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VIA ELECTRONIC MAIL and
U.S. Mail

February 25, 2011

RE: Indian Child Welfare Act/ICPC/Notice

Dear Rob:

Pursuant to our telephone conversation of February 24, 2011, this letter will outline the legal authority which clearly holds that Florida ICPC cannot require notice to an Indian Tribe in a *voluntary* adoption proceeding. If Florida ICPC continues to insist that notice to an Indian Tribe is required, I would be willing to serve as co-counsel for the birthparents and believe that you should proceed with litigation to resolve this issue.

If an adoption involves an Indian child and is a voluntary adoption, it is governed by the Indian Child Welfare Act (ICWA), 25 U.S.C. 1913. An Indian tribe does not have a right to notice in a *voluntary case,* whereas they must be notified in an involuntary case, pursuant to 25 U.S.C. §1911. See: *Catholic Social Service, Inc. v. C.A.A.,* 783 P.2d 1159 (Alaska, 1989), cert. denied 110 S. Ct. 2208 (1990); *Navajo Nation v. Superior Court of the State of Washington for Yakima County,* 47 F. Supp 2d 1233, 1237-1239 (E.D. Wash. 1999); *In re Phillip A.C.,* 149 P.3d 51, 59, 60 n. 44 (Nev. 2006) (noting, in dicta, that a tribe is not entitled to notice of a voluntary adoption proceeding under the ICWA).

This legal principle is further supported by the Department of Interior, Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584 (Nov. 26, 1979) (hereinafter, BIA Guidelines) interpretation of ICWA. The BIA Guidelines, specifically state:

> Under the Act confidentiality is given a much higher priority in voluntary proceedings than in involuntary ones. The Act mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones. (cites omitted) For voluntary placements, however, the Act specifically directs state courts to respect parental requests for confidentiality. 25 U.S.C. §1915(c). The most common voluntary placement involves a newborn infant. Confidentiality has traditionally been a high priority in such placements. The Act reflects that

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> traditional approach by requiring deference to requests for anonymity in voluntary placements but not in involuntary ones. BIA Guidelines *supra* at 67586. (Emphasis added).

While the BIA Guidelines are not federal regulations and are not binding upon the Court, the vast majority of courts have utilized the BIA Guidelines for guidance in their interpretation of the ICWA. See: *In the Matter of the Appeal in Maricopa County Juvenile Action No. A-25525,* 136 Ariz. 528, 532, 677 P.2d 228 232, footnote 4 (Ariz. App. 1983); *C.L. v. P.C.S.,* 17 P.3d 769 (Alaska 2001); *In the Matter of Adoption of F.H.,* 851 P.2d 1361 (Alaska 1993); *In re Baby Girl A.,* 282 Cal. Rptr. 105 (Cal. App. 1991).

In a voluntary adoption, such as this matter, you must take into account a parent's constitutional right to privacy. As an unanimous U.S. Supreme Court stated in *Whalen v. Roe*, 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed.2d 64 (1977) a parent's right of privacy embraces two (2) protected interests, the "individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Id* at 599-600.

Both of these protected interests are of paramount importance in this adoption case.

In *Eisenstadt v. Bair,* 405 U.S. 438, 92 S. Ct. 1029; 31 L. Ed.2d 349 (1972), Justice Brennan stated, in his majority opinion, that:

> If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. *Id.* at 453.

Recently, the Iowa Supreme Court, has held that the Iowa (*state*) ICWA placement preferences were unconstitutional, Iowa Code §232B.9(6), as said law violated the birth parent's right of privacy. The Iowa Supreme Court stated:

> Shannon's fundamental right to make decisions concerning the care of her child is <u>not</u> lessened because she intended to terminate her rights to Nairobi. *In re the Interest of N.N.E.*, 752 N.W.2d 1, 16 (2008). (Emphasis added).

