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LITTLE POWER TO HELP BRENDA? A DEFENSE OF THE INDIAN CHILD WELFARE ACT AND ITS CONTINUED IMPLEMENTATION IN MINNESOTA

Peter K. Wahl†

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I. INTRODUCTION

The tragic death of eight-year old Brenda Swearingen renewed vigor in the debate regarding the Indian Child Welfare Act (ICWA).¹ In Minneapolis in 1999, Brenda and her three siblings were involuntarily removed from their mother's care and placed in the temporary care of the children's maternal aunt.² During her foster care, Brenda was beaten to death by her aunt's relative, who was also living in the home.³

Most objective accounts of this tragedy properly place the full measure of blame upon the adults in Brenda's foster home, all of whom pleaded guilty to her murder.⁴ However, ICWA, which established the procedural aspects of the custody case, has taken some blame for Brenda's death. In a letter to the editor titled *Little Power to Help Brenda*, a local child protection worker apportioned some blame for Brenda's death on ICWA and demanded its amendment.⁵ The Indian community widely rejects this view and, by and large, continues to support ICWA.⁶ This article supports the Indian community's viewpoint.

ICWA created federally mandated procedural safeguards for Indian families confronted with a child custody matter.⁷ One goal

1. See 25 U.S.C. §§ 1901-1963 (1994); see also Robert Desjarlait, Editorial, *Death is a Call to Improve Indian Adoption Law, Not Abandon It*, STAR TRIB. (Minneapolis-St. Paul), Nov. 27, 1999, at 31A. Desjarlait was Brenda's former foster father.

2. See Joy Powell, *Murder Charges Filed in Beating of 8-Year Old*, STAR TRIB. (Minneapolis-St. Paul), Nov. 9, 1999, at 1A; Rachel E. Stassen-Berger, *Man pleads guilty in death of girl, murder sentence will be 25 years*, PIONEER PRESS (St. Paul), Dec. 8, 1999, at 4B.

3. See Powell, *supra* note 2, at 1A; Stassen-Berger, *supra* note 2, at 4B.

4. See David Hawley, *2 charged in death of 8-year-old girl, officials are seeking to revoke woman's custody of three other children*, PIONEER PRESS (St. Paul), Nov. 9, 1999, at 4B; Powell, *supra* note 2, at 1A; Stassen-Berger, *supra* note 2, at 4B; Leslie Brooks Suzukamo, *Girl, 8, dies in hospital; guardian and cousin held*, PIONEER PRESS (St. Paul), Nov. 4, 1999, at 4B; Margaret Zack, *Guardian of slain 8-year-old gives up rights to 3 siblings*, STAR TRIB. (Minneapolis-St. Paul), Dec. 9, 1999, at 1A; Margaret Zack & David Chanan, *Two admit guilt in 8-year-old's death; prosecutor: prison time exceeds norm for crimes*, STAR TRIB. (Minneapolis-St. Paul), Dec. 8, 1999, at 1B.

5. See Jody K. Johnson, Editorial, *Little Power to Help Brenda*, STAR TRIB. (Minneapolis-St. Paul), Nov. 17, 1999, at 18A.

6. See Desjarlait, *supra* note 1, at 31A; Gladys Henry, Editorial, *Saving Children*, STAR TRIB. (Minneapolis-St. Paul), Nov. 25, 1999, at 36A.

7. See 25 U.S.C. §§ 1911-12 (1994). ICWA gives Indian tribes exclusive jurisdiction over child custody proceedings involving Indian children who are residents of or domiciled on the reservation, except where existing federal law already grants such jurisdiction to the states. See *id.* § 1911(a). ICWA also provides

of ICWA is to promote greater tribal involvement in state child custody proceedings involving Indian children.⁸ ICWA also creates a placement preference in which an involuntarily placed Indian child must be placed with a relative, a member of the tribe, or another Indian family, if possible.⁹ ICWA also establishes procedural requirements for voluntary placements.¹⁰ Minnesota law makes ICWA more inclusive by adding cultural heritage as a placement factor for children of all races.¹¹ For Indian children, the Minnesota Legislature implemented and expanded ICWA requirements by creating the Minnesota Indian Family Preservation Act (MIFPA).¹²

for transfer of proceedings from state courts to tribal jurisdictions in cases involving foster care placement or termination of parental rights of Indian children who are not residents of nor domiciled with his or her tribe. *See id.* § 1911(b). Additionally, the act gives the Indian child's parents, Indian custodian or Indian tribe the right to intervene at any point during child custody proceedings in state courts. *See id.* § 1911(c). The act further provides that the United States and individual states must give full faith and credit to the public acts, records and judicial proceedings of the Indian tribes. *See id.* § 1911(d). ICWA also requires that notice be given to the Indian child's parents or Indian custodian, as well as the child's Indian tribe prior to any state court custody proceedings involving Indian children. *See id.* § 1912(a). Finally, the act provides for appointed counsel for indigent parents or Indian custodians. *See id.* § 1912(b).

8. *See id.* § 1911 (establishing tribal court exclusive jurisdiction over Indian children domiciled on reservations and concurrent jurisdiction with the states regarding Indian children domiciled elsewhere); *Id.* § 1912 (requiring that notice be given to the tribe regarding involuntary child custody proceedings involving Indian children); 124 CONG. REC. 38102 (1978) (statement by Robert Lagomarsino, co-sponsor of ICWA, that "[g]enerally, there are no requirements for responsible tribal authorities to be consulted about or even informed of child removal actions by non-tribal government or private agents"); *see also* Patrice H. Kunesh, *Transcending Frontiers: Indian Child Welfare in the United States*, 16 B.C. THIRD WORLD L.J. 17, 18 (1996) ("These tenets recognize that tribes have a serious stake in the welfare of their children and empower those tribes with expansive jurisdiction over Indian child custody proceedings . . .").

9. *See* 25 U.S.C. § 1915(a).

10. *See id.* § 1913(a) (including parental consent to placement executed in writing, recorded before a judge and certifying that the terms of the consent were fully understood by the parent).

11. *See* MINN. STAT. § 260C.193, subd. 3 (1998) (providing that "the child's religious and cultural needs" are to be factored when an involuntary placement is contemplated); *Id.* § 518.517 (requiring that ability to "continue educating and raising the child in the child's culture and religion or creed" be considered by the court in deciding custody disputes).

12. *See id.* § 260.751-835 (Supp. 1999) (containing similar provisions regarding jurisdiction over custody proceedings, notice requirements, intervention rights for proceedings in state courts, and grants for primary support for Indian child welfare programs, placement prevention and family reunification services for Indian children)

ICWA was enacted in the 1970s, when Congress finally realized that Native American families and culture were rapidly being driven toward extinction.¹³ The cause of this problem was a long history of government policies of assimilation and misguided court and agency decisions involving child custody matters.¹⁴ Much has changed in the past few decades, but studies confirm that ICWA continues to be crucial to Native American families and culture, while the original purpose and intent of ICWA still are being realized.¹⁵

13. See 25 U.S.C. § 1901 (4) (1994) (citing Congress' express finding "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-tribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions").

