

Tribal Customary Adoption: A Culturally Based Permanency Solution for Relative Caregivers¹²

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Abstract: *This two-part case study opens with a fictional example of what life is like for grandparents who are struggling to balance the love of their daughter and the long-term safety and well-being of their grandchild. Part one examines the challenges that family members might face when they step forward to help and the very real and emotional decisions that have to be made regarding permanency for the long-term well-being of the child. Part two examines the cultural underpinnings of legal and cultural concepts that underlie permanency. Many widespread tribal cultural practices have traditionally placed children whose parents are unable to care for them with relatives and extended family members without severing the bonds of kinship and love between parent and child. However, in modern times, in order for adoptive homes to be recognized by most state and federal funding and child welfare authorities, termination of parental rights (TPR) has been required. Many tribes reject termination of parental rights culturally, and many have had solely negative histories with foster care and adoption such that they shun the concept. Some have taken the initiative to create their own versions of adoption based in their traditions. A 2015 review of 107 tribal child welfare codes found that 19 codes (15%) included tribal customary adoption, some in addition to conventional adoption and some in place of conventional adoption.*

Part I: Case Scenario³

Harold looked up from tending his small garden plot as the shiny black late-model Mustang came up the long dusty driveway. He mostly worked in his garden to gain a few minutes respite from the unrelenting pressures faced by a modern-day tribal councilman. “PaPa, look! Can we eat it?” Millie, soon to be four and the light of his life, had just discovered a zucchini that was the

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² For the purpose of this brief, “relative caregivers” will be used to refer to families in which grandparents, other extended family and relatives, or close family friends are raising children whose parents, either temporarily or permanently, are unable to safely do so. Grandfamilies & Kinship Support Network: A National Technical Assistance Center, our partner organization in the development of this overview, uses the terms “kinship/grandfamilies” and “kin/grandfamily caregiver” to refer to these families. Tribal communities may use many different terms to describe this relationship. Here are a few other terms that might be used interchangeably to refer to these families: “kinship care”, “extended family”, “relatives”, “kinship caregivers”, and “kinship families”.

³ The following case scenario is a composite of several child welfare cases fictionalized to protect the confidentiality of the children and families who have had similar experiences. Any resemblance to persons living or dead is purely coincidental. The service and system responses are from actual cases.

biggest she had ever seen. “Yes, Millie, it will be ready to eat soon, but not today,” he told her as he watched the vehicle approach.

It was not unusual for tribal business to follow him home, but he did not recognize this car. Anita, his wife, stepped out onto the deck that Harold had added to their modest U.S. Department of Housing and Urban Development (HUD) house with a look of both worry and anticipation. He knew the look after 25 years of marriage. She knew something was up before it happened. They exchanged glances as she wiped her hands on the kitchen towel she carried, and both took a deep breath as the car pulled in.

It is hard to describe the complexity of the feelings of relief, sadness, and fear that can come with seeing their daughter, who five minutes before, they did not know was safe or even alive, and at the same time wonder what on earth was going to happen even five minutes from now.

Jenny stepped out of the passenger side of the car, dressed for a party, presents in hand. The driver, a man in dark glasses, stayed behind the wheel. Millie looked up at Harold and at the lady in the red party dress, the Mother she knew mostly from pictures. Harold took her hand and said, “Well, little one, let’s go see your Mom.” Anita came rushing down the steps to hug and greet her daughter, hoping and praying that by some miracle she was clean and sober and had truly come home to her.

Eighteen months before, Harold and Anita had received the call from the tribal Indian Child Welfare Program that their daughter was in the hospital with a miscarriage in a city four hours away and that their granddaughter was in the custody of child protection services. Thanks to the Indian Child Welfare Act, the tribe had received notice of the child’s removal from her mother, and the tribal court would soon petition for transfer of jurisdiction of the case from state court. After an interview with the tribal child welfare program and a background check, Harold and Anita had driven to the court hearing and picked up their granddaughter and stopped off in the hospital to see Jenny.

The bruises, black eye, and cast on the right arm were the only explanation they needed for the miscarriage. They already knew from the court hearing that there had been drugs involved. Jenny hardly spoke, heavily sedated by pain medication, still recovering from internal injuries. Yes, Millie was present when the domestic abuse happened. No, she had not been hurt, but only because Jenny locked her out of the apartment shortly after it started. No, she did not need to go to treatment. No, she did not want Millie to see her like this. Harold’s questions only seemed to make her more distant and angrier. The four-hour ride home was a combination of gratitude that Millie was safely with them and of their stomachs being tied in knots. Harold knew it was unlikely they would see Jenny any time soon, despite her promise to call when she was being released. He and Anita also faced the prospect of starting parenting duties all over again but twenty-five years older.

