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Debra Jean Coando, aka Debra Jean Robertson v. Patrick Dean Coando : Brief of Appellee

Utah Court of Appeals

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In the Utah Court of Appeals 950573-CA

DEBRA JEAN COANDO, aka DEBRA JEAN ROBERTSON, Plaintiff/Appellee,	)	Case No: 950573-CA
vs	)	
PATRICK DEAN COANDO Defendant/Appellant.	)	Priority No. 4

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

JURISDICTION

This matter is an appeal of a final decision of the Eighth District Juvenile Court terminating the parental rights of Patrick Dean Coando. This court has jurisdiction pursuant to Utah Code Annotated § 78-38-51(1).

STATUTORY PROVISIONS

The pertinent statutory provisions are, the Indian Child Welfare Act, 25 U.S.C. Chapter 21, §1901 et seq.; Utah Code Annotated § 78-3a-401 to 414.

STATEMENT OF THE CASE

This case originated as a petition for adoption, filed by the natural mother Debra Jean Robertson, in Eighth District Court. A petition was then filed to terminate the parental rights of Patrick Dean Coando, the natural father. The mater was transferred to the Juvenile Court.

The appellant is a registered member of the Eastern Shoshone Tribe, as are the children. However, none of the children have ever resided on the reservation and the family maintained its domicile in the State of Utah. The mother and father were divorced on August 15, 1989, with the mother being granted custody of the minor children. Because the children were eligible for enrollment in the tribe, but had never been domicile on the reservation, the Juvenile Court ruled that 25 U.S.C. § 1911(b) applied to the proceedings. The court

allowed the tribe to intervene in the case, but denied removal to Tribal Court. The court found that the case was between parents and did not involve state agencies, that the natural mother and children objected to removal, that the case did not involve the removal of children from an Indian family, and that there would be an undue burden if the trial were moved out of state to Tribal Court.

Trial was held on November 30, 1994, in the Eighth District Court. The mother and father were present and represented by counsel, as was the Tribe. The children were represented by the Guardian ad Litem. After trial the Juvenile Court took the matter under advisement. On May 25, 1995, the Juvenile Court ruled in favor of the mother and terminated the parental rights of the father, finding him to be an unfit parent. The Juvenile Court found that the ICWA did not apply to the proceedings because there was no existing Indian family unit or environment, the action was not for removal of Indian children, and the fact of the case did not fall within the scope of Congress' intent in establishing the Indian Child Welfare Act.

The natural father appeals from this decision.

SUMMARY OF THE ARGUMENT

The judgment of the Juvenile Court terminating the parental rights of the Appellant should be upheld because the facts justified a finding by clear and convincing evidence

that the father was unfit. The Indian Child Welfare Act puts no special burdens on the Appellee, as this is not an action for removal of Indian children from an Indian home or natural parent, nor are any state or private agencies involved in the action. As a result, state law was properly applied to the proceedings. Further, jurisdiction was properly retained by the Juvenile Court where the facts did not put the action under the Indian Child Welfare Act. However, even if the Act did apply, the standards and procedures required by the Act were met, and any error in the rulings of the Juvenile Court relating to the application of the Act amounts to harmless error.

ARGUEMENT

1. The Juvenile Court correctly retained jurisdiction as allowed under the Indian Child Welfare Act, 21 USC 1911.

A. The ICWA was enacted to protect the interests of Native American Tribes and families against unwarranted removal of children by state and private agencies, not to grant tribal member more rights than their non-member spouses.

The ICWA was enacted in order to protect the cultural identities of Native American Tribes. The IWCA recognized that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 USCS § 1901(3). The removal of Indian children from an Indian family and their cultural setting eventually robs the

tribe of its members. And prevents the knowledge of Indian life from being passed on through oral traditions. Prior to the enactment of the IWCA,

> an alarmingly high percentage of *Indian families* are broken up by the removal, often unwarranted, of their children from them by *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;…

25 USCS § 1901(4), emphasis added. State court "often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in *Indian communities and families.*" 25 USCS § 1901(5), emphasis added. From the congressional findings in 25 USCS § 1901, it is clear that the purpose of the act is to protect the interest of the tribe in its children from non-Indian governmental agencies. Further, congress believed that the interest of the tribe was damaged when Indian children were removed from a culturally native American environment to be placed in a non-Indian environment. These interests which Congress sought to protect are not of an individual nature belonging to an individual parent, but rather they belong to the tribe.

The stated policy was 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. . .

25 USCS § 1902. In the present case the children are not

being removed from their home nor is there a governmental agency attempting to do so.

To protect the rights of the tribe, the ICWA grants exclusive jurisdiction over Indian children that reside within the boundaries of the reservation. 25 USCS § 1911(a). The children in the present case have never resided on the reservation. In such cases, the ICWA also allows for the transfer of jurisdiction to the tribe where there is no good cause for the state court to retain jurisdiction, but this is subject to the "objection of either parent." 25 USCS § 1911(b). The Tribe is also given the right to intervene in the state court proceedings. 25 USCS § 1911(c). The ICWA also ensures full faith and credit to tribal courts. However, the claim that these safeguards amount to a "preference that any proceeding to terminate the parent rights to Indian children be before the Tribal Court," (Appellant's Brief at 9.) is unwarranted. Full faith and credit no more creates a preference in tribal court than it dose in any other court in the United States. It merely guarantees that the Tribal Court is treated equally.

In the present case, the tribe was allowed to intervene and was represented by counsel. However, the natural mother (respondent) and custodial parent objected to transfer, as was her right under the ICWA. *Memorandum Decision,* at 2. Further, there was good cause for the court to retain jurisdiction.

Id. Transfer of jurisdiction would have forced mother, children and witnesses to travel out or state to a tribal reservation upon which neither mother nor children had resided.

B. The Juvenile Court properly retained jurisdiction in this matter.

The appellant argues extensively that the Juvenile Court erred in retaining jurisdiction. Appellant argues that the court can only retain jurisdiction if there is good cause or a Parent objects. Appellant's Brief at 10. Further, appellant asserts that the court must "start with the presumption that jurisdiction be transferred to Tribal Court." *Id.* The appellant then brushes aside the parental objection by claiming that an absolute veto would be "destructive to the tribal interests." *Id.* at 11. Appellant gives no reason why it would be harmful to tribal interest, nor does he explain how his suggestion of a "qualified veto" would work.

The policy and purpose of the IWCA was stated as follows:

> The Congress hereby declares that it is the policy of this Nation to protect the best interest of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for removal of 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 Indian tribes in the operation of child and family service programs.

25 USCS § 1902. Further, Congress stated in §1901 that:

(4) That an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non tribal 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 States, exercising their recognized jurisdiction over Indian 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.

25 USCS § 1901. What Congress was addressing in the IWCA was 1) the removal of children from their "Indian families" by "state and private agencies" and their placement outside the family; 2) the failure of state courts to recognize the interests of the tribe; and 3) the failure of state courts to recognize the "cultural and social standards" prevailing in an Indian family unit. None of these concerns are at work in this case.

First, the children are not being removed from their family unit. This action was instituted by the natural mother and custodial parent of the minor children. The children have always resided with the mother and are not being removed from her care nor from the home in which they are living. Further, there is no state or private agency involved in this case that is attempting to remove the children from the care of the custodial parent. The only involvement by any state agency came about after trial as a result of the court ordering the Department of Family Services to supervise visitation between

the father and minor children due to the father's history of violent and abusive behavior, as well as the fears expressed by the children to the court.

