have successfully petitioned to reassume custody pursuant to 25 U.S.C. § 1918 because Alaska Tribes are subject to Public Law 280. *Native Vill. of Nenana v. Dep't of Health and Soc. Servs.*, 722 P.2d 219, 222 (Alaska 1986).

Tribes and that Alaska will work with Tribes on a government-to-government level.<sup>53</sup> A product of this order is the Millennium Agreement, which was signed in 2001 and outlines a procedure for effecting governmental relations.<sup>54</sup> In 2002, the Attorney General's Office issued a memorandum recognizing the concurrent jurisdiction of Tribes to initiate child protection proceedings and directing the Office of Children's Services (OCS) and the Bureau of Vital Statistics to adopt policies consistent with the Alaska Supreme Court decisions.<sup>55</sup> The OCS published their policy on December 3, 2002.<sup>56</sup> Alaska also settled a lawsuit in 2002 with the Sitka Tribe that addressed Tribal child protection cases and recognized Tribal adoptions.<sup>57</sup>

On October 1, 2004, however, the State Attorney General's Office issued an opinion reversing Alaska's position again: Alaska would no longer recognize Tribal adoptions or Tribal-initiated child protection proceedings.<sup>58</sup> The Attorney General opinion directed the OCS to retract their policy on Tribal adoptions.<sup>59</sup> Several Tribes sued the Attorney General over this opinion.<sup>60</sup> A federal lawsuit was also filed after the Bureau of Vital Statistics refused to recognize a Tribal adoption order from the Kaltag Tribal Council.<sup>61</sup>

In 2009, the United States Court of Appeals for the 9th Circuit held that the adoption order was valid, citing its previous 1991 decision.<sup>62</sup> In 2011, the Alaska Supreme Court invalidated the Attorney General's 2004

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53. OFFICE OF GOVERNOR, ALASKA ADMIN. ORDER NO. 186 (2000), <https://gov.alaska.gov/admin-orders/administrative-order-no-186/>.

54. *Millennium Agreement between the Federally Recognized Sovereign Tribes of Alaska and the State of Alaska* (Apr. 11, 2001), <http://dot.alaska.gov/tribalrelations/assets/Millennium-agree.pdf>.

55. Memorandum from Assistant Att'y Gen. Donna Goldsmith for Jay Lively, Dep't of Health & Soc. Servs. Comm'r (Mar. 29, 2002) (No. 441-00-0005). The decisions referenced are *John v. Baker*, 982 P.2d 738, 749 (Alaska 1999) and *In re C.R.H.*, 29 P.3d 849 (Alaska 2001).

56. ALASKA OFFICE OF CHILDREN'S SERVS., DEP'T OF HEALTH & SOC. SERVS., CHILD PROTECTIVE SERVS. MANUAL § 3.20.3 (2007), <http://dhss.alaska.gov/ocs/Documents/Publications/CPSManual/cps-manual.pdf>.

57. See *Sitka Tribe of Alaska v. State*, No. 1SI-01-00061 CI (Apr. 1, 2002) (agreeing the Department of Health and Social Services' Bureau of Vital Statistics would issue new birth certificates to recognize Tribal court adoptions).

58. 2004 OP. ATT'Y GEN. NO. 1, *Jurisdiction of State and Tribal Courts in Child Protection Matters* (Oct. 1, 2004), [http://law.alaska.gov/pdf/opinions/opinions\\_2004/04-019\\_661040467.pdf](http://law.alaska.gov/pdf/opinions/opinions_2004/04-019_661040467.pdf).

59. *Id.* at 29–31.

60. *State v. Native Vill. of Tanana*, 249 P.3d 734 (Alaska 2011).

61. Order, *Kaltag Tribal Council v. Jackson*, Case No. 3:06-cv-211 (TMB), 2008 WL 9434481, at \*10 (D. Alaska, Feb. 22, 2008), *aff'd* 344 Fed. App'x 324 (9th Cir. 2009), *cert. denied*, *Hogan v. Kaltag Tribal Council*, 562 U.S. 827 (2010).

62. *Id.*

opinion and ruled for the Tribes, entitling Tribal adoption orders to full faith and credit.<sup>63</sup>

#### D. Next Logical Step: Indian Custodianships

The progress of Indian law, while facing setbacks, has overall moved towards Tribal recognition: from assimilation and the forced separation of Indian families, to the Indian Child Welfare Act, to reducing barriers for Tribal jurisdiction and Tribal adoptions. The next logical step in this progression is for Alaska to explicitly recognize that Indian custodianships are a legitimate option to resolve child protection cases.

