

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

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ABSTRACT

Policymakers generally agree that if a child cannot live safely with her parents, then the child should be placed expeditiously with a relative. Alaska's current system for evaluating relative caregivers is overly complicated, creating unnecessary barriers for relatives and increasing the risk of mistakenly denying placement with relatives. This Article argues that Alaska should adopt a three-step approach to achieve better outcomes based on the American Bar Association's model licensing standards, which are narrowly tailored to evaluate whether a child should be placed with a relative. Additionally, this Article argues that Alaska should repeal its state statute that gives the child welfare agency the ability to establish prima facie evidence to deny a relative if a relative would not be eligible for a foster care license, for two reasons. First, a review of the history of the state's statutes indicates that the legislature did not

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intend to provide the Department of Health and Human Services with the current definition of prima facie evidence. Second, Alaska's current statute is not compliant with the 2016 federal regulations regarding the Indian Child Welfare Act. Lastly, this Article argues that Alaska should adopt a statute clearly delineating the court's authority to order placement of a child facing foster care with a relative to expedite compliance with relative placement in frontline child welfare practice. Adopting these proposals would reduce barriers and the number of mistakes in frontline child welfare practice, which would increase both the timeliness and the number of children placed with relatives.

INTRODUCTION

G.K. Chesterton's recommendation applies here: never tear down a system until understanding why it was built in the first place.¹ This Article argues that there is a clear rationale for Alaska to adopt less onerous foster care licensing and relative caregiving procedures given the government's duty to place children in foster care with relatives² absent

1. G.K. CHESTERTON, *THE THING: WHY I AM A CATHOLIC* 27 (1930) ("In the matter of reforming things . . . there is one plain and simple principle . . . The more modern type of reformer . . . says, 'I don't see the use of this; let us clear it away.' To which the more intelligent type of reformer will do well to answer: 'If you don't see the use of it, I certainly won't let you clear it away. Go away and think. Then, when you can come back and tell me that you do see the use of it, I may allow you to destroy it.'") (emphasis omitted).

2. This Article uses the term "relatives" to describe family members of a child in foster care. Some Alaska statutes used the term "relative" in prior versions of the statutes, and now use the term "adult family member." See, e.g., ALASKA STAT. § 47.10.080(c)(2) (2016) (using "adult family member" as definition of "relative"). Alaska defines "adult family member" for purposes of the state statutes. See *id.* § 47.10.990(1). Alaska has a state statute about relative placements that is not limited to adult family members. See *id.* § 47.32.032(a) (stating that a "person" can be "approved as a foster parent or relative placement" instead of limiting it to an "adult family member"). Additionally, the Indian Child Welfare Act uses the term "extended family member." See 25 U.S.C. § 1903(2) (2012). Tribes can determine by tribal custom or law who is an extended family member. *Id.* Since relatives of Alaska Native children not defined by state statute may qualify as an extended family member under ICWA, the more generic term relative is more applicable. See *id.* (explaining absent tribal law or custom, "extended family member" includes any "Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent" who is at least eighteen years of age).

good cause to do otherwise. Because the benefits of placing children with family first are well documented³ and reflected in the law,⁴ this Article treats these benefits as a given.

Alaska's current system is overly complicated, which increases error and creates unnecessary barriers that harm children. Consider the example of four-year-old Cassandra, who is removed from her parents and placed in a shelter. Cassandra's parents ask that she be placed with her Aunt Kelly, who submits to a background check. Aunt Kelly does not pass the background check because she has a felony conviction from six years ago for driving under the influence, which is a ten-year barrier crime that prevents her from receiving a foster care license under the Alaska Administrative Code (AAC).⁵ This all despite the fact that after Aunt Kelly was convicted, she completed treatment for her alcohol abuse and has remained sober and in recovery ever since.

The Department of Health and Human Services' Office of Children's Services (the "Department") has the discretion to place Cassandra with Aunt Kelly,⁶ but does not do so because the frontline worker erroneously

3. See, e.g., David M. Rubin et al., *Impact of Kinship Care on Behavioral Well-being for Children in Out-of-Home Care*, 162 ARCHIVES OF PEDIATRICS & ADOLESCENT MED. 550, 550–51 (2008) (noting some benefits of placing foster children with kin); see also MARC WINOKUR ET AL., KINSHIP CARE FOR THE SAFETY, PERMANENCY, AND WELL-BEING OF CHILDREN REMOVED FROM THE HOME FOR MALTREATMENT: A SYSTEMATIC REVIEW 9 (2014), <http://onlinelibrary.wiley.com/doi/10.1002/14651858.CD006546.pub3/epdf> (noting benefits of kinship care).

4. See 25 U.S.C. § 1902 ("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 which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs."); see also 42 U.S.C. § 671(a)(19) (requiring states to develop plan providing "that the State shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards."); ALASKA STAT. § 47.14.100(e) (showing preference for family members); *Irma E. v. State*, 312 P.3d 850, 853 (Alaska 2013) ("Alaska law has long demonstrated a preference that children who are in OCS's custody be placed with family members.").

5. ALASKA ADMIN. CODE tit. 7, § 10.905(c)(9) (2017).

6. The Department of Health and Human Services' Office of Children's Services is the agency that governs placement of children in its custody. See ALASKA STAT. §§ 47.10.084(a), 47.14.100(a), 47.10.142. The Department also governs foster care licensing. *Id.* § 47.32.032. The only requirements are the Department must complete a background check through the Alaska Public Safety Information Network (APSIN) for emergency placements, ALASKA OFFICE OF CHILDREN'S SERVS., CHILD PROTECTIVE SERVICES MANUAL § 3.5.1, at 2–3 (2017). For non-emergency placements, the Department must complete a fingerprint background check and an evaluation of the home. *Id.* at 3. The Department's policy shifted on January 1, 2017. *Id.* § 3.5.1, at 1–4 (noting date of revision). The

believes a variance⁷ is required in order to place Cassandra with Aunt Kelly. The frontline worker tells Aunt Kelly to apply for a variance before the Department will approve placing Cassandra with Aunt Kelly. The variance application requires copies of Aunt Kelly's DUI convictions, letters of recommendation, and proof that Aunt Kelly completed treatment so she can demonstrate her rehabilitation.⁸ Undeterred by this burden and the fact that the variance approval process can take up to 180 days, Aunt Kelly pursues the variance.⁹ This in addition to the forty-five days it took Aunt Kelly to receive that initial denial from the Department.¹⁰

In the meantime, Aunt Kelly files for a court hearing to explain to the court why Cassandra should be placed with her. Aunt Kelly has a hearing before the court. This is the court's first relative placement review, and the court is relying on the state statute regarding relative caregivers' right to a review hearing.¹¹ The Department argues that it has prima facie evidence that Aunt Kelly should be denied custody because her prior DUI conviction renders her ineligible for a foster care license per the AAC.¹² The court is troubled about the original denial, but the court is unsure if

Protective Services Manager (PSM) II for each respective region is able to approve placement with unlicensed relatives who have barring crimes or conditions if the placement is in the child's best interest. *Id.* § 3.5.5B, at 2 (2015). In order to address better permanency planning, the section of the policy regarding unlicensed relatives that references variances (§ 3.5.1 PROCEDURE E) is supposed to encourage line workers and relatives to seek a formal variance should the relative need to become a permanent caregiver for the child. *See id.* § 3.5.5.A, at 7 ("If an unlicensed relative caregiver or household member has a record that includes a barrier crime or condition . . . a placement will not be made in that relative's home until the placement has been reviewed, and the PSM II has approved the placement.").

7. The Alaska Administrative Code (AAC) does not provide a definition for the term "variance" in the background check chapter. *See* ADMIN. § 10.990. In the context of child welfare, a variance is needed for an applicant to receive a foster care license if the applicant would otherwise be denied based on the applicant's or a household member's background check. *See id.* § 10.930(a). As noted in the preceding footnote, a foster care license is not required in Alaska for a relative to be a placement for a child. ALASKA OFFICE OF CHILDREN'S SERVS., *supra* note 6, § 3.5.5B, at 2.

8. *See* ADMIN. § 10.935(d)-(e).

9. ADMIN. § 10.930-35. A relative has ninety days to submit the variance request. *Id.* § 10.930(a). The oversight committee has thirty days to determine if it is complete. *Id.* § 10.930(b). Within thirty days after the oversight committee determines that the variance application is complete, the variance review committee shall make a recommendation to the commissioner. *Id.* § 10.935(g). The commissioner has thirty days to issue a decision on the variance request. *Id.* § 10.935(i). The commissioner may seek additional information. *Id.*

10. ALASKA OFFICE OF CHILDREN'S SERVS., *supra* note 6, § 3.5.4, at 12.

11. ALASKA STAT. § 47.14.100(m).

12. *Id.*

it has the authority to order a specific placement. The Department argues that state law gives it the authority to make placement decisions.¹³ The court asks for further briefing on its authority. Aunt Kelly, unaccompanied by counsel because she cannot afford a lawyer and is not entitled to public counsel for this hearing,¹⁴ is not familiar with the case law¹⁵ or the statutes¹⁶ in Alaska that could demonstrate to the court that it indeed has the power to order the Department to place Cassandra with her.

While the variance request and litigation are pending, four-year-old Cassandra lives in a shelter, separated from her family. Cassandra exhibits behavioral concerns. The shelter staff note frequent crying and withdrawn behavior. Cassandra's increased behavioral issues are now making it more difficult for the Department to find Cassandra a suitable foster home.

Eventually, the variance is granted and the Department makes arrangements for Cassandra to change placements. Nine months after the original request, Cassandra is finally placed with Aunt Kelly.

This example highlights several, but by no means all, of the problems in Alaska's current child welfare system: the confluence of the Department's policies, the state administrative code, state statute, and state case law, and the additional need for correct application by frontline professionals. Relatives seeking placement face many barriers not covered in this example, including the application of recently released federal regulations.¹⁷

Part I of this Article explains how a one-size-fits-all licensing and background check system grew to encompass background checks for relatives seeking to care for children in foster care. Further, Part I reviews the 2016 federal regulations issued by the Bureau of Indian Affairs (BIA) that interpret the Indian Child Welfare Act (ICWA) with regard to good cause to deviate from placing children with relatives. Moreover, Part I will review relevant state law and its legislative history in the context of

13. See ALASKA STAT. § 47.14.100(a) ("the department shall arrange for the care of every child committed to its custody"); see also *id.* § 47.10.084 (imposing duty on the Department to make determination of where and with whom the child shall live).

14. ALASKA STAT. § 47.14.100(m).

15. See, e.g., *S.S.M. v. State*, 3 P.3d 342, 346 (Alaska 2000) ("A [Department] placement decision is ultimately a matter for superior court review.")

16. See, e.g., ALASKA STAT. § 47.10.080(c)(2) (giving the court authority to release a child to an adult family member).

17. See 25 C.F.R. 23.1-4 (2017) (overviewing purpose, definition, policies, and information collection under the Indian Child Welfare Act of 1978).

Alaska's background check system. This Part additionally discusses case law and statutes related to court-ordered placements of children with relatives.

