

# Chapter 30: Integrating Culture, Customs, Traditions, and Generally Accepted Practices

## [30.1] Overview

Tribal leaders, legislators, and judges today repeatedly face the task of identifying custom and factoring it into their policymaking. They must also consider when and how to incorporate custom into tribal legislation and into the written decisions of the tribal court. There are important questions concerning the transparency of the respective processes (the decision-making processes of the executive, legislative, or adjudicative branches), the reliability of the sources and characterizations of custom, and the relevancy and applicability of custom to the problems or disputes being addressed.<sup>53</sup>

Working with culture, customs, traditions, and generally accepted practices (CCTGAPs) in both the drafting of tribal laws and in the application of those laws by the tribal courts and justice system personnel can be challenging. Some critics argue that such undertakings romanticize tribal governance and law and/or that they will result in the application of old, out-of-date, or simply wrong principles. Others argue that custom and tradition are too hard to work with or that they are inefficient or lack the status of being “legal.” However, these criticisms are based in a misunderstanding of both the purpose of these undertakings and the nature of custom and tradition.

Many tribal governments today are under a legal duty under their own written laws to identify, respect, and at least to consider the incorporation of persisting legal norms (also known as CCTGAPs) arising from local (often traditional) groups within their communities. These “legal norms” are original, naturally arising law—the glue that has kept and continues to keep people in Native communities together. Tribal governments are also under a duty to ensure that their legal institutions and laws reflect principles that seem just or fair to their people in the given tribal culture. This includes a duty to reform to keep in step with the changing values and expectations of Native community members.

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<sup>53</sup> Pat Sekaquaptewa, “Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking,” 32 *AM. INDIAN L. REV.*, 319, 329 (2007-2008).

Unfortunately, many, if not most tribes today have inherited “boilerplate law” drafted by non-Natives, usually U.S. government officials, based on Western models but then often modified in curious ways by bureaucratic fiat. Recognition of this fact by Native legal scholars has resulted in cries for the reform of tribal constitutions, codes, rules, and in the tribal common law. As one Native scholar has put it:

[W]e are at an opportune moment to critically appraise our systems and evaluate them using native ideals and taking into consideration the native world view. It is the particular responsibility of native lawyers, practitioners, professionals, and advocates working with tribal justice systems to assess the current situation of tribal courts and to determine the future course. . . .<sup>54</sup>

This chapter seeks to inform a critical appraisal of existing tribal children’s and juvenile law (a.k.a. “codes”), to spur an evaluation of Western-influenced statutory provisions, and to prompt Native communities to explore their local values and ways in the reconceptualization and reform of their children’s and juvenile law(s).

There are three important considerations to keep in mind in making written custom law: (1) many Native people are horrified at the prospects of having their customs and traditions put into writing so it will be critical to explain why this is needed, how it will work, and to include them in crafting the laws. This can be accomplished by establishing a custom documenting committee working parallel to your law drafting committee; (2) in considering custom law, both committees and judges must consider the reliability of the sources and characterizations of custom, and the relevancy and applicability of the defined custom to the problems or disputes being addressed; and (3) most tribal legal scholars argue that the choice of enforcement of customs should be left up to tribal judges, who deal with real parties in real time with live issues, rather than to law makers, as legislation tends to freeze custom in time and lawmakers cannot predict or provide rules for all future variations of an issue or problem. Nevertheless, there are some procedural and substantive matters that are well suited and necessary to be legislated (see the list in following text).

Key statutory provisions for working with CCTGAP in a juvenile justice context include:

- setting out the values and purposes of the law;
- defining youth and family bills of rights, duties, and obligations;
- mandating the choice of law to be applied by the juvenile court;
- creating a process for finding CCTGAP;
- creating requirements for juvenile judges applying CCTGAP in court;

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<sup>54</sup> Christine Zuni, “Strengthening What Remains,” 7 *Kan. J.L. and Pub. Pol’y* 17 (Winter 1997).

- providing notice and participation rights in juvenile court for extended family members;
- mandating cultural education for justice and treatment system personnel;
- defining and authorizing traditional placements, guardianships, and adoptions;
- creating a diversion process to traditional authorities/entities, healers, mentors, and activities; and
- defining CCTGAP restitution and reconciliation.

Reviewing CCTGAP while working through [Chapter 2: Preliminary Choices to Guide Code Development](#) may be helpful.

## [30.2] Tribal Code Examples—Values and Purpose

### THE HOPI CHILDREN'S CODE

#### CHAPTER II - GENERAL

##### A. Purpose

It is the purpose of the Hopi Children's Code to:

1. preserve the unity of the family;
2. provide for the full consideration of religious and traditional preferences and practices of families during the disposition of a matter;
3. provide for the care, protection, mental and physical development of the children of the Hopi Tribe ...

### **Native Village of Barrow Iñupiat Traditional Government Tribal Children's Code \***

#### **4-1 GENERAL PROVISIONS**

##### **4-1-1 B. Purpose and Construction**

The Native Village of Barrow Iñupiat Traditional Government ("NVB Tribe" or "Tribe") hereby establishes the following procedures to protect the best interests of children, and the future of the Tribe and its customs and culture, as authorized by the Constitution of the NVB Tribe. All provisions of this Code shall be liberally construed in order to give effect to the following purposes with regard to child welfare:

1. Protect the best interests of children, prevent the unwarranted breakup of families, maintain the connection of children to their families, their community and the Tribe, and promote the stability and security of the Tribe by establishing tribal standards for the conduct of legal proceedings involving children;
2. Omitted
3. Provide child welfare services to children and families that are in accord with the laws, traditions, and cultural values of the Tribe; and
4. Preserve the opportunity for children to learn about their culture and heritage, and to become productive adult members of the NVB Tribe community, by experiencing their culture on an ongoing basis.

\* Not available online, as of April 2015.

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## **OGLALA SIOUX TRIBE**

### **CHAPTER 4 WAKANYEJA NA TIWAHE TA WOOPE (CHILD AND FAMILY CODE) \* PART A GENERAL AND DEPENDENCY PROVISIONS**

#### **SECTION 401.4—PURPOSE AND CONSTRUCTION**

The Child and Family Code shall be liberally interpreted and construed to fulfill the following expressed purposes:

- (1) To provide for the welfare, care, and protection of the children and families within the jurisdiction of the Oglala Sioux Tribe;
- (2) To preserve the unity of the tiwahe and tiospaye, separating the child from his or her parents, tiwahe and/or tiospaye, only when necessary;
- (3) To take such actions that will best serve the spiritual, emotional, mental, and physical welfare of the child;
- (4) Omitted
- (5) To secure the rights and ensure fairness to the children, parents, guardians, custodians, and other parties who come before the OST Children and Family Court under the provisions of this Code;
- (6) Omitted

- (7) To recognize and reinforce the tribal customs and traditions of the Oglala Lakota Oyate regarding child-rearing;
- (8) To preserve and strengthen children’s cultural and ethnic identities; and
- (9) To provide services and cultural support to children and families to strengthen and rebuild the Oglala Lakota Nation.

**SECTION 402.2—LENA TUWEPI HE/HWO (TRADITIONAL LAKOTA DEFINITIONS)**

- (1) Oyate (“people”): The Lakota People.
- (2) Tiospaye (“extended family”): The root of the Lakota social structure. Tiospaye are comprised of the immediate families of brothers and sisters, their descendants, and relatives adopted through formal ceremony.
- (3) Tiwahe (“family”): A family unit resulting from Hasanipi (a union or partnering of a man and a woman) to raise children and to live according to the laws, ceremonies, and customs of the people.
- (4) Wakanyeja (“child”): A sacred gift from Tunkasila, or Wakan Tanka (the Great Spirit) conceived by the union of a man and a woman. Spirits conduct ceremonies in Nagiyata (the spirit world) to prepare for the child’s entry into earth. Children are given a vision or role for their life on earth. Children are pure and have special powers until around the age of puberty.

**SECTION 402.3—WASICU WOIWANKE (GENERAL DEFINITIONS)**

- (33) **Extended Family Member:** An adult relative of a child who has not been deemed by a court of competent jurisdiction to be a danger to the child, including:
  - (A) The paternal and maternal grandfather and grandmother;
  - (B) Siblings of the grandparents;
  - (C) Father and mother;
  - (D) Paternal and maternal uncle and aunt;
  - (E) Brother and sister;
  - (F) The spouses of persons listed in (A) through (E);
  - (G) Any adult person legally adopted in (A) through (E); and

- (H) Any adult member of the child’s tiospaye, or other adult person adopted by the child’s tiospaye as a relative through a formal ceremony.

## **SECTION 402.1—WOTAKUYE (DEFINITIONS OF LAKOTA KINSHIP)**

### **(a) Background, Tiospaye, and Tiwahe**

- (1) The root of Lakota social structure is the tiospaye—extended family. Tiospaye are comprised of tiwahe, immediate families, as well as individuals adopted through formal ceremony. Equality is a prevailing principle of tiospaye life. Responsibilities are dispersed throughout the tiospaye and no one is above the laws. Social classes do not exist and leaders maintain prominence only insofar as they carry out the wishes of the people. Historically, tiospaye were self sufficient and life revolved around them. However, Federal policies and initiatives that accompanied reservation life promoted the assimilation of the Lakota into mainstream Anglo-American culture and have led to a loss of some of the strengths of the tiospaye lifestyle.
- (2) Among the strengths of traditional tiospaye life and the strong emphasis on kinship was that children never really became orphans. Upon birth, they had many mothers, fathers, brothers, and sisters. Thus, even though children might lose their natural parents, relatives stepped forward and assumed parental responsibilities. Furthermore, kinship customs minimized violence, conflicts, and disputes within the tiospaye. Few individuals would consider causing trouble among the people, knowing of the consequences they would face from disrespecting relatives. Kinship customs in the historical tiospaye, with few exceptions, promoted a peaceful and harmonious life.

### **(b) Omitted**

### **(c) Elders**

- (1) The first important consideration in traditional kinship is age. We often hear of, “respect your elders.” Elders hold a special place and status in traditional Lakota society. They are revered for their knowledge and wisdom, which they have acquired through lifelong experiences and learning. They are looked upon as the foundation of tiospaye life because they provide the guidance and direction needed by the people to endure from generation to generation.
- (2) Children are taught at an early age to respect their elders. They are also taught to know and to help their relatives. These teachings have a practical application of precluding intermarriages, but are mainly in keeping with the natural laws of respect and generosity. Elders are teachers and counselors in traditional Lakota life. Children

are often sent to them for Wowahokunkiye, lecturing or teaching. This is done particularly when children misbehave or need help. Elders are also called upon to mediate disputes and to help keep peace and harmony within the tiospaye.

- (3) In interactions among tiospaye members, preference is always given to elders. For example, in asking for assistance from a tiwahe or tiospaye, we ordinarily work through the eldest members. We may ask the younger people, but, in most cases, they would need to confer with the elders anyway before our request is either granted or denied. Furthermore, in gatherings, such as meetings, preference is always given to the eldest individuals present.
- (4) They are called upon for the wocekiye (prayer) and woiyaksape (words of wisdom) which always come first in a meeting. Elders always speak first, eat before others, and are made to feel comfortable until the gathering is concluded. If younger people are going to precede elders in any way, such as in speaking, it must be done with the permission or acknowledgment of the elders. In traditional Lakota society, we always give preference to individuals who are older than we are regardless of our relationship to them.