An Indian custodian can be established through one of three forms of authority: 1) Tribal law or custom, 2) state law, or 3) parental designation of temporary care, custody, and control.<sup>64</sup> Alaska has not addressed Indian custodianships created by Tribal law or custom or state law. However, the Alaska Supreme Court has issued two decisions related to Indian custodianships created by parental designation of temporary care, custody, and control. In *Ted W. v. State*,<sup>65</sup> the court held that a parent possesses the authority to revoke an Indian custodian created by temporary care, custody, and control any time prior to OCS's assumption of custody.<sup>66</sup> Once OCS has custody, a parent and OCS can act jointly to rescind the Indian custodianship.<sup>67</sup>

However, in *Molly O. v. State*,<sup>68</sup> the court held that, once the OCS has obtained custody, a parent can no longer create an Indian custodianship by designation of temporary care, custody, and control:

A parent whose child is in OCS's custody may, with the concurrence of OCS, revoke an Indian custodianship that was in place when OCS took custody of the child. A parent may not create or recreate an Indian custodianship for a child in OCS's custody by transferring temporary physical care, custody, and control of the child to an Indian person because OCS, not the child's parent, is the legal custodian of such a child, with sole authority to direct the child's physical care, custody, and control. OCS's placement of a child with an Indian person does not create an Indian custodianship.<sup>69</sup>

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63. *Native Vill. Of Tanana*, 249 P.3d 734 (Alaska 2011).

64. 25 U.S.C. § 1903(6) (2018).

65. 204 P.3d 333 (Alaska 2009).

66. *Ted W.*, 204 P.3d at 339.

67. *Id.*

68. 320 P.3d 303 (Alaska 2014).

69. *Id.* at 308-09.

OCS cannot create an Indian custodianship on its own through the temporary designation to an Indian person of physical care, custody, and control of an Indian child because the government is not considered a parent under ICWA.<sup>70</sup> The court did not address, however, whether an Indian custodianship could resolve a child protection case through another method of establishing an Indian custodianship.

No state statute or state case law prohibits the closure of a child protection case through the establishment of an Indian custodianship through state law, or Tribal law or custom. Indeed, Alaska acknowledges the state court's right to order a child released to a suitable person and to dispense with OCS's supervision of the child if the state court "finds that the adult to whom the child is released will adequately care for the child without supervision."<sup>71</sup> An Indian family could then seek to formalize the arrangement through a state guardianship or Tribal order in Tribal court, either of which would create an Indian custodianship; in the case of the former, through state law, and in the case of the latter, through Tribal law.

### III. THE DISPROPORTIONATE NUMBER OF ALASKA NATIVE CHILDREN IN FOSTER CARE AND THE IMPEDIMENTS TO ACHIEVING PERMANENCY

Alaska Native children are overrepresented in foster care.<sup>72</sup> Meanwhile, Alaska's OCS is overwhelmed and understaffed.<sup>73</sup> Further, Alaska's policies on background checks for potential caregivers are overly restrictive.<sup>74</sup> This trifecta disproportionately affects Alaska Native youth. Affirmatively authorizing a new form of permanency—explicit state recognition of Indian custodianships through Tribal law or custom as a pathway to exiting the state child welfare system—would improve outcomes for some Alaska Native youth.

Congress enacted ICWA in part as recognition that "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public . . . agencies" and placed in non-Native homes and institutions.<sup>75</sup> Alaska Native children are no exception. Alaska Native children are substantially

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70. 25 U.S.C. § 1903(9) (2018) ("'[P]arent' means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom.").

71. ALASKA STAT. § 47.10.080(c)(2) (2018).

72. See *infra* text accompanying notes 75–81.

73. See *infra* text accompanying notes 87–90.

74. See Courtney Lewis, *Placing Children with Relatives: The Case for a Clear Rationale for Separate Foster Care Licensing Standards, Background Check Procedures, and Improved Relative Placement Statutes in Alaska*, 34 ALASKA L. REV. 161 (2017).

75. 25 U.S.C. § 1901(4) (2018).

more likely to be removed from their homes than white children, the next largest racial group in Alaska.<sup>76</sup> Alaska Native children are about 20% of Alaska's population, but they accounted for over 60% of children in foster care until 2015, when their relative percentage dropped to 56%.<sup>77</sup> However, this decrease did not result from a decrease in the actual number of Alaska Native children removed from their homes, but from an increase in the removal of non-Native children.<sup>78</sup> Further, even more Alaska Native children were removed from their homes in 2015 than were removed in each of the preceding four years.<sup>79</sup> In 2017, Alaska Native children accounted for 55% of children in care, although they only account for 18.9% of Alaskan children.<sup>80</sup> As further evidence, Alaska's Western Region, which has the highest proportion of Alaska Native families, continues to have a substantially higher rate of removal than other regions.<sup>81</sup>

This disproportionality is alarming, as is the general rate of removal. In 2015, Alaska had more children in foster care proportionally than any other state.<sup>82</sup> Alaska had more foster care children both when considering foster care versus total child population, as well as foster care versus children living in poverty.<sup>83</sup> Alaska's rate of removal in 2015 was more

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76. DIWAKAR VADAPALLI ET AL., TRENDS IN AGE, GENDER, AND ETHNICITY AMONG CHILDREN IN FOSTER CARE 3 (2014), [https://iseralaska.org/static/legacy\\_publication\\_links/2014\\_12-TrendsInAgeGenderAndEthnicityAmongFosterChildrenInAlaska.pdf](https://iseralaska.org/static/legacy_publication_links/2014_12-TrendsInAgeGenderAndEthnicityAmongFosterChildrenInAlaska.pdf) ("Alaska Native children were 5.82 times more likely than white children to be in foster care in 2006, but by 2013 [Alaska Native children] were 6.95 times more likely.").