Part II discusses the challenges on the frontline in the application of the state system and federal law. The discretion given to the Department was meant to address the flaws of a one-size-fits-all system, but has not been adequately applied to the frontlines of child welfare practice in Alaska.¹⁸ The Department's high turnover rate and training issues lead to mistakes, even when frontline workers do their best to place children with relatives when possible.¹⁹

Part III proposes a three-step approach to achieve better outcomes in Alaska's child welfare system. First, Alaska should adopt the American Bar Association's model licensing standards when it comes to background checks for foster care licensing. The model licensing standards not only comply with federal standards for foster care licensing, but are also designed to assess safety and the best interests of the child.²⁰ Relatives who do not want a foster care license but whose background checks would be considered under these safety standards would still fare better than under Alaska's current system because the model licensing standards are tailored to child welfare.²¹

Second, Alaska should repeal the section of its state statute giving the Department *prima facie* evidence to deny a relative for failure to meet foster care licensing standards. Relatives who are denied placement of a child by the Department have the right to court review where the Department must prove by clear and convincing evidence that the relative should be denied.²² The current *prima facie* standard whereby the Department can deny a relative custody if the relative is ineligible for a foster care license does not comport with the federal regulations issued by the BIA effective December 12, 2016.²³ Additionally, the *prima facie* evidence definition is overbroad because background checks for foster care licenses have been swept into a system designed to encompass more than just foster care.²⁴ *Prima facie* evidence is also overbroad because foster care licensing has stringent requirements about other

18. DIWAKAR K. VADAPALLI & JESSICA PASSINI, ALASKA OFFICE OF CHILDREN SERVICES: RESULTS OF THE 2016 ANNUAL STAFF SURVEY 31 (May 2016), <http://crpalaska.org/wp-content/uploads/docs/Final-Report-OCS-2016-Annual-Staff-Survey.pdf>.

19. See *infra* notes 148–151 and accompanying text.

20. See *infra* notes 179–206 and accompanying text.

21. See *infra* notes 180–181.

22. ALASKA STAT. § 47.14.100(m) (2016).

23. See *infra* notes 209–219 and accompanying text.

24. ALASKA S. JOURNAL, 23rd Leg., 1st Sess. 375 (Mar. 6, 2003).

considerations, such as housing.²⁵ The original meaning of that section of the statute, which was tied to crimes and abuse history the legislature considered related to child safety, has been lost through various statutory changes, which makes the current statute both overbroad and vague.²⁶ A review of the history of those statutory changes indicates that the legislature did not intend to expand the definition of prima facie evidence.²⁷

Third, Alaska should adopt a state statute clearly delineating the court's authority to order placement of a child facing foster care with a relative. The current lack of clarity in the statutes contributes to confusion on the frontline.²⁸ This lack of clarity delays placing children with relatives, which harms families.²⁹

I. WHERE WE ARE AND HOW WE GOT THERE: THE CONVERGENCE OF BACKGROUND CHECKS, FOSTER CARE LICENSING, AND THE LAW

A. THE HISTORY OF BACKGROUND CHECKS

Prior to 2003, Alaska had nineteen different programs, governed by twelve different statutory requirements, relating to licensing and background checks for volunteers and workers in settings involving health care, childcare, or care for vulnerable adults.³⁰ Governor Frank Murkowski lamented to the legislature that an "absence of any clear rationale for the wide variation in standards for licensing, enforcement, and appeals resulted in a very burdensome and bureaucratic system."³¹ These onerous burdens were in tension with the state's duty to place children in foster care with relatives, absent good cause to do otherwise.³²

In 2003, Alaska began combining all forms of licensing for work related to children and vulnerable adults into one system.³³ At that time, Alaska was one of seven states selected to participate in a federal pilot program designed to improve background checks on employees with

25. See *infra* note 106 and accompanying text.

26. See *infra* Part I.B.

27. See *id.*

28. See *infra* note 169.

29. See, e.g., *infra* note 166.

30. ALAN WHITE ET AL., EVALUATION OF THE BACKGROUND CHECK PILOT PROGRAM 16 (2008), <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/Reports/Downloads/White8-2008.pdf>.

31. *Id.*

32. See ALASKA STAT. § 47.14.100(e) (2016); see also 25 U.S.C. § 1915(b) (2012); 25 C.F.R. § 23.132 (2017).

33. ALASKA S. JOURNAL, 23rd Leg., 1st Sess. 375 (Mar. 6, 2003).

direct access to patients, which meant it was eligible to receive federal funds to assist with the consolidation.³⁴ The program, which was part of an update to Medicare, focused on improving background checks by including fingerprint-based criminal records checks and registry checks of, for example, abuse and neglect or sex offender registries.³⁵ Alaska's newly consolidated program became operational in March 2006,³⁶ and the pilot ran through September 2007.³⁷

As part of this program, Alaska released its administrative code governing background checks with regard to licensing in June 2006.³⁸ The code was recently updated in June 2017.³⁹ The original code and the current code are substantially more restrictive than federal law as applied to the more narrow issue of foster care licensing and relative placement.⁴⁰ 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,⁴¹ while both the original and current code in Alaska do.⁴² Whereas federal law bars applicants for only five years if the applicant has a conviction involving a controlled substance,⁴³ the AAC bars applicants for five to ten years depending on the offense.⁴⁴ So, while a felony conviction for driving under the influence is a bar for only five years under federal law,⁴⁵ it is a ten-year bar under the AAC.⁴⁶

34. WHITE ET AL., *supra* note 30, at 1. Section 307 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) authorized the creation of the Background Check Pilot Program. *Id.*

35. *Id.*

36. *Id.* at 19 (showing beginning of pilot date).

37. *Id.* at 1 (showing end of pilot date).

38. See ALASKA ADMIN. CODE tit. 7, §§ 10.900-.990 (2017).

39. *Id.* (amended June 29, 2017).

40. For criminal barriers, compare 42 U.S.C. § 671(a)(20)(A) (2012), with ALASKA ADMIN. CODE tit. 7, § 10.905(b)-(e) (federal law limits barriers to violent crimes and substance abuse, often with shorter barrier times than Alaska's administrative code; Alaska's administrative code has many additional crimes listed). For abuse and neglect barriers, compare 42 U.S.C. § 671(a)(20)(B), with ALASKA ADMIN. CODE tit. 7, § 10.905(f) (federal law requires the state abuse and neglect registry to be checked while the Alaska administrative code creates ten year and permanent barrier times if an applicant is on the registry).

41. 42 U.S.C. § 671(a)(20)(A).

42. See ALASKA ADMIN. CODE tit. 7, § 10.905(b)-(e) (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) (2006) (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).

43. 42 U.S.C. § 671(a)(20)(A)(ii).

44. ALASKA ADMIN. CODE tit. 7, § 10.905(c)(6), (d)(6)-(7) (2017).

45. 42 U.S.C. § 671(a)(20)(A)(ii).

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

Federal funding to reimburse states for foster care licensing mandates one standard for licensing that applies to both relatives and non-relatives.⁴⁷ Federal funding is also contingent on criminal background checks,⁴⁸ as well as abuse and neglect background checks for relatives who have a child placed in their home, regardless of whether the relative is licensed.⁴⁹ States have discretion to issue waivers for relatives on a case-by-case basis for non-safety standards.⁵⁰ The state determines what constitutes a non-safety standard.⁵¹ Non-safety standards might include the child's sleeping arrangements or a waiver for a non-violent criminal history. The AAC provides a variance procedure for denials of a license.⁵² This procedure involves no less than two committees and the Commissioner of the Department of Health and Human Services.⁵³ In the case of permanent barriers, the procedure additionally involves the Director of the Department of Health and Human Services' Office of Children's Services.⁵⁴ This process can take up to 180 or even 230 days.⁵⁵

Originally, the state legislature vested broad authority and discretion in the Department to approve relatives as caretakers of children in foster care.⁵⁶ Over time, recognizing the effect of changes to the background check system on the child welfare system, the legislature has

47. Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews 65 Fed. Reg. 4020, 4032 (Jan. 25, 2000).

48. 42 U.S.C. § 671(a)(20)(A).

49. *Id.* § 671(a)(20)(B).

50. *Id.* § 671(a)(10).

51. *Id.*

52. ALASKA ADMIN. CODE tit. 7, §§ 10.930-.935 (2017).

53. *Id.*

54. *Id.*

55. *Id.* A relative has ninety days to submit the variance request. *Id.* § 10.930(a). The oversight committee has thirty days to determine if the variance request is complete. *Id.* § 10.930(b). If the variance request is not complete, the relative has thirty days to correct. *Id.* The chair of the variance review committee shall initially review the request within ten days. *Id.* § 10.935(c). If the relative does not have a permanent barrier, the chair shall send the request straight to the commissioner noting the prohibition. *Id.* § 10.935(b). If it is not a permanent barrier, the chair will make an initial determination. *Id.* § 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. *Id.* § 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. *Id.* § 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. *Id.* § 10.935(i). The commissioner may seek additional information. *Id.*

56. See *supra* note 6 (discussing the Department's foster placement authority).

established specialized rules regarding relative placement and foster care licensing.⁵⁷ In 2012, the legislature enacted a statute that required the Department to “streamline the application and licensing paperwork necessary for a person to be approved as a . . . relative placement to the extent consistent with federal law.”⁵⁸ Alaska’s current variance procedures for a relative who is denied a foster care license can take between 180 and 230 days. In addition to passing legislation in 2012, the legislature, in 2017, considered a bill that would reduce the variance procedure to forty-five days or less by separating foster care licensing from other types of background checks and licensing.⁵⁹

B. CURRENT LAW: ICWA AND STATE LAW

1. ICWA’s Good Cause Requirement

Alaska’s child welfare system heavily intersects with ICWA because over half of the children in Alaska’s foster care system are Alaska Natives.⁶⁰ ICWA applies in a child welfare case if the child is an Indian child.⁶¹ “Indian child” is defined as a person under eighteen years of age, who is unmarried, and is either a tribal member, or is eligible for membership as a tribal member and is the biological child of a tribal member. ICWA requires that a child be placed with a member of the Indian child’s extended family in the absence of good cause to do otherwise.⁶² These placement preferences apply in any foster care proceeding.⁶³ Section 47.14.100(e) of the Alaska Statutes mirrors ICWA: “the department shall place the child, in the absence of clear and convincing evidence of good cause to the contrary . . . with . . . an adult family member.”⁶⁴

The BIA, the federal agency responsible for the administration and management of matters related to Alaska Natives and Native Americans, issued new regulations effective December 12, 2016, to clarify the proper

57. Rep. Les Gara, Sponsor Statement H.B. 151: Children Deserve A Loving Home Act, H.B. 151, 30th Leg., 1st Sess. § 18 (Alaska 2017).

58. ALASKA STAT. § 47.32.032(a) (2016).

59. H.B. 151, 30th Leg., 1st Sess. § 18 (Alaska 2017).

60. Diwakar Vadapalli & Jessica Passini, *The Growing Number of Alaska Children in Foster Care, 2011-2015*, U. OF ALASKA ANCHORAGE INST. OF SOC. AND ECON. RES. WEBNOTES, at 4 (2016), http://www.iser.uaa.alaska.edu/Publications/webnote/2016_03_16-WebNote21-GrowingNumberOfAlaskaChildrenInFosterCare.pdf.

61. 25 U.S.C. § 1902 (2012).

62. *Id.* § 1915(b); *see also* 25 C.F.R. § 23.131(b) (2017).

63. 25 C.F.R. § 23.129(a).