**(d) Addressing Relatives**

Males and females use different terms in some cases to refer to the same relative. For example, a male and female have a cousin named Jake. The male would refer to him as Tahansi or Tahansi Jake. The female would refer to him as Sicesi or Sicesi Jake. We must distinguish between male and female kinship terms in referring to our relatives. Otherwise, we might embarrass ourselves and our relatives by using a term reserved for the opposite gender. This is one of the reasons we are taught at an early age to know our relatives. We need to know them in order to refer to them and to address them in the proper way. By using the proper kinship terms in addressing our relatives, we command a great deal of respect from them. Children and young people who address their relatives by the appropriate kinship terms are admired because they reflect a proper upbringing.

**(e) Making Relatives**

- (1) Tiospaye kinship also goes beyond bloodlines. Individuals are adopted into tiospaye through formal ceremony. Waliyacin means the prelude to the making of relatives; it means that individuals and their families make a commitment to being related which begins the necessary preparations for formal ceremony. The ceremony for making relatives is Hunkapi; individuals may also choose, however, to make relatives through a pipe ceremony and/or gift giving. Women who make relatives, such as taking on a sister, call the ceremony SaWicayapi. Ceremonies for making relatives are purposeful and elaborate. Spirituality is at the root of making relatives; individuals commit

themselves before their tiwahe and tiospaye, and before Wakan Tanka, to be related from that time on.

- (2) In the case of children, the making of relatives is a way for adults to provide a home for orphans, or children who have been abandoned. A father takes on a new son, or a mother a new daughter through formal ceremony. Once parents adopt children in this way, they treat them as they do their own children. Moreover, they acquire all the rights of kinship afforded other children in the tiospaye.

\* Not available online, as of April 2015.

## [30.3] Tribal Code Examples—Rights, Duties, and Obligations

### **Native Village of Barrow Iñupiat Traditional Government Tribal Children’s Code \***

#### **4-3 RESPONSIBILITIES AND RIGHTS REGARDING CHILDREN**

##### **4-3-1 RIGHTS OF CHILDREN**

###### **4-3-1 A. Right to Life**

A child has an inherent right to life, survival, and development, and the right to a standard of living adequate to the child’s physical, mental, spiritual, moral, and social development and reflective of the traditions and cultural values of that child’s people. This right includes the right to nutrition, clothing, shelter, nurturing, and appropriate discipline.

###### **4-3-1 B. Right to Identity**

A child has the right from birth to acquire and form an identity, including name, tribal affiliation, language, and cultural heritage. A child has the right to learn about and preserve his identity throughout his life, including the right to maintain ties to his birth parents, his extended family, and his village. A child has the right to learn about and benefit from tribal history, culture, language, spiritual traditions, and philosophy.

###### **4-3-1 C. Right to Protection**

A child has the right to be protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents, extended family members, or any other custodian. A child has the right to be free from torture or other cruel, inhuman, or degrading treatment or punishment. A child has the right not to face capital punishment or life imprisonment without possibility of release.



#### **4-3-1 D. Right to Health**

A child has the right to enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. Mentally or physically disabled children have the right to enjoy a full and decent life in conditions which ensure dignity, promote self-reliance, and facilitate the child's active participation in the community. All children have the right to periodic review of any medical or mental health treatment.

#### **4-3-1 E. Right to Family**

A child has the right not to be separated from his parents forcibly or against his will, except when competent authorities subject to judicial review determine that such separation is necessary for the best interest of the child. In case such separation is necessary, a child shall have the right wherever possible not to be separated from other members of his immediate and extended family.

A child temporarily or permanently deprived of his family environment shall be entitled to special protection and assistance provided by the Tribe, which shall strive to ensure continuity in the child's upbringing and the maintenance of ethnic, cultural, religious, and linguistic heritage.

#### **4-3-1 F. Right to Education**

A child has the right to education, including academic, physical, and cultural teachings, and training on how to safely undertake subsistence activities and other potentially dangerous work.

#### **4-3-1 G. Right to be Heard**

A child who is capable of forming his own views has the right to express those views freely in all matters, including judicial proceedings, affecting that child and those views shall be given due weight in accordance with the age and maturity of the child.

#### **4-3-1 H. Right to Due Process**

A child has the right not to be deprived of his liberty unlawfully or arbitrarily. Every child deprived of liberty shall have the right to challenge the deprivation of liberty and the right to appropriate judicial review. A child shall at all times be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of a person of his age.

### **4-3-3 RESPONSIBILITIES AND RIGHTS OF EXTENDED FAMILY MEMBERS**

#### **4-3-3 A. Common Responsibility for Children**

Extended family members have secondary, common responsibility for the upbringing and development of children in their family. This includes ensuring each child's inherent right to life, survival, and development and to a standard of living adequate to the child's healthy physical, mental, spiritual, moral, and social development and reflective of the traditions and cultural values of that child's people. The best interests of the child shall be their basic concern.

#### **4-3-3 B. Responsibility to Foster Identity**

Extended family members are responsible for helping children acquire and form identities, including name, tribal affiliation, language, and cultural heritage.

#### **4-3-3 C. Responsibility to Nurture and Discipline**

Extended family members are secondarily responsible for nurturing children and for administering appropriate discipline to children.

#### **4-3-3 D. Responsibility for Protection**

Extended family members are responsible for helping to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, torture, or other cruel, inhuman, or degrading treatment or punishment.

#### **4-3-3 E. Responsibility to Assist**

Extended family members have a responsibility to intervene or assist when necessary to protect a child's rights and well-being, and to ensure the continuity of the child's upbringing and the maintenance of the child's ethnic, cultural, religious, and linguistic heritage.

\* Not available online, as of April 2015.

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## **OGLALA SIOUX TRIBE**

### **CHAPTER 4 WAKANYEJA NA TIWAHE TA WOOPE (CHILD AND FAMILY CODE) \***

#### **PART A GENERAL AND DEPENDENCY PROVISIONS**

#### **SECTION 403—CHILDREN'S AND FAMILY RIGHTS**

##### **§403.1 WAKANYEJA TA WOWASAKE (TRADITIONAL CHILDREN'S RIGHTS)**

- (a) All children have the rights set out in subsection (b), and all decisions concerning children shall be made in consideration and furtherance of these rights. By definition, these rights are in the best interests of the children.

- (b) All children have a right to:
- (1) a mother (Ina);
  - (2) a father (Ate);
  - (3) identify with the traditional way of life (Lakolwicoh'an);
  - (4) learn and speak his or her language (Lakolliyapi);
  - (5) a family (Tiwahenatiospaye);
  - (6) know their relatives (Wotakuye);
  - (7) know the traditional laws, customs, and ceremonies of the people; and
  - (8) live according to and to practice the traditional laws, customs, and ceremonies that govern the people.

#### **§403.2 TIWAHE NA TIOSPAYE TA WOWASAKE (TRADITIONAL FAMILY RIGHTS)**

- (a) Largely because of their primary role in taking care of the children, tiwahe and tiospaye groups also have certain rights as set out in subsection (b). By definition, these rights are in the best interests of the tiwahe and tiospaye, and in turn they are therefore in the best interests of the children for whom the groups care.
- (b) Tiwahe and tiospaye have a right, and corresponding responsibilities, to:
- (1) Wicozani—to make choices and decisions to live a healthy and prosperous life according to the traditional laws, customs, and ceremonies;
  - (2) Igluhapi—to make choices and decisions to establish economic, political, educational and cultural self sufficiency, and to maintain privacy according to the traditional laws, customs, and ceremonies;
  - (3) Woose Gluhapi—to live and function according to the traditional laws, customs, and ceremonies; and to protect and nurture such laws, customs and ceremonies;
  - (4) Woitanca—to select and designate leaders to serve the people and to promote the common good according to the traditional laws, customs, and ceremonies; and

- (5) Woilake—to select and designate such official officers and workers as the tiospaye deem necessary to serve the people and to promote the common good according to the traditional laws, customs, and ceremonies.

#### **SECTION 401.5—OYATE TA WOOPE-TRADITIONAL LAWS TO GOVERN DECISIONS EFFECTING CHILDREN**

- (a) This Code reincorporates familial practices retained, sometimes even unknowingly, by our people. We have retained many traditional practices in spite of a history of attempts to outlaw or prevent the practice of our culture. These practices are rooted in our history and our language, and they arose naturally over a long period of time or as gifts from Wakan Tanka to aid in harmonious living with each other and our natural world.
- (b) The following traditional laws shall be considered and reinforced where the future of a child is decided or influenced, including in processes governed by this Code. Approximate English translations are provided, but the Lakota terms shall govern:
  - (1) Wocekiye (“faithfulness”)—To believe in and pray to Tunkasila, or Wakan Tanka—the Great Spirit—as the supreme being and power, and as the creator of all that is. Wakan Tanka gave the people seven sacred ceremonies as means of cleansing themselves and seeking guidance and direction from the Great Spirit. The ceremonies, in the order they were given to the people, are: (i) Inipi (purification); (ii) Hanbleceyapi (seeking a vision); (iii) Wiwangwacipi (Sun dance); (iv) Hunkapi (making of relatives); (v) Nagi Gluhapi (keeping of the spirit); (vi) Isnati Awicalowanpi (womanhood ceremony); (vii) Tapa Wankayeyapi (throwing of the ball).
  - (2) Wowacinksape (“wisdom”)—To be sound in mind and to acquire the knowledge necessary to make proper and effective decisions for the well-being of the people.
  - (3) Wonagiksape (“spirituality”)—To be sound in spirit and to live according to the laws, direction, and guidance of Tunkasila.
  - (4) Wowacintanka (“fortitude”)—To exercise self control and discipline and to have the strength of mind to endure pain and adversity.
  - (5) Wowaunsila (“generosity”)—To look after the well-being of others, and to share one’s knowledge and materials so that others may prosper.
  - (6) Wawoyuonihan (“respect”)—To respect oneself and the rights, beliefs, and decisions of others.

- (7) Wowahokunkiye (“guidance and counseling”)—To advise, counsel, and guide others in the proper ways and beliefs of the people, especially the youth.

\* Not available online, as of April 2015.

## [30.4] Tribal Code Examples—Choice of Law

### RESOLUTIONS OF HOPI TRIBE

#### Hopi Resolution H-12-76

##### Section 2. Precedential Authority for Trial Courts

- (a) The Courts of the Hopi Tribe, in deciding matters of both substance and procedure, in cases otherwise properly before the Courts of the Hopi Tribe, shall look to and give weight as precedent to, the following:
  - (1) The Hopi Constitution and Bylaws;
  - (2) Ordinances of the Hopi Tribal Council;
  - (3) Resolutions of the Hopi Tribal Council;
  - (4) Customs, traditions and culture of the Hopi Tribe;
  - (5) Laws, rules and regulations of the Federal Government and cases interpreting such. Such laws, rules and regulations may, in circumstances dictated by the Supremacy Clause of the U.S. Constitution, be required to take a higher order or precedence.
  - (6) The laws and rules, and cases interpreting such laws and rules, of the State of Arizona. This provision shall not be deemed to be an adoption of such laws or rules as the law of the Hopi Tribe nor as a grant or cession of any right, power or authority by the Hopi Tribe to the State of Arizona.
  - (7) The Common law
- (b) The Courts of the Hopi Tribe shall not recognize nor apply any federal, state, or common law rule or procedure which is inconsistent with either the spirit or the letter of either the Hopi custom, traditions, or culture of the Hopi Tribe, unless otherwise required, in the case of federal law, by the Supremacy Clause of the U.S. Constitution.