14. See H.R. REP. NO. 95-1386, at 11 (1978) [hereinafter H.R. REP. NO. 95-1386], reprinted in 1978 U.S.C.C.A.N. 7530, 7531, 7533 (placing partial blame for the disproportionate removal of Indian children from their families on state courts and "social workers, ignorant of Indian cultural values and social norms [in making] decisions that are wholly inappropriate in the context of Indian family life"); *The Indian Child Welfare Act of 1977: Hearings Before the United States Senate Select Comm. on Indian Affairs on S. 1214 to Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other Purposes*, 95th Cong. (1977) [hereinafter 1977 Hearings]; *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs*, 93rd Cong. 45-47 (1974) [hereinafter 1974 Hearings]; Donna J. Goldsmith, *Individual vs. Collective Rights: The Indian Child Welfare Act*, 13 HARV. WOMEN'S L.J. 1, 5 (1990) (stating that "many American Indians perceive themselves as part of the larger cultural group, not as completely autonomous individuals. Every child belongs to both its 'nuclear' family and to the tribe. Prior to the arrival of Anglo-Europeans in North America, an orphaned child was virtually unheard of in Indian tribal societies"); Christopher A. Karns, *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation: State Taxation as a Means of Diminishing the Tribal Land Base*, 42 AM. U. L. REV. 1213, 1236 (1993) (citing ICWA as an example of Congressional enactments aimed at rectifying the "destructive and nearly genocidal policies of previous government establishments"); Linda J. Lacey, *The White Man's Law and the American Indian Family in the Assimilation Era*, 40 ARK. L. REV. 327, 347 (1986) (citing both child-rearing differences between Native American and non-Native American society and assimilative government policies as reasons for the destruction of Indian families and culture); Stan Watts, *Voluntary Adoptions Under the Indian Child Welfare Act of 1978: Balancing the Interests of Children, Family, and Tribes*, 63 S. CAL. L. REV. 213, 214 (1989); see also Kunesh, *supra* note 8, at 24.

15. See MINNESOTA SUPREME COURT TASK FORCE ON RACIAL BIAS IN THE JUDICIAL SYSTEM, FINAL REPORT 79 (1993) [hereinafter TASK FORCE ON RACIAL BIAS] (citing MINNESOTA DEP'T OF HUMAN SERV., MINNESOTA MINORITY FOSTER AND ADOPTIVE CARE, 1989 (1991) for the proposition that Native American children are being removed from their homes at a rate 10 times higher than Caucasian children); MINNESOTA DEP'T OF HUMAN SERV., NEWS RELEASE, June 15, 1998; BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION AND HOUSING,

This article summarizes the history of Indian placement programs and provisions of ICWA and MIFPA, the practical implementation and current practice of the procedural safeguards required by federal and Minnesota law, and the continued need for ICWA in Minnesota today.

II. BACKGROUND OF THE INDIAN CHILD WELFARE ACT

Indian children have been disadvantaged in child custody proceedings from the earliest beginnings of a common law system in the United States.¹⁶ Child custody proceedings concerning Indian children historically separated Indian children from their families at a greatly disproportionate rate to the non-Indian population.¹⁷ The causes of this disproportionality are twofold. First, a long history of strong U.S. assimilation policies separated Indian children from their families and cultures.¹⁸ Second, marked cultural differences between Indian parents and non-Indian majority views of social services have created misunderstandings and have resulted in the common, but often unnecessary, removal of Indian children from their families.¹⁹ ICWA was an effort by Congress to remedy this long history of injustice.²⁰

SUMMARY POPULATION AND HOUSING CHARACTERISTICS, MINNESOTA 85 (1991) (stating that Native Americans in Minnesota comprise one percent of the population, yet nearly 12 percent of the state's out-of-home placements); Donna Halvorsen, *Siblings Can't be Adopted by White Family, Court Rules*, STAR TRIB. (Minneapolis-St. Paul), Jan. 24, 1995, at 1B, 2B (reporting that 60% of Minnesota-born Native American children were being placed in non-Native American homes).

16. See generally Denise L. Stiffarm, *The Indian Child Welfare Act: Guiding the Determination of Good Cause to Depart from the Statutory Placement Preferences*, 70 WASH. L. REV. 1151, 1153-55 (1994) (noting the findings of congressional studies prior to the enactment of the ICWA).

17. See Kunesh, *supra* note 8, at 24 (“[T]housands of Indian children had been forcibly removed from their homes at an incredibly disproportionate rate to the non-Indian population.”) (citations omitted).

18. See *id.* at 22 (“Education, a prominent social tenet of the assimilation policy, was one of the most pernicious Indian child removal methods.”).

19. See Stiffarm, *supra* note 16, at 1153-55 (noting that state courts and agencies long have failed to recognize Indian cultural standards and instead made determinations regarding Indian children's welfare by misapplying non-Indian standards to the Indian social system).

20. See 25 U.S.C. § 1901(4) (1994) (recognizing the all-too-common removal of Indian children to non-Indian foster homes often is unwarranted).

A. *The History of Indian Child Placement Programs*

The U.S. government's first policy directly aimed at Indian children was the establishment of the "Civilization Fund."²¹ This fund provided grants to private agencies that would seek to "civilize" Indian children.²² In his report to Congress in 1867, the commissioner of Indian services concluded that the only way to solve the "Indian problem" was to completely separate Indian children from their tribes.²³ The federal government has supported assimilating Indian children through separation from their tribes at different times in American history. In 1880, a written federal policy outlawed speaking any native languages in federally-funded boarding schools.²⁴ In 1910, a system of bonuses encouraged boarding school employees to take leave from their teaching jobs to "secure" students from nearby reservations.²⁵ According to one U.S. House of Representatives Report, this was accomplished essentially by state-sponsored kidnapping.²⁶

America's history reveals many overt government policies to assimilate Indian children through child placement. In 1959, the Child Welfare League and the Bureau of Indian Affairs initiated the Indian Adoption Project (the Project) to place Indian children into non-Indian homes.²⁷ In its first year, the Project "succeeded" in placing 395 Indian children for adoption in non-Indian homes in eastern metropolitan areas.²⁸ It appears that history has borne a wide variety of governments sponsoring many different Indian child placement policies, most of which are assimilative in nature. There appears to be very little historical evidence of policies attempting to actually strengthen and preserve existing Indian

21. See H.R. REP. NO. 104-808, at 15 (1996) [hereinafter H.R. REP. NO. 104-808]. In outlining the history of government policy towards Indians, the Committee on Resources acknowledged the invaluable information submitted "by tribes and tribal organizations, including the National Indian Child Welfare Association." *Id.* The committee also cites generally ROBERT H. BREMMER, CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY (1970) and DAVID FANSHL, FAR FROM THE RESERVATION: THE TRANSRACIAL ADOPTION OF AMERICAN INDIAN CHILDREN (1972). See *id.*

22. See *id.*

23. See *id.*

24. See *id.*

25. See *id.*

26. See *id.*

27. See *id.* (stating that the Indian Adoption Project was based on the notion that "Indian children were better cared for in non-Indian homes").

28. See *id.*

families.

