

CHAPTER 79 CHILD CUSTODY, PLACEMENT, AND VISITATION

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79.1. Purpose and Policy

79.1-1. The purpose of this law is to establish standards for the Oneida Appeals Commission to use when creating and modifying legal custody, physical placement, and visitation orders in cases where the Indian Child Welfare Act does not apply.

79.1-2. It is the policy of this law to create fair and equitable legal custody, physical placement, and visitation orders based on the facts surrounding each case and the best interest of the child.

79.2. Adoption, Amendment, Conflicts

79.2-1. This law was adopted by the Oneida Business Committee by resolution BC-06-24-09-D and amended by resolution BC-02-24-10-H and BC-02-23-11-E.

79.2-2. This law may be amended pursuant to the procedures set out in the Oneida Administrative Procedures Act by the Oneida Business Committee or Oneida General Tribal Council.

79.2-3. Should a provision of this law or the application thereof to any person or circumstances be held as invalid, such invalidity shall not affect other provisions of this law which are considered to have legal force without the invalid portions.

79.2-4. In the event of a conflict between a provision of this law and a provision of another law, the provisions of this law shall control. Provided that, nothing in this law is intended to repeal or modify any existing law, ordinance, policy, regulation, rule, resolution or motion.

79.2-5. This law is adopted under authority of the Constitution of the Oneida Tribe of Indians of Wisconsin.

79.3. Definitions

79.3-1. This section shall govern the definitions of words and phrases used within this law. All words not defined herein shall be used in their ordinary and everyday sense

(a) "Best interest of the child" means the interest of a child to:

- (1) have a full, meaningful, and loving relationship with both parents and family;
- (2) be free from physical, sexual and emotional abuse;
- (3) receive appropriate medical care;
- (4) receive appropriate education;
- (5) be raised in conditions which maximize the chances of the child becoming a contributing member of society; and
- (6) be raised in an environment that is respectful of the child's race(s), culture(s), and heritage(s).

(b) "Child" or "Children" means a person under the age of eighteen (18).

(c) "Commission" means the Oneida Tribal Judicial system, known as the Oneida Appeals Commission, which is the judicial arm of the Tribe.

- (d) “Custodian” means a person or agency that has been established as the guardian of a child through a court order or in the absence of the child’s parents.
- (e) “Domestic abuse” means the infliction of physical, sexual, or emotional injury, or the creation of a reasonable fear that physical or sexual injury will be inflicted, by a parent or a member or former member of a child’s household, against a child or another member of the household.
- (f) “Electronic communication” means the expression or exchange of information through telephone, text messaging, electronic mail, or any other electronic device.
- (g) “Guardian ad litem” means a person appointed by the Commission to appear at any peacemaking, mediation, or hearing on behalf of a child.
- (h) “Joint legal custody” means more than one person has the authority to make major decisions on a child’s behalf, including decisions about education, spirituality and healthcare.
- (i) “Legal custody” means the authority to make major decisions on a child’s behalf, including decisions about education, spirituality and healthcare.
- (j) “Major decisions” means decisions regarding consent to marry, consent to enter military service, consent to obtain a motor vehicle operator’s license, authorization for nonemergency health care, choice of school and religion, and other similar activities.
- (k) “Mediation” means a method of dispute resolution that involves a neutral third party who tries to help disputing parties reach an agreement.
- (l) “Parent” means the biological or adoptive parent of a child.
- (m) “Peacemaking” means a method of dispute resolution that is based on traditional methods of dispute resolution and addresses the needs of rebuilding relationships between people.
- (n) “Physical placement” means the condition under which a person has the right to have a child physically placed with that person and has the right and responsibility to make, during that placement, routine daily decisions regarding the child’s care, consistent with major decisions made by a person having legal custody.
- (o) “Sole legal custody” means only one person has legal custody and the authority to make major decisions on a child’s behalf, including decisions about education, spirituality and healthcare.
- (p) “Stepparent” means the spouse or ex-spouse of a child’s parent who is not a biological parent of the child.
- (q) “Tribe” or “Tribal” means the Oneida Tribe of Indians of Wisconsin.