**Stockbridge-Munsee Tribe**

**[Chapter 1 Tribal Court Code](#)**

**Section 1.3 Purpose and Construction**

**B. Construction.**

This code is exempted from the rule of strict construction. It shall be read and understood in a manner that gives full effect to the purposes for which it is enacted. Whenever there is uncertainty or a question as to the interpretation of certain provisions of this code, tribal law or custom shall be controlling and where appropriate may be used based on the written or oral testimony of a qualified tribal elder, historian, or other representative.

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**Native Village of Barrow Iñupiat Traditional Government**

**Tribal Judicial Code \***

**3-11 ORDER OF AUTHORITY**

**3-11 A. Mandatory Authorities**

The Tribal Court, in deciding matters of both substance and procedure, in cases otherwise properly before the Tribal Court, shall look to and give weight as precedent to the following mandatory authorities in the following order:

1. The Constitution and Bylaws of the NVB Tribe;
2. Agreements with other tribes entered into by the NVB Tribal Council;
3. Statutes of the NVB Tribe;
4. Resolutions of the NVB Tribe;
5. Common law of the NVB Tribal Court; and
6. Customs and traditions of the NVB Tribe.

**3-11 B. Persuasive Authorities**

If an issue cannot be resolved by reliance on the above authorities, the Tribal Court may look to the following foreign sources of law as persuasive authority only (in no particular order:

1. Federal laws and regulations applicable to or affecting Iñupiat people;
2. Federal common law;

3. Statutory and common law of other tribes;
4. International law;
5. Common law of the State of Alaska;
6. Common law of other states.

### **3-8 E. Conflict of Law Notices**

Any time a Tribal Court judge finds that an inter-tribal agreement, statute, or resolution of the NVB Tribe contravenes the customs or traditions of the NVB Tribe, that judge shall issue a written notice of the conflict to the Tribal Council and shall ensure that a copy of the relevant opinion accompanies such notice.

\* Not available online, as of April 2015.

## **[30.5] Tribal Code Examples—Process for Finding Culture, Customs, Traditions, and Generally Accepted Practices**

### **Native Village of Barrow Iñupiat Traditional Government Tribal Judicial Code \***

#### **3-5 TRIAL COURT**

(3-5 A. and 3-5 B. Omitted)

#### **3-5 C. Judicial Notice of Custom**

The court may take judicial notice of Iñupiat custom or tradition only if the court finds the custom or tradition to be generally known and accepted within the NVB Tribal community. Parties need not plead and prove the existence of a custom when the court has taken judicial notice of it. The taking of judicial notice shall not dispense with a required showing of relevancy.

#### **3-5 D. Notice and Pleading of Custom**

A party who intends to raise an issue of Iñupiat custom or tradition shall give notice to the other party and the court through its pleading or other reasonable written notice as soon as its relevance becomes apparent. The proponent of custom or tradition must then plead it to the court with sufficient proof to establish by a preponderance of the evidence that the custom or tradition exists and that it is relevant to the issue before the court. The relevancy of Iñupiat custom or tradition as to any legal matter shall not be presumed.

### **3-5 E. Certification of Custom Questions**

If the judge cannot take judicial notice of custom or tradition or if a question or dispute arises as to the existence or substance of custom or tradition, the court shall certify that question to the Elders Council.

### **3-5 F. Right of Parties to Petition for Recertification**

Where a question of custom or tradition law has been decided in a previous case, any party may petition the court to recertify that question to the Elders Council under the facts of the new case.

## **3-7 ELDERS COUNCIL**

### **3-7 A. Establishment of Elders Council**

An Elders Council is hereby established to resolve questions or disputes about the customs and traditions of the Iñupiat. The Elders Council shall decide such questions only when certified to them by a Tribal Court judge pursuant to Section 3-5 E or 3-5 F of this Code. Questions about customs or traditions shall be reviewed by the Elders Council de novo. The Elders Council shall not decide questions of fact or relevancy.

### **3-7 B. Composition**

The Elders Council shall be comprised of three (3) elders appointed by the Tribal Council.

### **3-7 C. Written Findings**

The Elders Council shall issue written findings of custom for each question of custom or tradition that comes before it. One copy of these findings shall be transmitted to the Trial Court and a second copy shall be maintained in a file for future reference by the Elders Council.

### **3-7 D. Effect of Decision**

A decision of the Elders Council shall not be binding as precedent until it is incorporated into an opinion of the Tribal Court.

### **3-7 E. Custom Law Treatises**

The Elders Council shall engage in ongoing documentation of custom and tradition in the following areas and in any other areas deemed necessary and funded by Tribal Council:

1. How boys and girls are raised;
2. How property is distributed, transferred, and inherited; and



3. Roles and duties in marriage.

This documentation shall be preserved in a searchable video archive, where possible and funded by Tribal Council, or on audio tapes and video tapes, and in written transcripts.

\* Not available online, as of April 2015.

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**OGLALA SIOUX TRIBE**

**CHAPTER 4 WAKANYEJA NA TIWAHE TA WOOPE (CHILD AND FAMILY CODE) \***

**PART A GENERAL AND DEPENDENCY PROVISIONS**

**SECTION 412.1—BACKGROUND, NAME, PURPOSE**

(a) Background

(1) Omitted

(2) The Tiospaye Navicakicijinpi, Tiospaye Advisory Council, is hereby established to ensure that these concepts, protocols, and definitions are properly understood, enforced, and interpreted. The Advisory Council shall consist of Oglala tribal members who have demonstrated knowledge of all aspects of traditional Lakota life—language, history, culture, philosophy, and spirituality.

(b) Omitted

(c) Purposes

(1) Omitted

(2) The Advisory Council also shall be empowered to issue official opinions on decisions of the Children and Family Court if the Council feels that such decisions are inconsistent with the provisions of the Child and Family Code. Such opinions shall be submitted to the Chief Judge of the Tribal Court, the Supreme Court, and to the members of the Judiciary Committee. The following purposes delineate the work of the Advisory Council:

(A) To promote, sustain, and support the Child and Family Code, Wakanyejana Tiwahe Ta Woope, and all provisions thereof;

(B) To answer certified questions from the Children and Family Court judge;

- (C) To promote, sustain, and support a Lakota perspective in all aspects of enforcing and interpreting the Child and Family Code, Wakanyeja Na Tiwahe Ta Woose, and all provisions thereof;
- (D) To advise and counsel judges, attorneys, and other advocates involved in child and family issues on matters pertaining to the enforcement and interpretation of the Child and Family Code, particularly with respect to the Lakota concepts, protocols, and definitions contained in the Code;
- (E) Omitted
- (F) To serve as intermediaries and/or interpreters in any and all matters arising of the enforcement and interpretation of the Child and Family Code, upon the request of court personnel, other program personnel involved in child and family issues, tiwahe, or tiospaye;

#### **§412.2 QUESTIONS CERTIFIED FROM CHILDREN AND FAMILY COURT**

- (a) If the Children and Family Court judge cannot take judicial notice of custom or tradition or if a question or dispute arises as to the existence or substance of custom or tradition, the judge shall certify that question to the Tiospaye Nawicakicijinpi, Tiospaye Advisory Council.
- (b) The Tiospaye Advisory Council shall resolve questions or disputes about the customs and traditions certified to them by a Children and Family Court judge. Questions about customs or traditions shall be reviewed by the Tiospaye Advisory Council de novo. The Council shall not decide questions of fact or relevancy.
- (c) The Tiospaye Advisory Council shall issue written findings of custom for each question of custom or tradition that comes before it. One copy of these findings shall be transmitted to the Children and Family Court for use in its proceedings and a second copy shall be maintained in a file for future reference by the Council.
- (d) A decision of the Tiospaye Advisory Council shall not be binding as precedent until it is incorporated into an order of the Children and Family Court.

#### **§412.3 ONGOING COMPILATION OF CUSTOM LAW TREATISES**

The Tiospaye Advisory Council shall engage in ongoing documentation of custom and tradition in the following areas and in any other areas deemed necessary and funded by Tribal Council:

- (1) How boys and girls are raised;

- (2) How property is distributed, transferred, and inherited; and
- (3) Roles and duties in marriage.

This documentation shall be preserved in a searchable archive, where possible and funded by Tribal Council, or on audio or video tapes or in some other digital form, and in written transcripts.

\* Not available online, as of April 2015.

## [30.6] Tribal Code Examples—Notice and Participation Rights for Extended Family

### **OGLALA SIOUX TRIBE**

#### **CHAPTER 4 WAKANYEJA NA TIWAHE TA WOOPÉ (CHILD AND FAMILY CODE) \***

##### **PART A GENERAL AND DEPENDENCY PROVISIONS**

#### **SECTION 408.8—RIGHTS OF THE PARTIES TO PROCEEDINGS—CHILDREN’S RIGHTS**

In addition to rights defined in Section 403.1, explaining Wakanyeja Ta Wowasake, a child involved in [a] Child in Need of Care case shall have a right to each of the following:

- (1. and 2. Omitted)
- (3) To have tiwahe and tiospaye members present at all stages of the proceedings;
- (4) To have tiwahe and tiospaye members speak on the child’s behalf if the child so requests;

#### **SECTION 402.2—LENA TUWEPI HE/HWO (TRADITIONAL LAKOTA DEFINITIONS)**

- (1) Omitted
- (2) Tiospaye (“extended family”): The root of the Lakota social structure. Tiospaye are comprised of the immediate families of brothers and sisters, their descendants, and relatives adopted through formal ceremony.
- (3) Tiwahe (“family”): A family unit resulting from Hasanipi (a union or partnering of a man and a woman) to raise children and to live according to the laws, ceremonies, and customs of the people.

### **SECTION 402.3—WASICU WOIWANKE (GENERAL DEFINITIONS)**

- (33) Extended Family Member: An adult relative of a child who has not been deemed by a court of competent jurisdiction to be a danger to the child, including:
- (a) The paternal and maternal grandfather and grandmother;
  - (b) Siblings of the grandparents;
  - (c) Father and mother;
  - (d) Paternal and maternal uncle and aunt;
  - (e) Brother and sister;
  - (f) The spouses of persons listed in (A) through (E);
  - (g) Any adult person legally adopted in (A) through (E); and
  - (h) Any adult member of the child's tiospaye, or other adult person adopted by the child's tiospaye as a relative through a formal ceremony.

(Sections Omitted)

### **SECTION 406.8—EMERGENCY REMOVAL OF CHILD—NOTICE TO PARENT, GUARDIAN OR CUSTODIAN, AND TIOSPAYE**

The LOWO Division of Child Protective Services shall make all reasonable efforts to notify the parents, guardian or custodian, as soon as possible and not later than twelve (12) hours after the removal of the child from the home. Reasonable efforts shall include personal, telephone, and written contacts at the residence, place of employment, or other location where the parents, guardian or custodian are known to frequent with regularity. Notice shall also be given to the child's Tiospaye Interpreter(s).

### **SECTION 408.1—STATEMENT OF PURPOSE OF SECTION [ADJUDICATION AND DISPOSITION]**

- (c) The Children and Family Court shall direct the Clerk of the Tribal Court to provide notice of all hearings under Section 408 to the appropriate Tiospaye Interpreter(s) who in turn shall be responsible for notifying the appropriate members of a child's and the child's parent(s)' guardian's, or custodian's Tiospaye. Notice under this paragraph does not relieve the LOWO Division of Child Protective Services from its own notice or collaboration requirements with Tiospaye Interpreters under other provisions of this Code.

\* Not available online, as of April 2015.

