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The Best Interests of Indian Children in Minnesota

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NOTES

THE BEST INTERESTS OF INDIAN CHILDREN IN MINNESOTA

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I. Introduction

> *Existing international law and existing national law do not adequately protect us against the serious threats to our existence. Our cultures, our religions, our governments and our ways of life are all in danger. We are not simply individuals with individual groups. We are a peoples, not simply individuals. For these reasons we face unique problems. Special measures are required to meet these problems. If these measures are not taken, more and more indigenous people may be destroyed their cultures vanished forever.*[1]

The above statement by Chief Jake Swamp describes concerns that are particular to indigenous peoples such as native Americans (Indians).[2] Although many laws still do not adequately address their concerns, some United States legislation protects and preserves Indian

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1. Chief Jake Swamp of the Mohawk Nation, Address to United Nations Commission on Human Rights (May 7, 1982) (in support of establishing a working group to focus on indigenous populations, which was established in 1982), U.N. Doc. E/CN.4/sub. 2/1982/33 annex. On August 26, 1982, the working group transmitted principles to the United Nations Human Rights Sub-Commission. One principle stated that indigenous peoples should be free of political intervention which results in the "destruction or disintegration of their physical, cultural, or political integrity." U.N. Doc. E/CN.4/Sub.2/AC.4/1982/R1. Also, a UN resolution guarantees all children the right to a culture. *See* Declaration of the Rights of the Child (Nov. 20, 1959), U.N. Doc. A/Res./1386, Principle III, as affirmed by Resolution 31-169 (Dec. 21, 1976).

2. Although the current preference is to refer to Indians as native Americans, this note uses the term Indians, in the colloquial sense, to refer to all indigenous peoples of the United States. *See* 25 U.S.C. § 1151 (1988).

cultures. One such legislative measure is the Indian Child Welfare Act of 1978 (ICWA).[3]

The provisions of the ICWA statutorily define the best interests of Indian children. Generally speaking, both family and juvenile laws delineate what encompasses any child's best interest when issues concerning a child's future are at stake. The ICWA, however, expands upon the usual factors of the best interest analysis. Overall, the ICWA statutorily insists that the best interest of an Indian child are intertwined with the interests of that child's Indian culture and peoples. To accomplish this, the ICWA imposes federal standards for courts to follow in custody cases involving Indian children.

Reflecting on the above purposes of the Act makes people aware of the problems which concern and are unique to Indian people. The State of Minnesota has also taken legislative steps to help alleviate the concerns of Indian people so they may retain their culture. However, courts do not consistently comply with such laws. Efforts must be undertaken to ameliorate this noncompliance.

"Non-Indian lawyers, social workers and judges perceive the necessity of terminating parental rights of Indian citizens through quite different cultural lenses in their attempts to help Indian children."[4] We cannot easily alter such perceptions. Yet, we can constrain and change the manner in which non-Indian people exercise their power over Indians. To combat and control bias by those in power we can mandate the involvement of competent Indian cultural experts sensitive to subtleties of Indian ways. Also, the safeguards incorporated into the ICWA must be strictly enforced to secure the well-being and future existence of tribes. We must all remember that "[i]t is not the function of our courts to homogenize [a state's] society."[5]

II. The Effect of Public Law 280 on Tribes in Minnesota

The ICWA has several purposes. First, the Act promotes the congressional responsibility of the United States to protect the integrity of Indian tribes as separate and viable political entities. Second, the Act enables Indian children to become well-adjusted adult Indians secure in their cultural identity. Finally, the act protects the cultural

3. Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1963 (1988 & Supp. 1990)).

4. *In re* Welfare of B.W., 454 N.W.2d 437, 444 (Minn. Ct. App. 1990) (establishing strict guidelines for qualified expert witnesses in ICWA cases).

5. Carle v. Carle, 503 P.2d 1050, 1055 (Alaska 1972). The court, in *Carle*, remanded a divorce proceeding custody determination. The lower court was instructed on remand to determine the best interest of a Native Alaskan child based on rational and unbiased information. The Alaska Supreme Court found that the trial court had exhibited a cultural bias against the native village way of life when it awarded custody to the mother who lived in urban society. *Id.*

identity of each Indian tribal community as well as each individual Indian person. This note will explore these factors in detail.

In the 1950s, the federal government entered into what has been termed as the "termination era." During this era, the policy of the federal government was to quickly "make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, [and] to end their status as wards of the United States."[6] The termination policy served to end federal responsibility, including financial responsibility, over Indian people. This policy effectively shifted certain responsibilities from the federal government to the states. As a result, several tribes lost their tribal status and financial benefits and, thus, were terminated.[7] Further, tribal lands during this era were converted into private, rather than tribal, Indian ownership; and the federal government sold some tribal land outright to non-Indians with the proceeds going to the tribes.[8]

Congress expressly adopted the termination policy by passing Public Law 280.[9] Pursuant to Public Law 280, certain states assumed jurisdiction over civil and criminal disputes in Indian territory.[10] Minnesota is one state still subject to Public Law 280. However, the Red Lake Reservation of the Minnesota Chippewa Tribe is excluded from Public Law 280. Red Lake retained jurisdiction over its own affairs and has an organized tribal court system to adjudicate issues. Consequently, Red Lake is still not subject to state jurisdiction for many matters.

Today, Public Law 280 largely eliminates federal restrictions on jurisdiction and authorizes state courts to assume jurisdiction over civil causes of action in Minnesota to which Indians are parties.[11] For the most part, civil laws of general application to non-Indian individuals have full force and effect in Indian Country.[12] Public Law 280 was intended to "redress the lack of adequate Indian forums."[13] However, it arguably hinders tribal self-determination because it gives state courts jurisdiction over internal tribal affairs. This assertion of state jurisdic-

6. H.R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132 (1953).

7. *See id.* The Menominee tribe of Wisconsin was one such terminated tribe. This tribe was later reestablished.

8. *Id.*

9. *See* Act of Aug. 15, 1953, Pub. L. No. 53-280, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. §§ 1161-1162, 25 U.S.C. §§ 1321-1322, 28 U.S.C. § 1360 (1988)). *See also* Carole E. Goldberg, *Public Law 280: The Limits of the State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. REV. 535 (1975).

10. *Id.* The original states were California, Minnesota (except Red Lake Reservation), Nebraska, Oregon (except Warm Springs Reservation), and Wisconsin. Alaska was included in 1958.

11. *See* 28 U.S.C. § 1360 (1988).

12. *Id.*

13. Bryan v. Itasca County, 426 U.S. 373, 383 (1976) (analysis of state authority under Public Law 280 to impose taxes on reservation Indians).

tion inherently diminishes tribal self-authority. Before and after Public Law 280, Indian tribes have struggled to retain the right of self-determination over their own affairs.

III. The Self-Determination Movement

Tribes finally regained some authority over internal affairs during the 1960s and 1970s. The concept of Indian self-determination gained momentum in 1968 when President Johnson gave a special message to Congress stressing the fact that Indians should have a right to determine their own choice between life in the city or on the reservation without the threat of tribal termination.[14] Following the president's message, Congress passed title IV of the Indian Civil Rights Act. This Act allowed states to impose jurisdiction over Indian lands and people only in cases where affected tribes gave their consent.[15] In 1970, President Nixon proposed a federal policy of self-determination.[16] The policy federally recognized tribes as distinct political entities which could control their own destiny yet retain the aid of the federal government to carry out that destiny.[17] At that time, President Nixon stated that "[w]e must assure the Indian that he can assume control of his own life without being separated voluntarily from the tribal group. And we must make it clear that Indians can become independent of federal control without being cut off from federal concern and federal support."[18] As a result of the self-determination policy, several major pieces of legislation were enacted, including the ICWA.[19]

IV. A Social Crisis Necessitates the ICWA

Enacted for social reasons, the ICWA also fulfilled political motives

14. President Lyndon B. Johnson, Special Message to the Congress on Goals and Programs for the American Indian: "The Forgotten America," 4 WEEKLY COMP. PRES. DOC. 438 (Mar. 11, 1968).

15. Act of Apr. 11, 1968, Pub. L. No. 90-284, §§ 401-402, 406, 82 Stat. 78-80 (codified at 25 U.S.C. §§ 1321-1322, 1326 (1988)); *see also* Barbara A. Atwood, *Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity*, 36 UCLA L. REV. 1051, 1073 (1989). The Act imposes a bill of rights for Indians which is similar to the Bill of Rights in the Constitution. The Act places concrete limits on the actions of tribes which impose legal sentences.

16. President Richard M. Nixon, The President's Message to Congress Transmitting Recommendations for Indian Policy, 6 WEEKLY COMP. PRES. DOC. 894-905 (July 13, 1970).

17. *Id.*

18. *Id.* at 896.

19. 25 U.S.C. §§ 1901-1963 (1988).

of the self-determination policy. Prior to enactment of the ICWA, a social crisis of major proportions threatened the cultural existence of American Indian people. Since the 1800s, a general assimilationist policy had existed in America. As part of that policy, the government took Indian children from their homes and sent them to boarding schools operated by the Federal Bureau of Indian Affairs (BIA).[20] These boarding schools were mostly located on the East Coast, a great distance from most tribes' reservations. The schools began in the 1800s as manual-labor schools that trained boys in agricultural skills or the common trades and trained girls in the domestic tasks of white households.[21] A few day schools were also available on Indian reservations.[22] However, these day schools were not historically deemed adequate by the government. Governmental authorities thought that "the exposure of the children who attend only day-schools to the demoralization and degradation of an Indian home neutralized the efforts of the school teacher especially those efforts which [were] directed to advancement in morality and civilization."[23] The boarding schools' goals were to assimilate Indian children into white society by teaching them white skills and by keeping them away from their Indian families during the school year, and many times even during the summer months. These practices show that the government strategically destroyed a good deal Indian culture.

