

American Indian Law Review

Volume 19 | Number 2

1-1-1994

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Jill E. Adams

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Recommended Citation

Jill E. Adams, *The Indian Child Welfare Act of 1978: Protecting Tribal Interests in a Land of Individual Rights*, 19 AM. INDIAN L. REV. 301 (1994),
<https://digitalcommons.law.ou.edu/air/vol19/iss2/2>

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THE INDIAN CHILD WELFARE ACT OF 1978: PROTECTING TRIBAL INTERESTS IN A LAND OF INDIVIDUAL RIGHTS

Jill E. Adams*

At bedrock, the concept of rights in American culture and American legal theory is individualistic.¹ Rights inhere in individuals and the rights of a collective group are no greater than the sum of the rights of the group's individual members.² Even where the legal focus is on the family, the most persistent collective unit in our culture, the language in which issues are discussed is the language of individual not collective rights.³ Coexistent with

* Associate Professor, Southern Illinois University School of Law. J.D., 1982, University of New Mexico; M.A.T., 1978, University of Massachusetts; B.A., 1974, University of North Carolina at Chapel Hill.

1. The classic formulation of the thesis that the aim of government is to protect individual rights is found in JOHN LOCKE, *THE SECOND TREATISE ON GOVERNMENT* (Thomas P. Peardon ed., 1952) (1690). For Locke, all relationships, whether political or social, as in marriage or in the relation of parent to child, are essentially contracts limited by the concept of inalienable rights. The influence of Locke upon English law in the eighteenth century and upon such American political thinkers as Jefferson is well known. See, e.g., CARL BECKER, *THE DECLARATION OF INDEPENDENCE* (1922). In this century, the theory of individualism has remained central in the work of such noted theorists as John Rawls and Ronald Dworkin. See JOHN RAWLS, *A THEORY OF JUSTICE* (1971); RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* (1977). For a discussion of individualism and altruism, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1713-24 (1976).

2. There has been the tenuous approach of urging recognition of group rights in several areas, such as group defamation and affirmative action. For example, Catharine MacKinnon argues that constitutional equality provisions can legitimate laws against group defamation even in the face of free speech claims. See, e.g., Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793, 809-12 (1991); see also *R. v. Keegstra*, [1991] 2 W.W.R. 1, 6 (S.S.C. 1990) (Can.); Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682 (1988). The ardor of the opposition to these concepts is perhaps a sign of how deeply ingrained the individual rights model is in our society. See, e.g., Henry Louis Gates, Jr., *Let Them Talk: Why Civil Liberties Pose No Threat to Civil Rights*, THE NEW REPUBLIC, Sept. 20-27, 1993, at 37.

3. See, e.g., *Hawk v. Hawk*, 855 S.W.2d 573, 577 (Tenn. 1993) (holding a Tennessee statute — which provided for grandparent visitation with a child where a court determined that such visitation was in the best interest of the child — unconstitutional under the state constitutional right of privacy, and stating that "when no substantial harm threatens a child's welfare, the state lacks a sufficient compelling justification for the infringement on the fundamental right of parents to raise their children as they see fit"); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (upholding parental right to teach children German in face of state law prohibiting such teaching); *In re Baby Girl Clausen*, 502 N.W.2d 649, 668 (Mich. 1993) (Levin, J., dissenting) (comparing the majority's holding — which affirmed an Iowa decision granting custody of a two-and-a-half-year-old child, who had lived with third-party custodians since birth, to her biological father — to a lawsuit concerning the ownership of a bale of hay). For a discussion of the growing role of individual rights in family law and a response, see MARY ANN

this dominant culture is Native American⁴ culture in which communitarian values may dominate. The continued existence and welfare of the tribe may be regarded as more important than individual rights,⁵ and individuals may belong to a web of kinship defined more by clan or other kinship groups than by the nuclear family.⁶ For example, some Indian languages do not distinguish between the word for "mother" and the word for "aunt."⁷

The issue presented by the Indian Child Welfare Act of 1978 (ICWA or the Act)⁸ is a difficult one: How does a society predicated on a concept of individual rights accommodate within it societies that are collective and that may have needs different from the needs of their individual members?⁹ Stunningly, in adopting the ICWA, Congress took steps to recognize and protect the collectivist interests of tribal culture.¹⁰ It is perhaps the only instance in American law where Congress has acted to recognize and implement the values of a culture other than the dominant one. The ICWA merits study as an instance of an accommodation of a minority culture, as an integral part of American adoption law, and as a significant step in the protection of Native American

GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989), and see also Susan B. Hershkowitz, *Due Process and the Termination of Parental Rights*, 19 *FAM. L.Q.* 245 (1985).

4. Because the Indian Child Welfare Act uses the term "Indian" rather than "Native American," I also use the term "Indian" throughout most of this article.

5. "Although tribes differ widely in organization and beliefs, there are some remarkable similarities even among tribal people of other continents. The common factor is that, consciously or subconsciously, tribal members regard the perpetuity of the tribe as being more important than individualism." Delores J. Huff, *The Tribal Ethic, The Protestant Ethic and American Indian Economic Development*, in *AMERICAN INDIAN POLICY AND CULTURAL VALUES: CONFLICT AND ACCOMMODATION* 75, 77 (Jennie R. Joe ed., 1986); see also *Indian Child Welfare Act: Hearing Before the Senate Select Comm. on Indian Affairs on S. 1976 to Amend the Indian Child Welfare Act*, 100th Cong., 2d Sess. 64 (1988) [hereinafter *1988 Hearing*] (statement of Eugene Ligtenberg, director, S.D. Div. of the Casey Family Program) ("Many native cultures view children as a responsibility of the group or tribe rather than a possession of a set of parents. Individual rights were subservient to the group or tribe, because native people viewed life as a whole entity made up of everyone and everything in the universe.").

6. See, e.g., Shirley R. Bysiewicz & Ruth E. Van de Mark, *The Legal Status of the Dakota Indian Woman*, 3 *AM. INDIAN L. REV.* 255, 256, 288 (1975) (describing historical and contemporary family structure among the Santee Sioux (Dakota)).

7. See, e.g., *id.* at 255-56.

8. 25 U.S.C. §§ 1901-1963 (1988).

9. For a thoughtful essay on feminism and collective interests in the context of the Indian Child Welfare Act, see Donna J. Goldsmith, *Individual vs. Collective Rights: The Indian Child Welfare Act*, 13 *HARV. WOMEN'S L.J.* 1 (1990).

10. This is not to suggest that there is no protection of individual rights in the Act. The Act protects the rights of parents by imposing heightened standards for termination of parental rights. 25 U.S.C. §§ 1912, 1913. Further, the Act declares it federal policy to protect "the best interests of Indian children" as well as promoting "the stability and security of Indian tribes and families." *Id.* § 1902. What is unique is that the Act protects tribal interests at all. The Act balances the interests of the child, the parents and the tribe.

culture. Although the ICWA clearly recognizes the values of Native American cultures, this Act has been subject to interpretation by courts hostile to tribal interests and imbued with the dominant cultural views. Many state courts interpreting the Act have inappropriately subjugated the collective interests protected by the Act to the traditional American emphasis on individual rights.¹¹

11. The language of the dispute is not always in terms of individual or collective rights. My argument is, rather, that collective rights are so alien to our culture that where their recognition can be avoided, courts will find ways to do so. For a moving fictional account which recognizes the pull of both tribal and individual interests in the context of the ICWA, see BARBARA KINGSOLVER, *PIGS IN HEAVEN* (1993).

Bertram Hirsch described the conflict between the states and the tribes in different terms than I do. It is his view that the Act does not go so radically against the mainstream of American law. In any child custody proceeding there is the interest of the sovereign as *parens patriae* as well as the interest of the parent and the child. It is his view that, where the custody proceeding concerns an Indian child, the Act shifts the *parens patriae* interest from the state sovereign to the tribal sovereign. The conflict in the case law, then, would reflect a struggle between sovereigns in asserting the *parens patriae* interest. Telephone Interview with Bertram Hirsch, former staff attorney to the Association on American Indian Affairs (AAIA) and one of the principal architects of the Act (Sept. 13, 1993).

This view finds support in the 1976 report of the Task Force on Federal, State and Tribal Jurisdiction to the American Indian Policy Review Commission. The Task force recommended enactment of legislation placing jurisdiction over child welfare matters in tribal court "where family ties to the reservation are strong, but the child is temporarily off the reservation." REPORT ON FEDERAL, STATE, AND TRIBAL JURISDICTION, TASK FORCE FOUR: FEDERAL, STATE, AND TRIBAL JURISDICTION, FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION (1976), reprinted in S. REP. NO. 597, 95th Cong., 1st Sess. at 41, 51 (1977). The Task Force stated, "This concept of court jurisdiction is based on the tribal status of the individual rather than the mere geography of the child and recognizes that the tribal relationship is one of *parens patriae* to all its minor tribal members." *Id.* at 51.

Hirsch's view has been influential in my thinking about the Act. Nevertheless, the ICWA does more than recognize a *parens patriae* interest of the tribe. The doctrine of *parens patriae* refers to the power of the sovereign to protect those citizens who, because of disability or minority, are unable to protect themselves. See Daniel B. Griffith, *The Best Interests Standard: A Comparison of the State's Parens Patriae Authority and Judicial Oversight in Best Interests Determinations for Children and Incompetent Patients*, 7 ISSUES L. & MED. 283, 287-91 & nn.26-56 (1991). In a *parens patriae* role, the sovereign acts in the best interest of the child. As discussed *infra* at notes 41-56 and accompanying text, the goals furthered by the Act include protection of the tribe as well as protection of the child.

The states have not always been hostile to the goals of the Act. A number of jurisdictions have statutorily adopted standards which are more rigorous than those imposed by the Act. See, e.g., The Minnesota Indian Family Preservation Act, MINN. STAT. §§ 257.351-.3579 (1990). The ICWA provides that if state law provides more stringent standards, the state provisions are applicable to custody proceedings concerning Indian children. 25 U.S.C. § 1921 (1988). Other states, such as Washington, have entered into agreements with tribes to manage child welfare issues with the policies and purposes of the Act fully enforced. See, e.g., State of Washington, DCFS Indian Child Welfare Manual (Sept. 9, 1991) [hereinafter Washington State Welfare Manual] (implementing agreement reached between state and twenty Washington tribes). The Act specifically provides for such agreements. 25 U.S.C. § 1919(a).

This article begins with a brief explanation of the operation of the Act. That is followed by a review of the background and legislative history of the Act to show the legislative purpose of protecting the collective interest of the tribe. The article then examines the treatment of the Act in the state courts where, not surprisingly, doctrines rooted in the dominant cultural themes of individual rights have often been grafted onto the Act in contradiction of its collectivist goals. Specifically, the article examines three areas where state courts have narrowed the reach of the Act by applying traditional rights analysis or by failing to recognize the collectivist interests protected by the Act.¹² First, a number of courts have refused to find the Act applicable unless the child is a member of an existing Indian family; second, courts have overused a provision that allows a state court, for good cause, to refuse to transfer to a tribal court a proceeding that involves an Indian child who is not a domiciliary of a reservation; finally, courts have limited tribal notice where a voluntary termination of parental rights occurs.¹³ The history of the Act in the state courts is a history of persistent attempts to avoid its application. Even where the state courts have rejected one of the limiting doctrines, they have frequently imposed another.¹⁴

12. Two articles have used several of these categories to address limitations imposed by state courts on the operation of the Act. See Michael J. Dale, *State Court Jurisdiction Under the Indian Child Welfare Act and the Unstated Best Interest of the Child Test*, 27 GONZ. L. REV. 353 (1991/92); Roger M. Baron, *The Resurgence of the "Tribal Interest" in Indian Child Custody Proceedings*, 26 TULSA L.J. 315 (1991). Professor Dale's article is perhaps the most far-reaching exploration of conflict between the Act and the dominant cultural view. He explores this conflict in the context of the "best interest of the child" test, concluding that the definition of this term in the dominant culture and the definition of the term under the Act are distinct and that under the Act it is in the best interest of the child "to maintain ties with the tribe, culture and family." Dale, *supra*, at 370-71.

13. A similar battle over collective and individual rights occurred in relation to the issue of domicile. Under the Act, tribal courts have exclusive jurisdiction over an Indian child who resides or is domiciled within the reservation. 25 U.S.C. § 1911(a). Some state courts had applied state law definitions of "domicile" to conclude that there was state court jurisdiction over child custody proceedings involving Indian children whose parents were reservation domiciliaries, where those parents had abandoned the children to the care of someone who was not a reservation domiciliary. See, e.g., *In re B.B.*, 511 So. 2d 918 (Miss. 1987), *rev'd sub nom.* *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). But see *In re Adoption of Holloway*, 732 P.2d 962, 969-70 (Utah 1986). The Supreme Court, however, has laid to rest any argument that such a child is not a reservation domiciliary and has reaffirmed exclusive tribal jurisdiction. *Holyfield*, 490 U.S. at 13.

14. See, e.g., *In re Adoption of T.N.F.*, 781 P.2d 973 (Alaska 1989), *cert. denied*, 494 U.S. 1030 (1990) (rejecting the existing Indian family requirement, but denying applicability of the Act on statute of limitation grounds); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988) (rejecting existing Indian family requirement but finding putative father not a "parent" under the Act); *In re Adoption of Baade*, 462 N.W.2d 485 (S.D. 1990) (rejecting the existing Indian family requirement, but finding that the restoration of the father's parental rights was precluded because the children would suffer serious emotional damage if removed from their adoptive parents).

This article explores how the courts can remain true to the collectivist impetus for the Act while recognizing individual rights which are so dominant in the national cultural heritage. Finally, the article recommends congressional action that would further the goals of the Act while balancing the interests of both the dominant and the tribal cultures.

I. An Overview of the Indian Child Welfare Act

The ICWA was passed in 1978 in response to the widespread removal of Indian children from their homes and tribes. Prior to passage, 25%-35% of all Indian children were separated from their families and placed in foster care, adoptive homes or institutions.¹⁵ Surveys indicated that 85% of the Indian children placed in foster care were in non-Indian homes.¹⁶ Testimony by Indian leaders before congressional committees despaired of the continuation of their tribes in the face of such wholesale removal of children. For example, Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians, testified:

[C]ulturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.¹⁷

Much of the problem was attributed to attitudes of social workers, social service agencies, and courts insensitive to tribal traditions and mores.¹⁸ Con-

15. H.R. REP. NO. 1386, 95th Cong., 2d Sess. 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7531. This figure may be somewhat misleading because it includes children at boarding schools. Boarding schools historically, however, have been central to policies encouraging assimilation and destruction of collectivist tribal values. *See* Linda J. Lacey, *The White Man's Law and the American Indian Family in the Assimilation Era*, 40 ARK. L. REV. 327, 356-62 (1987). The trend represented by the 25%-35% figure is supported by other data. For example, in Minnesota, in 1971-72, "nearly one in every four Indian children under 1 year of age was adopted." H.R. REP. NO. 1386, *supra*, at 9, *reprinted in* 1978 U.S.C.C.A.N. at 7531. For a general review of the historical treatment of the Indian family under federal Indian policy, see Lacey, *supra*.

16. H.R. REP. NO. 1386, *supra* note 15, at 9, *reprinted in* 1978 U.S.C.C.A.N. at 7531 (referencing a 1969 survey of 16 states). Extensive data was presented during hearings on the Act, particularly by the AAIA. *See Indian Child Welfare Act of 1977: Hearing Before the Senate Select Comm. on Indian Affairs on S. 1214, 95th Cong., 1st Sess. 150 (1977) [hereinafter 1977 Hearing]*.

17. *Indian Child Welfare Act of 1978: Hearings Before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs on S. 1214, 95th Cong., 2d Sess. 193 (1978) [hereinafter 1978 Hearing]*.

18. The legislative history of the Act provides:

gressional findings incorporated in the Act state that

(3) there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children

(4) 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 . . . an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) 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.¹⁹

The Act declares that it is the policy of the 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 culture²⁰

The goals of the Act are furthered through four mechanisms: (1) those relating to jurisdiction and tribal participation in child custody proceedings;²¹ (2) those relating to heightened standards for foster care placement and for termination of parental rights; (3) those relating to preferences for placement

The Indian child welfare crisis will continue until the standards for defining mistreatment are revised. Very few Indian children are removed from their families on the grounds of physical abuse. . . .

In judging the fitness of a particular family, many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists.

For example, the dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights.

H.R. REP. NO. 1386, *supra* note 15, at 10, *reprinted in* 1978 U.S.C.A.N. at 7532.

19. 25 U.S.C. § 1901(3)-(5) (1988).

20. *Id.* § 1902.

21. The Act defines "child custody proceeding" as including foster care placement, termination of parental rights, preadoptive placement and adoptive placement. It excludes custody determinations in divorce proceedings and placement as part of a juvenile criminal justice system. *Id.* § 1903(1).

of Indian children, and (4) those relating to support of Indian child and family programs.

