NEW MEXICO LAW REVIEW

Volume 23
Issue 2 *July 1993*

Summer 1993

Tribal Jurisdiction under Section 1911(b) of the Indian Child Welfare Act of 1878: Are the States Respecting Indian Sovereignty

Michael E. Connelly

Tribal Jurisdiction Under Section 1911(b) of the Indian Child Welfare Act of 1878: Are the States Respecting Indian Sovereignty?

I. INTRODUCTION

As with most areas of law, an enduring problem in federal Indian law relates to jurisdiction. The question of which court system has authority to hear cases involving Indians has remained constant for decades, in spite of lawmakers' best efforts to resolve the issue.[1] While in some areas of the law, tribal jurisdiction is being challenged,[2] in at least one area, child custody stemming from adoption and foster care placement, the federal government has sought to expand tribal jurisdiction. Because the matter of where and how minor tribal members are placed in custody proceedings is inextricably bound up in the survival of Native Americans as an entity, Congress determined that tribes should have jurisdiction over Indian child custody proceedings. In enacting the Indian child Welfare Act of 1978,[3] Congress gave tribes exclusive jurisdiction over proceedings in which the child was a resident or domiciliary on the tribal reservation.[4] Congress went even further by giving tribes jurisdiction over Indian children living off the reservation.[5]

To effectuate tribal jurisdiction over custody matters involving member children not living on the reservation, Congress mandated state courts to transfer any custody proceedings involving tribal member children to

---

1. For discussion of lawmakers' efforts to resolve jurisdiction over Native Americans, see Sidney Harring, *Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 AM. INDIAN L. REV. 191 (1990); Robert Clinton, *Development of Criminal Jurisdiction Over Indian Lands*, 17 ARIZ. L. REV. 951 (1975); Nell Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PENN. L. REV. 195 (1984); FELIX COHEN, HANDBOOK ON INDIAN LAW (1982 ed.).

2. *See, e.g.*, Duro v. Reina, 485 U.S. 676 (1990), where the Supreme Court held tribal courts lacked criminal jurisdiction not only over non-Indians, but also over non-tribal member Native Americans. The ruling was considered such an affront to tribal sovereignty that Congress introduced legislation to reverse the Court's ruling. *See* Helen A. Gaebler, Comment, *The Legislative Reversal of Duro v. Reina: A First Step Toward Making Rhetoric A Reality*, 1991 WIS. L. REV. 1399 ("Within months of the *Duro* decision, Congress passed a temporary amendment to the Indian Civil Rights Act that effectively reversed the Court's holding. The amendment clarified the meaning of tribal 'powers of self-government' under 25 U.S.C. § 1301(2) to include 'the inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians.'") *Id.* at 1401 (footnotes omitted). The amendment became permanent in 1991. *See also* Nell Newton, *Permanent Legislation To Correct Duro v. Reina*, 17 AM. INDIAN L. REV. 109 (1992). The amended definition of Indian, under the Indian Civil Rights Act, is "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153 of Title 18 if that person were to commit an offense listed in that section in Indian country to which that section applies." 25 U.S.C. § 1301(4) (1992).

3. Indian Child Welfare Act of 1978, Pub. L. No. 95-608 (codified as 25 U.S.C. §§ 1901-1963 (1978)) [hereinafter "ICWA" or "the Act"].

4. *See* Indian Child Welfare Act of 1978 (codified at 25 U.S.C. §§ 1901-1963 (1978)). Section 1911(a) gives tribal courts exclusive jurisdiction over child custody proceedings "involving any Indian child who resides or is domiciled within the reservation of such tribe."

5. 25 U.S.C. § 1911(b).

tribal court,[6] with limited exceptions.[7] This Comment analyzes how the state courts increasingly have relied on those exceptions to deny tribal jurisdictional over Indian child custody matters. Contradicting ICWA's preference for tribal jurisdiction over Indian child custody proceedings, state courts are finding reasons *not* to transfer these cases to the tribes. Instead, the courts are exercising their concurrent jurisdiction[8] over Indian child custody cases, when in fact ICWA mandates that they transfer them to tribal court.

II. ORIGINS OF THE INDIAN CHILD WELFARE ACT AND ITS TRIBAL JURISDICTION PROVISION

By the mid-1970s, the rate of Indian children being separated from their families and tribes through placement in non-Indian foster care and adoptive homes had reached an alarming proportion.[9] The House Report on Indian Child Welfare stated:

> The wholesale separation of Indian children from their famileies [sic] is perhaps the most tragic and destructive aspect of American Indian life today.
>
> Surveys of States with large Indian populations conducted by the Association of American Indian Affairs (AAIA) in 1969 and again in 1974 indicate that approximately 25-35 percent of all Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions. In some States, the problem is getting worse: in Minnesota, one out of every eight Indian Child under 18 years of age is living in an adoptive home; and in 1971-72, nearly one in every four Indian children under 1 year of age was adopted.[10]

The Report indicated that, per capita, Indian children in Minnesota were five times more likely than their non-Indian counterparts to be placed in adoptive homes or foster care.[11] In Montana, Indian children were

---

6. "In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court . . . shall transfer such proceeding to the jurisdiction of the tribe . . . ." *Id.* This Congressional mandate is part of §1911(b) even though state courts enjoy concurrent jurisdiction and can exercise that jurisdiction.

7. *See supra* note 6 and accompanying text regarding § 1911(b)'s requirement that state courts transfer Indian child custody proceedings. The exceptions to the mandate apply when the tribe declines, when a parent vetoes the proposed transfer, or when a state court determines there is good cause not to transfer the case. 25 U.S.C. § 1911(b).

8. State and tribal courts share concurrent jurisdiction over Indian child custody cases. *See e.g.*, Joan Hollinger, *Beyond the Best Interest of the Tribe: The Indian Child Welfare Act and the Adoption of Indian Children*, 66 U. DET. L. REV. 451, 459-60 (1989) (states have concurrent jurisdiction when Indian children live off the reservation); Patrice Kunesh-Hartman, *The Indian Child Welfare Act of 1978: Protecting Essential Tribal Interests*, 60 U. COLO. L. REV. 131, 141-46 (1989) (discusses states' historical concurrent jurisdiction over matters involving Indians). However, ICWA mandates preference for tribal jurisdiction. *See* 25 U.S.C. § 1911(b) (even when states enjoy concurrent jurisdiction over Indian child custody matters, they "shall" transfer such proceedings to tribal court).

9. *See* HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, H. R. REP. NO. 1386, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530.

10. *Id.* at 7531.

11. *Id.*

thirteen times more likely to be put in such an environment.[12] Close to ninety percent of the adoptions and foster care situations involved an Indian child going to live with a non-Indian family, the Indian child thus being separated from his native heritage.[13] The future of the Native American family, and of tribal survival, had reached a critical point.