Aside from sending away children to boarding schools, the government took other Indian children away from their tribes permanently. Non-Indian families adopted these children and deprived them of their Indian culture. In 1974, Senator Abourezk of South Dakota stated:

> For decades Indian parents and their children have been at the mercy or abusive action of . . . [un]warranted removal of children from their homes. . . . Officials would seemingly rather place Indian children in non-Indian settings where their Indian traditions and, in general, their entire Indian way of life is smothered.[24]

20. Margaret Howard, *Transracial Adoption: Analysis of the Best Interest Standard*, 59 NOTRE DAME L. REV. 503, 519 (1984) (citing Task Force Four Report on Federal and Tribal Jurisdiction, S. REP. No. 597, 95th Cong., 1st Sess. 45 (1977) (other citations omitted)). The BIA was originally part of the War Department but was transferred to the Department of Interior in 1849. *See* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 16-17 (2d ed. 1988).

21. 2 FRANCIS P. PRUCHA, THE GREAT FATHER, THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIAN 689 (1984).

22. *Id.*

23. *Indian Child Welfare Program, Hearings Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs*, 93d Cong., 2d Sess. 1-2 [hereinafter *1974 Hearings*] (opening statements of James Abourezk of South Dakota) (1974).

24. *Id.*

Also, the same year that the Senate discussed these issues, "Indian parents and officials all across the United States [were] protesting what they described as cultural or legal 'genocide' inflicted by County, State and Federal agencies that sanction or participate in the wholesale removal of Indian children from their homes and reservations."[25]

The legislative history of the ICWA acknowledged the social crisis. Congress found that boarding schools and non-Indian out-of-home placements were the two major contributors to the destruction of Indian families and community life.[26] In 1969, the House report on the ICWA stated that "approximately 85 percent of all Indian children in foster care were living in non-Indian homes."[27] Also in 1974, "approximately 25-35 percent of all Indian children were separated from their families and placed in foster adoptive homes or institutions."[28]

In the ICWA legislative reports, the prominence of Minnesota's statistics are disturbingly prominent. For example, in Minnesota in 1974, state agencies removed Indian children from their parents at an alarmingly high rate. In fact, state agencies placed Indian children in foster care or adoptive homes at a per capita rate five times higher than the same placement for non-Indian children.[29] This meant that many Indian children were not living with their Indian families. In 1972, one out of eight Minnesotan Indians under the age of eighteen and nearly one out of four Indian infants under one year of age lived in adoptive homes.[30] Finally, by 1978, over 90% of the Indian children adopted by non-relatives were adopted by non-Indian couples.[31] Thus, state agencies separated these children from their families and also from their Indian culture. The passage of the ICWA was a major step toward curbing this wholesale removal of Indian children from their families and heritage.

V. The Indian Child Welfare Act

Because states, such as Minnesota, removed so many Indian children from their families and placed them in non-Indian homes, Congress

25. Edwin McDowell, *The Indian Adoption Problem*, WALL ST. J., July 12, 1974, at 6.

26. H.R. REP. No. 1386, 95th Cong., 2d Sess. 9, *reprinted in* 1978 U.S.C.C.A.N. 7530, 7531 [hereinafter HOUSE REPORT].

27. *Id.* (citing Association of American Indian Affairs, Inc., Indian Child Welfare Statistical Survey (July 1976) (AAIA Survey), *in Indian Child Welfare Act of 1977: Hearings on S. 1214 Before the Senate Select Comm. on Indian Affairs*, 95th Cong., 1st Sess., 537, 538 (1977)) (surveys conducted in 1969 and 1974).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

enacted the ICWA. The provisions of the ICWA help resolve the inherent conflict between the federal government's jurisdiction over Indian affairs and the exclusive right of states to have jurisdiction over child custody matters. Congress balanced its exercise of plenary power over Indian affairs and its trust responsibilities to Indian people by enacting the ICWA.[32] The Act allows states to retain their traditional authority over child custody proceedings but imposes federal standards for states to follow in cases where courts remove Indian children from their parents.[33] This statutory compromise resolves the tension between exclusive federal jurisdiction over Indian affairs and exclusive state jurisdiction over child custody matters.

The ICWA serves to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families."[34] The Act recognizes that a tribe's integrity and very existence depend upon control over the adoption and foster home placements of Indian children.[35] Under the ICWA, even tribes subject to state jurisdiction pursuant to Public Law 280 can reassume tribal jurisdiction over child custody proceedings. To reassume jurisdiction, a tribe must go through a petitioning process through the Secretary of Interior. A petitioning tribe must present a detailed plan to the Secretary which includes establishment of some type of adjudicatory system such as a court. The Secretary must approve the petition before a tribe can assert exclusive or partial jurisdiction over custody proceedings.[36] Therefore, Minnesota tribes subject to Public Law 280 must establish an appropriate system for handling child custody cases and have a petition approved by the Secretary to assume jurisdiction. To date, none have done so.

Further, to receive federal funds for implementing an appropriate adjudicatory system, the tribe or tribal court must show that it will adhere to BIA procedures and the Indian Civil Rights Act of 1968. These requirements ensure that Indian people are given constitutional rights, including due process in custody cases decided by tribal systems.[37] Thus, any tribal system must provide legal safeguards and

32. 25 U.S.C. § 1901 (1988). The government has a federal responsibility to Indian people. Also, Congress has plenary power over Indian affairs by virtue of U.S. CONST. art. I, § 8, cl. 8. Protection of the integrity of Indian families is a permissible goal that is tied to the fulfillment of Congress' unique guardian obligation for Indians. *See* Angus v. Joseph, 655 P.2d 208 (Or. Ct. App. 1982), *reh'g denied*, 660 P.2d 683 (Or. 1983), *cert. denied*, 464 U.S. 830 (1983).

33. *See* 25 U.S.C. §§ 1901-1902 (1988).

34. *Id.* § 1902.

35. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 241 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN].

36. 25 U.S.C. § 1918 (1988) (Minnesota tribes, except the Red Lake Reservation, are subject to Public Law 280).

37. Kathryn A. Carver, *The 1985 Minnesota Indian Preservation Act: Claiming a Cultural Identity*, 4 LAW & INEQ. J. 327, 342-43 (1986).

procedures which are similar to state courts, while providing a more appropriate cultural forum.[38]

The ICWA applies to situations where the state places Indian children in nonparental custody, either voluntarily by their parents or involuntarily.[39] The Act does not apply to parental custody cases that arise out of a divorce proceeding.[40] Also, the Act does not apply to juvenile placements that are a consequence of the child's acts "which, if committed by an adult, would be deemed a crime."[41]

Before a court may apply the ICWA to a given case, the following initial determinations must be made:[42] First, is the child an "Indian child" as defined under ICWA section 1903(3) and (4)?[43] and second, is the proceeding a "child custody proceeding" as defined under ICWA section 1903(1)?[44] If the answer to both of these questions is yes, the remaining provisions of the Act apply to the case.

If the Act does apply, an Indian tribe which has an authorized tribal adjudicatory system or court which exists at law or has been authorized by petition through the Secretary, as discussed above, may assume jurisdiction over the proceeding. If the Indian child is residing or domiciled on the reservation or is a ward of the tribal court, the tribe can assume exclusive jurisdiction over the matter.[45] The ICWA states that any proceeding originating in the state court shall be transferred to the tribe "absent good cause to the contrary" or "absent objection by either parent."[46] If good cause or parental objection exist the state court retains the case. However, if the proceeding remains in the state court, the tribe may intervene at any point in the proceeding and become involved as an interested party.[47] Finally, a determination by either the tribal or state court will be given full faith and credit by the other respective court.[48]

38. *Id.* at 343.

39. *See* 25 U.S.C. § 1903(1) (1988).

40. *See generally* Dement v. Oglala Sioux Tribal Court, 874 F.2d 510 (8th Cir. 1989); Desjarlait v. Desjarlait, 379 N.W.2d 139 (Minn. Ct. App. 1985).

41. *See* 25 U.S.C. § 1903(1) (1988).

42. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 42 (1989).

43. 25 U.S.C. §§ 1903(3), (4) (1988). The determination of whether the child is an Indian child requires consideration of the tribal membership or tribal eligibility of the child and parents, as well as the status of the child's tribe as a recognized tribe of the United States. Also, the child must be under eighteen and unmarried. *Id.*

44. 25 U.S.C. § 1903(1) (1988). A child custody proceeding is a foster care placement, a preadoptive placement, adoptive placement, or termination of parental rights proceeding. *Id.*

45. *Id.* § 1911(a).

46. *Id.* § 1911(b).

47. *Id.* § 1911(c).

48. *Id.* § 1911(d).

