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In the Best Interest: The Adoption of F.H., an Indian Child

I. INTRODUCTION

The competing interests of biological parents, adoptive parents, extended family, child welfare agencies, and the children themselves make adoption difficult under any circumstances. Even when all parties enter into the adoption intending to provide a secure home for the child there may be genuine, conflicting values and disagreement as to what will serve the child's best interest.¹ The definition of "best interest" has become a battleground for child-welfare experts, with different factions giving priority to emotional security, medical needs, educational resources, economic stability, ethnic background, or other factors.

When the adoption involves an Indian child and non-Indian adoptive parents, cultural factors and statutory restrictions complicate an already complex and emotional process. Indian tribes have long mourned the loss of their most precious asset, their children, to non-Indian adoptive parents.² When an Indian child is removed from his or her tribal roots and transplanted into society outside the native culture, both the tribe and the child sustain a loss.³ There is no easy remedy for such loss, though many concerned and dedicated people have struggled with the problem.⁴ This note examines the issues surrounding adoption of Indian children by non-Indian parents through the case of F.H.,⁵ an Alaskan native child from the Village of Noatak, Alaska, and the application of the Indian Child Welfare Act⁶ (ICWA) to such cases.

Section II describes the factual and procedural background of the case. Section III discusses the provisions and the legislative history of the ICWA. Section IV analyzes the application of

1 See, e.g., Michael J. Dale, *State Court Jurisdiction Under the Indian Child Welfare Act*, 27 GONZ. L. REV. 353 (1992).

2 *Id.* at 354.

3 Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503 (1984).

4 *Id.*

5 *In re Adoption of F.H.*, 851 P.2d 1361 (Alaska 1993).

6 25 U.S.C. § 1903 (1988).

the ICWA to the present case. The note concludes that a child's well-being must weigh heavily in the balance against the interests of other parties.

II. FACT SUMMARY AND PROCEDURAL HISTORY

A. *Factual Background*

F.H. is a female child born February 24, 1990, to a native Alaskan mother.⁷ The identity of her biological father is not known.⁸ Her mother, identified only as E.P.D., is a member of the Alaskan village of Noatak, though she has not resided in the village for several years and has no plans to return. During her pregnancy, E.P.D. was homeless and suffering from severe alcohol dependence.⁹ E.P.D. is orphaned, with no close ties to her native village. Her mother was murdered by a brother. Her father died of alcoholism. None of E.P.D.'s siblings grew up in Noatak, though she does have a cousin, Mary Penn, who lives there.

At the time of her baby's birth, E.P.D. had a blood alcohol level of .275.¹⁰ Due to E.P.D.'s homeless status, the history of alcohol abuse, and the high blood alcohol level at birth, F.H. was taken into custody by the state welfare organization, the Division of Family and Youth Services (DFYS), shortly after birth. Due to prenatal alcohol abuse by the mother, the child was at risk for Fetal Alcohol Effects (FAE), though not full-blown Fetal Alcohol Syndrome (FAS) which is similar though more severe.¹¹

F.H. was subsequently placed in a series of four foster homes. The third set of foster parents, the Hartleys, cared for F.H. from June 1990, when she was approximately four months

7 *Adoption of F.H.*, 851 P.2d at 1362.

8 *Id.*

9 *Id.*

10 A person with a blood alcohol level of .01 is legally drunk in most states. At the level of .01, one in every thousand parts of blood is pure alcohol. A concentration of .4 can produce a coma. RICHARD J. WAGMAN, *MEDICAL AND HEALTH ENCYCLOPEDIA* 499-500 (1983).

11 *Adoption of F.H.*, 851 P.2d at 1362. Fetal Alcohol Syndrome (FAS) results from maternal prenatal consumption of alcohol. The effects on the child include facial malformations, mental retardation, behavior problems, and learning disorders. The full syndrome affects one in every 700 live births in this country. In some Indian communities, the incidence is as high as one in eight births. Fetal Alcohol Effects (FAE) is a milder form of the syndrome. Ann P. Stressguth et al., *Fetal Alcohol Syndrome in Adolescents and Adults*, 265 *JAMA* 1961, 1961 (1991).

old, until June 1991 when the foster father, Carol Hartley was transferred from Alaska to Kennewick, Washington. F.H., then sixteen months old, was placed with a fourth foster family. In March of 1992, at age two years, F.H. was adopted by the Hartleys and now lives with them in Washington. Child welfare officials in Washington have indicated that F.H. is happy, well-adjusted, and seems to be making good progress. She may continue to have medical problems resulting from prenatal alcohol exposure.¹²

During the time F.H. was in foster care, her biological mother discussed giving up custody to several people, including her cousin and the Hartleys.¹³ Notably, F.H. never lived with her biological mother or any member of her extended family, nor has she ever been to Noatak.¹⁴

The adoption was an open placement allowing the child access to her biological family and her native heritage.¹⁵ E.P.D. believed that she could visit the child more easily in Kennewick than Noatak. The birth mother and the extended biological family were given visitation rights and F.H. retained inheritance rights from E.P.D.¹⁶

B. Procedural Background

1. The adoption

When DFYS took custody of F.H., the agency filed a Child in Need of Aid (CINA) petition, and notified the village in compliance with provisions of the ICWA.¹⁷ A petition to terminate E.P.D.'s parental rights was filed in August 1991, with trial set for September 18, 1991. On September 16, two days prior to the trial date, E.P.D. executed documents voluntarily relinquishing parental rights to the Hartleys.¹⁸ E.P.D. stipulated three conditions: (1) the Hartleys proceed with adoption of

12 *Adoption of F.H.*, 851 P.2d at 1362.