Responding to this crisis, the federal government enacted the Indian Child Welfare Act of 1978.[14] The Act's twofold purpose is protecting the best interests of Indian children and promoting tribal stability and security.[15] ICWA sought to establish minimum federal standards governing the removal and placement of Indian children from their biological families, in order to closely regulate the "off reservation" placement of Indian children. It also stressed the importance of allowing the child's tribe to share in the child custody proceeding, thereby enhancing tribal sovereignty by allowing the tribe a greater voice in shaping its own destiny.[16] In a phrase, the Act attempts to reverse a decline in tribal jurisdiction over tribal members by mandating district courts to transfer non-resident Indian cases to the tribal courts.

ICWA generally, and its jurisdictional provision in particular, came in response to and were indicative of Native Americans moving off the reservations and into the cities, and thus creating an urban Indian class.[17] As a result of the post-World War II federal Indian policy of termination and relocation,[18] as well as the high rates of unemployment,[19] Indian

---

12. *Id.*

13. *Id.*

> In South Dakota, 40 percent of all adoptions made by the State's Department of Public Welfare since 1967-68 are of Indian children, yet Indians make up only 7 percent of the juvenile population . . . . In Wisconsin, the risk run by Indian children of being separated from their parents is nearly 1,600 percent greater than it is for non-Indian children . . . .

Id.

14. 25 U.S.C. §§ 1901-1963 (1978).

15. 25 U.S.C. § 1902 ("The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families . . . .").

16. *Id.* Note that ICWA's scope is limited to removal of Indian children from their families and placement of these children in foster or adoptive homes. *See In re* Bertleson, 617 P.2d 121 (Mont. 1980) (ICWA not directed at disputes within Indian families regarding custody of Indian children); County of Inyo v. Jeff, 277 Cal. Rptr. 841 (Cal. App. 1991) (ICWA does not prevent state from collecting child support from Indian father).

17. Note that the aggressive campaign by social service agencies, including religious missionaries, to have reservation-born Indian children adopted by non-Indian urban couples also helped create an urban Indian class. For discussion of the agencies' efforts to have Indian children adopted off the reservation, see DAVID FANSHELL, FAR FROM THE RESERVATION: THE TRANSRACIAL ADOPTION OF AMERICAN INDIAN CHILDREN (1972); *see also* FRANCIS PRUCHA, INDIAN POLICY IN THE UNITED STATES: HISTORICAL ESSAYS (1981).

18. Following World War II, federal Indian policy focused on terminating the federal government's trusteeship of Indian lands and relocating Indians from reservations to urban areas around the country where, it was believed, employment and educational opportunities were better, and where Indians could integrate into mainstream society. For in-depth discussion, see DONALD FIXICO, TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945-1960 (Univ. of New Mexico Press 1986).

19. In 1969, for example, the unemployment rate reached forty-three percent on the Hopi Reservation, topping fifty-one percent on the Navajo Reservation. Minnesota tribes suffered rates of forty-two percent (Grand Portage), forty-three percent (White Earth), and forty-eight percent (Fond du Lac). *See* FEDERAL AND STATE INDIAN RESERVATIONS: AN EDA HANDBOOK, U.S. DEPARTMENT OF COMMERCE, ECONOMIC DEVELOPMENT ADMINISTRATION (1971).

families began leaving the reservations. Indian youth moved to the cities, often far away from their homes, where chances for employment seemed better, but where they were far from familiar surroundings.[20] Increasingly, Indian children were born off the reservation.[21] Often, the parents of these children were inadequately prepared to meet the challenges of parenting. Perhaps the parents themselves were juveniles, or had a host of substance abuse problems.[22]

Upon learning that a child was in the custody of apparently unfit parents, state child welfare departments typically sought to remove the Indian child from the parents' custody. Prior to ICWA's enactment, the state district court exercised jurisdiction over these child custody proceedings. At that time, there was no federal or state policy to transfer a custody case to tribal court simply because the involved child was Native American.[23] With ICWA's enactment, however, Congress required state district courts to recognize the unique cases of urban Indians and to transfer Indian child custody proceedings to tribal authorities.

Section 1911 of the Act describes the jurisdictional element of Indian child welfare cases. Subsection (a) grants the tribe exclusive jurisdiction over the custody proceeding of a child residing or domiciled within the tribal reservation.[24] Subsection (c) gives the tribe "the right to intervene at any point in the proceeding,"[25] while subsection (d) requires federal and state courts to give the same full faith and credit to tribal court custody proceedings as they would grant to any other judicial entity.[26] The subject of this Comment, subsection 1911(b), states:

> In any State court proceeding for the foster care placement of or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court,

---

20. *See supra* note 18.

21. *See generally* ELAINE M. NEILS, RESERVATION TO CITY (1971); ALAN L. SORKIN, THE URBAN AMERICAN INDIAN (1978); CHRISTINE BOLT, AMERICAN INDIAN POLICY AND AMERICAN REFORM: CASE STUDIES OF THE CAMPAIGN TO ASSIMILATE THE AMERICAN INDIANS (1987).

22. *See, e.g., In re* D.S., 577 N.E.2d 572 (Ind. 1991) (parental rights of urban Potawatomi Indian mother terminated due to alcoholism); *In re* C.W., 479 N.W.2d 105 (Neb. 1992) (parental rights of Rosebud Sioux mother terminated due to substance abuse); A.H. v. State, 779 P.2d 1228 (Alaska 1989) (state terminated parental rights of Eskimo mother who was considered a serious suicide risk).

23. Note, however, that by the mid-1970s, the federal government recognized limited exclusive tribal jurisdiction over member Indians living on the reservation. *See* Wisconsin Potowatomies v. Houston, 393 F. Supp. 719 (W.D. Mich. 1973); Wakefield v. Little Light, 347 A.2d 228 (Md. 1975) ("[T]here can be no greater threat to 'essential tribal relations' and no greater infringement on the right of the . . . tribe to govern themselves (sic) than to interfere with tribal control over the custody of their children."). Under 25 U.S.C. § 1911(a), "[a]n Indian tribe shall have exclusive jurisdiction as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of each tribe . . . ." *See also* Letter from Forrest J. Gerard, Asst. Sec., U.S. Dept. of Interior, to Rep. M. Udall, Chairman, Comm. in Int. and Insular Affairs (June 6, 1978) *reprinted in* 1978 U.S.C.C.A.N. 7553 ("[Section 1911(a)] would vest in tribal courts *their already acknowledged* right to exclusive jurisdiction over Indian child placements within their reservations.") (emphasis added).

24. *See* 25 U.S.C. § 1911(a).

25. *Id.* § 1911(c).

26. *See id.* § 1911(d).

> in the absence of good cause to the contrary, shall transfer such proceedings to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe; *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.[27]

This subsection reflects longstanding federal policy, that is, to enhance tribal sovereignty and survival by allowing tribes to adjudicate child custody cases involving tribal members, even when those members do not live on the reservation. Because children are its future, the tribes, through their court systems, need a greater voice in determining the placement of their member children.[28] Congress considered the jurisdictional provisions of the Act, which expanded tribal court jurisdiction to hear non-resident Indian child welfare cases, to be a legitimate manner in which to achieve the national federal policy of promoting Indian self-government.