**Native Village of Barrow Iñupiat Traditional Government  
Tribal Children’s Code \***

**4-3-3 RESPONSIBILITIES AND RIGHTS OF EXTENDED FAMILY MEMBERS**

(Sections Omitted)

**4-3-3 F. Right to Notice**

Any member of a child’s extended family currently residing in the Native Village of Barrow has the right to be timely noticed by the court of any judicial or other proceeding involving that child.

**4-3-3 G. Right to be Heard**

Any member of a child’s extended family who comes forward in a timely manner has the right to be heard in any judicial or other proceeding involving that child ...

**4-3-3 I. Right to Request a Family Conference**

Any member of a child’s extended family has the right to request a family conference pursuant to Subchapter 4-5-2 of this Code.

**Section 4-2 Definitions**

15. Extended Family Member: Any adult sibling, grandparent, aunt, uncle, great aunt, great uncle, or cousin of the child, including adoptive adult siblings, grandparents, aunts, uncles, great aunts, great uncles, and cousins. Extended family members have certain rights and responsibilities with respect to children.

\* Not available online, as of April 2015.

# [30.7] Tribal Code Examples—Cultural Education for Personnel

## **OGLALA SIOUX TRIBE**

### **CHAPTER 4 WAKANYEJA NA TIWAHE TA WOOPE (CHILD AND FAMILY CODE) \***

#### **PART A GENERAL AND DEPENDENCY PROVISIONS**

#### **SECTION 416—COMPLIANCE OF LOWO OFFICE, DIVISIONS AND COLLABORATING ORGANIZATIONS**

##### **§416.1 BACKGROUND AND PURPOSE**

- (a) It is common knowledge that service providers for children and families on the Pine Ridge Reservation operate for the most part on Western European methods and concepts. This is happening despite the fact that many of the Oglala Lakota tiospaye have been reviving their traditions and customs, and have called for culturally based programs and services. The passage of the Child and Family Code, Wakanyeja Na Tiwahe Ta Woope, which is based on traditional Lakota knowledge, necessitates that service providers now honor the vision of the tiospaye. It is imperative that service providers and their employees and representatives have a sufficient understanding of the traditional Lakota concepts, protocols, and definitions that are contained in this Code.
- (b) Requirements for compliance are hereby established in this Code to ensure that these concepts, protocols, and definitions are properly understood, enforced, interpreted, and followed in the delivery of services to children and families.

##### **§416.2 APPLICABILITY**

The requirements for compliance as defined in this section shall apply to any program, office, agency, association, or entity operating on the Pine Ridge Reservation whose business is to enforce, interpret, apply, or comply with the provisions of this Code. The requirements also apply to any program, office, agency, association, or entity operating on the Pine Ridge Reservation that, by the nature of the services they provide, could cause children and families to be subjected to the provisions of this Code. Programs, offices, agencies, associations, or entities shall be held accountable for the requirements of this section if their mission, purposes, services, or identities can be tied to any of the following areas:

- (1) Law Enforcement;
- (2) Social/Human Services;
- (3) Child Protection;
- (4) Child Advocacy;

- (5) Child Neglect/Abuse;
- (6) Domestic Violence;
- (7) Education;
- (8) Foster Care;
- (9) Medical Care;
- (10) Mental Health Care;
- (11) Adjudication; or
- (12) Religion/Culture/Spirituality.

### **§416.3 MEANS OF COMPLIANCE**

- (a) Programs, offices, agencies, associations, or entities shall be expected to comply with the provisions of this Code as defined in this section by initiating the necessary organizational changes and plans using their own resources and at their own expense. Changes and plans shall be directed at adapting the delivery of services to the Lakota concepts, protocols, and definitions contained in this Code. Changes and plans shall be directed also at providing opportunities for staff, board members, volunteers, consultants, and other institutional representatives to develop sufficient knowledge and understanding of the Lakota concepts, protocols, and definitions contained in this Code.
- (b) Among the means by which entities shall be expected to comply are, but not limited to the following:
  - (1) Staff training and orientation;
  - (2) Board training and orientation;
  - (3) Training and orientation for volunteers, consultants, and other representatives of the entities;
  - (4) Restructuring;
  - (5) Revision of policies and procedures; and
  - (6) Revision of statements of mission, philosophy, vision, or purposes.

\* Not available online, as of April 2015.

# [30.8] Tribal Code Examples—Traditional Placements, Guardianships, and Adoptions

## LAW AND ORDER CODE OF THE ROSEBUD SIOUX TRIBE

### **TITLE TWO - DOMESTIC RELATIONS**

#### **CHAPTER TWO ADOPTION**

##### **§ 2-2-7 Ecagwaya or Traditional Adoption**

**2-2-7 ECAGWAYA or TRADITIONAL ADOPTION**—means according to Tribal custom, the placement of a child by his natural parent(s) with another family but without any Court involvement. After a period of two years in the care of another family, the Court upon petition of the adoptive parents will recognize that the adoptive parents in a custom or traditional adoption have certain rights over a child even though parental rights of the natural parents have never been terminated. Traditional adoption must be attested to by two reliable witnesses. The Court, in its discretion, on a case-by-case basis, shall resolve any questions that arise over the respective rights of the natural parent(s) and the adoptive parent(s) in a custom adoption. The decision of the Court shall be based on the best interests of the child and on recognition of where the child's sense of family is. Ecagwaya is to raise or to take in as if the child is a biological child.

## **Native Village of Barrow Iñupiat Traditional Government**

### **Tribal Children's Code \***

#### **4-5-5 IÑUGUUQ [TRADITIONAL ADOPTION]**

##### **4-5-5 A. Definition**

Iñuguuq, meaning “to raise,” refers to a traditional Iñupiat adoption process in which a child gains, but does not lose, a parent. This procedure shall not terminate the rights of the birth parent.

##### **4-5-5 B. Who May Adopt**

Any adult at least ten (10) years older than the child in question may file a petition for Iñuguuq adoption. Where the petitioner has made an agreement with the birth parent, the birth parent shall be made a party to the petition. In the case of married persons maintaining a home together, both spouses shall be petitioners except that, if one of the spouses is the birth parent of the child to be adopted, the birth parent shall not be a party to the petition. A married person legally separated may adopt without the participation of her spouse.



The court shall order the Social Services Department to perform a background check on all prospective adoptive parents in order to ensure the safety of the child, and no person shall be approved as an adoptive parent under this Code if a background check reveals any of the following:

1. Felony conviction for child abuse or neglect;
2. Felony conviction for spousal abuse;
3. Felony conviction for crimes against children, including child pornography;
4. Felony conviction for a crime involving violence, including rape, sexual abuse, or homicide; or
5. Felony conviction of assault, battery, or a drug-related offenses within the last five (5) years.

#### **4-5-5 C. Petition**

Proceedings under this Subchapter shall commence when a petition for adoption is filed with the court. A petition for adoption shall contain:

1. A citation to the specific Section of this Code giving the court jurisdiction over the proceedings;
2. The full name, residence, place of birth, date of birth, and sex of the child, with attached documentary proof of the date and place of birth;
3. Documentary proof of the child's membership status in the Tribe, if such proof exists;
4. A written statement by the prospective adoptive parent stating her full name, residence, date and place of birth, occupation, and relationship to the child, with attached documentary proof of marital status, provided this not be interpreted to prohibit single parent adoptions, and tribal membership status;
5. Written statement of consent from all persons whose consent is required by Section 4-5-5 D;
6. A written statement by the birth parent specifying the reasons why the birth parent cannot or does not want to raise the child;
7. An agreement by the prospective adoptive parent of the desire that a relationship of parent and child be established;

8. A full description and statement of value of all property owned, possessed, or held in trust by and for the child;
9. A report by the Social Services Department indicating the results of the home study conducted pursuant to Section 4-5-5 I; and
10. A brief and concise statement of the facts which may aid the court in its determination.

#### **4-5-5 D. Valid Consent Required**

In order to be valid, consent must be written and voluntary. Valid consent to Inūguuq adoption is required of:

1. Each birth or prospective adoptive parent whose parental rights have not been involuntarily terminated, who has not voluntarily relinquished her parental rights, or who has not been declared incompetent;
2. The guardian or custodian, if empowered to consent;
3. The court, if the guardian or custodian is not empowered to consent; and
4. The child, if he or she is over fourteen (14) years of age.

Written consents shall be attached to the petition for adoption. Written consent to an adoption shall be signed and acknowledged before a Notary Public. An interpreter shall be provided if required by the court. The court shall have authority to inquire as to the circumstances behind the signing of a consent under this Section.

#### **4-5-5 E. Purpose of Hearing**

The purpose of an Inūguuq hearing shall be to determine, by examining all persons appearing before the court and all evidence presented, whether the child is suitable for adoption, whether the consent of all parties is valid, whether the adoptive parent is financially, morally, and physically fit to adopt, whether the best interests of the child will be promoted by the adoption, and how best to allocate parental rights and responsibilities between the parents. If the parties have already come to an agreement regarding allocation of parental rights, the court shall review their agreement at the hearing.

(Sections Omitted)

#### **4-5-5 M. Granting Petition**

If the court is satisfied that it is in the best interest of the child to grant the petition, the court may enter a final decree of adoption as follows:

1. In the case of a child who has lived with the adoptive parent for more than one year before the adoption petition was filed, the final decree of adoption shall be entered immediately; and
2. In all other cases, the court shall appoint the potential adoptive parent to be the child's guardian pursuant to Subchapter 4-5-3 and shall allow the child to live with the potential adoptive parent for at least one year; at that time, the court shall request a supplemental report and, if the court determines that the best interest of the child is served, shall enter the final decree of adoption immediately.

(Sections Omitted)

#### **4-5-5 P. Name and Legal Status of Child**

Children adopted under this Subchapter may assume the surname of the persons by whom they are adopted. They shall be entitled to the same rights as natural children of the persons adopting them. However, Iñuguuq adoption does not confer tribal membership status on adopted children who would not be otherwise eligible. Iñuguuq adoption does not terminate the rights of natural extended family members of the child, unless those rights are specifically terminated by the court.

#### **4-5-5 Q. No Effect on Enrollment, Inheritance, or Shareholder Rights**

Iñuguuq adoption shall not affect a child's enrollment status as a member of the Tribe, a child's degree of blood quantum, a child's right to inherit from his or her birth parents, or a child's rights as a shareholder in a Native corporation.

#### **4-5-5 R. Transfer and Reversion of Parental Rights**

If the birth parents dies or is otherwise incapacitated, all parental rights shall be transferred to the adoptive parent. If the adoptive parent dies or is otherwise incapacitated, all parental rights shall revert to the birth parent.

#### **4-5-5 S. Denying Petition**

If satisfied that the Iñuguuq adoption requested will not be in the best interests of the child, the court shall deny the petition. If necessary, the court may request that the Social Services Department assist in the placement and care of the child.

#### **4-5-5 T. Challenging an Iñuguuq Adoption**

Any party whose parental, custodial, or extended family rights are limited or terminated by an Iñuguuq adoption may file a motion for rehearing. A motion for rehearing must be filed within ninety (90) days from when the adoption was granted. Where a motion for rehearing alleges a defect in notice which may affect the validity of the proceedings or questions the

validity of consent, and the allegation is supported by evidence, the court shall grant the motion.

#### **4-5-5 U. Withdrawal of Consent**

Valid consent cannot be withdrawn after the entry of a final order of adoption. Valid consent may be withdrawn prior to the final order of adoption upon a showing by a preponderance of the evidence that the best interests of the child require the consent to adoption be voided.

\* Not available online, as of April 2015.