The jurisdictional provisions establish exclusive jurisdiction in the tribal courts of child custody proceedings concerning reservation domiciliaries.²² Presumptive jurisdiction exists in the tribal courts for child custody matters concerning nondomiciliaries of the reservation. Unless a parent objects or the court finds good cause to deny the transfer, a state court must transfer a custody proceeding concerning an Indian child to a tribal court if a parent, an Indian custodian of the child, or the child's tribe petitions for transfer.²³ Even if the matter proceeds in state court, the tribe has a right to intervene.²⁴

22. *Id.* § 1911. This provision is supported by preenactment law. See *Fisher v. District Court*, 424 U.S. 382 (Mont. 1976) (finding tribal court had exclusive jurisdiction over an adoption proceeding where all parties were tribal members and reservation domiciliaries).

Part of the debate over who is a domiciliary of the reservation was resolved in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), which held that the term "domicile" under the ICWA has a uniform meaning and that children who are born off reservation and are abandoned or placed for adoption are reservation domiciliaries if their parents are reservation domiciliaries. In *Holyfield*, the mother of twins left the reservation to give birth and sought to place her children in a non-Indian adoptive home. The Supreme Court invalidated the adoption decree entered by the Mississippi courts on the ground that the tribal court had exclusive jurisdiction over any adoption proceeding. The twins had never been on the Choctaw reservation, were three years old at the time of the Supreme Court ruling, and had spent their entire lives in the custody of the non-Indian adoptive parent recognized by the Mississippi courts. When the matter was taken up by the tribal court, the non-Indian adoptive parent was granted adoption of the twins. Marcia Coyle, *After the Gavel Comes Down*, NAT'L L.J., Feb. 25, 1991, at 1, 24; see also Todd J. Gilman, *Baby Given to Couple by Navajo Court*, L.A. TIMES, Sept. 1, 1988, pt. 1, at 25 (recounting custody dispute over child who was in the process of being adopted when the Navajo tribe intervened asserting jurisdiction under the ICWA; the Navajo tribal court awarded permanent guardianship to the non-Indian couple with whom the child had been living).

23. 25 U.S.C. § 1911(b) (1988).

24. *Id.* § 1911(c). This right to intervene applies to any "proceeding for the foster care placement of, or termination of parental rights to" an Indian child. Since the definition of "child custody proceeding" includes "preadoptive placement" and "adoptive placement" as well as "foster care placement" and "termination of parental rights," *id.* § 1903(1), the right to intervene does not extend to all child custody proceedings involving Indian children.

There is conflict over the issue of whether the tribe has a right to notice of voluntary termination proceedings. The right to notice is explicit where the termination proceedings are involuntary. *Id.* § 1912(a). Bureau of Indian Affairs (BIA) interpretive guidelines provide that there is no right to notice where a parent voluntarily relinquishes parental rights. BIA, *Guidelines for State Courts: Indian Child Custody Proceedings*, 44 Fed. Reg. 67,583, 67,586 (1979) [hereinafter BIA Guidelines] ("The Act mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones."). These guidelines were not published as regulations because they were not "intended to have binding legislative effect." *Id.* at 67,584; see also *Catholic Social Servs. v. C.A.A.*, 783 P.2d 1159, 1160 (Alaska 1989), *cert. denied*, 495 U.S. 948 (1990) (finding, over a strong dissent, that no requirement of notice exists in voluntary termination proceedings). There is also some dispute over whether there is a right to intervene in voluntary proceedings. The Act provides, "In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding."

Further, tribes subject to state jurisdiction under Public Law 280 or other federal law may petition to reassume jurisdiction over child custody proceedings.²⁵

Procedural safeguards required by the Act for state court proceedings are extensive. In involuntary proceedings, ten days' notice must be given to both the tribe and the parent or Indian custodian of the child. Upon request of the tribe, parent or custodian, additional time to prepare for the proceeding must be allowed.²⁶ If indigent, the parent or custodian has a right to court-appointed counsel.²⁷ A party seeking to terminate parental rights or to place an Indian child in foster care must show that remedial and rehabilitative programs designed to keep the family intact were provided and proved unsuccessful.²⁸ Further, before a foster care placement can be made, there must be clear and convincing evidence that continued custody by the parent or Indian custodian is likely to cause serious emotional or physical damage to the child.²⁹ The burden of proof mandated for the termination of parental rights is the highest: beyond a reasonable doubt.³⁰ Whether the proceeding is a foster care proceeding or a proceeding to terminate parental rights, the showing must be made, at least in part, by testimony of a "qualified expert witness."³¹ Although the courts have split on the issue,³² the legislative

25 U.S.C. § 1911(c). A separate section, 25 U.S.C. § 1912, makes explicit reference to the right to intervene in involuntary proceedings. *Id.* § 1912. The *Catholic Social Servs.* court, in dicta, stated that there was no right to intervene in voluntary proceedings. As noted above, this view is also taken by the interpretive guidelines published by the BIA. Nevertheless, the Supreme Court held that the jurisdictional provisions of the Act were fully applicable in a case where the parents were voluntarily relinquishing parental rights, *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) and the explicit language of the Act recognizes the right of the tribe to intervene in any termination proceeding. 25 U.S.C. § 1911(c). See *infra* notes 153-78 and accompanying text.

25. 25 U.S.C. § 1918(a) (1988). Criminal and civil jurisdiction over most Indian country within the geographical boundaries of five states — California, Minnesota (except Red Lake Reservation), Nebraska, Oregon (except Warm Springs Reservation), and Wisconsin (except Menominee Reservation) — was delegated to the states under Public Law 280. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326 (1988)) (commonly known as "Public Law 280"). Alaska was added to the Public Law 280 jurisdictions in 1958. Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545 (codified at 18 U.S.C. § 1162 (1988)). In addition, Public Law 280 allowed other states to assume jurisdiction over Indian country voluntarily. Ten states assumed full or partial jurisdiction over Indian country under these provisions. Public Law 280 was amended in 1968 to allow states to retrocede some or all of the jurisdiction over Indian country acquired under it, and forbade further assumption of state jurisdiction without Indian consent. 25 U.S.C. § 1326.

26. 25 U.S.C. § 1912(a) (1988).

27. *Id.* § 1912(b).

28. *Id.* § 1912(d).

29. *Id.* § 1912(e).

30. *Id.* § 1912(f).

31. *Id.* § 1912(e)-(f).

32. See *infra* note 33 and accompanying text.

history suggests that the expert witness must have specialized knowledge of Indian customs and mores.³³

Procedural safeguards also apply to proceedings where an Indian child is voluntarily placed in a foster care setting or where parental rights are voluntarily terminated. Any consent to such a placement or termination must be in writing and recorded before a judge. Further, the judge must certify that the terms and consequences of the consent were fully explained and understood by the parent or Indian custodian. The court must also certify that the parent or custodian understood the explanation in English or that the explanation was interpreted into a language that the parent or custodian understood. In addition, no consent is valid if it is given prior to or within ten days after the birth of the Indian child.³⁴ Consent to a voluntary termination of parental rights may be withdrawn at any time up until the final decree of termination or adoption and, if withdrawn, the child must be returned to the parent.³⁵ The Act provides for a two-year statute of limitations on collateral

33. The House Report provides, "The phrase 'qualified expert witnesses' is meant to apply to expertise beyond the normal social worker qualifications." H.R. REP. NO. 1386, *supra* note 15, at 22, *reprinted in* 1978 U.S.C.C.A.N. at 7545. Elsewhere, the House Report stresses the abuses caused by social workers who are unfamiliar with tribal custom and mores: "In judging the fitness of a particular family, many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists." *Id.* at 10, *reprinted in* 1978 U.S.C.C.A.N. at 7532. Courts have split on whether the expert witnesses must have specialized knowledge of Indian customs and culture. *Compare* State *ex rel.* Juvenile Dep't of Multnomah County v. Charles, 688 P.2d 1354, 1359 n.3 (Or. Ct. App. 1984), *review dismissed* 701 P.2d 1052 (Or. 1985) and *In re* Appeal in Pima County Juvenile Action No. 5-903, 635 P.2d 187, 192 (Ariz. Ct. App. 1981), *cert. denied*, 455 U.S. 1007 (1982) (requiring specialized knowledge) with *In re* C.W., 479 N.W.2d 105 (Neb. 1992), D.W.H. v. Cabinet for Human Resources, 706 S.W.2d 840 (Ky. Ct. App. 1986), *In re* K.A.B.E., 325 N.W.2d 840, 843 (S.D. 1982), and *In re* J.L.H., 316 N.W.2d 650, 651 (S.D. 1982) (requiring no specialized knowledge).

The BIA guidelines also provide for expert witnesses who have specialized knowledge of tribal cultural standards. These guidelines state:

Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:

(i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.

(ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.

(iii) A professional person having substantial education and experience in the area of his or her specialty.

BIA Guidelines, *supra* note 24, 44 Fed. Reg. at 67,593.

34. 25 U.S.C. § 1913(a) (1988).

35. *Id.* § 1913(c). The language of the statute provides, "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." *Id.*

attacks on adoptions on the ground that the consent to the termination of parental rights was obtained through fraud or duress.³⁶

Where an Indian child is placed for adoption, the Act provides a hierarchy of placement preferences. First priority is given to the child's extended family, second priority is given to other members of the child's tribe, and third priority is given to other Indian families.³⁷ These preferences may be overridden by tribal resolution.³⁸ Preferences are also established for foster care placement.³⁹

The fourth mechanism by which the Act seeks to protect the interests of tribes and Indian families is through the establishment of tribal and off-reservation child welfare and family service programs. Subchapter II of the Act provides for federal grants to tribes and other Indian organizations to establish programs that will further the goals of the Act.⁴⁰

II. The Collectivist Goals of the Act

Federal Indian policy has vacillated between policies of separation and policies of assimilation.⁴¹ Since the Civil War, most of the history of federal Indian policy has emphasized assimilation.⁴² In the late 1960s, a shift in

Courts have construed this to mean that if there has been a final termination of parental rights, the parent may not revoke consent even if the adoption decree is not final. *See, e.g., In re Adoption of Crews*, 825 P.2d 305 (Wash. 1992); *In re J.R.S.*, 690 P.2d 10 (Alaska 1984); *In re Kiogima*, 472 N.W.2d 13 (Mich. Ct. App. 1991), *appeal denied*, 437 Mich. 1061 (1991), *cert. denied*, 502 U.S. 1064 (1992); *B.R.T. v. Executive Director of Social Serv. Bd.*, 391 N.W.2d 594 (N.D. 1986).

36. 25 U.S.C. § 1913(d).

37. *Id.* § 1915(b). The BIA guidelines underscore that the preferences identified by the Act are to be considered in the order listed. BIA Guidelines, *supra* note 24, 44 Fed. Reg. at 67,594 ("This section makes clear that preference shall be given in the order listed in the Act.").

38. 25 U.S.C. § 1915(c). Where appropriate, a court may also consider the preference of the Indian child or parent. *Id.*

39. *Id.* § 1915(b).

40. *Id.* §§ 1931-1934.

41. *See* Felix S. Cohen, *A History of Indian Policy*, in FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 47 (Rennard Strickland et al. eds., 1982) [hereinafter Cohen, *History*]. Assimilationist themes dominated in the late nineteenth and early twentieth century. These themes expressed both an attempt to make land available to white settlers and benevolent attempts to draw individual Indians into the mainstream of American life. *Id.* at 128; *see also* Lacey, *supra* note 15, at 349-72. In the late 1920s, a view more deferential to tribal interests was adopted. Cohen, *History*, *supra*, at 144-46. In 1934, the Wheeler-Mound Act, popularly known as the Indian Reorganization Act, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (1988 & Supp. V 1993)), was enacted. This act strengthened tribal autonomy. Assimilationist views gained dominance again in the late 1940s through the early 1960s. This period was marked by the termination of a number of tribes, ending their special relationship with the federal government; nonterminated tribes faced increasing assimilationist policies such as those expressed in Pub. L. No. 83-280. Cohen, *History*, *supra*, at 152-80.

42. *See, e.g.,* General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341-342, 348-349, 381 (1988 & Supp. V 1993)) (designed to break

policy began that recognized the goal of tribal self-determination.⁴³ The ICWA is part of the reemergence of this policy favoring tribal self-determination. The Act protects two tribal interests. First, the Act protects the sovereignty of the tribe by recognizing the tribe's interest in participating in decisions concerning the welfare of those tribal members and those eligible for tribal membership who are too young to protect themselves. Second, the Act protects the tribe's interest in maintaining tribal membership. Early drafts of the Act emphasized the first interest,⁴⁴ while the final version, as discussed *infra*, emphasizes the second.

The Act's role in protecting tribal interests, as well as the interests of the child and the parents, is explicit in the congressional statement of purpose and in the legislative history of the Act. As noted above, one of the congressional purposes recognized in the Act is "to promote the stability and security of Indian tribes."⁴⁵ Congressional findings supporting the Act include the

up reservations by providing for the partition of reservation land among tribal members). Another assimilationist policy was the removal of Indian children to off-reservation schools. The first off-reservation federal boarding school was founded in 1879. Cohen, *History*, *supra* note 41, at 140. For a discussion of the philosophies of these schools, see Lacey, *supra* note 15, at 356-62.

43. Among the acts which recognized self-determination goals are the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified at 25 U.S.C. §§ 450-450n (1988 & Supp. V 1993)); the American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified in part at 42 U.S.C. § 1996 (1988)); and the Indian Financing Act of 1974, Pub. L. No. 93-262, 88 Stat. 77 (codified at 25 U.S.C. §§ 1451-1453, 1461-1469, 2481-1498, 1511-1512, 1521-1524, 1541-1543 (1988 & Supp. V 1993)), as well as the ICWA.

44. Compare S. 1214, 95th Cong., 1st Sess. § 2(c) (1977), *reprinted in* S. REP. NO. 597, *supra* note 11, at 2 (the findings in the version of the Act reported out of the Senate Select Committee on Indian Affairs) ("For Indians generally, the child placement activities of nontribal public and private agencies undercut the continued existence of tribes as self-governing communities and, in particular, subvert tribal jurisdiction in the sensitive field of domestic and family relations.") (emphasis added) with 25 U.S.C. § 1901(3) (1988) (the comparable provision in the enacted version) ("[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.").

45. 25 U.S.C. § 1902. The other purposes of the Act are "to protect the best interests of Indian children" and "to promote the stability and security of Indian . . . families." *Id.* The legislative history provides that "the underlying principle of the bill is in the best interest of the Indian child." H.R. REP. NO. 1386, *supra* note 15, at 19, *reprinted in* 1978 U.S.C.A.N. at 7542. Congressional hearings on the Act elicited testimony on the psychological harm caused to Indian children by placement in non-Indian homes. See, e.g., 1978 Hearing, *supra* note 17, at 80-82 (statement of Virginia Q. Bausch, executive director, American Academy of Child Psychiatry) (providing to the committee the proceedings of the meeting sponsored by the American Academy of Child Psychiatry in Bottle Hollow, Utah, in 1977, on "Supportive Care, Custody, Placement and Adoption of Indian Children"); see also *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 2d Sess. 46 (1974) [hereinafter 1974 Hearing] (statement of Dr. Joseph Westermeyer). Although most of the testimony before Congress emphasized the difficulty faced by Indian children who were adopted into non-Indian homes, not all of the studies find transracial adoptions problematic. See, e.g., Arnold R. Silverman, *Outcomes of Transracial Adoptions*, 3 FUTURE OF CHILDREN 104

finding that "Congress . . . has assumed the responsibility for the protection and preservation of Indian tribes and their resources"⁴⁶ and that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . ."⁴⁷ The placement preference provisions are designed "to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society."⁴⁸

The Association on American Indian Affairs (AAIA) proposed the initial Indian child welfare legislation in 1974.⁴⁹ This group was instrumental in securing the eventual passage of the Act.⁵⁰ In its earliest congressional testimony, the AAIA urged congressional action because the problem went "to the very heart of the existence of the tribes."⁵¹ In introducing the legislation in the House, Rep. Morris Udall (D.-Ariz.), one of the Act's sponsors, stated, "We could not more effectively and completely destroy an Indian tribe than by depriving them of their children."⁵² Later, during the floor debate, Representative Udall again emphasized the tribal interests sought to be protected by the Act: "Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being placed in jeopardy."⁵³ He continued,

[B]ecause of the trust responsibility owed to the Indian tribes by the United States to protect their resources and future, we have an obligation to act to remedy this serious problem. What resource is more critical to an Indian tribe than its children? What is more vital to the tribes' future than its children?⁵⁴

(1993).

46. 25 U.S.C. § 1901(2).

47. *Id.* § 1901(3).

48. H.R. REP. NO. 1386, *supra* note 15, at 23, *reprinted in* 1978 U.S.C.C.A.N. at 7546.

49. *See* 1974 *Hearing, supra* note 45, at 33, 499-503.

50. *See id.* at 3-40; 1977 *Hearing, supra* note 16, at 150-52; 1978 *Hearing, supra* note 17, at 68-72. The AAIA also conducted the surveys indicating the frequency of removal of Indian children from their homes which were relied upon by Congress. *See* 1974 *Hearing, supra*, at 15-17, 231-52; *see also* S. REP. NO. 597, *supra* note 11, at 11; H.R. REP. NO. 1386, *supra* note 15, at 9, *reprinted in* 1978 U.S.C.C.A.N. at 7531 (citing AAIA studies).

51. 1974 *Hearing, supra* note 45, at 35 (testimony of Bertram Hirsch, staff attorney, AAIA).

52. 124 CONG. REC. 12,532 (1978).

53. *Id.* at 38,102.