B. *The History of ICWA*

More than twenty years ago, Congress finally deemed it necessary to enact legislation providing procedural protections to Native American families when confronted with child protection and custody issues.²⁹ At the time of ICWA's deliberation, it was commonly held that the disproportionate removal of Indian children from their families was caused mainly by "social workers, ignorant of Indian cultural values and social norms [in making] decisions that are wholly inappropriate in the context of Indian family life."³⁰

Congress suggested that what social workers commonly determine to be "neglectful," leaving of children with adults outside of the nuclear family, is reliance in Indian culture upon a large group of very extended relatives.³¹ Furthermore, non-Indian social workers get the wrong impression when Indian parents continue to rely upon the welfare department which usually appears quite willing to provide competent help in child-rearing.³² Unbeknownst to many Indian mothers, what is meant to be the willingness to accept help in the raising of a child can be interpreted as parental incompetence.³³ Finally, what commonly is regarded as Indian parents' improper "permissiveness" in parenting their children is not incompetence as interpreted by some non-Indian social workers, but rather a different cultural method of parenting not normally used by non-Indian parents.³⁴

Congressional deliberations regarding the Indian Child Welfare Act brought forth a flood of information regarding unfair Indian child custody practices and the tragic removal of Indian children from their families.³⁵ Congress also heard expert testimony from psychologists that removal of these children from

29. See 25 U.S.C. §§ 1901-1963 (1994).

30. See H.R. REP. NO. 95-1386, *supra* note 14, at 10.

31. See *id.*

32. See *id.*

33. See *id.*

34. See *id.*

35. See H.R. REP. NO. 104-808, *supra* note 21, at 16 (stating that the Committee on Resource's 1978 report "acknowledged that 'the wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today'").

the home would have long-term adverse affects.³⁶ Finally, Congress heard testimony from Indian community leaders regarding the devastating effects that child removal practices have had and continue to have on tribes and Indian culture across the country.³⁷

In the late 1960s and 1970s, between twenty-five and thirty-five percent of all Indian children nationwide were separated from their families and living in an adoptive family, foster care or an institution.³⁸ Approximately eighty-five percent of these Indian children were placed with non-Indian families.³⁹ Two studies concluded that Indian children were placed in foster care five times more often than non-Indian children.⁴⁰

Adoption rates demonstrate that Native American children were more likely to have been adopted than non-Native American children into non-Native homes.⁴¹ Between 1964 and 1975, non-

36. See 1974 Hearings, *supra* note 14, at 45-47 (evidencing the testimony of Dr. Joseph Westermeyer regarding the problems for Indian adolescents and their families connected with the child being removed from their Indian families in favor of non-Indian living arrangements). Dr. Westermeyer testified that while the children were raised with a white cultural and social identity and attended predominantly white schools and churches, they experienced many problems when they reached adolescence. See *id.* at 46; see also *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 33 n.1 (1989) (citing Dr. Westermeyer's testimony during the 1974 Hearings). For example, when they began to date white children, parents of the white children objected and pressured their children not to date Indian children. See 1974 Hearings, *supra* note 14, at 46. Many Indian children were called derogatory names relating to their racial identity. See *id.* Dr. Westermeyer stated that "they were finding that society was putting on them an identity which they didn't possess and taking from them an identity that they did possess." *Id.*

37. See *Hearings on S. 1214 before the Subcomm. on Indian Affairs and Public Lands of the House Comm. on Interior and Insular Affairs*, 95th Cong. 193 (1978) [hereinafter 1978 Hearings] (recording the testimony of Calvin Isaac, the Chief of the Mississippi Band of Choctaw Indians, as stating that "[c]ulturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their people"); see also 124 CONG.REC. 38102 (1978) ("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.") (comments of Rep. Morris Udall); 124 CONG.REC. 38102 (1978) ("This bill is directed at conditions which . . . threaten . . . the future of American Indian tribes . . .") (Comments of Rep. Robert Lagomarsino).

38. See 1974 Hearings, *supra* note 14, at 15; H.R. REP. NO. 95-1386, *supra* note 14, at 9.

39. See H.R. REP. NO. 95-1386, *supra* note 14, at 9.

40. See *id.* (citing studies conducted by the Association of American Indian Affairs).

41. See Russel L. Barsh, *The Indian Child Welfare Act of 1978: A Critical Analysis*, 31 HASTINGS L.J. 1287, 1288 (1980); see also H.R. REP. NO. 95-1386, *supra* note 14,

Native American children were adopted at a rate of 32.2 per thousand while Native American children were adopted at a rate of 126.6 per thousand in Minnesota.⁴² In Minnesota, of all non-relative adoptions of Native American children, ninety percent of these adoptees were placed in non-Native American families.⁴³

Minnesota statistics for placement of Indian children drew particularly harsh criticism during ICWA's congressional deliberations.⁴⁴ A 1972 Minnesota survey showed some of the starkest inequities regarding out-of-home placement of Native American children.⁴⁵ While Minnesota children in general were placed in foster care at a rate of 3.5 per thousand, Minnesota Native American children were placed at a rate of 58.1 per thousand.⁴⁶ The adoption rates in Minnesota were similarly unequal.⁴⁷ While one in eight Indian children under the age of eighteen were living in adoptive homes,⁴⁸ the rate doubled to one in four for Indian children under one year old.⁴⁹

The reasons behind the disproportionate removal of Indian children appeared quite clear. As aptly stated by Chief Calvin Isaac of the Mississippi Band of Choctaw Indians:

One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.⁵⁰

The great weight of authority reveals that the unwanted disproportionate removal of Indian children from their homes and

at 10.

42. See Barsh, *supra* note 41, at 1288-89 n.14.

43. See H.R. REP. NO. 95-1386, *supra* note 14, at 9.

44. See *id.*

45. See *id.*

46. See Barsh, *supra* note 41, at 1288-89 n.14

47. See H.R. REP. NO. 95-1386, *supra* note 14, at 9.

48. See *id.*

49. See *id.*

50. 1978 Hearings, *supra* note 37, at 191-92.

culture is threatening both the child and tribe. Evidence heard during the deliberation of ICWA cited problems in the psychological development and self-esteem of both the individual and the collective tribe associated with the disproportionate removal of Indian children.⁵¹ Additionally, many tribal leaders expressed concern that separating children from the tribe threatened the very existence of Native American culture. Chief Issac stated at the ICWA Congressional hearings that “[c]ulturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their people.”⁵²

III. THE INDIAN CHILD WELFARE ACT

A. *Provisions of the Indian Child Welfare Act*

In enacting ICWA, Congress properly attempted to educate the Anglo-American judicial system on issues of Indian culture when dealing with Indian child custody matters. First, a system of notice provisions was established requiring a state court to give notice to the relevant tribe upon commencement of a child custody proceeding.⁵³ Second, a tribal court may be allowed to take jurisdiction of a commenced state court child protection matter.⁵⁴ Finally, procedural and evidentiary requirements are placed upon Indian child custody proceedings remaining in the state court system.⁵⁵ In legislating ICWA, Congress expected that stricter procedural standards in Indian child custody proceedings would be effective in “protect[ing] the best interests of Indian children” and ultimately would “promote the stability and security of Indian tribes and families.”⁵⁶

51. See 1974 Hearings, *supra* note 14, at 37, 45-47 (citing the testimony of Dr. Joseph Westermeyer, Professor at the University of Minnesota, and William Byler, Executive Director of Association of American Indian Affairs).