## **[30.9] Tribal Code Examples—Diversion to Traditional Authorities, Entities, Healers, Mentors, and Activities**

### **OGLALA SIOUX TRIBE**

#### **CHAPTER 4 WAKANYEJA NA TIWAHE TA WOOPE (CHILD AND FAMILY CODE) \***

#### **PART A GENERAL AND DEPENDENCY PROVISIONS**

#### **SECTION 408.13—INFORMAL RESOLUTION**

- (a) At any time . . . the Children and Family Court may allow, or may require on its own initiative, referral to an informal resolution process.
- (b) This process should be considered by the Office of the Attorney General and the LOWO Division of Child Protective Services in those cases where a parent has voluntarily placed a child with the LOWO Division of Child Protective Services because of an expressed inability to provide for the child, not due to the faults or omissions of the parent(s), . . . but there has been a breakdown in the family relationship and intervention is needed.
- (c) Upon referral to the informal resolution process, the child and family will be summoned into Children and Family Court to meet informally with the judge, the LOWO Division of Child Protective Services, the Tiospaye Interpreter, appropriate members of the child's extended family and tiospaye, and any other person whose presence is necessary for a full and open discussion of the problems facing child and his or her family. At that meeting the group will attempt to achieve a plan to assure that appropriate intervention is made to prevent future court involvement in the family. The parent(s), guardian, custodian, appropriate extended family and tiospaye members, the child, and the LOWO Division

of Child Protective Services, shall sign a plan stipulating what each will do to address the problem or crisis facing the family.

- (d) Review hearings shall be held every 90 days and the Children and Family Court will review the plan in an informal manner to assure that progress is being made.
- (e) Participation in a plan under this section shall not prevent the Office of the Attorney General from filing a neglect or abuse petition or other legal action.

**SECTION 402.2—LENA TUWEPI HE/HWO (TRADITIONAL LAKOTA DEFINITIONS)**

- (a) Omitted
- (b) Tiospaye (“extended family”): The root of the Lakota social structure. Tiospaye are comprised of the immediate families of brothers and sisters, their descendants, and relatives adopted through formal ceremony.

(Sections Omitted)

**SECTION 405.2—DESCRIPTION OF TRADITIONAL RESOLUTION OF CHILD AND FAMILY ISSUES**

- (a) In traditional tiospaye life, children are under constant supervision. Lakota customary law gives adult relatives the right to correct and discipline children, in the absence of the parents. Children are corrected on the spot when they misbehave or commit wrongdoings. Wowahokunkiye is the proper method for correcting and disciplining children. Wowahokunkiye means to advise, counsel, teach, or lecture. When children misbehave or commit a wrongdoing, adults explain to the children what they did wrong, why is it wrong, what they need to do to correct their behavior, and the consequences for continued misbehavior or wrongdoings. Incidences are reported immediately or as soon as possible to the affected parents.
- (b) In correcting children through wowahokunkiye, adults evoke all the traditional laws, customs, and ceremonies to remind children and adults about the proper way to live. Verbal abuse, the use of strong or bad language, labeling, or any form of threatening physical contact is prohibited in correcting children through wowahokunkiye. Physical contact is proper only if it is to encourage or nurture (wokigna) such as through hugs or handshakes. Physical contact is also allowed if it is necessary to restrain children who are fighting or who physically attack others. In such cases, restrain means only to hold back or separate and not physical force such as hitting or choking.

- (c) Constant supervision and discipline precludes issues from reaching crisis proportions. Issues between children and parents are addressed by the parents' parents (grandparents of the children) or other elders, again through wowahokunkiye. In the absence of the grandparents, the parents' aunts and uncles have the responsibility to mediate the issues. In addressing family issues, individuals directly responsible for mediating the issues have the right to ask for assistance from other individuals in the tiospaye or from individuals from other tiospaye. Given the existence of service agencies today, it would also be proper to ask for assistance from these programs, such as from social workers, legal experts, or guidance counselors. In cases where incidences are reported to service agencies, employees of the services agencies are obligated to follow and exhaust the chain of command and protocols defined in this subsection. Service agencies cannot take arbitrary actions as tiospaye have the right and responsibility to initially attempt to resolve each and every case or situation. If written notification is to be given concerning a child/family issue, all the relatives in the chain of command have to be notified, not just the parents.
- (d) Omitted
- (e) Spiritual ceremonies and rituals play a significant role in the proper upbringing of children. Adults have the right and responsibility to ensure that young men and women undergo the appropriate ceremonies and rituals at the appropriate times to make sure they grow up in the proper way and to be well—mentally, physically, and spiritually. Rites of passage for young men and women are good preventive medicine for misconduct and inappropriate behavior. Ceremonies also play a significant role in addressing child and family issues, especially in instances where there are mental or physical anguish or abuse. Adults have the right and responsibility to arrange for the appropriate ceremonies for the affected parties to provide for healing, reconciliation, and correction.
- (f) Given the realities of modern-day reservation life, there might be children in crises for whom relatives cannot be immediately identified. If these types of situations arise, an extensive relative search shall be conducted in an attempt to find a relative who will take responsibility for such children. The assumption is that every child has a relative somewhere that cares for them and who would take responsibility for them. Modern-day technologies, such as ancestral projects on the internet, provide excellent means for conducting relative searches. If relatives are found, they will be properly notified about the issue or issues and given the opportunity to take responsibility for the children. If searches for relatives are unsuccessful or that reveal uncaring relatives, other tiospaye will be given notice and opportunity to take responsibility for the children. Tiospaye have adoption ceremonies through which they can adopt children who are abandoned.

\* Not available online, as of April 2015.

## [30.10] Tribal Case and Code Examples—Traditional Restitution and Reconciliation

**District Court of the Navajo Nation (Crownpoint District)**  
**In the Matter of the Interest of D.P., a Minor, 3 Nav. R. 255 (1982)**

### **Situation before the Court**

On February 28, 1982 this minor was found to have violated criminal law as a juvenile and to have committed what would otherwise have been the offenses of armed robbery, unlawful use of a deadly weapon, and unauthorized use of an automobile had he been an adult. The order of the same date ordered that the juvenile “make restitution to the victim in the amount of One Thousand Dollars (\$1,000.00) and no/100.” That order was appealed, and on August 6, 1982 the Court of Appeals dismissed the appeal for failure to comply with the Rules of Appellate Procedure.

When the case was returned to this court the child asked that the amount of restitution be reduced due to his unemployment and the failure of the victim to prove the amount of damage. On October 29, 1982 the deputy prosecutor moved the court to leave the victim to collect his damages through a separate civil action. Finally, on November 22, 1982 both the counsel for the child and the Navajo Nation entered into a stipulation asking that this action be dismissed because of unknown damage amounts, the fact restitution was not requested by the prosecution, that the amount of restitution is unreasonable and unsubstantiated, and that the rules of court and the law of the Navajo Nation do not allow for restitution in juvenile cases.

### **Whether Restitution in Juvenile Cases is Permitted by Law**

The question of whether restitution is permitted in juvenile cases is easily answered, and counsel should be ashamed to execute a stipulation agreeing there is no such law. 9 NTC Sec. 1191(6) clearly authorized the court to “order that the child be required to make restitution for damage or loss caused by his wrongful acts.” While the statute does say that the obligation to make restitution is only that of the child, it is clear that the court has the power to order it.

It is of no consequence whatsoever that the prosecutor did not ask for restitution to the victim in this case. The court has the independent right and duty to justice to order whatever relief is appropriate and fits under the circumstances. 9 NTC Sec. 1191. As is noted below, restitution in criminal and quasi-criminal cases is also a matter of Navajo custom, and this court will require it whenever and wherever it is appropriate to the circumstances.

### **Restitution under Navajo Common (Custom) Law**

In general Anglo-European history, the victims of crime lost their right to be paid back for a crime by the offender. Some Anglo historians argue that this was because of the need of

European governments to build social unity and stop revenge, the desire of kings to take all powers to themselves, and the practice of kings taking money in the form of fines as payment to protect the wrongdoers from the vengeance of the victim. This ridiculous trend, which thankfully is being slowly replaced by concern for the victim of crime, is totally the opposite from the traditional Navajo way.

Under Navajo tradition, all offenses (with the exception of witchcraft) were punished by payments to the victim or the victim's immediate family and clan. In this case, robbery with injury would be punished by a payment of "blood money" to the immediate family, plus a multiple payment for any property taken. Theft would be punished by a multiple payment to the victim of the immediate family group.

The Navajo tradition recognized that the central ideas of punishment were to put the victim in the position he or she was before the offense by a money payment, punish in a visible way by requiring extra payments to the victim or the victim's family (rather than to the kind or state), and give a visible sign to the community that wrong was punished. The offender was given the means to return to the community by making good his or her wrong. Surely this is a far better concept of justice than to leave the victim out of the process of justice and leaving the victim with no means of healing the injury done.

Therefore, this court finds that not only is restitution permitted under Navajo custom law, but indeed it was so central to the Navajo tradition in offenses that it should be presumed to be required in any juvenile disposition.

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## **The Cherokee Code of the Eastern Band of the Cherokee Nation**

### **Chapter 7A—JUVENILE CODE**

#### **ARTICLE V. LAW ENFORCEMENT PROCEDURES IN DELINQUENCY PROCEEDINGS**

##### **Sec. 7A-53. Dispositional alternatives for delinquent juvenile.**

The court exercising jurisdiction over a juvenile who has been adjudicated delinquent may use the following alternatives:

- (4) Require restitution, full or partial, payable within a 12-month period to any person who has suffered loss or damage as a result of the offense committed by the juvenile. The court may determine the amount, terms, and conditions of the restitution. If the juvenile participated with another person or persons, all participants should be jointly and severally responsible for the payment of restitution; however, the court shall not require the juvenile to make immediate restitution if the juvenile satisfies the court that the juvenile does not have, and could not reasonably acquire, the means to make restitution.



## [30.11] Tribal Code Commentary

**Values and Purpose**—The Culture, Customs, Traditions, and Generally Accepted Practices (CCTGAP)-informed provisions setting out the values and purposes of tribal children’s or juvenile codes focus on generally protecting customs and culture, protecting the rights of families to their religious and traditional preferences, preserving the nuclear and extended family units, preserving opportunities for children to learn about their culture and heritage or to preserve their ethnic identity, and ensuring that services include cultural support. The Oglala Sioux Tribe’s Children’s code stands out in explicitly protecting the unity of the extended family unit (“tiospaye”) and in its substantial provisions defining Lakota kinship and the roles and duties associated with it. See discussion in the following text.

The Hopi Children’s code states that it is the purpose of the code to “preserve the unity of the family [and] provide for the full consideration of religious and traditional preferences and practices of families during the disposition of the matter.”

The Native Village of Barrow in Section 4-1-1 B. of its Children’s Code, states that it “establishes the following procedures to protect the best interests of children, and the future of the Tribe and its customs and culture. . . .” Further it provides that [a]ll provisions of this Code shall be liberally construed in order to give effect to the following purposes with regard to child welfare: “. . . [p]rotect the best interests of children [and] prevent the unwarranted breakup of families, maintain the connection of children to their families, their community and the Tribe . . . [p]rovide child welfare services to children and families that are in accord with the laws, traditions, and cultural values of the Tribe . . . and [p]reserve the opportunity for children to learn about their culture and heritage, and to become productive adult members of the NVB Tribe community, by experiencing culture on an ongoing basis.”