77. DIWAKAR VADAPALLI & JESSICA PASSINI, THE GROWING NUMBER OF ALASKA CHILDREN IN FOSTER CARE, 2011-2015, UNIV. OF ALASKA ANCHORAGE INST. OF SOCIAL AND ECON. RES. WEBNOTES, 1 (2016), [https://pubs.iseralaska.org/media/2d3f800a-1d74-41ba-a732-8e4643e9ff6f/2016\\_03\\_16-WebNote21GrowingNumberOfAlaskaChildrenlqGh6EB.pdf](https://pubs.iseralaska.org/media/2d3f800a-1d74-41ba-a732-8e4643e9ff6f/2016_03_16-WebNote21GrowingNumberOfAlaskaChildrenlqGh6EB.pdf).

78. *Id.* at 2. In 2015, 1514 Alaska Native children were removed, as compared to 1362 in 2014, 1250 in 2013, 1195 in 2012, and 1182 in 2011. *Id.* The next largest racial group, white children, saw removal numbers between 515 in 2011 and 777 in 2015. *Id.*

79. *Id.*

80. U.S. DEP'T. OF HEALTH AND HUMAN SERVS., CHILDREN'S BUREAU, CHILD AND FAMILY SERVICES REVIEW: 2017 STATEWIDE ASSESSMENT 2 (2017), <http://dhss.alaska.gov/ocs/documents/cfsr.pdf>.

81. VADAPALLI & PASSINI, *supra* note 77, at 1. In the Western Region, 17 per 1000 children were removed in 2015, as compared to 13 in the Anchorage Region, 11 in the Southcentral Region, and 10 in the Northern and Southeastern Regions. *Id.*

82. THE NAT'L COALITION OF CHILD PROTECTION REFORM, THE 2015 NCCPR RATE-OF-REMOVAL INDEX 6-7 (2017), [https://drive.google.com/file/d/0B291mw\\_hLAJselRZSEfXN2ZxY00/view](https://drive.google.com/file/d/0B291mw_hLAJselRZSEfXN2ZxY00/view).

83. Richard Wexler, *Congratulations, Alaska: You're the Foster Care Capital of America*, THE CHRON. OF SOC. CHANGE (Feb. 22, 2017), <https://chronicleofsocial>

than three times the national average.<sup>84</sup> The high number of Alaskan children in foster care is not a new phenomenon. A 2014 study found that almost 1% of Alaskan children under the age of twenty-one were in foster care between 2006 and 2013, as compared with 0.5% of children in the entire United States.<sup>85</sup> The Child Protection and Opportunity Act, signed by Governor Bill Walker in 2016, acknowledged this problem, and focused on reducing the barriers to permanent homes for Alaskan children because “[o]n a per capita basis Alaska has more children ready and waiting for permanent adoptive homes than 48 other states.”<sup>86</sup>

Coupled with the rate of removal and disproportionate removal of Alaska Native children, the OCS suffers from high caseloads and high staff turnover. In an annual survey conducted on OCS staff in 2016, researchers found that OCS had over a 30% turnover rate of frontline workers annually, and about 60% of frontline caseworkers had held their current position for less than three years.<sup>87</sup> Caseworkers surveyed provided the following feedback regarding training:

Less than 20% of the workers that attended . . . in the last year felt that it made them confident that they are working according to the practice model; a little over 20% felt that it prepared them to work with families served by OCS; and almost 40% felt that it helped them understand their role as a child protection services worker.<sup>88</sup>

Frontline workers explain, “you learn most of it as you go” and the current training is “well short of equipping them to perform on the job.”<sup>89</sup> The survey concluded that “[o]verall, frontline workers seem to report impossible working conditions, and are hoping for an urgent need for significant changes on several fronts” and that “[m]ore long-term and concrete action seems desirable in improving training opportunities, on-the-job support, safety issues, and workload management.”<sup>90</sup>

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[change.org/blogger-co-op/congratulations-alaska-youre-foster-care-capital-america](http://change.org/blogger-co-op/congratulations-alaska-youre-foster-care-capital-america).

84. *Id.*

85. VADAPALLI ET AL., *supra* note 76, at 3.

86. Rep. Les Gara, Sponsor Statement H.B. 27: Child Protection and Opportunity Act, H.B. 27, 4SSLA 16 (Alaska 2015), [http://www.akleg.gov/basis/get\\_documents.asp?session=29&docid=65408](http://www.akleg.gov/basis/get_documents.asp?session=29&docid=65408).

87. DIWAKAR K. VADAPALLI & JESSICA PASSINI, ALASKA OFFICE OF CHILDREN SERVICES: RESULTS OF THE 2016 ANNUAL STAFF SURVEY 23-24 (May 2016), <http://crpalaska.org/wp-content/uploads/docs/Final-Report-OCS-2016-Annual-Staff-Survey.pdf>.

88. *Id.* at 19.