III. IMPLEMENTATION OF SECTION 1911(b) OF THE INDIAN CHILD WELFARE ACT

Section 1911(b) applies to state court custody proceedings involving Indian children residing off the reservation.[29] It requires state courts to transfer these proceedings to the affected child's tribal court. Within section 1911(b) are three narrowly tailored exceptions allowing a state court to exercise its concurrent jurisdiction. First, the tribe itself may decline to accept jurisdictional transfer.[30] Next, an objection by either parent effectively vetoes the transfer from state to tribal court.[31] Finally, the state court can prevent transfer by determining that there is good cause not to allow a tribal court to hear the case.[32]

When a tribe declines jurisdiction, or either parent objects to the intended transfer, states exercise their concurrent jurisdiction, and the Indian child custody case remains in district court. Jurisdictional questions become more problematic, however, when the state courts attempt to define, then apply, good cause. With few exceptions, the definitions state courts have composed allow state courts to refuse to transfer jurisdiction to the tribes.[33] State courts usually are able to fashion a definition of good cause which precludes a tribe from hearing the case. This Comment examines each of the three exceptions.

---

27. *Id.* § 1911(b) (emphasis in original).

28. The House Report noted the "legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future." HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, H. R. REP. No. 1386, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 7541.

29. 25 U.S.C. § 1911(b). *Compare* 25 U.S.C. § 1911(a), vesting tribal courts with exclusive jurisdiction over child custody proceedings for children residing or domiciled on the reservation.

30. 25 U.S.C. §1911(b).

31. *Id.*

32. *Id.*

33. *See infra* notes 61-124 and accompanying text for discussion regarding "good cause".

A. *Tribal Declination*

Prior to ICWA's enactment, some feared the provision in section 1911(b) allowing tribes to decline jurisdiction would cause an unfair burden on the state court system:

> [T]ribal courts may pick and choose those Indian children over which they will exercise jurisdiction, however State courts are allowed no choice. One potential result, of course, is that tribal courts will waive jurisdiction in all difficult or expensive cases while State courts . . . will have no choice but to accept these cases. Such a situation is clearly inequitable.[34]

As ICWA cases began to be adjudicated, however, such fears seemed misplaced, as tribes rarely decline jurisdiction.

One of the few reported cases in which a tribe exercised its declination power involved termination of parental rights. In *In re B.R.B.*,[35] a woman claiming Cheyenne River Sioux heritage appealed the termination of her parental rights.[36] She charged the district court with failing to apply the ICWA in adjudicating the case.[37] In affirming the district court, the South Dakota Supreme Court noted that "[t]he tribe declined jurisdiction without indicating the eligibility status of either the mother or child."[38] Thus, the question of jurisdiction was summarily answered. The record did not reflect why the tribe declined jurisdiction, simply that the tribe was notified of the child custody proceeding and chose to decline. Such declination is within the sound discretion of the tribal court.[39]

Tribal courts can decline jurisdiction even when an affected litigant demands tribal participation. In *In re Laurie R.*,[40] the Cheyenne-Arapahoe tribal court executed a written waiver of participation in the New Mexico state court proceedings involving a minor tribal member.[41] Laurie R., like her deceased father, was an enrolled member of the Cheyenne-Arapahoe tribe. Her mother, the subject of this parental rights termination action, was a non-Indian.[42] In honoring the tribal court's right to decline jurisdiction, the state court held the tribal court's written waiver constituted a declination,[43] even though Laurie R.'s mother demanded transfer to tribal court, and the tribal court could rightfully have heard the case.

---

34. Letter from Richard A. Weber, Staff Attorney, Office of Legal Affairs, Montana Dept. of Soc. and Rehab. Services, to Rep. Ron Marlenee, Congressman from Montana, HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, H. R. REP. No. 1386, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 7566.

35. 381 N.W.2d 283 (S.D. 1986).

36. *Id.* at 284.

37. *Id.*

38. *Id.*

39. 25 U.S.C. § 1911(b) (1978); *see also In re* Wayne R.N., 107 N.M. 341, 757 P.2d 1333 (Ct. App. 1988), where tribal court refused jurisdiction on grounds, *inter alia*, that "Tribe's attorney stated that the Tribes were opposed to a transfer." *Id.*

40. 107 N.M. 529, 760 P.2d 1295 (Ct. App. 1988).

41. *Id.* at 533, 757 P.2d at 1299.

42. *Id.* at 534, 757 P.2d at 1296.

43. *Id.* at 533, 757 P.2d at 1299.

The state court concluded that the tribal court could not be forced to accept jurisdiction, even at the mother's insistence.[44]

Section 1911(b) of the Act permits a tribe to refuse a state's offer to transfer jurisdiction.[45] Nothing in the Act requires a tribal court to explain why it is exercising its declination power, and no state courts have transferred a child custody case to tribal court against the tribe's will. Even when an affected litigant wants a tribal court to hear a case and that court otherwise has competent jurisdiction, states respect a tribe's section 1911(b) declination power. Jurisdiction declination by a tribe effectively requires a state court to exercise its concurrent jurisdiction over such matters.

B. Parental objection

The second exception to section 1911(b)'s requirement that state courts transfer Indian child custody matter to tribal court arises when either parent objects.[46] Even where the state has offered to transfer the proceedings, and the tribe has indicated its desire to adjudicate the matter, there is no guarantee of transfer. Generally, a case transfers only when the state court, the tribal court and the parents all agree that it shall transfer. If a parent objects to the intended transfer, the Indian child custody matter proceeds in state court.

Before a tribal court exercises jurisdiction over a custody matter, a jurisdictional hearing must be held, and the parent(s) given an opportunity to exercise his own section 1911(b) power to veto transfer to tribal court. In *In re G.L.O.C.*,[47] the Montana state district court transferred a child custody hearing to the Crow tribe without first giving the child's father an opportunity to object to the transfer.[48] On appeal, the state court held that "a jurisdictional hearing is required before the court can enter an order granting or denying a request for the transfer of jurisdiction of Indian children to tribal custody."[49] It added that "[a] transfer of jurisdiction to Tribal Court, without giving a parent the right to object to a transfer of jurisdiction [might] plung[e] the children into circumstances that are traumatic or otherwise not in their best interest. That is precisely why a jurisdictional hearing is required before a transfer order is entered

---

44. *Id.*

45. 25 U.S.C. § 1911(b) (1978).

46. *Id.* (state courts shall transfer Indian child custody proceedings to tribal courts "absent objection by either parent"). The statute's plain language controls jurisdiction - if one or both parents object to transfer from state to tribal court, transfer will not occur. *Id.*; *see also In re* R.I., 402 N.W.2d 173 (Minn. App. 1987) (court rejected argument that, upon receiving parental objection, a state court can, in its discretion, nevertheless transfer the case to tribal court: "We have found no authority for the . . . assertion that upon receiving a parental objection, the decision to transfer is discretionary. Other jurisdictions have held that parental objection *mandates* the retention of the action in state court.") *Id.* at 177 (emphasis in original) (citing *In re* Adoption of Baby Boy L., 643 P.2d 168, 178 (Kan. 1982); *In re* S.Z., 325 N.W.2d 53, 65 (S.D. 1982)).