The Iowa Supreme Court further stated that:

> The State has no right to influence her decision by preventing her from choosing a family she feels is best suited to raise her child. **Moreover, we do not believe the federal ICWA condones state law curtailing a parent's right in this manner**. *Id* at 17. (Emphasis added).

Indeed, the importance of parent's privacy rights was emphasized in testimony before Congress by Mr. Calvin Isaac, Tribal Chief of the Mississippi Bank of Choctaw Indians wherein he stated:

> "The ultimate responsibility for child welfare rests with the parents and we would not support legislation which interfered with that basic relationship." Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong., 2d Sess., 62 (1978).

The importance of a birth parent's constitutional right of privacy preempts any statutory right an Indian tribe may have pursuant to the ICWA. This principal is clearly recognized and set forth by the BIA Guidelines, and exemplified as follows:

> F.1. Commentary
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> The third subsection recommends that the court or agent make an active effort to find out if there are families entitled to preference who would be willing to adopt the child. **This provision recognizes, however, that the consenting parent's request for anonymity takes precedence over efforts to find a home consistent with the Act's priorities.** BIA Guidelines, 44 Fed. Reg. at 67594. (Emphasis added).
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> . . .
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> F.3. Commentary
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> The Act indicates that the court is to give preference to confidentiality requests by parents in making placements. **Paragraph (i) is intended to permit parents to ask that the order of preference not be followed because it would prejudice confidentiality or for other reasons.** BIA Guidelines, 44 Fed. Reg. at 67594 (Emphasis added).
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> The BIA Guidelines, 44 Fed. Reg. at 67586 (1979) further state:
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> B.1. Commentary
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> **Under the Act confidentiality is given much higher priority in voluntary proceedings than in involuntary ones.** The Act mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones. (cite omitted) **For voluntary placements however, the Act, specifically directs state courts to respect parental requests for confidentiality.** 25 U.S.C. §1915(c). **The most common voluntary placement involves a new born infant.** BIA Guidelines, 44 Fed. Reg. at 67586. (Emphasis added).

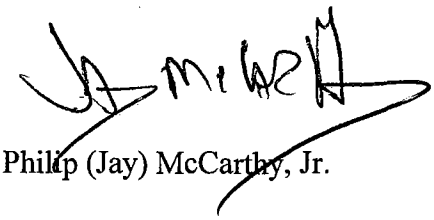
In a voluntary ICWA adoption, an Indian tribe's rights are **NOT** on parity with those of a parent. In a voluntary adoption proceeding, a parent's rights are superior to those of an Indian tribe, as any other outcome would violate a parent's constitutional rights. As noted by the California Appellate Court, wherein it determined a request of a parent may constitute "good cause" to modify the ICWA placement preferences, the Court stated as follows:

The tribe's interest in actions involving Indian children living off the reservation is not as great. A review of ICWA's provisions supports this difference in the interests and rights between an Indian child's parents and his or her tribe. For example, section 1911(b) grants a preference to tribal courts in foster care and parental termination matters where an Indian child resides or is domiciled off the reservation "*absent objection by either parent.*" **Also, section 1913(a) permits an Indian parent or custodian to voluntarily consent to a foster care placement or termination of parental rights without first notifying the tribe.** Finally, under section 1915(c), the Indian parent's placement preferences must be considered "[w]here appropriate."

Furthermore, this interpretation of the ICWA does not entirely preclude an Indian child adopted by non-Indians from discovering and reestablishing his or her roots later in life. Section 1917 permits an adopted Indian to receive information on his or her "tribal affiliation . . . and . . . such other information as may be necessary to protect any rights flowing from the individual's tribal relationship" upon reaching the age of eighteen." *In re Baby Girl A.*, 230 Cal App.3d 1611, 1621, 282 Cal. Rptr. 105, 111 (Cal. App. 1991). (Emphasis added).

Please feel free to contact me to further discuss this matter.

Sincerely,



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PJM/jsr