89. *Id.* at 31.

90. *Id.*

These shortcomings impact OCS's ability to achieve permanency for children. In 2017, only 27.2% of children achieved permanency within twelve months, compared to 40.4% nationwide.<sup>91</sup> For Alaskan children in care for 12–23 months, only 37% achieved permanency, compared to 43.7% nationwide.<sup>92</sup> Thus, it is incumbent upon Alaska to create clear statutes and policies to address the needs of Alaska Native children and the overburdened system.

To incentivize adoption, the federal and state governments offer financial subsidies to families for foster care and adoption. In order to qualify, families must apply and pass a specific background check. While many families need or want the benefit of a financial subsidy offered through a state adoption or state guardianship, some families do not want to go through the necessary hurdles to receive a subsidy, and some families will never qualify under Alaska's current background check system.<sup>93</sup> Although conducting background checks prior to approving caregivers makes sense, Alaska's background check procedures are substantially more restrictive than federal requirements regarding who can be approved to care for a child in state custody.<sup>94</sup> For example, federal law does not bar an applicant from receiving a foster care license if the applicant's criminal background check shows convictions for property crimes,<sup>95</sup> while the Alaska code does.<sup>96</sup> Whereas federal law bars applicants for only five years if the applicant has a conviction involving a controlled substance,<sup>97</sup> Alaska bars applicants for five to ten years depending on the offense.<sup>98</sup> So, while a felony conviction for driving

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91. CHILDREN'S BUREAU, *supra* note 80, at 32.

92. *Id.*

93. See generally Lewis, *supra* note 74.

94. For criminal barriers, compare 42 U.S.C. § 671(a)(20)(A) (2018) (providing shorter barrier times to violent crimes and substance abuse), with ALASKA ADMIN. CODE tit. 7, §§ 10.905(b)–(e) (2018) (providing longer barrier times with many additional crimes listed). For abuse and neglect barriers, compare 42 U.S.C. § 671(a)(20)(B) (2018) (requiring the state abuse and neglect registry be checked), with ALASKA ADMIN. CODE tit. 7, § 10.905(f) (2018) (creating ten year and permanent barrier times if an applicant is on the registry).

95. 42 U.S.C. § 671(a)(20)(A) (2018).

96. See ALASKA ADMIN. CODE tit. 7, §§ 10.905(b)–(e) (2018) (barring an applicant from receiving a foster care license for no less than three years, and potentially permanently, if the applicant's criminal background check shows convictions for property crimes); see also ALASKA ADMIN. CODE tit. 7, §§ 10.905(b)–(f) (2018) (barring an applicant from receiving a foster care license for no less than one year, and potentially permanently, if the applicant's criminal background check shows convictions for property crimes).

97. 42 U.S.C. § 671(a)(20)(A)(ii) (2018).

98. ALASKA ADMIN. CODE tit. 7, §§ 10.905(c)(6), (d)(6)–(7) (2018).

under the influence is a bar for only five years under federal law,<sup>99</sup> it is a ten year bar under the Alaska Administrative Code.<sup>100</sup>

The Alaska background check system provides a variance procedure for applicants who are denied approval based on their background check.<sup>101</sup> An individual can apply to the government for a variance by filling out various forms and submitting documentation showing why the barrier to approval should not apply to the individual's household.<sup>102</sup> This procedure involves no less than two committees and the Commissioner of the Department of Health and Human Services.<sup>103</sup> In the case of permanent barriers, the variance procedure additionally involves the Director of the Department of Health and Human Services' Office of Children's Services.<sup>104</sup> This process can take up to 180 or even 230 days.<sup>105</sup>

In addition to Alaska's overly restrictive background check system, families can be denied the OCS's consent for a state adoption, state guardianship, or Tribal adoption based on other criteria. For example, a homestudy could be denied based on a child aged twelve to fifteen in the home with juvenile delinquency history<sup>106</sup> or based on the health of a proposed caregiver.<sup>107</sup>

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99. 42 U.S.C. § 671(a)(20)(A)(ii) (2018).

100. ALASKA ADMIN. CODE tit. 7, § 10.905(c)(9) (2018).

101. *Id.* at §§ 10.930–35.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* An applicant has ninety days to submit the variance request. § 10.930(a). The oversight committee has thirty days to determine if the variance request is complete. § 10.930(b). If the variance request is not complete, the applicant has thirty days to correct. *Id.* The chair of the variance review committee shall initially review the request within ten days. § 10.935(c). If the applicant does not have a permanent barrier, the chair shall send the request straight to the commissioner noting the prohibition. § 10.935(b). If it is not a permanent barrier, the chair will make an initial determination. § 10.935(c). Within thirty days after the oversight committee determines the variance application is complete, the variance review committee shall make a recommendation to the commissioner. § 10.935(g). Within twenty days after the oversight division determines a variance request is complete, the variance review committee shall submit to the director of the oversight division the recommendation to grant or deny. § 10.935(h). Within thirty days after the oversight division determines a variance to be completed, the director shall consider the committee's recommendation and make a written recommendation that the commissioner grant or deny the variance request. *Id.* The commissioner has thirty days to issue a decision on the variance request. § 10.935(i). The commissioner may seek additional information. *Id.*