13 *Id.*

14 *Id.*

15 Open adoption, as used by this court, permits visitation by the biological parents, and family records of both adoptive and biological families are available to the child. *Id.* at 1363.

16 *Adoption of F.H.*, 851 P.2d at 1363.

17 The ICWA requires notice to the tribe, or in this case, the native village, that adoption or custody proceedings are pending whenever the state has reason to believe the child involved is or may be an Indian child. 25 U.S.C. § 1912 (1988). See also *In re J.W.*, 498 N.W.2d 417 (Iowa Ct. App. 1973).

18 *Adoption of F.H.*, 851 P.2d at 1363-65.

F.H.; (2) F.H. retain inheritance rights from E.P.D.; and (3) E.P.D. and her extended family retain visitation rights with F.H.

The Hartleys filed a Petition for Adoption the following day. The adoption was approved on March 5, 1992, despite vigorous opposition by the village.¹⁹ The judge approved the adoption based on the following factors: (1) the preference of the birth mother; (2) the open status of the Hartley adoptive placement; and (3) the continued inheritance and visitation rights of the birth family, giving F.H. access to her native heritage.²⁰ Social service officials made numerous contacts with the Hartley family during the first year of the adoption, and agency reports were very positive about the placement.²¹

2. *The appeal*

On appeal by the village, the Court stated that the issue was "whether the superior court erred in concluding that good cause existed to deviate from the adoptive placement preferences²² mandated under the ICWA."²³ The Hartleys had to prove by a preponderance of evidence that there was good cause for permitting a placement other than those preferred under the ICWA. The court had discretion to determine if good cause existed, based on the facts of the individual case.²⁴ What constitutes good cause will vary, based on the facts of the case, and may include "the best interests of the child, the wishes of the biological parents, the suitability of persons preferred for placement and the child's ties to the tribe."²⁵

The Supreme Court of Alaska found no abuse of discretion

19 In October 1991, after receiving notice of the Petition for Adoption, the village moved to intervene in the proceeding, based on the right of intervention under the ICWA. *Id.* The ICWA gives tribes a right of intervention anytime during a custody proceeding involving an Indian child. 25 U.S.C. § 1912(a) (1988). The Hartleys argued that intervention was barred by laches. It was held to be "doubtful" that laches could be raised in such a case, in view of the tribe's right to intervene at any time.

20 *Adoption of F.H.*, 851 P.2d at 1363-65.

21 An early interventionist who worked with F.H. in the Hartley's home twice a month for almost one year believes F.H. made substantial progress during that period and that F.H.'s bond with Nancy Hartley is the best F.H. will ever have. Both guardians ad litem assigned to F.H. testified that they believe it is in F.H.'s best interest to be placed with the Hartleys. *Id.* at 1364-65.

22 25 U.S.C. § 1915 (1988).

23 *Adoption of F.H.*, 851 P.2d at 1364-65.

24 *Id.*

25 *Id.*

by the lower court,²⁶ and approved this adoption by non-Indian adoptive parents even though the native village opposed the placement, intervened in the action, and offered an alternative placement with an extended family member, Mary Penn, who qualified as a first priority placement preference under the statutory directives of the ICWA.²⁷ The basis for the decision lies in the state court interpretation of the available exemptions from the ICWA placement preferences. To understand these exemptions, it is necessary to look at the history and provisions of the Act.

III. THE INDIAN CHILD WELFARE ACT

A. *Legislative History and Intent*

The ICWA is the product of long-standing dissatisfaction and frustration with adoption and custody procedures commonly used to separate Indian children from their native families and culture. Though these procedures were not specifically intended to cause separation and cultural deprivation to the child or the tribe, the effect on native American tribes was devastating.²⁸ During legislative hearings on the ICWA, it was estimated that between one-fourth and one-third of all Indian children had been removed from their Indian homes by various public and private organizations, and placed in non-Indian homes or in other non-Indian custodial arrangements, such as boarding schools.²⁹ Congress sought to reverse this trend by enacting the ICWA, which states in its opening passages, "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."³⁰

26 *Id.*

27 *Id.*

28 Linda A. Marousek, Note, *The Indian Child Welfare Act of 1978: Provisions and Policy*, 25 S.D. L. REV. 98 (1980).

29 In Minnesota, for example, during 1971-1972, nearly one-fourth of all Indian infants born in the state were placed for adoption, with 90% of those infants placed in non-Indian homes. *Hearings on S. 1214 Before Senate Select Comm. on Indian Affairs*, 95th Cong., 1st Sess. 538-40 (1977). Indian children overall were eight times more likely than non-Indian children to be in adoptive homes. *Id.*

30 Among other things Congress found:

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by

The statute recognizes inherent differences in child care practices between Indian and non-Indian cultures, previously not given positive consideration. These basic differences are more than merely alternative means to the same end. Tribal childrearing practices result from a fundamentally different world view. This cultural conflict is poignantly obvious in the following statement of Indian leaders in 1744. Virginia colonists invited Iroquois boys to leave the tribal community and attend the College of William and Mary. The Iroquois leaders declined the invitation.