64. ALASKA STAT. § 47.14.100(e) (2016); *see also id.* § 47.10.088(i) (governing adoption placement).

interpretation of ICWA's protections for Native American and Alaska Native families.⁶⁵ The regulations must inform a court's decision regarding whether good cause exists for the Department to deny placement with a relative.⁶⁶

ICWA requires that an Indian child be placed with a member of the child's extended family in the absence of good cause to do otherwise.⁶⁷ The regulations provide that if a court finds good cause to depart from the placement preferences of ICWA, the court's decision must be made on the record or in writing.⁶⁸ The regulations enumerate considerations on which good cause can be based, including the request of at least one parent; "the request of the child, if the child is of sufficient age and capacity;" the presence of sibling attachment that requires a specific placement; the child's extraordinary needs; or the "unavailability of a suitable placement" after a diligent search.⁶⁹

The regulations also state that "placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement."⁷⁰ Furthermore, a "placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA."⁷¹ This last point is particularly noteworthy as children may be in a non-ICWA compliant placement for months while parties litigate whether the Department has good cause to deviate from ICWA's placement preferences.⁷² Congress designed ICWA to promote "the long-term health and welfare of Indian children" and families.⁷³ As such, a delay caused by the failure to comply with the placement preferences under ICWA cannot result in the continued failure to comply with ICWA.⁷⁴

65. Indian Child Welfare Act Proceedings, 81 Fed. Reg. 114 38,777-78 (June 14, 2016). The BIA derives authority to issue regulations from ICWA, 25 U.S.C. § 1952, and derives its authority to manage Indian affairs from 25 U.S.C. § 2. The BIA's interpretations of ICWA are entitled to deference by the court. *See, e.g.,* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations. . . .") (internal citations omitted).

66. Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38,779.

67. 25 U.S.C. § 1915(a).

68. 25 C.F.R. § 23.132(c) (2017).

69. *Id.*

70. *Id.* § 23.132(d).

71. *Id.* § 23.132(e).

72. Indian Child Welfare Act Proceedings, 81 Fed. Reg. at 38,846.

73. *Id.* at 38,844.

74. *See id.* at 38,846 ("The Department . . . recognizes that, as the Supreme Court has cautioned, courts should not reward those who obtain custody,

2. *Prima Facie Evidence*

Currently, state law allows the Department to use failure to meet foster care licensing requirements as prima facie evidence of good cause not to place a child with a relative. Section 47.14.100(m) of the Alaska Statutes states:

Prima facie evidence of good cause not to place a child with an adult family member . . . includes the failure to meet the requirements for a foster care license under AS 47.32 and regulations adopted under AS 47.32, taking into account a waiver, variance, or exemption allowed under AS 47.32.030(a)(3) and 47.32.032.⁷⁵

Recall Aunt Kelly from the example in the introduction. Aunt Kelly's six-year-old felony DUI conviction renders her ineligible for a foster care license under the AAC.⁷⁶ Under section 47.14.100(m) of the Alaska Statutes, then, the Department can use this as prima facie evidence of good cause not to place the child with Aunt Kelly. Aunt Kelly is unfit for relative placement merely because of Alaska's one-size-fits-all criminal background check system, which is not narrowly tailored to assess a relative's fitness to care for a child in foster care.

The Department's ability to establish prima facie evidence is a problem in both ICWA and non-ICWA cases. The prima facie evidence state statute has not been reviewed since the BIA issued the 2016 regulations on the proper interpretation of ICWA. This is problematic.

In addition to the commonality of the prima facie evidence state statute and the 2016 federal regulations, a review of the legislative history of this state statute itself shows that changes in 2008 and 2012 made the current state statute overbroad and vague respectively.⁷⁷

whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation, by treating relationships established by temporary, non-ICWA-compliant placements as good cause to depart from ICWA's mandates. . . . While it can be difficult for children to shift from one custodian arrangement to another, one way to limit any disruption is to mandate careful adherence to procedures that minimize errors in temporary or initial custodial placements.") (internal citations and quotations omitted).

75. ALASKA STAT. § 47.14.100(m) (2016).

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

77. See *An Act Making Corrective Amendments to the Alaska Statutes as Recommended by the Revisor of Statutes*, ALASKA H. JUDICIARY STANDING COMM. MINUTES, 25th Leg. (Apr. 2, 2008) (statement of Pamela Finley, Revisor of Statutes, Legislative Legal Counsel, at 1:24:17 PM); see also Sponsor Statement of Senator Bettye Davis, S.B. 82, 27th Leg. (Alaska 2012) (outlining additional changes to the statute's language in 2012). This bill also amended the foster care licensing statute to reflect exceptions for rural housing that are safe for a child, although not up to the standards of more strict urban building codes. *Id.* Relatives were to be

In 2002, Alaska adopted section 47.35.019 of the Alaska Statutes (hereinafter “Mandatory Denial Statute”) and section 47.35.021 of the Alaska Statutes (hereinafter “Discretionary Denial Statute”).⁷⁸ The Mandatory Denial Statute and the Discretionary Denial Statute limited the Department’s ability to grant a foster care license to an applicant convicted of certain crimes, primarily felonies involving violence or child abuse, or to an applicant on the child abuse and neglect registry.⁷⁹ The purpose of the Mandatory Denial Statute and Discretionary Denial Statute was to bring Alaska’s laws in line with the federal Adoption and Safe Families Act (ASFA).⁸⁰ Congress adopted ASFA in 1997.⁸¹ The federal government prohibits states from receiving monetary reimbursement from the federal government for foster care funding if the state placed a child in a home where an applicant or a household member had certain

accorded the same waivers for housing as applicants seeking a foster care license. See ALASKA STAT. § 47.32.032(b) (2012); cf. ALASKA ADMIN. CODE tit. 7, § 10.935(i) (2017) (the 2012 amendment changed the state statute, requiring any variance to be taken into account in the determination of prima facie evidence, but the commissioner can grant a variance for any background check barrier).

78. Section 47.35.019 of the Alaska Statutes governed mandatory denial of an initial license if the applicant committed child abuse and neglect, or other certain crimes. ALASKA STAT. § 47.35.019 (2002) (repealed 2005). An initial license is denied if convicted of one of the following: a felony involving domestic violence, most felony personal offenses, a felony offense committed against a minor, including a crime where the perpetrator was a person responsible for the child’s welfare, and arson. *Id.* Additionally, no initial license would issue if the applicant has been convicted of one of the following within five years of the application: felony assault, stalking, a controlled substance offense, or “a crime involving imitation controlled substances.” *Id.* Section 47.35.021 of the Alaska Statutes governed discretionary denial of a license. ALASKA STAT. § 47.35.021 (2002) (repealed 2005). If the applicant or household member had a conviction for any of the following within the preceding five years, the application could be denied: a misdemeanor crime of domestic violence (if the misdemeanor is under Title 11 of the Alaska Statutes); assault in the fourth degree (under section 11.41.230 of the Alaska Statutes); contributing to the delinquency of a minor (under section 11.51.130 of the Alaska Statutes); endangering the welfare of a child in the second degree (under section 11.51.110 of the Alaska Statutes); a serious offense (as defined in section 12.62.900 of the Alaska Statutes that is not already covered by section 47.35.019); or a crime concerning operating certain vehicles, aircraft, or watercraft while intoxicated (under sections 28.33.030–.031 and 28.35.032 of the Alaska Statutes). *Id.* § 47.35.021.

79. See § 47.35.019; see also § 47.35.021.

80. *Youth Services: Regulation & Task Force*, ALASKA H. COMM. ON HEALTH, EDUC. & SOC. SERVS., 22nd Leg. (Apr. 18, 2002) (statement of Rep. Lesil Maguire at 4:22:00 PM).

81. Adoption & Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997).

criminal convictions or prior child abuse and neglect history.⁸² Alaska's language in the Mandatory Denial Statute and the Discretionary Denial Statute was almost identical to Congress's language in the ASFA.⁸³

In 2005, the Alaska legislature adopted section 47.14.100(m) (hereinafter "Section 100(m)"), which originally stated, "[p]rima facie evidence of good cause not to place a child with an adult family member . . . includes grounds for denial of a foster care license"⁸⁴ under the Mandatory Denial Statute or the Discretionary Denial Statute. Importantly, this meant that the Department's ability to deny a relative placement of a child due to the relative's inability to receive a foster care license was originally limited to the barriers to a foster care license established by ASFA (with some additional minor modifications the Alaska legislature added to reflect state child safety standards).⁸⁵ In other words, prima facie evidence to deny relative placement was limited to evidence of only certain criminal convictions or a relative's presence on the abuse and neglect registry, as provided by federal law.⁸⁶

In 2005, the Mandatory Denial Statute and the Discretionary Denial Statute were repealed when foster care licensing was swept into a consolidated background check and licensing system under Senate Bill 125 (hereinafter "Single Background Check System Bill").⁸⁷ This consolidated system, as previously noted, primarily stemmed from the federal government's grant to states to create a comprehensive system to protect patients under Medicare.⁸⁸ Recall that the Mandatory Denial Statute and the Discretionary Denial Statute enumerated which crimes would be a barrier to a foster care license.⁸⁹ The Mandatory Denial Statute also mandated the denial of an initial license if the applicant had certain prior child abuse and neglect history.⁹⁰ Under the Single Background

82. *Id.* § 106 (codified as amended at 42 U.S.C. § 671) (amending Social Security Act). Mandatory child abuse and neglect registry checks were added by the Adam Walsh Child Protection and Safety Act of 2006 § 151 Pub. L. No. 109-248, 120 Stat. 587 (2006) (codified as amended at 42 U.S.C. § 671) (amending Social Security Act).

83. Compare ALASKA STAT. § 47.35.019, and § 47.35.021 (2002), with Adoption & Safe Families Act § 106.

84. ALASKA STAT. § 47.14.100(m) (2016); see also H.B. 53, § 37, 2005 Alaska Sess. Laws ch. 64 (creating section 47.14.100(m)).

85. For example, Alaska made misdemeanor assault a discretionary five-year barrier for an initial license if the assault involved domestic violence. ALASKA STAT. § 47.35.021 (2004). Federal law does not prohibit issuing a foster care license for misdemeanor assault convictions. 42 U.S.C. § 671(a)(20) (2012).

86. See ALASKA STAT. §§ 47.35.019, 47.35.021 (2002); see also 42 U.S.C. § 671(a)(20).

87. S.B. 125, 2005 Alaska Sess. Laws ch. 57.

88. See *supra* note 34 and accompanying text.

89. See ALASKA STAT. § 47.35.019; see also § 47.35.021.

90. See ALASKA STAT. § 47.35.019.

Check System Bill, then, it made sense to repeal the Mandatory Denial Statute and the Discretionary Denial Statute because Alaska was introducing an entirely new procedure for foster care licensing. The legislature adopted chapter 32 of title 47 the Alaska Statutes (hereinafter “Centralized Licensing Statute”) to establish the new procedure.⁹¹

Also in 2005, the child in need of aid (CINA) statutes were updated by House Bill 53 (hereinafter “Updated CINA Statutes Bill”).⁹² The final version of the Updated CINA Statutes Bill specifically created Section 100(m), which stated that the Mandatory Denial Statute and the Discretionary Denial Statute would define the prima facie evidence needed to deny a relative the right to be a caregiver for a child in foster care.⁹³ The Department “completely and wholeheartedly” supported adopting the Updated CINA Statutes Bill.⁹⁴

From 1998 until the adoption of Section 100(m) in 2005, section 47.14.100(e) of the Alaska Statutes had delineated when the Department must place a child with a relative, and when the Department may decide not to do so.⁹⁵ The reasons listed in section 47.14.100(e) of the Alaska

91. Alaska S.B. 125.

92. H.B. 53, 2005 Alaska Sess. Laws ch. 64.

93. *Id.* § 37.

94. ALASKA S. HEALTH, EDUC., & SOC. SERVS. STANDING COMM. MINUTES, 24th Leg. (May 4, 2005) (statement of Tammy Sandoval, Deputy Commissioner, Office of Children’s Services at 2:54:32 PM).