79.4. General Provisions

79.4-1. When it is necessary to determine the legal custody, physical placement, and/or visitation of a child, the Commission shall make such provisions as it deems just and reasonable in accordance with this law.

79.4-2. If legal custody and physical placement are uncontested, the parties may submit a voluntary agreement as to the legal custody and physical placement of the child to the Commission. The Commission shall approve the agreement if it is in the best interest of the child.

79.4-3. All proceedings relating to the custody of children shall comply with the requirements of the Uniform Child Custody Jurisdiction and Enforcement Act.

79.5. Jurisdiction

79.5-1. The Commission has jurisdiction over any action brought under this law. Personal jurisdiction over an individual under this law may be established where the parties are any of the following:

- (a) a member of the Tribe; or
- (b) a resident of the Reservation who is also a member of an Indian tribe, band or community which is recognized by a State or the federal government; or
- (c) a resident of the Reservation who is also the biological parent of a child that is enrolled or is eligible for enrollment with the Tribe; or
- (d) a parent, custodian, or potential custodian who consents to the jurisdiction of the Commission by one (1) of the following:
 - (1) Filing an action with the Commission.
 - (2) Knowingly and voluntarily giving written consent to the jurisdiction of the Commission.
 - (3) Entering a notice of appearance before the Commission in an action without concurrently preserving the defense of lack of personal jurisdiction or filing a motion to dismiss for lack of personal jurisdiction within thirty (30) days of entering the notice of appearance.
 - (4) Appearing in an action before the Commission without asserting the defense of lack of personal jurisdiction.

79.5-2. *Transfer of Cases from Other Courts.* If personal jurisdiction over the parties has been established under 79.5-1, the Commission has jurisdiction over any action transferred to the Commission from any court of competent jurisdiction.

79.6. Commencing a Custody Proceeding

79.6-1. A child custody proceeding is commenced by a parent by filing a petition to:

- (a) seek custody of a child;
- (b) establish the paternity of a child;
- (c) establish a child support order; or

79.6-2. A person, other than a parent of the child, may seek custody of the child only if:

- (a) the child is not in the physical custody of one of his or her parents; or
- (b) the person has a parent-child relationship with the child; or
- (c) the petition alleges that neither parent is a suitable custodian.

79.6-3. Notice of a child custody proceeding shall be given to the child's parent(s) and any custodian. The Commission may, upon a showing of good cause, permit the intervention of other interested parties.

79.6-4. Child custody proceedings initiated independently of another action shall be conducted in accordance with the Commission's rules of civil procedure.

79.7. Peacemaking and Mediation

79.7-1. The Commission may refer the parties to peacemaking or mediation if the parties agree to attend peacemaking or mediation. The Commission shall not refer the parties to peacemaking or mediation if attending the session will cause undue hardship or would endanger the health or safety of a party. The Commission shall consider evidence of domestic abuse when determining if peacemaking or mediation would endanger the health or safety of a party. When the parties attend peacemaking or mediation based on a referral from the Commission, the Commission shall be responsible for the costs of the peacemaking or mediation.

79.7-2. *Peacemaking.* If the parties agree to attend peacemaking, peacemaking shall be provided to the parties by peacemakers recognized by the Cultural Heritage Department of the Tribe or the Commission. The parties shall determine what type of peacemaking they will attend.

79.7-3. *Mediation.* If the parties agree to attend mediation, mediation shall be provided to the parties by any person or public or private entity contracted to conduct mediation. Every mediator shall have not less than twenty-five (25) hours of mediation training or not less than three (3) years of experience in dispute resolution. Every mediator shall have training on domestic violence and the effects of domestic violence on victims and on children.

(a) Private Mediator. The parties may, at their own expense, receive mediation services from a mediator other than the mediator they are referred to by the Commission. Parties who receive services from a private mediator shall be responsible for the cost and shall sign and file with the clerk a written notice stating the mediator's name and the date of the first meeting with the mediator.