47. 668 P.2d 235 (Mont. 1988).

48. *Id.* at 236.

49. *Id.* at 237.

. . . ."[50] Thus, not only can a parent object, but further, he must have the opportunity to object.

Section 1911(b) also addresses cases in which a parent submits herself to tribal jurisdiction, only to later object to transfer from state to tribal court. In *In re M.R.D.B.*,[51] a White Mountain Apache mother placed her child with a non-Indian family in Colorado.[52] A little over a year later, the mother withdrew her consent to the Colorado adoption, and asked the White Mountain Apache Tribe for assistance.[53] Shortly thereafter, the tribal court accepted jurisdiction over the case and custody of the child.[54] The Colorado court, giving full faith and credit to the tribal court, ordered the child turned over the tribe, which in turn gave custody of the child to the natural mother.[55] Later, the mother again sought to place her child with the Colorado family, this time proceeding in state court.[56] When the White Mountain Apache Tribal Court sought jurisdictional transfer, the mother now objected.[57] The Montana court held that when a parent submits to tribal jurisdiction, and the child becomes a ward of the tribal court, the parent cannot later prevent transfer to tribal court by objection.[58] Having obtained jurisdiction over the child custody matter, the tribal court gained *exclusive* jurisdiction, and the mother was estopped from denying that the tribe had such jurisdiction.[59]

Section 1911(b) protects a parent's right to veto jurisdictional transfer from state to tribal court. Nothing in the section requires a parent to explain why he objects. The fact that he does object is sufficient to defeat transfer.[60] Importantly, even when the state and tribes agree that the tribe has competent jurisdiction, the parents must have the opportunity to object. However, once a tribal court has jurisdiction, it has exclusive jurisdiction.

C. "Good Cause"

The first two jurisdictional transfer exceptions in Section 1911(b) require little judicial interpretation. Either a tribe declines jurisdiction, or it does not; either a parent vetoes the transfer to tribal court, or she does not.

---

50. *Id.* at 238.
51. 787 P.2d 1219 (Mont. 1990).
52. *Id.* at 1220.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 1222.
58. *Id.*
59. *M.R.D.B.* is a most interesting case in that it shows the transformation of a § 1911(b) case into a § 1911(a) case. When the mother first withdrew her consent to the adoption by the non-Indian Colorado family, she could have, but did not, object to the transfer to tribal court, as per her § 1911(b) veto right. Indeed, by asking the White Mountain Apache tribal court to assume jurisdiction, she implicitly consented to its *exclusive* jurisdiction under § 1911(a). Having waived her § 1911(b) right, the mother could not later assert that right.
60. Note, however, that once a parent waives his § 1911(b) veto right, then a later objection does not defeat a jurisdictional transfer. A tribe having gained jurisdiction, that jurisdiction becomes exclusive. *See* 25 U.S.C. § 1911(a) (1978).

In contrast, the third exception is most problematic because it gives state courts great interpretive powers. This exception allows a state court to refuse to transfer jurisdiction to a tribal court based on "good cause,"[61] a uniquely subjective determination. A tribal court may consider spurious what a state court considers good cause not to transfer jurisdiction.[62]

A serious flaw in "good cause" cases is the state courts' tendency to answer prematurely the substantive question of the case without first determining whether they have jurisdiction to hear the case. Instead of transferring Indian child custody matters as Congress desired when enacting ICWA, state courts are employing the ethereal and subjective concepts of "good cause," "undue hardship," and "best interest" to deny tribal courts the opportunity to hear Indian child custody cases. In so doing, state courts often confuse the jurisdiction issue with the substantive determination, merging them into one. For example, a court might use the same "good cause" why an Indian child should stay in her present (non-Indian) home as "good cause" to refuse a jurisdictional transfer. While there may be a perfectly acceptable reason why the child should stay where she is, that reason is not the same as "good cause" why a tribal court should be denied its right to hear the child's custody case, and presumably make a well-reasoned decision of its own.[63]

Perhaps more troubling is that in finding good cause not to transfer, state courts implicitly suggest that tribal courts are incapable of arriving at reasonable conclusions regarding custody of their own member children, or that state courts are in a better position than tribal ones to determine what is in an Indian child's best interest.[64] Such gratuitous paternalism perpetuates the very practice that section 1911(b) sought to end—that an Indian would best be served by remaining dependent on the dominant judicial system to determine for him what is in his and his children's best interest. The Supreme Court explicitly rejected this sentiment when it noted that "we must defer to the experience, wisdom, and compassion of the . . . tribal courts to fashion an appropriate remedy [in Indian child welfare cases]."[65]

1. Undue hardship

In an attempt to help state courts determine what constitutes good cause to deny jurisdictional transfer, the Bureau of Indian Affairs prom-

---

61. 25 U.S.C. § 1911(b) (State courts shall transfer Indian child custody proceedings "in the absence of good cause to the contrary.")

62. Also, tribal courts can have a perception problem when objecting to a transfer denial. Most lay observers assume the correctness of a state court's determination that good cause exists not to transfer. Thus, when a tribal court questions a state court's refusal, the tribal court may appear self-seeking rather than concerned with the child's best interest.

63. *See, e.g., In re* Robert T., 246 Cal. Rptr. 168 (Cal. App. 1988) (according to state court, fact that Indian child already bonded with non-Indian family constituted good cause to refuse jurisdictional transfer).

64. *See infra* notes 105-24 and accompanying text.

65. Mississippi Choctaw Indian Band v. Holyfield, 490 U.S. 30, 54 (1989) (quoting *In re* Adoption of Halloway, 732 P.2d 962, 972 (Utah 1986)).

ulgated non-binding guidelines to aid the courts in adjudicating the jurisdictional question.[66] In addressing jurisdictional transfer, state courts can look to the Guidelines for guidance. The Guidelines list several possible "good cause" reasons why a case might not be transferred: the tribe does not have a tribal court,[67] the proceedings were at an advanced stage in state court when the transfer petition was received,[68] the child is over twelve years of age and objects to the transfer,[69] the parents of a child over five are unavailable and the child has had no significant contact with the tribe,[70] or the evidence could not be presented in tribal court without undue hardship to the parties or witnesses.[71] In Comments to the Guidelines, the drafters suggested that the geographic distance between state and tribal courts may, but does not necessarily, constitute a hardship.[72] Thus, the burden of presenting all the necessary evidence in tribal court may create "good cause" not to transfer jurisdiction.

Implicit in section 1911(b) and the Guidelines is the need for state courts to balance state and tribal interests in hearing an Indian child custody case. State courts must weigh the burden of transferring a case from state to tribal court with the benefit, and federal goal,[73] of allowing a tribe to determine the future of its children, and itself. A few state courts have acknowledged this implicit balancing test, noting that when considering jurisdiction, district courts "should balance the interests of the state and the tribe."[74] But the present trend in interpreting section 1911(b) and the Guidelines is that *any* distance which imposes *any* hardship on case participants is sufficient good cause to deny a transfer.[75] Such haste in denying tribal jurisdiction defeats the spirit of the ICWA, which is to strengthen tribal integrity by transferring relevant cases to tribal court.