52. 1978 Hearings, *supra* note 37, at 193; see also 124 CONG. REC. 38102 (1978) (“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.”) (comments of Rep. Morris Udall).

53. See 25 U.S.C. § 1912(a) (1994).

54. See *id.* § 1911(b).

55. See *id.* §§ 1911-1917.

56. H.R. REP. NO. 95-1386, *supra* note 14, at 9.

1. Notice Provisions

The first aim of ICWA is to allow tribal involvement in involuntary state court child custody proceedings over Indian children.⁵⁷ In addition to parental notice, ICWA requires that the child's tribe be notified of the pending involuntary proceeding at least ten days prior to the proceeding.⁵⁸ Following notice and if requested, the state court must give a tribe an additional twenty days to prepare for a hearing.⁵⁹ The notice sent to the parents and the tribe under Section 1912 of ICWA must contain information about the Indian child at issue, the family, the proceeding scheduled and appointed counsel.⁶⁰ This notice must be sent by a means no less secure than registered mail.⁶¹ ICWA contains an apparent gap that fails to provide a tribe notice of child custody proceedings if the proceeding is voluntary.⁶²

2. Jurisdiction Provisions

Section 1911 of ICWA attempts to outline new boundaries regarding the complex jurisdictional issues between states and tribes with regard to child custody.⁶³ To understand the intricacies of ICWA jurisdiction, an understanding of some general principles of federal, state, and tribal jurisdiction is necessary.

57. See 25 U.S.C. § 1912 (a).

58. See *id.*

59. See *id.*

60. See BUREAU OF INDIAN AFFAIRS, U.S. DEP'T OF THE INTERIOR, GUIDELINES FOR STATE COURTS, CHILD CUSTODY PROCEEDINGS, 44 Fed. Reg. 67584, 67588-89 (1979) [hereinafter BIA GUIDELINES].

61. See 25 U.S.C. § 1912(a). Among the means of acceptable service of notice is registered mail and personal service. See BIA GUIDELINES, *supra* note 60, at 67589. Service by first-class mail or publication usually is deemed inadequate. See *In re L.A.M.*, 727 P.2d 1057, 1060-61 (Alaska 1986) (reviewing order terminating parental rights due to failure to notify by registered mail); *In re N.A.H.*, 418 N.W.2d 310, 311 (S.D. 1988) (noting lack of evidence that notice was sent to tribe by registered mail). However, some courts appear willing to hold notice by first-class mail sufficient if the tribe receives actual notice of and participates in the proceeding. See *In re D.M.J.*, 741 P.2d 1386, 1389 (Okla. 1985) (noting that in this case first class mail gave sufficient notice because the tribe did in fact intervene); *In re S.Z.*, 325 N.W.2d 53, 55-56 (S.D. 1982) (noting actual notice and opportunity for tribe to intervene well before final adjudication).

62. Note that some states, including Minnesota, have added to ICWA by requiring that a tribe receive notice of even voluntary proceedings within seven days after the voluntary placement is made. See MINN. STAT. § 260.765, subd. 2 (Supp. 1999).

63. See 25 U.S.C. § 1911.

a. *Public Law 280*

States have criminal, civil and regulatory jurisdiction over Indians residing off of an Indian reservation.⁶⁴ However, jurisdictional issues involving on-reservation Indians become increasingly complex.

Prior to 1953, Indian tribes had jurisdiction over tribal members on the reservation to the exclusion of the states. However, in 1953 Congress drastically changed the landscape of federal Indian law by enacting Public Law 280.⁶⁵ Public Law 280 extends concurrent jurisdiction of six states to include civil and criminal matters involving on-reservation Indians.⁶⁶ Child custody issues are within this transferred civil jurisdiction.⁶⁷ As an aside, Public Law 280 has left tribal jurisdiction over "regulation" intact and free from state jurisdiction.⁶⁸ Public Law 280 also delegated to

64. See *Kiowa Tribe v. Lewis*, 777 F.2d 587, 591 (10th Cir. 1985); *Fletcher v. Florida*, 858 F. Supp. 169, 173 (M.D. Fla. 1994); *In re Maricopa County Juvenile Action No. JS-8287*, 828 P.2d 1245, 1248 (Ariz. Ct. App. 1991); *In re C.W.*, 479 N.W.2d 105, 112 (Neb. 1992); *B.R.T. v. Executive Dir. of Soc. Serv. Bd.*, 391 N.W.2d 594, 598 (N.D. 1986).

65. See Act of August 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326 and 28 U.S.C. § 1360 (1994)).

66. See 28 U.S.C. § 1360; 18 U.S.C. § 1162. The "mandatory" states enumerated by Public Law 280 include California, Minnesota (excluding the Red Lake Reservation), Nebraska, Oregon (excluding the Warm Springs Reservation), Wisconsin and Alaska; see also Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545 (codified as amended at 18 U.S.C. § 1162(a), 28 U.S.C. § 1360(a) (1994) (adding Alaska as a mandatory state for concurrent jurisdiction)).

67. See *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 560-61 (9th Cir. 1991) (applying Public Law 280 over adoption proceeding); *Confederated Tribes of Colville Reservation v. Okanogan County*, 945 F.2d 1138, 1141 (9th Cir. 1991) (applying P.L. 280 to marriage dissolution custody proceeding); 70 Op. Att'y Gen. 237, 243 (Wis. 1981).

68. See Act of August 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326 and 28 U.S.C. § 1360 (1994)). See generally *Washington v. Confederated Tribes*, 447 U.S. 134 (1980). Two general rules have emerged from *Washington* and commonly are used by the courts to determine whether government enforcement is regulatory, civil or criminal. The first is "if the state law generally permits the conduct at issue, subject to regulation, it must be classified as [regulation]." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987). The second test is "not a bright line rule" but is a consideration of "whether the conduct at issue violates the states public policy." *Id.* The courts have taken the *Washington* rules and applied them in very different ways. In *St. Germaine v. Circuit Court for Vilas County*, 938 F.2d 75, 77-78 (7th Cir. 1991), the court held that state enforcement of its motor vehicle laws over an Indian driver with a revoked license was not regulatory because such activity was against public policy. However, in *State v. Stone*, 557 N.W.2d 588, 593 (Minn. Ct. App. 1996), the court held in a similar situation that state enforcement was

all remaining states the power to enact state law vesting the state with civil and/or criminal jurisdiction over Indian tribes and reservations.⁶⁹ Ten additional states have used Public Law 280 to voluntarily “opt-in” to have concurrent civil and criminal jurisdiction over Indian reservations.⁷⁰

b. Trial Power in Child Custody Cases

The Indian Child Welfare Act permits tribal intervention in a state court child custody proceeding.⁷¹ Upon receiving notice of an ICWA child custody proceeding, the child’s tribe must be allowed to intervene at any point in the proceeding.⁷²

i. Exclusive Jurisdiction

Section 1911(a) grants Indian tribes exclusive jurisdiction over

impermissibly regulatory because driving was a generally accepted activity. *See also Cabazon Band of Mission Indians*, 480 U.S. at 209 (holding that the state did not have jurisdiction over an Indian bingo hall because such an assertion of jurisdiction was regulatory); *Bryan v. Itasca County*, 426 U.S. 373, 379-90 (1976) (holding that the state could not permissibly levy a property tax against an on-reservation mobile home); *Seminole Tribe v. Butterworth*, 658 F.2d 310, 316 (5th Cir. 1981) (barring the state from asserting jurisdiction over a reservation bingo hall).