54. *Id.* The tribal interest is more clearly stressed in the Act that passed than it is in prior drafts of the Act. For example, the original bill, in so far as it addressed tribal interests, emphasized self-determination more than the threat of population depletion through adoption of children to non-Indian parents. It stated in its findings that the child welfare problem "undercut[s] the continued existence of tribes as self-governing communities and, in particular, subvert[s] tribal jurisdiction in the sensitive field of domestic and family relations." *See* 1977 *Hearing, supra* note 16, at 5 (emphasis added) (setting out Senate Bill 1214 as introduced). Similarly, the statement of policy did not address tribal stability or security. *Id.* Compare with 25 U.S.C. § 1902 (1988). The Act as originally reported out of the Senate committee also did not emphasize the tribal interest. *See* 1977 *Hearing, supra* note 16, at 24-26.

The Supreme Court has recognized the tribal interests protected by the Act. In *Mississippi Band of Choctaw Indians v. Holyfield*,⁵⁵ the Court stated,

Tribal jurisdiction . . . was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians. . . . The numerous prerogatives accorded the tribes through the ICWA's substantive provisions . . . must . . . be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves.⁵⁶

Although Congress was deeply concerned about the breakup of families and the difficulties faced by Indian children raised in non-Indian homes, it was also concerned about the needs of the tribes as entities. Any construction of the Act that ignores tribal interests is antithetical to its goals.

III. The Imposition of an Individual-Rights Ethic on the ICWA

In our culture, the concept of collective rights trumping the interests of individuals, or at least weighing equally with individual rights, jars deep-rooted understandings of justice. Media treatment of the Act reflects this sense that group rights are improperly impinging on the rights of mothers and children. Newspaper articles invariably recount the stories of Indian children who have bonded with non-Indian preadoptive or foster parents whose loving family relationships are threatened by a tribal assertion of rights under the Act.⁵⁷ There are also stories of women who are thwarted in their attempts place privately their children who are covered under the Act into non-Indian homes.⁵⁸ Newspapers rarely report the wise decisions of tribal courts which,

55. 490 U.S. 30 (1989).

56. *Id.* at 56.

57. For example, numerous and lengthy news media stories appeared about the children involved in the *Holyfield* case. Few appeared about the tribal court decision to allow the children to be adopted by the non-Indian woman who had tried to adopt them through the state courts and with whom the children had lived since birth. Coyle, *supra* note 22. Similarly, numerous stories cited the "plight" of Michael Halloway, who had lived with non-Indian adoptive parents since he was three years old and whose adoption was in jeopardy because of a tribal challenge to state court jurisdiction under the ICWA. Few reported the tribal court decision to award permanent custody to the non-Indian parents. The story is repeated in the reporting of the Baby Keetso case and in others. Gillman, *supra* note 22. The competency of tribal courts to recognize the importance of bonding to a child is repeatedly ignored by the news media.

58. See, e.g., Katherine M. Griffin, *Girl's Guardian Parents Forge Rare Kinship with Navajo Birth Mother*, L.A. TIMES, May 15, 1988, pt. 1, at 3; *Adoption Law Creates A No-Win Situation*, L.A. TIMES, Jan. 28, 1990, at B10 ("There is something basically wrong with a law that would force a young mother who wants to give up her baby for adoption to put the baby in a situation the mother deplors."); Catherine Gewertz, *Judge Reverses Self, Denies Tribe Say in Adoption*,

in rendering custody decisions, recognize the importance of bonding to the child.⁵⁹

The reported cases under the Act reveal a strong tendency to undermine the Act through judge-made exceptions.⁶⁰ These exceptions, evident in the reported cases, probably mask a larger hostility to the Act in unreported, trial-court decisions which may never be appealed. For example, the newspaper account of one case reports the trial judge as stating that custody of two half-blood Arapaho children should be awarded to their white foster parents rather than to relatives who were tribal members. In so ruling, the judge stated, "The fact still remains that the unemployment on the reservation runs between 65 and 85 percent The evidence does show that, if the children are raised on the reservation, they will have a greater likelihood of developing a drinking problem."⁶¹ The statements of the trial judge, made almost one decade after passage of the Act, evidence the kind of suspicion of reservation life and the assumption that Indian children will fare better in middle class white homes at which the ICWA was targeted.⁶²

In the reported decisions, a number of interpretations have been adopted by state courts thwarting full implementation of the Act. The state court decisions may not often be as overtly hostile as the trial judge above toward placing Indian children in a setting that maintains the child's tribal relationship. The decisions, however, clearly reflect a hesitancy to give full

L.A. TIMES, Feb. 22, 1990, at B5.

59. See, e.g., *In re Armell*, 550 N.E.2d 1060, 1063 (Ill. App. Ct. 1990), *appeal denied*, 555 N.E.2d 374 (Ill. 1990), *cert. denied*, 498 U.S. 940 (1990). Upon transfer to tribal court, the child was placed in the custody of the tribal child welfare agency. That agency determined that the child should remain with the same foster parents with whom she had been placed prior to the assertion of tribal jurisdiction. *Id.*

60. Although the state court cases frequently reflect a hostility toward the Act, there are some courts that have tried to fully implement it. Perhaps the trend toward eviscerating the Act through judicial interpretation has lessened in recent years. See, e.g., *In re Guardianship of Ashley Elizabeth R.*, 863 P.2d 451 (N.M. Ct. App. 1993); *In re Armell*, 550 N.E.2d 1060 (Ill. App. Ct. 1990), *appeal denied*, 555 N.E.2d 374 (Ill. 1990), *cert. denied*, 498 U.S. 940 (1990); *In re Baby Girl Doe*, 865 P.2d 1090 (Mont. 1993).

61. Untitled News Release, Dateline: Ethete, Wyo., UPI, May 17, 1987, *available in* LEXIS, News Library, Arcnws File.

62. See *supra* note 14. See also 1977 Hearing, *supra* note 16, at 1-2 (statement of Sen. Abourezk, committee chairman, on the convening of the hearings).

Because of poverty and discrimination[,] Indian families face many difficulties, but there is no reason or justification for believing that these problems make Indian parents unfit to raise their children; nor is there any reason to believe that the Indian community itself cannot, within its own confines, deal with problems of child neglect when they do arise. Up to now, however, public and private welfare agencies seem to have operated on the premise that most Indian children would really be better off growing up non-Indian. . . . Officials seemingly would rather place Indian children in non-Indian settings where their Indian culture, their Indian traditions and, in general, their entire Indian way of life is smothered.

Id.

effect to the Act's goal of protecting tribal interests as well as the interests of the Indian child and parent.

State courts persistently undermine the goals of the Act in a number of ways. Three of these are particularly common.⁶³ Some state courts require the child to be a member of an "existing Indian family" before finding the Act applicable.⁶⁴ Many courts construe too liberally the language of the Act that allows a court to refuse to transfer the proceeding to tribal court for "good cause."⁶⁵ In addition, most courts limit tribal notice in voluntary proceedings.⁶⁶

A. The Existing Indian Family Requirement

Under the statutory language, the ICWA is applicable to any child custody proceeding⁶⁷ concerning an Indian child.⁶⁸ The Act defines "Indian child" as "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."⁶⁹ The only

63. In addition to the interpretations discussed at some length here, state courts have limited applicability of the Act by three means. First, courts have limited applicability by applying a restrictive statute of limitations designed to protect state interests. *See In re Adoption of T.N.F.*, 781 P.2d 973 (Alaska 1989), *cert. denied*, 494 U.S. 1030 (1990). Second, courts have limited applicability by refusing to apply the Act to intrafamily disputes. *See In re Bertelson*, 617 P.2d 121, 125-26 (Mont. 1980). Third, state courts have limited applicability by applying restrictive definitions of who is an Indian child. *See In re Adoption of Crews v. Hope Servs.*, 803 P.2d 24 (Wash. Ct. App. 1991), *aff'd on other grounds*, 825 P.2d 305 (Wash. 1992).

64. *See* discussion *infra* notes 67-115 and accompanying text.

65. *See* 25 U.S.C. § 1911(b) (1988). *See* discussion *infra* notes 116-52 and accompanying text.

66. *See* discussion *infra* note 153-80 and accompanying text.

67. "Child custody" proceeding is defined as including foster care placement, terminations of parental rights, preadoptive placements and adoptive placements. 25 U.S.C. § 1903(1) (1988).

68. "Indian child" is defined at *id.* § 1903(4).

69. 25 U.S.C. § 1903(4). A proposed amendment to the Act, considered by the Senate in 1988, would have expanded the definition of "Indian child" by deleting the requirement that the biological parent be a tribal member and by extending the definition to include any unmarried person who is under age eighteen and is . . . (c) of Indian descent and is considered by an Indian tribe to be part of its community . . . ; if a child is an infant he or she is considered to be part of a tribal community if either parent is so considered.

S. 1976, 100th Cong., 2d Sess. § 4(5) (1987), *reprinted in 1988 Hearing, supra* note 5, at 9-10. This bill included numerous proposed changes to the Act and did not progress beyond the committee. The bill was so comprehensive in addressing concerns which had arisen under the Act that little can be read into Congress' failure to enact any particular provision of the proposed amendments. This proposed change in definition was attacked as violative of equal protection guarantees by the Reagan administration. *See 1988 Hearing, supra* note 5, at 113-14 (letter from Secretary of the Interior Donald Paul Hodel); *id.* at 109, 111 (statement of Ross O. Swimmer, Assistant Secretary, Indian Affairs, Dep't of the Interior). Under the existing definition, a parent can avoid coverage under the Act by renouncing tribal membership. *See United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14,891). The extended

express exclusions are custody awards to a parent as part of a divorce proceeding and placements based on acts that would be criminal if committed by an adult.⁷⁰ A number of courts, however, have created an exception to the Act where the child has never been part of an existing Indian family. This exception was first applied by an appellate court in *In re Adoption of Baby Boy L.*⁷¹

In *Baby Boy L.*, the Kansas Supreme Court ruled that the Act was inapplicable where the proceedings concerned a child born out of wedlock to a non-Indian mother and to a father who was an enrolled member of the Kiowa tribe. The mother executed a consent to adoption on the day the child was born, limiting the consent to adoptive placement with a named, non-Indian couple. The named adoptive parents immediately filed a petition for adoption and were awarded temporary custody. During proceedings to terminate the father's parental rights, the court's attention was drawn to the possible applicability of the ICWA. Notice was given to the Kiowa tribe, which then sought to intervene. The trial court refused the tribe's petition for intervention on the ground that the Act was inapplicable, terminated the father's rights, and approved the adoption of the child.⁷² On appeal, the Kansas Supreme Court affirmed, stating that it was not the intent of the Act "to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother."⁷³ The court explicitly recognized the mother's interest in the placement of the child but undertook no analysis of what tribal interests were at stake. Although the courts are not uniform, many states have followed *Baby Boy L.* by imposing an existing Indian family requirement on the Act.⁷⁴

definition would have made the Act applicable regardless of the parent's actions. 1988 Hearing, *supra* note 5, at 109, 111, 113-14; see also John Robert Renner, Comment, *The Indian Child Welfare Act and Equal Protection Limitations on the Federal Power Over Indian Affairs*, 17 AM. INDIAN L. REV. 129, 167-69 (1992).

70. 25 U.S.C. § 1903(1) (1988). In addition to these express exceptions, the Act provides that the term "parent" does not include "the unwed father where paternity has not been acknowledged or established." *Id.* § 1903(9). This provision clearly limits the rights of such a father; it is less clear that this limitation affects the applicability of the Act. "Indian child" is defined as "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." *Id.* § 1903(4). The word "parent" is not used in the definition. The limitation on the meaning of "parent" may operate only to limit the father's rights but not affect the definition of "Indian child."

71. 643 P.2d 168 (Kan. 1982).

72. *Id.* at 173-74.

73. *Id.* at 175. The non-Indian mother had indicated her intent to revoke the consent to adoption if the child, which was five-sixteenths Kiowa, were to be placed in accordance with the Act. *Id.* at 175-77.

74. See, e.g., *In re Adoption of T.R.M. v. D.R.L.*, 525 N.E.2d 298 (Ind. 1988), *cert. denied*,

The *Baby Boy L.* court's hostility to the Act is evident in its characterization of the Act as "complex federal legislation which is not only confusing but, if applied [to the facts of *Baby Boy L.*], would also be inconsistent, contradictory, and would accomplish no worthwhile or useful purpose."⁷⁵ The court, focusing on the legislative history and on the use of the word "removal" in the Act,⁷⁶ found that the overriding purpose of the legislation was to maintain the family and tribal relationships existing in Indian homes.⁷⁷ The court reasoned that this goal would not be furthered where the child had not yet had an Indian home or a tribal relationship.⁷⁸

The "existing Indian family" requirement has been applied most frequently where the mother of the child is non-Indian and the Indian father was not married to the mother.⁷⁹ It has been applied occasionally, however, where the mother is an enrolled tribal member but has had little contact with her tribe⁸⁰ or where, even though the mother maintained tribal contact, the child was

490 U.S. 1069 (1989); *In re S.A.M.*, 703 S.W.2d 603 (Mo. Ct. App. 1986); *In re Adoption of Baby Boy D.*, 742 P.2d 1059 (Okla. 1985), *cert. denied*, 484 U.S. 1072 (1988); *Claymore v. Serr*, 405 N.W.2d 650 (S.D. 1987), *overruled by In re Adoption of Baade*, 462 N.W.2d 485 (S.D. 1990); *In re Adoption of D.M.J. v. Howard*, 741 P.2d 1386 (Okla. 1985); *In re S.C.*, 833 P.2d 1249 (Okla. 1992); *In re Appeal in Maricopa Co. Juvenile Action No. A-25525*, 667 P.2d 228 (Ariz. Ct. App. 1983); *In re Adoption of Crews*, 825 P.2d 305 (Wash. 1992); *S.A. v. E.J.P.*, 571 So. 2d 1187 (Ala. Civ. App. 1990); *In re C.E.H. v. L.M.W.*, 837 S.W.2d 947 (Mo. Ct. App. 1992) (finding an "existing Indian family" requirement in the Act). *But see In re Baby Boy Doe v. Doe*, 849 P.2d 925 (Idaho 1993), *cert. denied*, 114 S. Ct. 173 (1993); *In re Adoption of Baade*, 462 N.W.2d 485 (S.D. 1990); *In re Adoption of A Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988); *In re Custody of S.B.R.*, 719 P.2d 154 (Wash. Ct. App. 1986), *review denied*, 108 Wash. 2d 1009 (1986); *In re Adoption of Lindsay C.*, 280 Cal. Rptr. 194 (Ct. App. 1991), *review denied*, 1991 Cal. LEXIS 3192 (Cal. July 11, 1991); *In re Junious M. v. Diana L.*, 193 Cal. Rptr. 40 (Ct. App. 1983); *In re Adoption of T.N.F.*, 781 P.2d 973 (Alaska 1989), *cert. denied*, 494 U.S. 1030 (1990) (finding that there is no existing Indian family requirement); *In re Adoption of S.S.*, 622 N.E.2d 832 (Ill. App. Ct. 1993), *appeal granted*, 631 N.E.2d 709 (Ill. 1994).

75. *Baby Boy L.*, 643 P.2d at 174.

76. The court focused on 25 U.S.C. § 1902, which declares, *inter alia*, that it is the policy of the United States to establish "minimum Federal standards for the removal of Indian children from their families." 25 U.S.C. § 1902 (1988) (emphasis added). The court also looked to other provisions, such as those concerned with efforts to prevent the break up of Indian families, *id.* § 1912(d), those concerned with standards for removal of the child from the *continued custody* of the parent or Indian custodian, *id.* § 1912(e)-(f), those concerned with actions to be taken to invalidate placements or parental rights terminations, allowing parents or Indian custodians from whose custody the child was removed to bring actions, *id.* § 1914, and other provisions concerning the return of custody of the child, *id.* §§ 1916(b), 1920, 1922.

77. *Baby Boy L.*, 643 P.2d at 175.

78. *Id.*

79. *See, e.g., id.*; *S.A. v. E.J.P.*, 571 So. 2d 1187 (Ala. Civ. App. 1990); *In re S.C.*, 833 P.2d 1249 (Okla. 1992); *In re S.A.M.*, 703 S.W.2d 603 (Mo. Ct. App. 1986); *In re Appeal in Maricopa Co. Juvenile Action No. A-25525*, 667 P.2d 228 (Ariz. Ct. App. 1983); *In re Adoption of Baby Boy D.*, 742 P.2d 1059 (Okla. 1985), *cert. denied*, 484 U.S. 1072 (1988).