(b) Child support shall not be considered during mediation unless child support is directly related to the legal custody or physical placement of the child and the parties agree, in writing, to consider child support.

(c) Powers and Duties of a Mediator. A mediator shall be guided by the best interest of the child and may:

- (1) include the counsel of any party or any appointed guardian ad litem in the mediation.
- (2) interview any child of the parties, with or without a party present.
- (3) require a party to provide written disclosure of facts relating to any legal custody or physical placement issue.
- (4) suspend mediation when necessary.
- (5) terminate mediation if a party does not cooperate or if mediation is not appropriate.

79.7-4. *Agreement.* Any agreement that resolves issues of legal custody or periods of physical placement between the parties and that is reached as a result of peacemaking or mediation shall be prepared in writing, reviewed by the attorney, if any, for each party and the guardian ad litem, if any, and submitted to the Commission to be included in the order as a stipulation. The peacemaker or mediator shall certify that the written agreement accurately reflects the agreement made between the parties. The Commission may reject the agreement if it is not in the best interest of the child. The Commission shall state in writing its reasons why an agreement is not in the best interest of the child.

(a) If, after peacemaking or mediation, the parties do not reach an agreement on legal custody or periods of physical placement, the parties, the peacemaker, or the mediator shall so notify the Commission. The Commission shall promptly appoint a guardian ad litem, if necessary. The parties may return to peacemaking or mediation at any time before any trial of or final hearing on legal custody or periods of physical placement.

79.7-5. A person who is awarded periods of physical placement, visitation rights, or legal custody of a child and is having a problem relating to any of these matters may be referred to peacemaking or mediation by the Commission for assistance in resolving the problem.

79.8. Guardian Ad Litem

79.8-1. The Commission shall be responsible for establishing and administering a program for guardians ad litem.

79.8-2. *Appointment.* Except as provided for in 79.8-3, the Commission shall appoint a guardian ad litem for a child if the Commission has reason for special concern for the welfare of the child or the legal custody or physical placement of the child is contested. Preference shall be given to enrolled Tribal members.

79.8-3. The Commission is not required to appoint a guardian ad litem if:

- (a) Legal custody or physical placement is contested in an action to modify legal custody or physical placement under 79.12; and
- (b) The modification sought would not substantially alter the amount of time that a parent may spend with his or her child; and
- (c) The Commission determines either of the following:
 - (1) That the appointment of a guardian ad litem will not assist the Commission in the determination regarding legal custody or physical placement because the facts or circumstances of the case make the likely determination clear; or
 - (2) That a party seeks the appointment of a guardian ad litem solely for a tactical purpose, or for the sole purpose of delay, and not for a purpose that is in the best interest of the child.

79.8-4. *Qualifications.*

- (a) A guardian ad litem shall be an adult who:
 - (1) is currently certified as a guardian ad litem and in good standing;
 - (2) has never been convicted of a felony; and
 - (3) has never been convicted of any crime against a child.
- (b) No person may be appointed guardian ad litem in that proceeding who is:
 - (1) an interested party;
 - (2) appears as counsel in the proceeding on behalf of any party; or
 - (3) is related to an interested party, an actual party, a Commissioner for the proceeding, or to an appointing Commissioner. For the purposes of this section, "related to" shall include a spouse, parent, parent-in-law, stepparent, child, son- or daughter-in-law, stepchild, sibling, stepsibling, half-sibling, sibling-in-law, grandparent, grandchild, aunt, uncle, niece, nephew, first cousin, or any similar relationship by blood, adoption, marriage, or social tie that could be reasonably interpreted as a conflict of interest.
- (c) A guardian ad litem may be recognized as certified by the Commission if he or she:
 - (1) has completed guardian ad litem training provided by the Commission, another Indian tribe, or a state; or
 - (2) is recognized as a certified guardian ad litem by another jurisdiction.