95. H.B. 375, § 49, 1998 Alaska Sess. Laws ch. 99, 43–44 (“A child may not be placed in a foster home or in the care of an agency or institution providing care for children if a relative by blood or marriage requests placement of the child in the relative’s home. However, the department may retain custody of the child and provide for its placement in the same manner as for other children if the department (1) makes a determination, supported by clear and convincing evidence, that placement of the child with the relative will result in physical or mental injury; in making that determination, poverty, including inadequate or crowded housing, on the part of the blood relative, is not considered prima facie evidence that physical or emotional damage to the child will occur; this determination may be appealed to the superior court to hear the matter de novo; (2) determines that a member of the relative’s household who is 12 years of age or older was the perpetrator in a substantiated report of abuse under AS 47.17; or (3) determines that a member of the relative’s household who is 12 years of age or older is under arrest for, charged with, has been convicted of, or has been found not guilty by reason of insanity of, a serious offense; notwithstanding this paragraph, the department may place or continue the placement of a child at the relative’s home if the relative demonstrates to the satisfaction of the department that conduct described in this paragraph occurred at least five years before the intended placement and the conduct (A) did not involve a victim who was under 18 year of age at the time of the conduct; (B) was not a crime of domestic violence as defined in AS 18.66.990; and (C) was not a violent crime under AS 11.41.100 - 11.41.455 or a law or ordinance of another jurisdiction having similar elements.”).

Statutes regarding when the Department may not place a child with a relative became, almost verbatim, the Mandatory Denial Statute and Discretionary Denial Statute.⁹⁶

In 2008, the Revisor of Statutes of the Legislative Affairs Agency, Pam Finley, introduced Senate Bill 260, which was that legislative's session's bill to correct statutory errors.⁹⁷ Ms. Finley remarked that the purpose of the bill was "to make the statutes clean without changing or setting, in any way, the policy."⁹⁸ Representative Coghill specifically asked about the revisor bill's proposed change to Section 100(m).⁹⁹ Ms. Finley responded that the Mandatory Denial Statute was repealed in 2005, and replaced with the Centralized Licensing Statute.¹⁰⁰ Ms. Finley stated that the revisor bill would make no policy changes, but she was mistaken.¹⁰¹ Adopting the revisor bill expanded what constitutes prima facie evidence from the crimes outlined in the Mandatory Denial Statute and the Discretionary Denial Statute to "the failure to meet the requirements of a foster care license under [the Centralized Licensing Statute] and regulations adopted under [the Centralized Licensing Statute]."¹⁰² The bill was adopted.¹⁰³

Unfortunately for children facing foster care in Alaska, the replacement of the Mandatory Denial Statute and Discretionary Denial Statute with the Centralized Licensing Statute represented a drastic shift within the context of Section 100(m), as it expanded what the Department can assert as prima facie evidence to justify not placing a child with a relative. The Mandatory Denial Statute and Discretionary Denial Statute limited foster care licenses for applicants when either the applicant or household member had convictions for specific crimes that implicated child safety or had a history of prior child abuse and neglect.¹⁰⁴ Under the Centralized Licensing Statute though, the Department has the authority to create foster care licensing standards.¹⁰⁵ As a consequence, instead of primarily basing prima facie evidence to deny a relative caregiver on criminal convictions related to child safety, the adoption of the revisor bill

96. Compare ALASKA STAT. § 47.14.100(e) (2016), with ALASKA STAT. § 47.35.019 (2004) (repealed 2005), and ALASKA STAT. § 47.35.021 (2004) (repealed 2005).

97. S.B. 260, 25th Leg., Reg. Sess. (Alaska 2008).

98. ALASKA S. FIN. COMM. MINUTES, 25th Leg. (Mar. 24, 2008) (Statement of Pamela Finley, Revisor of Statutes, Legislative Legal Counsel at 10:26:18 AM).

99. ALASKA H. JUDICIARY STANDING COMM. MINUTES, 25th Leg. (Apr. 2, 2008) (Discussion between Representative John Coghill and Pamela Finley, Revisor of Statutes, Legislative Legal Counsel, at 1:24:17 PM).

100. *Id.*

101. *Id.*

102. ALASKA STAT. § 47.14.100(m) (2016).

103. 2008 Revisor's Bill, 2008 Alaska Sess. Laws ch. 40.

104. See *supra* note 78 and accompanying text.

105. ALASKA STAT. § 47.32.010 (2005).

meant minor and non-violent crimes counted as prima facie evidence against placing children with relatives. The Centralized Licensing Statute also expanded the category of prima facie evidence beyond background checks to include other evidence, such as a relative's inability to receive a foster care license because the relative's housing did not meet foster care licensing standards.¹⁰⁶ The 2008 revisor bill changed what had been essentially the same policy in Alaska for a decade.

In 2012, the definition of prima facie evidence was further amended to include "taking into account a waiver, variance, or exemption allowed under AS 47.32.030(a)(3) and [the Centralized Licensing Statute]."¹⁰⁷ The intent of this addition was to allow different standards for rural and urban housing, as rural housing can be safe even when not meeting the requirements of foster care licensing building codes.¹⁰⁸ The broad support for this statutory change underscores that the revisor bill did cause policy changes that the legislature had to correct. Covenant House Alaska,¹⁰⁹ the Alaska Mental Health Board,¹¹⁰ the Alaska chapter of the National Association of Social Workers,¹¹¹ and several child-placing agencies¹¹²

106. *Id.* § 47.32.010 "The purpose of this chapter is to establish centralized licensing and related administrative procedures" which apply to foster homes. *Id.* § 47.32.010. The purpose of Title 7 of the Alaska Administrative Code §§ 10.1000-.1095 is to "protect public health, safety, and welfare by establishing environmental health and safety standards." ALASKA ADMIN. CODE tit. 7, § 10.1000(a) (2017). This includes establishing housing standards as these sections govern water supply, heating, disposal of wastewater and solid waste, bathing facilities, etc. *Id.* § 10.1000. In order to be licensed, foster homes must be in compliance with sections 10.1000 through 10.1095 of title 7 of the Alaska Administrative Code unless the AAC provides an exemption. *Id.* §10.1000(b); *see also, e.g., id.* § 10.1030 (providing an exemption).

107. ALASKA STAT. § 47.14.100(m) (2012).

108. Sponsor Statement of Sen. Bettye Davis, S.B. 82, 27th Leg. (Alaska 2012). This bill also amended the foster care licensing statute to reflect exceptions for rural housing that is safe for a child, but not up to strict urban building codes. *Id.* Relatives were to be accorded the same waivers for housing as applicants seeking a foster care license. *See* ALASKA STAT. § 47.32.032(b) (2012).

109. Letter from Deirdre A. Cronin, Exec. Director, Covenant House Alaska, to Sen. Bettye Davis (Mar. 30, 2011), http://www.akleg.gov/basis/get_documents.asp?session=27&docid=12007.

110. Letter from J. Kate Burkhart, Exec. Director, Alaska Mental Health Bd., Advisory Bd. on Alcoholism and Drug Abuse, to Rep. Les Gara (Feb. 23, 2011), http://www.akleg.gov/basis/get_documents.asp?session=27&docid=12007.

111. Letter from Meg Loomis, Exec. Director, Nat'l Ass'n of Social Workers, to Rep. Les Gara (Jan. 2, 2011), http://www.akleg.gov/basis/get_documents.asp?session=27&docid=12007

112. *See, e.g.,* Letter from Donn Bennice, President, Alaska Behavioral Health Ass'n, to Rep. Les Gara (Jan. 26, 2011), http://www.akleg.gov/basis/get_documents.asp?session=27&docid=12007.

submitted letters supporting the amendment because of the difficulties of placing children in rural communities, even with relatives, due to rigid foster care licensing standards.

These changes have rendered the current version of Section 100(m) unclear. For instance, while the Centralized Licensing Statute specifically provides for variances related to building codes, section 47.32.030(a)(3)(D) of the Alaska Statutes states the Department may “provide for waivers, variances, and exemptions from the requirements of this chapter, including the requirement to obtain a license.”¹¹³ The commissioner can also grant a variance for any barrier crime or condition identified on a background check.¹¹⁴

The changes to Section 100(m) through the revisor bill in 2008 and the amendment in 2012 furthermore created an overbroad and vague definition of what constitutes prima facie evidence. Due to the 2008 changes, non-violent criminal history and the number of bedrooms in the home could now be prima facie evidence to deny a placement with a relative. The application of the 2012 changes makes the statute vague because it requires the Department to consider its ability to grant a variance before the Department has prima facie evidence. First, if the Department is inclined to grant a variance for the relative, the Department would have no need to assert to the court the Department has prima facie evidence to deny the relative. Further, if under the current statute the Department does not receive prima facie evidence because the Department has the ability to grant a waiver, the Department would never have prima facie evidence.

C. THE STATUS OF COURT-ORDERED PLACEMENTS

Historically, the Department’s position has been that it, not the courts, determines a child’s specific placement after the Department receives legal custody.¹¹⁵ Even today, nothing in the Department’s policy manual acknowledges that the court can direct a specific placement after reviewing the Department’s denial of a relative.¹¹⁶ The Department’s policy manual does not clearly acknowledge that the court can direct a

113. ALASKA STAT. § 47.32.030(a)(3)(D) (2016).

114. ALASKA ADMIN. CODE tit. 7, § 10.935(i) (2017).

115. *In re B.L.J.*, 717 P.2d 376, 378 (Alaska 1986) (“The Department . . . claim[ed] that the court lacked authority to dictate the physical placement of the children under AS 47.10.080(c)(1).”); *see also* *S.S.M. v. State*, 3 P.3d 342, 346 (Alaska 2000) (“[Department of Family and Youth Services] also argues . . . that in any event the superior court did not have authority to order placement because only [Department of Family and Youth Services] has authority to order placement.”).

116. *See* ALASKA OFFICE OF CHILDREN’S SERVS., CHILD PROTECTIVE SERVICES MANUAL §§ 3.5.4, 4.5.9 (2017).

specific placement at a temporary custody hearing. It states only that the court “may make other findings or orders regarding the terms, conditions, and duration of the child’s placement.”¹¹⁷ The Department’s policy manual also does not acknowledge that the court can direct specific placement at an adjudication hearing, referencing only whether the child should be placed out-of-home or not.¹¹⁸ Neither the temporary custody nor the adjudication hearing section of the Department’s policy manual reference section 47.10.142 of the Alaska Statutes as governing authority, even though it is the controlling statute for emergency custody and temporary out-of-home placement hearings.¹¹⁹

Conversely, the Department’s policy manual does acknowledge that following a dispositional hearing, the court can order a child returned to a relative.¹²⁰ However, even this acknowledgement is unclear because the manual indicates dispositional hearings are one-time events rather than subject to judicial review.¹²¹ The Department’s policy manual lists only the governing authority of sections 47.10.080 and .081 of the Alaska Statutes, and Alaska Child in Need of Aid Rules 14, 16, and 17.¹²² However, Alaska Child in Need of Aid Rule 19.1(c) delineates that the court may review a disposition order upon motion of a party or the court’s own motion.¹²³

The Alaska Supreme Court does not endorse the Department’s position that the court cannot direct a specific placement.¹²⁴ The Department often justifies its opposing view by relying on the Alaska Supreme Court’s 1986 decision, *In re B.L.J.*:

Having legal custody, the Department was able to transfer the minors as long as it met the two requirements of AS 47.10.080(c)(1). If the court wanted to remove legal custody from the Department, it could modify its original order. *The court cannot, however, order a specific placement of the minors.* At a hearing, the court can review this decision to see if the Department abused its discretion when making its placement decision.¹²⁵

117. *Id.* § 4.5.1.

118. *Id.* § 4.5.3.

119. *See id.* § 4.5.1; *see also id.* § 4.5.3.