106. ALASKA OFFICE OF CHILDREN'S SERVS., DEP'T OF HEALTH & SOC. SERVS., CHILD PROTECTIVE SERVS. MANUAL § 3.15.4 (2017), <http://dhss.alaska.gov/ocs/Documents/Publications/CPSManual/cps-manual.pdf>

107. *Id.* Though the OCS does not cite the Americans with Disabilities Act as controlling law for this section, presumably the OCS should only deny a family's homestudy if the health of the caregiver impacts the ability to parent a child safely and no safety plan can be arranged to control for the caregiver's health issue. *See*

Alaska can and should improve the outcomes for some Alaska Native children in care by resolving their cases through establishing an Indian custodianship. The steps to create this new outcome are outlined in the following section.

#### IV. ENACT A STATE STATUTE TO FORMALLY RECOGNIZE INDIAN CUSTODIANSHIP AS A PATHWAY TO PERMANENCY FOR CHILD IN NEED OF AID CASES

Alaska should enact a statute that authorizes the release of a child from foster care to an Indian custodian. This Section first argues that a state statute is the appropriate mechanism to achieve this form of permanency. Second, a proposed framework for the statute is provided. Lastly, this Section explains the cultural and practical benefits of creating an Indian custodianship as a form of permanency for Alaska's child protection system.

##### A. A State Statute as a Mechanism

ICWA requires states provide full faith and credit to Tribal public acts, records, and judicial proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.<sup>108</sup> The Alaska Supreme Court addressed this issue in *Simmonds v. Parks*.<sup>109</sup> The Alaska Supreme Court held that “[t]hrough ICWA’s full faith and credit clause, Congress mandates that states respect a tribe’s vital and sovereign interests in its children. This requires that we give the same respect to Tribal court judgments that we give to judgments from a sister state.”<sup>110</sup> Further:

[Alaska] will deny full faith and credit to the final judgment of a sister state only in limited circumstances, including situations where (1) the issuing court lacked personal or subject matter jurisdiction when it entered its judgment; or (2) the issuing court failed to render its judgment in accordance with minimum due process.<sup>111</sup>

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ADMIN. FOR CHILDREN AND FAMILIES, DEP’T OF HEALTH AND HUMAN SERVS., ACYF-CB-IM-19-01, NATIONAL MODEL FOSTER FAMILY HOME LICENSING STANDARDS 5 (2019), <http://www.grandfamilies.org/Portals/0/Documents/FFPSA/final%20AECF%20model%20licensing%20standards.pdf>.

108. 25 U.S.C. § 1911(d) (2018).

109. 329 P.3d 995 (Alaska 2014).

110. *Id.* at 1007.

111. *Id.* at 1011.

Under this framework, the question arises whether a state statute is necessary if a Tribal order is entitled to full faith and credit by Alaska, absent very limited circumstances outlined in *Simmonds*. A state statute is the best option for several reasons. ICWA is a floor, not a ceiling, for establishing protections for Indian families.<sup>112</sup> Indeed, a few states have adopted statutes to provide additional protections and clarification for Indian families.<sup>113</sup>

First, child protection cases can already be resolved by creating an Indian custodianship. However, creating an Indian custodianship requires an unnecessary hurdle—transfer to a Tribal court. Currently, parties can agree to transfer a case to Tribal jurisdiction. Once the Tribe receives the case, the Tribe can issue a Tribal court order creating an Indian custodianship. A state statute would eliminate the need for this extra step because the statute would provide clear authority to resolve the state case through the establishment of an Indian custodianship. Additionally, a state statute would eliminate any concern of a party to the state child protection case that the Tribe may take a different approach once the case is transferred.<sup>114</sup>

Second, a state statute is less likely to be changed than an attorney general opinion, agency policy, a state-Tribal agreement, or federal law. Recall the history of Alaska’s recognition of Tribes, and based on the changing position, whether to recognize Tribal adoption.<sup>115</sup> State-Tribal agreements are authorized under ICWA and state law.<sup>116</sup> The agreements, however, can be rescinded upon 180 days’ notice,<sup>117</sup> leaving agreements vulnerable to changing administrations. Changing administrations should not threaten a child’s permanency. Likewise, in October 2018, a

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112. 25 U.S.C. § 1902 (2018) (“The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of *minimum Federal standards* for the removal of Indian children from their families and the placement of such children in foster or adoptive homes . . . .”) (emphasis added); *see also* 25 U.S.C. § 1921 (2018) (“In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.”).

113. *See* Iowa Indian Child Welfare Act codified at IOWA CODE §§ 232B.1–14 (2018); *see also* Michigan Indian Family Preservation Act codified at MICH. COMP. LAWS §§ 712B.1–41 (2018); California’s Tribal Customary Adoption codified at CAL. WELF. & INST. CODE § 366.24 (adopted 2010, amended 2013).

114. A state court cannot find good cause to deny a transfer of a child protection case to Tribal court based on a concern that the child’s placement may be changed. 25 C.F.R. § 23.118(c)(3) (2018).