We know that you highly esteem the kind of learning taught in those Colleges, and the Maintenance of our young men, while with you, would be very expensive for you. We are convinced, that you mean to do us Good by your Proposal; and we thank you heartily. But you, who are wise must know that different Nations have different Conceptions of things and you will therefore not take it amiss, if our Ideas of this kind of Education happen not to be the same as yours. We have had some Experience of it. Several of our Young People were formerly brought up at the Colleges of the Northern Provinces; they were instructed in all your Sciences; but, when they came back to us, they were bad Runners, ignorant of every means of living in the woods . . . neither fit for Hunters, Warriors, nor Counsellors, they were totally good for nothing. We are, however, not the less oblig'd by your kind Offer, tho' we decline accepting it; and to show our grateful Sense of it, if the Gentlemen of Virginia will send us a Dozen of their Sons, we will take Care of their Education, instruct them in all we

nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the United States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

§ 1902. *Congressional declaration of policy*

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 by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to tribes in the operation of child and family service programs.

know, and make Men of them.³¹

After 250 years, one can sense the consternation of the Gentlemen of Virginia at the refusal of their offer, teamed with a pointed rebuke of the cultural arrogance that assumed Indian youths would be better off cared for and educated by non-Indians. Implicit in the offer is an ignorance of the gap in educational priorities between the two cultures.

Generations later, these assumptions continue to cause pain and misunderstanding between the cultures, evidenced in the following statement of Mr. Calvin Isaac, a modern tribal leader:

One of the most serious failings of the present systems is that Indian children are removed from the custody of their natural parents by nontribal governmental authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and *convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.*³²

Misunderstanding arises from the conception of extended family and the determination of who constitutes an appropriate caregiver in tribal culture.³³ Most Indians who maintain traditional ways consider the entire tribe to be quasi-family, and have close relationships with numerous relatives by blood and marriage. The misinterpretation of these relationships has been a source of mutual frustration to social workers and Indians. An Indian parent under stress may leave children in the care of extended family members, without intending a permanent placement.³⁴ Social workers have occasionally interpreted

31 Manuel P. Guerrero, *Indian Child Welfare Act of 1978: A Response to the Threat to Indian Culture Caused by Foster and Adoptive Placements of Indian Children*, 7 AM. INDIAN L. REV. 51 (1979).

32 (Emphasis added.) *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), citing the testimony of Chief Isaac at the congressional hearing passage of the ICWA; see also *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. 193 (1978).

33 See, e.g., *Graybeal v. Alaska*, 912 F.2d 468 (Alaska 1990). An informal custodial placement arranged according to traditional Athabascan tribal practices was sufficient to satisfy the ICWA definition of Indian custodian, even though the child's natural mother opposed continuing the placement.

34 Occasionally, the child may be left with non-Indian friends. In a pre-

this temporary arrangement as abandonment and initiated proceedings to remove the child from the home and terminate parental rights, much to the astonishment and indignation of the Indian caregiver.³⁵

Not all child removal cases result from such benign circumstances, and not all Indian children placed with other Indian or non-Indian families end up in happy, loving homes. Alcoholism and drug dependency remain serious problems on and off reservations.³⁶ Genuine neglect and physical abuse disrupt Indian families just as they do other families. These social ills are exacerbated in Indian communities by a dearth of employment opportunities, poverty, inadequate medical facilities, and limited access to education.³⁷ Nevertheless, in the ICWA, Congress has attempted to preserve for Indian children the right to remain in their native culture even when foster care or adoptive placement is required.³⁸

ICWA case, a Crow mother allowed non-Indian friends, the Wakefields, to take her child, in the belief they would care for him while she was unable to do so. The mother refused requests for adoption. When she later wanted the child returned, the Wakefields, who had intended to keep the child permanently, were distressed and sought assistance from Maryland courts, which declined subject matter jurisdiction. The tribal court returned the child to its mother. This appears to be an example of misunderstanding between Indian and non-Indian about the nature of the temporary custody relationship. See *Wakefield v. Little Light*, 347 A.2d 228 (Md. 1975).

35 *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 35 n.4 (1989).

One of the particular points of concern was the failure of the non-Indian child welfare workers to understand the role of the extended family in Indian society. The House Report on the ICWA noted, 'An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights'

Id.

36 See *In re Welfare of B.W.*, 454 N.W.2d 437 (Minn. 1990); *In re Riva M.*, 235 Cal. App. 3d 403 (Cal. 1991).

37 See *Village of Chalkystik v. M.S.F.*, 690 P.2d 10 (Alaska 1984); *In re Wanomi*, 216 Cal. App. 3d 156 (Ct. App. 1991); *In re Appeal in Coconino Co. Juvenile Action No. J10175*, 736 P.2d 829 (Ariz. 1987); *K.N. v. Alaska*, 856 P.2d 468 (Alaska 1993).