Second, the interests of the tribe were recognized and the tribe was represented at trial by the tribal attorney. Further, the tribe was allowed to put on extensive testimony at trial relating to its interests and cultural matters. *See,* Transcript of Hearing on 11/30/94 and 12/1/94, at 174 - 194. From the testimony produced by the tribe, it was clear that the children had never been exposed to tribal culture or society. Transcript of Hearing on 11/30/94 and 12/1/94 at 248; *See, id. generally.* Nor would it have been possible for Mr. Coando to teach the children of tribal culture and traditions. *See,* Transcript of Hearing on 11/30/94 and 12/1/94 at 189-190.

Third, because there was no Indian family the concerns that the court might not recognize the standards that exist within Indian society do not come into play. The Children knew nothing of Indian society. The cultural standards that applied to the children and their family life was that of the non-Indian community.

2. THE ICWA ALLOWS THE STATE COURT TO RETAIN JURISDICTION IF EITHER PARENT OBJECTS TO A TRANSFER TO TRIBAL COURT.

Even leaving the policy issues aside, the Juvenile Court still acted properly in retaining jurisdiction. Section 1911 provides that in an action for the

> termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, *absent the objection by either parent,* . . .

25 USCS § 1911(b), emphasis added. The natural mother objected to transfer of the case to Tribal Court. *Memorandum and Decision,* at 2.

The issue of jurisdiction was ruled upon by the court on July 5, 1994. In its ruling, the Juvenile Court found that 1) the children were Indians within the meaning of 25 USCS § 1901; 2) Section 1911 (b) of the ICWA applied because the children were not domiciled on the reservation; and 3) it was the mother's burden to show good cause why the case should not be transferred to tribal court. *Memorandum Decision,* July 5, 1994. This is what the appellant asserts that this should be the case in his brief. And despite the fact that the Juvenile Court applied these standards, the court still found that it was appropriate to retain jurisdiction.

In its decision, the Juvenile Court noted that the "non-Indian natural mother and legal custodian of the . . . children objects to the transfer of jurisdiction." *Id.* at 2. The court stated:

> That pursuant to the Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings, section C2, the Indian Child Welfare Act "gives the parents and the Tribal Court of the Indian child's tribe an absolute veto over transfers, and there is no need for any adversary proceeding if the parents or the Tribal Court

opposes transfer."

Id. The court also noted that even though the court was not required to determine if a parent's veto was absolute, the act at least made the "transfer to Tribal Court discretionary with the State Court when there was an objection to the transfer by either parent. *Id.*

Even so, the court went on to find that there was good cause. Citing the Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings section C2 and C3, the court noted that the following constituted "good cause to the contrary";

> a. The Indian child is over 12 years of age and objects to the transfer.
>
> b. The evidence necessary to decide the case could not be adequately presented to the tribal Court without undo hardship to the parties or witnesses.

Id. citing the Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings section C2 and C3. The Juvenile Court properly noted that "David Allen Coando and Paul Dean Coando are twin boys, 14 years of age, who object to the transfer of jurisdiction to Tribal Court." *Id.* The Juvenile Court went on to find that all three children expressed serious fears regarding their father and their being on the reservation, as a result forcing them to go to the reservation for trial against their will "would be detrimental to their physical and emotional well-being and not in their

best interest." *Id.*

The Juvenile Court also found that section 1911 (b) was satisfied in that there would be undue hardship if the petitioners were forced to travel to Wyoming for Tribal Court. Both parties had resided primarily in Utah and most of the witnesses lived in the Vernal area. Further, many of the witnesses were older and that an "undue hardship will be placed upon them to travel to the Tribal Court in Wyoming". *Id.* It is interesting to note that the Bureau of Indian Affairs has specifically recognized the doctrine of *forum non conveniens* in its guidelines for state courts. The Montana Supreme Court also supported this view. *See, Application of Bertelson,* 617 P.2d 121, 125 (Mont. 1980).

3. ALTHOUGH THE JUVENILE COURT RULED THAT THE ICWA DID NOT APPLY THE EVIDENCE STILL MET THE REQUIREMENTS OF THE ICWA.

In addition the Juvenile Court noted that the ICWA was designed to protect the Indian family from being broken up by "non-tribal public and private agencies". *Id.* Further, the Juvenile Court found specifically that there was "no state agency seeking to remove the Indian children from their Indian home. The issue of termination of parental rights is between the natural parents and custody of the children will remain with a natural parent." *Id.*

Finally, the Juvenile Court considered all these issues

together and weighed "the interests of the Indian Tribe pertaining to its children and its sovereignty with those of the parents, in this case each parent individually, and the interests of the children." *Id.* After weighing the competing interests the court found that the matter fell under 25 USC § 1911(b), however,

> the controversy is between two parents and does not involve the breakup of Indian families by the removal of Indian children by non-tribal public and private agencies or the placement of the children in non-Indian foster or adoptive homes. Good cause exists to retain the matter in the State Court. The custodial parent objects to the transfer, and this Court finds that it does not run counter to the intent of the ICWA to retain jurisdiction in the State Court.

Memorandum Decision, at 4.

In making its ruling on jurisdiction, the Juvenile Court took into consideration several factors, including best interest of the children, hardship on the parties, the interest of the tribe, the objections of the mother to transfer, the objection of the two 14-year old boys. All of these together justified a finding of good cause to keep jurisdiction. This is true, even when discounting the fact that the wording of the ICWA grants a parent the right to veto transfer when the children are not domiciled on the reservation. Appellant's argument that jurisdiction was based solely on the doctrine of *forum non conveniens* as grounds for good cause is simply not supported by the facts.

Appellant's extremely belabored argument that *forum non*

conveniens does not apply because of its placement in a discussion located in house report 1386 is lacking in merit. Further, if the court were to adopt Appellant's position there would be no doctrine of *forum non conveniens*.

In his brief, Appellant relies on a number of cases which are not controlling in the case at hand. For example, *Mississippi Band of Choctaw Indians v. Holyfield*. *Holyfield* dealt with the sole issue of domicile. *Mississippi Band of Choctaw Indians v. Holyfield,* 490 US 30, 42, 104 L.ED 2d 29, 42, 109 S.Ct. 1597 (1989). In that case the parents, who were both tribal members and residents of the reservation, intentionally went off the reservation for the birth of their illegitimate child. The purpose of this act was to avoid tribal jurisdiction and give the child up for adoption. The Supreme Court ruled that domicile was that of the parents (*Holyfield*, 490 U.S. 48.), and that individual tribal members could not avoid exclusive tribal jurisdiction simply by having the baby off the reservation. *Id.* at 51. These facts were similar to *Matter of Adoption of Halloway*, 732 P.2d 962 (Utah 1986), where a child was taken off the reservation shortly after birth to be given up for adoption. The Court found that domicile was on the reservation. The issue of domicile is not relevant to the case at hand. Nor is it relevant to the issue of parental objection. All parties agreed that the children never resided on the reservation. *Memorandum Decision,* July

5, 1994. Therefore, only section 1911 (b) applies which allows an individual parent to object to removal to Tribal Court in actions that are already pending in state court.

A. IN CASES FALLING UNDER 25 USC § 1911(B) THE PARENTAL VETO IS ABSOLUTE.

Appellant asserts that Congress intended for there to be a "qualified veto" in order to deny removal to Tribal Court. Brief of Appellant, at 12. No justification for this position is given other than the claim that allowing "an absolute veto would foster the same type of forum shopping rejected in Holyfield." *Id.* This disregards the fact that *Holyfield* dealt with a completely different issue, that of a child domiciled on the reservation. In that situation the Tribe has exclusive jurisdiction. 25 USCS § 1911(a). It is only in a case such as the present one, where the child is not domiciled on the reservation, that gives rise to a parental objection being allowed. 25 USCS § 1911(b). Appellant's argument relating to parental object, therefore, lacks merit because the statute has already limited the objection to certain cases. The only forum shopping that is available is where a party seeks to avoid the state court by removing the proceedings to the Tribal Court. The proceedings cannot be removed from the Tribal Court. Further, adopting appellant's position on parental objection disallow the objection, as there would be no grounds which would justify its use.