115. *See supra* Section II.C.

116. 25 U.S.C. § 1919(a) (2018); *see also* ALASKA STAT. § 47.14.100(g) (2018).

117. 25 U.S.C. § 1919(b) (2018); *see also* ALASKA STAT. § 47.14.100(g) (2018).

federal judge in Texas found ICWA unconstitutional in its entirety.<sup>118</sup> Currently Alaska does not agree with that decision, and issued a formal statement that Alaska is committed to ICWA and its Native youth and families.<sup>119</sup> Thus, state statutes are a more immutable solution because it takes a larger consensus to change a state statute compared to executive branch policies and agreements, which a single individual in the executive branch can change.

Third, a state statute would provide an affirmative answer to whether a child protection case can be resolved through creating an Indian custodianship. Without affirmative authority, cases where this is an option can languish in litigation, resulting in more open cases for the already overburdened OCS, and most importantly, more children needlessly spending more time in the foster care system rather than achieving permanency through an Indian custodianship. This is why the current practice to resolve cases through an Indian custodianship requires transfers to Tribal jurisdiction first; it avoids litigation with the state over whether state child protection cases can be resolved through creating an Indian custodianship.

A state statute would also provide an affirmative answer to the question of jurisdiction of the child protection case. By comparison, Tribal adoptions completed in a state child protection case do not change the case's jurisdiction from state court to Tribal court.<sup>120</sup> The Tribal court only participates to effectuate the Tribal adoption.<sup>121</sup>

Fourth, a state statute would strengthen state-Tribal relations. In 2017, Alaska and specific Tribes signed the Alaska Tribal Child Welfare Compact (Compact).<sup>122</sup> The Compact noted the disproportionality of Alaska Native youth in care<sup>123</sup> and that the overloaded state child welfare system results in poor permanency outcomes for youth.<sup>124</sup> The purpose of

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118. *Brackeen v. Zinke*, 338 F. Supp. 3d 514, 546 (N.D. Texas 2018).

119. Office of the Governor, *Governor Walker Releases Statement Opposing Federal Judge's Child Welfare Ruling* (Oct. 8, 2018), <https://gov.alaska.gov/newsroom/2018/10/governor-walker-releases-statement-opposing-federal-judges-child-welfare-ruling/> [<https://web.archive.org/web/20181018041224/https://gov.alaska.gov/newsroom/2018/10/governor-walker-releases-statement-opposing-federal-judges-child-welfare-ruling/>].

120. ALASKA OFFICE OF CHILDREN'S SERVS., DEP'T OF HEALTH & SOC. SERVS., CHILD PROTECTIVE SERVS. MANUAL § 3.20.3 (2007), <http://dhss.alaska.gov/ocs/Documents/Publications/CPSManual/cps-manual.pdf>.

121. *Id.*

122. ALASKA TRIBAL CHILD WELFARE COMPACT BETWEEN CERTAIN ALASKA NATIVE TRIBES AND TRIBAL ORGANIZATIONS AND THE STATE OF ALASKA (2017), <http://dhss.alaska.gov/ocs/Documents/Publications/pdf/TribalCompact.pdf>.

123. *Id.* at 4 ("Fifty-seven percent of the children in out of home care are of Native descent, but Native children only make up 18.9% of the overall population of Alaskan children.").

124. *Id.* ("[U]nbalanced OCS worker-to-caseload ratios have resulted in poor

the Compact was to improve outcomes for families.<sup>125</sup> Specifically, the Compact “recognize[s] and support[s] the child welfare services administered and carried out by Tribes . . . for the benefit of the State[.]”<sup>126</sup> Tribes who signed the Compact can now contract with OCS to provide services to families.<sup>127</sup>

A natural extension of this Compact would be a state statute recognizing the culturally appropriate case resolution of establishing an Indian custodianship. This strengthens state-Tribal relations because a state statute is more than an acknowledgement of a problem: it addresses the problem. Further, the State would be providing clear guidance to state child welfare practitioners and the state courts that the State has no objection to resolving state cases involving Native youth through this culturally appropriate resolution.

## **B. How the State Statute Should Be Constructed**

The state statute should address what is required of the parent, proposed Indian custodian, state, guardian ad litem, and child. The statute should require the consent of the parents. Requiring the consent of the parents controls for the parent’s right to pursue reunification. If a parent’s consent cannot be obtained, the parent should be provided with proper notice and be given an opportunity to respond to comport with Alaska’s standards on minimum due process to recognize the orders of Tribal courts or sister states.<sup>128</sup>

The statute should also require the consent of the proposed Indian custodian. An Indian custodian is most analogous in Alaska to a guardian, and the guardian’s acceptance of the court appointment is required.<sup>129</sup> Additionally, requiring the proposed Indian custodian’s consent controls for his/her interest, if any, in pursuing a Tribal or state-sponsored adoption or state-sponsored guardianship.

Furthermore, the statute should address what is required from OCS: either the Department’s agreement or non-opposition, or a court order authorizing the creation of the Indian custodianship over the OCS’s objections. Alaska law currently allows for the court to dispense with the Department’s consent to an adoption if OCS’s written reasons for withholding consent are unreasonable.<sup>130</sup>

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permanency outcomes for children in state custody.”).