State courts are at their strongest in refusing jurisdictional transfer because of undue hardship when the distance between state and tribal court is what one might objectively classify as "long." Only the most obdurate tribal partisan would fail to see the undue burden a long distance jurisdictional transfer could occasion. State courts persuasively show good cause when the distance between state and tribal court is several hundred miles. For example, in *Chester County Department of Social Services v.*

---

66. Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (1979) [hereinafter, "Guidelines"].

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. The Supreme Court has ruled that greater Native American self-government is a fundamental aspect of federal Indian policy. Morton v. Mancari, 417 U.S. 535 (1974).

74. *In re* of C.W., 479 N.W.2d 105, 113 (Neb. 1992); *see also In re* Bertleson, 617 P.2d 121 (Mont. 1980) (when considering whether to retain or transfer jurisdiction, state courts should balance state and tribal interests). *Id.* at 129-30.

75. *See infra* notes 83-104 and accompanying text.

Coleman,[76] a Cheyenne River Sioux family lived in South Carolina, some two thousand miles from the reservation.[77] In 1983, the children were removed from the parents' custody after allegations of physical and sexual abuse.[78] The parents moved to transfer jurisdiction to the Cheyenne River Sioux Tribal Court in South Dakota.[79] In finding good cause not to transfer, the South Carolina court noted the undue hardship which would result if all of the case participants had to travel to South Dakota. "Here, the bulk of the evidence and the majority of the witnesses necessary for the termination of parental rights action are located in South Carolina . . . . All of the witnesses to the physical and sexual abuse, as well as records of treatment and evaluation, are located in South Carolina, while the tribal court is located several thousand miles away in South Dakota."[80] Because of the distance between the two states, and taking note of the Guidelines' suggestion that good cause to deny transfer may occur when the case cannot be heard in tribal court without undue hardship, the court denied the transfer request.[81]

Denying jurisdictional transfer because of the hundreds of miles between the state and tribal court is perhaps the most legitimate "good cause" reason, and it finds support in the Guidelines. Yet a principal drawback to finding "good cause" based on geographic distance is that the tribal courts of remote states like Alaska are virtually assured to receive 1911(b)-transferred cases only in the most rare cases. If a state court will not transfer a case within the contiguous United States because of geographic distance, it would be even less inclined to transfer jurisdiction over a foreign country, into the remote reaches of Alaska.[82]

A more troubling result than a refusal to transfer jurisdiction across the country occurs when a state court finds good cause not to transfer

---

76. 399 S.E.2d 773 (S.C. 1990).

77. *Id.* at 774. Distance measurements taken from the NATIONAL ATLAS OF THE UNITED STATES, U.S. DEP'T OF THE INTERIOR, GEOLOGICAL SURVEY (1970).

78. *Id.*

79. *Id.*

80. *Id.* at 776. While the decision of the South Carolina court was well-founded, its hyperbolic portrayal of the tribal court as "several thousand miles away" perpetuates the public perception that tribal courts are "way out there", impenetrable, inaccessible. In fact, the Cheyenne River Sioux tribal court is "only" 2,000 miles from South Carolina, and accessible by air and road. Two thousand miles is far indeed, but it is not "several thousand miles."

81. *Id.* at 775; *see also In re* Robert T., 246 Cal. Rptr. 168 (Cal. App. 1988) (California court refused transfer to New Mexico tribal court on grounds, inter alia, of long distance); *In re* Adoption of K.L.R.F., 515 A.2d 33 (Pa. Super. Ct. 1986) (Pennsylvania court upheld decision denying transfer to South Dakota tribal court based partly on distance); *In re* Adoption of T.R.M., 525 N.E.2d 298 (Ind. 1988) (distance between Indiana state court and South Dakota tribal court constituted undue hardship). *But see In re* Armell, 550 N.E.2d 1060 (Ill. App. 1990) (court accepted witnesses' statements that distance between Illinois and South Dakota tribal court did not create undue burden).

82. *See, e.g., In re* T.S., 801 P.2d 77 (Mont. 1990) (Montana court refused to transfer case to Alaskan native village court based, inter alia, on "undue hardship if the parties and witnesses were required to travel from Montana in order to appear in Tribal Court in Alaska.") *Id.* at 82. The obvious question, "what is long?" remains unanswered, and perhaps unanswerable, because the answer is subjective (i.e., what is long to a state court may be close to a tribal court). Thus state courts are free to tailor the answer to their own satisfaction. A distance is long when a state court says a distance is long.

based on distance in the middle and shorter range.[83] The Guidelines suggest that good cause to deny a jurisdictional transfer *may* exist when the evidence necessary to decide the case could not be adequately presented in the tribal court without *undue* hardship on the parties or the witnesses.[84] The Guidelines clearly suggest that case parties and participants will endure at least some hardship when the district court transfers an Indian child custody matter to tribal court. What they caution against is *undue* hardship. Yet many state courts rule as if *any* hardship, even that caused by middle or shorter distances, is good cause not to transfer jurisdiction.[85] This increasingly liberal interpretation of "hardship" defeats the letter and the spirit of ICWA, which is to transfer Indian child custody cases to tribal courts *even when such transfers may cause some hardship to case participants.*

Generally, state courts have refused to transfer cases except when the tribal court is quite close. For example, in *In re Bird Head*,[86] a Nebraska court roughly one hundred miles from the Oglala Sioux tribal court in South Dakota refused to transfer an Indian child custody case, based, *inter alia*, on the undue hardship travelling to tribal court would cause.[87] The court noted that among the "ample evidence" which established good cause for denying transfer, the Indian child resided in Sheridan County, Nebraska, while the child's tribe and the tribal court were in far off South Dakota.[88] In fact, Sheridan County abuts the South Dakota county in which the Oglala Sioux tribal court is located. Likewise, in *In re J.R.H.*,[89] an Iowa court found good cause to refuse jurisdictional transfer based on the four hundred mile distance between the Iowa state court and the South Dakota tribal court. "In determining good cause, we may consider the circumstances when the 'evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship of the parties or the witnesses.'"[90] The court denied the transfer.[91]

---

83. The terms "long," "medium," and "short" are as ethereal and subjective as "good cause," "undue hardship," and "best interest," and certainly as arbitrary. For purposes of this comment, long means distances over 500 miles, medium indicates distances in the 100-500 mile range, and short signifies distances under 100 miles.