38 A related situation concerns Indian children who do not have intact Indian families and little or no contact with their native culture. A good example is that of illegitimate children who are born off the reservation to non-Indian mothers. It has been suggested that such children do not fall within the intent of the ICWA. See, e.g., *In re Adoption of Infant Boy Crews*, 803 P.2d 24 (Wash. Ct. App. 1991); see also *In re Adoption of Baby Boy W.*, 831 P.2d 643 (Okla. 1992); *In re*

B. Provisions of the Act

The Indian Child Welfare Act does not bind tribal courts. It applies only to state court custody proceedings,³⁹ and is designed to prevent placement of Indian children with non-Indian adoptive or foster parents. Ostensibly, these provisions provide for the child's best interest, though the ICWA may define these interests differently for Indian adoptions than state courts' definition of best interest for adoption procedures of non-Indian children.⁴⁰

1. Defining "Indian child" under the ICWA

Defining "Indian child" for the purposes of the ICWA is crucial to understanding the statute.⁴¹ The designation "Indian" is a term of art in Indian law, and carries different meanings for the purposes of different statutes. "Indian" may refer to any person with native American ancestry, though the "quantum of Indian blood" necessary for definition as an "Indian" varies from tribe to tribe and according to the statute. The term may refer to someone who functions as a member of a specific Indian tribe. Though there is no definitive inclusive definition, to be considered "Indian" a person must generally have at least one ancestor who lived on this continent before the coming of Europeans, and must be recognized as an Indian by other Indians in his or her community.⁴² However, ancestry and cultural recognition are not enough to grant membership in any tribe, absent tribal consent.⁴³ Individual tribes determine enrollment requirements, which is significant in establishing eligibility for many federal programs. In 1934, the Indian Reorganization Act (IRA) defined "Indian" for most federal programs as any person who is a member of any recognized tribe.⁴⁴

Adoption of Baby Boy L., 643 P.2d 168 (Kan. 1982).

39 See Dale, *supra* note 1, at 353.

40 See Howard, *supra* note 3, at 503.

41 The party seeking to invoke the ICWA has the burden of proof that the child in question is an Indian child within the definition of the ICWA. *In re J.L.M.*, 451 N.W.2d 377 (Neb. 1990).

42 ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW* 83-85 (1991).

43 *Santa Clara Pueblo v. Martinez*, 536 U.S. 49, 55 (1978). The Supreme Court upheld the right of the Pueblo to deny tribal membership to children of female members who marry outside the tribe, while admitting similarly situated children of men of that tribe.

44 The IRA uses the following definition:

The definitions of "Indian child" and "Indian tribe"⁴⁵ in the ICWA are very similar to IRA provisions and adopt most of the factors previously recognized as conferring "Indian" status, while adding several unique concepts.⁴⁶ For the purposes of the ICWA, an Indian child is (a) a member of an Indian tribe or (b) a person who is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe⁴⁷

When any state court knows or has reason to believe that the subject of a child custody proceeding is an Indian child according to the definitions of the Act, that court must notify the child's tribe.⁴⁸ The ICWA extends certain rights to the

The term Indian . . . shall include all persons of Indian descent who are members of any Indian tribe recognized now under Federal jurisdiction, and all persons who are descendants of such members who were on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood . . . Eskimos and other aboriginal peoples of Alaska shall be considered Indians.

25 U.S.C. § 479 (1988).

45 *In re* Petition to Adopt T.I.S., 586 N.E.2d 690, 691 (Ill. App. Ct. 1991). The Appellate Court of Illinois considered the definition of "Indian tribe" for the purposes of the ICWA, and ruled that the ICWA is not applicable to Indians who are members of Canadian tribes not recognized by the United States government, and that exclusion from the provisions of the ICWA did not violate equal protection rights.

46 "Indian" child is defined as follows:

Indian child means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

"Indian child's tribe" means (a) the Indian tribe in which the Indian child is a member or (b) in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

"Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

25 U.S.C. § 1903 (1988).

47 *Id.*

48 25 U.S.C. § 1912(a) (1988) states, in part:

In any involuntary proceeding in a State court where the court knows or has reason to know that an Indian child is involved, the party seeking foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention No foster care placement or termination of parental rights proceeding shall be held until at

tribe, and recognizes a tribal interest similar to the interests reserved for family members in non-Indian custody proceedings. The tribe and the child's Indian caretaker may exercise any of several options, including the right of intervention in the proceeding.⁴⁹

2. *The right of intervention*

The right of intervention by the tribe or the child's Indian custodian in any custody action for placement of an Indian child appears to be unlimited and may be exercised at any time.⁵⁰ Besides allowing broad intervention rights, the ICWA grants tribal courts exclusive jurisdiction over child custody proceedings involving an Indian child. Tribes without tribal courts, including most native Alaskan communities, protect their interests solely through intervention in state proceedings.

The right to receive notice and to intervene is not subject to discretion⁵¹ by state courts, and may be exercised against the wishes of Indian parents.⁵² Courts have held that tribes

least ten days after receipt of notice . . . [The] parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such a proceeding.

Id.

49 "The Act . . . provides that Indian tribes are to play a central role in custody proceedings involving Indian children If tribes are to protect the values Congress recognized, they must be allowed to participate in hearings in which those values are significantly implicated." *In re Custody of S.B.R.*, 719 P.2d 154, 156 (Wash. 1986). An Indian custodian may intervene in any child custody action involving an Indian child. For a discussion of the relationship between an Indian custodian and the tribe, see *In re Charloe*, 629 P.2d 1319 (Or. 1981). The right of intervention is established by 25 U.S.C. § 1911(a) (1988).