Appellant cites a number of other cases relating to *forum non conveniens,* however, none of them add anything to the argument. They relate primarily to the fact that the doctrine "should be limited to meeting the objective of the ICWA" (Brief of Appellant at 14, citing *In the Matter of Dependency and Neglect of A.L.,* 442 N.W.2d 233 (S.D. 1989)), and that "the Court should consider the rights of the child, the rights of the tribe and the rights of the parents" (*Id.* citing *In the Interest of C.W.,* 479 N.W.2d 105 (Neb. 1992)), all of which were done by the court. *See, Memorandum Decision,* July 5, 1994. The Juvenile Court went beyond simply considering the objection of the parent, or the children, or the other traditional factors concerning *forum non conveniens,* and considered all the factors together as well. When considering all these factors together there can be no doubt that the Juvenile Court properly retained jurisdiction in this matter.

4. THE JUVENILE COURT HAS AUTHORITY TO RECONSIDER ITS OWN RULINGS.

The Appellant makes the claim that the Juvenile Court erred in reconsidering a prior decision. This claim is based upon the Memorandum Decision of July 5, 1994 (attached as appendix), and the final ruling of the Court dated June 29, 1994, (attached as appendix). Appellant asserts that the doctrine of "law of the case" prevents the court from

reconsidering a prior ruling by a different judge of the same court in the same case. Brief of Appellant, at 17-19. However, Appellant noted that there are circumstances where the court may reconsider a previous ruling. For example, if the court believes it has made an error or if new facts are presented. *Trembly v. Mrs. Fields Cookies,* 884 P.2d 1306, 1311 (Utah App. 1994).

A. THE JUVENILE COURT DID NOT OVERRULE ITS PREVIOUS DECISION.

Although the Juvenile Court stated that it reconsidered the previous ruling, the court did not actually overrule the previous decision. Judge Lindsay's Memorandum Decision of July 5, 1994, addressed only the issue of whether the case should be transferred to Tribal Court. In that decision, Judge Lindsay found that Section 1911(b) of ICWA applied to the proceeding. This section deals solely with the transfer of a case to Tribal Court, not the standards and procedures for the actual trial. 25 USCS § 1911. Judge Wilson did not address this issue, did not overrule it, nor was there a need to do so. Judge Lindsay had already determined that jurisdiction should remain with the Juvenile Court and the Tribe was allowed to intervene. Judge Wilson decision went to the Tribe's motion to dismiss, which was an entirely different matter from the jurisdictional ruling. As a result, the Appellant's argument that the Juvenile Court erred in

reconsidering Judge Lindsay's ruling is not relevant in this case, or amounts to harmless error.

5. THE COURT PROPERLY FOUND THAT THE STANDARDS FOR TERMINATION OF PARENTAL RIGHTS UNDER THE ICWA DID NOT APPLY IN THIS CASE

The court properly found that the ICWA did not apply. There were several significant factors that justified this decision. First, the court found that "this action is not for the removal of Indian children from an existing family unit". *Finding of Facts, Order and Decree,* 2, June 29, 1995; *See also, Memorandum Decision at 4.* Second, there was no Indian family unit. *Finding of Facts, Order and Decree,* 2. Third, no state or private agencies were involved. *Finding of Facts, Order and Decree,* 2; *Memorandum and Decision,* at 4.

The Juvenile Court found that the "specific facts of this case are not within the scope of Congress' intent in establishing the Indian Child Welfare Act. Therefore, the court concludes that the legal and procedural standards of the Indian Child Welfare Act dose not apply in this case." *Finding of Facts, Order and Decree,* 2.

The stated policy of Congress was 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. . .

25 USCS § 1902. Of main concern was the breakup of "Indian families" by nontribal public and private agencies (25 USCS § 1901(4)), and the failure of courts to recognize "essential tribal relations. . .and the cultural and social standards prevailing in Indian communities and families." 25 USCS § 1901(5). Nowhere is an action by one parent against the other mentioned. An action between private parties, where one is a non-indian "does not fall within the ambit of the Indian Child Welfare Act." *Application of Bertelson*, 617 P.2d 121, 125 (Mont. 1980). Nor was the Act "directed at disputes between Indian families." *Id.* The purpose was to grant a certain amount of protection to the cultural identity of Indian Tribe and a recognition of the cultural values existing in an Indian family. *See,* 25 USCS § 1901(3). This does not mean that an Indian parent was to be granted greater rights than the non-Indian custodial parent. Nor does it mean that all aspect of the ICWA apply in every case.

In the present case, the children were enrolled as tribal members after the mother initiated the action for termination of parental rights. As a result, the Tribe was allowed to intervene in the proceedings and counsel was appointed for the father. *See,* 25 USCS § 1911(c); § 1912(a), (b). However, not all parts of the ICWA apply in all cases. Section 1911(a) as already discussed above, applies only in cases where the child is domiciled on the reservation. Other sections can

only reasonably be attributed to cases were there is intervention by state agencies. An example of this is section 1912(d), which requires remedial services and rehabilitative programs be provided.

A. A PARENT SHOULD NOT BE REQUIRED TO PROVIDE THE SAME REMEDIAL SERVICES AS IS THE STATE IN A REMOVAL ACTION.

Appellant argues that the mother provide "remedial and rehabilitative programs and preventative measures designed to prevent the break up of the Indian family must be undertaken and these efforts proven unsuccessful". Brief of Appellant at 22, citing 25 USCS § 1912(d). The problems with this is that such programs can only be provided by governmental agencies. They require expertise to establish and millions of dollars to run. It would be unreasonable and unfair to require the parent to provide such programs. (This is one reason why the ICWA deals with governmental agencies and not "parent vs. Parent" issues.) At best, the mother could be held to attempt reasonable efforts to prevent the breakup of the family. And this she did. The father never supported the children. Transcript of Hearing on 11/30/94 and 12/1/94, 20 - 101, generally. Even making his wife pay him to baby sit the children. *Id.* at 69. He physically and mentally abused the wife. *Id.* When he was in prison for assault on the mother, the mother took the children to see him. *Id* at 22-24. However, the father's violent and abusive behavior made it

impossible and unreasonable for the mother to do more than she did. Further, it was the children's desire that they not see the father. *Id.* at 24; *See,* testimony of David Coando and Pau Coando, generally, 225-249. It would be unreasonable to require a mother, who had been severely mistreated, whose children were terrified of their father, to do more. Further, the father never provided support for the children or undertook any reasonable efforts on his part to repair the relationship.

B. THIS CASE DOES NOT INVOLVE AN INDIAN FAMILY OR THE REMOVAL OF INDIAN CHILDREN FROM THE FAMILY.

Of greater importance to finding that the IWCA did not apply was the court's finding that there was no Indian family to breakup. *Finding of Facts, Order and Decree,* 2, June 29, 1995. The facts supporting this finding were:

1) The children never resided on the reservation,
2) The father did not support the children.
3) The children always resided with the non-Indian mother.
4) There had been no effort by either parent to raise the children in an Indian cultural setting.
5) The children did not consider themselves to be Indians and knew very little about Indian ways.

There was a great deal of testimony about Indian culture and values. *See, Testimony of Mr. Wise,* Transcript of Hearing on 11/30/94 and 12/1/94, at *174 - 194.* This testimony made clear a number of import facts. First, Mr. Coando never attempted to raise the children in the Indian way. Second, Mr. Wise testified that an abusive person Like Mr. Coando, could

not pass on properly the oral traditions necessary to raise a family in the Indian way. Transcript of Hearing on 11/30/94 and 12/1/94 at 189-90. Third, a person could not be forced into the Indian culture. *Id.* at 187-89. And fourth, the children never lived in a native American setting. *Id.* at 173-174.