84. Guidelines, *supra* note 66, at 67,591.

85. *See, e.g., In re* Maricopa County Juvenile Action, 828 P.2d 1245 (Ariz. App. 1991) (500 miles between Phoenix, Arizona and Santo Domingo Pueblo, New Mexico tribal court was undue hardship); *In re* C.W., 479 N.W.2d 105 (Neb. 1992) (400 miles between Nebraska state court and Oglala Sioux tribal court in South Dakota created burden); C.E.H. v. L.M.W., 837 S.W.2d 947 (Mo. App. 1992) (275 miles between Kansas City, Missouri and Cherokee Nation tribal court in Oklahoma constituted undue burden). Note that distance, and not the possible jurisdictional dilemma arising from crossing state lines, is the determinative factor.

86. 331 N.W.2d 785 (Mo. 1983).

87. *Id.* at 790.

88. *Id.* Curiously, the record is silent as to whether the presumably affected parties (i.e., witnesses, experts, social workers, etc.) brought up the hardship issue, or whether the court unilaterally determined that the geographical distance constituted good cause.

89. 358 N.W.2d 311 (Iowa 1984).

90. *Id.* at 317 (quoting Guidelines For State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67,591 (1979)).

91. *Id.*

Perhaps the most egregious abuse of the state court's jurisdictional transfer power is the refusal to refer a case to a tribal court within a relatively short distance from the state court.[92] When a state court refuses transfer in such a case, it guts section 1911(b)'s intent to promote tribal jurisdiction over Indian child custody cases and reduces it to a meaningless provision. If even a short distance is an "undue hardship", then a state court can completely ignore Congress' mandate that tribal courts hear Indian child welfare cases.

In *In re N.L.*,[93] an Oklahoma court refused to transfer an Indian child custody case some ninety miles away within the state.[94] The court noted that "[g]ood cause to deny a transfer has been found where almost all of the parties and witnesses reside in the county of the state court . . . ."[95] The court performed no balancing between any hardship the witnesses might have experienced with the benefit of allowing tribes to shape their own destiny by helping determine the future of their children. It simply found the ninety miles from state to tribal court to be a geographical barrier. Instead of finding a reason *to* transfer jurisdiction as ICWA suggests, the court here found a reason *not* to transfer.

In *In re J.J.*,[96] the South Dakota Supreme Court upheld a district court decision not to transfer a case from Rapid City to the Standing Rock Sioux Tribal Court,[97] noting "the Tribal court is quite a long distance from Rapid City . . . ."[98] While the one hundred or so miles between Rapid City and the Standing Rock Sioux Tribal Court may seem substantial to urbanites, it cannot be considered "quite a long distance" in the context of rural and sparsely-populated South Dakota. If a state court will not transfer a case to a tribal court a short distance away, under what circumstances *will* it transfer a case? The South Dakota court's reasoning suggests transfer is appropriate only when there are absolutely no burdens.

Distance between state and tribal courts can be so great as to constitute undue hardship on some case participants.[99] Tribal courts may be several hundred miles away, or the time and expense of travelling to tribal court may be so great as to warrant the state court exercising its concurrent jurisdiction.[100] But the increasing disposition of state courts to consider virtually any distance from state to tribal court to be a good cause to deny jurisdictional transfer is troubling. This unfortunate trend "could

---

92. *See infra* notes 93-104.
93. 754 P.2d 863 (Okla. 1988).
94. *Id.* at 868-69.
95. *Id.* at 869 (citing *In re* Baby Boy L., 643 P.2d 168 (Kan. 1982); *In re* Bird Head, 331 N.W.2d 785 (Neb. 1980)).
96. 454 N.W.2d 317 (S.D. 1990).
97. *Id.* at 330.
98. *Id.*
99. *See, e.g.*, Chester County Dep't of Social Serv. v. Coleman, 399 S.E.2d 773 (S.C. 1990) (distance between South Carolina and South Dakota); *In re* T.S., 801 P.2d 77 (Mont. 1990) (distance between Montana and Alaska); *see also supra* note 81.
100. *See* cases cited *supra* note 99.

preclude transferring jurisdiction to tribal court except in cases where the child resides on or near a reservation."[101]

This Comment does not mean to suggest that medium and short distances never constitute an undue burden on case participants. Theoretically, there may be situations when even a short distance constitutes a hardship. What is troubling is the state courts' bland assertion, without more, that distance "could" constitute an undue hardship.[102] Currently, the courts speak in hypothetical terms, instead of detailing how distance creates an undue hardship in a particular case. For state court decisions to be more convincing and less troubling, each court must explicitly show how the distance between state and tribal court constitutes an *actual* undue burden. At present, some courts merely assert that a tribal court is far away, as if that in and of itself is adequate "good cause" to deny jurisdictional transfer.[103]

State courts must avoid reflexively declaring distances as insurmountable obstacles to jurisdictional transfer. Instead, they ought to first clearly identify the potential hardship, and then balance that potential hardship of presenting the case in tribal court with the federal policy of allowing tribal courts to adjudicate Indian child custody cases. Only after performing the balancing test should state courts declare a jurisdictional transfer to be an "undue hardship". They need to be more thoughtful of ICWA's intent and mindful of its express tribal court preference before declaring geographic distance as good cause not to transfer jurisdiction.[104]

2. "Best Interest"

The twofold purpose of the Indian Child Welfare Act is laid out in section 1902: "The Congress hereby declares it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes . . . ."[105] The inclusion of the conjunctive "and" signals a congressional mandate that state courts consider both the child's well-being and the tribe's interest when adjudicating Indian child custody matters. Recognition of such a mandate is in line with the spirit of the Act, and is reflected in the letter of the law. Section 1902

101. *In re* Armell, 550 N.E.2d 1060, 1067 (Ill. App. 1990). As both *In re* J.J., 454 N.W.2d 317 (S.D. 1990) and *In re* N.L., 754 P.2d 863 (Okla. 1988) make clear, transfer to tribal courts is not assured even when the child lives near the reservation. In both cases, state courts denied jurisdictional transfer to tribal courts less than 100 miles away from state court.

102. *See, e.g., In re* C.W., 479 N.W.2d 105 (Neb. 1992) (asserting that transfer "would cause an undue burden" but neglecting to show how it would cause burden); *In re* C.E.H., 837 S.W.2d 947 (Mo. App. 1992) (asserting that tribal court was less convenient forum, but failing to show how jurisdictional transfer would be undue burden).

103. *See* cases cited *supra* note 102.

104. In order to fulfill ICWA's mandate to transfer Indian child custody cases to tribal jurisdiction, Congress should consider amending § 1911(b) such that state courts are estopped from denying transfer on the basis of undue hardship when the distance between state and tribal court is less than 500 miles. When the distance between state and tribal court is over 500 miles and the state court is inclined to deny jurisdictional transfer, then that court must detail the basis for its denial, and the reasoning used in deciding that a certain distance, *ipso facto*, creates an undue hardship.