50 25 U.S.C. § 1911(c) (1988).

51 *In re M.E.M.*, 725 P.2d 212 (Mont. 1986).

52 A case from Montana graphically illustrates this problem from the parental viewpoint. In spite of vehement protests by a member of the White Mountain Apache tribe, her parental rights were terminated by the tribe and her child declared a ward of the tribal court. Though concluding that the state court had no choice but to transfer the case to tribal court, Justice Weber stated the following in a dissenting opinion:

First, I am shocked at the Tribe's apparent disregard of the due process rights of the parent Also shocking to me is the apparent ease with which the Tribe now argues against the desires of the mother, one of its own tribal members Who is left to represent the rights of the individual Indian mother when she is so abandoned by her tribe?

In re Parental Placement of M.R.D.B., 787 P.2d 1219, 1224 (Mont. 1989).

Referring to *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), Justice Weber continued:

This holding indicates the interests of the tribe now are superior to the in-

have an "absolute" right of notice and intervention in a hearing concerning the voluntary or involuntary surrender of parental rights by the parent of an Indian child.⁵³ In another Alaska case, Alaskan Supreme Court Justice Rabinowitz, in a strongly worded dissenting opinion, discussed the interests of the parents and the tribe in the Indian child:

[The] tribe has a right to intervene at any point in any State proceeding regardless of the parent's consent. This right to intervene is absolute, as an instrumental part of the jurisdictional scheme "at the heart of the ICWA." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). To deny tribes this right in voluntary proceedings is to allow parents to defeat the Congressional scheme by usurping the tribe's equal interest in the Indian child. *Id.* at 1610, 4415. ("[T]he tribe has an interest in the child which is distinct from but on a parity with the interest of the parents.") (citing *In re Adoption of Halloway*, 48 Utah Adv. Rep. 3, 732 P.2d 962, 969-70 (Utah 1986).⁵⁴

The notion of "parity" between tribal and parental interests is startling to many non-Indian social workers and courts⁵⁵ and may lead to friction between the tribe and the state.⁵⁶ The role the tribe plays in Indian life has no counterpart in contemporary non-Indian American society. Consequently, state welfare workers may be confused and even hostile when confronted with what appears to be unwarranted intrusion by a tribe asserting the "equal interest" of parents and tribes in Indian children.⁵⁷ The incidence of such confrontation is minimized by the jurisdictional grant to tribal courts.

terests of the parents [I]t was questionable whether Congress intended to deprive Indian parents of their wishes in regard to the placement of their children. Parental rights are among the most significant rights granted to any human being.

Id.

53 *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989); *In re Adoption of Halloway*, 732 P.2d 963 (Utah 1986).

54 *Catholic Social Serv., Inc. v. Cook Inlet Tribal Council*, 783 P.2d 1159, 1162 (Alaska 1989).

55 *Id.*; see also *In re Adoption of Halloway*, 732 P.2d 963 (Utah).

56 For a discussion of what constitutes parental abandonment, see *In re J.L.M.*, 451 N.W.2d 377 (Neb. 1990).

57 See, e.g., *Catholic Social Serv., Inc. v. Cook Inlet Tribal Council*, 783 P.2d 1159 (Alaska 1989).

3. *Jurisdiction of tribal courts in child custody proceedings*

Indian leaders, concerned over perceived insensitivity by state courts and welfare agencies to the unique needs of Indian children, supported a statutory grant of exclusive tribal court jurisdiction in adoptions and foster care placements.⁵⁸ Unless preempted by federal law, the tribal court has exclusive jurisdiction in any child custody proceeding involving an Indian child domiciled on the reservation. If federal law preempts tribal jurisdiction, the state has jurisdiction, but is still subject to the notice and intervention requirements of the ICWA.⁵⁹

Proceedings involving Indian children not domiciled on a reservation are always subject to the tribe's right to assert its interest. Absent good cause to the contrary,⁶⁰ state courts must, on petition of the child's parent, Indian custodian, or tribe,⁶¹ transfer to the tribal court any custody proceeding involving an Indian child who is not residing on, or domiciled on, the reservation, subject to two limitations: (1) the objection of either parent to transferring the proceeding, and (2) the right of the tribal court to decline the transfer.⁶² The Act does not define "good cause" in this context, however, and state courts have some discretion in determining what constitutes good cause for not transferring a proceeding.⁶³

Also of concern to child welfare authorities and to adoptive parents, is the provision that gives the tribal court jurisdiction except "where such jurisdiction is vested in the State"⁶⁴ by ex-

58 Lynn A. Kerbeshian, *Domicile: Federal Definition of Domicile Determines Jurisdiction Under Indian Child Welfare Act*, 66 N.D. L. REV. 553 (1990).

59 25 U.S.C. §§ 1911(a), 1911(c), 1912(a) (1988).

60 In addition, published guidelines from the Bureau of Indian Affairs list the following as "good cause" to prevent transfer of an action to a tribal court: objection to transfer by a child over the age of 12 or parents of a child over the age of five, or little contact of the child with his tribe. Guidelines for State Courts: Indian Custody Proceedings, 44 Fed. Reg. 67, 584, 591 (1979).

