

IN THE SUPREME COURT OF THE STATE OF ALASKA
ORDER NO. 1521

Amending the Child in Need of Aid (CINA) rules to add a new Rule 23 concerning transfers of jurisdiction from state courts to tribal courts.

IT IS ORDERED:

The Child in Need of Aid rules are amended to add a new Rule 23, to read as follows:

Part X. Transfer of Jurisdiction

Rule 23. Transfer of Jurisdiction to Tribal Court.

(a) **Who May File Petition.** In circumstances in which the Indian child's tribe may exercise jurisdiction in child welfare cases under 25 U.S.C. §1911(b), the Indian child's tribe, if it has intervened, a parent, or an Indian custodian, may file a petition to transfer CINA proceedings in state court to the tribal court of the Indian child's tribe.

(b) **Contents of Petition.** The petition shall state:

(1) the name, address and telephone number of the petitioner;

(2) the names, addresses and telephone numbers of the parents of the child, if known;

(3) the names, addresses and telephone numbers of any Indian custodians of the child, if known;

(4) the name, address and telephone number of the Indian child's tribe;

(5) the name, address and telephone number of the tribal court of the Indian child's tribe; and

(6) the tribal court's position, if known, on whether it will decline or accept jurisdiction in the case.

(c) Notice and Sample Forms. With the petition, the petitioner shall also serve the parties with a notice stating the following:

(1) the parties must file and serve any response they wish to make to the petition within 20 days after service;

(2) if either parent opposes the transfer of jurisdiction to tribal court the petition will not be granted under 25 U.S.C. §1911(b), unless the parental rights of the parent have already been terminated by a court of competent jurisdiction;

(3) if the tribal court declines jurisdiction at any time before an order granting the petition is signed the petition will not be granted;

(4) if a party to the state court proceeding demonstrates good cause why jurisdiction should not be transferred, the petition will not be granted;

(5) if jurisdiction is transferred to tribal court and the tribal court exercises jurisdiction, any state court appointments of counsel for parents or Indian Custodians, or of Guardians ad Litem or counsel for the child, will terminate; and

(6) that a tribal court may find a copy of a sample order to file with the state court to accept or decline jurisdiction, and that a parent or Indian Custodian may find a copy of a sample form to file with the state court to agree or object to the proposed transfer, on the court system's website at www.state.ak.us/courts.

(d) Service.

(1) *Parents or Indian Custodians.* The petitioner shall serve parents or Indian Custodians by registered or certified mail, restricted delivery with return receipt requested, with copies of the petition for adjudication in state court, the petition to transfer to tribal court, and the notice described under subsection (c). The state court may waive service on a parent or Indian custodian under this paragraph when diligent inquiry has failed to locate that parent or Indian custodian.

(2) *Tribal Court.* If the petitioner is a parent or an Indian Custodian, the petitioner shall serve the tribal court to which transfer is sought by registered or certified mail, return receipt requested, with copies of the petition for adjudication, the petition to transfer to tribal court, and the notice required under subsection (c).

(3) *Tribe.* The petitioner shall serve any tribe that may be the Indian child's tribe, regardless of whether a tribe has intervened. Service shall be by registered or certified mail, return receipt requested, with copies of the petition for adjudication and the petition to transfer to tribal court.

(4) *Other State Court Parties.* The petitioner shall serve the petition to transfer on all other parties in the state proceeding under Civil Rule 5(b) (set forth at the end of this rule).

(e) Procedure.

(1) *Parties' Responses.* Parties to the state court proceeding may serve and file a response within 20 days after service of the petition.

(A) *Parent's Statement.* A parent served with a petition to transfer shall file and serve a statement about whether they agree with or object to the proposed transfer within the time allotted to respond to

the petition. If a parent objects to transfer, the court shall deny the petition.

(B) *Good Cause Not to Transfer.* The response of any party asserting that good cause exists not to transfer the case to tribal court shall state the alleged grounds for a finding of good cause not to transfer. Any other party may serve and file a supplemental response, limited to the issue of good cause, within ten days after service of the response. If material issues of fact are raised in the pleadings, the state court shall set an evidentiary hearing. A party asserting good cause not to transfer the case bears the burden of proof by a preponderance of the evidence.

(2) *Petitioner's Reply.* The petitioner may serve and file a reply within ten days after service of a response.

(f) Acceptance or Declination by the Tribal Court.

(1) Only the tribal court of the Indian child's tribe may accept or decline a transfer of jurisdiction under this rule.

(2) If the tribal court declines jurisdiction while the petition is pending, the state court shall dismiss the petition without further proceedings.

(3) If the tribal court has not stated its position regarding transfer by the time the petition is ripe for decision, the state court shall contact the tribal court to request a timely response. The state court shall keep a record of any communication with the tribal court, and the parties shall be informed promptly of the communication and granted access to the record.

(g) Findings and Order. In its order granting or denying the petition, the state court shall make findings on the following:

(1) whether the child is an Indian child as defined in the Indian Child Welfare Act, 25 U.S.C. §1903(4);

(2) whether the tribe to whose tribal court transfer is sought is the Indian child's tribe as defined in the Indian Child Welfare Act, 25 U.S.C. 1903(5);

(3) whether the Indian child's tribe has intervened in the state court proceeding;

(4) whether the Indian child's tribe has a tribal court, and whether that court has accepted jurisdiction over the child;

(5) whether a parent has objected to a transfer of jurisdiction to the tribal court; and

(6) whether there is good cause not to transfer jurisdiction to the tribal court.

(h) Transfer to Tribal Court.

(1) If the state court grants the transfer of jurisdiction, it shall retain jurisdiction pending exercise of jurisdiction by the tribal court.

(2) When the tribal court exercises jurisdiction under (h)(1), the state court shall provide the tribal court with copies of any documents in the state court file requested by the tribal court.

Note: Nothing in this rule shall be construed to prevent the emergency removal or placement of an Indian child under state law in accordance with 25 U.S.C. §1922, as necessary to prevent imminent physical damage or harm to the child.

CROSS REFERENCES: 25 U.S.C. §§1911(b); 25 U.S.C. §§1903.

SERVICE RULE--Civil Rule 5(b): The service provisions of Civil Rule 5(b), referred to in Rule 23(d)(4) above, are as follows:

(b) **Service -- How Made.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party, by mailing it to the attorney's or party's last known address, by transmitting it to the attorney's or party's facsimile machine telephone number as provided in Civil Rule 5.1(b), or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the attorney's or party's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the attorney's or party's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Mailing of a copy means mailing it by first class United States mail. Service by mail is complete upon mailing. Service by a commercial delivery company constitutes service by delivery and is complete upon delivery.

DATED: July 8, 2004
EFFECTIVE DATE: October 15, 2004

Chief Justice Bryner

Justice Matthews

Justice Eastaugh

Justice Fabe

Justice Carpeneti