A state court that retains jurisdiction must comply with the standards for pending court proceedings set forth in the ICWA section 1912.[49] Pursuant to this section, the tribe must receive notification of each "involuntary" placement proceeding.[50] Further, in all placement cases, voluntary or involuntary, the party effecting the action, many times the state's department of human services, must prove to the court that "active efforts" have been made to prevent the existing family's breakup and that those efforts failed.[51] Additionally, in foster care placements and termination proceedings, "qualified expert witnesses" must present supporting testimony that continued custody by either the parent or Indian custodian will likely result in some serious emotional or physical damage to the child.[52] Overall, any custodial placement of an Indian child can be effected only by a showing of some harm to the child. The burden of proof to effect a foster care placement is the "clear and convincing" evidence standard.[53] On the other hand, courts may terminate parental rights solely by evidence proving harm "beyond a reasonable doubt."[54]

If after taking into account the active efforts, witness testimony, and appropriate burden of proof a court decides to place a child in nonparental care, the court must determine appropriate placement. When a court places an Indian child in either foster or adoptive care, it must adhere to specified placement preferences in the absence of "good cause to the contrary."[55] The ICWA mandates preferences and prioritizes choices for a child's custodial placement in the following order: (1) with the child's extended family, (2) a member of the child's tribe, (3) another Indian family or tribally approved institution, or, as a final resort, (4) a non-Indian family or institution.[56] In all ICWA custody cases, the court must evaluate the preferences by considering the prevailing social and cultural standards of the Indian tribal community most closely related to the child's family.[57] The remaining

49. *Id.* § 1912.
50. *Id.* § 1912(a).
51. *Id.* § 1912(d).
52. *Id.* § 1912(e)-(f).
53. *Id.* § 1912(e).
54. *Id.* § 1912(f).
55. *Id.* § 1915. Good cause is not defined in the Act and there are no Minnesota cases which define it to date. However, the BIA published guidelines which give factors for determining the existence of good cause. The three factors are: (1) the request of the parent; (2) extraordinary needs of the child as established by qualified expert witnesses; and (3) the unavailability of a suitable Indian home. *See* BIA Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67,594 ¶ F.3 (1979).
56. *Id.*
57. *Id.* The tribal community must be the one in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

ICWA provisions particularize the procedures, funding, and record-keeping standards for implementing the Act.

VI. Placement Statistics After the ICWA

A number of reports since 1978 indicate that courts and agencies place Indian children into Indian homes more often than was done prior to the ICWA. However, courts and agencies still place Indian children in non-Indian homes in Minnesota as well as in other states. Nationally, in 1983, Indian children were placed in foster care with Indian relatives at a rate of only 1.1%, which is a much lower rate than the placements with relatives for any other ethnic group.[58] A report in 1987 revealed that there was an overall reduction in foster care placement in the early 1980s after enactment of the ICWA.[59] However, an increase in nonparental placements in the mid-1980s followed this reduction.[60]

By 1988, one report stated that "the rate of placement of Indian children in substitute care [was] 3.6 times greater than that of their non-Indian counterparts — 25 percent increase over a six-year period."[61] This report's conclusion states that efforts to comply with the ICWA are limited, implementation is uneven, and in some localities noncompliance is quite pronounced.[62] A need for expanded preventative services exists.[63]

Although no one can achieve perfect compliance, evidence suggests greater placement in Indian homes. For example, 62.2% of Indian children in 1986 were placed in Indian or Alaskan native homes.[64] In

58. MAXIMUS, Inc., Final Report, Child Welfare Indicator Survey: Volume I at III-24 (Oct. 21, 1983) (unpublished report, on file with the *American Indian Law Review*) (prepared for the U.S. Health and Human Services, Office of Human Development Services Office of Program Development and Administration for Children, Youth and Families (Children's Bureau)).

59. Cecilia Sudia, Impact of the 1978 Indian Child Welfare Act and the 1980 Adoption Assistance and Child Welfare Act on the Out of Home Placement of American Indian Children (July 1987) (unpublished survey by the U.S. Department of Health and Human Services, Office of Human Development Services Office of Program Development and Administration for Children, Youth and Families) (Children's Bureau)); *see also System Provides FY 85 Data on Indian Child Placements*, LINKAGES, (Bureau of Indian Affairs, Washington, D.C.), Oct. 1987, at 11.

60. *Id.*

61. Margaret C. Plantz et al., Indian Child Welfare: A Status Report at 3-2 (Apr. 18, 1988) (unpublished report, on file with the *American Indian Law Review*) (subtitled "Final Report of the Survey of Indian Child Welfare and Implementation of the Indian Child Welfare Act and Section 428 of the Adoption Assistance and Child Welfare Act of 1980") (ACYF/BIA contract no. 105-82-1602).

62. *Id.*

63. *Id.*

64. *Id.* at 3-27 (tbl. 3-9).

Minnesota, Indian children were placed in Indian homes at a rate of 63.1%.[65] These figures indicate some effort to comply with the Indian placement preferences of the ICWA.

Unfortunately, the above statistics do not reflect the total picture. American Indians comprise only 1.3% to 2.5% of the general population.[66] However, a recent Minnesota survey found that Indian children account for 7% of the total number of children placed in out-of-home care.[67] Further, Indian children constitute 16% of all children in extended placements in Minnesota.[68] These figures indicate an apparent low success ratio in keeping together and reuniting Indian families. There are numerous and complex reasons for these statistics. One prominent reason remains the lack of compliance with the ICWA. The Minnesota survey also includes a report to the Minnesota legislature stating that agencies and courts need better coordination with the ICWA.[69] The report goes on to state that the overall rate of reunification between minority parents and their children remains lower than that same rate for whites.[70] Cultural bias in our legal system is one explanation for this low success ratio.

VII. Minnesota Indian Child Welfare Statutes

Minnesota continually passes legislation to remedy the low success of keeping minority families intact. In 1985, Minnesota incorporated the ICWA into state law by enacting the Minnesota Indian Family Preservation Act (MIFPA).[71] This Act adopted the general provisions of the ICWA but added some more stringent criteria. For example, under the MIFPA, agencies or courts contemplating *any* out-of-home placement or adoptive placement must send notice to the tribe.[72] This requires a higher notification standard than the ICWA, which mandates notice to the tribe only for involuntary proceedings.

When a Minnesota court extinguishes parents' custodial rights to their child, a court must consider the action in light of the termination of parental rights statute found in Minnesota's juvenile laws.[73] Under this statute, both voluntary and involuntary parental right terminations recognize the child's best interests to be of paramount consideration.[74]

65. *Id.*
66. (MINN. LEGISLATURE) CHILD PROTECTION SYSTEM STUDY COMM'N, FINAL REPORT 49 (1990) [hereinafter MINN. FINAL REPORT].
67. *Id.*
68. *Id.*
69. *Id.* at 2 (systems committee summary).
70. *Id.* at 49.
71. MINN. STAT. ANN. §§ 257.35 to 257.3579 (West Supp. 1991).
72. *Id.* §§ 257.352 subdivision 2-3, 257.353 subdivision 2.
73. *Id.* §§ 257.35(d), 260.221.
74. *Id.* § 260.221 subdivision 4.

In 1988, the Minnesota legislature added a provision to the termination statute to mandate courts to determine the best interests of an Indian child consistent with the ICWA.[75] This requirement should facilitate implementation of the appropriate best interest standards for Indian children in Minnesota. Other Minnesota statutes governing custody determinations require courts to consider any child's cultural background as a determinative factor in deciding to place a child out of his/her home.[76] Therefore, Minnesota's statutes acknowledge the minimum federal standards of the ICWA and provide some higher criteria.

VIII. The Holyfield Decision

Minnesota's courts frequently face the difficult task of deciding where to place an Indian child. The ICWA, Minnesota statutes, and court decisions provide guidance for making such determinations. The ICWA states that it

> is the policy of this Nation to protect *the best interests of Indian children* and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . . .[77]

This policy should be applied by state court judges and state administrative agencies when they interpret the provisions of the Act and place Indian children.[78] It is not always easy to balance the individual and tribal interests when determining an Indian child's best interest.

A recent Supreme Court decision, *Mississippi Band of Choctaw Indians v. Holyfield*,[79] clarifies the competing interests among parent, child, and tribe. The Court recognized it must prioritize these interests according to tribal custom.[80] *Holyfield* involved a proposed voluntary adoption proceeding concerning twins born to two unmarried members

75. *Id.*

76. *See id.* § 518.17 subdivision 1(a)(11) (best interest factors); *id.* § 257.025(h) (custody dispute factors); *id.* § 259.28 (best interest factors applied to adoptions); *id.* § 260.181 subdivision 3 (juvenile dispositions must consider a child's ethnic heritage in foster care placements).

77. 25 U.S.C. § 1902 (1988).

78. Craig J. Dorsay, The Indian Child Welfare Act and Laws Affecting Indian Juveniles (June 1984) (unpublished report) (prepared for the Indian Law Support Center of the Native American Rights Fund; on file with Minnesota Indian Women's Resource Center, Minneapolis, Minn.

79. 490 U.S. 30 (1989).

80. Donna J. Goldsmith, *Individualism vs. Collective Rights: The Indian Child Welfare Act*, 13 HARV. WOMEN'S L.J. 1, 7 (1990).

of the Mississippi Band of Choctaw Indians. The parents wanted to give the twins up for adoption to a non-Indian couple. However, the tribe wanted the exclusive right to determine the twins' custody.