The tribal court took jurisdiction and placed Millie with her grandparents. Six months later, there was a review hearing, and Harold and Anita were asked if they would take guardianship of Millie. After a year, there was still no contact with Jenny, and Harold and Anita began to talk about what to do if she did get her life together. They lived in hope and fear at the same time—

hoping the daughter they loved would get the help she needed to overcome her addiction and fear that she might try to disrupt Millie's life with them. At eighteen months there was a "permanency hearing" where they learned that a permanent decision about their granddaughter's custody would soon need to be made. Their caseworker had recently spoken to them about alternatives; guardianship, formal adoption, or customary adoption. Guardianship gave them open-ended custody but was still vulnerable to future change. A formal state or tribal adoption required termination of Jenny's parental rights but protected Millie from any future disruptions. Customary adoption was different.

Harold had been involved in the passage of the tribal code, setting up the process some time ago, never thinking that he and Anita might need to use this act of sovereignty for their own good and the well-being of a yet-to-be born grandchild. He knew that, unlike state sanctioned adoptions, their tribal court did not have to terminate parental rights but could use something called suspension or modification of parental rights instead. He would never consider being involved in terminating his daughter's parental rights. Between him and Anita, he was the more traditional in tribal customs of the two. He would say, "You can't undo what the Creator did," as he had been taught by his elders. Anita, he knew, might see it differently. For her, adoption seemed so final; it seemed like giving up on their daughter. She would have to be convinced that it was a good thing, customary or not. But yes, Indigenous peoples had always had ceremonies for adoption. In those old ways, you just got more family; no one's rights were terminated. Luckily, some far-sighted leaders and elders in their tribe had understood that children need stability in their sense of belonging: "permanency" the courts call it. Further, they knew that as a sovereign nation, a tribal government has jurisdiction over custody issues involving its members, and they could put their own customary practices into law.

Anita welcomed everyone inside. The young man in the dark glasses sat uncomfortably in the living room while Millie opened presents, and Jenny explained that they were early birthday presents. Harold sat and watched, cell phone ready to call the tribal police should Jenny try anything foolish. He had already put in a call to alert the officer on duty to be close at hand if needed. Anita served up some food, and after some discussion about the garden and Millie's artwork still on the fridge from Head Start, Jenny said she needed to change and wanted to get some stuff from her old room. Anita said it was fine, that it was Millie's room now, but a few of Jenny's clothes were still in the closet. Millie was excited to show her Mom her room. A few minutes later, Anita also went back to the room and stepped in the door just in time to see the party dress on the bed, Jenny in tight jeans slipping on a sweatshirt. As the sweatshirt was lifted over her head Anita could see the finger shaped bruises on Jenny's upper arms and the needle tracks on the inside of her elbows. She knew her daughter was in trouble again, and she told Millie to go tell PaPa to get out her school pictures to give her Mom one. Her attempt at a brief conversation with her daughter was cut short by the young man in dark glasses saying it was time to go "get well," a code word for getting high, Anita suspected.

Millie played with the new toy as her Mom slipped out the door, hurried along by her boyfriend. Anita and Harold felt pain and relief as the black Mustang raised a cloud of dust in the summer heat as it rolled out of the yard. Harold turned to Anita, both sick at heart, "Time for a heart-to-heart talk" he said. "Two years is long enough for Millie to wait." That night they talked late into the night: guardianship, termination of parental rights and adoption, customary adoption?

How could they decide on which option? Would the tribal court support their decision? What was best for Millie? What support and services would they need from the tribe to take on the unexpected role of primary caregiver for Millie permanently? These were hard but necessary choices to be made, but they were grateful for having options.

Part II: History and Policy Context

Prior to the early 1960s, the child welfare system in America consisted primarily of orphanage-like group care facilities. In the late 1960s, social reformers advocated for “deinstitutionalization,” moving to close down large group care facilities for the mentally ill, developmentally delayed, and indigent. Children who would have once been placed in a “children’s home” or with their families in the county “poor farm” were instead placed in foster care. Foster care came into even wider use in the 1970s, as child abuse became more widely known through the work of Dr. C. Henry Kempe and colleagues (1962), in their seminal paper “The Battered Child Syndrome.” For American Indian and Alaska Native children, the child welfare system had been used as part of the U.S. government’s assimilation policy. The Child Welfare League of America (CWLA), in partnership with the Bureau of Indian Affairs, conducted large trans-racial adoption programs, placing Native children in White adoptive homes as a solution to high rates of poverty, unemployment, and other the social ills of the times on reservations.

Further, many of the Native children separated from their families, were removed not for actual safety concerns but due to the imposition of western values and standards on Native families, judging traditional Native child-rearing practices as backwards, deficient, or inferior and believing that Native children would be “better off” in middle-class, Protestant, White families. The book *Far From the Reservation* (Fanshel, 1972) is a report on the success of the program. Fanshel found the program to be very successful, but in the last paragraph of his book acknowledges that it “just may have been the greatest indignity ever perpetrated on a people” (1972, p. 388).