Because the whole purpose of the ICWA is to prevent the destruction of Indian culture and way of life, as well as prevent courts from applying standards that do not apply to a traditional Indian family environment, the purpose cannot fairly be applied where no such environment exists. Further, the children are not being removed from their family setting at all. This is a key factor in the policy behind the act. Section 1902 establishes "minimum federal standards for the removal of Indian children from their families". 25 USCS § 1902. These standards do not rightfully apply where the children are not being removed from their family by a governmental agency. *See, K.E. v. State of Utah*, 285 Utah Adv. Rep. 25 (Utah App. 1996).

C. EXPERT TESTIMONY IS ONLY REQUIRED IN CASES WHERE THE STATE IS SEEKING TO REMOVE CHILDREN FROM AN INDIAN FAMILY.

In *K.E. v. State of Utah*, 285 Utah Adv. Rep. 25 (Utah App. 1996), this Court noted that "the ICWA only requires the State to present qualified expert testimony on the issue of whether serious harm to the Indian child is likely to occur if

the child is not removed from the home." *Id.* at 27, citing *In re C.W.*, 479 N.W.2d 105, 111 (Neb. 1992). The children were not being removed from the home, nor were they in the custody of the appellant.

Appellant argues that a natural parent is required to provide expert testimony "that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 USCS § 1912(f). Assuming that this requirement applies in the case at hand, the requirement was met. Mr. Augustus testified that he was a licensed Clinical Social Worker with a Masters in Sociology and a Masters in Social Work. Further, he had been working in the field since 1970, primarily with children and families. Transcript of Hearing on 11/30/94 and 12/1/94, at 2-3. Mr. Augustus was qualified to be an expert and testified that the time he spent with the children was adequate to determine that serious emotional or physical damage would result if Mr. Coando's parental rights were not terminated. *Id.* at 205-06, 210. (There are no time requirements for such interviews) The fact that Mr. Augustus had little experience with the ICWA is irrelevant, since he was not testifying as a legal expert. Mr. Augustus' expertise was that of a counselor, who deals with people, not statutes. Expert do not need to be versed in the ICWA nor even in Indian culture. This Court has noted that "professionals having substantial

education and experience in child welfare might well qualify as expert witnesses under ICWA, even though their experience with Indians is limited." In *K.E. v. State of Utah*, at 27.

a) MR. AUGUSTUS SATISFIED THE QUALIFICATIONS OF AN EXPERT WITNESS.

In the Matter of M.E.M., 635 P.2d 1313 (Mont. 1981), used the Department of Interior Guidelines to aid it in determining who qualified as an expert under the ICWA. The Montana Supreme Court felt that this was appropriate since a "qualified expert witness" is not defined under the act and because the Court felt that the "guidelines comport with the spirit of the ICWA." *In the Matter of M.E.M.*, at _____. Of the three examples cited, the third is applicable to Mr. Augustus. Such an expert is described as a "professional person having substantial education and experience in the area of his or her specialty." *Id.; K.E. v. State of Utah*, at 27. Proper foundation was laid to qualify Mr. Augustus under this category and no objection was made.

6. THE STANDARD OF PROOF THAT APPLIES TO THIS CASE IS THE CLEAR AND CONVINCING STANDARD APPLICABLE IN STATE COURT. BEYOND A REASONABLE DOUBT ONLY APPLIES TO EXPERT TESTIMONY IN STATE REMOVAL CASES.

The standards of proof that apply to this case are clear and convincing. In *K.E. v. State of Utah*, this court found that there was a "dual burden of proof" wherein state and federal requirements are satisfied separately. *K.E. v. State*

of Utah, at 26-27. The burden of "beyond a reasonable doubt" is employed only in relation to expert testimony as to harm to the child and then only in termination cases where the child is being removed from the home. *Id.*; 25 USCS § 1912(f). All other aspects are governed by the state standards of clear and convincing. However, because the children are not being removed from the home, there is no need for the expert testimony.

Even assuming that expert testimony was required the testimony was sufficient to make a finding beyond a reasonable doubt that failure to remove the children from the "custody" of the father "would result in serious emotional damage" to the children. The was evidence that Mr. Coando subjected the children to emotional distress. Transcript of Hearing on 11/30/94 and 12/1/94, 205-206. That he had neglected and failed to support his children. That he was constantly intoxicated and abusive when he was at home. That he physically abused his wife if front of the children. And that the only respite in this behavior was when he was in prison. *Id.*, generally.

There was adequate evidence to support a finding under clear and convincing. The evidence supported a finding that would allow termination of parental rights under five of the seven grounds listed in U.C.A. § 78-3a-407. The father failed to support the children. He was found to be unfit or

incompetent to care for the children. *Findings of Facts, Order and Decree,* at 4. He had been incarcerated for long periods of time. *Id.* at 3. Failure of parental adjustment. *See, Id.* at 5. The father had made only token efforts to support the children, to prevent neglect, to eliminate risk of serious physical, mental or emotional abuse of the children. *Id* at 3. Or to avoid being an unfit parent. *Id* at 4. Each of these findings taken by themselves constitute grounds for termination. U.C.A. § 78-3a-408. Taken they more than satisfy burden of proof required for termination.

7. *THE GUARDIAN AD LITEM ACTED PROPERLY AND ANY ACTIONS TAKEN BY HIM ARE NOT GROUNDS FOR APPEAL.*

The Guardian ad Litem was appointed pursuant to U.C.A. § 55-16-7. Appointment was justified due to the violent and abusive history of Mr. Coando, his failure to support the children, his neglect of the children, and the fears the children had of their father. The Guardian ad Litem has the duty to represent the best interests of the minor children. He does not have the duty to look after the parent's best interest or that of the tribe. The main point of Appellant's argument is that Mr. Austin did not agree with Mr. Coando. This is not grounds for appeal.

Appellant argues that because Mr. Austin decided it was necessary to take a more active role than he at first intended, that this is somehow prejudicial. Appellant argues

that Mr. Coando felt bad. Brief of Appellant, at 34. Appellant complains that the questions asked by Mr. Austin were "combative". *Id* at 32. The question Appellant complains of was not allowed by the Judge, and is not prejudicial because it was not allowed. However, the point that the Guardian ad Litem was bringing out was that Mr. Coando had never attempted to raise his children in the Indian way. None of this is grounds for appeal. An appeal cannot be made on the grounds that the other attorney did not agree with you, or that your client felt bad as a result.

Appellant complains that Mr. Austin asked that Mr. Coando be barred from the court room. The motion was made after Mr. Coando had left the courtroom. Mr. Coando had continually disrupted court proceedings throughout the course of the trial, causing numerous delays. *See,* Record generally. During one such outburst apellant's attorney stated that it would be necessary for Mr. Coando to remain outside the courtroom if the case was to proceed. Transcript of Hearing on 11/30/94 and 12/1/94, at 12-13. The motion, however, was denied. The fact that a party makes such a motion, so that he can get through his closing arguments, is not grounds for appeal, especially where the motion is denied.

The appellant is unhappy that the Guardian ad Litem took the position that the children were not living as part of the Indian culture, and should not be forced to do so against

their wishes. This was the position taken by the tribe as well. Appellant takes exception with statements by Mr. Austin during closing argument that race was not an issue, but that "[w]hat is important is culture identity." Brief of Appellant at 32. The appellant quotes most of this particular statement in its brief. Brief of Appellant at 33. However, appellant leaves off the last sentence, where Mr. Austin states that, the children's cultural setting "may change in the future, but like Mr. Wise said, that is to be - that should be their decision and no one else's. Transcript of Hearing on 11/30/94 and 12/1/94, at 312. The point being, once again, that the interest of the Tribe is in maintaining its culture and society, but it cannot be forced upon anyone. The Guardian ad Litem never decided that the children had no interest in being Indian (Brief of Appellant at 34), but rather agreed with the Tribe that it must be the children's decision. The Tribe's interest in these matters could best be realized if the negative influence of the father were not present to dissuade the children.