The issue before the Supreme Court was whether the twins, who were born outside the confines of the reservation, were "domiciled" on the reservation. The issue of domicile remained crucial to the tribe's assertion of exclusive jurisdiction over the custody matter.[81] The Court found the twins' domicile to be the reservation.[82] At the same time, the Court established five uniform federal rules for determining domicile:[83] (1) a child acquires domicile at birth which continues until a new one is acquired; (2) the domicile of a minor child is determined by the domicile of the parents; (3) the domicile of an illegitimate child is the same as the mother's domicile; (4) the domicile of an abandoned child is the domicile of the last abandoning parent; and (5) a tribal member cannot waive a tribe's jurisdiction by giving birth and executing a consent for adoption off the reservation.[84]

Although the strict holding in *Holyfield* only construes the term "domicile" under the ICWA, the decision also sets forth strong policy statements and principals for future courts to follow. Primarily, the Court said that "[t]ribal jurisdiction under § 1911(a) was not meant to be defeated by the actions of individual members of the tribe."[85] Further, the Court explicitly analyzed the congressional intent of the ICWA finding that the Act purposefully protects tribal interests and culture which go beyond the wishes of individual parents.[86] The Court understood the fact that Indian cultures focus on the collective rights of the community, permitting individual rights to bow more readily to the needs of the community.[87] Exemplifying this knowledge, the Court stated that "tribal interest is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on parity with the interest of the parents."[88] Therefore, the best interests of an Indian child must be determined by consideration of both tribal and individual parental interests. Finally, the Court in

81. *Holyfield*, 490 U.S. at 43. Under the ICWA (28 U.S.C. § 1911(a) (1988)), a tribe may assume exclusive jurisdiction if the child is domiciled within the reservation of such tribe.

82. *Id.* at 53.

83. The Court stated that "Congress intended a uniform federal law of domicile for the ICWA." *Id.* at 47.

84. *Id.* at 48, 52-53.

85. *Id.* at 49.

86. *Id.* at 49-50.

87. Goldsmith, *supra* note 80, at 1. Tribes differ widely in organization and beliefs, but this general factor is integral to all tribes.

88. *Holyfield*, 490 U.S. at 52 (quoting *In re* Adoption of Holloway, 732 P.2d 962, 969-70 (Utah 1986)); *see also Stanley v. Illinois*, 405 U.S. 645, 651 (1971) (a parent's right to raise and nurture a child is an essential and basic civil right).

Holyfield deferred the ultimate custody decision to the "experience, wisdom and compassion of the [tribal court]."[89] The tribe then assumed exclusive jurisdiction over the matter.

After the tribe assumed jurisdiction, "the tribal court appointed a guardian ad litem for the [twins], demanded proof of paternity from the father and conducted a thorough investigation of Ms. Holyfield."[90] After weighing all the information, the "Tribal Court Judge granted adoption of the children to Ms. Holyfield."[91] The Court decided the placement was in the best interest of the children.[92] The *Holyfield* decision and the subsequent tribal action reaffirmed both the tribe's right and ability to make a wise and compassionate decision. Also, *Holyfield* sends a strong message to lower courts to allow tribal courts the right to determine the future of Indian children.

IX. The Effect of the Best Interest Standard

The standards for the best interest of an Indian child as set forth in the ICWA[93] and interpreted in *Holyfield*[94] are integrally related to the future interest and survival of Indian tribes. Congress considered the alternatives to the "best interests of the child" principle in 1974 hearings prior to the ICWA's enactment.[95] Members considered the "best interest" principle "vague and nebulous."[96] One alternative which Congress discussed stated "what would be least detrimental to the child."[97] This concept included factors such as promptness of the custodial decision, determination of the child's "psychological parent," and determination of the party who could best meet the child's needs.[98] However, Congress eventually drafted the ICWA using the terms "the best interests of Indian children."[99] Provisions of the Act enumerate specific criteria to meet this best interest standard.

89. *Holyfield*, 490 U.S. at 54. Even though there was concern because the twins had already been with the prospective adoptive mother for three years, the Court still deferred the final placement decision to the tribe. *Id.* at 53-54.

90. Marcia Coyle, *It's Never Quite Over When It's Over, Parties Before the Supreme Court Find Out*, THE NAT'L L.J., Feb. 25, 1991, at 1, 24. Ms. Holyfield was a non-Indian woman seeking to adopt the twins. At the time the Supreme Court decided the case, Mr. Holyfield was deceased.

91. *Id.*

92. *Id.*

93. 25 U.S.C. § 1902 (1988).

94. *See generally Holyfield*, 490 U.S. at 30.

95. *1974 Hearings, supra* note 23, at 57-58 (Dr. Mindell's recommendations to the Senate Subcommittee on Indian Affairs).

96. *Id.*

97. *Id.*

98. *Id.*

99. 25 U.S.C. § 1902 (1988).

Additionally, in *all* parental rights termination proceedings in Minnesota before 1981, courts construed the general termination statute by applying a "parental fitness standard."[100] This fitness standard emphasized a parent's fundamental right to custody by depriving parents of that right only when they were found to be unfit.[101] In the alternative, the "best interest" standard focuses on the child's needs.[102] Eventually, in *In re J.J.B.*, the Minnesota Supreme Court ruled that the "best interest" standard applies to termination proceedings.[103] Today, this standard is codified in the Minnesota statutes, as discussed in section VI.

Using the best interest standard which focuses on the child's needs, courts apply psychological factors such as the psychological parent theory and the theory of bonding. Bonding is the attachment infants have for parents, generally the mother, from infancy.[104] On the other hand, the psychological parent theory states that a severance of the parent-child bond will inflict irreparable psychological harm and damage upon the child.[105] A parent or substitute parent becomes a "psychological parent" by bonding with a child.[106]

It is difficult to define the quality of a relationship between a child and another person or to make determinations about whether a parent's rights should be terminated.[107] Courts must assess facts and make predictions about a child's future. As a result, this vague best interest standard allows decision makers to be influenced by prejudice and preconceptions.[108] Therefore, decision makers, such as courts, often favor substitute families over rehabilitation of existing Indian families. This favoritism is due in part to misconceptions about cultures and a lack of economic resources by tribes and states for rehabilitation.[109]

The ICWA's greater emphasis on cultural environment than family permanency reflects the "best interests" principle for Indian children.[110]

100. Gloria Christopherson, Minnesota Developments, *Minnesota Adopts a Best Interest Standard in Parental Rights Termination Proceedings: In re J.J.B.*, 71 MINN. L. REV. 1263, 1276 (1987).

101. *Id.* at 1270.

102. *Id.* at 1269.

103. *In re* J.J.B., 390 N.W.2d 274, 279 (Minn. 1986).

104. EVELYN LANCE BLANCHARD, M.S.W., THE QUESTION OF BEST INTEREST REVISITED 8 (1988). Ms. Blanchard has a Master's Degree in Social Work and is a widely published authority on Indian children's issues. The bonding concept was developed by a psychiatrist, John Bowlby, in the 1950s.

105. *Id.* at 5.

106. *Id.*

107. *Id.* at 9.

108. *Id.*

109. *Id.*

110. Evelyn L. Blanchard & Russel L. Barsh, *What Is Best for Tribal Children? A Response to Fischler*, 25 SOCIAL WORK 350, 356-57 (1980).

American society as a whole is lacking any one culture. Rather, it is "at best a crazy quilt culture of disintegrating values."[111] Anglo-Americans seem to reject culture as an essential factor in a child's development, an attitude contrary to the goals of the ICWA.[112] The ICWA's emphasis on culture reflects the unique needs of Indian people.

A viable Indian identity can give true shape to the Indian child's emerging character. Once a child has a strong cultural identity, that child can then choose the facets of American society that most enhance the child's cultural integrity, that most enhance the child's "best interest."[113] An Indian child, like any child, is born to a biological family. However, unlike other children, an Indian child is born into a kinship network, clan, or band.[114] From the Indian perspective, a newborn child renews support to the tribal group.[115] Indian children develop a strong sense of community because individual goals intertwine with the community goals.[116] As more Indians become psychologists and social workers, a greater understanding of Indian culture emerges in society.[117] Consequently, tribes take more control of tribal children's issues and psychological research.[118] For instance, a tribal member, as a psychologist or social worker, can with firsthand knowledge assess a custody case from the Indian perspective.

Presently, biases still exist and states still place Indian children in non-Indian homes. Dr. Joseph Westermeyer has spent years researching the effect of non-Indian placements on Indian children. He studied a number of Indians raised in white homes. As a result, he found a psychological condition present in these children which he labels the "apple syndrome."[119] The apple syndrome analogizes the Indian to an apple — red on the outside but white on the inside — by virtue of being raised as a non-Indian.[120] In these cases, Dr. Westermeyer found that the children's Indian identity was weak or even absent.[121]

111. *Id.* at 357.

112. *See id.* The ICWA ensures that culture remains a primary focus for a child's future. *See* 25 U.S.C. §§ 1901-1963 (1988).

113. Gaylene McCartney, *The American Indian Child-Welfare Crisis: Cultural Genocide or First Amendment Preservation*, 7 COLUM. HUM. RTS. L. REV. 529, 550-51 (1975) (citing statements of Dr. Joseph Westermeyer, *1974 Hearings*, *supra* note 23, at 45-51, and statements of Dr. Carl Mindell and Dr. Gurwitt, *id.* at 54-64).

114. Blanchard & Barsh, *supra* note 110, at 351.

115. *Id.*

116. *Id.*

117. *Id.* at 356.