125. *Id.* at 1.

126. *Id.* at 5.

127. *Id.* at 8.

128. *Simmonds v. Parks*, 329 P.3d 995, at 1011 (Alaska 2014).

129. ALASKA STAT. § 13.26.101 (2018); *see also* § 13.26.121.

130. ALASKA STAT. § 25.23.050(a)(8) (2018).

In addition to OCS's position, the statute should specifically say that an OCS-approved homestudy is not required. A major factor in OCS-approved homestudies is the finances tied to those homestudies.<sup>131</sup> Cases arise where an unlicensed family member is the best caregiver for a child in foster care, but the family is not going to pass a homestudy under Alaska's current system.<sup>132</sup> Children can be placed with these family members, but then the children languish in foster care while parties try to find a resolution to the question of permanency if reunification is not an option.

Requiring OCS consent based on an OCS-approved homestudy unnecessarily complicates permanency planning through Indian custodianship. No state or federal subsidy would attach to an Indian custodianship, so the stringent standards required to receive a financial subsidy should not be applied. Instead of the strict homestudy standard, a more appropriate standard would be the standard OCS applies to unlicensed relatives where OCS conducts a sufficient check to ensure child safety and well-being.<sup>133</sup>

Consent should not be required from the guardian ad litem. The consent of the guardian ad litem is not required for other forms of permanency such as guardianship<sup>134</sup> or adoption.<sup>135</sup> The consent of the guardian ad litem is also not required for other Tribal rights under ICWA, such as transfer to Tribal jurisdiction<sup>136</sup> or the placement preference exceptions.<sup>137</sup>

Consent should also not be required from the child, though a statute should consider a child's right to object. Alaska allows a child to file objections to a proposed guardianship if the child is fourteen or older.<sup>138</sup> However, the child's objection does not preclude the court from ordering the guardianship.<sup>139</sup> One option would be to structure this section to reflect similar thinking to ICWA's language for placement preferences; a

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131. ALASKA STAT. § 25.23.200 (2018); *see also* § 25.23.210(e); § 25.23.230; 42 U.S.C. § 671 (2018); ALASKA OFFICE OF CHILDREN'S SERVS., DEP'T OF HEALTH & SOC. SERVS., CHILD PROTECTIVE SERVS. MANUAL § 3.17 (2017), <http://dhss.alaska.gov/ocs/Documents/Publications/CPSManual/cps-manual.pdf>.

132. *See* Section III, *supra*, and text accompanying footnotes 93-107.

133. ALASKA OFFICE OF CHILDREN'S SERVS., DEP'T OF HEALTH & SOC. SERVS., CHILD PROTECTIVE SERVS. MANUAL § 3.5.1 (2017), <http://dhss.alaska.gov/ocs/Documents/Publications/CPSManual/cps-manual.pdf>.

134. ALASKA STAT. § 13.26.147 (2018).

135. ALASKA STAT. § 25.23.040(a) (2018).

136. 25 U.S.C. § 1911(b) (2018); *see also* 25 C.F.R. § 23.117-18 (2018).

137. 25 U.S.C. § 1915 (2018); *see also* 25 C.F.R. § 23.132 (2018).

138. ALASKA STAT. § 13.26.126 (2018).

139. *Id.*

child could have the right to object subject to the Tribal laws of the child's Tribe.<sup>140</sup>

### C. Why an Indian Custodianship Option Improves Child Welfare Law

Creating a path to resolve a state child protection case that recognizes Indian custodianships as a form of permanency is culturally appropriate. Alaska has made strides since 2011 to recognize and embrace Alaska Native culture and sovereignty.<sup>141</sup> OCS already recognizes the importance of Tribal adoptions:

Historically and as a matter of custom, Alaska Native Tribes have conducted cultural adoptions for Tribal children who are being adopted by another family/Tribal member in the Tribal Court or council proceedings. In these proceedings, there is an agreement among the child's family and Tribe that it is in the best interests of the child for the adoption to be finalized. This option for ICWA-eligible children in OCS custody honors the child's cultural traditions for adoption and allows for the adoption to be finalized in a Tribal setting.<sup>142</sup>

Similarly, Indian custodianship is a part of Alaska Native and Native American culture, which is why Congress enacted formal recognition of Indian custodians and provided Indian custodians with special protections under ICWA.<sup>143</sup>

ASFA and the Fostering Connections Act place an emphasis on achieving permanency for children through termination of parental rights

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140. See 25 U.S.C. § 1915(c) (2018) (“[I]f the Indian child’s tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child . . .”).