Appellant also argues that the Guardian ad Litem did not draft a list of issues to be addressed in a psychological exam before taking the children to Ute Tribal Psychologist. This is simply not true. The issues were determined by the Juvenile Court, and the Guardian ad Litem was to provide a background statement. The fact that the Guardian ad Litem

acted upon the findings of the psychologist to protect the child and terminate visitation, is not grounds for appeal. It was the duty of the Guardian ad Litem, as the children's attorney, to represent their best interests. If in looking after the best interest of his clients the Mr. Austin "became an advocate against Mr. Coando" (Brief of Appellant at 35) then this was appropriate. And being appropriate, could not have "created undue bias and prejudice against Mr. Coando in the mind of Court." *Id.* If anyone has acted unethically it is the attorney for the appellant for bringing such frivolous claims, based only on the fact that someone disagreed with the appellant.

CONCLUSION

The Court should uphold the ruling of the Juvenile Court terminating the parental right of Mr. Coando. The Juvenile Court did not overrule itself. Sections 1912 (d) and (f) do not apply in the case at hand. Nor does the ICWA require expert testimony and proof beyond a reasonable doubt as to the harm to the children where the children are not being removed from the home nor from an Indian family. Even if such proof were required, the evidence was sufficient to support such a finding. Nor were the actions of the Guardian ad Litem in an adversarial proceeding prejudicial. The Court, should therefore, affirm the judgment of the Juvenile Court.

DATED: this 23rd day of July, 1996.

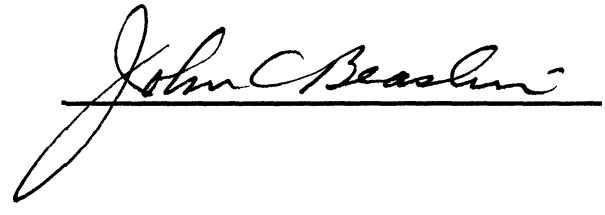
John C. Beaslin
Attorney for Appellee

CERTIFICATE OF MAILING

I certify that on 23rd day of July, 1996, a true and accurate copy of the foregoing document was mailed, postage prepaid, to:

Cindy Barton-Coombs
Attorney for Appellant
193 North State Street
Roosevelt, Utah 84066

Cleave J. Hatch
Guardian ad Litem
363 East Main, 2nd Floor
Vernal, Utah 84078



APPENDIX

Memorandum Decision, July 5, 1994
Finding of Facts, Order and Decree, 2, June 29, 1995
Indian Child Welfare Act

IN THE EIGHTH DISTRICT JUVENILE COURT

STATE OF UTAH

In the Matter of the Interest of: David Alan Coando Sky Deona Coando Paul Dean Coando	MEMORANDUM DECISION

Comes now the Court in the above entitled matter and hereby rules on the jurisdictional Motion to Stay Proceeding and Transfer to the Tribal Court filed by Patrick D. Coando on November 8, 1993, and the jurisdictional Motion for Transfer of Jurisdiction filed by Mr. John C. Schumacher on behalf of the Eastern Shoshone Tribe of the Wind River Reservation in Fort Washakie, Wyoming. The Court held hearings on November 18, 1993 and March 3, 1994 and heard proffers and argument form counsel. Present at the hearing on November 18, 1993, was Mr. John Beaslin representing Debra Jean Robertson and Mr. Dixon Hindley representing Patrick Coando. Present at the hearing held on March 3, 1994, was Mr. Jose Luis Trujillo and Mr. John C. Schumacher representing the Eastern Shoshone Tribe of the Wind River Reservation, Mr. Larry A. Steele, Guardian Ad Litem, Mr. Patrick A. Coando who was represented by his attorney of record, Dixon D. Hindley, and Debra Jean Robertson, who was represented by her attorney of record, Mr. John C. Beaslin. The Court considered the Memorandums of Law and Points of Authority filed by all parties, and being fully advised in the premises, now makes the following order:

1. That counsel for the parties have made the following stipulation:

   a. That the above named minors are Indian children, within the meaning of the Indian Child Welfare Act, 25 United States Code, Section 1901, et seq. 1978.

b. That the above named minors are not domiciled on the reservation and thereby Section 1911 (b) of the Act applies to this proceeding.

c. That the burden of proof is on Debra Jean Robertson, the party seeking termination of parental rights, to show good cause why this matter should not be transferred to the Tribal Court.

2. That the State Court pursuant to Section 1911 (b) of the Indian Child Welfare Act (25 USCS) is required to transfer a proceeding for the termination of parental rights to an Indian child not domiciled within the reservation to the Indian child's Tribe in the absence of good cause to the contrary and absent objection by either parent.

3. That Debra Jean Robertson, the non-Indian natural mother and legal custodian of the above-named children, objects to the transfer of jurisdiction of this matter to the Tribal Court on the ground that she and the children are sufficiently removed form the Tribe and its ways to justify giving jurisdiction over to a non-Indian Court. Mrs. Robertson has never resided on the reservation and neither have the children's. The only contact the children have had with their Indian father has been minimal and the children perceive that contact to be a negative experience.

4. That pursuant to the Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings, section C2, the Indian Child Welfare Act "gives the parents and the Tribal Court of the Indian child's tribe an absolute veto over transfers, and there is no need for any adversary proceeding if the parents or the Tribal Court opposes transfer."

5. That it is not necessary for this Court to determine whether an objection by one parent to the transfer of jurisdiction to the Tribal Court is an absolute veto to the application of the Indian Child Welfare Act because good cause exists to retain this matter in the Eighth District Juvenile Court.

6. That even though the Court is not required to determine whether one parent's objection to the transfer

of jurisdiction to the Tribal Court is an absolute veto to the transfer, the plain meaning of the Indian Child Welfare Act provides that the Court consider an objection by either parent. In the least the Act makes transfer of jurisdiction to a Tribal Court discretionary with the State Court when there is an objection to the transfer by either parent.

7. That pursuant to the Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings section C2 and C3, the following constitutes "good cause to the contrary";

a. The Indian child is over 12 years of age and objects to the transfer.

b. The evidence necessary to decide the case could not be adequately presented to the Tribal Court without undo hardship to the parties or the witnesses.

8. That David Allen Coando and Paul Dean Coando are twin boys, 14 years of age, who object to the transfer of jurisdiction to the Tribal Court. These boys have personal memories of their father, Patrick D. Coando, beating their mother on a number of occasions. They are extremely fearful of their father. They remember their father taking them from the custody of their mother and without her knowledge or permission to the Indian reservation where he told they would never see their mother again. Although the boys views may have been colored by the fears and opinions of their mother, their determination is clearly based on their experiences and observations with their father and is not merely a reflection of their mother's objection. To require them to travel at this time to the Indian reservation for Tribal Court would be detrimental to their physical and emotional well-being and not in their best interest. The boys perceive that they are not safe on the reservation.

9. That Sky Deona Coando, the 7 year old daughter of the parties, objects to the transfer of jurisdiction of this matter to the Tribal Court based upon personal memories and nightmares she has of an occasion when her father physically attacked her mother in her presence. Sky was knocked down during the struggle, and her father tried to take her away from her mother. To require Sky to travel to the reservation at this time would be seriously detrimental to her emotional stability because she perceives that she is not safe on the reservation.

10. That good cause exists to retain this case in the state Court because the evidence necessary to decide this case could not be adequately presented in the Tribal Court without undo hardship to the parties or the witnesses. In this case the Tribal Court of the Eastern Shoshone Tribe of the Wind River Reservation is 5 hours driving time from Vernal, Utah, the home of the Petitioners. The parties and minor children have resided primarily in Vernal, Utah and Roosevelt, Utah and the witnesses required for the termination hearing primarily reside in the Vernal and Roosevelt area. Many of the witnesses are older and an undo hardship will be placed upon them to travel to the Tribal Court in Wyoming.