79.8-5. *Responsibilities.* The guardian ad litem has none of the rights or duties of a general guardian. The guardian ad litem shall:

- (a) be an advocate for the best interests of a child.
- (b) consider, but shall not be bound by, the wishes of the child or the positions of others as to the best interests of the child.
- (c) investigate the issues and provide a written report to the Commission.
- (d) communicate to the Commission the wishes of the child, unless the child asks the guardian ad litem to do otherwise.

79.8-6. *Status Hearing.* The Commission shall schedule a status hearing approximately thirty (30) days, or sooner if practical, after a guardian ad litem is appointed, in order to receive an update on the actions taken and work performed by the guardian ad litem in the matter.

79.8-7. *Compensation.* The guardian ad litem shall be compensated at a rate that the Commission determines is reasonable, to be paid by the parties. The Commission may apportion the amount that each party shall pay based on the ability to pay or assess the cost equally between the parties.

79.9. Temporary Orders

79.9-1. The Commission may make temporary custody and placement orders, consistent with this law and any other applicable law.

79.9-2. Notice of motion for a temporary order may be served when the action is commenced, or any time after, and shall be accompanied by an affidavit stating the basis for the request for relief.

79.10. Custody and Physical Placement

79.10-1. In determining legal custody and periods of physical placement, the Commission shall consider all facts relevant to the best interest of the child. The Commission may not prefer one potential custodian over the other on the basis of the sex or race of the custodian.

79.10-2. *Legal Custody.*

(a) The Commission shall presume that joint legal custody is in the best interest of the child. The Commission may give joint legal custody to both parties only if it finds that doing so is in the child's best interest and that either of the following applies:

(1) Both parties agree to joint legal custody; or

(2) One (1) party requests joint legal custody or both parties request sole legal custody, and the Commission specifically finds all of the following:

(A) Both parties are capable of performing parental duties and responsibilities and wish to have an active role in raising the child.

(B) No conditions exist at the time which would substantially interfere with the exercise of joint legal custody.

(C) The parties will be able to cooperate in the future decision making required under an award of joint legal custody. In making this finding the Commission shall consider, along with any other pertinent items, any reasons offered by a party objecting to joint legal custody. Evidence of domestic abuse creates a rebuttable presumption that the parties will not be able to cooperate. This presumption may be rebutted by clear and convincing evidence that the abuse will not interfere with the parties' ability to cooperate in the future decision making required.

(b) The Commission shall not give sole legal custody to a party who refuses to cooperate with the other party if the refusal to cooperate is unreasonable.

79.10-3. *Allocation of Physical Placement.* In determining the allocation of periods of physical placement, the Commission shall consider each case on the basis of the factors in 79.10-4. The Commission shall set a placement schedule that allows the child to have regularly occurring, meaningful periods of physical placement with each party and that maximizes the amount of time the child may spend with each party, taking into account geographic separation and accommodations for different households.

(a) A child is entitled to periods of physical placement with both parties unless, after a hearing, the Commission finds that physical placement with a party would endanger the child's physical, mental or emotional health.

(b) No Commission may deny periods of physical placement for failure to meet, or grant periods of physical placement for meeting, any financial obligation to the child.

(c) If the Commission grants periods of physical placement to more than one (1) party, either or both parties may be granted a reasonable amount of electronic communication at reasonable hours during the other party's periods of physical placement with the child. Electronic communication shall not be used as a substitute for a party's periods of physical placement with the child. If the Commission grants electronic communication to a party whose physical placement with the child is supervised, the party's electronic communication with the child shall also be supervised.

79.10-4. *Factors in Legal Custody and Physical Placement Determinations.*

(a) The Commission shall consider the following factors in determining legal custody and periods of physical placement:

(1) The wishes of the parties, including the child's parents, or other family members, as shown through testimony or documents submitted to the Commission.

(2) The wishes of the child, which may be communicated by the child or through the child's guardian ad litem or other appropriate professional.

(3) The relationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest.

(4) The child's adjustment to the home, school, religion and community.

(5) Whether the mental or physical health of a party, child, or other person living in a proposed custodial household negatively affects the child's well-being.