69. *See* Act of August 15, 1953, ch. 505, 67 Stat. 590 (codified at 25 U.S.C. § 1323 (1994)). The voluntary “opt-in” period lasted only 15 years. This “window” closed when Congress foreclosed this opportunity. *See* Act of April 11, 1968, Pub. L. No. 90-284, 82 Stat. 79 (codified at 25 U.S.C. § 1323 (1994)).

70. *See* GETCHES, ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 466-94 (3d ed. 1993) (detailing the extent to which Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah and Washington have exercised Public Law 280 jurisdiction); *see also* IOWA CODE ANN. §§ 1.12–1.14 (West 1999); N.D. CENT. CODE §§ 27-19-01 to 27-19-13 (1999); S.D. CODIFIED LAWS §§ 1-1-12 to 1-1-21 (Michie 1999); *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 474 (1979) (upholding that portion of Public Law 280 allowing state legislation to create civil and criminal jurisdiction over on-reservation Indians).

71. *See* 25 U.S.C. § 1911 (c) (1994).

72. *See id.*; *In re Appeal in Maricopa County Juvenile Action No. A-25525*, 667 P.2d 228, 233 (Ariz. Ct. App. 1983) (concluding that the trial judge acted within his discretion by allowing the Indian child’s tribe to intervene in an adoption proceeding, even though ICWA does not expressly provide such a right to intervene in adoption proceedings); *In re A.K.H.*, 502 N.W.2d 790, 793 (Minn. Ct. App. 1993) (holding that the Indian child’s tribe was entitled to intervene in custody dispute between the child’s parents and grandmother); *In re Q.G.M.*, 808 P.2d 684, 689 (Okla. 1991) (holding that the Indian child’s tribe was entitled to intervene at any point during the guardianship proceedings, and that the tribe did not waive this right when it failed to intervene at the beginning of the proceeding).

some child custody proceedings.⁷³ First, if an Indian child is a ward of a tribal court, the tribe will continue to have exclusive jurisdiction over that child and child custody, regardless of where the child lives.⁷⁴ Second, subject to federal law, ICWA grants a tribe exclusive jurisdiction over child custody proceedings involving an Indian child "who resides or is domiciled" on the reservation.⁷⁵ However, the grant of exclusive jurisdiction by Congress nearly is illusory because Public Law 280 limits such jurisdiction.⁷⁶ As discussed, Public Law 280 has given most states the right to exercise civil and criminal jurisdiction over on-reservation Indians.⁷⁷ As child custody proceedings are considered civil matters, Public Law 280 limits tribal jurisdiction to act concurrently with state jurisdiction.⁷⁸

Section 1918 of ICWA establishes a framework whereby a tribe can regain exclusive jurisdiction over reservation child custody matters.⁷⁹ First, a tribe must submit the plan for reassumption to the BIA.⁸⁰ The BIA then must determine that the plan is "feasible."⁸¹ In making this determination, the BIA must consider (1) whether the tribe has an accurate record of tribal members; (2) the size of the reservation; (3) the population of the tribe and the geographic disbursement of these people; and (4) the feasibility of the plan in light of more than one tribe occupying the same reservation.⁸² The BIA ultimately has power to grant or deny the petition for exclusive jurisdiction through reassumption, in whole or in part.⁸³

73. See 25 U.S.C. § 1911(a).

74. See *id.*

75. See *id.*

76. See *supra* notes 65-70 and accompanying text; see also Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1634 (1998) (indicating that the great majority of federally recognized Indian tribes exist either within the five original Public Law 280 states or the 10 that opted in to Public Law 280, making jurisdiction in reality concurrent rather than exclusive).

77. See *supra* notes 65-70 and accompanying text.

78. See Jimenez & Song, *supra* note 76, at 1634.

79. See 25 U.S.C. § 1918 (1994).

80. See *id.*; *In re F.P.*, 843 P.2d 1214, 1215-16 (Alaska 1992).

81. See 25 U.S.C. § 1918, subd. (b).

82. See *id.*

83. See *id.*

ii. Concurrent and Transferable Jurisdiction

The Indian Child Welfare Act gives the tribe influence over state court Indian child custody proceedings by providing concurrent and transferable jurisdiction between the state and tribe. Section 1911(b) creates a referral system whereby a state court custody proceeding must be transferred to a tribal court willing to take jurisdiction upon the request of either the parent or the tribe.⁸⁴ A state court can refuse such a transfer only on grounds that either of the child's parents objects to the transfer or upon "good cause" shown.⁸⁵

"Good cause" is an ambiguous, continually litigated concept. The only apparent dispositive factor in opposition to transfer is the absence of a transferee tribal court.⁸⁶ The clearly delineated factor that may not be considered in opposing transfer is discretionary findings regarding the adequacy of existing tribal courts and social services.⁸⁷ ICWA's implementing regulations list four factors that a state court may consider in determining whether good cause exists to deny transfer to a tribal court. First, the state court must consider the timing of the proposed transfer relative to the stage to which the state court proceeding has progressed.⁸⁸ Second, the

84. See *id.* § 1911(b).

85. See *id.*; *In re J.R.H.*, 358 N.W.2d 311, 317 (Iowa 1984) (holding that good cause existed to deny tribal court transfer); *In re R.I.* 402 N.W.2d 173, 177 (Minn. Ct. App. 1987) (holding that parental objection is necessarily fatal to a motion to transfer to tribal court); *In re J.J.*, 454 N.W.2d 317, 328-29 (S.D. 1990) (holding that good cause existed to deny tribal court transfer); *In re S.Z.*, 325 N.W.2d 53, 56 (S.D. 1982) (holding that the trial court erred by transferring state court case to tribal court despite parental objection).