80. *See, e.g., In re C.E.H. v. L.M.W.*, 837 S.W.2d 947 (Mo. Ct. App. 1992); *In re Adoption of Crews*, 825 P.2d 305 (Wash. 1992).

placed at birth with non-Indian adoptive parents.⁸¹ In one case, it was applied where the child was born during the marriage of an Indian man and a non-Indian woman.⁸² In their subsequent divorce, the non-Indian mother was awarded custody. The child lived with the mother for six years, after which time the mother sought to place the child for adoption. Over the objections of the father and the tribe, the trial court terminated the rights of the father under Oklahoma law. The Oklahoma Supreme Court affirmed, finding the Act inapplicable because the child was not being removed from an existing Indian family.⁸³

Although the "existing Indian family" requirement gained a wide foothold, a number of jurisdictions quickly rejected the imposition of the additional requirement on the Act, reasoning that the statutory language did not permit a court to impose an additional requirement. For example, the New Jersey Supreme Court, in 1988, refused to impose an existing Indian family requirement in *In re Adoption of a Child of Indian Heritage*.⁸⁴ The adoptive parents of the child argued that the Act should not apply because the child, whose mother voluntarily placed him for adoption when he was about one week old, had never lived in an Indian environment. The court initially acknowledged that the Act "is . . . an intrusion on the mother's ability to determine what is in the best interests of her child."⁸⁵ Nevertheless, the court refused to apply the existing Indian family requirement because it recognized Congress's concern for the interests of the child and for tribal interests, stating that "[t]he effect on . . . the tribe and the Indian child of the placement of the child in a non-Indian setting is the same whether or not the placement was voluntary."⁸⁶ Courts in California,⁸⁷ Washington,⁸⁸ and Alaska⁸⁹ similarly refused to find that the Act applied only to the removal of children from existing Indian families.⁹⁰

81. *In re Adoption of T.R.M. v. D.R.L.*, 525 N.E.2d 298 (Ind. 1988), *cert. denied*, 490 U.S. 1069 (1989).

82. *In re Adoption of D.M.J. v. Howard*, 741 P.2d 1386 (Okla. 1985).

83. *Id.* at 1389. Oklahoma has recently passed legislation overturning the cases adopting the existing Indian family requirement. Oklahoma Indian Child Welfare Act, 10 OKLA. STAT. ANN. §§ 40-40.9 (West 1987 & Supp. 1995). The Act provides, "[T]he Oklahoma Indian Child Welfare Act applies to all state voluntary and involuntary child custody proceedings involving Indian children, regardless of whether or not the children involved are in the physical or legal custody of an Indian parent or Indian custodian at the time state proceedings are initiated." *Id.* § 40.3(B).

84. 543 A.2d 925 (N.J. 1988).

85. *Id.* at 932.

86. *Id.*

87. *In re Junious M. v. Diana L.*, 193 Cal. Rptr. 40, 46 (Ct. App. 1983).

88. *In re Custody of S.B.R.*, 719 P.2d 154, 156 (Wash. Ct. App. 1986), *review denied*, 108 Wash. 2d 1009 (1986).

89. *In re Adoption of T.N.F.*, 781 P.2d 973, 977 (Alaska 1989), *cert. denied*, 494 U.S. 1030 (1990).

90. See also Michelle L. Lehmann, Comment, *The Indian Child Welfare Act of 1978: Does*

In 1989, the Supreme Court, in *Mississippi Band of Choctaw Indians v. Holyfield*,⁹¹ applied the ICWA to the adoption of twin Indian children. Their parents, who were reservation domiciliaries, voluntarily placed the twins for adoption at birth. Although the parents opposed tribal jurisdiction over the proceeding, the Court found that exclusive jurisdiction rested with the tribal court.⁹² Commentators heralded this ruling as the end of the "existing Indian family" doctrine. Roger Tellinghuisen, for example, wrote, "After the decision in *Holyfield*, it appears that the Kansas court in *Baby Boy L.* may have given inappropriate weight to the wishes of the family."⁹³ At least one court abandoned the existing Indian family requirement in response to *Holyfield*. In *In re Adoption of Baade*,⁹⁴ the South Dakota Supreme Court rejected its prior ruling recognizing the requirement. The court stated that "it is incorrect, when assessing [the] ICWA's applicability to a particular case, to focus only upon the interests of an existing family."⁹⁵ Despite a move away from an existing

It Apply to the Adoption of an Illegitimate Indian Child?, 38 CATH. U. L. REV. 511 (1989) (arguing that there should be no existing Indian family requirement).

91. 490 U.S. 30 (1989).

92. *Id.* at 53.

93. Roger A. Tellinghuisen, *The Indian Child Welfare Act of 1978: A Practical Guide with [Limited] Commentary*, 34 S.D. L. REV. 660, 671 (1989). Tellinghuisen did not advocate the complete abandonment of the existing Indian family requirement, but rather recognized that *Holyfield* made the advocacy of the position difficult. *Id.* at 672. Other commentators, however, did advocate the complete abandonment of the existing Indian family requirement. *See, e.g.*, Baron, *supra* note 12, at 331-32.

94. 462 N.W.2d 485 (S.D. 1990).

95. *Id.* at 489 (citing Lehmann, *supra* note 90). Although the court in *Baade* purported to recognize tribal interests, it refused to reverse the termination of the father's parental rights. The trial court had found that the Act was not applicable to the proceeding and had not complied with its provisions. The Act provides,

No termination of parental rights may be ordered in [any involuntary proceeding] in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, 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.

25 U.S.C. § 1912(f) (1988). The *Baade* court applied this provision to preclude restoration of the father's rights because the child had bonded with his adoptive parents and would suffer serious emotional damage if he were to be removed from their care. *Baade*, 462 N.W.2d at 490. This reasoning certainly defeats the intent of the ICWA, which expressly recognizes the right to bring an action for noncompliance with its provisions. 25 U.S.C. § 1914. Under the reasoning of the *Baade* court, there could never be any relief on appeal from a trial decision because the child would have already bonded to his or her adoptive or foster parents or adjusted to his or her new environment. Rational policy arguments can be made that in any custody proceeding, the only issue should be the best interests of the child: we all certainly agonized to see Jessica DeBoer removed from the home of her adoptive parents (although subsequent news stories suggest she is faring well). Nevertheless, that is not the policy judgment that has been made by Congress with respect to Indian children. There, the interests to be protected are those of the child, the Indian family and the tribe. *Id.* § 1902.

Indian family requirement in some courts, other courts adopted or tenaciously held to the doctrine even after *Holyfield*.⁹⁶

Applying traditional standards of statutory interpretation, no existing Indian family requirement should be read into the Act. Two provisions of the Act are rendered meaningless if the courts apply this requirement. Courts imposing an existing Indian family requirement refuse to apply the Act to a child who is placed outside an Indian family at birth.⁹⁷ The statutory language of the ICWA, however, explicitly contemplates application of the Act where an Indian child is voluntarily placed for adoption at birth. Section 1913(a) provides, "Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid."⁹⁸ If the Act is inapplicable where the child has not established a connection to an Indian family, this provision would be given no effect. The Act also provides that the term "parent" does not include "the unwed father where paternity has not been acknowledged or established."⁹⁹ As a corollary, the term "parent" does include an unwed father whose paternity is acknowledged or established. An Indian child is defined, in part, as "any unmarried person who is under eighteen and is . . . eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."¹⁰⁰ The existing Indian family requirement would remove from the Act those children who derive their Indian blood from Indian fathers who have acknowledged paternity, where the father is not married to and does not live with the mother of the child. In addition, the rights afforded parents under the Act would not apply to such fathers. This interpretation renders the provisions about paternity meaningless. The Act defines "Indian child" with reference to biological parents, not by reference to social or psychological parents.

The Idaho Supreme Court has also rejected the existing Indian family requirement as inconsistent with the Supreme Court's ruling in *Holyfield*. *In re Baby Boy Doe v. Doe*, 849 P.2d 925 (Idaho 1993), cert. denied, 114 S. Ct. 173 (1993).

96. See, e.g., *In re Adoption of Crews*, 825 P.2d 305 (Wash. 1992); *S.A. v. E.J.P.*, 571 So. 2d 1187 (Ala. Civ. App. 1990); *In re S.C.*, 833 P.2d 1249 (Okla. 1992); *In re C.E.H. v. L.M.W.*, 837 S.W.2d 947 (Mo. Ct. App. 1992). Although the Washington Supreme Court adopted an existing Indian family requirement after the decision in *Holyfield*, the Court of Appeals of Washington State has read the *Crews* decision narrowly. In *In re Adoption of M. v. Navajo Nation*, 832 P.2d 518 (Wash. Ct. App. 1992), the court of appeals found that the adoption of an Indian child was governed by the ICWA where the child was not being removed from an "Indian family" but where application of the Act might lead to placement of the child with an Indian family. The court distinguished *Crews* on the ground that application of the Act in *Crews* would not result in the child being placed with an Indian family.

The result in *In re S.C.* has been legislatively overturned. See *supra* note 83.

97. See, e.g., *In re Adoption of T.R.M. v. D.R.L.*, 525 N.E.2d 298 (Ind. 1988), cert. denied, 490 U.S. 1069 (1989).

98. 25 U.S.C. § 1913(a) (1988).

99. *Id.* § 1903(9).

100. *Id.* § 1903(4).

Further, the *Baby Boy L.* court turned to legislative history to read the existing Indian family requirement into the Act. However, where there is no ambiguity in statutory language, there is no need to resort to legislative history.¹⁰¹ Even if one does look at the legislative history, it does not support such a narrowing of the statute. The legislative history reflects a concern for the welfare of tribes and Indian children who grow up without a connection to their Indian culture. As noted by one court, "Limiting the Act's applicability solely to situations where non-family entities physically remove Indian children from actual Indian dwellings deprecates the very links — parental, tribal and cultural — the Act is designed to preserve."¹⁰² The Act is clear about the limitations of its applicability and names only two: first, placements based upon acts which would be criminal if committed by an adult and, second, custody awards to a parent in the context of a divorce proceeding.¹⁰³ In view of the explicit concern of Congress with overstepping by state agencies and courts, state courts should be particularly cautious about imposing a limitation on the Act which is not found in the statutory language.¹⁰⁴

One further indication that no existing Indian family requirement should be imposed on the Act is found in the promulgation history of the Bureau of Indian Affairs (BIA) Guidelines for State Courts in Indian Child Custody Proceedings. These Guidelines were issued by the BIA in 1979. Although the BIA used the rule-making procedures of the Administrative Procedures Act in adopting the Guidelines, it determined that they were nonbinding because Congress placed primary responsibility for interpretation of the Act in the courts.¹⁰⁵

Although the BIA Guidelines are only advisory,¹⁰⁶ a number of courts find them persuasive.¹⁰⁷ The BIA first published the Guidelines in draft form

101. *United States v. Oregon*, 366 U.S. 643 (1961).

102. *In re Crystal K. v. Joseph K.*, 276 Cal. Rptr. 619, 625 (Ct. App. 1990), *review denied*, No. CIV.C006504, 1991 Cal. LEXIS 1156 (Ct. App. Mar. 14, 1991), *cert. denied*, 502 U.S. 862 (1991).

103. 25 U.S.C. § 1903(1) (1988).

104. *In re Adoption of T.N.F.*, 781 P.2d 973, 977-78 (Alaska 1989), *cert. denied*, 494 U.S. 1030 (1990).

These judicially-created exceptions to the coverage of ICWA are somewhat suspect in light of the Act's purpose of imposing federal procedural safeguards. State courts must be particularly hesitant in creating judicial exceptions to a federal act which was enacted to counter state courts' prejudicial treatment of Indian children and communities.

Id.

105. BIA Guidelines, *supra* note 24, 44 Fed. Reg. at 67,584.

106. *Id.*

107. *See, e.g., In re Crystal K. v. Joseph K.*, 276 Cal. Rptr. 619, 625 (Ct. App. 1990), *review denied*, No. CIV.C006504, 1991 Cal. LEXIS 1156 (Ct. App. Mar. 14, 1991), *cert. denied*, 502 U.S. 862 (1991).

for comment prior to their final promulgation. The draft form provided that the following were among the factors a state court should consider when deciding whether to transfer an action to tribal court: "The child has had little or no contact with his Indian tribe, or members of his tribe, for a significant period of time," and "[t]he child has not resided on his reservation for a significant period of time."¹⁰⁸ The final version of the BIA Guidelines delete these provisions, providing that contact with the tribe and tribal members is relevant only if the child is over five years old and the child's parents are not available.¹⁰⁹ The commentary to the final BIA Guidelines explains that these provisions were criticized because they would "virtually exclude from transfers infants who were born off the reservation."¹¹⁰ The BIA concluded that "in most cases state court judges [should] not be called upon to determine whether or not a child's contacts with a reservation are so limited that a case should not be transferred."¹¹¹

The first draft of the BIA Guidelines indicates that the BIA considered the Act applicable even in situations where the child's contacts with the tribe were very limited. No issue of transfer to the tribal court would arise unless the Act was applicable. On further consideration, the BIA concluded that lack of contact with the tribe was not proper for a state court to consider in deciding whether to transfer the matter to a tribal court unless the child was over five years old and the child's parents were unavailable. The BIA explained that where the child was under five years old, lack of contact with the tribe was irrelevant to transfer because "[m]ost children younger than five years can be expected to adjust more readily to a change in cultural environment."¹¹²

Courts that impose the existing Indian family requirement on the Act repeatedly view the issues before them as ones of competing rights between individuals. Just as the *Baby Boy L.* court refused to evaluate what tribal interests were at stake, other courts which refuse to apply the Act similarly fail to consider tribal interests. The tribe has several interests in these cases. First, it has an interest in tribal membership and community. If the Act applies where a non-Indian mother bears the child of an Indian father, any relinquishment of custody by the mother is likely to bring the child within the fold of the tribe. If the father receives custody, then the child will grow up with a connection to his Indian parent. If the father does not obtain custody, the placement preference provisions of the Act may bring the child into the tribal community through placement with the child's extended family or other tribal members.¹¹³ This is not the only tribal interest. The tribe also has a

108. 44 Fed. Reg. 24,001 (1979).

109. BIA Guidelines, *supra* note 24, 44 Fed. Reg. at 67,591.

110. *Id.*

111. *Id.*

112. *Id.*

113. *See* 25 U.S.C. § 1915(a) (1988).

strong interest in playing a *parens patriae* role to children who are eligible for tribal membership and an interest as a sovereign in the welfare of its people.¹¹⁴ State courts refusing to apply the Act because the child is not part of an existing Indian family may be motivated by a concern for the non-Indian mother's wishes. The court may also be concerned about the best interests of the child, who may be adjusting already to a placement outside the provisions of the Act. Nevertheless, this requirement diminishes the status of the tribe as a sovereign concerned with the welfare of all who are tribal members or who are eligible to be tribal members and who are not yet of an age to choose whether to be members.¹¹⁵ Even if the best interests of the child dictate that the tribe take a position that a nontribal placement be maintained, the tribe's interest as a sovereign should be recognized and the matter decided in tribal court or with the participation of the tribe as an intervenor. Refusing to allow this participation by the tribe diminishes its sovereignty and fails to recognize the dual nature of the tribal interests protected by the Act.

B. State Court Refusals to Transfer Proceedings to Tribal Court

Where an Indian child is not a reservation domiciliary, any proceeding for foster care placement of, or the termination of parental rights to, an Indian child is to be transferred to tribal court if a parent, the tribe, or an Indian custodian petitions for transfer.¹¹⁶ Either parent may veto the transfer.¹¹⁷ Unless a parent objects, however, the transfer must occur unless the court finds "good cause" to refuse the transfer.¹¹⁸ State courts frequently have interpreted the "good cause" provision broadly by finding that transfer should not occur because it would be counter to "the best interests of the child." This approach ignores the competence of the tribal court to act in the best interests of the child and the tribe's sovereign interest in deciding matters concerning tribal members and those eligible for tribal membership. As noted in *Holyfield*, the jurisdictional provisions of the ICWA concern "*who* should make the custody determination[s] concerning [Indian] children — not what the outcome of [those] determination[s] should be."¹¹⁹ Imposing a "best interests" test denigrates the tribal interest in decision making about Indian children and wrongfully assumes the tribal courts are incompetent to protect the interests of Indian children.

114. See *supra* note 11.

115. An adult may always choose to relinquish tribal membership. *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14,891).

116. 25 U.S.C. § 1911(b).

117. *Id.*

118. *Id.* A tribal court may decline the transfer. *Id.*

119. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 53 (1989) (emphasis added).

State courts applying the provision have often confused the issue of who decides custody with the issue of what placement is in the best interests of the child.¹²⁰ For example, in *In re C.W. v. D.W.*,¹²¹ the Nebraska Supreme Court applied the "best interests of the child" standard to find that the trial court erred in transferring the proceeding to tribal court.¹²² In concluding that nontransfer served the children's best interests, the court considered the fact that the children had bonded with their foster parents, that they were special needs children, and that the children would face a cultural shock if transfer occurred because they had not previously lived in an Indian environment.¹²³ The BIA Guidelines provide that "[s]ocio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists."¹²⁴ Nevertheless, the Nebraska court explicitly ignored this injunctive and considered the impermissible factors. The court stated, "[I]n the case of two of the children, those [factors] become necessary to a determination of the best interests of the children [because they are special needs children] and, therefore, 'good cause' not to transfer the case."¹²⁵ The court cited section 1915(b) of the Act in support of its ruling against transfer. That section, however, is irrelevant to the issue of jurisdiction; it applies solely to placement.

Similarly, other courts have failed to consider tribal interests and focused solely on the child's interests in considering whether to honor a request for transfer to tribal court. In *In re M.E.M.*,¹²⁶ the Montana Supreme Court noted the BIA Guidelines, but stated that in addition to the circumstances set forth in the BIA Guidelines, "the best interests of the child could prevent transfer of jurisdiction [to tribal court] upon a 'clear and convincing' showing by the State."¹²⁷ The court remanded the case to the trial court for consideration of whether this standard was met. In another Montana case, *In re T.S.*,¹²⁸ the state showed that the child currently lived in a stable

120. See Dale, *supra* note 12, at 384-90 (arguing that the state courts have improperly imposed the Anglo "best interests of the child test" in applying the good cause exception to the transfer provisions).