61 See, e.g., *In re Adoption of T.R.M.*, 489 N.E.2d 156 (Ind. 1986).

62 25 U.S.C. § 1911(h) (1988).

63 See, e.g., *In re Appeal of Maricopa County Juvenile Action No. JS-8287*, 828 P.2d 1245 (Ariz. 1991); *Native Village of Venetie v. Alaska*, 918 F.2d 797 (9th Cir. 1990); *Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d 587 (10th Cir. 1985); *Brown v. Rice*, 760 F. Supp. 1459 (Kan. 1991).

64 State court jurisdiction exists in some cases through Public Law 280, which granted civil jurisdiction to states over civil actions "between Indians to which Indians are parties" in certain specific geographic areas: all of Alaska, Nebraska, or California, and most of Minnesota, Oregon, and Wisconsin, with the exception of certain named reservations. 28 U.S.C. § 1360(a) (1988).

isting Federal law.⁶⁵ Domicile plays an important role in such determinations. The tribal court has exclusive jurisdiction for children of parents domiciled on the reservation. For children domiciled off the reservation, tribal court jurisdiction may be concurrent with state court jurisdiction, creating complexities not adequately addressed by the ICWA. The issue of domicile may become a serious contention to the detriment of the child. Its determination is always subject to a charge of error.⁶⁶

4. *Placement preferences of the ICWA*

The ICWA purports to accomplish its goals by imposing a hierarchy of placement preferences upon the courts. These preferred placements reflect Indian cultural values and the important roles the tribe and extended family play in Indian societies. In order of priority, adoptive placement preferences under the ICWA are: (1) a member of the child's extended family; (2) other members of the child's tribe; or (3) other Indian families.⁶⁷

The statute applies only to state court proceedings. Tribal courts are not subject to provisions of the ICWA, presumably because they are expected to act in harmony with Indian priorities. As a result, tribes may substitute their own list of preferences for those imposed on state courts.⁶⁸ In protecting tribal interests, tribal courts frequently disregard the explicit wishes of parents and family members, and award custody to tribal members and extended family even though parents have expressed preferences for off-reservation or non-Indian adoptive placement.⁶⁹ State courts are expected to apply Indian cultural or community standards in the implementation of the preference directives.⁷⁰ The placement preferences of the Act may be

65 25 U.S.C. § 1911(a), 1911(c) (1988).

66 As Justice Steven's dissent in *Holyfield* points out, "any adoption of an Indian child effected through a state court will be susceptible of challenge no matter how old the child and how long it has lived with its adoptive parents." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989); see also *In re Adoption of Halloway*, 732 P.2d 962 (Utah 1986).

67 25 U.S.C. § 1915(a) (1988).

68 *Id.*

69 The tribe may establish a different order of preference, and may, "where appropriate," consider the preferences of the Indian child or parent. 25 U.S.C. § 1915(c) (1988). See, e.g., *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989); *In re Adoption of Halloway*, 732 P.2d 962 (Utah 1986); *In re Parental Placement of M.R.D.B.*, 787 P.2d 1219 (Mont. 1990); *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982).

70 "The standards to be applied in meeting the preference requirements of

set aside by state courts for "good cause" though the statute fails to define this term.⁷¹ Despite occasional jurisdictional disputes between tribes, parents, and extended families, tribal jurisdiction over child custody has proven to be a powerful tool in the hands of Indian tribes, since state courts are required to accord "full faith and credit" to tribal adoption and placement orders.⁷²

C. *Constitutional Concerns Raised by the ICWA*

The passage of the ICWA in 1978, and its subsequent implementation in the various tribal and state courts have raised several Constitutional questions. Not all of these questions have been resolved to the satisfaction of parties directly involved in Indian affairs. Despite these difficulties, few detractors have been willing to speak against the stated purposes of the Act since the general end the Act aims to achieve is widely believed to be laudable.⁷³ The means used to achieve that end, however, have been criticized.

The ICWA may be seen as a jurisdictional encroachment on the traditional right of states to regulate family law within their borders. During the hearings prior to passage of the ICWA, a statement from the Department of Justice placed this issue in clear focus:

[W]e are not convinced that Congress' power to control the incidents of such litigation involving nonreservation Indian children and parents pursuant to the Indian commerce clause is sufficient to override the significant State interest in regulating the procedure to be followed by its courts in exercising State jurisdiction over what is traditionally a state matter.⁷⁴

The obvious and undeniable racial basis of the Act may

this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties." 25 U.S.C. § 1915(d) (1988).

71 *Id.*

72 *Id.*

73 Because of this reference to protecting Indian families, there has been some discussion as to whether the ICWA was intended to apply only where there was an intact Indian family. Such an interpretation would preclude application to children of unwed or divorced parents. This does not appear to be the interpretation of most courts. *In re Baby Boy Doe*, 849 P.2d 925 (Idaho 1993). See *supra* note 38 and accompanying text.