11. That the Indian Child Welfare Act (25 USCS) was enacted to address congressional findings set forth in section 1901 in paragraph four "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children by non-Tribal public and private agencies, and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions."

12. That the above entitled matter is a dispute between the natural parents of the above named three minor children. There is no state or private agency seeking to remove the Indian children from their Indian home. The issue of termination of parental rights is between the natural parents and custody of the children will remain with a natural parent.

13. That the Court must weigh the interests of the Indian Tribe pertaining to its children and its sovereignty with those of the parents, in this case each parent individually, and the interests of the children. The ICWA gives parents an opportunity to object to the transfer of the jurisdiction to the Tribal Court, and that Act gives parties the opportunity to show "good cause" why jurisdiction should not be transferred. Upon balancing these competing interests, this Court finds that while this matter comes within the ICWA pursuant to section 1911 (b) (action to terminate parental rights), the controversy is between two parents and does not involve the breakup of Indian families by the removal of Indian children by non-Tribal public and private agencies or the placement of the children in non-Indian foster or adoptive homes. Good cause exists to retain the matter in the State Court. The custodial parent objects to the transfer, and this Court finds that it does not run

counter to the intent of the ICWA to retain jurisdiction in the State Court.

Dated this July 5, 1994

BY THE COURT:

Kay A. Lindsay

JUDGE

JUVENILE COURT

CERTIFICATE OF SERVICE

I, Janet Gurr, Deputy Court Clerk, hereby certify that a true and correct copy of the Memorandum Decision in the Coando Children case was mailed on July 11, 1994, by United States First Class Mail, postage prepaid to:

DIXON D HINDLEY, #3932
ATTORNEY FOR PATRICK COANDO
8 EAST BROADWAY, SUITE 623
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ATTORNEY FOR DEBRA ROBERTSON
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VERNAL UT 84078

JOSE LUIS TRUJILLO ESQ
8 E BROADWAY, SUITE 735
SALT LAKE CITY UT 84111

LARRY A STEELE
GUARDIAN AD LITEM
319 WEST 100 SOUTH
VERNAL UT 84078

JOHN C SCHUMACHER
ATTORNEY FOR EASTERN SHOSHONE TRIBE
P O BOX 748
FORT WASHAKIE WY 82514

Janet Gurr

JANET GURR/DEPUTY CLERK

JUVENILE COURT

File
Debra Robertson

EIGHTH DISTRICT JUVENILE COURT
FOR UINTAH COUNTY, STATE OF UTAH

IN THE MATTER OF	(	**FINDING OF FACTS ORDER AND DECREE**
Coando, David Alan 12-02-79	(	
Coando, Paul Dean 12-02-79	(	**CASE NO.** 856709
Coando, Sky Deona 04-15-87	(	856706
	(	856707
	(	
Children under 18 years of age	(	Judge Jeril B. Wilson

The above-entitled matter came before the Honorable Judge Jeril B. Wilson for trial on November 30th and December 1st 1994. The Petitioner, Debra Robertson was present, and was represented by counsel, John C. Beaslin; the Defendant Patrick Coando was present, and was represented by counsel, Cindy Barton-Coombs; the Eastern Shoshone Tribe was represented by counsel, John C. Schumacher; the children were represented by Eugene Austin, Guardian ad Litem. The Court having heard the testimony of the witnesses and having taken the matter under advisement now enters the following Findings of Fact, Conclusion of Law and Order, based upon the law; the exhibits, the briefs that were submitted, and the testimony given.

FINDINGS OF FACT

1. This court has reconsidered the March 23, 1994 order of Judge Lindsay, issued prior to the conclusion of the case, and finds that the children have spent their entire lives with their custodial mother with frequent aid from relatives, and have had minimal contact with their natural father.

2. The children have no real attachment to nor affection for their Indian father and members of his family.

3. There is no existing Indian family unit or environment from which the children are being removed.

4. The Indian father has not maintained custody of the children and the mother is non-Indian.

5. Even though the children are certified with the Eastern Shoshone Tribe as enrolled members, this action is not for the removal of Indian children from an existing Indian family unit, and the termination of Mr. Coando's parental rights will not result in the break-up of an Indian family.

6. The specific facts of this case are not within the scope of Congress intent in establishing the Indian Child Welfare Act. Therefore, the court concludes that the legal and procedural standards of the Indian Child Welfare Act do not apply in this case.

7. That these findings are convincing grounds to reconsider the previous order of Judge Lindsay dated March 23, 1994 to correct clear error and prevent manifest injustice.

TERMINATION OF FATHER PARENTAL RIGHTS

The Court finds by clear and convincing evidence:

1. David Allen Coando and Paul Dean Coando were born December 2, 1979 and Sky Deona Coando was born April 15, 1987. They are the natural children of Debra Robertson and Patrick Coando.

2. Debra Robertson and Patrick Coando were married in 1985 or 1986 and were

divorced August 15, 1989. The divorce decree gave custody of the 3 children to Debra Robertson.

3. Mr. Coando has been incarcerated three times since the birth of the twins, David and Paul most recently from July 10, 1990 to July 24, 1994 as a result of a conviction of felony assault against Mrs. Robertson. Which fact is evidence of grounds for termination pursuant to 78-3a-408 (2)(e) Utah Code Annotated 1953, as amended.

4. On July 10, 1990 Mr. Coando broke into Mrs. Robertson's home and assaulted her by hitting and kicking her. When she tried to flee Mr. Coando grabbed ahold of her hair and yanked her back into the house. She tried to flee a second time and Mr. Coando caught up with her and knocked her to the road and dragged her back into the house again. Sky, age three, witnessed this assault and was knocked down during it. Mrs. Robertson then ran to a neighbor for help and called 911. Mr. Coando placed Sky in his car and was attempting to leave when the police arrived.

5. Mr. Coando has failed to provide support for the children. Therefore the Court finds that Mr. Coando has failed to support his children pursuant to 78-3a-407(6)(a) Utah Code Annotated 1953, as amended.

6. Mr. Conado has frequently been inebriated, sometimes in the presence of the children.

7. On one occasion in 1979 Mr. Coando was tending the twins, David and Paul, and Mrs. Robertson returned to find Mr. Coando passed out from drinking and a bag of marijuana on the living room floor. Such actions constitute a failure to prevent the neglect

of the children,, pursuant to 78-3a-407(6)(b) Utah code Annotated 1953, as amended. The Court further finds that this event was but a sampling from the testimony offered evidencing a habitual or excessive use of intoxication liquor, controlled substances, and dangerous drugs, to the extent that Mr. Coando would be rendered unable to care for the child, pursuant to 78-3a-408 (2)(c) Utah Code Annotated, 1953 as amended.

8. Throughout their relationship, on numerous occasion, Mr. Coando would threaten Mrs. Robertson with physical harm including threatening to kill her.

9. Frequently Mr. Coando would take part of Mrs. Robertson's paychecks by threatening her with physical harm,

10. Frequently Mr. Coando would threaten Mrs. Robertson with taking the children and that she would never see them again.

11. Mr. Coando has a history of violent behavior.

12. Mr. Coando is unfit or incompetent to parent the children which fact is seriously detrimental to the children, in that he has made no more than token efforts to support or communicate with the children, to prevent neglect of the children, to eliminate the risk of serious physical, mental, or emotional abuse of the children, or to avoid being an unfit parent, which constitutes grounds for termination of parental rights under 78-3a-407 (6) Utah Code Annotated, 1953 as amended.

13. It is in the best interest and welfare of the children that Mr. Coando's rights be terminated.

14. Mr. Coando has for many years put his own needs and welfare above that

JUVENILE COURT

of his children.