121. 479 N.W.2d 105 (Neb. 1992).

122. The trial court refused to transfer the termination of parental rights proceeding on the ground that the parent had previously opposed transfer and on *forum non conveniens* grounds. The trial court ruled that the matter should be transferred to tribal court for a decision regarding placement of the children. The Supreme Court reversed. *Id.* at 116-18.

123. *Id.* at 117-18.

124. BIA Guidelines, § C.3(c), *supra* note 24, 44 Fed. Reg. at 67,591.

125. *In re C.W. v. D.W.*, 479 N.W.2d 105, 118 (Neb. 1992).

126. 635 P.2d 1313 (Mont. 1981).

127. *Id.* at 1317; see also *In re Robert T. v. Devon T.*, 246 Cal. Rptr. 168, 174-76 (Ct. App. 1988) (finding "good cause" to refuse transfer because, *inter alia*, child had bonded with foster parents).

128. 801 P.2d 77 (Mont. 1990), *cert. denied*, 500 U.S. 917 (1991).

environment and that the mother's Eskimo tribe had failed to express an interest in the child during the period of abuse.¹²⁹ The court found that this met the state's burden of showing "clear and convincing evidence that the best interests of the child would be injured by . . . a transfer [to tribal court]."¹³⁰ The court also noted that transfer to the tribal court in Alaska would present difficulties for witnesses.¹³¹ Courts in South Dakota¹³² and California¹³³ also have applied a "best interests of the child" test to transfer issues.¹³⁴

Several of the courts applying a "best interests" standard to determine whether to transfer jurisdiction have relied inappropriately on the Senate Committee Report which accompanied the bill that first passed the Senate.¹³⁵ That version provided for transfer to tribal court only where the child had significant contacts with a tribe.¹³⁶ The bill listed considerations to be taken into account in determining whether a child had significant contact with his or her tribe.¹³⁷ In the Senate Committee Report's section-by-section analysis, the Committee explained that the provisions relating to the determination of whether a child has significant tribal contact, "coupled with the 'good cause for refusal' provisions . . . , are designed to provide State courts with a degree of flexibility in determining the disposition of a placement proceeding involving an Indian child."¹³⁸ The version eventually enacted differed significantly from that which accompanied the Senate Committee Report. The requirement that the court find that the child has significant tribal contact prior to transferring the matter to tribal court was deleted entirely in the enacted version. The Senate Committee's explanation of the meaning of "good cause"

129. *Id.* at 81.

130. *Id.* at 79.

131. *Id.* at 82.

132. *In re J.J.*, 454 N.W.2d 317 (S.D. 1990).

133. *In re Robert T. v. Devon T.*, 246 Cal. Rptr. 168 (Ct. App. 1988).

134. Michael J. Dale has argued that, with respect to Indian children, Congress has redefined the "best interests test," finding that the best interests of an Indian child are served by maintaining ties with his or her tribe, culture and family. Under his analysis, the "Anglo best interests test" that is usually applied by state courts, is replaced with the congressionally mandated test. Congress has limited the discretion a court has to determine what is in the best interests of an Indian child. Dale, *supra* note 12.

135. See, e.g., *In re J.J.*, 454 N.W.2d 317, 328 (S.D. 1990) ("Although 'good cause to the contrary' is not defined in the Act, the legislative history states that the term was designed to provide State courts with flexibility in determining the disposition of a child custody proceeding involving an Indian child."). *Chester Co. Dep't of Social Servs. v. Coleman*, 399 S.E.2d 773, 775 (S.C. 1990), *cert. denied*, 500 U.S. 918 (1991); *In re T.S.*, 801 P.2d 77, 80 (Mont. 1990), *cert. denied*, 500 U.S. 917 (1991); *In re Robert T. v. Devon T.*, 246 Cal. Rptr. 168, 172 (Ct. App. 1988).

136. S. 1214, 95th Cong., 1st Sess. § 102(c) (1977), *reprinted in* S. REP. NO. 597, *supra* note 11, at 4.

137. S. 1214, 95th Cong., 1st Sess. § 102(f) (1977), *reprinted in* S. REP. NO. 597, *supra* note 11, at 5.

138. S. REP. NO. 597, *supra* note 11, at 17.

in the prior bill merits little credence. The House Committee Report which accompanied the final version of the bill explains that the transfer provision "is intended to permit a State court to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected."¹³⁹ This history, in contrast to that which accompanied the original Senate bill, stresses the protection of tribal interests and the child's interest *as an Indian* rather than the state court's flexibility.

A number of courts have properly construed the "good cause" provision as a *forum non conveniens* provision. The Appellate Court of Illinois affirmed the trial court's transfer of a matter concerning an Indian child to a Potawatomi tribal court in *In re Armell*.¹⁴⁰ The court wrote, "though any psychological effects the transfer may have on [the child] may properly be considered when ascertaining placement, they are not factors which should be considered when deciding jurisdiction."¹⁴¹ The New Mexico Court of Appeals recently came to the same conclusion. In *In re Guardianship of Ashley Elizabeth R.*,¹⁴² the court rejected the trial court's consideration of the best interests of the children, stating that "[a]lthough these may be good reasons to appoint [appellees] guardians, they have nothing to do with whether transferring the proceeding to tribal court was appropriate."¹⁴³ The courts in *Armell* and *Ashley Elizabeth R.* properly distinguished between jurisdictional decisions and placement decisions.¹⁴⁴

139. H.R. REP. NO. 1386, *supra* note 14, at 21, reprinted in 1978 U.S.C.C.A.N. at 7544.

140. 550 N.E.2d 1060 (Ill. App. Ct. 1990), *appeal denied*, 555 N.E.2d 374 (1990), *cert. denied*, 498 U.S. 940 (1990).

141. *Id.* at 1065.

142. 863 P.2d 451 (N.M. Ct. App. 1993). This opinion is interesting in a number of respects. The subjects of the proceedings were two one-quarter-blood Navajo children whose mother had been murdered. The non-Indian paternal great aunt and uncle of one of the children (the children had different fathers) took the children in upon the mother's death and sought to be named guardians. The court considered whether the action was a "child custody proceeding" under the Act and found that the proceeding fit the Act's definition of "foster care placement."

The Act defines "foster care placement" as "any action removing an Indian child from its parent or Indian custodian for temporary placement in . . . the home of a guardian . . . where the parent or Indian custodian cannot have the child returned upon demand . . ." 25 U.S.C. § 1903(1)(i) (1988). The court ruled that the children's maternal aunt was an Indian custodian from whom the children were being removed. Although the maternal aunt had never had physical custody of the children, the court relied on Navajo custom, which places custody of orphaned children within the mother's family, to find that she was an Indian custodian. Although the ICWA explicitly defines "Indian custodian" as including an "Indian person who has legal custody of an Indian child under tribal law or custom," it is rare for a state court to give such deference to tribal custom. *Id.* § 1903(6).

143. *Ashley Elizabeth R.*, 863 P.2d at 456.

144. See also *In re J.L.P.*, 870 P.2d 1252 (Colo. Ct. App. 1994); *In re Welfare of B.W.*, 454 N.W.2d 437 (Minn. Ct. App. 1990); *In re C.E.H. v. L.M.W.*, 837 S.W.2d 947, 954 (Mo. Ct. App. 1992) (refusing to transfer on *forum non conveniens* considerations but rejecting the "best

The BIA Guidelines provide that the burden of showing that there is good cause not to honor a request to transfer lies with the party opposing transfer¹⁴⁵ and that neither concerns about the socioeconomic conditions of the reservation nor concerns about the adequacy of tribal or BIA social services or courts should affect the decision.¹⁴⁶ "Good cause" not to transfer clearly exists if there is no tribal court to which transfer can be made.¹⁴⁷ Other circumstances which may be considered are set out in the BIA Guidelines:

- (i) [t]he proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing;
- (ii) [t]he Indian child is over twelve years of age and objects to the transfer;
- (iii) [t]he evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses;
- (iv) [t]he parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.¹⁴⁸

The first and third considerations identified in the BIA Guidelines are appropriate procedural limitations on the right to transfer. The first simply recognizes the need for procedural regularity. In child custody proceedings, particularly, there is a need for prompt disposition so that the child may be placed in a stable setting. Unexcused delay is an appropriate consideration in determining whether a transfer, which is likely to delay final disposition, should be granted. Requiring a timely petition to transfer is in keeping with the legislative history that identifies the transfer provision as a modified forum non conveniens provision.¹⁴⁹ The third consideration recognizes traditional forum non conveniens issues. If a child is living in Los Angeles, the social service agencies involved with the child are located in Los Angeles and all of the witnesses who may have witnessed parental abuse of the child are in Los Angeles, the termination proceeding should not be tried in Alaska, even if that

interests of the child" test).

145. BIA Guidelines, § C.3.(d), *supra* note 24, 44 Fed. Reg. at 67,591.

146. *Id.* § C.3.(c), 44 Fed. Reg. at 67,591.

147. *Id.* § C.3.(a), 44 Fed. Reg. at 67,591. Note, however, that the Act broadly defines "tribal court" to include any tribal entity that can adjudicate the case. 25 U.S.C. § 1903(12) (1988).

148. BIA Guidelines, § C.3.(b), *supra* note 24, 44 Fed. Reg. at 67,591.

149. A motion to transfer an action in federal court to a more convenient forum should be made at an early point in the litigation, but a later motion that does not unduly delay disposition is not precluded. 1A JAMES W. MOORE ET. AL, MOORE'S FEDERAL PRACTICE pt. 2, ¶ 0.345[4.—3] (2d ed. 1991) (discussing 28 U.S.C. § 1404 (1988)).

is where the child's tribe is located.¹⁵⁰ The tribal court would not be able to subpoena the necessary witnesses and the litigation would be significantly more costly. The transfer provision acts as a *modified* forum non conveniens provision because the presumption favors transfer; state court retention of the case is appropriate only if traditional forum non conveniens factors favor the retention.

The second consideration is also a reasonable balance of individual and tribal interests, although perhaps not consistent with the forum non conveniens nature of the transfer provision. Just as parents are expressly given a right to veto a transfer, a child who is of an age to make decisions on his or her own should, perhaps, have a similar right.

The fourth consideration appears to confuse the issue of who is the decision maker with the issue of placement. Although one could argue that a tribe has less of a *parens patriae* interest in an older child who has had little or no contact with his or her tribe or with tribal members, the commentary to this BIA Guideline suggests the concern is ultimately with placement: "[T]he shock of changing cultures may, in some cases, be harmful to the child. This determination, however, can be made by the parent who has a veto over transfer to tribal court. This reasoning does not apply, however, where there is no parent available to make that decision."¹⁵¹ Section 1915 of the ICWA, which sets forth placement preferences, states that a court may avoid the listed preferences for "good cause." The concerns addressed in the fourth item listed are more relevant to a determination of good cause to avoid a placement preference than to good cause to avoid transfer to tribal court. As noted in the introduction to the BIA Guidelines, the Guidelines are nonbinding, and while courts may take into account the BIA's interpretation, they should reject that interpretation if it is contrary to the statute.¹⁵² This is an instance where courts should exercise their independent duty to apply the Act and reject the BIA's interpretation.

C. Voluntary Termination Proceedings

Conflict between individual and tribal rights is strongly evident in voluntary terminations of parental rights. In a voluntary termination, a birth parent with a strong interest in confidentiality may seek a placement for the child which is counter to the preference provisions provided by the Act. A

150. It may be appropriate to transfer the proceeding to Alaska for a subsequent placement decision. Local witnesses will play a less crucial role at this stage. In addition, it may be feasible for the tribal court to convene off the reservation in the place where relevant evidence may be obtained.

151. BIA Guidelines, *supra* note 24, 44 Fed. Reg. at 67,591. If, as the Guidelines state, a possible culture shock is of concern, it seems ironic to place the duty to protect the child from this harm in the hands of a parent whose parental rights may be terminated for abuse or neglect. Such a parent hardly seems the appropriate person to look out for the welfare of the child.

152. *Id.*, 44 Fed. Reg. at 67,584.

tribe, however, has as much interest in its children placed for adoption voluntarily as it does in other child custody proceedings. The Act itself is ambiguous and should be amended to clarify the balance drawn between these competing interests.

The ICWA clearly applies to protect parental rights in voluntary proceedings.¹⁵³ It explicitly sets out the rights of the parent choosing to relinquish his or her parental rights: the consent to the voluntary termination of parental rights must be in writing; it must be recorded before a judge of competent jurisdiction, and the judge must certify that the terms and consequences of the consent were explained and understood.¹⁵⁴ Further, the judge must certify that the parent or Indian custodian understood the explanation in English or that it was interpreted into a language understood by the parent or custodian.¹⁵⁵ In addition, no consent given prior to or within ten days after the birth of the child is valid.¹⁵⁶ The Act strongly protects the individual rights of the parent of an Indian child to assure that parental consents are knowingly and voluntarily made.¹⁵⁷

The status of tribal rights in voluntary proceedings is less clear. There is an incongruity in the provisions of the ICWA concerning the tribe's right to intervene and the tribe's right to notice of the pendency of a child custody proceeding. The provision defining the tribe's right to intervene states, "In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, . . . the Indian child's tribe shall have a right to intervene at any point in the proceeding."¹⁵⁸ No distinction is made in the language of the Act between voluntary and involuntary proceedings. In contrast, the right to notice specifically attaches only to involuntary proceedings. The Act states: "In any *involuntary* proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental

153. The procedural safeguards for voluntary terminations also apply to voluntary consents to foster care placement. 25 U.S.C. § 1913 (1988).

154. *Id.* § 1913(a).

155. *Id.*

156. *Id.*

157. The statutory language does not appear to be limited to protecting the rights of an Indian parent. The Act defines parent as "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." *Id.* § 1903(9). Thus, no distinction is made between Indian and non-Indian biological parents although there is a distinction drawn between Indian and non-Indian adoptive parents. See *In re Adoption of T.N.F.*, 781 P.2d 973 (Alaska 1989), *cert. denied*, 494 U.S. 1030 (1990) (reasoning that the Act applied to protect interest of non-Indian biological mother).

158. 25 U.S.C. § 1911(c). Note that the right to intervene applies only to foster care placement and the termination of parental rights. It does not apply to two other child custody proceedings: preadoptive placement and adoptive placement. See *id.* § 1903(1).

rights to, an Indian child shall notify . . . the Indian child's tribe"¹⁵⁹ There is no analogous provision concerning voluntary proceedings.

Although the Act appears explicitly to give the tribe the right to intervene in any proceeding for foster care placement or termination of parental rights, voluntary or involuntary, the commentary to the BIA Guidelines states that there is neither a right to notice nor intervention in voluntary proceedings.¹⁶⁰ A number of other commentators agree with this conclusion.¹⁶¹ The only case directly addressing the issue of the tribal right to notice in voluntary proceedings is *Catholic Social Services, Inc. v. C.A.A.*¹⁶² There the court held, over a strong dissent, that the tribe had no right to notice, and stated in dicta that the tribe had no right to intervene.¹⁶³ The dissent argued that the language regarding the tribe's right to intervene unambiguously applied to any proceeding, voluntary or involuntary, and the right to intervene was meaningless unless there was a parallel right to notice of the proceeding.¹⁶⁴ Both the commentary to the BIA's Guidelines and the majority opinion in *Catholic Social Services* rely on the Act's recognition of the parent's interest in confidentiality in determining that the tribe's rights are limited in voluntary placements.¹⁶⁵

159. *Id.* § 1912(a) (emphasis added).

160. "Under the Act confidentiality is given a much higher priority in voluntary proceedings than in involuntary ones. The Act mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones." BIA Guidelines, *supra* note 24, 44 Fed. Reg. at 67,586.

161. *See, e.g.*, Russel Lawrence Barsh, *The Indian Child Welfare Act of 1978: A Critical Analysis*, 31 HASTINGS L.J. 1287, 1312-13 (1980); Jesse C. Trentadue & Myra A. DeMontigny, *The Indian Child Welfare Act of 1978: A Practitioner's Perspective*, 62 N.D. L. REV. 487, 513 n.162 (1986).

162. 783 P.2d 1159 (Alaska 1989), *cert. denied*, 495 U.S. 948 (1990); *see also In re J.J.*, 454 N.W.2d 317, 327 (S.D. 1990) ("Tribe has acknowledged that it was not entitled to notice of the parental termination as a § 1913(a) proceeding.").

163. *Catholic Social Servs.*, 783 P.2d at 1160.

164. *Id.* at 1162-63 (Rabinowitz, J., dissenting).

165. *See id.* at 1160, n.2; *see also* BIA Guidelines, *supra* note 24, 44 Fed. Reg. at 67,586.