86. See BIA GUIDELINES, *supra* note 60, at 67591.

87. See *id.*

88. See *id.*; see also *In re J.W.*, 528 N.W.2d 657, 660-61 (Iowa Ct. App. 1995) (holding that the trial court had good cause not to transfer the termination proceedings to the tribal court where the proceedings were at an advanced stage when the tribe petitioned for a transfer and where the transfer would result in undue hardship to the parties and witnesses); *In re Wayne R.N.*, 757 P.2d 1333, 1335-36 (N.M. Ct. App. 1988) (affirming the trial court's refusal to transfer the termination proceedings to the tribal court where the petitioners filed their petition six months after being served and having counsel appointed to them, where the tribe's attorney stated, and the tribe's social worker testified, that the tribe likely would decline jurisdiction, and where the respondents, children and witnesses all would be forced to travel from New Mexico to Oklahoma were transfer granted); *J.J.*, 454 N.W.2d at 331 (S.D. 1990) (affirming the trial court's refusal to transfer custody proceedings to the tribal court, where the request for transfer was made late in the proceedings and where transfer would "wreak havoc").

state court must consider the child's opinion if the child is twelve years old or older.⁸⁹ Third, if the child is orphaned and five years old or older, the state court must consider the degree of the child's contact with the tribe.⁹⁰ Finally, the state court must consider whether the evidence, without undue hardship, could be adequately presented in tribal court.⁹¹ The courts are split as to whether a consideration of the "best interests of the child" may be considered in determining good cause.⁹²

iii. Full Credit to Tribal Records and Proceedings

ICWA also strengthens the legitimacy of outcomes of tribal court child custody proceedings. Section 1911(d) requires that federal and state courts give "full faith and credit" to tribal acts, records, and judicial proceedings in the same manner afforded other non-tribal entities.⁹³ Section 1919 of ICWA allows the establishment of tribal-state agreements where many of the inherent jurisdictional and full faith conflicts likely will arise.⁹⁴

89. See BIA GUIDELINES, *supra* note 60, at 67591.

90. See *id.*; see also *In re Adoption of Baby Boy L*, 643 P.2d 168, 176 (Kan. 1982); *J.J.*, 454 N.W.2d at 328-29. The BIA Guidelines appear to presume that if an Indian child has parents, there exists a sufficient connection between the child and his or her cultural heritage. See BIA GUIDELINES, *supra* note 60, at 67591.

91. See BIA GUIDELINES, *supra* note 60, at 67591; see also *J.W.*, 528 N.W.2d at 661; *J.R.H.*, 358 N.W.2d at 317; *J.J.*, 454 N.W.2d at 328-30.

92. See *In re Adoption of T.R.M.*, 525 N.E.2d 298, 307-08 (Ind. 1988) (stating that the best interests of the child are a valid consideration in determining the issue of good cause); *In re M.E.M.* 635 P.2d 1313, 1317 (Mont. 1981) (stating that the burden of showing "good cause to the contrary" must be carried by the state with clear and convincing evidence that the best interest of the child would be injured by a transfer of jurisdiction); *In re C.W.*, 479 N.W.2d 105, 114 (Neb. 1992) (holding that best interests of the child favored maintenance of state court action); *In re N.L.*, 754 P.2d 863, 869 (Okla. 1988) (stating that best interests of the child may prevent transfer of jurisdiction to a tribal court). Some courts have held that the best interests standard is presumed to be met by a tribal court transfer. See *In re Armell*, 550 N.E.2d 1060, 1064-66 (Ill. Ct. App. 1990); *C.W.*, 479 N.W.2d at 117-18. Additionally, some commentators have argued that a determination of good cause is a procedural inquiry independent from an inquiry of good cause. See Peter W. Gorman & Michelle Therese Paquin, *A Minnesota Lawyer's Guide to the Indian Child Welfare Act*, 10 LAW & INEQ. J. 311, 343 (1992).

93. See 25 U.S.C. § 1911(d) (1994); see also *Adoption of T.R.M.*, 525 N.E.2d at 306 (stating that while section 1911 requires that the state courts give full faith and credit to the public acts, records and judicial proceedings of the Indian tribe, the state courts do not have to give absolute deference to a tribal court regardless of the circumstances).

94. See 25 U.S.C. § 1919(a) (1994).

3. Procedural Provisions

For the reasons discussed, adjudications in many Indian child custody proceedings remain in the state court system. The substance of an ICWA case will be identical to a non-ICWA custody proceeding. However, the procedure of an ICWA case will be slightly different. The most significant differences between an ICWA and a non-ICWA case are (1) different burdens of proof; (2) different requirements regarding remedial services; (3) different required sources of proof; and (4) an ICWA case will have a prioritization system upon the placement of a child.

First, ICWA heightens the evidentiary burden to terminate parental rights.⁹⁵ To place a child in a non-Native American foster care home or to terminate parental rights, the state must allege "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."⁹⁶ Typically, state courts require a showing of clear and convincing evidence before a child is found to be in need of protection or services.⁹⁷ Section 1912(e) of ICWA heightens the evidentiary burden for terminating parental rights and Indian child custody cases to "beyond a reasonable doubt," but foster care still may be ordered upon a showing of clear and convincing evidence.⁹⁸

Second, ICWA requires that a state court in an ICWA proceeding admit and consider testimony by an expert in Indian culture before ordering foster care or terminating a parent's rights over an Indian child.⁹⁹ For an individual to be "qualified" for ICWA purposes, this person must have particularized knowledge

95. See *id.* § 1912 (f).

96. *Id.* § 1912 (e)-(f).

97. See, e.g., MINN. R. JUV. P. 59.05; *Santosky v. Kramer*, 455 U.S. 745, 769-70 (1982).

98. See 25 U.S.C. § 1912(e)-(f); *In re J.R.B.*, 715 P.2d 1170, 1172 (Alaska 1986); *In re D.S.*, 577 N.E.2d 572, 575 (Ind. 1991) (vacating termination of parental rights because trial court applied "clear and convincing" standard, not "beyond a reasonable doubt," to ICWA termination proceeding); *In re L.F.*, 880 P.2d 1365, 1368 (Mont. 1994); *C.W.*, 479 N.W.2d at 115; *In re Bluebird*, 411 S.E.2d 820, 822-23 (N.C. Ct. App. 1992); *In re N.S.*, 474 N.W.2d 96, 100 n.5 (S.D. 1991).

99. See 25 U.S.C. § 1912(e), (f); *In re D.C.*, 715 P.2d 1, 1 (Alaska 1986); *In re Baby Boy Doe*, 902 P.2d 477, 484 (Idaho 1995); *D.S.*, 577 N.E.2d at 575; *In re Kreft*, 384 N.W.2d 843, 846-47 (Mich. Ct. App. 1986); *In re M.E.M.*, 635 P.2d 1313, 1317-18 (Mont. 1981); *C.W.*, 479 N.W.2d at 111-12; *Juvenile Dep't of Multnomah County v. Woodruff*, 816 P.2d 623, 626 (Or. Ct. App. 1991); *In re Fisher*, 643 P.2d 887, 888-89 (Wash. Ct. App. 1982).

regarding Indian culture.¹⁰⁰ However, the courts generally have been given wide discretion in determining whether a witness is qualified as an ICWA expert witness.¹⁰¹

Third, ICWA requires that the state work diligently in providing social services to parents or custodians of children covered by ICWA.¹⁰² A county usually is obligated to provide social services to a parent or guardian before a child may be involuntarily and permanently placed out of the home.¹⁰³ In Minnesota, for example, the state or county must ensure that "reasonable efforts . . . are made to prevent placement or to eliminate the need for removal and to reunite the child with the child's family."¹⁰⁴ However, prior to a state court order for foster care placement of an Indian child or the termination of parental rights, the court must be satisfied beyond a reasonable doubt that the state used active efforts to maintain the family unit but that these remedial measures failed.¹⁰⁵ ICWA makes explicit that these heightened remedial measures will be rendered irrelevant if it can be determined that the removal was done "to prevent imminent