120. *Id.* § 4.5.4(G)(2).

121. *Id.* § 4.5.4(A).

122. *Id.* § 4.5.4.

123. *Id.*

124. *In re B.L.J.*, 717 P.2d 376, 378 (Alaska 1986).

125. *Id.* at 382 (emphasis added). The standard for review, as it relates to relatives denied placement, is now clear and convincing evidence. ALASKA STAT. § 47.14.100(e) (2016); *see also* *Irma E. v. State*, 312 P.3d 850, 853 (Alaska 2013).

But the Department's reliance on this language is misplaced. It is correct that if the court grants legal custody under AS 47.10.080(c)(1) then the Department is awarded "the determination of where and with whom the child shall live," pursuant to section 47.10.084(a) of the Alaska Statutes. But that authority is subject to statutory limitations.¹²⁶ Specifically, the Department must comply with the relative placement preferences delineated in Alaska's state statutes.¹²⁷ Further, the Department must provide parties notice of a non-emergency placement change.¹²⁸ Parties can challenge the Department's proposed placement change by requesting a review hearing in superior court.¹²⁹

The Department's reliance on the *In re B.L.J.* language is also misplaced because the Alaska Supreme Court ultimately held that a court can modify the original disposition awarding legal custody to the Department.¹³⁰ A trial court can therefore find that the Department did not meet its burden by clear and convincing evidence to deny a relative seeking to care for children in foster care, find that legal custody should transfer to the relative with Departmental supervision, and order a modified disposition placing the child with an adult family member.¹³¹

Fourteen years later, in *S.S.M. v. State*, the Alaska Supreme Court again rejected the Department's position and held that the court can review the Department's placement decisions:

[The Department] also argues . . . that in any event the superior court did not have authority to order placement because only [the Department] has authority to order placement. . . . [I]t is irrelevant to this appeal that [the Department], not the superior

126. ALASKA STAT. § 47.10.084.

127. *Id.* § 47.14.100(a).

128. *Id.* § 47.10.080(s).

129. *Id.*

130. *In re B.L.J.*, 717 P.2d 376, 382 (Alaska 1986).

131. ALASKA STAT. § 47.14.100(e); *see also id.* § 47.10.080(c)(2) ("[T]he court shall order the child released to . . . [an] adult family member . . . and, in appropriate cases, order the . . . adult family member . . . to provide medical or other care and treatment; if the court releases the child, it shall direct the department to supervise the care and treatment given to the child, but the court may dispense with the department's supervision if the court finds that the adult to whom the child is released will adequately care for the child without supervision; the department's supervision may not exceed two years or in any event extend past the date the child reaches 19 years of age, except that the department or the child's guardian ad litem may petition for and the court may grant in a hearing . . .") At the time of the decision in *B.L.J.*, the court could have amended the dispositional order to order the child released to a suitable person. H.B. 375, 1998 Alaska Sess. Laws ch. 99. At the time of the decision in *S.S.M. v. State*, the court could have amended the dispositional order to order the child released to a relative. *Id.* This language was amended to change "relative" to "adult family member" in 2005. H.B. 53, §§ 11, 35, 2005 Alaska Sess. Laws ch. 64.

court, is primarily responsible for placing a child in a CINA proceeding. A [Department] placement decision is ultimately a matter for superior court review.¹³²

It is also worth noting that, like in *In re B.L.J.*, the Alaska Supreme Court reviewed this case post-disposition.¹³³ As the Alaska Supreme Court reviewed both cases post-disposition, neither addresses the court's authority to review the Department's decisions pre-disposition.¹³⁴

In 2016, the Alaska legislature amended the statute on temporary custody and out-of-home care to address any perceived gap in judicial review by adding that if the Department has "emergency custody . . . or a court orders a child committed to the department for temporary placement" the Department shall "to the extent feasible and consistent with the best interests of the child" comply with the order of placement preferences in section 47.14.100(e) of the Alaska Statutes.¹³⁵ The denial of a relative under section 47.14.100(e) of the Alaska Statutes triggers the right to superior court review under Section 100(m).¹³⁶

Prior to this 2016 amendment, the Alaska legislature had already provided that if a minor is committed to the temporary custody of the Department "the court order shall specify the terms, conditions, and duration of placement."¹³⁷ However, that section continued: "[t]he court shall require the minor to remain in the placement provided by the department."¹³⁸ The legislature emphasized the importance of applying the state's relative placement preferences by codifying the requirements directly into the statute governing emergency or temporary custody of a child.¹³⁹ The legislature received ample support for the bill.¹⁴⁰ The Tanana Chiefs Conference submitted a letter encouraging placing children with family in emergencies to avoid re-traumatizing children and to facilitate

132. *S.S.M. v. State*, 3 P.3d 342, 346 (Alaska 2000).

133. *Id.* at 344.

134. *See id.*; *see also B.L.J.*, 717 P.2d at 377.

135. Child Protection and Opportunity Act, § 8, 2016 Alaska Sess. Laws ch. 7 (creating ALASKA STAT. § 47.10.142) Arguably, the relative placement preferences already applied because § 47.14.100(e) states the relative placement preferences apply "when a child is *removed* from a parent's home." (emphasis added). A child can be removed based on an emergency or if the court awards the Department temporary custody.

136. ALASKA STAT. § 47.14.100(m) (2016).

137. *Id.* § 47.10.142(f).

138. *Id.*

139. Rep. Les Gara, Sponsor Statement H.B. 27: Child Protection and Opportunity Act, H.B. 27, 45SLA 16 (Alaska 2015), http://www.akleg.gov/basis/get_documents.asp?session=29&docid=965.

140. *See, e.g.*, Letter from Victor Joseph, President, Tanana Chiefs Conference, to Senate Health & Soc. Servs. Comm. Members (Apr. 11, 2016), http://www.akleg.gov/basis/get_documents.asp?session=29&docid=65804.

reunification.¹⁴¹ Facing Foster Care in Alaska, a current foster care youth and alumni organization, also expressed support, and emphasized that relative placements provide for children's need for "safety, well-being and permanency."¹⁴²

This bill attracted support from outside Alaska as well. The Center for Family Finding and Youth Connectedness favored adopting this section to help children facing foster care.¹⁴³ Further, First Focus Campaign for Children, a national bipartisan advocacy organization "committed to making children and their families a priority in federal policy and budget decisions," noted that "children and youth do best and are most able to cope with and overcome trauma when they have permanent connections to caring and supportive adults," which means extended family and communities.¹⁴⁴

In sum, Alaska's one-size-fits-all background check system and current state statutes unnecessarily deny relatives seeking placement of children in foster care. The AAC is substantially more restrictive than federal law when applied to the more narrow issue of foster care licensing and relative placement. In 2008 the state statute that originally gave the Department *prima facie* evidence to deny licensure to a relative caregiver due to criminal convictions related to child safety was mistakenly expanded to include minor crimes and crimes that did not involve violence. It additionally went beyond background checks to include additional barriers, such as housing that did not meet foster care licensing standards. The 2012 amendments to the state statute on *prima facie* evidence made the statute vague by including consideration of variances; the Department can grant a variance for any background check barrier. This problem is further compounded by the absence of a state statute clearly delineating the court's authority to order specific placements. As recently as 2016 the Alaska legislature had to amend state statutes to specifically affirm relative placement preferences applied if the Department has emergency custody or temporary custody.

141. *Id.*

142. Letter from Amanda Metivier, Exec. Dir., Facing Foster Care in Alaska, to Rep. Les Gara (Feb. 1, 2015), <http://www.akleg.gov/basis/getdocuments.asp?session=29&docid=65416>.

143. Letter from Kevin A. Campbell, Founder, Ctr. for Family Finding and Youth Connectedness (Jan. 30, 2015), http://www.akleg.gov/basis/get_documents.asp?session=29&docid=963 (writing open letter to legislators regarding the viability of adoption to assist foster children).

144. Letter from Bruce Lesley, President, First Focus Campaign for Children, to Rep. Les Gara (Feb. 3, 2015), http://www.akleg.gov/basis/get_documents.asp?session=29&docid=963.

II. THE NEED FOR REFORM: WHAT HAPPENS ON THE FRONTLINES

The Department has the authority and complete discretion to place a child in foster care with a relative regardless of the relative's background check.¹⁴⁵ If the relative has a background check barrier, such as Aunt Kelly's DUI conviction, a foster care license can be issued only if the Department grants a variance.¹⁴⁶ However, it is reasonable to infer that the Alaska legislature recognized the State's duty to children in foster care, and therefore gave the Department broad discretion to place children with relatives regardless of what the relative's background check contains. The Department, it can be contended, would seek to avoid unnecessary denials of relatives under this system because the system exists for licensing many different programs, and the Department should be able to assess the relative's ability to safely care for the child. Indeed, this inference is supported by the fact that a solid majority, 71%, of relatives in 2016 requesting a variance due to a background check barrier received approval.¹⁴⁷

However, this broad discretion still does not necessarily result in compliance with ICWA or state law. With the Department's heavy employee turnover,¹⁴⁸ caseworkers with little experience and training scrutinize relatives receiving background checks under the same administrative code as, for example, a person applying to work at an assisted living facility subject to state licensure.¹⁴⁹ 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."¹⁵⁰ Thus, the risk of erroneous denial in the one-size-fits-all background check system becomes exacerbated with this lack of adequate training and support.¹⁵¹

The lack of compliance with ICWA and state law on the frontline is particularly troubling when considering Alaska Native children. Congress enacted ICWA in part as recognition that "an alarmingly high percentage of Indian families are broken up by the removal, often

145. See *supra* note 6 (discussing the Department's foster placement authority).

146. ALASKA ADMIN. CODE tit. 7, § 10.930(a) (2017).

147. This data is compiled by Timothy Jones, Social Services Program Coordinator at the Alaska Department of Health and Social Services. It is available from the author upon request.

148. VADAPALLI & PASSINI, *supra* note 18, at 31.

149. See generally ALASKA ADMIN. CODE tit. 7, § 10.900 (2017) (noting various different applications of sections 10.900 through 10.990 of title 7 of the Alaska Administrative Code).

150. VADAPALLI & PASSINI, *supra* note 18, at 31.

151. *Id.* ("Overall, frontline workers seem to report impossible working conditions.").

unwarranted, of their children from them by nontribal public . . . agencies” and placed in non-Native homes and institutions.¹⁵² Alaska Native children are no exception. Alaska Native children are substantially more likely to be removed from their homes than white children, the next largest racial group in Alaska.¹⁵³ Alaska Native children are about 20% of Alaska’s population, but they accounted for over 60% of children in foster care until 2015, where their relative percentage dropped to 56%.¹⁵⁴ 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 Alaskan children.¹⁵⁵ Further, even more Alaska Native children were removed from their homes in 2015 than were removed in each of the preceding four years.¹⁵⁶ 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.¹⁵⁷

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.¹⁵⁸ 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.¹⁵⁹ Alaska’s rate of removal in 2015 was more than triple the national average.¹⁶⁰ The high number of Alaskan children in foster care is not a new phenomenon. A 2014 study found that almost one percent of Alaskan children under the age of twenty-one were

152. 25 U.S.C. § 1901(4) (2012).

153. DIWAKAR VADAPALLI ET AL., TRENDS IN AGE, GENDER, AND ETHNICITY AMONG CHILDREN IN FOSTER CARE, 3 (2014), http://www.iser.uaa.alaska.edu/Publications/2014_12TrendsInAgeGenderAndEthnicityAmongFosterChildrenInAlaska.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.”).

154. Vadapalli & Passini, *supra* note 60, at 1.

155. *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.*

156. *Id.*

157. *Id.* In the Western Region 17 children 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.*

158. 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.