74 H.R. REP. NO. 95-1386, 95th Cong., 2d Sess. 40 (1978).

also violate the Fifth Amendment. It can be argued that the ICWA is regulation and jurisdiction based on race alone. The Department of Justice expressed concern about denying access to state courts to Indians who have chosen not to participate in tribal activities. It is questionable whether Congress intended such a person to be forced, based only on his race, to submit to tribal court rulings regarding such important matters as child custody, when a similarly situated non-Indian would have access to the full range of lower and appellate courts of his state:

An eligible Indian who has chosen, for whatever reasons, not to enroll in a tribe would be in a position to argue that depriving him of access to the state courts on matters related to family life would be invidious. Such an Indian presumably has, under the First Amendment, the same right of association as do all citizens, and indeed would appear to be in no different situation from a non-Indian living on the reservation who . . . would have access to State courts. The only difference between them, in fact, would be the racial characteristics of the former.⁷⁵

While Congress did discuss and debate these issues prior to passage of the ICWA, the conflicts were not resolved to everyone's satisfaction.⁷⁶ Whether constitutional compromises were made, and if so whether they were justified by the good that was expected to be accomplished remains a question over which reasonable people may disagree. These issues remain in the background in most custody proceedings involving the ICWA, though they never disappear. Indian and non-Indian parents and guardians disagree about the racial impact of the Act on individual rights, especially when the ICWA is used to accomplish goals far removed from its stated purposes. The ICWA has been invoked in custody proceedings involving an Indian child, defined for the purposes of the Act, with as little as 1/64th Indian ancestry, whose parents had no ties whatsoever to Indian culture.⁷⁷ The ICWA was merely used as a tool to invalidate a state court action. In such a case, the Act cannot

75 H.R. REP. NO. 95-1386, 95th Cong., 2d Sess. 37 (1978).

76 See, for example, *In re Guardianship of D.L.L.*, 291 N.W.2d 278 (S.D. 1980), where a South Dakota court discussed state and federal constitutional concerns raised by the ICWA and concluded that there was no substantial constitutional conflict.

77 *In re Adoption of T.N.F.*, 781 P.2d 973 (Alaska 1989).

fulfill its stated purpose—to protect Indian families.⁷⁸ In the case of F.H., there was no intact Indian family to be protected.

IV. APPLICATION OF THE ICWA TO THE ADOPTION OF F.H.

A. *The Issue in the Lower Court*

The Superior Court of Alaska was asked to decide whether good cause existed to disregard the placement preferences of the ICWA, and allow a non-Indian adoptive placement of F.H., an Indian child. It held that there was good cause to deviate from the mandated placement preferences. The Village of Noatak appealed, exercising its right of intervention under Section 1911(c) of the ICWA.

B. *The Issue on Appeal*

On appeal by the village, the issue as stated by the Supreme Court of Alaska, was “whether the superior court erred in concluding that good cause existed to deviate from the adoptive placement preferences mandated under ICWA.”⁷⁹ The ruling of the lower court could be overturned only if there was abuse of discretion, or if “controlling factual findings are clearly erroneous.”⁸⁰ The adoptive parents had to show by a preponderance of evidence that good cause existed to permit a placement not in accord with the ICWA placement preferences. In addition to the ICWA, state adoption regulations address the issue of discretion.⁸¹

C. *The Village of Noatak's Argument*

For the village, opposition to the placement was based on the principle that a non-Indian placement would deny the child access to her native culture. ICWA guidelines gave first priority preference to Mary Penn, who satisfies two criteria, as the child's aunt, and a member of the native village.

Furthermore, the village maintained that all three ICWA

78 See also *In re Adoption of Quinn*, 845 P.2d 206 (Or. 1993). An unmarried teenage mother, one-eighth Cherokee, with no ties to Indian culture or tribal members, enrolled in the Cherokee tribe one week prior to the state custody hearing, with no purpose other than to defeat state court jurisdiction and revoke her consent to adoption of her baby, who was 1/16th Cherokee.

79 *Adoption of F.H.*, 851 P.2d at 1363.

80 *Id.*

81 Alaska Adoption Rule 11(f) (1991) provides that “good cause” is a matter of discretion for the state court. *Id.* at 1363.

placement preferences⁸² must be considered before an outside placement could occur. This argument, which would require exhaustion of all other possibilities in preference to a non-Indian placement, would virtually guarantee denial of the Hartley adoption.

The village relied upon the decision in *Holyfield*,⁸³ arguing that parental preference was not controlling and could not be used to determine an adoptive placement in opposition to the interests of the child's tribe. The village also argued that even if the court found that the preference of the biological mother could be used to establish good cause, it should be disregarded in the instant case, contending that E.P.D.'s decision to relinquish her parental rights was not reasonable or knowledgeable.⁸⁴

The village submitted affidavits stating that E.P.D. and other family members would have access to F.H. in Noatak if the Mary Penn placement was approved.⁸⁵ Absent was any reference to the best interest of F.H. An unspoken assumption seems to have been that the child's interests are subsumed in the tribal interest.⁸⁶

D. *The State's Argument*

The lower court placed considerable emphasis on maternal preference and the fact that E.P.D. had signed away her parental rights at a hearing where the "terms and consequences" of her decision were openly discussed.⁸⁷ The court specifically followed the recommendation of Probate Master John E. Duggan, acknowledging the "strong and consistent preference" of the birth mother for the Hartley placement, and against

82 The order of preferences are: (1) a member of the child's immediate family, (2) a member of the child's tribe, and (3) any other Indian family. 25 U.S.C. § 1915(a) (1988).