100. See BIA GUIDELINES, *supra* note 60, at 67593; *State v. Cooke*, 744 P.2d 596, 597 (Ariz. Ct. App. 1981); *Baby Boy Doe*, 902 P.2d at 484-85 (finding an expert qualified under ICWA who was Indian, had a masters degree in social work, was a judge for his tribe, had personal experience with ICWA cases, had been a caseworker in adoption and foster cases, had lived on a reservation, and had contact with the child at issue); *In re B.W.*, 454 N.W.2d 437, 442-45 (Minn. Ct. App. 1990); *In re T.J.J.*, 366 N.W.2d 651, 655 (Minn. Ct. App. 1985) (finding expert who had taken coursework in Indian culture was an ICWA qualified expert); *C.W.*, 479 N.W.2d at 111; *In re Appeal of Pima County Juvenile Action*, 635 P.2d 187, 192 (Or. Ct. App. 1987).

101. See *D.W.H. v. Cabinet for Human Resources*, 706 S.W.2d 840, 842-43 (Ky. Ct. App. 1986) (holding that the failure of the court to hear experts with special knowledge of Indian culture was not fatal to an ICWA involuntary termination of parental rights petition); *C.E.H. v. L.M.W.*, 837 S.W.2d 947, 955-56 (Mo. Ct. App. 1992) (requiring that experts have expertise only "beyond normal social workers' qualifications"); *C.W.*, 479 N.W.2d at 111-12 (holding that expert with no experience in Indian culture nonetheless could be a qualified witness under ICWA); *In re N.L.*, 754 P.2d 863, 866-68 (Okla. 1988) (holding that judge's failure to hear expert testimony was reversible error); *Juvenile Dep't of Multnomah County v. Charles*, 688 P.2d 1354, 1359-60 (Or. Ct. App. 1984) (holding that experts were not qualified under ICWA even though both possessed expertise beyond normal social workers qualifications).

102. See 25 U.S.C. § 1912(d) (1994).

103. *Id.*; see also MINN. STAT. § 260.012(a) (Supp. 1999).

104. See MINN. STAT. § 260.012(a).

105. See *id.*; *K.N. v. State*, 856 P.2d 468, 476-77 (Alaska 1993); *Baby Boy Doe*, 902 P.2d at 482-83; *In re Annette P.*, 589 A.2d 924, 927-28 (Me. 1991); *T.J.J.*, 366 N.W.2d at 656; *C.E.H.*, 837 S.W.2d at 957-58; *In re P.B.*, 371 N.W.2d 366, 372 (S.D. 1985).

physical damage or harm to the child.”¹⁰⁶

Finally, ICWA establishes a preference system for Indian children to be placed in foster care or adopted.¹⁰⁷ Section 1915(a) provides that an adoptive placement preference first shall be given to a member of the child’s extended family, then to other members of the child’s tribe and finally to other Indian families.¹⁰⁸

ICWA is more specific in the placement preferences when Indian children are placed in out-of-home foster care. Section 1915(b) of ICWA first requires that the child be placed in the least restrictive setting which most resembles a family.¹⁰⁹ Second, the child must be placed within reasonable proximity to his or her home.¹¹⁰ Finally, barring any good cause, the child first is to be placed with extended family.¹¹¹ If extended family is unavailable or unsuitable, the child is to be placed in a foster home approved by the child’s tribe, then to a licensed Indian foster home, and finally to an institution approved by the child’s tribe or run by an Indian organization.¹¹²

BIA guidelines provide only three examples of what constitutes “good cause” to justify avoiding ICWA placement preferences.¹¹³ These include the request of a parent or the child if of sufficient age, any extraordinary needs established by qualified expert testimony and the unavailability of suitable families after a diligent search.¹¹⁴

Some jurisdictions allow a “best interests” analysis to determine good cause.¹¹⁵ In other jurisdictions the courts have refrained from using a “best interests” analysis in favor of using placement suitability as the sole discretionary guide to the courts when following placement preferences.¹¹⁶ Minnesota courts, for example,

106. See 25 U.S.C. § 1922 (1994).

107. See *id.* § 1915.

108. See *id.* § 1915(a).

109. See *id.* § 1915(b).

110. See *id.*

111. See *id.* § 1915(b)(i).

112. See *id.* § 1915(b)(ii-iv); BIA GUIDELINES, *supra* note 60, at 67594 (“The extended family should be looked to first when it becomes necessary to remove the child . . .”).

113. See BIA GUIDELINES, *supra* note 60, at 67594.

114. See *id.*

115. See *In re Adoption of H.M.O.*, 962 P.2d 1191, 1197-98 (Mont. 1998) (holding that the expert testimony did not substantiate a finding that continued joint custody would result in serious physical or emotional damage to the child).

116. See *In re Brandon M.*, 63 Cal. Rptr.2d 671, 679 (Cal. App. 1997); *In re Custody of S.E.G.*, 507 N.W.2d 872, 880 (Minn. Ct. App. 1993); *In re M.T.S.*, 489

presume that ICWA preempts "best interests" analysis.¹¹⁷ The cogent reasoning of these courts is that the ICWA placement preference, coupled with the importance in Indian culture of family stability, permits the presumption that suitable family placement is in an Indian child's best interest.¹¹⁸

B. *Applicability of ICWA*

ICWA applies when two criteria are established. First, the child must be an unmarried minor who either is a member of, or eligible for membership in, a tribe and a biological child of a tribal member.¹¹⁹ Second, the subject matter of the custody proceeding must be deemed a "child custody proceeding" within the definition provided in the statute.¹²⁰ Both of these criteria can be complex and are briefly outlined below.

1. *Heritage Requirement*

The threshold question of whether ICWA will apply to a child custody case is the heritage of the child. ICWA states that the act applies only to "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."¹²¹ If an Indian child is enrolled or eligible to be enrolled in more than one tribe, a court must decide the child's tribe for ICWA purposes by determining the tribe with which the child has "the most significant contacts."¹²² Determining whether ICWA applies also partially depends upon the eligibility criteria of Indian tribes, usually based on individualized blood

N.W.2d 285, 287 (Minn. Ct. App. 1992).

117. See *S.E.G.*, 507 N.W.2d at 880; *M.T.S.*, 489 N.W.2d at 287.

118. See *M.T.S.*, 489 N.W.2d at 287.

119. See 25 U.S.C. § 1903(4) (1994).

120. See *id.* § 1903(1) (defining child custody proceedings to include foster care placements, terminations of parental rights, pre-adoptive placements and adoptive placements, and stating that child custody proceedings do not include placements based upon acts which, if committed by an adult, would be considered criminal, or upon an award of custody to either parent in a divorce proceeding).

121. *Id.* § 1903(4). The definition of a "tribe" for purposes of ICWA "means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians . . ." *Id.* § 1903(8).