159. Richard Wexler, *Congratulations, Alaska: You’re the Foster Care Capital of America*, THE CHRON. OF SOC. CHANGE (Feb. 22, 2017), <https://chronicleofsocialchange.org/blogger-co-op/congratulations-alaska-youre-foster-care-capital-america>.

160. *Id.*

in foster care between 2006 and 2013, as compared with 0.5% of children in the entire United States.¹⁶¹ 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 on a “per capita basis Alaska has more children ready and waiting for permanent adoptive homes than 48 other states.”¹⁶²

In June 2017, the Alaska Office of the Ombudsman released two reports detailing the Department’s serious failings in two cases where children were separated from their families.¹⁶³ In the first, the Ombudsman found a significant delay in determining whether a child could be placed with her out-of-state father.¹⁶⁴ While in foster care, awaiting a determination, the child was sexually abused.¹⁶⁵ In the second case, the Ombudsman found a significant delay in determining whether a child could be placed with an out-of-state grandfather.¹⁶⁶ On two separate occasions, the caseworker told the court that she had begun the process of determining whether the child could live with the grandfather, but in fact she had not.¹⁶⁷

These issues are not isolated. The Director of the Office of Children’s Services, Christy Lawton, responded to the reports by citing the caseworker’s heavy caseload:

I think if we reviewed any number of cases, we would find similar problems where everything wasn’t done to the ‘T’ that it should in terms of every single policy, every single phone call returned, every single thing happening timely. It’s simply impossible to do that virtually for every single caseworker we have, who has more than the recommended national average of cases. It’s an impossible job.¹⁶⁸

161. VADAPALLI ET AL., *supra* note 153, at 10.

162. Gara, *supra* note 139.

163. ALASKA OFFICE OF THE OMBUDSMAN, OMBUDSMAN COMPLAINT A2016-0923 (June 22, 2017), <http://www.alaskapublic.org/wp-content/uploads/2017/06/A2016-0923-EXECUTIVE-SUMMARY.pdf>; ALASKA OFFICE OF THE OMBUDSMAN, OMBUDSMAN COMPLAINT A2017-0015 (June 22, 2017), <http://www.alaskapublic.org/wp-content/uploads/2017/06/A2017-0015-EXECUTIVE-SUMMARY-1.pdf>.

164. OMBUDSMAN COMPLAINT A2016-0923, *supra* note 163, at 13.

165. *Id.* at 21.

166. OMBUDSMAN COMPLAINT A2017-0015, *supra* note 163, at 6.

167. *Id.* at 3.

168. Anne Hillman, *Ombudsman Reports Show Failures at OCS*, ALASKA PUB. MEDIA 23 (June 23, 2017), <http://www.alaskapublic.org/2017/06/23/ombudsman-reports-show-failures-at-ocs/>.

Indeed, the Department suffers from over a 30% turnover rate of frontline workers annually, and about 60% of frontline caseworkers have held their current position for less than three years.¹⁶⁹ Caseworkers surveyed in 2016 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.¹⁷⁰

With this heavy burden on individual frontline caseworkers, who do not receive adequate training, it is incumbent upon Alaska to make policies that emphasize placing children facing foster care with relatives. The next section proposes three reforms Alaska could implement to increase the number of children placed with relatives given current law and the practical reality of frontline casework.

III. PRACTICAL REFORMS

Recent history has shown that Alaska cannot rely on the Department's discretion alone. Alaska should continue to allow the Department broad discretion to determine a child's best interests following a relative's background check. But meaningful reform can only be effectuated if controlling the Department's errors is coupled with additional reforms.

First, Alaska should adopt the provisions of the American Bar Association's Model Family Foster Home Licensing Standards for background checks.¹⁷¹ In doing so, Alaska would prioritize placing children facing foster care with relatives, and provide the relatives with foster care licenses when able. This would also increase the number of available foster homes since federal law requires that licensing standards be the same for relative and non-relative homes.¹⁷² The current rules are overly restrictive when applied to background checks and foster care licensing as noted by the large number of approved variances for

169. VADAPALLI & Passini, *supra* note 18, at 23-24.

170. *Id.* at 19.

171. *See infra* Part III.A.

172. MODEL FAMILY FOSTER HOME LICENSING STANDARDS 4 (Am. Bar Ass'n 2014).

relatives.¹⁷³ The ABA's standards are sensible standards that account for child safety and recognize the importance of relative caregivers and can streamline foster placement.

Second, Alaska should repeal Section 100(m), which allows the Department to establish prima facie evidence denying a relative placement of a child if the relative does not pass foster care licensure.¹⁷⁴ Section 100(m) no longer comports with the requirements of ICWA's placement preferences in light of the 2016 federal regulations delineating what constitutes good cause to deviate from the placement preferences. Further, the history of Section 100(m) shows that the definition of prima facie evidence has been unintentionally changed over time.¹⁷⁵ In its current iteration, Section 100(m) is vague and overbroad.

Third, the Alaska Legislature should enact a law clarifying the courts' authority to order a child to be placed with a relative until a case is resolved.¹⁷⁶ While the legislature has recognized the Department's authority to determine placement when the Department is named the legal parent, both the legislature and the courts have acknowledged that the Department is not infallible and subject the Department's denials of relatives as caregivers to court review.¹⁷⁷ The issue is simply that this review does not get exercised frequently enough. This is in part because the Department sometimes incorrectly takes the position that the court cannot order a specific placement even if the court finds that the Department has not met its burden to deny the relative. This also underscores why Department discretion is not a sufficient check on the one-size-fits-all background check system. Office of Children's Services Director Christy Lawton has said that the Department has an "impossible job" with the current work overload, and the frontline workers admit being undertrained.¹⁷⁸ The most effective way, therefore, to prevent errors made on the frontline is for the legislature to acknowledge the problem and provide a backstop for the Department by clarifying the court's authority to order a specific placement with a relative at all stages of a child welfare case.

173. This data is compiled by Timothy Jones, Social Services Program Coordinator at the Alaska Department of Health and Social Services. It is available from the author upon request.

174. See *infra* Part III.B.

175. See *id.*

176. See *infra* Part III.C.

177. ALASKA STAT. § 47.14.100(m) (2016); see also *S.S.M. v. State*, 3 P.3d 342, 346 (Alaska 2000) ("A [Department] placement decision is ultimately a matter for superior court review.").

178. Hillman, *supra* note 168.

A. ADOPT MODEL LICENSING STANDARDS FOR BACKGROUND CHECKS

In 2014, the American Bar Association, the Annie E. Casey Foundation, Generations United, and the National Association for Regulatory Administration released the Model Family Foster Home Licensing Standards (“Model Licensing Standards”).¹⁷⁹ The purpose of the Model Licensing Standards is to ensure child safety and provide a “reasonable, common-sense pathway to enable more relatives and non-related caregivers to become licensed foster parents.”¹⁸⁰ The Standards “encompass all the necessary components to license a family foster home [and] are flexible enough to respond to individual circumstances.”¹⁸¹

The Model Licensing Standards designate certain crimes as “barrier crimes,” which preclude placement of a child either for five years or permanently.¹⁸² The Model Licensing Standards also provide guidelines on how to evaluate a relative’s home if the background check reveals a conviction for any other type of crime.¹⁸³ Under the Model Licensing Standards, presence of a juvenile offender is not an automatic bar.¹⁸⁴ Instead, the Model Licensing Standards apply the same guidelines recommended for evaluating adult convictions that are not subject to automatic denial.¹⁸⁵

The Model Licensing Standards consider household members age eighteen or older as adults.¹⁸⁶ The Standards also require sex-offender registry checks for applicants or household members who are adults.¹⁸⁷ The Standards mirror the requirements under the federal Adam Walsh Child Protection and Safety Act (the “Walsh Act”),¹⁸⁸ which required states to conduct child abuse and neglect registry background checks in

179. MODEL FAMILY FOSTER HOME LICENSING STANDARDS (Am. Bar Ass’n 2014).

180. *Id.* at 4.

181. *Id.*

182. *See id.* at 11 (listing, in sections 10(C) and (D), qualifying offenses).

183. *See id.* (listing, in section 10(E), considerations for agency to follow if applicant was convicted of an otherwise enumerated crime).

184. *See id.* (providing agency procedure for determining suitability in section 10(F))

185. *Id.*

186. *Id.*

187. *Id.*

188. Adam Walsh Child Protection & Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006).

2006.¹⁸⁹ The Model Licensing Standards actually go even further than what is required under the Walsh Act by requiring state or local criminal background checks *in addition to* federal checks.¹⁹⁰

The Model Licensing Standards recommend checking the state's child abuse and neglect registry for every household member.¹⁹¹ If any household member has lived in another state within the last five years, the Model Licensing Standards recommend checking that state's child abuse and neglect registry as well.¹⁹² The relative must be denied a license if there is a substantiated allegation of sexual exploitation, sexual abuse of a child, or child abuse that resulted in a child fatality.¹⁹³ The Model Licensing Standards treat any other substantiated child abuse or neglect finding on a case-by-case basis.¹⁹⁴

The Model Licensing Standards "recognize that family systems change over time and therefore [licensure] assessments must be ongoing."¹⁹⁵ The Standards add that the foster "licensing standards must be distinct from licensing standards for child care and adult care settings."¹⁹⁶ This is in marked contrast to Alaska's current regime.¹⁹⁷

Alaska's current consolidated system for all types of background checks, which are subject to one agency's discretion to overcome barriers, puts too much pressure on individual frontline caseworkers, who are often overworked and undertrained. Adopting the Model Licensing Standards for background checks while keeping the Department's discretion would allow more children facing foster care to be placed with relatives because of fewer automatic background check barriers, and would allow more relatives to take foster care children because the family would be eligible for foster licensing, which would improve efficacy.

The Model Licensing Standards' treatment of a person's prior abuse and neglect history is a more reasonable response than that of the Alaska Administrative Code. Currently, Alaska permanently bars any person who had parental rights terminated under Alaska Statute 47.10, including if the person signed a voluntary relinquishment of parental rights.¹⁹⁸

189. *Id.*

190. MODEL FAMILY FOSTER HOME LICENSING STANDARDS 33 (Am. Bar Ass'n 2014).

191. *Id.* at 11 (requiring checks in section 11(A)(1)).

192. *Id.* (requiring checks in section 11(A)(2)).

193. *See id.* (requiring denial of license in section 11(B)).

194. *See id.* (describing procedure for substantiated reports of child abuse or neglect in section 11(C)).

195. *Id.* at 5.

196. *Id.*

197. *See generally* ALASKA ADMIN. CODE tit. 7, § 10.900 (2017) (noting various different applications of sections 10.900 through 10.990 of title 7 of the Alaska Administrative Code).

198. ALASKA ADMIN. CODE tit. 7, § 10.905(f)(3) (2017).

Consider a fourteen-year-old mother who decides to relinquish her parental rights. Once the court orders her rights terminated pursuant to the relinquishment, she has a *permanent* barrier condition. To get around this, the commissioner of the Department of Health and Human Services would need to grant a variance prior to the issuance of a foster care license, a process that can currently take up to 200 days.¹⁹⁹ The Department, in its sole discretion, could even deny that applicant the ability to care for a relative child in foster care while the variance application is pending. Under current state law, the Department has prima facie evidence to deny her as a relative caregiver should she apply for court review.²⁰⁰ It is unsound to presume that if someone is unfit to care for a child at fourteen, then they will never be fit.