141. See *State v. Native Vill. of Tanana*, 249 P.3d 734, 750 (Alaska 2011) (“[U]nless and until its powers are divested by Congress, a federally recognized sovereign Indian tribe has powers of self-government that include the inherent authority to regulate internal domestic relations among its members.”); CLARUS CONSULTING GRP., TRANSFORMING CHILD WELFARE OUTCOMES FOR ALASKA NATIVE CHILDREN, STRATEGIC PLAN 2016-2020, at 3 (2016), [http://dhss.alaska.gov/ocs/Documents/Publications/pdf/AK-Transforming-Child-Welfare-Outcomes\\_StrategicPlan.pdf](http://dhss.alaska.gov/ocs/Documents/Publications/pdf/AK-Transforming-Child-Welfare-Outcomes_StrategicPlan.pdf) (“This Plan reflects a paradigm shift in the approach to child welfare as it relates to Alaska Native children, based on the understanding that Tribes know best what is best for their children, as they have for centuries.”); ALASKA TRIBAL CHILD WELFARE COMPACT BETWEEN CERTAIN ALASKA NATIVE TRIBES AND TRIBAL ORGANIZATIONS AND THE STATE OF ALASKA (2017), <http://dhss.alaska.gov/ocs/Documents/Publications/pdf/TribalCompact.pdf>.

142. ALASKA OFFICE OF CHILDREN’S SERVS., DEP’T OF HEALTH & SOC. SERVS., CHILD PROTECTIVE SERVS. MANUAL § 3.20.3 (2007), <http://dhss.alaska.gov/ocs/Documents/Publications/CPSManual/cps-manual.pdf>.

143. 25 U.S.C. §§ 1901-22 (2018).

and adoption.<sup>144</sup> Without additional statutes, “the existing emphasis on termination of parental rights and adoption may operate to bar Indian children from stable, long-term placements in culturally-appropriate families and communities.”<sup>145</sup>

It is to Alaska’s benefit to enact a state statute recognizing the importance of Indian custodianships and to explicitly establish that Indian custodianships can be an approved permanency option for Indian children in care. This policy also conforms with OCS’s strategic plan for 2016–20 to improve outcomes for Alaska Native children: “[a]lign systems so that Tribal processes are respected,” which OCS plans to accomplish through “identify[ing] and align[ing] federal and state regulations.”<sup>146</sup>

Formally recognizing this permanency option for children to exit the foster care system will reduce the number of children in care. Certainly, most child protection cases will continue to resolve through reunification or state-sponsored adoption/guardianship due to the financial incentives, instead of an unfunded Indian custodianship. However, resolving a child protection case by creating an Indian custodianship will nonetheless allow some children to achieve permanency and exit the foster care system. This outcome is good for the child and for the state child protection system, which suffers from higher-than-average caseloads,<sup>147</sup> high vacancy rates,<sup>148</sup> and high employee turnover.<sup>149</sup> Formally recognizing this pathway to permanency can reduce OCS’s caseload. Indeed:

The experience in Alaska is that as Tribes acquire resources to more completely fulfill this authority [to make a difference in their families’ lives], the number of Alaska Native children who become subject to OCS investigations and custody actions diminishes. In addition, when Tribes and Tribal Organizations collaborate with or take responsibilities for OCS, the outcomes improve[.]<sup>150</sup>

Reducing OCS’s caseload also saves money. Alaska is in an economic downturn, which has lasted several years, impacting OCS’s

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144. Barbara Ann Atwood, *Achieving Permanency for American Indian and Alaska Native Children: Lessons from Tribal Traditions*, 37 CAP. U. L. REV. 239, 260 (2008).

145. *Id.*

146. CLARUS CONSULTING GRP., *supra* note 141, at 8.

147. CHILDREN’S BUREAU, *supra* note 80, at 18.

148. *Id.* at 2. OCS had a vacancy rate of 34% in 2017.

149. *Id.* Workers are only averaging eighteen months on the job.

150. ALASKA TRIBAL CHILD WELFARE COMPACT BETWEEN CERTAIN ALASKA NATIVE TRIBES AND TRIBAL ORGANIZATIONS AND THE STATE OF ALASKA (2017), <http://dhss.alaska.gov/ocs/Documents/Publications/pdf/TribalCompact.pdf>.

ability “to meet the needs of families and children.”<sup>151</sup> On average, OCS pays \$19,000 per year per foster child.<sup>152</sup> Money spent on families whose cases could be closed is money that cannot be spent on other families.

## V. CONCLUSION

It is well established that Alaska has an overburdened child welfare system, and that Alaska Native youth are overrepresented in that system. Many solutions to child welfare problems involve more funding or major structural changes. This Article offers a simple no-cost solution. Enacting a state statute formally recognizing Indian custodianship as a pathway to permanency for Indian children and their families would help some children exit the state child welfare system and reduce the workload of the state child welfare agency. A state statute would also be culturally appropriate, and would allow the State to continue positive state-Tribal relations. The proposed statute is a common sense solution that does not require additional funding. The Alaska Legislature should enact this measure to assist Alaska Native youth in care, their families, and the state’s child welfare agency.

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151. *Id.* at 5.

152. Lisa Demer, *Dramatic Spike in Foster Children Overwhelming State Agencies*, ANCHORAGE DAILY NEWS (Feb. 13, 2016), <https://www.adn.com/crime-justice/article/dramatic-spike-alaska-foster-children-overwhelming-agencies/2016/02/13/>.