Under the Act confidentiality is given a much higher priority in voluntary proceedings than in involuntary ones. The Act mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones. [Citations omitted]. For voluntary placements, however, the Act specifically directs state courts to respect parental requests for confidentiality. 25 U.S.C. § 1915(c). The most common voluntary placement involves a newborn infant. Confidentiality has traditionally been a high priority in such placements. The Act reflects that traditional approach by requiring deference to requests for anonymity in voluntary placements but not in involuntary ones. This guideline [concerning determination by the tribe whether the child is a member or eligible for membership] specifically provides that anonymity not be compromised in seeking verification of Indian status. If anonymity were compromised at that point, the statutory requirement that requests for anonymity be respected in applying the preferences would be meaningless.

Id.

Those who state that the tribe has no right to intervene in a voluntary proceeding rely on the maxim of statutory construction *expressio unius est exclusio alterius*, i.e., "expression of one thing is the exclusion of another." Although section 1911(c) is comprehensive and does not distinguish between voluntary and involuntary proceedings, specific mention of the right to intervene is found again in section 1912(a), which designates the kind of notice required in involuntary proceedings. It is not, however, repeated in section 1913 governing voluntary proceedings. As noted by one commentator on statutory construction,

[The maxim *expressio unius est exclusio alterius*] . . . is a rather elaborate, and mysterious sounding, anachronistic way of describing the negative implication. Far from being a rule, it is not even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes it does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore, there is not even a mild presumption here. Accordingly, this maxim is at best a description, after the fact, of what the court has discovered from context.¹⁶⁶

With respect to the right to intervene, the context provides that the right applies to any "State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child."¹⁶⁷ The language of section 1912 relates primarily to notice, mentioning the right to intervene solely as the content of the notice: "In any involuntary proceeding in a State court . . . the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the . . . Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and their right of intervention."¹⁶⁸ This context supports the tribe's right to intervene in voluntary proceedings.

In *Mississippi Band of Choctaw Indians v. Holyfield*,¹⁶⁹ the Supreme Court, in a voluntary proceeding, allowed the tribe to challenge the state court's exercise of jurisdiction even though the parents wished the matter to be decided in state court. In a footnote, the Court observed that the Act allows the tribe to intervene in any termination proceeding and that "termination proceeding" is defined as "any action resulting in the termination

166. REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 234-35 (1975).

167. 25 U.S.C. § 1911(c) (1988).

168. *Id.* § 1912(a).

169. 490 U.S. 30 (1989).

of the parent-child relationship."¹⁷⁰ Although the Court does not comment on the right to notice, the Court suggests that the tribe's right to intervene is undisputed. This is supported by section 1914, which allows a tribe to bring an action to invalidate a termination of parental rights which fails to comply with the voluntary termination provisions.¹⁷¹ It would make little sense to allow a tribe to bring an action to invalidate such a termination but not allow it to intervene.¹⁷² Therefore, the commentary suggesting that a tribe does not have a right to intervene in voluntary proceedings is unfounded.

The dissonance between the right to intervene and the right to notice is perhaps the result of sloppy draftsmanship. The committee reports do not comment on the discrepancy.¹⁷³ The draft of the bill which initially passed the Senate provided for notice to the tribe in any proceeding, voluntary or involuntary, if the child had significant tribal contacts.¹⁷⁴ Testimony at the

170. *Id.* at 39 n.12.

171. 25 U.S.C. § 1914. The section states:

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 1911 [tribal jurisdiction], 1912 [involuntary proceedings], and 1913 [voluntary termination proceedings] of this title.

Id.

172. Some have argued that tribe and parent must join together in any petition to invalidate a foster care placement or termination of parental rights. Section 1914 uses the conjunction "and," stating that "any parent . . . and the child's tribe may petition . . ." *Id.* § 1914. The cases which have considered this argument have rejected it. *See, e.g., In re Kreft v. Lawless*, 384 N.W.2d 843 (Mich. Ct. App. 1986); *In re Begay v. Rael*, 765 P.2d 1178 (N.M. Ct. App. 1988).

173. A second discrepancy relating to voluntary proceedings is also contained in the Act. Section 1913(b) provides, "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." 25 U.S.C. § 1913(b) (1988). Anomalously, "foster care placement" is defined as "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. . . ." *Id.* § 1903(1)(i). Some courts have used this definition of "foster care placement" to conclude that the ICWA does not apply to voluntary foster care placements. *See, e.g., D.E.D. v. State*, 704 P.2d 774, 781-82 (Alaska 1985); *Sayers v. Beltrami Co.*, 472 N.W.2d 656, 661 (Minn. Ct. App. 1991), *rev'd on other grounds*, 481 N.W.2d 547 (Minn. 1992). Other courts have rejected this reading because it would render § 1913(b) meaningless. *See, e.g., In re Adoption of K.L.R.F.*, 515 A.2d 33, 36-38 (Pa. Super. Ct. 1986), *appeal dismissed*, 533 A.2d 708 (Pa. 1987).

174. The Senate bill stated:

In the case of any Indian child who is not a resident of an Indian reservation or who is otherwise under the jurisdiction of a State, if said Indian child has significant contacts with an Indian tribe, no child placement shall be valid or given any legal force and effect, except temporary placements under circumstances where the physical or emotional well-being of the child is immediately and

hearings on the Act raised concerns about the confidentiality to be afforded parents voluntarily terminating their parental rights,¹⁷⁵ but there is no evidence of whether Congress intended to respond to that testimony by deleting provisions for tribal notice in voluntary proceedings. Confidentiality is protected in section 1915, concerning placement preferences.

It is not incongruous to protect confidentiality in the placement provisions while requiring tribal notice. The tribe, as a sovereign, may be expected to maintain the confidentiality of the parent. While this may be practically difficult in some small tribes, it is not conceptually different from the situation faced in any small community where the court will enter a termination of parental rights. The tribe, as a governmental entity, may be trusted to maintain confidences. On the other hand, if the placement preferences were followed, the extended family of the parent relinquishing parental rights would be evaluated as potential placements.¹⁷⁶ Notification of family would be a much greater intrusion into the parent's privacy than notification of the tribe. Even with respect to the placement provisions, the parent's interest in confidentiality does not negate the preferences. It is merely a factor to be considered by the court. The Act provides "[t]hat where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences."¹⁷⁷ The House Committee Report notes that "[w]hile the request for anonymity should be given weight in determining if a preference should be applied, it is not meant to outweigh the basic right of the child as an Indian."¹⁷⁸ The parent's interest in confidentiality is not so overwhelming in the balance drawn by Congress that it overtakes all other interests protected by the Act.

In voluntary placements, the parent's right to privacy and the tribe's right

seriously threatened, unless the Indian tribe with which such child has significant contacts has been accorded thirty days prior written notice of a right to intervene as an interested party in the child placement proceedings.

S. 1214, 95th Cong., 1st Sess. § 102 (c) (1977), *reprinted in 1978 Hearing, supra* note 17, at 13.

175. *See, e.g., id.* at 85-90 (statement of Sister Mary Clare, Director of Catholic Social Services, Anchorage, Alaska).

176. "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 member's of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1914(a) (1988).

177. *Id.* § 1915(c). For an interesting discussion of the parent's right to confidentiality in relation to the tribe's right to participate in the placement decision, see *In re Baby Girl Doe*, 865 P.2d 1090 (Mont. 1993). In this case, a tribe sought disclosure of the mother's identity in order to assure that any child placement conformed to the preferences set forth in the Act. Although the court weighed the mother's interest in privacy, it concluded, "To give primary importance to the mother's request for anonymity would defeat the Tribe's right to meaningful intervention and possibly defeat application of the clear preference provided by statute for placement . . . with a member of [the child's] extended family." *Id.* at 1095.

178. H.R. REP. NO. 1386, *supra* note 15, at 23, *reprinted in 1978 U.S.C.C.A.N.* at 7546.

to notice of the proceeding conflict. The Act, unfortunately, sets no clear mandate for the resolution of this conflict. Predictably, the one state court to address the issue resolved it in favor of individual rights.¹⁷⁹ Voluntary adoptions remain a serious source of "out placement" of Indian children. Unless tribes are given notice of these proceedings, tribes cannot protect their own interests in assuring compliance with the exclusive jurisdiction provisions of the Act where the child is a reservation domiciliary and their interest in keeping children within the tribal community through the placement preferences. Further, "voluntary proceedings" may not always be truly voluntary. Agencies may make implied threats to parents or may otherwise encourage a parent to consent to a foster care placement or to a termination of parental rights.¹⁸⁰ In such circumstances, tribal participation may be essential to protect the rights of parents as well as tribal rights. The Act should be clarified to unquestionably provide for tribal notice in voluntary proceedings.

Until Congress acts to clarify this issue, courts should construe the Act consistently with its collectivist goals and require notice to the tribe in any voluntary proceeding. Nowhere in the Act does it state that notice is not to be given in voluntary proceedings. If the Act were totally silent, the courts would be likely to construe the right to intervene to carry with it the right to notice of the pendency of the proceeding. The mere fact that specific reference to notice is made in the section on involuntary proceedings should not be read to negate the right to notice in voluntary proceedings.

IV. Proposals for Change

The genius of the ICWA is its reliance on jurisdictional provisions and provisions which allow tribal participation in the decision making about Indian children. This approach recognizes the interest of the tribe as sovereign in the welfare of its people. Further, it provides a framework for decision making in which tribal customs and mores are considered, are valued, and are less likely to be misinterpreted by social workers and others in the child welfare system. Because the tribe is competent to recognize and act in the best interests of the child,¹⁸¹ this approach does not sacrifice the child's interest

179. *Catholic Social Serv., Inc. v. C.A.A.*, 783 P.2d 1159 (Alaska 1989), *cert. denied*, 495 U.S. 948 (1990).

180. *See, e.g.*, Peter W. Gorman & Michelle Therese Paquin, *A Minnesota Lawyer's Guide to the Indian Child Welfare Act*, 10 LAW & INEQ. J. 311, 330 (1992).

181. *See* NATIONAL INDIAN JUSTICE CTR., INDIAN YOUTH AND FAMILY LAW ch. 11, at 5-6 (1985) ("An especially critical problem for tribal courts concerns the prospect of non-Indian persons attempting to adopt Indian children. . . . [T]he Tribal Court Judge must make his/her decision on the adoption petition based upon the best interests of the child.").

The competence of child welfare systems of individual tribes may certainly vary, as they do among the states. There is no overwhelming evidence, however, that state child welfare systems do appreciably better. *See, e.g.*, Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional*

to the tribal interest.

Not all of the provisions of the ICWA operate through recognizing the sovereign interests of tribes. Placement priorities, for example, protect the tribe's interest in membership and in fostering a relationship with people who are tribal members or who are eligible to be tribal members. Although sovereignty would be meaningless to a tribe that lost its members, the interests protected by placement preferences are fundamentally of a different nature than the interests protected through provisions assuring tribal participation in the decision making about Indian children. Placement priorities directly affect the final determination reached by a court while other provisions assure tribal participation in decision making but do not directly affect result. Individual interests are more likely to come into conflict with tribal interests in provisions such as placement priorities than they are as a result of provisions recognizing tribal jurisdiction or tribal involvement in decision making.¹⁸² Any proposal for change which seeks to remedy the problems encountered in enforcement of the Act without increasing the tension between tribal and individual interests, therefore, should be measured by the extent to which it will increase tribal participation in the decision making about Indian children without firmly dictating the outcome in specific cases.

Unfortunately, the role of the tribe frequently has been circumscribed by state courts imposing unwarranted restrictions on the applicability of the Act or on enforcement of the Act. Some of these restrictions can be addressed directly by legislation; other problems can be addressed by increasing tribal involvement through state-tribe agreements, such as that reached between the

Protection of Foster Children from Abuse and Neglect, 23 HARV. C.R.-C.L. L. REV. 199 (1988); Jeanine L. English & Michael R. Tritz, *In Support of the Family: Family Preservation as an Alternative to Foster Care*, 4 STAN. L. & POL'Y REV. 183 (1992-93); Marcia Chambers, *The System Fosters Abuse of Children*, NAT'L L.J., Apr. 8, 1991, at 13-14 (describing delays in the New York Family Court System); Rob Karwath & Rick Pearson, *DCFS May Face Quagmire, Hiring Push is Slipshod, Monitor Says*, CHI. TRIB., May 22, 1993, at 1 (reporting on failure of the Illinois Department of Children and Family Services to comply with 1991 settlement agreement reached in a lawsuit brought by the ACLU against the department); Rob Karwath, *DCFS Again Runs Out of Shelter Space*, CHI. TRIB., July 20, 1993, at 1 (reporting that children in the care of the Illinois Dept. of Children and Family Services were found sleeping on cots in offices in Chicago because of a lack of appropriate foster homes). Federal assistance to the tribes could assist in improving these systems. See *infra* notes 226-50 and accompanying text.

182. State courts have viewed jurisdictional provisions and provisions for tribal involvement as being in conflict with the rights of parents and children at times. See *supra* notes 121-34 and accompanying text. These views are based more on a distrust of tribal courts and tribal participation than on any real conflict of rights.

State of Washington and twenty Washington tribes,¹⁸³ and by providing for firm, reliable funding for the operation of tribal child welfare systems.

A. Amendments to the ICWA

There is a strong need for legislative response to state-court interpretation of the Act. Unlike most federal legislation, the case law on the Act is made in state court, not federal court. Uniformity can emerge from the courts only by Supreme Court review. The few attempts to obtain federal court review have found that a state court determination that the Act is inapplicable is *res judicata* and not subject to collateral attack in the federal court.¹⁸⁴ Although federal jurisdiction has been recognized in a few narrow instances,¹⁸⁵ there is little opportunity for relief from state court judgments that misapply the Act. The impetus for passage of the Act came from inappropriate responses by state courts and welfare agencies to child welfare issues among Indian people. These same bodies should not be allowed to narrow the applicability of the Act without legislative intervention.

The ICWA should be amended to strengthen tribal participation in decision making about Indian children. Congress should reverse the limitations imposed by state courts on tribal participation, and the tribal role should be enhanced by additional provisions. There are four specific recommendations that will accomplish these goals. First, the "existing Indian family" requirement should be clearly rejected. Second, the provision allowing a state court to refuse to transfer a case to tribal court for "good cause" should be redrafted to indicate that this is exclusively a *forum non conveniens* provision, and that the state court's lack of confidence in the tribal court or fear that the best interests of the child will not be protected in tribal court do not constitute

183. See Washington State Welfare Manual, *supra* note 11; see also New Mexico Model Tribal-State Indian Child Welfare Agreement, reprinted in Toby Grossman, *State Legislative Reform and Tribal/State Agreements* app., in NATIONAL CONFERENCE ON THE INDIAN CHILD WELFARE ACT at tab 4 (materials from a conference sponsored by the Indian Law Support Center and held at Tempe, Az., Sept. 23, 1993).

184. See, e.g., *Kiowa Tribe of Okla. v. Lewis*, 777 F.2d 587 (10th Cir. 1985), *cert. denied*, 479 U.S. 872 (1986); *Kickapoo Tribe of Okla. v. Rader*, 822 F.2d 1493 (10th Cir. 1987); see also *Confederated Tribes of the Colville Reservation v. Superior Court of Okanogan Co.*, 945 F.2d 1138 (9th Cir. 1991) (finding no federal jurisdiction to give declaratory relief in dispute over whether state court properly had jurisdiction of custody dispute between Indian woman and non-Indian man); *Navajo Nation v. District Court for Utah Co.*, 624 F. Supp. 130 (D. Utah 1985), *aff'd*, 831 F.2d 929 (10th Cir. 1987).

185. *Native Village of Venetie I.R.A. Council v. State of Alaska*, 944 F.2d 548 (9th Cir. 1991) (finding federal court has jurisdiction to enforce full faith and credit provisions of the ICWA through injunctive and declaratory relief where state failed to give full faith and credit to tribal court adoptions); *Roman-Nose v. New Mexico Dep't of Human Serv.*, 967 F.2d 435 (10th Cir. 1992) (holding federal court has subject matter jurisdiction over an action brought under 25 U.S.C. § 1914 which collaterally attacked a state court proceeding for failing to comply with provisions of §§ 1911-1913).

"good cause" to deny transfer. Third, the Act should be amended so that a tribe receives notice of any voluntary relinquishment of parental rights made by the parent of an Indian child, and, in order to allow the tribe to assure compliance with the preference provisions of section 1915, the tribal right to intervene should be extended to preadoptive placements and adoptions. Finally, a new provision should be adopted, stating that the recommendation of an intervening tribe in a state-court Indian child custody proceeding should be given great weight. Each of these provisions is designed to protect tribal participation in decision making with minimal conflict with individual rights of the parents or the child.

By the time ICWA issues reach the state courts, however, there has often already been a failure in state-tribe cooperation. The ICWA primarily addresses the role of tribes once adjudicatory proceedings have begun. Child welfare agency involvement with troubled families usually begins long before any adjudication occurs. Tribal input at this early point would reduce conflict at the adjudicatory stage and would further the underlying policies of the Act. Therefore, the federal government should monitor state compliance with the Act, facilitate state-tribe agreements and provide funding and other assistance to strengthen tribal child welfare programs. By strengthening tribal child welfare programs and by facilitating state-tribe agreements, the federal government could do much to allay the mistrust which sometimes exists between state agencies and the tribes.