15. There exists no parent/child relationship between Mr. Coando and the children.

16. The children have bonded with D.Ray Robertson who married their mother January 11, 1990.

CONCLUSION OF LAW

1. The parental rights of Patrick Coando, natural father to the children should be terminated pursuant to Utah Code Annotated 78-3a-407 and 408.

2. It is in the best interest of there children that the parental rights of their natural father Patrick Coando be terminated.

ORDER

1. The legal and procedural standards of the Indian Child Welfare Act do not apply in this case.

2. The Eastern Shoshone Tribe's motion to dismiss is hereby denied and judgement is rendered terminating the parental rights of Patrick Coando, natural father to the children.

DATED this 29th day of June 1995.

Judge Jeril B. Wilson

Juvenile Court Judge

JUVENILE COURT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29 day of June, 1995, a true and correct copy of the foregoing proposed ORDER was mailed, postage fully pre-paid, the following:

Cindy Barton-Coombs, Esq.
193 North State Street
P.O. Box 7313
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John Beaslin, Esq.
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John Schumacher, Esq.
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Ft. Washakie, Wy. 82514-0748

Cleve J. Hatch
Guardian ad Litem
363 East Main, 2nd Floor
Vernal, Utah 84078

Barbara Wilson
Deputy Court Clerk

CROSS REFERENCES

This chapter is referred to in 25 USCS § 1727.

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§ 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

(1) that clause 3, section 8, article I of the United States Constitution [USCS Constitution, Art. I, § 8, cl 3] provides that "The Congress shall have Power . . . To regulate Commerce . . . with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(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 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 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.

(Nov. 8, 1978, P. L. 95-608, § 2, 92 Stat. 3069.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Short titles:

Act Nov. 8, 1978, P. L. 95-608, § 1, 92 Stat. 3069, provided: "This Act [25 USCS §§ 1901 et seq.] may be cited as the 'Indian Child Welfare Act of 1978'.".

INTERPRETIVE NOTES AND DECISIONS

Congress, in enacting Indian Child Welfare ct of 1978 (25 USCS §§ 1901 et seq.) has ecifically recognized importance of allowing bal courts to assume full responsibility for acement of Indian children in foster care and loptive homes, by granting Indian tribes exclu- e jurisdiction over such proceedings. Johnson Frederick (1979, DC ND) 467 F Supp 956.

Indian Child Welfare Act (25 USCS §§ 1901 et seq) is not unconstitutional under equal protection clause, since protection of integrity of Indian families is permissible goal that is rationally related to fulfillment of Congress' unique guardianship obligation toward Indians. Re Application of Angus (1982) 60 Or App 546, 655 P2d 208

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 Indian tribes in the operation of child and family service programs.

(Nov. 8, 1978, P. L. 95-608, § 3, 92 Stat. 3069.)

1903. Definitions

For the purposes of this Act [25 USCS §§ 1901 et seq.], except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include—

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian

child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 7 of the Alaska Native Claims Settlement Act (85 Stat. 688, 689) [43 USCS § 1606];

(4) "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;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership 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;

(6) "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;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 3(c) of the Alaska Native Claims Settlement Act (85 Stat. 688, 689), as amended [42 USCS § 1602(c)];

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of title 18, United States Code [18 USCS § 1151] and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

(Nov. 8, 1978, P. L. 95-608, § 4, 92 Stat. 3069.)

lesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Nov. 8, 1978, P. L. 95-608, Title I, § 102, 92 Stat. 3071.)

CROSS REFERENCES

This section is referred to in 25 USCS §§ 1914, 1916.

INTERPRETIVE NOTES AND DECISIONS

If party wishes to defeat biological parent's petition for return of custody, he or she must prove that such return is not in child's best interest by showing (1) that remedial and rehabilitative programs designed to prevent breakup of Indian family had been implemented without success and (2) that such return of custody is likely to result in serious harm to child; serious harm element must be proved beyond reasonable doubt and must be established by testimony of qualified expert witnesses. A.B.M. v M.H. (1982, Alaska) 651 P2d 1170.

Parental rights in Indian child pursuant to Indian Child Welfare Act (25 USCS §§ 1901 et seq.) may not be terminated on basis of finding that evidence was clear and convincing that continued custody would likely result in severe emotional and physical damage to child; the Act requires proof beyond reasonable doubt. Re H. (1980, SD) 299 NW2d 812, later app (SD) 316 NW2d 650.

Under Indian Child Welfare Act (25 USCS §§ 1901 et seq.), dependency and neglect must be proved by clear and convincing evidence. People In Interest of S. R. (1982, SD) 323 NW2d 885.

Expert witness requirement of 25 USCS § 1912(f) was fulfilled by testimony of social worker with 4 years experience who has BA degree in social work and has had contact with Indians on regular basis, and testimony of director of children's shelter and resource center who has BS degree in social work and one year towards her master's degree, since approximately 30 percent of children utilizing shelter are Indians. Matter of K. A. B. E. (1982, SD) 325 NW2d 840.

§ 1913. Parental rights; voluntary termination

(a) Consent; record; certification matters; invalid consents. Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent. Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody. In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian

child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations. After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

(Nov. 8, 1978, P. L. 95-608, Title I, § 103, 92 Stat. 3072.)

CROSS REFERENCES

This section is referred to in 25 USCS § 1914.

§ 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 101, 102, and 103 of this Act [25 USCS §§ 1911, 1912, 1913].

(Nov. 8, 1978, P. L. 95-608, Title I, § 104, 92 Stat. 3072.)

§ 1915. Placement of Indian children

(a) Adoptive placements; preferences. In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with

(1) a member of the child's extended family;

(2) other members of the Indian child's tribe; or

(3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences. Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences. In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: Provided, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable. The standards to be applied in meeting the preference requirements of 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.

(e) Record of placement; availability. A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

(Nov. 8, 1978, P. L. 95-608, Title I, § 105, 92 Stat. 3073.)

§ 1916. Return of custody

(a) Petition; best interests of child. Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 102 of this Act [25 USCS § 1912], that such return of custody is not in the best interests of the child.

(b) Removal from foster care home; placement procedure. Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this Act [25 USCS

§§ 1901 et seq.], except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

(Nov. 8, 1978, P. L. 95-608, Title I, § 106, 92 Stat. 3073.)

§ 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

(Nov. 8, 1978, P. L. 95-608, Title I, § 107, 92 Stat. 3073.)

§ 1918. Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary. Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession.

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a), the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 101(a) of this Act [25 USCS § 1911(a)] are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 101(b) of this Act [25 USCS § 1911(b)], or, where appropriate, will allow them to

exercise exclusive jurisdiction as provided in section 101(a) [25 USCS § 1911(a)] over limited community or geographic areas without regard for the reservation status of the area affected.

) **Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval.** If the Secretary approves ıy petition under subsection (a), the Secretary shall publish notice of such ›proval in the Federal Register and shall notify the affected State or ıtes of such approval. The Indian tribe concerned shall reassume jurisction sixty days after publication in the Federal Register of notice of ›proval. If the Secretary disapproves any petition under subsection (a), ıe Secretary shall provide such technical assistance as may be necessary to ıable the tribe to correct any deficiency which the Secretary identified as cause for disapproval.

) **Pending actions or proceedings unaffected.** Assumption of jurisdiction ıder this section shall not affect any action or proceeding over which a ›urt has already assumed jurisdiction, except as may be provided pursuıt to any agreement under section 109 of this Act [25 USCS § 1919].

Nov. 8, 1978, P. L. 95-608, Title I, § 108, 92 Stat. 3074.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"The Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 73, 78)", referred to in this section, is Act Aug. 15, 1953, ch 505, 67 Stat 588, as amended by Act Apr. 11, 1968, P. L. 90-248, Title IV, 82 Stat. 79. For full classification of such Act, consult USCS Tables volumes.