(6) The availability of public or private child care services.

(7) The cooperation and communication between the parties and whether either party unreasonably refuses to cooperate or communicate with the other party.

(8) Whether there is evidence of domestic abuse.

(9) Whether either party has or had a significant problem with alcohol or drug abuse.

(10) Such other factors as the Commission may, in each individual case, determine to be relevant.

(b) If the Commission finds that a party has engaged in a pattern or serious incident of domestic abuse, the safety and well-being of the child and the safety of any party who was the victim of the abuse shall be the paramount concerns in determining legal custody and periods of physical placement.

(c) If a party is a member of the National Guard or of a reserve unit of the U.S. armed forces, the Commission shall not consider as a factor in determining the legal custody of a child whether he or she has been or may be called to active duty and consequently is, or in the future will be or may be, absent from home.

79.10-5. *Final Order.* If legal custody or physical placement is contested, the Commission shall state in writing why its findings relating to legal custody or physical placement are in the best interest of the child.

(a) In making an order of joint legal custody, upon the request of one (1) party the Commission shall specify who may make major decisions for the child. The Commission may give one (1) party sole power to make specified decisions, while both parties retain equal rights and responsibilities for other decisions.

- (b) In making an order of joint legal custody and periods of physical placement, the Commission may specify one (1) party as the primary caretaker and his or her home as the primary home of the child.
- (c) In an order of physical placement, the Commission shall specify the right of each party to the physical control of the child in sufficient detail to enable a party deprived of that control to request relief for interference with custody or parental rights.
- (d) If the Commission finds that a party has engaged in a pattern or serious incident of domestic abuse, the Commission shall state in writing whether the presumption against awarding joint or sole legal custody to that party is rebutted and, if so, what evidence rebutted the presumption, and why its findings relating to legal custody and physical placement are in the best interest of the child.
- (e) If the Commission finds that a party has engaged in a pattern or serious incident of domestic abuse or other activity that endangered the child's physical, mental or emotional health, and the Commission awards periods of physical placement to both parties, the Commission shall provide for the safety and well-being of the child and for the safety of the party who was the victim of the abuse, if applicable. This may include:
- (1) requiring supervised exchanges of the child;
 - (2) requiring supervised physical placement and/or visitation;
 - (3) requiring a party to attend and complete a certified treatment program for batterers and/or alcohol or substance abusers;
 - (4) prohibiting a party from being under the influence of alcohol or controlled substances during the exchange of the child or prohibiting a person from possessing or using alcohol or controlled substances during the period of physical placement; or
 - (5) ordering any other conditions that the Commission determines is necessary for the safety and well-being of the child and the party who was the victim of the abuse, if applicable.

79.11. Visitation Rights of Certain Persons

79.11-1. *General.* Upon petition by a grandparent, great-grandparent, stepparent, or person who has maintained a relationship similar to a grandparent-child or parent-child relationship with the child, the Commission may grant reasonable visitation rights to that person if:

- (a) the parents have notice of the hearing;
- (b) the parents' objection to the visitation, if any, is considered; and
- (c) it is determined that visitation is in the best interest of the child.

79.11-2. *Parent's Decision.* Whenever possible, the wishes of the child shall be considered when the Commission is determining whether to grant visitation rights under 79.11-1 however, it is presumed that a fit parent's decision regarding non-parental visitation is in the best interest of the child.

79.11-3. *Homicide Conviction.* The Commission may deny visitation rights to a person if he or she has been convicted of the intentional homicide of a parent of the child, and the conviction has not been reversed, set aside or vacated.

79.12. Revision of Orders

79.12-1. *Substantial Modifications.*

- (a) Within Two (2) Years After Final Judgment. Except as provided in 79.12-2, the Commission may not modify any of the following orders before two (2) years after the

initial order is entered, unless a party seeking the modification shows by substantial evidence that the modification is necessary because the current custodial conditions are harmful to the best interest of the child:

(1) An order of legal custody.