The Oglala Sioux Tribe in its Child and Family Code at Section 401.4, states that the code “shall be liberally interpreted and construed to fulfill the . . . purposes [including] . . . [t]o preserve the unity of the tiwahe and tiospaye, separating the child from his or her parents, tiwahe and/or tiospaye, only when necessary; . . . [t]o recognize and reinforce the tribal customs and traditions of the Oglala Lakota Oyate regarding child-rearing; . . . [t]o preserve and strengthen children’s cultural and ethnic identities; and . . . [t]o provide services and cultural support to children and families to strengthen and rebuild the Oglala Lakota Nation.” The code at Section 402.2(3) defines “tiwahe” as “[a] family unit resulting from Hasanipi (a union or partnering of a man and a woman) to raise children and to live according to the laws, ceremonies, and customs of the people.” At Section 402.2(2) it defines “tiospaye” as “[t]he root of Lakota social structure . . . comprised of the immediate families of brothers and sisters, their descendants, and relatives adopted through formal ceremony.” At Section 402.2(1) the code defines “oyate” as “[t]he Lakota People.”

The Oglala Sioux Tribe’s code, in Section 402.1 et seq., also includes more substantial provisions defining Lakota kinship with a more detailed background on the tiospaye and tiwahe; the connection

between kinship and essentially caretaking and guardianship of children by the tiwahe; how kin traditionally talk to one another and interact; respect for and the place and role of elders as wisdom keepers, teachers and mediators; the proper ways to know and address relatives; and the making of ceremonial relatives, including traditional adoption.

**Rights, Duties, and Obligations**—A number of tribes have set out lists of “positive” rights in addition to various “negative rights” that we are more familiar with. Positive rights are things that the tribe or government must provide, as opposed to those things that a tribe or government can’t do to you (e.g., seizing you and your car and throwing you in jail without fair process). The Native Village of Barrow Children’s Code at Section 4-3-1, lists the following positive rights relevant to CCTGAP including:

A child has a right to . . .

- Life, survival, development, and a standard of living . . . reflective of the traditions and cultural values of that child’s people;
- Acquire and form an identity from birth, including name, tribal affiliation, language, and cultural heritage;
- Learn about and preserve his or her identity throughout his life, including the right to maintain ties to his or her birth parents, extended family, and village;
- Learn about and benefit from tribal history, culture, language, spiritual traditions, and philosophy;
- If separated from his parents for the child’s best interests, wherever possible not to be separated from other members of his immediate and extended family;
- If separated from his parents for the child’s best interests, special protection and assistance to ensure the maintenance of ethnic, cultural, religious, and linguistic heritage; and
- Education, including cultural teachings and training on how to safely undertake subsistence activities and other potentially dangerous work.

Contrast this with the shorter Oglala Lakota Tribe’s list at Section 403.1:

All children have a right to . . .

- A mother;
- A father;
- Identify with the traditional way of life;
- Learn to speak his or her language;
- A family;

- Know their relatives;
- Know the traditional laws, customs, and ceremonies of the people; and
- Live according to and to practice the traditional laws, customs, and ceremonies that govern the people.

There is debate about the legal implications of positive rights. Lawyers argue that they are either aspirational and thus unenforceable, or they are enforceable and the tribe may be forced to pay to make such a right real if successfully sued by a child and his family. Note, sadly, that some positive rights might never be enforceable like the right of a child to have a mother or father. Aspirational language may still influence a judge in his or her interpretation of other provisions of a statute. Tribal law drafting committees will need to discuss what their intent might be and memorialize this in the statutory language.

The Native Village of Barrow Code at Section 4-3-3 also sets out the responsibilities and rights of extended family members. The section begins by recognizing that extended family members have a “secondary, common responsibility for the upbringing and development of children in their family.” The responsibilities and rights of extended family members include the responsibilities and rights to. . .

- Be responsible for helping children acquire and form identities, including name, tribal affiliation, language, and cultural heritage;
- Be responsible for intervening or assisting when necessary to ensure the continuity of the child’s upbringing and the maintenance of the child’s ethnic, cultural, religious, and linguistic heritage;
- Be timely noticed by the court of any judicial or other proceeding involving the child;
- Be heard in any judicial or other proceeding involving the child;
- Have reasonable visitation with the child; and
- Request a family conference.

Again, there is debate about the enforceability of the responsibilities (the rights are easier to effect). For example, would such statutory provisions create a right on the part of the tribe or the child and his family to sue extended family members for breach of responsibility? If yes, what would be the remedy (e.g., money damages)? Again, aspirational language may still influence a judge in his or her interpretation of other provisions of a statute. As stated previously, tribal law drafting committees will need to discuss what their intent might be and memorialize this in the statutory language.

Contrast the Native Village of Barrow language with the Oglala Lakota Tribe’s “traditional family rights” and “traditional laws governing the decisions affecting children” at Sections 403.2 and 401.5. These provisions are more like a code of ethics for family members in their dealings with one

another—to have “faithfulness,” “wisdom,” “spirituality,” “fortitude,” “generosity,” and “respect,” and to advise and counsel others. Such provisions, no doubt, will be difficult for an outsider judge to apply. However, assuming that the tribe appoints its own people as judges or those very familiar with its ways, such provisions could be a powerfully effective for interpreting other parts of the statute.

**Choice of Law**—Choice of law provisions are mandates from the tribal legislature to the tribal judiciary directing them in what laws to apply and in what order to resolve disputes that come before the courts. If your community is committed to integrating CCTGAP into your judge-made law, it is critical to include custom and tradition in your tribe’s “choice of law” provision. It is also important to consider where custom and tradition sits in the order of law to be applied. If it sits above tribal written law (the constitution, statutes, resolutions, etc.), then custom and tradition will trump the constitution, statutes, and codes. This may pose serious problems where the legislated rules represent the consensus (or majority consensus) on what customs should be reinforced and what safety measures should trump custom (e.g., if your statute/code says that extended family members have rights to notice and participation in children’s proceeding but only if they are not “dangerous relatives”). If custom and tradition sits below the tribe’s written law but before the importation of foreign law, it may be used by the judge as the default gap-filler where the tribal council has not legislated. Many tribes treat custom and tradition as mandatory law at this level.

The Hopi Tribe in its Resolution H-12-76 at Section 2(a) treats custom and tradition as a mandatory gap filler after the application of the tribe’s written law. This means that the tribal judge has to apply it where the tribe’s written law fails to address the issue before the court: “The Courts of the Hopi Tribe, in deciding matters of both substance and procedure . . . shall look to and give weight as precedent to . . . (1) The Hopi Constitution and Bylaws; (2) Ordinances of the Hopi Tribal Council; (3) Resolutions of the Hopi Tribal Council; (4) Customs, traditions and culture of the Hopi Tribe. . . .”

The Hopi Tribe’s choice of law provision at Section 2(b) also provides for importation of foreign law where neither the tribe’s written law nor its customs or traditions have an answer. However, it prohibits the recognition and application of foreign law where it is “inconsistent with either the spirit or the letter of either the Hopi custom, traditions, or culture of the Hopi Tribe.”

Contrast this with the Stockbridge-Munsee Tribe’s approach at Section 1.3, where instead of using a choice of law provision, it makes the consideration of custom part of how a judge must read only that particular statute (a.k.a. “rules of statutory construction”): “This code is exempted from the rule of strict construction. . . . Whenever there is uncertainty or a question as to the interpretation of certain provisions of this code, tribal law or custom shall be controlling. . . .”

The Native Village of Barrow Code at Section 3-11 provides the clearest direction for judges by dividing “mandatory authorities” (judges have to apply it) from “persuasive” authorities (judges may apply it), and by making “customs and traditions” mandatory after the tribe’s written laws:

The Tribal Court, in deciding matters of both substance and procedure, shall look to and give weight as precedent to the following mandatory authorities in the following order: 1. The Constitution and Bylaws of the NVB Tribe; 2. Agreements with other tribes entered into by the NVB Tribal Council; 3. Statutes of the NVB Tribe; 4. Resolutions of the NVB Tribe; 5. Common law of the NVB Tribal Court; and 6. Customs and traditions of the NVB Tribe.

Notice that the Native Village of Barrow Tribe statute ranks agreements with other tribes and the “common law of the NVB Tribal Court” higher than its customs and traditions, which means that provisions in the agreement and prior written judicial opinions will influence or trump the interpretation or application of customs and traditions in future cases.

The Native Village of Barrow Tribe statute at Section 3-8 E also includes a requirement that where a tribal judge finds that an agreement, tribal statute, or resolution “contravenes the customs or traditions,” the judge must issue a “written notice of the conflict” to the tribal council, along with a copy of the judge’s written opinion in the case.

**Process for Finding CCTGAP**—Tribal judicial codes often contain processes describing how a tribal judge may identify culture, custom, and tradition. There are three popular methods. The judge may “take judicial notice of generally accepted and known custom.” This means that a judge may simply recognize and restate a custom that everyone in the tribal community is familiar with. The judge may also hold hearings with “traditional expert witnesses” testifying as to what the custom is and then the judge ultimately decides what parts of the custom are relevant to the dispute in front of him, how it is defined, and how the custom will be applied to the parties. Finally, a particular tribe may have established a culture-bearer or elders panel or a similar body to assist the judge in identifying and defining a particular custom. Some tribes have set up these bodies and set out a “certification process” where a tribal judge may certify a question to the body and where it can then send a written answer back to the judge who then applies the written custom to the facts in the case before him or her in tribal court. The judge’s final written “opinion and order” in the tribal court case would then describe the custom and how it was to be applied to the parties and their problem in the case. All such processes should be set out in tribal court statutes/codes to ensure the consistent application of custom and tradition in tribal court cases over time, and to ensure the orderly development of the tribe’s common law (judge-made law) incorporating custom and tradition.

The Native Village of Barrow Judicial Code at Section 3-5 provides for all three custom identification processes, including: (1) “judicial notice”—“The court may take judicial notice of Iñupiat custom or tradition only if the court finds the custom or tradition to be generally known and accepted within the NVB tribal community”; (2) custom-law-finding hearings—“A party who intends to raise an issue of Iñupiat custom or tradition shall give notice to the other party and the court through its pleading. . . . The proponent of custom or tradition must then plead it to the court with sufficient proof to establish by a preponderance of the evidence that the custom or tradition exists and that it is relevant to the issue before the court”; and (3) certification to a culture-bearers

panel—”If the judge cannot take judicial notice of custom or tradition or if a question or dispute arises as to the existence or substance of custom or tradition, the court shall certify the question to the Elders Council.”

Note that tribal judges will need at least two methods at all times, judicial notice and custom law finding hearings or judicial notice and a culture-bearer panel. This is due to the fact that not all tribal judges will know “custom or tradition generally known and accepted” as they may be a nontribal member or not from the same region or group within the tribal communities as the parties. Also, it may be prudent to include all three processes where there is uncertainty as to the consistent availability of funding and staffing of the culture-bearer panel.

The Oglala Sioux Tribe provisions are similar to those of the Native Village of Barrow at Sections 412.1 and 412.2 that establish a “Tiospaye Advisory Council” that “shall resolve questions or disputes about the customs and traditions certified to them by a Children and Family Court Judge.” The Council “shall issue written findings of custom for each question of custom or tradition that comes before it. One copy of these findings shall be transmitted to the Children and Family Court for use in its proceedings. . . . A decision of the Tiospaye Advisory Council shall not be binding as precedent until it is incorporated into an order of the Children and Family Court.”

However, the Oglala Sioux Tribe at Section 412.1(c)(2) further empowers its Tiospaye Advisory Council “to issue official opinions on the decisions of the Children and Family Court if the Council feels that such decisions are inconsistent with the provisions of the Child and Family Code.” Recall that their Children’s Code contains extensive cultural definitions, values, ethics, and responsibilities and rights for extended family members.