118. *Id.*

119. Joseph Westermeyer, M.D., Ph.D., *The Apple Syndrome in Minnesota: A Complication of Racial-Ethnic Discontinuity*, 10 J. OPERATIONAL PSYCH. 134 (1979). Dr. Westermeyer testified about his research at hearings before the Subcommittee on Indian Affairs. *See 1974 Hearings*, *supra* note 23.

120. *Id.*

121. *Id.* at 135.

On the other hand, Dr. Westermeyer found that Indian children who were products of the boarding school era did not seem to develop the apple syndrome.[122] In boarding schools, children at least had contact with other Indian children at school as well as their tribes on occasional holidays and vacations.[123] This continued contact with Indian culture allowed some Indian identity to remain intact.[124] In addition, some children raised in non-Indian homes who had some contact with other Indians also did not develop the syndrome.[125] In all, the apple syndrome has devastating results. Indian children who are placed in non-Indian homes frequently experience severe identity confusion, especially as adolescents.[126] The suicidal tendencies are higher for these children than for other high-risk Indian youths.[127] Further, these children have trouble forming intimate relationships, and have trouble with violence, promiscuity, theft, truancy, and running away, and develop tendencies for substance abuse.[128] These individuals may also develop a distrust of other Indian people due to a feeling of abandonment by Indians.[129] While an Indian child can be told by his or her non-Indian parents to be proud of his or her Indian culture, the mere act of being placed and raised in a non-Indian culture teaches the child that living with Indians is not desirable.[130] In spite of these psychological findings, Indian children continue to be placed in non-Indian homes. One of the reasons for non-Indian placement relates to economics. Because of the stringent residential requirements for qualified foster or adoptive homes, many Indians previously could not become foster or adoptive families. The housing requirements in the past mandated high square footage and a certain number of separate rooms which many Indian families did not have available or could not afford.[131] Thus, affluent non-Indians became parents or foster parents for Indian children.

A non-Indian family raising an Indian child most times will not reinforce the child's Indian identity. In a set of studies done in 1977 and 1979, one-third of the families involved in transracial adoptions did little or nothing to foster the minority child's cultural identity.[132]

122. *Id.* at 139.
123. *Id.*
124. *Id.*
125. *Id.* at 137.
126. *See* Joseph Westermeyer, *Ethnic Identity Problems Among Ten Indian Psychiatric Patients*, 25 INT'L. J. OF SOC. PSYCHIATRY 188 (1979); *see also* Westermeyer, *supra* note 119, at 137.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at 139.
132. Howard, *supra* note 20, at 539 (quoting RITA SIMM & HOWARD ALTSTEIN, TRANSRACIAL ADOPTION 11, 104 (1977)).

Of the group surveyed, 12% stated that "[t]heir main objective [was] to bring the child into their life-style" and that they intended "to live as they would have if they had not adopted a child of a different race."[133] Finally, non-Indian parents may not know or may be unable to understand their Indian child's trauma. This parent may not empathize when the child is called names such as "squaw" or "buck," or when in adolescence the child is not asked out on dates or does not get hired for jobs while the child's non-Indian peers enjoy such things.[134] The true dilemma is that people may discriminate against the child because he or she is Indian, yet the child does not identify with, nor is the child tied to, the Indian culture.[135] The adverse psychological effects of placements with non-Indians support the conclusion that the best interests of an Indian child lie in protecting and reinforcing the tribal culture and heritage.

X. Minnesota's Application of the ICWA

As recalled from section V above, the ICWA applies only in cases where a "child custody proceeding" is within the scope of the Act and the child is an "Indian child."[136] After this initial determination has been made, courts must meet the standards for the appropriate burden of proof through qualified expert testimony. Further, active efforts must be made to keep the existing family unit intact. Also, the case may be transferred to an appropriate tribal court absent good cause to the contrary or absent any objection by either parent. Finally, full faith and credit will be afforded any disposition by either a state or tribal court. Minnesota courts have attempted to comply with these standards. These efforts are analyzed below.

A. Indian Child

Courts must initially determine whether the child is an Indian child under the ICWA. In early American history, courts used highly biased and arbitrary standards to determine who was an Indian. A few early Supreme Court cases concerning the natives of the Pueblos exemplify these vague criteria. In *United States v. Joseph*,[137] the Supreme Court found that the indigenous people of the Southwest were not Indians because they were "a peaceable, industrious, intelligent, honest, and virtuous people . . . Indians only in feature, complexion and a few of their habits."[138] Yet in another case, *United States v. Sandoval*,[139] the Court found the Pueblos were Indians. The Court quoted agents' reports to support its conclusion that the Pueblos were Indians that

133. *Id.*
134. Westermeyer, *supra* note 119, at 136.
135. *Id.*
136. *See supra* notes 42-44.
137. 94 U.S. 614 (1876).
138. *Id.* at 616.
139. 231 U.S. 28 (1913).

needed Indian Bureau supervision.[140] The quoted reports asserted these people were Indians because of their drunkenness, debauchery, dancing, and communal life. The Court stated that the Pueblos were a "simple, uninformed and inferior people."[141] Fortunately, today this blatant bigotry does not exist.

Today, the test for being an Indian child under the ICWA has become a two-part statutory question.[142] First, the child must be either a member of a tribe or eligible for membership in a tribe. Second, the child must be the biological child of a tribal member.[143] The tribe has the primary power to determine its own tribal membership.[144] Written membership requirements establish tribal membership. Tribal constitutions or other tribal law define these requirements in the tribal roll.[145] Although membership requirements vary widely, many tribes mandate a minimum of one-fourth degree of blood of the particular tribe for membership.[146] Yet Congress has the power to define tribal membership for administrative purposes such as eligibility for funding, social programs, administrative matters, and certain jurisdictional matters.[147]

The ICWA does not demand a specific blood quantum but rather recognizes the tribe's designation of a person as a member or eligible member of that tribe.[148] A few Minnesota cases have refused to apply the ICWA when the child involved had some Indian blood but was neither a member nor eligible for membership in a tribe. In *In re Custody of M.A.L.*,[149] the court admitted that the maternal grandfather was an enrolled member of a Minnesota Chippewa tribe. However, the child was not eligible for enrollment with the Chippewa tribe. The court recognized the child's Indian heritage. Nevertheless, the court did not follow the ICWA. Rather, the court applied the general best

140. *Id.* at 39-47. The Indian Bureau was the predecessor of the BIA.

141. *Id.*

142. 25 U.S.C. § 1903(4) (1988).

143. *Id.*

144. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). A tribe has the right to define membership for its own purposes. This issue is a nonjusticiable political question. *Id.* at 72.

145. COHEN, *supra* note 35, at 22. Following passage of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. §§ 461-470 (1988), membership has become more formalized.

146. Cohen, *supra* note 35 (citing AMERICAN INDIAN POLICY REVIEW COMM'N, 95TH CONG., 1ST SESS., FINAL REPORT 108-09 (Comm. Print 1977)). Some tribes require as much as one-half degree of tribal blood. Others allow as little as one-eighth, but allow a person to include other tribal blood to reach a minimum quantum of total Indian blood, such as one-fourth. *Id.* at 23 & n.27.

147. *Id.* at 23 (citing Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 84-86 (1977); Wallace v. Adams, 204 U.S. 415 (1907); Simmons v. Eagle Seelatsee, 244 F. Supp. 808 (E.D. Wash. 1965) (three-judge court), *aff'd*, 384 U.S. 209 (1966)).

148. 25 U.S.C. § 1903 (1988).

149. 457 N.W.2d 723 (Minn. Ct. App. 1990).

interest test.[150] As a result, the child was placed with a white middle-class family. The court based its conclusion upon the bonding and emotional closeness between the non-Indian family and the child.[151] Although the court did not apply the ICWA, it did note that the non-Indian family committed itself to reinforcing the child's connections with her Indian relatives and Indian heritage.[152]

In another recent decision, *In re Welfare of M.M.O.*,[153] an adolescent mother and her child were considered non-Indians. Most tribes in Minnesota require at least a one-quarter blood quantum for membership. The mother in this case had only one-eighth Indian blood. Thus, the court found she was not an Indian. Consequently, it declined imposition of the ICWA best interest standards for Indian children as embodied in the MIFPA.[154] Unfortunately, some children, such as M.M.O. and M.A.L., have an obvious Indian heritage but do not fall within the definition of the ICWA. The ICWA best interest criteria regrettably does not protect these children.

B. Custody Determination

Secondly, for the ICWA to apply the case must involve a "custody determination" as prescribed in section 1903.[155] In an Eighth Circuit Court of Appeals case, *DeMent v. Oglala Sioux Tribal Court*,[156] the court found the ICWA inapplicable. The case evolved out of a prior divorce proceeding custody determination. The court stated that the "statute only applies to proceedings to determine foster care placement, the termination of parental rights, preadoptive placement and adoptive placement."[157]

Also, in an earlier Minnesota case, *Desjarlait v. Desjarlait*,[158] the Act did not apply in a custody dispute which evolved out of marital dissolution.[159] The court said the intent of the ICWA was to "preserve Indian culture [sic] values under circumstances in which an Indian child is placed in a foster home or other prospective institution."[160] Further, the court decided that the MIFPA did not apply.