The current presumption that abuse and neglect by minor parents could be a permanent barrier condition is not consistent with other sections of Alaska's administrative code. The code enumerates what constitutes a permanent barrier crime unless the background check shows that the barrier crime stems from an adjudication as a minor for delinquent conduct, in which case the barrier time is reduced to ten years from the minor's age of majority.²⁰¹ However, the fourteen-year-old minor parent mentioned in the example above has a permanent barrier condition if she signed a relinquishment and the court terminated her rights based on that voluntary relinquishment.²⁰² There is no explanation provided for why the administrative code only partially recognizes the trend in public policy toward treating juvenile delinquency differently from adult criminal convictions but not for minor parents in the child welfare system.

Additionally, the Model Licensing Standards are not that different than the Department's policies were prior to the adoption of Alaska's consolidated system of background checks and licensure. From 2004 to 2006, the Department had a policy of mandatory denial where the applicant had a prior felony conviction involving domestic violence, personal offenses, crimes against minors, and arson.²⁰³ In addition, the Department policy was not to grant an initial license where the applicant had a conviction for felony assault, stalking, and controlled substances offenses within the previous five years.²⁰⁴ Although the wording is

199. *Id.* § 10.935.

200. ALASKA STAT. § 47.14.100(m) (2016).

201. ADMIN. § 10.905(b).

202. *Id.* § 10.905(f)(3).

203. See ALASKA OFFICE OF CHILD SERVS., CHILD PROTECTIVE SERVICES MANUAL § 610.2.1 (2004).

204. *Id.*

different, the Department's policy regarding abuse and neglect background checks from 2004–2006 is substantially similar to what is outlined in the Model Licensing Standards.²⁰⁵

Though similar, Alaska should adopt the Model Licensing Standards, as opposed to readopting the Department's old standards, because the Standards better comport with other federal law.²⁰⁶ Furthermore, the Model Licensing Standards more accurately reflect current public policy. For instance, the Model Licensing Standards are more flexible on juvenile delinquency history, which corresponds with the national trend of recognizing juvenile delinquency as different from adult criminal convictions.²⁰⁷

Finally, controlling for error by the Department by adjusting the background check policies should reduce how often the court hears appeals about relatives being denied. Resolving issues outside of court has become more important for families and stakeholders in the child welfare system because the Alaska court system only operates four and a half days per week instead of the traditional five days.

205. *Id.*

206. For example, the Walsh Act's changes to ASFA mean the Department's prior policies based on Alaska's Mandatory Denial Statute and Discretionary Denial Statute, which are based on the 1997 ASFA, would be out of date. Also, Alaska's prior policy of initially denying anyone with a conviction within the last five years for controlled substances may violate the Americans with Disabilities Act: "Title II prohibits discrimination against drug addicts based solely on the fact that they previously illegally used controlled substances. Protected individuals include persons who have successfully completed a supervised drug rehabilitation program or have otherwise been rehabilitated successfully and who are not engaging in current illegal use of drugs. Additionally, discrimination is prohibited against an individual who is currently participating in a supervised rehabilitation program and is not engaging in current illegal use of drugs. Finally, a person who is erroneously regarded as engaging in current illegal use of drugs is protected." THE AMERICANS WITH DISABILITY ACT: TITLE II TECHNICAL ASSISTANCE MANUAL § II-2.3000.

207. Since 2005, the United States Supreme Court has issued five cases distinguishing juvenile delinquents from adult offenders. *See Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the imposition of the death penalty for crimes committed by juveniles is cruel and unusual punishment); *Graham v. Florida*, 560 U.S. 48 (2010) (holding that it is unconstitutional to impose life imprisonment without the possibility of parole on juveniles for non-homicide crimes); *J.D.B. v. North Carolina*, 564 U.S. 261 (2011) (holding that a child's age is a factor when defining "custody" for the purposes of a *Miranda* warning); *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that juveniles cannot be sentenced to life without the possibility of parole for homicide crimes without taking into account mitigating factors).

B. REPEAL THE PRIMA FACIE SECTION OF THE STATE STATUTE

Currently, Section 100(m) allows the Department to assert prima facie evidence of good cause not to place a child with an adult family member if the family member would not be eligible for a foster care license.²⁰⁸ Section 100(m) should be repealed for two reasons.

First, Section 100(m) does not comply with ICWA, as it is currently interpreted. In 2016, the BIA issued regulations on the application of ICWA. The regulations state that the “party seeking departure from the [ICWA] placement preferences should bear the burden of proving by clear and convincing evidence that there is ‘good cause’ to depart from the placement preferences.”²⁰⁹ Federal regulations do not give parties opposing placement preferences an opportunity to assert prima facie evidence based on the proposed caregiver’s ability to obtain a foster care license.²¹⁰ The considerations for deviation from compliance with ICWA are the request of a parent, the request of a child, sibling attachment through a particular placement, the child’s extraordinary needs, and the unavailability of a suitable placement.²¹¹ If the BIA interpreted ICWA to mean the suitable placement must have the ability to pass state foster care licensure, then the BIA would have issued that regulation. Instead, the Federal Register commentary on the 2016 regulations noted:

ICWA must be interpreted as providing meaningful limits on the discretion of agencies and courts to remove Indian children from their families and Tribes, since this is the very problem that ICWA was intended to address. Accordingly, the final rule identifies specific factors that should provide the basis for a finding of good cause to deviate from the placement preferences.²¹²

208. ALASKA STAT. § 47.14.100(m) (2016) (“Prima facie evidence of good cause not to place a child with an adult family member . . . includes the failure to meet the requirements for a foster care license under AS 47.32 and regulations adopted under AS 47.32, taking into account a waiver, variance, or exemption allowed under AS 47.32.030(a)(3) and 47.32.032. Prima facie evidence of good cause not to place a child with an adult family member or adult family friend does not include poverty or inadequate or crowded housing.”).

209. 25 C.F.R. § 23.132(b) (2017).

210. See generally *id.* § 23.132 (indicating no mention of foster care license eligibility to be a caregiver).

211. 25 C.F.R. § 23.132(c).

212. Indian Child Welfare Act Proceedings, 81 Fed. Reg. 114, 38,778, 38,844 (June 14, 2016).

In its commentary about the rule the BIA noted further:

Recognizing the benefits of placements with family and within communities, Congress has repeated its emphasis on such placements in subsequent statutes in the years since it passed ICWA. For example, in order to obtain Federal matching funds, a State must consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets *all relevant State child protection standards*, and must exercise “due diligence” to identify, locate, and notify relatives when children enter the foster care system.²¹³

The BIA’s commentary regarding “all relevant State child protection standards” is about the ability of the child to live safely with the relative, not the relative’s ability to achieve a foster care license.

When Congress enacted ICWA, it specified that “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.”²¹⁴ The regulations are an equitable response from the federal government to prior state court decisions from across the country that did not follow ICWA. The regulations were expressly adopted to ensure greater uniformity with ICWA compliance.²¹⁵

With Alaska Native children making up more than half of the children in foster care,²¹⁶ it is not logical for Alaska to have statutes that do not comport with ICWA. It is not enough to recognize that the BIA regulations supersede this state statute. Repeal of Section 100(m) is the best practice because it will reduce the burden on frontline workers by giving them one set of rules to follow. Such clarity will increase the number of children placed with relatives.

The Department should support this proposal because it aligns with its goal to “[e]mbrace the spirit and values of ICWA to ensure Alaska Native children are with their families and community.”²¹⁷ In 2016, the Department indicated that it plans to implement that goal through “policy and practice changes to align the interpretation of ICWA with the original legislative intent” and by “implement[ing] processes that increase the number of children placed with family in their own

213. 81 Fed. Reg. at 38,838–39 (emphasis added) (citations omitted).

214. 25 U.S.C. § 1901(3) (2012).

215. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146–47 (Feb. 25, 2015).

216. Vadapalli & Passini, *supra* note 60, at 4.

217. CLARUS CONSULTING GROUP, TRANSFORMING CHILD WELFARE OUTCOMES FOR ALASKA NATIVE CHILDREN, STRATEGIC PLAN 2016-2020 10 (2016), http://dhss.alaska.gov/ocs/Documents/Publications/pdf/AK-Transforming-Child-Welfare-Outcomes_StrategicPlan.pdf.

communities.”²¹⁸ Nothing in ICWA mandates that relatives must be able to pass the State’s foster care licensing standards in order to prove the relative’s fitness to care for children.

Moreover, incentivizing relatives to obtain foster care licenses to help ease the financial burden of caring for children is good public policy. However, it is bad public policy for a state statute to disincentivize placing children with relatives by granting the Department prima facie evidence that a relative is unfit because the relative will not pass rigorous foster care licensure. Section 100(m), authorizing the Department to establish prima facie evidence against a relative for failure to qualify for a foster care license, contributes to the number of Alaska Native children in non-ICWA compliant homes, and Alaska Native children’s lack of permanency and placements outside their home community. The BIA regulations are the best interpretation of ICWA; the standard for placing with a relative should be the relative’s suitability for the individual child.²¹⁹

The second reason for repeal is that Section 100(m)’s legislative history demonstrates that the Department’s grant of broad power to present prima facie evidence to deny custody was given inadvertently. The prima facie evidence provision of the statute was altered in 2008 and 2012. In 2008, the meaning of prima facie evidence was drastically expanded as the result of a revisor bill.²²⁰ A revisor bill is not intended to change policy.²²¹ But it did just that. In 2012, the legislature stated prima facie evidence must take into account a waiver, variance, or exemption allowed under certain state statutes.

The revisor bill made the Department’s ability to establish prima facie evidence overbroad. As outlined earlier,²²² Alaska spent most of the 2000s substantially rewriting and then implementing background check policies and procedures related to various licenses to be governed by one overarching policy that encompassed more than just foster care licensing.²²³ The product of this reform, the original version of the administrative code, was substantially more restrictive than federal law when applied in the narrower context of foster care licensing and relative

218. *Id.*

219. *See* 25 C.F.R. § 23.132(c)(5) (2017); *see also* Indian Child Welfare Act Proceedings, 81 Fed. Reg. 114, 38,778, 38,838–39 (June 14, 2016).

220. *See* discussion *supra* Part I.B.2.

221. ALASKA S. FIN. COMM. MINUTES, 25th Leg. (Mar. 24, 2008) (Statement of Pamela Finley, Revisor of Statutes, Legislative Legal Counsel at 10:26:18 AM) (testifying that the purpose of the revisor bill was “to make the statutes clean without changing or setting, in any way, the policy.”).

222. *See* discussion *supra* Part I.A.

223. ALASKA ADMIN. CODE tit. 7, § 10.900–90 (2006).

placement.²²⁴ The revisor bill unintentionally expanded what constituted prima facie evidence to include not only all barrier crimes and conditions in the AAC, but also other reasons an applicant can be denied a foster care license, such as housing standards. Recall that 71% of variances related to background check issues arising from the failure to pass a background check under the AAC were granted in 2016.²²⁵

No meaningful debate or public comment was held in the legislature about whether the revisor bill was intended to expand the prima facie evidence that could be used to deny a potential relative caregiver to include so many additional barrier crimes or housing standards. The wide-ranging support for the 2012 amendments, which provided exceptions from the prima facie evidence standard for rural housing and variances for foster care licensing, underscores that the revisor bill did cause policy changes that the legislature had to correct.²²⁶

The 2012 amendments that authorize the Department to take into account waivers and variances make what constitutes prima facie evidence vague. Since the Department has the discretion to grant a variance for any barrier crime or condition to a foster care license,²²⁷ there is no reason to keep Section 100(m). If the legislature limited the Department's ability to establish prima facie evidence by "taking into account waiver, variance, and exemption" allowed under the state statute, then the fact that the Department can grant a variance for any background check barrier would mean that it could not establish prima facie evidence.