1. Prior Attempts to Amend the ICWA

Any consideration given to amending the ICWA should be made against the backdrop of previous attempts to amend the Act. In 1988, the Senate conducted hearings on Senate Bill 1976, which would have amended the ICWA extensively to remedy many of the then-perceived problems with the Act.¹⁸⁶ The proposed amendments, however, never moved beyond committee. Although there is some overlap, the amendments proposed in 1988 were more far reaching than the proposals made here and did not distinguish between provisions which increased the role of the tribe in decision making and those which affected ultimate decisions about placement.

The 1988 proposed amendments would have significantly shifted the balance between individual rights and tribal interests, protecting tribal interests through mechanisms that more directly impinge upon individual rights than do jurisdictional provisions, and provisions that assure tribal participation in decision making. For example, the enactment of Senate Bill 1976 would have limited a state court's right to consider interests other than

186. See S. 1976, *supra* note 69, reprinted in *1988 Hearing, supra* note 5, at 3-45. For a critique arguing that the changes proposed in this bill would have violated the equal protection clause of the fourteenth amendment of the United States Constitution, see Renner, *supra* note 69.

"the best interests of the child as an Indian."¹⁸⁷ The policy declaration would have been amended to provide, "[T]he Congress hereby declares its intent to protect the right of Indian children to develop a tribal identity and to maintain ties to the Indian community within a family where their Indian identity will be nurtured."¹⁸⁸ Placement preferences would have become mandatory unless certain very specific criteria for variance were met.¹⁸⁹ Flexibility to meet the needs of individual children would have been lost.

Among the most controversial of the proposed amendments was a change in the definition of "Indian child."¹⁹⁰ Under the amended definition, a child subject to the Act because of his or her eligibility for tribal membership would not need to be "the biological child of a member of an Indian tribe," as is required by the current Act.¹⁹¹ In an even more far-reaching provision, the term "Indian child" was defined to encompass any child who is of "Indian descent and [who] is considered by an Indian tribe to be part of its community."¹⁹²

These amendments addressed some troubling problems. Under the current definition, children living in Indian communities may be excluded from coverage because of membership systems premised on matrilineal or patrilineal descent, or because they do not meet the blood quantum requirements because their Indian blood is derived from several tribes.¹⁹³ Nevertheless, the amendments proposed in Senate Bill 1976 were troubling. When the ICWA was initially considered in Congress, the Justice

187. See S. 1976, *supra* note 69, §§ 101(b), 105, reprinted in 1988 Hearing, *supra* note 5, at 14, 24-27.

188. *Id.* § 3, reprinted in 1988 Hearing, *supra* note 5, at 6.

189. *Id.* § 105(b), (d), reprinted in 1988 Hearing, *supra* note 5, at 24-26. Under these provisions, the strict placement preferences could be avoided in only three circumstances: (1) where a child over the age of twelve and of sufficient maturity requested a different placement; (2) where, through expert testimony, it was established that the child had extraordinary physical or emotional needs which could not be met through the placement preferences, and (3) where, after diligent search, families within the placement preferences could not be located. *Id.* § 105(d), reprinted in 1988 Hearing, *supra* note 5, at 25-26.

190. *Id.* § 4(5), reprinted in 1988 Hearing, *supra* note 5, at 9-10.

'Indian child' means any unmarried person who is under age eighteen and is —

(a) a member of an Indian tribe, or

(b) is eligible for membership in an Indian tribe, or

(c) is of Indian descent and is considered by an Indian tribe to be part of its community. . . . ; if a child is an infant he or she is considered to be a part of a tribal community if either parent is so considered

Id.

191. See 25 U.S.C. § 1903(4) (1988).

192. S. 1976, *supra* note 69, § 4(5)(c), reprinted in 1988 Hearing, *supra* note 5, at 9.

193. *Indian Child Welfare Act: Hearing Before the Senate Select Committee on Indian Affairs on Oversight Hearings on the Indian Child Welfare Act*, 100th Cong., 1st Sess. 116, 170 (1987) [hereinafter *Oversight Hearings*] (app. B to statement on behalf of the AAIA, delivered by Jack F. Trope, staff attorney).

Department raised concerns about the constitutionality of the Act.¹⁹⁴ These concerns were somewhat ameliorated by a revision narrowing the definition of "Indian child" to that which now appears in the Act.¹⁹⁵ At least one commentator has argued that the proposed expansion of the definition in Senate Bill 1976 would violate the equal protection clause.¹⁹⁶

Other proposed amendments would have been similar to those made in this article. For example, the definition of "child custody proceeding" would have been amended to explicitly overturn the "existing Indian family requirement";¹⁹⁷ a state court would have less discretion to refuse to transfer the action to tribal court,¹⁹⁸ and tribal notice would be required for voluntary termination proceedings.¹⁹⁹ In addition, the proposed amendments provided for federal review of state court decisions through either a petition for habeas corpus or in an independent action.²⁰⁰

The Reagan administration strongly opposed the bill, labelling it "pure racism."²⁰¹ Others objected to the bill's requirement of tribal notification of proceedings to voluntarily terminate parental rights as an intrusion on the privacy rights of birth parents who wanted to place their children for adoption.²⁰² Much of the testimony before the Senate Select Committee on Indian Affairs concerned the cross-cultural conflict addressed in this article. Representatives of adoption agencies and attorneys who represent adoptive parents in private adoptions argued that the proposed amendments would interfere with birth mothers' rights.²⁰³ Tribal representatives tried to

194. H. REP. NO. 1386, *supra* note 15, at 35-41, *reprinted in* 1978 U.S.C.C.A.N.: at 7558-64 (letters of Feb. 9, 1978 and May 23, 1978, from Patricia M. Wald, Assistant Attorney Gen., U.S. Dep't of Justice, to Sen. Morris Udall, Chairman, Comm. on Interior & Insular Affairs, House of Representatives).

195. *Id.* at 39, *reprinted in* 1978 U.S.C.C.A.N. at 7561-62.

196. Renner, *supra* note 69.

197. "[C]hild custody proceeding' shall mean and include any proceeding referred to in this subsection . . . regardless of whether the child has previously lived in Indian country, in an Indian cultural environment or with an Indian parent . . ." S. 1976, *supra* note 69, § 4(1), *reprinted in* 1988 Hearing, *supra* note 5, at 7.

198. The amendments limited the state court's right to refuse to honor a request for transfer to tribal court to three situations: (1) where a parent objected and nontransfer was in the "best interest of the child as an Indian," (2) where the request for transfer was not timely made, or (3) where the tribe declined the transfer. *Id.* § 101(b), *reprinted in* 1988 Hearing, *supra* note 5, at 14.

199. *Id.* § 103, *reprinted in* 1988 Hearing, *supra* note 5, at 20-23.

200. *Id.* § 104 (b), *reprinted in* 1988 Hearing, *supra* note 5, at 24.

201. Letter from Donald Paul Hodel, Secretary of the Interior, to Sen. Daniel K. Inouye, Chairman, Senate Select Committee on Indian Affairs (May 11, 1988), *reprinted in* 1988 Hearing, *supra* note 5, at 113-14.

202. 1988 Hearing, *supra* note 5, at 68 (statement of Robert B. Flint, Counsel and Board Member, Catholic Social Services, Anchorage, Alaska).

203. *See, e.g.*, 1988 Hearing, *supra* note 5, at 77 (statement of Robert B. Flint, Counsel and Board Member, Catholic Social Servs., Anchorage, Alaska, on proposal to limit a court's

explain the importance of relationships outside the nuclear family in tribal societies.²⁰⁴ Ultimately, the bill did not pass. Although it did not move out of committee in 1988, the legislative agenda of the Senate Select Committee on Indian Affairs in the 101st Congress suggested that the issue would be revisited.²⁰⁵ The amendments, however, were never made. The bill may have tried to do too much at one time; it may have been affected by the Supreme Court's resolution of some of the most pressing issues in *Mississippi Band of Choctaw Indians v. Holyfield*.²⁰⁶ One person active in Indian child welfare speculated that the bill did not move forward because the tribes, which had other pressing concerns at that time, simply did not lobby hard enough.²⁰⁷

In comparison to the amendments considered in 1988, the recommendations made here are narrow, addressing specific trouble spots encountered in the courts. Where possible, the proposed amendments cure deficiencies in current practices under the Act by increasing tribal involvement. These proposals are not intended to be comprehensive. There are, no doubt, other areas of difficulty with the Act.²⁰⁸ Nevertheless,

discretion to vary from the placement preferences) ("All I want to do in this sort of group area is carve out a small right of individuals to make choices, and that is all . . ."); *id.* at 82 (statement of Marc Gradstein, attorney at law, San Francisco, Calif.) ("I am not saying that we want to have the mother not make a placement that is sensitive to the needs of this child and the cultural needs of this child, whatever background it may have. But I think we have to let her make that choice, not a court.").

204. 1988 Hearing, *supra* note 5, at 97 (statement of Evelyn Blanchard, Vice President, National Indian Social Workers Ass'n, Portland, Or.)

As was explained to Congress repeatedly when the law was being developed, Indian people have two relational systems. They have a biological relational system, and they have a clan or band relational system. It is the convergence, if you will, of these two systems in a tribal society that creates the fabric of tribal life. And each of us as an Indian person has a very specific place in the fabric. We have very specific responsibilities within the fabric. Those responsibilities are our rights, individual rights. And even our mother has no right to deny us those rights.

Id.

205. Senator Inouye stated:

In the last Congress the Select Committee considered legislation to amend the Indian Child Welfare Act of 1978. In the course of the hearings it became clear that there have been problems in the implementation of this act and that some legislation is desirable. Nevertheless, the bill before us was flawed and it did not move forward. I anticipate the development of a new bill — one which will add a child protection component to the bill — and look forward to the introduction of this new bill early in this session of the Congress.

135 CONG. REC. S798-99 (daily ed. January 25, 1989) (statement of Sen. Inouye).

206. 490 U.S. 30 (1989).

207. Telephone Interview with Jan Goslin (Sept. 10, 1993).

208. For example, some have raised the problem with the definition of "Indian" in 25 U.S.C. § 1903(3) (1988), as it relates to Alaskan Natives. *See, e.g.*, Barsh, *supra* note 161, at 1308-10.

attempts to amend the Act should emphasize the tribal role in decision making rather than compel particular decisions. Amendments that compel particular decisions will come into more intense conflict with the individual rights ethic of the dominant culture and will meet with more opposition both in Congress and the courts.

2. *Specific Amendments*

a) *Definition of "Child Custody"*

The definition of "child custody proceeding" in section 1903 of the Act should be amended to provide (with new language in italics):

(1) "child custody proceeding" shall mean and include *the following, regardless of whether the child has previously lived in Indian country, in an Indian cultural environment or with an Indian parent —*

(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~~ *any administrative, adjudicatory or dispositional action, including a voluntary proceeding under 25 U.S.C. § 1913, which may result in the placement of an Indian child in a foster home or institution, group home or the home of a guardian or conservator;*

(ii) "termination of parental rights" which shall mean *any adjudicatory or dispositional action, including a voluntary proceeding under 25 U.S.C. § 1913, which may result* ~~any action resulting~~ *in the termination of the parent-child relationship or the permanent removal of the child from the parent's custody;*

(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 any~~ *permanent placement of an Indian child for adoption, including any action resulting* *voluntary proceeding under 25 U.S.C. § 1913, which may result in a final decree of adoption.*

~~Such term or terms~~ *The term "child custody proceeding" 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 nor shall*

it include a placement based upon an award of custody to one of the parents in a custody contest between the parents. All other child custody proceedings involving family members are covered under this Act.

These proposed changes are derived, with only minor modification, from some of the amendments proposed in Senate Bill 1976.²⁰⁹ They are designed to close some of the loopholes that state courts have created to avoid application of the Act. The "existing Indian family" requirement imposed by some courts is repudiated by the clarification that the term "child custody proceeding" applies "regardless of whether the child has lived in Indian country, in an Indian cultural environment or with an Indian parent." The definition of "foster care placement" is redrafted so that it does not conflict with the use of that term in section 1913 which addresses voluntary foster care placements.²¹⁰ These provisions are currently inconsistent.

The definition of "termination of parental rights" is amended to explicitly include voluntary relinquishment of rights. This change in definition will clarify the tribe's right to intervene in and seek transfer of voluntary as well as involuntary proceedings. The provision is also modified to cover permanent custodial placements such as guardianships.²¹¹ The definition of "adoptive placement" is also amended to include explicitly voluntary proceedings, and the definition is made applicable to "any" proceeding to clarify that private as well as agency adoptions are covered by the term.

Finally, the divorce exception is amended to clarify that it applies only to custody disputes between parents and is not to be extended to any custody dispute among members of an extended family.²¹² The language is broadened to include any custody dispute between parents. The existing language, if applied literally, would not exclude custody disputes between parents who are separated but not divorced, between parents after a divorce, or between unmarried parents. The intent of the Act was to exclude disputes between parents. The existing language is unduly restrictive.

209. S. 1976, *supra* note 69, § 4(1), *reprinted in 1988 Hearing, supra* note 5, at 7-8.

210. *See* discussion *supra* note 173 and accompanying text.

211. *Oversight Hearings, supra* note 193, at 116, 168 (app. B to statement on behalf of the AAIA, delivered by Jack Trope, staff attorney).

212. Some courts have read the divorce exception broadly to apply to any dispute among members of an extended family, thus narrowing the application of the Act. *See, e.g., In re Bertelson*, 617 P.2d 121 (Mont. 1980). *But see In re Guardianship of Q.G.M.*, 808 P.2d 684 (Okla. 1991); *In re Crystal K. v. Joseph K.*, 276 Cal. Rptr. 619 (Ct. App. 1990), *review denied*, 1991 Cal. LEXIS 1156 (Mar. 14, 1991), *cert. denied*, 502 U.S. 862 (1991).

b) Transfer to Tribal Court

The provisions for transfer to tribal court should be amended to provide that, upon petition, the state court must make the transfer unless a parent objects, the tribal court declines jurisdiction or conditions warrant maintaining the action in state court on limited forum non conveniens grounds. Section 1911(b) should be amended to provide (with new language in italics):

~~In any state court proceeding for the foster care placement of, or termination of parental rights to child custody proceeding concerning 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 objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe. Provided That such transfer shall be subject to declination by the tribal court of such tribe.~~ *shall upon petition of either parent, an Indian custodian or the Indian child's tribe, transfer such proceeding to the jurisdiction of the tribe unless either parent objects, the tribe declines jurisdiction, the tribal court will be unable to compel or obtain the attendance of necessary witnesses or the petition is made at an advanced stage of the proceedings and the petitioner did not file the petition within a reasonable time of receiving notice of the proceeding. A parent may revoke an objection to transfer at any time. If a transfer is denied because of the unavailability of witnesses in the tribal court, subsequent proceedings concerning that child should be transferred if the unavailable witnesses will not be required to testify in the subsequent proceeding.*

The amendments here are designed to limit the state courts' discretion in ruling on motions to transfer. The "best interests of the child" is not a relevant consideration on the issue of jurisdiction. Nevertheless, where a custody proceeding is pending far from the reservation, a tribal court could not compel the attendance of necessary witnesses. In such circumstances the proceeding should remain in the state court. The provision concerning subsequent proceedings is designed to allow a placement determination to be made in a tribal court after the state court has terminated parental rights.

c) Notice to Tribe of Voluntary Proceedings

The most comprehensive study conducted on the implementation of the ICWA concluded that the ambiguity about the tribe's right to notice in voluntary proceedings was one of the points of greatest confusion under the

Act.²¹³ Some states which have adopted state Indian child welfare acts provide for tribal notice in voluntary proceedings.²¹⁴ Elsewhere, such a requirement has been imposed by state-tribe agreements.²¹⁵ Therefore, empirical data on the effect of this practice on maintenance of confidentiality should be available to Congress should it seek to clarify the notice requirement. Anecdotal evidence suggests that the confidentiality concerns raised by opponents to notice in voluntary proceedings only rarely affect the decision making of parents seeking to voluntarily terminate parental rights.²¹⁶ The tribe is a governmental entity, and, as such, concerns about entrusting the tribe with confidential information should be no greater than those expressed about providing confidential information to other governmental entities. As state-tribe agreements become more prevalent, procedures for maintenance of confidentiality may appropriately be an area to be addressed in these agreements.

The proposed amendments to the definition of "child custody proceeding" underscore the fact that the term includes voluntary proceedings. References to child custody proceedings in section 1911, concerning jurisdiction and intervention, thus would more clearly encompass voluntary proceedings. In addition, section 1913 should be amended by adding a subsection parallel to that in section 1912, providing that notice of the proceeding and the right to intervene must be sent to the tribe ten days prior to any voluntary child custody proceeding. The duty to send the tribe notice should be placed on the following, in descending order: (1) any governmental or private agency facilitating the placement; (2) any private attorney representing the

213. U.S. DEPT OF THE INTERIOR, INDIAN CHILD WELFARE: A STATUS REPORT 10-6 (1988) [hereinafter STATUS REPORT]. This report was prepared under contract by CSR, Inc., Washington, D.C., and Three Feathers Associates, Norman, Okla.

214. See, e.g., Minnesota Indian Family Preservation Act, MINN. STAT. ANN. §§ 257.352 subdivisions 2-3, 257.353 subdivisions 2-3 (West 1992 & Supp. 1995); Oklahoma Indian Child Welfare Act, 10 OKLA. STAT. §§ 40 to 40.9 (West 1987 & Supp. 1995).