Finally, the BIA established federal guidelines that suggest the statutory exclusion of a "divorce proceeding" includes "other domestic

150. *Id.* at 727.
151. *Id.*
152. *Id.* at 727-28.
153. No. C6-89-1598, 1990 WL 13388 (Minn. Ct. App. Feb. 20, 1990).
154. *Id.* at *1.
155. 25 U.S.C. § 1903(1) (1988).
156. 874 F.2d 510 (8th Cir. 1989).
157. *Id.* at 514.
158. 379 N.W.2d 139 (Minn. Ct. App. 1985).
159. *Id.* at 144 (citing *In re* Bertelson, 617 P.2d 121, 125 (Mont. 1980); A.B.M. v. M.H., 651 P.2d 1170, 1172-73 (Alaska 1982)).
160. *Id.* (quoting *Bertelson*, 617 P.2d at 125).

relations proceedings between spouses."[161] Therefore, any Indian child custody case involving a spousal dispute will not employ the ICWA or MIFPA.

C. *Burden of Proof*

If the ICWA applies to a custody case, the court must meet the appropriate burden of proof in accordance with the Act. Congress originally introduced the ICWA evidentiary standards for both foster care and termination actions as "beyond a reasonable doubt."[162] The House Committee felt that any removal of a child from the child's parents effected a severe penalty, possibly greater than a criminal penalty. In spite of this, Congress amended the original bill by reducing the standard to "clear and convincing in cases where parental rights are not terminated."[163] This clear and convincing standard of proof is a minimum standard required by the Due Process Clause[164] in *any* parental rights termination process.[165] However, Congress did retain the higher standard for termination proceedings. Therefore, as a protection under the ICWA, the burden of proof is higher in termination proceedings involving Indian parents than the burden of proof for non-Indian parents' termination proceedings.

Minnesota case law establishes the criteria for meeting the appropriate burden of proof under ICWA. In *In re Welfare of Chosa*,[166] the earliest Minnesota case discussing the ICWA, the court did not apply the Act, but did set forth standards for future ICWA proceedings.[167] The court stated that ICWA termination proceedings "must be 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."[168] Further, the court said

161. BIA Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 ¶ B.3 commentary. Domestic placements that do not deprive the parents or Indian custodian of the right to regain custody of the child upon demand.

162. HOUSE REPORT, *supra* note 26, at 22.

163. *Id.*

164. U.S. CONST. amend. XIV.

165. *See* Santosky v. Kramer, 455 U.S. 745, 747-48 (1982) (emphasis added). A parent's rights to custody of children integrity is a fundamental liberty interest under the Constitution and is therefore protected. *See generally id.* at 745-70.

166. 290 N.W.2d 766 (Minn. Ct. App. 1980).

167. *Id.* at 769. An eighteen-year-old Indian mother's rights were not terminated because she showed growing maturity. She previously had a chemical dependency problem but received some treatment. The evidence was inconclusive as to whether she would be unable to care for her son in the future or whether his welfare would be adversely affected. Thus, the court expressed a desire that she be monitored to ensure that she continued to meet the challenge of parenthood.

168. *Id.*

that trial courts must "make clear and specific findings which conform to the statutory requirements for termination adjudications."[169] Future courts were supposed to follow these evidentiary criteria.

1. Expert Witnesses

Under the ICWA, "qualified expert witnesses" must present testimony to the court to satisfy the burden of proof for either "clear and convincing" or "beyond a reasonable doubt."[170] Individuals who possess expertise beyond the normal social worker qualifications should present this testimony.[171] Social workers ignorant of Indian cultural values and social norms may make decisions totally inappropriate to the context of Indian family life and often may discover neglect or abandonment where none exists.[172] Many times, when Indian parents leave their children for periods of time with extended family members, courts and agencies perceive this action as abandonment.[173] Many experts do not or cannot view the Indian child's best interest from the federal congressional standard which includes the tribal interest.[174] This is due, in part, to a lack of understanding or existence of a perception that Indians are "a vanishing race" and their relationships are inherently dysfunctional.[175] Thus, to implement placement standards which truly reflect an Indian child's best interests, experts must possess knowledge about Indian culture.

The application of the evidentiary standards in Minnesota has evolved through a series of cases which define qualified expert witnesses. In earlier cases, the qualification level of expert witnesses in ICWA cases was quite low. As recently as 1985, in *In re Welfare of T.J.J.*,[176] the court found that the ICWA did not require a witness to have a background in Indian culture.[177] Further, the court refused to apply

169. *Id.*

170. HOUSE REPORT, *supra* note 26, at 22; *see also Chosa*, 290 N.W.2d at 766 (establishing Minnesota's requirements for termination proceedings).

171. *Id.*

172. Ronald S. Fischler, *Protecting American Indian Children*, 25 SOCIAL WORK 341, 342 (Sept. 1980) (quoting WILLIAM BYLER, *The Destruction of American Indian Families* 3 (Steven Unger ed., 1977)). In the past, too many "children were removed merely because the family did not conform to the decision-maker's stereotype of what a proper family should be." BIA Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,593 ¶ D.3 commentary.

173. *Id.* Many Indian tribes view aunts and uncles as important in a child's life as the parents.

174. BLANCHARD, *supra* note 104, at 23.

175. *Id.*

176. 366 N.W.2d 651 (Minn. Ct. App. 1985). The trial court allowed the testimony of two psychologists, neither of whom had extensive exposure to Indian culture. However, both had some coursework in Indian culture and one had some experience working with Indian youths. *Id.* at 655.

177. *Id.* at 655.

the specific standards set forth in the Minnesota Department of Public Welfare (DPW) Manual (now the DHS Manual) concerning expert testimony for Indian custody proceedings.[178] Although the appellate court said that the DPW guidelines were appropriate, it found that these guidelines did not bind the trial court. Instead, the trial court could exercise broad discretion to assess a witness' knowledge. As a result, in *T.J.J.*, the court terminated a mother's parental rights based largely upon the testimony of two psychologists, both of whom possessed little knowledge and had little exposure to Indian culture.[179] This decision clearly did not meet the "beyond a reasonable doubt" standard of proof.

Fortunately, a later case, *In re Welfare of B.W.*,[180] overruled the arbitrary decisions in *T.J.J.* and set forth strong guidelines for expert witness qualifications in Indian child custody proceedings. Reviewing the Supreme Court's language in *Holyfield*, the *B.W.* court held that the *T.J.J.* decision was erroneous because it left "application of the evidentiary standards in the DHS Manual to the discretion of the state trial courts."[181] In *B.W.* the appellate court found that the experts who testified at the trial court were not qualified experts pursuant to the DHS Manual standards.[182] The appellate court stated that in cases where a trial court chooses not to apply the DHS Manual standards, it must give specific written findings showing "good cause" reasons for not applying the standards.[183] Absent such written findings, the DHS Manual must be applied as an "explicit expression of [Minnesota] state policy consistent with and carrying out the purposes of the federal ICWA."[184] The DHS Manual requires an expert witness to have "substantial knowledge of prevailing social and cultural standards and child-rearing practices within the Indian community."[185]

The court in *B.W.* then assessed the trial court witnesses' qualifications and found that their experience insufficiently met the DHS

178. *Id.* at 655. The MINN. DPW SOC. SERV. MANUAL (now the DHS MANUAL) states that an expert should have "substantial knowledge of prevailing social and cultural standards and child rearing practices within the Indian community." *Id.*

179. *See T.J.J.*, 366 N.W.2d at 655-56.

180. 454 N.W.2d 437 (Minn. Ct. App. 1990). The parental rights of a mother and father were terminated, based upon experts' testimonies. Both parents were accused of numerous occasions of intoxication. However, the mother entered chemical dependency treatment followed by AA meetings and later an Anti-abuse program. Several times a social worker made unannounced visits to the home to assess the family's alcohol use.

181. *Id.* at 443.

182. *See id.* at 443-45. The case was remanded to the trial court for application of the new more stringent standards for expert witnesses.

183. *Id.* at 443-44.

184. *Id.* at 444.

185. *Id.* (citing DHS MANUAL, *supra* note 178, at XIII-3586 (last revised) (Jan. 30, 1987)). Because the DHS MANUAL sets a higher standard of protection than the ICWA, it should therefore be applied. *Id.*; *see also* 25 U.S.C. § 1921 (1988) (stating that the

standards for the "beyond a reasonable doubt" standard.[186] The court found that a caseworker who deals with Indian families is not necessarily qualified. Also, a person of Indian heritage who has no recognized knowledge of tribal customs does not automatically become qualified.[187]

The court remanded the case for several reasons. First, the state's experts lacked sufficient qualifications.[188] Second, the trial court disregarded the testimonies of the defendant's experts, who were highly qualified.[189] In conclusion, the appellate court found that the evidence presented did not "constitute the necessary proof beyond a reasonable doubt, which proof must include qualified expert testimony."[190]

A recent decision reaffirmed the criteria established in *B.W.* In *In re Welfare of M.S.S.*,[191] the appellate court discovered that of the eight witnesses who testified before the trial court, only one person potentially qualified as an expert witness. The trial court order was issued prior to the publication of *B.W.* For this reason, the appellate court remanded the issue of the experts' qualifications for reconsideration.[192] On remand, the trial court was instructed to follow the standards of the DHS Manual to establish proof "beyond a reasonable doubt 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."[193]

In the future, Minnesota courts must adhere to the standards set forth in *B.W.* and *M.S.S.* "If the petitioning party's witnesses are not conversant with Indian culture and child-rearing practices, the problems the Congress has tried to remedy may remain, despite the adoption of the Indian Child Welfare Act."[194]

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higher standard of either state or federal law should apply to the rights of Indians). The BIA Guidelines also set forth specified criteria for expert witnesses. *See* BIA Guidelines, *supra* note 161, at 67,593 ¶ D.4.