Both the Native Village of Barrow and the Oglala Sioux Tribe Codes include provisions authorizing their culture-bearer bodies to engage in the ongoing documentation of custom and tradition. See Section 3-7 E of the Native Village of Barrow Judicial Code and Section 412.3 of the Oglala Sioux Tribe Children’s Code.

**Notice and Participation Rights for Extended Family**—Once a tribal community has identified “who is family” with respect to a child, it will be important to define the terms *parent* or *extended family* (or the traditional terms and categories) in order to provide them with notice and participation rights when a child is detained, taken into custody, or involved in court proceedings. If your community desires to hold parents and extended family members responsible for their youth, they will need to have information and participation rights in the juvenile justice system process. Note that the Oglala Sioux Tribe’s definition of “extended family” at Section 402.3 includes “an adult relative of a child,” but not “[an adult relative] who has . . . been deemed by a court of competent jurisdiction to be a danger to the child.”

The Oglala Sioux Tribe’s Children’s Code at Section 408.8 provides “tiwahe” and “tiospaye” members with the “right to be present at all stages of the [court] proceedings,” and to “speak on the

child's behalf if the child so requests." Tiwahe is defined at Section 402.2(3), as "a family unit resulting from Hasanipi (a union or partnering of a man and a woman) to raise children and to live according to the laws, ceremonies, and customs of the people. Tiospaye (or "extended family") is defined at Section 402.2(2), as "[t]he root of the Lakota social structure . . . comprised of the immediate families of brothers and sisters, their descendants, and relatives adopted through formal ceremony." Section 402.3 further defines extended family to include:

- (A) The paternal and maternal grandfather and grandmother;
- (B) Siblings of the grandparents;
- (C) Father and mother;
- (D) Paternal and maternal uncle and aunt;
- (E) Brother and sister;
- (F) The spouses of persons listed in (A) through (E);
- (G) Any adult person legally adopted in (A) through (E); and
- (H) Any adult member of the child's tiospaye, or other adult person adopted by the child's tiospaye as a relative through a formal ceremony."

The Oglala Sioux Tribe definitions of family are expansive and appear to include biological parents, all adult biological relatives who have not been found to be a danger to the child, and ceremonial relatives. The burden of providing notice to family and "tiospaye interpreters" regarding hearings involving the child is put on the "clerk of the court" in Section 408.1. In other parts of the Oglala Sioux Tribe Children's Code, the burden of providing notice to parents and the child's "tiospaye interpreter" is put on the child protective services agency regarding notice of any removal of the child from the home (Section 406.8). The tiospaye interpreter is defined in another part of the code to be a representative of the tiospaye and a liaison with the children's court to speak for the children of the tiospaye who are court involved. A key consideration to make notice effective will be to locate responsibility for maintaining updated family trees, including ceremonial relatives, and contact information for family members with a responsible agency and/or official.

The Native Village of Barrow Children's Code at Section 4-3-3 F-I, establishes the rights of resident extended family members to "be timely noticed by the court of any judicial or other proceeding involving the child"; to be "heard in any judicial or other proceeding involving that child," should that person "come . . . forward in a timely manner"; and the right to "request a family conference." The Native Village of Barrow Children's Code defines extended family member at Section 4-2 15 to include: "Any adult sibling, grandparent, aunt, uncle, great aunt, great uncle, or cousin of the child, including adoptive adult siblings, grandparents, aunts, uncles, great aunts, great uncles, and cousins."

The Native Village of Barrow Children’s Code provisions notably differ from the Oglala Sioux Tribe provisions by providing family with the right to request family conferences.

**Cultural Education for Personnel**—Once a tribal community has drafted or amended its children’s laws to incorporate CCTGAP, it will be necessary to train justice system and service provision personnel and others on both the substance and process of the new law, and particularly with respect the CCTGAP provisions. The question is whether and how this should be set out in the statute/code and/or what should be part of a negotiated MOU or MOA with tribal agencies, private agencies, and/or other governments.

The Oglala Sioux Tribe’s Children’s Code in its Sections 416.1 to 416.3 mandates expansive compliance across tribal entities to comply with the new law. This includes its justice system, law enforcement and service provider agencies, educational and health care entities, and even its religious entities. All are mandated to revise their mission and vision statements, to adapt their policies and procedures and the delivery of services to the new law, and also to provide orientations and trainings about the new law.

Although all these agencies and entities are mandated to comply with the new children’s law including its CCTGAP provisions, the Oglala Sioux Tribe mandates may prove to be impossible to enforce where the entity is not tribally controlled and/or located within reservation boundaries (this would necessitate the negotiation and signing of MOUs or MOAs). Also, it is also unreasonable to expect that private entities governed by board of directors, for example, would be agreeable or feel obligated to revise their mission statements. A more workable approach would be to invite them to participate in early community discussions and/or to give them an opportunity to provide feedback on the draft law(s). Finally, even tribally controlled agencies and entities have their own distinct missions and legal parameters. A better approach would be to have the statute authorize the negotiation of interagency agreements including provisions for the development or reform of policies and procedures and the nature of required orientations and trainings.

**Traditional Placements, Guardianships, and Adoptions**—In juvenile court proceedings, from time to time, there will be a need to place a youth outside the home. Whether this is temporary (sometimes called “interim care,” “respite care,” or a temporary “guardianship”) or permanent (sometimes called “guardianship” or “adoption”), tribal communities will need to explore what traditional arrangements or present day generally accepted practices exist. The community should discuss the pros and cons of including these arrangements within the interim care (emergency) provisions and the disposition alternatives within their juvenile justice codes.

Here we provide examples from the tribal dependency court context (tribal children’s codes dealing with child abuse and neglect). The first example from the Rosebud Tribe, at Section 2-2-7, sets out a process for judicial recognition of an existing placement of a child with “another family”:



After a period of two years in the care of another family, the court upon petition of the adoptive parents, will recognize that the adoptive parents in a custom or tradition adoption have certain rights over a child even though parental rights of the natural parents have never been terminated.

The Rosebud code requires an attestation by two reliable witnesses.

The second example, from the Native Village of Barrow Children’s Code at Sections 4-5-5 A to 4-5-5 U, sets out a more elaborate process for legally effecting traditional adoptions—where new parents will be made and added to a child’s existing set of parents. While the Rosebud provisions are far simpler, the Native Village of Barrow provisions ensure greater protections for the child in that they: (1) ensure that the adoptive parent is old enough; (2) ensure that both spouses agree to the adoption; (3) ensure that the child will be safe by undertaking background checks on prospective adoptive parents; (4) ensure proof of a child’s membership status, proof of consent on the part of the birth parents, prospective adoptive parents, and children over fourteen years of age, protect the child’s tribal membership and property rights, and require a statement of the reasons for the adoption; and (5) require a hearing and findings from a tribal court judge that “the child is suitable for adoption,” that the consents are valid, that the adoptive parents are “financially, morally, and physically fit to adopt,” “how best to allocate parental rights and responsibilities between parents,” and “whether the best interests of the child will be promoted by the adoption,” before the adoption is legally recognized.

Neither the Rosebud provisions, nor the Native Village of Barrow provisions, terminate the biological parents’ parental rights. This means that the tribal court and/or some sort of family conferencing or mediation process will likely be necessary to handle parenting disputes where the multiple sets of parents cannot agree in the future and on an ongoing basis.

**Diversion to Traditional Authorities, Entities, Healers, Mentors, and Activities**—As can be gleaned from the model provisions highlighted in this resource for tribal juvenile justice codes, there is a preference for the diversion of youth from the juvenile justice system at multiple stages, some even prior to any justice system involvement. For truant youth or for families-in-need-of-care, ideally, there should be diversions at the school and/or law enforcement levels. For recurrent status offending youth, there should be statutory diversions before trial or disposition (a.k.a. “informal adjustment” using “consent decrees,” or similar terms). For juvenile offenders there should also be pretrial and predisposition diversions processes. For all status and juvenile offenders who find themselves adjudicated, the statute should provide yet one more opportunity for diversion through court-ordered participation in community-based programs and activities as part of the judges’ final dispositions. Basically, you want to create as many doors exiting the juvenile court process as you can to screen, assess, treat, and divert youth to therapeutic and cultural programming and activities. The reasons for having multiple doors include having multiple opportunities for youth and their families to seek assistance when they might be ready. Also different tribal officials are in charge of the different doors (e.g., school officials, law enforcement, juvenile intake officers, prosecutors and

presenting officers, and judges) and you may not want to hinge the fate of youth and their families on the discretion of just one official at a given time.

However, creating all of these “doors out of the juvenile justice system” assumes that youth and their families will have somewhere to go. One of the most important things your tribal community will want to consider is the type of cultural entities, authorities, healers, mentors, and/or activities you will want to divert youth and families to and/or what type of cultural programming you will wish to design and implement.

There is a universe of possibilities here but three common approaches are to divert youth and their families directly to existing traditional entities/activities (e.g., traditional authority figures, healers, and ceremonies), to design and implement cultural programming (e.g., history and language education programs, hunting, fishing, gathering, and/or subsistence activities), and/or to modify existing non-Indian justice, dispute resolution, and therapeutic processes to accommodate a tribe’s CCTGAP (e.g., wellness courts, family conferencing, mediation/peacemaking, and sentencing circles).

Here we provide examples from the Oglala Sioux Tribe that opted to provide two required doors or “diversions,” from their children’s court process. These include first, an initial referral to the tiospaye, or extended family, and then an informal resolution process (a quasifamily conferencing process) once a child becomes court involved.

See the Oglala Sioux Tribe’s Section 405.2(c) where it states “[i]n cases where incidences are reported to service agencies, employees of the service agencies . . . cannot take arbitrary actions as tiospaye have the right and responsibility to initially attempt to resolve each and every case or situation.” If this tiospaye involvement does not remedy the situation or if it does not happen and a child proceeds through the children’s court process, Section 408.13 provides that the child may be referred to an “informal resolution process.” This is an informal meeting with the child, his or her family, child protective services, the tiospaye interpreter, and members of the child’s tiospaye for the purpose of developing a plan of intervention.

**Traditional Restitution and Reconciliation**—Many tribes view restitution as a part of their CCTGAP. For example, the Navajo Tribe in *In the Matter of the Interest of D.P.*, found that restitution is a matter of custom and centers on the harm suffered by the victim. The Navajo court stated:

Under Navajo tradition, all offenses (with the exception of witchcraft) were punished by payments to the victim or the victim’s immediate family. . . . [T]he central ideas of punishment were to put the victim in the position he or she was before the offense by a money payment, punish in a visible way by requiring extra payments, . . . and give a visible sign to the community that wrong was punished. The offender was given the means to return to the community by making good his or her wrong.

The Navajo formulation of restitution favors concepts of reparations to the victim, punishment, satisfying public calls for justice, and providing the offender with “making good his wrong.”

The Eastern Band of Cherokee Juvenile Code, at Section 7A-53, sets out a fairly standard provision in authorizing its juvenile court to order restitution as a disposition alternative:

The court exercising jurisdiction over a juvenile who has been adjudicated delinquent may use the following alternatives: . . . [r]equire restitution, full or partial, payable within a 12 month period to any person who has suffered loss or damage as a result of the offense committed by the juvenile.

Tribal communities should explore whether their CCTGAP includes the concept of restitution and what its parameters include. For example, what amount of restitution? Payable to whom? Should youth be excused from paying if they can’t pay it? Should their parents be required to pay? What happens if they can’t afford it?

## [30.12] Exercises

The following exercises are meant to guide you in identifying and integrating CCTGAP into various sections of the tribal juvenile code.