215. See Washington State Welfare Manual, *supra* note 11, at 06.97(B)(3) (Sept. 9, 1991) ("Upon filing the relinquishment [of parental rights] petition, the social worker . . . provides the child's tribe with at least twenty (20) working days written notice of the date, time and place of any court proceeding."). The manual implements the agreement reached between the State of Washington and twenty tribes. Memorandum to Tribal Leaders/Indian Organizations/Interested Parties from Members of the Indian Child Welfare Tribal/State Agreement Negotiating Team (Mar. 28, 1990), *reprinted in* Washington State Welfare Manual, *supra* note 11.

216. Telephone Interview with Ted Stamos, Director of Open Adoption and Pregnancy Counselling, Children's Home Society of Minn. (Oct. 22, 1993). One social worker reported that she knew of no case where the tribe had sought to intervene where the parent requested confidentiality. She did report one case where an Indian mother who was pregnant as a result of a rape decided to keep the child rather than place the child for adoption because of her concerns about tribal notice. Telephone Interview with Rosemary Stewart, Social Worker, Lutheran Social Servs., Minneapolis, Minn. (October 22, 1993). *But see In re Baby Girl Doe*, 865 P.2d 1090 (Mont. 1993) (refusing to abide by parent's request for anonymity where tribe sought identity of mother in order to advocate for placement with next of kin).

biological parent or custodian, the foster parent, or the adoptive or preadoptive parent(s), or (3) if no attorney is involved, the party who is consenting to the placement or termination of parental rights.

d) Deference to Tribal Input in State Court Proceedings

The tribe's right to intervene in a state court child custody proceeding is an important mechanism for protecting the role of the tribe in decision making about Indian children. Intervention is important for two additional reasons. First, in an involuntary proceeding for the termination of parental rights, the tribe is in a position to inform the court if the alleged grounds for termination reflect a cultural bias. The House Committee Report on the Act repeatedly expressed concern that many Indian children were being removed from their homes because of misperceptions about culturally appropriate parenting. The report cited, for example, the problem of social workers seeking to terminate parental rights on the ground of neglect where the parent left the child for an extended period with someone who was not part of the nuclear family. Because of the tribal view of the extended family where many relatives may be regarded as close, the parent's action in these circumstances may have been culturally appropriate.²¹⁷ The Act tries to avoid this cultural misunderstanding, in part, through the requirement that the testimony of a qualified expert witness be elicited in an involuntary proceeding.²¹⁸ Nevertheless, participation by the tribe is another important check on this problem. In addition, the tribal right to intervene protects the tribe's interest in placement of the child within the tribe. Although this interest is protected in part through the placement preferences set forth in section 1915, in some proceedings there may be no party to the litigation other than the tribe which wishes to assure compliance with the preferences. Section 1915 explicitly defers to the tribe if the tribe should, by resolution, adopt a different order of preference.²¹⁹

Both of these interests would be furthered by adoption of a provision that deference should be given to the tribal view on whether there should be an involuntary termination of parental rights and on the proper placement of the child. Such a provision would make it more difficult for a state court to act out of concerns that are culturally biased. Just as the "good cause" provision in section 1911(b) concerning transfer to tribal courts has been misapplied, the "good cause" provision in section 1915 on placement preferences has been misapplied.²²⁰ Requiring a state court to give

217. H.R. REP. NO. 1386, *supra* note 15, at 10, *reprinted in* 1978 U.S.C.C.A.N. at 7532.

218. 25 U.S.C. § 1912(e)-(f) (1988).

219. *Id.* § 1915(c).

220. Indian child welfare advocates identify this as one of the most troubling aspects of enforcing the Act. Telephone Interview with Jan Goslin, *supra* note 207; Telephone Interview with Craig Dorsay, formerly of the Navajo Nation Justice Dep't (Oct. 22, 1993); Telephone

deference to the tribal view on these issues would strengthen the tribal voice in decision making and would further the Act's goals of assuring that child welfare determinations are culturally appropriate.

B. Federal Facilitation of State-Tribe Agreements

The Act specifically provides that states and tribes may enter into agreements concerning Indian child welfare issues.²²¹ State-tribe agreements have been generally well received by both state and tribal officials.²²² These agreements fall into two basic categories: (1) those which are essentially service contracts under which the tribe takes responsibility for specified child welfare services under the state plan in exchange for payment, and (2) those which identify tribal and state rights and responsibilities and provide for coordination between the state and tribe.²²³ The need for the first kind of agreement should be lessened if Congress acts to provide direct funding of tribes as is discussed in the next section. The second kind of agreement can play a significant role in obtaining better implementation of the Act because high-level child welfare officials in the state government are more likely to provide guidance and training on Indian child welfare issues to field workers. Federal facilitation of such agreements could help increase cooperation between tribal and state child welfare officials.

The federal government could undertake a number of actions to facilitate such agreements. This assistance should include technical assistance in the drafting of agreements, the preparation of model agreements, and the maintenance of a clearinghouse that catalogues and provides copies of existing agreements to states and tribes.²²⁴ Funding appropriations to states for child welfare programs or block grants for social service programs should require states to account for their compliance with the ICWA.²²⁵ This too would encourage states to enter into such agreements.

Interview with Frank Seanez, attorney, Office of the Attorney Gen. of the Navajo Nation (Oct. 22, 1993).

221. 25 U.S.C. § 1919.

222. STATUS REPORT, *supra* note 213, at 5-7.

223. *Id.* at 5-17.

224. Some of these ideas were suggested by David Simmons. Telephone Interview with David Simmons, Program Specialist, National Indian Child Welfare Ass'n, Portland, Or. (Oct. 25, 1993).

225. Currently there is no federal monitoring of state compliance with the Act. OFFICE OF INSPECTOR GEN., U.S. DEPT OF HEALTH & HUMAN SERVS., OPPORTUNITIES FOR ACF TO IMPROVE CHILD WELFARE SERVICES AND PROTECTIONS FOR NATIVE AMERICAN CHILDREN 9-10 (1994) [hereinafter OPPORTUNITIES FOR ACF]. The BIA has no formal relationships with state child welfare agencies and the Administration for Children and Families lacks clear jurisdiction to monitor compliance. *Id.*

C. Funding of Tribal Child Welfare Programs

The focus of this article has been on the ICWA in the courts. However, before a child welfare case ever gets to the courts, at least in an involuntary proceeding, the child welfare system has already failed. One of the Act's goals is to promote the stability and security of Indian families. This can be done best by providing social services and support to families in need. One of the best ways to avoid removal of children from Indian families on improper grounds is to have a social welfare system cognizant of the tribe's culture, child-rearing practices, and mores; one of the best ways to heal families where there are difficulties is to provide social services that are culturally sensitive and appropriate.²²⁶ A 1988 study commissioned by the Department of the Interior and the Department of Health and Human Services identified inadequate and unstable funding as the foremost problem faced by tribal child welfare programs.²²⁷ Although funding has increased in the past three years, and some moves toward increased stability of funding have been made, Indian child welfare advocates still identify this area as one of great need.²²⁸

Title II of the ICWA provides for grants to tribes and off-reservation Indian organizations for the development of Indian child and family service programs.²²⁹ Funding under Title II has been problematic, both in terms of amount and in terms of distribution mechanisms. The bill that originally passed the Senate included a provision appropriating \$26 million for fiscal year 1979.²³⁰ The enacted bill deleted the specific appropriations provision and provided for appropriations under the Snyder Act²³¹ which authorizes the BIA to direct the expenditure of funds appropriated by Congress for the welfare of Indians. Funding has never reached the level contemplated by the original Senate bill. For example, in fiscal year 1990, more than ten years after enactment, funding for Title II programs was only \$8.4 million.²³² By

226. As final revisions were being made on this article, the Office of the Inspector General of the Department of Health and Human Services issued a report which outlines options for improving services offered by the Administration for Children and Families concerning Native American children. These options include both the provision of greater informational services and revisions of funding guidelines which would allow direct appropriations to the tribes. *Id.*

227. STATUS REPORT, *supra* note 213, at 6-9.

228. Telephone Interview with Sid Gilson, social worker for Navajo Nation Indian Child Welfare Act Program (Oct. 22, 1993); Telephone Interview with David Simmons, note 225.

229. 25 U.S.C. §§ 1931-1934 (1988).

230. S. 1214, 95th Cong., 1st Sess. § 203(b) (1977), *reprinted in 1978 Hearing, supra* note 17, at 2, 24. This is, in part, a comparison of apples and oranges; the Senate Bill authorized construction of facilities to house child welfare and family services. The enacted version authorized the Secretary to make grants for operating expenses of such services but not for construction.

231. 25 U.S.C. §§ 13-13e (1988).

232. 54 Fed. Reg. 50,310 (1989).

fiscal year 1992, funding had increased to \$16.78 million,²³³ but still had not matched the dollar amount, much less the dollar value, of the original Senate bill. Funding for fiscal year 1994 climbed to over \$24 million,²³⁴ still short of the initial proposals. Further, the funds have been "reprogrammed" at times to cover other BIA expenditures. For example, in fiscal year 1993, \$8.7 million were taken from Title II programs to meet a shortfall in funding for BIA schools.²³⁵

Title II has faced significant problems with administration as well as with funding. Under regulations originally promulgated by the BIA, grants were made to tribes and to Indian organizations for only one year at a time and on a competitive basis.²³⁶ In 1985, the BIA amended the regulations to allow multiyear grants for up to three years.²³⁷ When the Senate Select Committee on Indian Affairs held oversight hearings on the ICWA in 1987, numerous witnesses testified to problems caused by the lack of stability in funding and the problems caused by the competitive grant process.²³⁸ In early 1994, the BIA issued amendments to the regulations which would change the grants from competitive to noncompetitive.²³⁹ Grants to off-reservation Indian organizations will continue to be awarded on a competitive basis,²⁴⁰ but grants will be made to all federally recognized tribes that comply with the application process.²⁴¹ These changes should significantly improve the ability of tribes to do long-range planning and to develop stable child welfare programs. Under the competitive bid process, tribes have lacked the stable source of funding that has been available to states under the Social Security Act.²⁴²

Title II funds have not been sufficient to fully serve the child welfare needs of the tribes. Other funding sources for tribal child welfare programs are Titles IV-E,²⁴³ IV-B,²⁴⁴ and XX²⁴⁵ of the Social Security Act and "638 funds" provided to tribes that contract with the BIA to undertake child welfare

233. 59 Fed. Reg. 2248 (1994).

234. *Id.*

235. Bunty Anquoe, *Senate Slashes New Funding for BIA Schools*, INDIAN COUNTRY TODAY, June 16, 1993, at A3.

236. 47 Fed. Reg. 39,980 (1982).

237. 50 Fed. Reg. 51,244 (1985).

238. *Oversight Hearings*, *supra* note 193, at 9 (statement of Julie Kitka, spokesperson, Alaskan Fed'n of Natives, Anchorage, Alaska); *id.* at 16-17 (Gary Peterson, ICWA Comm. Chairman, Affiliated Tribes of the Northwest, Shelton, Wash.); *id.* at 57-58 (statement of Anslern Rounhorse, Director, Div. of Social Welfare, Navajo Nation, Window Rock, Az.).

239. Indian Child Welfare Act, 25 C.F.R. §§ 23.21-23 (1994).

240. *Id.* §§ 23.32-.35.

241. *Id.* §§ 23.21-23.

242. STATUS REPORT, *supra* note 213, at 6-11.

243. 42 U.S.C. §§ 670 to 679a (1988 & Supp. V 1993).

244. *Id.* §§ 620-632a.

245. *Id.* §§ 1397-1397e.

programs under the Indian Self-Determination and Education Assistance Act of 1975.²⁴⁶ Although funds may be made available to the tribe directly under Title II of the ICWA, under the Indian Self Determination Act and, in some cases, under Title IV-B of the Social Security Act,²⁴⁷ tribes have no access to funding under Titles IV-E and XX of the Social Security Act unless they enter into agreements with the states. States have been hesitant to enter into these agreements partially because of fears that tribal sovereignty would prevent legal action to recover funds that were not used in compliance with the agreement.²⁴⁸

Title IV-E provides states with money to provide foster care for children whose families are eligible for Aid to Families with Dependent Children. Under case law, there is no requirement that states fund foster care when a tribal child welfare agency places the child in foster care.²⁴⁹ Thus, without direct funding of tribes, a tribal foster care system removes children from the state system without any diminution of state resources. It places financial responsibility on the tribe with only limited recompense. Title XX operates in a similar manner. Under Title XX, the federal government provides large grants to states for social services. Providing for direct funding of tribes through these programs could significantly increase the funding for tribal services. Because the funding would be taken from state programs currently providing similar services to Indian people, it should be viewed primarily as a shift in management of the funds and of responsibility rather than an increased cost to taxpayers or a loss to the states.²⁵⁰ By strengthening tribal child welfare services, decision making would more frequently remain in the tribe and conflict over tribal interests and individual rights would be lessened. In addition, improved tribal child welfare programs would reduce some of the skepticism about the competency of tribal programs. This skepticism is a persistent undercurrent in resistance to the Act.

246. 25 U.S.C. §§ 450-450n (1988 & Supp. V 1993).

247. 42 U.S.C. § 628 (1988 & Supp. V 1993). Direct grants to tribes under Title IV-B have historically been small. STATUS REPORT, *supra* note 213, at 6-15, 6-16.

248. STATUS REPORT, *supra* note 213, at 6-15.

249. Native Village of Stevens v. Smith, 770 F.2d 1486 (9th Cir. 1985), *cert. denied*, 475 U.S. 1121 (1986).

250. Proposals for direct funding of tribes through Title IV-E and Title XX have been made by a number of people and agencies. Such proposals were presented to Congress by the American Association of Indian Affairs in 1987. See *Oversight Hearings*, *supra* note 193, at 116-235 (statement on behalf of the AAIA, delivered by Jack F. Trope, staff attorney). See particularly appendix C, the proposed "Indian Social Service Assistance Act of 1987," at 205. Direct funding is among the options discussed in OPPORTUNITIES FOR ACF, *supra* note 225. Only nine of the 24 states with the largest Indian populations shared any Title XX or Title IV-E funds with the tribes between FY 1969 and FY 1993. *Id.* at B-4 n.1. In these nine states, Indian people comprised 4.36% of the population, but the tribes received only .96% of the state's allotted Title XX funds. *Id.* at tbl. 3.

V. Conclusion

The ICWA is remarkable for its recognition of tribal interests. It may be unique in American law in its recognition and implementation of the values of a culture other than the dominant one. That recognition conflicts with strong themes in our culture about individual rights and with our hesitancy to permit the rights of the group to interfere with the rights of individuals. Part of the conflict is more apparent than real. If we recognize the role of a tribe as sovereign, it is less anomalous to protect the tribe's interest. In state court custody proceedings concerning non-Indian children, a parent may not be able to place her child for adoption with the family she wishes if the state determines that it is an inappropriate placement. Recognition of a tribal role in the decision making about Indian children imposes an analogous limitation that is only a little more restrictive on a parent of an Indian child than is the recognition of a state's role in decision making about non-Indian children.²⁵¹ Nevertheless, one fundamental assumption of the ICWA's recognition of the tribal role in decision making is that decisions made with tribal input may be different from decisions that are made without tribal input. Other provisions of the Act, such as the placement preferences, more directly challenge our assumptions about individual rights and the inappropriateness of decision making based on group identification. These provisions are justified in the context of the ICWA by the federal duty to protect the integrity of Indian tribes.²⁵² Much of the limitation that has been imposed on the ICWA by case law is a result of state court suspicion of the competency of tribal decision making and a bias against placement of children outside of a traditional middle class setting. Doctrines which limit the applicability of the Act for these reasons have no place in the determination of custody of Indian children.

Identification of the improper values which have led state courts to restrict the ICWA does not resolve the dilemma, however. We come full circle to the question with which we began: How does a society that is predicated on a concept of individual rights accommodate within it societies that are collective and that may have needs different from the needs of their individual members? In the ICWA we see one such endeavor. By relying on mechanisms which increase tribal participation in decision making, the Act

251. There is slightly more imposition on the parent under the ICWA in that a parent of a non-Indian child can oust a state sovereign from the role of decision maker by moving out of state. Since the role of the tribe is based on the child's membership or eligibility for membership, geographic relocation will not affect the role of the tribe in decision making. This is appropriate because belonging to a tribe is a different sort of relationship than being a citizen of a state. See *supra* note 5 and accompanying text. Nevertheless, the imposition attendant to recognition of a tribal role in decision making is less onerous than the imposition of mandatory rules concerning custody decisions.

252. H.R. REP. NO. 1386, *supra* note 15, at 15, reprinted in 1978 U.S.C.C.A.N. at 7537.

lessens but does not obliterate the conflict. At this point in history, however, we can feel the full call of the endeavor's importance.

Accommodation of difference will be the talisman which leads us to the future. The question of accommodation of values that differ from those of the dominant culture is faced by Eastern Europe as it tries to forge democracies. Israel faces the same question as it struggles with autonomy for Palestinian people. It is similar to the struggle faced by emerging nations with strong tribal or differing religious traditions. The ICWA works, in part, because the differences between tribal values and those of the dominant culture are relatively small. Nevertheless, the Act's unique place in American law bears study because of its role in adoption law, its role in protecting Native American interests, and because of its recognition of the value of difference.