83 *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

84 This conclusion is supported by the following:

E.P.D. had offered to relinquish F.H. to several people, including Mary Penn. At least once, she adamantly opposed placement with the Hartleys. She admitted that when she signed the relinquishment to the Hartleys she was so mixed up she would have signed anything. Noatak argues that E.P.D.'s decision was based in part on her belief that F.H. had serious health problems.

Adoption of F.H., 851 P.2d at 1364.

85 *Id.* at 1363-65.

86 *Id.*

87 *Id.*

placement of her daughter in the village of Noatak.⁸⁸

Additionally, the court looked to other factors, including the bond between F.H. and Nancy Hartley, and the open adoption agreement that permitted visitation rights by E.P.D. and informational access to all parties to the adoption.⁸⁹ The court gave some weight to E.P.D.'s statement that she could more easily visit F.H. in Kennewick than in Noatak.⁹⁰ There is no reference to visitation by other family or tribal members, and the court seems not to have considered this a priority.⁹¹

The lower court found three factors determinative in this case: (1) maternal preference, (2) the bond between the child and the adoptive parents, and (3) the openness of this adoption.⁹² These factors, taken together, constituted good cause to deviate from the preferred placement of the ICWA.⁹³ This reasoning indicates that the court gave considerable weight to the individual preferences and needs of the biological mother and child, rather than merely focusing on tribal interests.⁹⁴

E. Holding of the Supreme Court of Alaska

The Supreme Court of Alaska affirmed the trial court decision, finding a good cause exception to ICWA placement preferences.⁹⁵ In so doing, the Court reasoned that the best interest of the child was to continue her placement with the Hartleys.⁹⁶ The court rejected arguments that the ICWA preferences must be exhausted before any other placement could be considered.⁹⁷ This interpretation gives new breadth to the concept of "best interests" in the context of the ICWA.⁹⁸ Another observer has noted the irony of weighing the welfare of chil-

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.*

92 *Id.* at 1363.

93 *Id.* at 1365.

94 *See generally* Dale, *supra* note 1; *see also* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989); *In re* Adoption of Holloway, 732 P.2d 962 (Utah 1986).

95 *Adoption of F.H.*, 851 P.2d at 1365.

96 State welfare officials were unanimous in their recommendation that F.H. remain with the Hartleys. F.H.'s case worker from the Alaska DFYS, who monitored the family until the Hartleys moved to Washington in 1991, stated that she believed F.H. should have remained with the Hartleys. *Adoption of F.H.*, 851 P.2d at 1364.

97 *Id.* at 1364 n.3.

98 *See supra* note 1 and accompanying text.

dren like F.H. against the interests of their tribes:

It is somewhat paradoxical that the ICWA which was enacted to further the best interests of Indian children forbids considering the best interest of the individual child. The ICWA presumes that the child's best interest results from protecting the relationship between the child and the tribe. A traditional "best interest of the child" standard was rejected by Congress because it was susceptible to bias by state agencies and courts. However, the rejection of the best interest standard may work to the disadvantage of the child because interest in tribal integrity and self-government is given precedence over the child's interests.⁹⁹

This decision by the Supreme Court of Alaska attempts to address the controversy, balancing the needs and well-being of F.H., a vulnerable three year old, against her native village's interest in preserving its connection to its children. The open nature of this adoption gives F.H. access to her extended family and her native roots. The loving and supportive environment of her adoptive family will provide the child with emotional support, medical care, and other needs. Perhaps just as important, however, is the fact F.H. has been spared the tragedy of separation from the woman she loves as her mother, a bonding described by F.H.'s social worker, as "the best she will ever have."¹⁰⁰ This court determined that the good cause provision may allow an alternative placement preference which need not be the option of last resort.¹⁰¹ In this humane and reasoned decision, the Supreme Court of Alaska weighed competing interests to find that the child's best interests constituted good cause to deviate from ICWA preferred placement guidelines.¹⁰²

99 Kerbeshian, *supra* note 58, at 556.

100 *See supra* note 21 and accompanying text.

101 *See supra* note 60 and accompanying text. These guidelines define "good cause" to prevent transfer of an action to a tribal court, though not for deviation from the placement preferences. How much discretion in placement is allowed state courts is an issue before the court in the instant case. For a discussion of the best interests of the child in relation to the best interest of the tribe, see *In re Adoption of Doe*, 555 P.2d 906 (N.M. 1976).

102 *See supra* note 82 and accompanying text. The village had argued that the court was required to exhaust all other options under the ICWA before it could approve a non-preferred placement. This court rejected that argument.

V. CONCLUSION

The Indian Child Welfare Act was passed to prevent the destruction of Indian families. In implementing the statute, however, state courts have been brought face-to-face with unavoidable conflicts between Indian family norms and those of non-Indians. Non-Indian social welfare agencies have traditionally emphasized the welfare of the individual child and the preference of the biological parents, a position that Indians have considered far too narrow. The pervasive role of the tribe in Indian life has no counterpart in other contemporary cultures in this country, and it has been difficult for tribes to communicate their values to the predominantly non-Indian judicial system. Tribes have equated their own interests with the best interests of the child, a view difficult for state courts to adopt wholeheartedly; nevertheless, states have been forced by the ICWA to develop tolerance of tribal interests. In the end, tribes will win only when each Indian child who goes into foster care or adoptive placement has the opportunity to grow in a nurturing environment, enriched by access to his or her native culture.

Ivy N. Voss