186. *B.W.*, 454 N.W.2d at 444-45.

187. *Id.* at 444.

188. *Id.* at 445.

189. *Id.*

190. *Id.*

191. 465 N.W.2d 412 (Minn. Ct. App. 1991). The lower court's proceeding terminated a father's parental rights. His request that the child be placed with his brother and sister-in-law, who were licensed foster parents, was virtually ignored in spite of the expert testimony recommending this proposal. Also, the trial court refused to hear the testimony of the father's brother and sister-in-law. After the trial court's termination all relatives were forbidden visits with the child. The appellate court discussed the errors of the lower court and remanded the case. *Id.* at 419.

192. *Id.* at 417.

193. *Id.* at 447 (citing ICWA, 28 U.S.C. § 1912(f)). The court also referred to the BIA guidelines which are similar to the *DHS Manual* guidelines.

194. *In re* B.W., 454 N.W.2d 437, 444 (Minn. Ct. App. 1990).

2. Active Efforts

The "active efforts" provision of the ICWA is yet another standard that implements the Act's presumption against the termination of parental rights and the Act's purpose of keeping the Indian family together. The ICWA requires:

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the Court that 'active efforts' have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these 'efforts' have proved unsuccessful.[195]

Congress adopted this criterion because "most State laws require public or private agencies involved in child placements to resort to remedial measures prior to initiating placements or termination proceedings, but that these services are rarely provided."[196] The "active efforts" standard places a higher burden of proof on state agencies than the predominately applied "reasonable efforts" standards.[197] A court must make a truly diligent and good faith effort to keep the family together. This criteria is a minimum threshold even for "reasonable efforts" to be satisfied.[198] Additionally, to meet reasonable efforts requirements, an agency must make affirmative, repeated, and meaningful efforts to assist parents in overcoming their problems. "Caseworkers must do more than document failures. They have to want the family to make it."[199]

Until lately, Minnesota courts virtually ignored the ICWA's federal mandate for "active efforts" and instead applied the "reasonable efforts" standards set forth in the state statutes.[200] In *In re R.M.M.*,[201]

195. 25 U.S.C. § 1912(d) (1988) (emphasis added).

196. HOUSE REPORT, *supra* note 26, at 22. When the reasonable efforts requirements were followed the result was an avoidance of removal in 70% of the cases. A total of 20% resulted in family reunification. Only 2% resulted in adoption and 1% in permanent foster care. MINN. FINAL REPORT, *supra* note 66 (citing DHS study of permanency planning activities and dispositions between 1986-1988 (released Mar. 1989)).

197. DEBRA RATTERMAN, REASONABLE EFFORTS, A MANUAL FOR JUDGES, NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION — A PROJECT OF THE ABA YOUNG LAWYER DIVISION 3 (1987). Minnesota's termination statute requires a showing of reasonable efforts. However, the same statute now requires that the best interest standard for Indian children follow the ICWA which calls for active efforts. *See* MINN. STAT. ANN. § 260.221 (West Supp. 1991).

198. RATTERMAM, *supra* note 197, at 13.

199. *Id.*

200. *See* MINN. STAT. ANN. § 260.221 (West Supp. 1991). In 1988, the legislature specifically clarified the fact that reasonable efforts are not enough for cases involving Indian children. The statute now refers to the ICWA standards.

201. 316 N.W.2d 538 (Minn. 1982). A mother's parental rights were terminated.

the Minnesota Supreme Court found that "reasonable efforts had 'failed to correct conditions leading to a determination' of neglect."[202] The court purportedly scrutinized the evidence to determine whether it sufficiently satisfied the "beyond a reasonable doubt" standard demanded by the ICWA.[203] In spite of this professed scrutiny, the mother's rights were terminated absent a showing of active efforts. Also, the statutes require a written case plan even for a showing of reasonable efforts; none existed in this case.[204] The court concluded that although "victimized," the mother was "simply unable to care for her child."[205] Even if in the end the mother's rights might have been terminated, the court should have followed the active efforts mandate of the ICWA. The court may have prevented the breakup of this Indian family.

In later cases, the courts still applied a lesser standard rather than the required active efforts. In *T.J.J.*,[206] the court found that the social worker's testimony "supported a finding that the county *actively offered* remedial *services*."[207] The court used the key word "actively." However, the ICWA requires that the *efforts* be active. These efforts must not merely *offered* to the parents but must be proved unsuccessful.[208] Here, the state did not meet the proper burden.

In yet another case, *In re Welfare of W.R.*,[209] the court affirmed a termination of parental rights, in part because "reasonable" efforts were made which "failed to remedy the conditions that led to the determination that the children were dependent."[210] The appellate court

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The Court applied the reasonable efforts language of § 260.221 of the Minnesota Statutes instead of the ICWA. Although there was a finding of the mother's alcohol abuse, there appeared to be no active efforts to obtain treatment for her. Instead, the court said that "treatment options has (sic) been available to her; but she has not made use of them." *Id.* at 541. This incorrectly put the burden on her instead of the agencies.

202. *Id.* at 541 (citing MINN. STAT. ANN. § 260.221 (1978)).

203. *Id.* at 540-41 (citing MINN. STAT. ANN. § 260.221 (1978)).

204. *Id.* at 542 (citing MINN. STAT. ANN. § 257.071 subdivision 1 (1978)).

205. *Id.*

206. 366 N.W.2d 651, 656 (Minn. Ct. App. 1985).

207. *Id.* (emphasis added).

208. 25 U.S.C. § 1912 (1988).

209. 379 N.W.2d 544 (Minn. Ct. App. 1985). A father's parental rights were terminated because the Court found that abandonment existed. The father claimed a lack of financial resources existed. Yet, the court found abandonment due to the father's sporadic phone calls and sending of few gifts to his children. Also, the children were deemed abandoned when placed with grandparents for periods of time. Further, despite requests to the state that the children be allowed to visit and stay with the father's parents, the arrangements were never made to help accommodate the visits. The father was accused of harming the children. These accusations were found only through the testimony of one social worker, who did not appear to be a qualified expert witness.

210. *Id.* at 549 (again the standard of § 260.221 of the Minnesota Statutes was applied).

agreed with the trial court's determination that "termination was mandated because of appellant's failure to meet minimum standards of compliance with social service efforts to bring appellant and the children back together."[211] More appropriately, the court should have placed the burden of proof concerning the efforts upon the social service agency rather than upon the parent.[212]

Finally, a Minnesota court in *M.S.S.* established the correct standard of proof required for active efforts.[213] The court stated that the agency must prove "active efforts" beyond a reasonable doubt for termination proceedings. The court noted that this burden of proof standard had been applied by other jurisdictions.[214] The court in *M.S.S.* premised that parental termination requires the reasonable doubt standard. Further, it found that a court can only effect terminations by showing that active efforts have been made and failed. Therefore, the appellate court concluded that the "adequacy of efforts and futility of them, as predicates to termination, must likewise be established beyond a reasonable doubt."[215] Consequently, the court remanded *M.S.S.* for consideration of a previously ignored proposal to allow the child to be placed with the father's brother and sister-in-law. The appellate court said "we do not believe the reasonable doubt standard could have been met without consideration of this alternative plan."[216] The court also noted that implementation of the father's proposed plan would fulfill the purpose of the ICWA by preventing the breakup of the existing Indian family.[217]

3. *Objections to Jurisdictional Transfer*

A tribe may assume jurisdiction over a custody case involving an Indian child. Public Law 280 still governs in Minnesota. A Minnesota tribe establishing a tribal court approved by the Secretary of Interior or the Red Lake Tribe exempted from Public Law 280 currently may request exclusive jurisdiction over custody proceedings when the child resides or is domiciled on the reservation.[218] A tribal court may exert

211. *Id.* at 548.

212. RATTERMAN, *supra* note 197, at 10. The party seeking the termination must satisfy the Court that active efforts were made and were unsuccessful. *See* 25 U.S.C. § 1912(d) (1988).

213. 465 N.W.2d 412, 418-19 (Minn. Ct. App. 1991).

214. *Id.* (citing *In re* L.N.W., 457 N.W.2d 17, 19 (Iowa Ct. App. 1990); *In re* Morgan, 364 N.W.2d 754, 758 (Mich. Ct. App. 1985); People *ex rel.* S.R., 323 N.W.2d 885, 887 (S.D. 1982)).

215. *Id.*

216. *Id.* at 419. The court said that if the relatives were qualified foster parents, the ultimate need for termination might be avoided.

217. *Id.* at 418-19.

218. *See* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 42-43 n.16 (1989) (establishing federal definition of domicile for ICWA cases).

exclusive jurisdiction only in the absence of good cause to the contrary and in the absence of an objection by either parent.[219] Congress drafted an exclusive tribal jurisdiction provision into the Act to confirm the developed case law which held that tribes have exclusive jurisdiction when the child resides or is domiciled on the reservation.[220]

Tribal jurisdiction may be denied for several reasons. First, good cause to the contrary may exist. Good cause to the contrary is present if the child's tribe has no appropriate tribal court as defined in the ICWA.[221] Additionally, good cause not to transfer jurisdiction may exist if (1) the proceeding is too far along when the transfer petition is filed; (2) the child is over twelve years old and objects; (3) the evidence required can not be adequately presented in tribal court without undue hardship; (4) the parents of a child over five years old are unavailable and the child has had very minimal contact with the tribe or its members.[222] Also, the burden of establishing good cause to the contrary is on the opposing party.[223] To date, no Minnesota cases address this issue. However, in light of *B.W.* and *M.S.S.*, Minnesota courts should adhere to the decision in *Holyfield* as well as to the BIA and DHS guidelines[224] to resolve these issues.