CROSS REFERENCES

This section is referred to in 25 USCS §§ 1727, 1923.

1919. Agreements between States and Indian tribes

) **Subject coverage.** States and Indian tribes are authorized to enter into ;reements with each other respecting care and custody of Indian children ıd jurisdiction over child custody proceedings, including agreements hich may provide for orderly transfer of jurisdiction on a case-by-case ısis and agreements which provide for concurrent jurisdiction between ıates and Indian tribes.

) **Revocation; notice; actions or proceedings unaffected.** Such agreements ıay be revoked by either party upon one hundred and eighty days' written ›tice to the other party. Such revocation shall not affect any action or ›roceeding over which a court has already assumed jurisdiction, unless the ;reement provides otherwise.

Nov. 8, 1978, P. L. 95-608, Title I, § 109, 92 Stat. 3074.)

CROSS REFERENCES

This section is referred to in 25 USCS §§ 1918, 1923.

§ 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception

Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

(Nov. 8, 1978, P. L. 95-608, Title I, § 110, 92 Stat. 3075.)

§ 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this title [25 USCS §§ 1911 et seq.], the State or Federal court shall apply the State or Federal standard.

(Nov. 8, 1978, P. L. 95-608, Title I, § 111, 92 Stat. 3075.)

§ 1922. Emergency removal or placement of child; termination; appropriate action

Nothing in this title [25 USCS §§ 1911 et seq.] shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this title [25 USCS §§ 1911 et seq.], transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

(Nov. 8, 1978, P. L. 95-608, Title I, § 112, 92 Stat. 3075.)

§ 1923. Effective date

None of the provisions of this title [25 USCS §§ 1911 et seq.], except sections 101(a), 108, and 109 [25 USCS §§ 1911(a), 1918, and 1919], shall

affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after the enactment of this Act [enacted Nov 8, 1978], but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child

(Nov 8, 1978, P L 95-608, Title I, § 113, 92 Stat 3075)

INTERPRETIVE NOTES AND DECISIONS

Provisions of Indian Child Welfare Act (25 USCS § 1901 et seq) do not apply on remand to trial court of decision to terminate parental rights where Act was not in effect at time parental rights were terminated and where there has been no constitutional challenge to statute under which such rights were terminated A v State (1981, Alaska) 623 P2d 1210

Provisions of Indian Child Welfare Act of 1978 (25 USCS §§ 1901 et seq) do not apply to action to vacate adoption where final adoption hearing was held within 180 days after November 8 1978 Re Adoption of Baby Nancy (1980) 27 Wash App 278, 616 P2d 1263

INDIAN CHILD AND FAMILY PROGRAMS

§ 1931. Grants for on or near reservation programs and child welfare codes

(a) Statement of purpose; scope of programs. The Secretary is authorized to make grants to Indian tribes and organizations in the establishment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be a last resort Such child and family service programs may include, but are not limited to—

(1) a system for licensing or otherwise regulating Indian foster and adoptive homes,

(2) the operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children,

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care,

(4) home improvement programs,

(5) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters,

(6) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs,

(7) a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs, and

(8) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings

(b) Non-Federal matching funds for related Social Security or other Federal financial assistance programs; assistance for such programs unaffected; State licensing or approval for qualification for assistance under federally assisted program. Funds appropriated for use by the Secretary in accordance with this section may be utilized as non-Federal matching share in connection with funds provided under titles IV-B and XX of the Social Security Act [42 USCS §§ 620 et seq, 1397 et seq] or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized to be appropriated for use under this Act [25 USCS §§ 1901 et seq] The provision or possibility of assistance under this Act [25 USCS §§ 1901 et seq] shall not be a basis for the denial or reduction of any assistance otherwise authorized under titles IV-B and XX of the Social Security Act [42 USCS §§ 620 et seq, 1397 et seq] or any other federally assisted program For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State

(Nov 8, 1978, P L 95-608, Title II, § 201, 92 Stat 3075)

INTERPRETIVE NOTES AND DECISIONS

Regulations implementing Indian Child Welfare Act of 1978 (25 USCS §§ 1931 to 1934) do not permit Indian tribe to combine with social services corporation within area designated near reservation for social services funding purposes Navajo Tribe v Commissioner of Indian Affairs (1982) 89 ID 424

§ 1932. Grants for off-reservation programs for additional services

The Secretary is also authorized to make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs which may include, but are not limited to—

(1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate State standards of support for maintenance and medical needs,

(2) the operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children,

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care, and

(4) guidance, legal representation, and advice to Indian families involved in child custody proceedings

(Nov 8, 1978, P L 95-608, Title II, § 202, 92 Stat 3076)

CROSS REFERENCES

This section is referred to in 25 USCS § 1934

§ 1933. Funds for on and off reservation programs

(a) Appropriated funds for similar programs of Department of Health and Human Services; appropriation in advance for payments. In the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements with the Secretary of Health, Education, and Welfare [Secretary of Health and Human Services], and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health, Education, and Welfare [Department of Health and Human Services] Provided, That authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts

(b) Appropriation authorization under 25 USCS § 13. Funds for the purposes of this Act [25 USCS §§ 1901 et seq] may be appropriated pursuant to the provisions of the Act of November 2, 1921 (42 Stat 208), as amended [25 USCS § 13]

(Nov 8, 1978, P L 95-608, Title II, § 203, 92 Stat 3076)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

The bracketed words "Secretary of Health and Human Services" and "Department of Health and Human Services" are inserted on authority of Act Oct 17, 1979, P L 96 88, Title V, § 509, 93 Stat 695, which appears as 20 USCS § 3508, and which redesignated the Secretary and Department of Health, Education, and Welfare as the Secretary and Department of Health and Human Services, respectively, and provided that any reference to the Secretary or Department of Health, Education, and Welfare, in any law in force on the effective date of such Act Oct 17, 1979, shall be deemed to refer and apply to the Secretary or Department of Health and Human Services, respectively, except to the extent such reference is to a function or office transferred to the Secretary or Department of Education under such Act Oct 17, 1979

CROSS REFERENCES

This section is referred to in 25 USCS § 1934

§ 1934. "Indian" defined for certain purposes

For the purposes of sections 202 and 203 of this title [25 USCS §§ 1932, 1933], the term "Indian" shall include persons defined in section 4(c) of

the Indian Health Care Improvement Act of 1976 (90 Stat 1400, 1401) [25 USCS § 1603(c)]

(Nov 8, 1978, P L 95-608, Title II, § 204, 92 Stat 3077)

RECORDKEEPING, INFORMATION AVAILABILITY, AND TIMETABLES

§ 1951. Information availability to and disclosure by Secretary

(a) Copy of final decree or order; other information; anonymity affidavit exemption from 5 USCS § 552. Any State court entering a final decree or order in any Indian child adoptive placement after the date of enactment of this Act [enacted Nov 8, 1978] shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show—

(1) the name and tribal affiliation of the child,

(2) the names and addresses of the biological parents,

(3) the names and addresses of the adoptive parents, and

(4) the identity of any agency having files or information relating to such adoptive placement

Where the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include such affidavit with the other information The Secretary shall insure that the confidentiality of such information is maintained and such information shall not be subject to the Freedom of Information Act (5 U S C 552), as amended [5 USCS § 552]

(b) Disclosure of information for enrollment of Indian child in tribe or for determination of member rights or benefits; certification of entitlement to enrollment. Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe

(Nov 8, 1978, P L 95-608, Title III, § 301, 92 Stat 3077)

§ 1952. Rules and regulations

Within one hundred and eighty days after the enactment of this Act [enacted Nov 8, 1978], the Secretary shall promulgate such rules and