**Step 1:** Hold a discussion about CCTGAP with stakeholders (youth and their families, etc.), culture bearers, elders, and interested community members to refine views and definitions, and to find and document relevant CCTAGP. Begin with the following questions.

### How do we recognize and incorporate “custom”?

#### A. What terms and definitions should we use when working with “custom”?

- “Social Norm” and “Legal Norm”
- “Tradition” and “Current Practice”
- “Traditional Authority” and “Modern Secular Authority”
- “Traditional Legal Levels” and “Secular Legal Levels”
- “Policy Making”
- “Social Norm” and “Legal Norm”
- “Social Norm”—A felt standard of proper behavior
- “Legal Norm”—A felt standard of proper behavior backed by official recognition or sanction

1. Identify a social norm in your community. What is something that everyone says you should or shouldn't do?

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2. Identify an unwritten legal norm in your community. What is something that everyone says you should or shouldn't do? What happens to you if you do or forget to do this thing?

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“Tradition” and “Current Practice”

“Tradition”—Old values or ways of doing things

“Current Practice”—Current, generally accepted ways of doing things

3. Identify a tradition in your community. What is the old way of doing things? How have things changed? Is there a different current practice for this tradition now?

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“Traditional Authority” and “Modern Secular Authority”

“Traditional Authority”—The old offices or respected leaders

“Modern Secular Authority”—Constitutionally or statutorily recognized leaders or other leaders elected or appointed by the community

4. Identify several traditional authorities in your community:

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5. Identify several tribal secular leaders:

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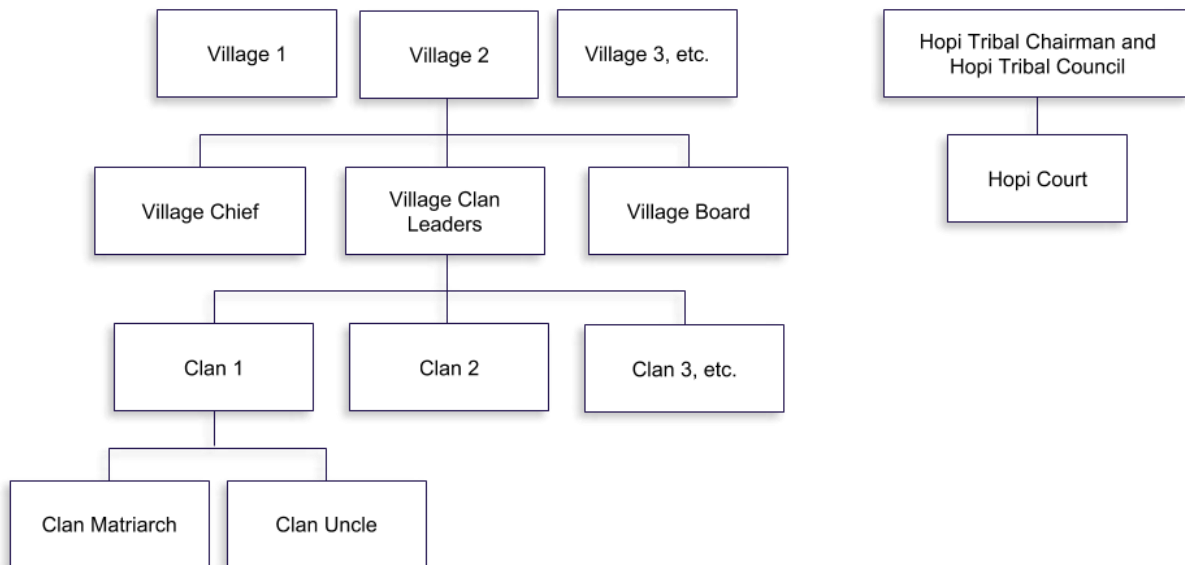
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“Traditional Legal Levels” and “Secular Legal Levels”

“Legal Levels”—Legal norms vary within different, traditional and secular legal levels, that is, the custom law may be different for different villages, clans, or bands within one tribe. The written tribal law (constitution, codes, resolutions, tribal court opinions, and orders) may also deal differently with people from different villages, clans, or bands. **Example: The Hopi Tribe**



6. Identify your community’s traditional and secular legal levels. Identify a norm that may be different from one place to the next. Is there written tribal law that recognizes different norms/rules for different groups?

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“Policy Making,” Custom, and Tradition

“Policy Making”—When you formalize custom in your written tribal law (constitution, code, or tribal court opinion), you are engaging in policy making—that is picking and choosing bits of custom and putting them in your modern written tribal law—for a good reason.

Custom or Tradition

Mother’s Sister = Mother

Tribal Policy

Mother’s Sister has a right to notice of involuntary dependency hearings regarding her sister’s children

7. Can you think of an example where your tribe has done this?

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8. Define who is family

- “**Natural Parent(s)**”—The mother and father who conceive the child.
- “**Nuclear Family**”—A kin group consisting only of parents and children. The prevalence of nuclear families in modern nations reflects the realities of industrialism, geographic mobility, a lack of ties to the land, and the sale of labor for cash.
- “**Extended Family**”—The term “extended family” is used in tribal communities to mean close kin outside the nuclear family, including “band relatives,” “clan relatives,” etc.
- “**Band Relatives**”—Comprised of nuclear families that join the husband’s or wife’s family on a seasonal basis—traditionally to hunt or gather.
- “**Clan Relatives**”—Comprised of a permanent social unit whose members say they have an ancestor(s) in common. Membership is determined at birth and is lifelong.
- “**Matrilineal Descent**”—A person is born into the mother’s group automatically at birth. That group is considered close family.
- “**Patrilineal Descent**”—A person is born into the father’s group automatically at birth. That group is considered close family.
- “**Ceremonial Relatives**”—People who are selected, or who come to be relatives for ceremonial or other purposes.

9. Who do you consider to be your child’s “relatives” in your community? Is it the same on both the mother’s and father’s side? Are there ceremonial or other important traditional relationships?

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10. Identify any “third parents.”

- **“Third Parent Status”**—Those kin, designated by specific kin terms, who are understood to have parent-like duties, obligations, and privileges (rights) with respect to a child(ren) they are kin to.
- **“Kin Types”**—Genealogical kin types such as biological father (F), mother (M), son (S), daughter (D), brother (B), sister (Z), child (C), and husband (H) and wife (W).
- **“Kin Terms”**—The words used for different relatives in the native language.

11. Are there certain relatives that equal natural parents (who are like “third parent[s]”) in duties and rights with respect to children?

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12. What is the word for “mother” in your language? Does the child call more than one person in his or her life by this term?

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13. What is the word for “father” in your language? Does the child call more than one person in his or her life by this term?

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14. Are there other important names or terms to a child to note here?

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15. Determine what duties and obligations are owed to youth.

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16. What traditional duties are owed to children? Which people are primarily responsible for the care, supervision, protection, and education of boys? Which people are primarily responsible for the care, supervision, protection, and education of girls?

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17. Figure out what your CCTGAP documenting committee should work on.

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18. Make a list of questions to be explored and documented by a custom-law finding body of culture bearers or elders<sup>55</sup> on the following topics relevant to the tribal juvenile justice system (add in your own topics as they arise):

- Values, such as “respect,” “honor,” “patience,” “teaching others,” “self-respect,” “honoring self,” “positive beliefs about self,” etc.
- Beliefs in spiritual renewal leading to healing and recovery
- Beliefs and practices about behavior, health, healing, humor, and children/youth
- How one should manage thoughts, emotions, and physical reactions
- Worldview about family
- Worldview about children and youth
- Duties and obligations owed between people (e.g., parent-child and child-parent, ceremonial aunt-child and child-aunt) who are related to each other in the nuclear, extended, and ceremonial family
- How boys should be raised
- How girls should be raised
- Good parenting skills
- Good communication skills
- Traditional placements, guardianships, and adoptions
- Traditional authorities, entities, healers, and mentors
- Traditional healing practices, activities, and ceremonies used to provide instruction about relationships and parenting
- Traditional restitution and reconciliation

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<sup>55</sup> This body or committee should work in tandem with a separate law or code drafting committee and should regularly share its “found CCTGAPs” to inform the law drafting process as it happens. The law/code drafting committee should provide a list of topics and questions to the custom law finding body/committee to have it explore topics and answer questions relevant to the juvenile code drafting process as an integral part of its law/code drafting process.

**Step 2: Examine the current situation.**

Review your tribal laws to determine whether you have any of the following provisions (note you will need to check your constitution, judicial or court establishment code, and children’s laws):

- Values and/or purpose statement
- Youth and family “Bill of Rights”
- Bill of Duties and Obligations to Youth
- Choice of law provision allowing or mandating use of CCTGAP
- Provisions authorizing judges to notice, find, and/or apply CCTGAP in tribal court
- Notice and participation rights for extended family members
- Mandating cultural education for justice system and treatment personnel
- Provisions defining and authorizing traditional temporary placements, guardianships, and/or adoptions
- Diversion provisions to traditional authorities, entities, healers, and/or mentors
- Provisions defining traditional restitution and reconciliation processes

What is working well under your current laws? What is not working?

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**Step 3: Capture the key provisions.**

- Which of your tribal constitutional provisions, codes, or court rules will need to be amended?
- What new laws or codes will need to be drafted?
- Do you need to establish a law-finding/documenting committee of stakeholders/culture bearers/elders? If yes, who should be recruited to be on the committee?

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## Read and Discuss\*

What is custom, is it legal, where do we find it, who knows it best?

- “**Custom**” is law and it permeates every subject category within the written laws of a tribe;
- Custom law exists and operates underneath written tribal laws in many contemporary tribal societies. A functional definition of substantive custom is one that distinguishes . . .
  - “**custom as a kernel of law**” (what people feel/believe/do given certain values) (for example, women have certain mandatory duties to their families, clans and villages; including organizing and carrying out baby namings, weddings, their part in funerals, and ceremonially supporting their husbands and clansmen);
  - “**custom of a legal nature in its natural setting**” (legal norms vs. social norms where the traditional system somehow backs or recognizes the legal norm) (for example, where a clan uncle declares that a clanswoman has met her duties and recognizes her right to use a house or a field); and
  - “**custom that is enforceable under tribal law**” (custom that is incorporated into written tribal law in a policy-making process) (for example, a tribal statutory provision recognizing the property rights of caretakers of elders once the elder has passed and defining “caretaking” to include meeting both basic day-to-day needs of the elders and ceremonial support).
- Custom law varies among groups at the subtribal level (villages, clans, bands, etc.). Tribal societies are comprised of multiple legal levels with differences in their legal structure and their substantive bodies of custom;
- Tribal legislators, judges, and ad hoc elders may not be the most reliable sources to identify and define customary law elements. Some sources are more reliable than others for identifying and defining relevant legal norms (custom that is law in its natural setting). For example, traditional authorities from the same village or clan who have decided similar cases in the past would be more reliable;
- Custom law often naturally arises from kinship, ceremonial, and other relationships and looks like duties and obligations with rules about what happens in case of a breach of duty;
- All contemporary tribal societies arguably have “new custom laws” that are naturally arising and that are in the process of being internalized by members. Customs or generally accepted practices (and their underlying values) may change but may still be considered “custom that is law”; and

- Not all tribes “find” custom in the same way. Check the court establishment code, judicial code, court rules, or tribal common law to determine what custom knowing or finding process is used.

\*Taken and condensed from Pat Sekaquaptewa, “Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking,” 32 *AM. INDIAN L. REV.*, 319, 329 (2007–8).