Second, under the ICWA, an objection by either parent can cause denial of exclusive jurisdiction. Two Minnesota cases construe this situation. In *In re Welfare of R.I.*,[225] the Minnesota Court of Appeals upheld a trial court's finding that there was no parental objection. Although the mother verbally had objected to a transfer of the proceeding to tribal court, the court found that she impliedly consented to the transfer by voluntarily taking the children to the reservation and leaving them there.[226] Arguably, the verbal objection was not "absent an objection" in the literal sense. However, the court found that the mother's actions spoke louder than her words.

In another case concerning parental objection, *In re Welfare of C.C.T.L., Jr.*,[227] the court found no objection to exist. In this case,

219. *See* 25 U.S.C. §§ 1911(b), 1918 (1988).

220. *See* HOUSE REPORT, *supra* note 26, at 21 (citing Wisconsin Potowatomies v. Houston, 393 F. Supp. 719 (1973); Wakefield v. Little Light, 276 Md. 333 (1975); *In re* Greybull, 543 P.2d 1079 (1975); Duckhead v. Anderson, 555 P.2d 1334 (Wash. 1976)).

221. BIA Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,591 ¶ C.3 (1979); *see also* DHS MANUAL, *supra* note 178, at XIII-3573.

222. *Id.*

223. *Id.*

224. *Id.* Either or both guidelines were cited to as authoritative in *M.S.S.*, *B.W.*, and *Holyfield*.

225. 401 N.W.2d 173 (Minn. Ct. App. 1987).

226. *Id.* at 177.

227. No. C3-88-253, 1988 WL 53115 (Minn. Ct. App. May 31, 1988). Jurisdiction was initially granted to the tribal court. The tribal court then awarded permanent custody to the father. The mother later alleged there would be harm to the child if

the maternal grandparents petitioned for custody of the child, contending that the mother had not knowingly consented earlier when a state court transferred jurisdiction to the tribal court. In the alternative, the grandparents claimed the mother was under duress at the time and could not object. The court found that neither of these arguments were supported by law or facts. In conclusion, the court stated that the ICWA "does not require that a parent give consent to the transfer of jurisdiction to the Tribal Court."[228] Rather, "transfer is required when a parent has made *no* objection."[229] The court was persuaded by the fact that the mother had been represented by counsel at the prior hearing. Finally, the previous judgment of the tribal court on the best interests of the child was not overruled but rather given full faith and credit by the state court.[230] The state court found that the appellant's desire to retain the child was not sufficient reason to overrule the tribal court decision.[231] The primary focus in such a jurisdictional conflict "is not tribal rights versus individual rights, but rather the right of a people to maintain a culture that has provided them meaning in this world from the beginning of time."[232]

XI. Tribal Court Decisions

An existing appropriate tribal court has jurisdiction to adjudicate the custody of an Indian child either by assuming original jurisdiction or by assuming exclusive jurisdiction upon transfer from a state court pursuant to section 1911(a) of the ICWA. The tribal court remains best qualified to determine the future best interests of one of its members. The Supreme Court acknowledged this premise in *Holyfield*[233] when it deferred the ultimate determination to the Choctaw tribal court. The tribal court then thoroughly assessed the case and determined the final placement based upon the children's best interests.[234]

Because Minnesota is a Public Law 280 state, it currently has only one authorized tribal court, the Red Lake Band of Minnesota Chippewa, with the exclusive authority to adjudicate child custody cases without state involvement. Because the Red Lake tribal court does not

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returned to the father. The state court found no evidence to support this allegation. Further, the court found the tribal court would be the best forum for assessing the child's treatment which occurred on the reservation.

228. *Id.* at *4.

229. *Id.* (emphasis added).

230. *Id.*

231. *Id.*

232. Blanchard & Barsh, *supra* note 110, at 354.

233. *Id.* at 353-54.

234. *See supra* note 89 and accompanying text.

publish its opinions, an analysis of the factors that it applies to determine the best interests of a child is not possible. However, other tribal courts do publish decisions. These decisions are worthy of comment at this point to ascertain how some tribal courts determine the best interests of children.

A recent appellate tribal court decision, *In re DeCoteau, Jr.*,[235] reversed a lower tribal court decision to terminate a father's parental rights. The tribal court evaluated the best interests of the child as a determinative factor in reaching its decision. The tribal court found that the lower court based its decision upon allegations of parental abuse unsupported by the evidence. Quoting the ICWA and the BIA guidelines, the court found that expert testimony must be used as primary evidence to answer two questions: (1) Will the parent's conduct cause serious physical or emotional harm to the child? and (2) Can the parent be persuaded to change this damaging conduct?[236] The latter question is similar to the active efforts requirement of the ICWA, which mandates a concerted effort to help the parent mend their ways.[237]

The court said that the collective testimonies of expert witnesses must fully answer both questions. Also, the court found that the experts must be qualified to be Indian experts.[238] In sum, the court found that the testimony presented to the lower court did not warrant termination of the father's parental rights. The court said, "There is no decision that a trial judge makes that requires a greater sense of involvement, understanding, patience, to say nothing of judicial wisdom garnered over years of experience, than [a decision] that require[s] a determination of 'what is in the best interests of a minor child.'"[239] This statement shows a compassionate insight often lacking in state court proceedings.

Another tribal court evaluated the best interests of Indian children in a similar fashion. In *In re C.D.S. & C.M.H.*,[240] the grandmother of two minor Indian children sought permanent guardianship. Because the tribal court found the mother capable of raising her own children, the court did not terminate her parental rights. Previously, the children had resided with their grandmother. However, the mother refused to

235. 17 Indian L. Rep. (Am. Indian Law. Training Program) 6081 (N. Plains Intertribal Ct. App. 1990).

236. *Id.* at 6082.

237. 25 U.S.C. § 1912(d) (1988).

238. *See DeCoteau*, 17 Indian L. Rep. at 6082.

239. *Id.* at 6083.

240. 17 Indian L. Rep. (Am. Indian Law. Training Program) 6083 (Ct. Indian Offenses, Delawares, Nov. 23, 1988). The children previously lived for a time with their grandparents. However, the natural mother had various psychological and chemical abuse problems in the past, reformed, and then wished to have her children with her again. She did not want the children to have any contact with the grandparents.

allow the children any further contact with their grandmother after she resumed total parental custody.

The court resolved the dilemma between the mother and grandmother by formally awarding visitation rights to the grandmother rather than awarding her the permanent guardianship she requested. The court based its visitation award upon the best interests of the children. The court said:

> Since this is an Indian family, where grandparents oftentimes provide the necessary guidance in traditional tribal customs, history, and culture, and function as the central part of the family, the court would find it difficult to completely ignore the need to maintain and foster such important relationships. The fact that the children in this case have lived with the petitioner for a significant period of their childhood, is a weighty factor in reaching this conclusion.[241]

Because of these factors, the court denied the mother's desires that the children have no contact with their grandmother. However, because of the existing feud between the two women, the court imposed constraints on the visitation decree. The court maintained continuing jurisdiction over the matter and ordered periodic review hearings to monitor the situation.[242]

Clearly, tribal courts like those above are fully competent to determine child custody issues. Further, they can more fully consider the particular tribal culture and customs when making these decisions. Finally, tribes inherently should have the right to determine the futures of its own members.

XII. Conclusion

The provisions of the ICWA express the best interests of an Indian child. The Act acknowledges that an Indian child's interests intertwine with the tribe's interests. The Act embraces more culturally perceptive criterion to assess the best interests of Indian children than previously existed. The criterion differs from non-Indian criterion in several respects. First, the Act furthers federal responsibility to protect tribal sovereignty and self-determination. Also, the criterion embodies the concept that Indian children psychologically need to maintain tribal heritage and culture to become well-adjusted Indian adults, who have a strong cultural identity. Further, compliance with the ICWA preserves the cultural identity of tribes for future generations.

241. *Id.* at 6084.
242. *Id.*

Minnesota's legislature recognizes the need for compliance with the ICWA. The legislature continually conforms state statutes to comport with the provisions of the ICWA. Also, existing statutes such as MIFPA provide some higher protections than the ICWA.

In the past, Minnesota courts have inadequately applied the provisions of the ICWA in Indian child custody cases. Fortunately, Minnesota now applies more stringent standards in such cases. The courts established strong standards for qualified expert witnesses to fulfill the "beyond a reasonable doubt" burden of proof that is required for termination proceedings. In addition, courts now mandate a showing of evidence beyond a reasonable doubt to prove that active efforts have been made to preserve the existing Indian family.

Finally, Minnesota courts do relinquish jurisdiction to appropriate tribal courts. In cases where the tribe can exercise exclusive jurisdiction, Minnesota courts grant such jurisdiction absent an objection by the parents. However, no published decisions exist to show whether courts grant such jurisdiction absent good cause to the contrary. Once state and tribal courts agree to tribal jurisdiction, tribes assert their right to self-determination and thus ensure continued determination over the future of their tribal members and tribal culture.