105. 25 U.S.C. § 1902 (1978).

does not suggest that the two interests are mutually exclusive, or that they should be balanced against each other. Rather, it reflects Congress' intention that state courts consider both interests.[106]

State courts, unfortunately, have been disposed to ignore the tribal interest altogether, focusing only on what it considers to be in the Indian child's best interest.[107] Courts implicitly balance the child's well-being against tribal interests, whereas section 1902 suggests a national policy of giving both interests equal consideration.[108]

Intuitively, considering an Indian child's best interest in custody proceedings would seem to make sense, and not at all contrary to ICWA's goals. Indeed, section 1902 clearly states that protection of the Indian child's best interest is one of the Act's stated purposes.[109] Yet denying jurisdictional transfer based on the Indian child's best interest is troubling for several reasons. To begin, there is no federally-defined "best interest of the Indian child" standard. As a result, state courts are free to impose their own standard.[110] Tribal courts thus are confronted with fifty distinct

---

106. Unfortunately, while the Act urges state courts to consider the child's and the tribe's interests, it does not define those interests. At present, the Act allows state courts to fashion their own definition. *See infra* note 110. Note also the federal policy of Indian preference in areas substantially related to tribal sovereignty. *See* Morton v. Mancari, 417 U.S. 535 (1974) ("[Indian] preference is a longstanding, important component of the Government's Indian program." *Id.* at 550. The Court went on to affirm Congressional policy when that policy "is reasonably and rationally designed to further [Indian] self-government." *Id.* at 555.) The preference extends to Congressional preference for tribal court jurisdiction over Indian child custody matters. *See* 25 U.S.C. § 1911(b) (1978).

107. The most notable exception to courts' general refusal to consider the tribal interest came in Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989), in which the Court explicitly took note of § 1902's purpose of "promot[ing] the stability and security of Indian tribes." *Id.* at 49. *Holyfield* is often considered the preeminent case urging states to consider both the child's and the tribe's interest. *See, e.g.*, Richard Taylor, *Curbing the Erosion of the Rights of Native Americans: Was the Supreme Court Successful in Mississippi Band of Choctaw Indians v. Holyfield?*, 20 J. FAM. L. 171 (1990/91) (*Holyfield* is important in its interpretation of ICWA's purpose to "preserve and protect Indian culture and heritage"). *But see* Ester Kim, *Mississippi Band of Choctaw Indians v. Holyfield: The Contemplating of All, the Best Interests of None*, 43 RUTGERS L. REV. 734 (1991) ("The ICWA's goals to protect the 'best interests of Indian children' and to promote the 'stability and security of Indian tribes and families' are laudable, but unattainable. The Act did not anticipate the possibility that the interests of these three parties—the children, the tribes, and the parents—may not be identical. In fact, *Holyfield* exemplifies that very possibility.") *Id.* at 793.

108. *See, e.g.*, *In re* Robert T., 246 Cal. Rptr. 168 (Cal. App. 1988) (Indian child's best interest required state court to hear the case); *In re* T.S., 801 P.2d 77 (Mont. 1990) (suggesting that allowing tribal court to come to a different conclusion than state court regarding ultimate placement of the child would devastate Indian child); *In re* C.W., 479 N.W.2d 105 (Neb. 1992) (transfer to tribal court could harm child's best interest).

109. 25 U.S.C. § 1902 (1988).

110. Early state court decisions treating an Indian child's best interest have led to adverse results for tribal jurisdiction over Indian children. In Montana, for example, in one of the earliest ICWA cases, a court suggested that the child's best interest might prevent a jurisdictional transfer upon a "clear and convincing" showing by the State. *In re* M.E.M., 635 P.2d 1313, 1317 (Mont. 1981). The court there did not cite the source from which it drew this conclusion, and seems to have made the assertion as if in passing. Later court decisions treated this unsupported *dicta* as legal precedent, so that now, this vaguely-defined "'best interest of the child' test *will* be applied in Montana in determining good cause not to transfer jurisdiction of custody proceedings of Indian children under § 1911(b)." *In re* T.S., 801 P.2d 77, 80 (1990) (emphasis added) (citing *M.E.M.*, 635 P.2d at 1317). Other states' courts are misapplying *M.E.M.* and imposing a "best interest of

"best interest of the child" standards, none of which address the unique problems of an *Indian* child. Also, while the standard certainly has a place in Indian child custody cases, as it does in *any* custody case, it is applicable only at the placement stage.[111] Presently, however, states are applying the standard at the jurisdictional stage. The effect is to deny tribal courts any input in the determination of what is in a tribal member's best interest.

Equally disturbing is that by refusing to transfer Indian child custody matters to tribal courts, state courts show a lack of full faith and credit in the actions of tribal courts,[112] thereby suggesting that they, better than tribal courts, know what is in an Indian child's best interest. It was this same well-meaning but debilitating paternalism which ICWA sought to prevent. State courts summarily dismiss tribal jurisdiction under the guise of best interests, and then proceed to answer the substantive issue of the case.[113]

State courts can convincingly enumerate the many good reasons why the child should remain where he is. Invariably, however, the courts neglect to demonstrate how it is in the child's best interest to deny his tribe's court the right to adjudicate the matter. For example, in *In re Robert T.*,[114] a California court considered a New Mexico tribal court's request for jurisdictional transfer.[115] Among the numerous reasons the

---

the child" standard at the jurisdictional stage. *See, e.g., In re* Maricopa County Juvenile Action, 828 P.2d 1245 (Ariz. 1991) ("A trial court may properly consider an Indian child's best interest when deciding whether to transfer a custody proceeding to tribal court.") *Id.* at 1251 (citing *M.E.M.*); *In re* Robert T., 246 Cal. Rptr. 168 (Cal. App. 1988) (court was "satisfied that [Indian child's best interest] is a pertinent and indeed an necessary consideration in deciding whether to grant or deny a transfer request.") *Id.* at 175 (citing *M.E.M.*); *In re* T.R.M., 525 N.E.2d 298 (Ind. 1988) (applying *M.E.M.*'s contention that child's best interest can defeat jurisdictional transfer). *Id.* at 307-08. By merging the jurisdictional and substantive questions, state courts have strayed from Congress's goal of transferring Indian child custody cases to tribal courts. By applying the best interest standard at the jurisdictional stage, the states obviate any tribal participation, in clear contravention of the federal policy of tribal preference.

111. *See, e.g., In re* Armell, 550 N.E.2d 1060 (Ill. App. 1990) ("The United States Supreme Court in Mississippi Band of Choctaw Indians v. Holyfield . . . reasoned that when Congress enacted the ICWA, it intended nationwide uniformity of terms and that state laws should not frustrate that intention. Therefore, the ICWA's provisions regarding "good cause" not to transfer jurisdiction should not be interpreted by individual state law. [Individual state standards] are therefore inapplicable to ICWA's jurisdictional requirements.") (citations omitted). Best interest is clearly a proper consideration when deciding the ultimate placement of an Indian child, but inappropriate when considering jurisdiction.

112. 25 U.S.C. § 1911(d) requires state courts to give full faith and credit to tribal court proceedings.

113. In *Holyfield*, the Court recognized state courts' propensity to dismiss too quickly the jurisdictional questions and instead proceed directly to the substantive issues. The Court reprimanded those state courts. "Whatever feeling we might have as to [the ultimate placement of Indian children], however, it is not for us to decide that question. We have been asked to decide the legal question of *who* should make the custody determination concerning these children—not what the outcome of the determination should be." Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30,53 (1989) (emphasis in original). With this admonition, the Court sought to modify state courts' patronizing view of tribal jurisdiction.