The changes to the original meaning of prima facie evidence in Section 100(m) of the Alaska Statutes through the 2008 revisor bill and the 2012 amendment have created an overbroad and inarticulate definition of what constitutes prima facie evidence. Frontline work in child welfare requires clarity.

224. For criminal barriers, compare 42 U.S.C. § 671 (a)(20)(A) (2012), with ALASKA ADMIN. CODE tit. 7, § 10.905 (b)-(f) (2006) (e.g., Alaska's original administrative code created three-year and one-year barrier crimes, which the federal law has never had).

225. See *supra* text accompanying note 147.

226. See *supra* note 101-103 and accompanying text.

227. ALASKA ADMIN. CODE tit. 7, § 10.935(i) (2017) (allowing the commissioner to grant a variance for any barrier crime or condition identified on a background check).

C. ENACT STATUTES GIVING COURTS BETTER GUIDANCE ON ORDERING CHILDREN PLACED WITH RELATIVES

Until Alaska adopts a law clarifying the court's authority to review the Department's placement decisions, relatives will continue to face unnecessary delays in seeking placement of children in foster care. As outlined earlier,²²⁸ the Alaska Supreme Court has rejected the Department's argument that the Department's decision is not subject to court review. However, practitioners on the frontline must look to a variety of sources to demonstrate the court's authority to order a specific placement of children in foster care.

Alaska needs look no further than Washington State for a model statute on court-ordered placements with relatives for children facing foster care:

If the court does not release the child to his or her parent, guardian, or legal custodian, the court shall order placement with a relative or other suitable person . . . unless there is reasonable cause to believe the health, safety, or welfare of the child would be jeopardized or that the efforts to reunite the parent and child will be hindered. If such relative or other suitable person appears otherwise suitable and competent to provide care and treatment, the fingerprint-based background check need not be completed before placement, but as soon as possible after placement. The court must also determine whether placement with the relative or other suitable person is in the child's best interests. The relative or other suitable person must be willing and available to:

- i. Care for the child and be able to meet any special needs of the child;
- ii. Facilitate the child's visitation with siblings, if such visitation is part of the supervising agency's plan or is ordered by the court; and
- iii. Cooperate with the department or supervising agency in providing necessary background checks and home studies.²²⁹

Washington's statute provides clear authority to a trial court to immediately place a child with a relative unless there is reasonable cause to believe placement with the relative would make the child unsafe.

228. See discussion *supra* Section I.C.

229. WASH. REV. CODE § 13.34.065(5)(b) (2017).

Washington is not alone in authorizing courts to order children facing foster care to be placed with a relative or other suitable adult the child knows instead of placement in an unfamiliar foster home. Indiana, New Jersey, and Texas all have similar laws. Indiana authorizes courts to order children placed with relatives “before considering any other [out-of-home] placement.”²³⁰ The New Jersey Supreme Court has affirmed a trial court’s authority to order a child placed with a specific relative if the court found it was in the child’s best interests.²³¹ Texas courts also order children to be placed with specific relatives and other suitable adults after hearing evidence.²³²

Washington’s statute would be the best model for Alaska over other states because of its clarity. Washington’s statute also recognizes the harm in separating children from their families unnecessarily, which is evidenced by the court’s authority to order a child placed with a relative even if the fingerprinted background check has not yet been completed. Alaska would benefit from a similar approach because of its unique geography, which not only encompasses a large rural area that can only be reached by airplane, but which is also subject to frequent weather delays. In other words, expediency is all the more important in Alaska as a lack of swiftness can frequently be compounded by additional delay.

Enacting a statute like Washington’s with regard to placing children with relatives prior to receiving the fingerprint background check results also benefits the Alaska Native community. Alaska’s geographical challenges for completing fingerprint-based background checks disproportionately affect ICWA cases because Alaska Natives are substantially more likely to live in rural Alaska. As noted earlier, the highest rate of removal is in the Western region of Alaska.²³³ In 2014, approximately 71% of people in Yukon-Koyukuk Census Area, which is the largest population concentration in Western Alaska, identified as

230. IND. CODE ANN. § 31-34-4-2(a)(2) (2006).

231. N.J. Div. of Child Prot. & Permanency v. K.N., 126 A.3d 1231, 1234 (N.J. 2015).

232. Texas courts derive this authority from TEX. FAM. CODE ANN. § 153.002 (1995) (“The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.”). Austin’s Model Court frequently uses this practice. Austin is designated a model court by the National Council on Family and Juvenile Court Judges. See NAT’L COUNCIL ON FAMILY AND JUVENILE COURT JUDGES, ENHANCED RESOURCE GUIDELINES 230 (2016), <http://www.ncjfcj.org/sites/default/files/%20NCJFCJ%20Enhanced%20Resource%20Guidelines%2005-2016.pdf> (“Courts should first seek to place children with relatives when placement with a parent is not possible.”).

233. Vadapalli & Passini, *supra* note 60, at 2.

Alaska Native.²³⁴ Nearly all children in foster care in the Western Region are Alaska Native.²³⁵ In Northern Alaska, the other large rural portion of the state, approximately 68% of respondents identified as Alaska Natives.²³⁶ In the rural jurisdictions in Northern Alaska, nearly all children in foster care are Alaska Native.²³⁷ With 85% of the White population living in Alaska's five largest areas in 2000, the White population is "concentrated in the most heavily populated boroughs and census areas, and the Alaska Native population is more rural than the population at large."²³⁸ White foster children therefore do not generally face the same challenges as Alaska Native foster children.

Indeed, Alaska's current law allows for non-fingerprint based background checks.²³⁹ However, this timesaving measure to reduce harm to children in care is hardly, if ever, used. The Department's policy manual on this issue is dense for frontline caseworkers facing an emergency decision on where a child lives.²⁴⁰ Departmental policy also requires a fingerprint-based background check for non-emergency

234. ALASKA DEP'T OF LABOR AND WORKFORCE DEV., ALASKA POPULATION OVERVIEW 2014 ESTIMATES 61 (May 2016), <http://live.laborstats.alaska.gov/pop/estimates/pub/14popover.pdf>. This percentage is derived from individuals who reported being of one race alone or in combination. With a total of 5755 responses, 4093 people identified as Alaska Native/American Indian.

235. Vadapalli & Passini, *supra* note 60, at 4.

236. See ALASKA DEP'T OF LABOR AND WORKFORCE DEV., *supra* note 234, at 61. This percentage is derived from one race alone or in combination. *Id.* This study defines Northern Alaska as the Nome Census Area, the North Slope Borough, and the Northwest Arctic Borough. *Id.* With a total of 29,109 responses, 19,930 identified as Alaska Native/American Indian. *Id.*

237. The Department includes Fairbanks when providing numbers for its Northern Regional Office. *Id.* However, if Fairbanks, an urban setting in Alaska, is removed, the Northern Region would include the rural jurisdictions referenced in the preceding footnote. *Cf. supra* note 236. Almost all children in foster care in Northern rural jurisdictions are Alaska Native. Vadapalli & Passini, *supra* note 60, at 5 (showing number of children in foster care for the entire Northern Region).

238. GREG WILLIAMS, 2001 ALASKA ECONOMIC TRENDS: RACE AND ETHNICITY IN ALASKA 19 (2001), <http://laborstats.alaska.gov/trends/oct01art2.pdf>

239. ALASKA STAT. § 47.14.100(j) (2016).

240. The Office of Children's Services Policy Manual has a section on placing with a relative in an emergency, both licensed and unlicensed. The manual instructs workers to "follow the background check procedures in 3.5.5 Background Checks for placement resources." See ALASKA OFFICE OF CHILDREN'S SERVS., *supra* note 6, at § 3.5.1 Procedure B. The worker is then expected to review a twelve-page section in an emergency that frequently references the law requiring fingerprint-based background checks. See *id.* § 3.5.5 Background Information A.1.b. ("The criminal background checks must be fingerprint based."); see also *id.* § 3.5.5 Background Information B. ("State regulations require a fingerprint-based criminal background check of . . . foster care applicants."). The manual does allow for a non-fingerprint-based background check in emergency situations. *Id.* 3.5.5.A. POLICY A.2.a.

placements of children with unlicensed relatives.²⁴¹ Thus, by policy, the Department is never using this statute to reduce children living in non-ICWA compliant placements if it considers the placement option a non-emergency situation.

Alaska originally vested authority in the Department to direct specific placements for children in its custody because of the Department's expertise in childcare licensing.²⁴² However, the 2016 Annual Staff Survey acknowledging the lack of training and experience of front line caseworkers coupled with the June 2017 Alaska Office of the Ombudsman reports, along with the Department's own response to the Ombudsman's reports admitting that those incidents are not isolated, demonstrate that the Department needs help. The Department has many frontline practitioners and attorneys who are hardworking and dedicated to their field. But the immense institutional strain leads to mistakes. Alaska, and the children in foster care that Alaska owes a duty to, would be better served with a statute that properly vests clear review standards for courts.

CONCLUSION

The reality of the child welfare system in Alaska is that frontline caseworkers are overworked and undertrained. This results in delays and mistakes, even when frontline workers strive to support the families they are assigned to help. As the Department's own Director has said, "the job is impossible."²⁴³

The proposals contained herein help everybody. Alaska can adopt the Model Licensing Standards for background checks for foster care licensing. Concise rules for evaluating relative background checks and increasing a relative's ability to receive a foster care license would more quickly ensure more children are placed with their families because

241. *Id.* 3.5.5.A. POLICY A.2.b. ("Non-Emergency Placements with Unlicensed Relatives: Fingerprint based checks on all individuals in the household 16 years of age or older will be conducted prior to placement.").

242. *In re B.L.J.*, 717 P.2d 376, 380 (Alaska 1986) ("The legislature has committed placement decisions to the Department's discretion. The various statutory provisions indicate that the Department, not the court, has expertise on the availability and suitability of placements for minors in its legal custody."); *see also In re B.L.J.*, 717 P.2d 376, 380 n.4 (Alaska 1986). ("The Department licenses and supervises foster and group homes, institutions and nurseries and it purchases residential services for minors it has a responsibility for under AS 47.10. . . . It establishes standards of care and regulations desirable for the health, education and welfare of every child.").

243. Hillman, *supra* note 168.

frontline workers would have a better tool. Controlling for Departmental error by adjusting the background check policies should also reduce how often the court hears appeals about relatives being denied.

Additionally, Alaska should repeal Section 100(m) regarding the Department's prima facie evidence against a relative if the relative cannot obtain a foster care license. The current Alaska licensing system results in unnecessary initial denials of relatives based on their background checks, which is evident in the high percentage of variances granted to relatives. It also does not comport with the BIA's regulations on interpreting placement preferences under ICWA. With so many Alaska Native children in care, Alaska's laws should conform to ICWA to reduce confusion. Lastly, the history of the statute shows the definition of prima facie evidence has become overbroad and vague over time.

Finally, Alaska should enact a statute delineating the court's authority to direct placement of children in foster care with relatives. Busy frontline stakeholders will make errors without clear direction. The Alaska Supreme Court already acknowledges courts in Alaska are vested with authority to review the Department's placement decisions. Adopting a statute like Washington State's would result in less confusion and more compliance with placing children with appropriate relatives.

The last ten years have shown that a one-size-fits-all system of background checks is not ideal when that system is applied to Alaska's child welfare system. The legislature has already amended state statutes to carve out specific protections for children facing foster care so they do not languish in non-relative care when a relative may be available. The Alaska Supreme Court continues to rule that relatives who are denied placement are entitled to court review. Now the BIA has issued regulations on how to determine whether there is good cause to deviate from ICWA's placement preferences. This is the time to initiate reform.