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February 24, 2016

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**RECEIVED**

FEB 24 2016

CLERK OF SUPREME COURT  
OF WISCONSIN

Chief Justice Patience Drake Roggensack  
Associate Justices of the Wisconsin Supreme Court  
Supreme Court of Wisconsin  
110 East Main Street, Suite 440  
Madison, WI 53703

Re: Rule Petition 07-11C  
In the Matter of the Review of the Discretionary Transfer of Cases to Tribal Court

Dear Chief Justice Roggensack and Associate Justices:

On behalf of the Wisconsin State-Tribal Justice Forum, I am responding to the Court's invitation to submit additional comments to Rule Petition 07-11C following the public hearing on November 10, 2015 and prior to the open administrative rules conference scheduled for March 17, 2016.

The Forum stands on its previous written submission to the Court dated September 30, 2015, and on its comments to the Court on November 10, 2015.

One unexpected issue arose at the public hearing. That is, several justices expressed concerns that there was no established mechanism for *tribal courts* to transfer cases to the *circuit courts*. It is true that not all tribal courts in Wisconsin currently have an equivalent to WISCONSIN STAT. § 801.54 in their tribal codes or court rules. At least one, however, the Ho-Chunk Nation, does. A copy of the Ho-Chunk Nation's applicable family code provision is attached (Chapter XVIII of 4HCC § 3).

The Forum believes that it is appropriate to encourage other tribal governments to include similar provisions in their court rules. To this end, the Forum has provided a copy of this attachment to the Wisconsin Tribal Judges Association with a request that this issue be taken up by its

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members. However, respecting the sovereignty of Wisconsin's Indian tribes, the Forum believes that any action in this regard must come from the tribes themselves, rather than be imposed by a rule revision by this Court.

As much as a reciprocal transfer rule may be desirable, it must again be emphasized, as it was during the oral testimony of the Forum in favor of continuing WIS. STAT. § 801.54, that there *always* remains a way for persons who object to tribal court jurisdiction to seek jurisdiction in Wisconsin's circuit courts by filing a separate action. While this may invoke a *Teague* analysis (either by established protocols in certain judicial districts or otherwise), the concurrent jurisdiction between tribal courts and circuit courts in almost all cases under Public Law 280 provides this option. The circuit courts in Wisconsin are almost never precluded from hearing a case involving one or more tribal members.

It should also be pointed out there is currently no statutory provision that would expressly allow a *circuit* court to accept transfer of a case from a *tribal* court. WIS. STAT. § 801.54 was only designed to permit transfers from circuit courts to tribal courts. It would be entirely appropriate for the Wisconsin Supreme Court to amend WISCONSIN STAT. § 801.54 to add a provision that expressly authorizes a circuit court to accept a transfer of a case originating in tribal court. In this way the mutual respect between our respective court systems could be fully realized.

The Forum thanks the Court for its thorough examination of these issues and again requests the Court to permanently adopt WISCONSIN STAT. § 801.54 with such amendment for accepting transfer of cases from tribal courts to circuit courts as the Court deems appropriate.

Respectfully Submitted,

Neal A. Nielsen III, Chair  
Wisconsin State-Tribal Justice Forum

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cc: Julie Anne Rich, Supreme Court Commissioner  
J. Denis Moran, Director of State Courts  
Honorable Eugene White-Fish, President, Wisconsin Tribal Judges Association

shall be heard and decided at the earliest practicable time. The name of the child shall not appear on the record of appeal.

## CHAPTER XVIII TRANSFER OF CASES

111. **Transfer to Foreign Court.** In any proceedings before the Court, the Court may transfer the proceedings to any appropriate foreign court or another tribal court where the State or other American Indian tribe has a significant interest in the child, and the transfer would be in the best interest of the child.

112. **Transfer From Other Courts.** The Court may accept or decline, under the procedures set forth in this Act, transfers of child welfare cases from foreign or other tribal courts.

### a. Procedures.

(1) Receipt of Notice. The agent for service of notice of foreign court child custody proceedings, as defined by the Indian Child Welfare Act, shall be the Ho-Chunk Nation Children and Family Services. The aforementioned child custody proceedings do not include custody proceedings stemming from divorce or private custody disputes between parents.

(2) Transfer Report. The CFS shall file a written Transfer Report with the foreign court and the Hocak Department of Justice.

(3) Petition for Transfer. The petition for transfer shall be filed by the Hocak Nation Department of Justice within ten (10) days of receipt of the Pre-Transfer Report.

### (4) Intervention in Foreign Court Proceedings.

(a) The Nation may intervene in foreign court child custody proceedings, as defined in the Indian Child Welfare Act, at any point in the proceedings; and

(b) The Hocak Department of Justice shall file a motion to intervene within ten (10) days of receipt of the Pre-Transfer Report from CFS.

(5) Hearing(s). Upon receipt of transfer of jurisdiction from the foreign court, CFS shall file either a Child/Family Protection Petition and/or an updated report attached to the State's Petition with the Court and appropriate hearing(s) shall be held in accordance with this Act.

### b. Full Faith and Credit.

(1) Foreign Court Orders. State child custody Orders of other tribal courts involving children over whom the Court could take jurisdiction may be recognized by the

Court only after a full independent review of such State proceedings. The Court shall determine the following:

- (a) The foreign court had jurisdiction over the child.
- (b) The provisions of the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963, were properly followed.
- (c) Due process was provided to all interested persons participating in the foreign court proceedings.
- (d) The foreign court proceedings do not violate the public policies, customs, or common law of the Nation.

(2) Orders of Other Tribal Courts. Court Orders of other tribal courts involving children over whom the Court could take jurisdiction shall be recognized by the Court after the Court has determined the following:

- (a) That the other tribal court exercised proper subject matter and personal jurisdiction over the parties.
- (b) Due process was afforded to all interested parties participating in the other tribal court proceedings.
- (c) The foreign court proceedings do not violate the public policies, customs, or common law of the Nation.

(3) Tribal Interests. Because of the vital interest of the Nation in its children and those children who may become members of the Nation, the statutes, regulations, public policies, customs and common law of the Nation shall control in any proceeding involving a child who is a member of the Nation.

#### CHAPTER XIX REIMBURSEMENT FOR CARE

113. **Child Placement Assistance.** The Ho-Chunk Nation through CFS provides child placement assistance to any child who is under the legal custody of the Nation under this Act. These funds are used to provide for the needs of the child. The Nation is entitled to full reimbursement from the parent(s) as a debt owed to the Nation. CFS shall request reimbursement from the Court in the same or subsequent proceedings. If CFS believes reimbursement would hamper reunification, CFS can motion the Court to reduce or eliminate the payment.

114. **Duty to Reimburse the Nation.** The parent(s) of a child under the custody of the Ho-Chunk Nation have a duty to fully reimburse the Nation for any funds expended to care for the child.