(2) An order of physical placement if the modification would substantially alter the time a party may spend with the child.

(b) After Two (2) Year Period. Upon a party's request, the Commission may modify an order of legal custody or an order of physical placement where the modification would substantially alter the time a party may spend with the child if the Commission finds all of the following:

(1) The modification is in the best interest of the child.

(2) There has been a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement.

(c) With respect to 79.12-1(b), there is a rebuttable presumption that:

(1) Continuing the current legal custody order is in the best interest of the child.

(2) Continuing the child's physical placement with the party with whom the child resides for the greater period of time is in the best interest of the child.

(d) A change in the economic circumstances or marital status of either party is not sufficient to meet the standards for modification under 79.12-1(b).

79.12-2. *Modification of Substantially Equal Physical Placement Orders.* If the parties have substantially equal periods of physical placement pursuant to a custody order and circumstances make it impractical for the parties to continue to have substantially equal physical placement, the Commission may modify the order within two (2) years after the initial order is entered if it is in the best interest of the child.

79.12-3. *Modification Without Substantial Alterations.* The Commission may modify an order of physical placement which does not substantially alter the amount of time a party spends with the child if the Commission finds that the modification is in the best interest of the child.

79.12-4. *Denial of Physical Placement.* The Commission may deny a party's physical placement rights at any time if it finds that the physical placement rights would endanger the child's physical, mental or emotional health.

79.12-5. *Reasons for Modification.* If a party opposes modification or termination of a legal custody or physical placement order, the Commission shall state, in writing, its reasons for the modification or termination.

79.12-6. *Notice.* The Commission may not enter an order for modification until notice of the modification request has been given to the child's parents, if they can be found, and to any person having custody of the child.

79.12-7. *Revisions Agreed to by Stipulation.* If after an initial order is entered, the parties agree to a modification in an order of physical placement or legal custody and file a stipulation with the Commission that specifies the agreed upon modification, the Commission shall incorporate the terms of the stipulation into a revised order of physical placement or legal custody unless the Commission finds that the modification is not in the best interest of the child.

79.13. Enforcement of Physical Placement Orders

79.13-1. *Who May File.* A party who has been awarded periods of physical placement may file a motion for enforcement of the physical placement order if the party has had one (1) or more

periods of physical placement denied by the other party or substantially interfered with by the other party.

79.13-2. *Motion.* The motion shall allege facts sufficient to show one or more of the criteria in 79.13-1 apply and shall request the imposition of a remedy or any combination of remedies.

79.13-3. *Service on Responding Party.* Upon the filing of a motion under 79.13-2, the moving party shall serve a copy of the motion upon the responding party by personal service. The responding party may respond to the motion either in writing before or at the hearing or orally at the hearing.

79.13-4. The Commission shall hold a hearing on the motion no later than thirty (30) days after the motion has been served, unless the time is extended by mutual agreement of the parties or upon the motion of a guardian ad litem and the approval of the Commission. The Commission may order that a guardian ad litem be appointed for the child prior to the hearing.

(a) If at the conclusion of the hearing, the Commission finds that the responding party has intentionally and unreasonably denied the moving party one (1) or more periods of physical placement or that the responding party has intentionally and unreasonably interfered with one (1) or more of the moving party's periods of physical placement, the Commission shall:

- (1) grant additional periods of physical placement to replace those denied or interfered with; and
- (2) award the moving party a reasonable amount for the cost of maintaining an action under this section and for attorney fees.

(b) The Commission may:

- (1) issue an order specifying the times for the exercise of periods of physical placement;
- (2) find the responding party in contempt; and/or
- (3) grant an injunction ordering the responding party to strictly comply with the judgment or order relating to the award of physical placement.
- (4) issue an order requiring the responding party to pay to the moving party a sum of money sufficient to compensate the moving party for any financial loss or expenses associated with the periods of physical placement that were denied or interfered with.

(c) The Commission may not permanently modify an order of legal custody or physical placement in an action under this section.

End.

Adopted – BC-06-24-09-D

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