114. 246 Cal. Rptr. 168 (Cal. App. 1988).

115. *Id.* at 174-75.

court included in rejecting the request,[116] it noted that consideration of the child's best interest was good cause to refuse jurisdictional transfer, finding that the Indian child "was strongly bonded to his foster-adoptive family, and . . . he perceived them as his psychological family."[117] The court further opined that "[i]t would be psychologically injurious to remove [the Indian child] from [his present] setting."[118]

Presumably, a child's psychological well-being is significant justification for permitting him to remain in his present living situation, and the California court pointed that out.[119] Yet the court failed to show how it was in the child's best interest that the tribal court not hear the case. While the court gave a good reason for the child to stay where he is, it failed to demonstrate how transferring this case would harm the child's best interest. By applying its own local best interest standard at the jurisdictional stage, the court effectively rejected any tribal participation in determining what was in an Indian child's best interest.

Robert T., and other cases in which the state courts denied tribal jurisdiction based on best interest,[120] are examples of state court paternalism toward tribal courts. By unilaterally and preemptively deciding what is in an Indian child's best interest, state courts suggest that tribal court input is unnecessary and irrelevant, and show their lack of faith in tribal courts. When refusing jurisdictional transfer under the guise of protecting the Indian child's best interests, state courts seem to be acting out of fear that the tribal courts might decide a case differently than state courts and thus harm the Indian child's best interests. To deal with that fear, state courts simply deny tribal courts of the opportunity to hear the case.[121] Such denials are contrary to ICWA's goals, one of which is to allow tribal courts to adjudicate custody matters involving member children.

ICWA's framers understood that state courts would find it difficult to transfer cases to tribal court when the state courts felt they could best adjudicate a given case. In the Guidelines to interpreting ICWA, commentators addressed this problem when rejecting inclusion of provisions which would have allowed "good cause" to block a transfer, even though it was clear only a state court could make a particular

---

116. The other reasons included the child's lack of contact with his tribe, the tribe's delay in seeking jurisdiction, and the 1,000 miles between the state and tribal court. *Id.* at 173-76.

117. *Id.* at 175.

118. *Id.* In asserting that removing the child from his present home would harm the child, the state court apparently, and with no basis, assumes the tribal court would remove the child. Of course, by not allowing the tribal court even to hear the case, no one, including the *Robert T.* court, knows how the tribal court would rule.

119. *Id.*

120. *See, e.g.*, *In re* Adoption of T.R.M., 525 N.E.2d 298 (Ind. 1988); *In re* Maricopa County Juvenile Action, 828 P.2d 1245 (Ariz. 1991).

121. Fear of tribal courts is fear of the unknown. *See, e.g.*, Catherine Baker Stetson, Preface, TRIBAL COURT HANDBOOK (1990) ("[T]ribal courts are underused or misused. [State courts and non-Indian practitioners] cannot develop respect for a system they fear . . . ."), *cited in* Lisa Driscoll, *Tribal Courts: New Mexico's Third Judiciary*, 32 N.M. Bar Bull. 7 (Feb. 18, 1993) at 7.

disposition which "held especially great promise of benefitting [an Indian] child."[122] The BIA said:

> Such considerations are important but they have not been listed because the Department [of the Interior] believes such judgments are best made by tribal courts. Parties who believe that state court adjudication would be better for such reasons can present their reasons to the tribal court and urge it to decline jurisdiction. The Department . . . believes [this approach] is more in keeping with the confidence Congress has expressed in tribal courts.[123]

Congress preferred that tribal courts hear Indian child welfare matters, even when, to the objective non-Indian, it would seem that a state court could come up with a "better" decision.

Congress, the state courts, and tribal courts can act in concert to ameliorate the present trend of denying jurisdictional transfer based on best interest. Congress needs to define what the best interests of Indian children are, providing state courts with federal guidance as to when, and when not to deny transfer based on good cause. State courts must remember that the Indian child's ultimate placement is not a valid reason to deny transfer.[124] If state courts are going to deny jurisdictional transfer by simply asserting "best interest", as if that were a generally agreed-upon concept, they must be willing to show *how* transferring to tribal court is against an Indian child's best interest. Tribal courts can do their part by reassuring state courts that, as ICWA dictates, tribal courts also work to protect the best interests of their member children. When state courts understand that tribal courts consider the Indian child's best interest when placing the child in foster care, they will be less hesitant to transfer cases to tribal jurisdiction. In so doing, the tribal courts may allay some of the latent fear state courts have that tribal courts will do something contrary to the child's best interest.

IV. CONCLUSION

> Ignorance is one of the greatest barriers to understanding between different peoples. If we do not understand each other, if we do not know the culture and history of each other, it is difficult to see the value and dignity of each other's societies. This is especially true in relations between Indians and non-Indians.[125]

The ICWA has accomplished only some of its goals. For example, state courts respect a tribe's right to decline jurisdiction to hear Indian child custody matters. Contrary to early fears that tribal courts would

---

122. Guidelines, *supra* note 66, at 67,584, 67,592.

123. *Id.*

124. *See In re* Armell, 550 N.E.2d 1060, 1065 (Ill. App. 1990) ("[The] issue[] of . . . ultimate placement of the child is not [a] proper consideration[] when . . . deciding the issue of jurisdiction.").

125. Chief Justice Robert Yazzie, Navajo Nation Supreme Court, *quoted in* Lisa Driscoll, *Tribal Courts: New Mexico's Third Judiciary*, 32 N.M. Bar Bull. 7 (Feb. 18, 1993) at 5.

refuse jurisdiction inequitably, these courts appear eager to accept transfer and exercise judicial authority. State courts also have acted to protect the rights of parents of Indian children to veto transfer to tribal courts. At the same time, state courts recognize that when a tribe gains jurisdiction, that jurisdiction is exclusive of other judicial entities.

Problems arise, however, when state courts refuse to transfer jurisdiction based on the ethereal concept, good cause. The subjective nature of the phrase, coupled with relatively scant federal guidance, allows state courts to fashion an independent conclusion often contrary to tribal interests. Instead of finding reasons *to* transfer child custody cases to an Indian child's tribe, state courts are finding good cause *not to* transfer the proceedings. This exercise of concurrent jurisdiction deviates from the Congressional preference for tribal adjudication over Indian child welfare matters. States can more fully respect tribal sovereignty by balancing the burden of transferring cases to tribal courts with the federal policy of granting tribes greater self-government. State courts must also determine if they properly have jurisdiction before answering the substantive question of a case. Presently, state courts tend to merge jurisdiction and substance, with the result that tribes are denied jurisdiction. Finally, in accordance with ICWA's dictates, states must grant tribal court actions full faith and credit, and recognize that tribal courts consider an Indian child's best interests. In so doing, state courts will be less fearful that tribal courts will act contrary to an Indian child's best interest.

MICHAEL E. CONNELLY