As foster care grew in the U.S., so did placement of Native children in care as states and counties were trained by CWLA on the removal of American Indian/Alaska Native children. The devastating results for Native families were documented in *The Destruction of the American Indian Family* (Byler, 1976). By 1976, one in every four Indian children was in out-of-home care, and 85% to 95% were in the care of non-Native families. The Indian Child Welfare Act (ICWA, P.L. 95-608) passed in 1978 as an attempt to stop this widespread trend of forced separation and assimilation.

Also, in the 1970s, social welfare researchers began to document the harm caused by foster care, and especially foster care “drift,” the movement of foster children from home to home with no sense of belonging. In *Beyond the Best Interest of the Child* (Goldstein, Freud, and Solnit, 1973), the authors established the theory of the psychological parent and introduced the concept of “bonding” widely in child welfare. The “permanency planning” movement, intended to stop foster care drift and ensure permanence in placements for children removed from their homes, began in the mid-seventies and resulted in the Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-272). Policies established then were made even more restrictive in 1997 with the

passage of the Adoption and Safe Families Act (ASFA, P.L. 105-89) which set short timelines for parents to make changes if they want to have their children returned after being removed for maltreatment. In tribal communities, the vast majority of maltreatment is neglect rather than child abuse. Because neglect is often related to structural factors like poverty, unemployment, and lack of housing, and is exacerbated by lack of access to mental health services and substance abuse treatment, it is often a herculean task for individual parents to address these complex, multi-faceted and interrelated challenges in short timeframes.

Public policy, including the Fostering Connections to Success and Increasing Adoptions Act (P.L. 110-351), is now heavily weighted toward termination of parental rights and adoption. While the original movement for permanency was based on the child's sense of belonging (to the psychological parent), the bureaucratic version of that became legalistic, and its implementation turned into a process in which termination of parental rights was considered by itself as achieving permanency. This problem persists to the present day and is one reason that tribes have resisted this version of permanency planning.

The National Indian Child Welfare Association (NICWA 1985, 1996) takes the position that permanency can only be said to exist if it exists in the mind of the child, and that can only happen if the child's reference points for belonging are kept intact as much as possible. While legal status is one factor, it is not the only factor, and not even the most important factor in establishing permanency.

As tribes have exercised their rights under ICWA to establish their own laws and dependency courts and run their own child welfare programs, they have discovered how ill-matched the federal laws are for most Native families. Most tribes reject termination of parental rights culturally, and many have had solely negative histories with foster care and adoption, such that they shun the concept. Some have taken the initiative to create their own versions of adoption based on their traditions. The White Earth Nation in Minnesota was the first in the U.S. to establish customary adoption in their laws and practice (see Fineday, 2015).⁴ This approach allows adoption without termination of parental rights and is based in tribal cultural law rather than English Common Law, which is the foundation of American custody law.

Customary, or traditional, law is a concept that has gained increasing attention as more Indigenous people have entered the legal profession. It is now well recognized that customary practices can have the force of law when they have been consistently practiced over a long period with broad understanding (see, Zuni-Cruz, 2000). Tribes today can codify such practices by writing them into law, or by formally recognizing the practice. Additionally, some states have recognized tribal authority to create permanent placements for member children through customary adoption in state law. For example, in 2009, California Governor Arnold Schwarzenegger signed Assembly Bill 1325, the California Tribal Customary Adoption Bill into law. More recently, in 2019, New Mexico adopted NM HM51, Tribal Customary Adoption, which requested the Children, Youth, and Families Department, in consultation with tribes, to

⁴ White Earth Band of Ojibwe Customary Adoption Code is available here: <https://turtletalk.files.wordpress.com/2014/07/whiteearthcustomaryadoptioncode.pdf>. See also a tribal presentation slide deck here: <https://www.bia.gov/sites/default/files/dup/assets/public/pdf/idc2-040842.pdf>.

develop a tribal customary adoption plan, policies and procedures and to make legislative recommendations for the implementation of tribal customary adoption in state courts.

Since 2000, NICWA has championed the cause of customary adoption, created a manual on how to draft the tribal codes (see Cross et al., 2003 and National Indian Child Welfare Association, 2015), and disseminated information throughout the country on the issue. The article “Encouraging Customary Adoptions” (Cross and Fox, 2005) describes this effort. Today only a handful of tribes have enacted customary adoption laws. As of 2015, 19 tribes were known to have incorporated their traditional practices into law (Starks et al., 2016). The primary barrier is resources. It takes time and legal talent to write law based in custom. Some tribes have struggled with a fear of damaging the customs by writing them into law. While the idea of customary adoption has gained wide acceptance in the past two and a half decades, implementation has been limited. Yet there is a growing awareness that Native people can and will fight to make the practice of customary adoption a central tenet of permanency planning in tribal communities.

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