122. See *id.* § 1903(5).

quantum requirements.¹²³ This determination usually must be pursued through the tribes' offices of enrollments, which maintain family history records, including each member's blood quantum.¹²⁴

2. *Child Custody Proceeding Requirement*

The definition of "child custody proceeding" for ICWA to apply includes those proceedings contemplating a foster care placement, termination of parental rights, pre-adoptive placement and adoptive placement.¹²⁵ Foster care is further defined to mean "any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home . . . where the parent or Indian custodian cannot have the child returned on demand."¹²⁶ Thus, an action involving only foster care must be an involuntary proceeding for all of ICWA's provisions to be applicable.¹²⁷ However, actions involving termination of parental

123. See BIA GUIDELINES, *supra* note 60, at 67586; State *ex rel.* Tucker, 710 P.2d 793, 796 (Or. Ct. App. 1985); see also Gorman & Paquin, *supra* note 92, at 373 (containing a table describing the enrollment criteria for tribes in the midwestern United States); Jesse Tretadue & Myra DeMontigny, *The Indian Child Welfare Act of 1978: A Practitioner's Perspective*, 62 N.D. L. REV. 487, 505 (1986) (describing different enrollment criteria). However, in *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988), the court circumvented the requirements of tribal determination for ICWA applicability when the tribe's rejection of enrollment was based upon an incomplete knowledge of family history. See *id.* at 933. The identification of child ethnicity has proven to be very difficult. The Minnesota Department of Human Services, for example, reports that determinations of ethnicity are misidentified more than six percent of the time. See TASK FORCE ON RACIAL BIAS, *supra* note 15, at 80; MINNESOTA DEP'T OF HUMAN SERV., MONITORING OF HENNEPIN COUNTY COMPLIANCE WITH LAWS RESPECTING CULTURAL HERITAGE, at 14 (1991) [hereinafter MONITORING]. While general issues of ethnicity commonly are misidentified, it is expected that even more complex determinations of tribal enrollments and eligibility are misidentified even more often.

124. The courts and federal government have made it quite clear that the tribes are to be "the arbiters of their own membership." *In re J.W.*, 498 N.W.2d 417, 422 (Iowa Ct. App. 1993); see also *In re M.C.P.*, 571 A.2d 627, 634 (Vt. 1989).

125. See 25 U.S.C. § 1903(1) (1994).

126. *Id.* § 1903(1)(i).

127. See *id.* Note that the standard of ICWA applicability is the potential for foster care placement, not actual foster care placement. See *In re J.H.*, 358 N.W.2d 311, 321 (Iowa 1984); *Juvenile Dep't of Multnomah County v. Cooke*, 744 P.2d 596, 598 (Or. Ct. App. 1987). Accordingly, many cases arising in the juvenile court system are covered by ICWA because of the broad potential for foster care placement. See, e.g., *In re J.S.*, F.A.B., and C.J.S., 488 N.W.2d 332, 335 (Minn. Ct. App. 1992) (stating that ICWA provisions were necessary at a hearing to determine whether children were in need of protection of services as the children had been placed out of the home prior to the hearing); *In re N.L.*, 754 P.2d 863, 866-68

rights, pre-adoptive placement and adoptive placement suggest that all ICWA provisions would apply to these situations whether occurring through a voluntary or an involuntary proceeding.¹²⁸

IV. THE INDIAN CHILD WELFARE ACT IN MINNESOTA

Shortly after ICWA was enacted, Minnesota began creating legislation that would accommodate the newly created federal standards for child custody proceedings and Indian children within the state. The legislation enacted by Minnesota currently conforms with most of the federal requirements.¹²⁹ Minnesota's legislation actually exceeds ICWA's federal minimums in one important aspect—tribal notice.¹³⁰ Also, Minnesota and the tribes within the state have drafted a "Tribal/State Agreement" that provides guidance in the issues associated with Indian child custody matters.¹³¹

Demographics have demanded that counties approach their implementation of ICWA in different manners. Three distinct models appear to currently exist: that used in Hennepin County and other large counties with relatively large Indian populations, that used by counties neighboring Indian reservations, and that used by counties without large Indian populations.¹³²

A. State Legislation and Agreements

Minnesota enacted the Minnesota Indian Family Preservation

(Okla. 1988) (applying ICWA provisions to hearing regarding competency of mother and risk of harm to child); *In re K.A.B.*, 325 N.W.2d 840, 843 (S.D. 1982) (applying ICWA to hearing regarding termination of parental rights).

128. See 25 U.S.C. § 1903(1)(i) (1994). Whether all ICWA provisions apply to both involuntary and voluntary proceedings is unclear. The plain text of section 1903 suggests, but does not state, that its provisions apply to involuntary child custody proceedings and both involuntary and voluntary proceedings of termination of parental rights, pre-adoptive placement and adoptive placement. See *id.* However, section 1913 sets up independent requirements of voluntary actions for foster care placement and termination of parental rights. See *id.* § 1913. These proceedings require that consent to such a proceeding must be in writing and presented before a judge who has certified that the parent fully understood the consequences of the consent. See *id.* § 1913(a).

129. See MINN. STAT. § 260.751–260.835 (Supp. 1999).

130. See *id.* § 260.761, subd. 5.

131. See The Tribal/State Agreement on Indian Child Welfare, June 18, 1998 [hereinafter Tribal/State Agreement].

132. See *infra* Part IV.B. and accompanying notes.

Act (MIFPA) in 1985.¹³³ MIFPA has broader applicability than its federal counterpart, ICWA. Unlike ICWA, MIFPA requires tribal notice of all child custody proceedings,¹³⁴ including voluntary placements,¹³⁵ and does not require that the Indian child be the child of an Indian parent.¹³⁶ Thus, in Minnesota, ICWA protections have been extended to nearly all child custody proceedings involving Indian children.

MIFPA, as originally enacted, failed to incorporate some ICWA requirements into state law.¹³⁷ These oversights later were legislated through what is known as the "Reasonable Efforts Legislation."¹³⁸ This piece of legislation amended the Minnesota Juvenile Court Act to add heightened burdens of proof in state court ICWA cases.¹³⁹ Also, the Reasonable Efforts Legislation forced ICWA's requirements upon state courts to make a decision in a child protection case without first addressing the remedial services that have been provided to the family.¹⁴⁰ Finally, this legislation created a preference for Indian guardians *ad litem* for ICWA cases.¹⁴¹

The Minnesota Department of Human Services (DHS) and Minnesota tribes spent seven years working on a state-tribal agreement regarding child custody as provided in Section 1919 of ICWA. On June 18, 1998, DHS and leaders of the eleven tribal

133. See Minnesota Indian Family Preservation Act, MINN. STAT. §§ 260.751-260.835 (Supp. 1999) (originally enacted as Minn. Stat. §§ 257.35-257.3579, repealed by 1999 ch. 39, art. 4 § 3).

134. See *id.* § 260.761, subd. 2 (Supp. 1999); cf. 25 U.S.C. § 1913 (1994).

135. See *id.* § 260.765, subd. 2; cf. 25 U.S.C. § 1913.

136. Compare MINN. STAT. § 260.755, subd. 9 (stating that where tribe with most significant contacts does not express an interest in the outcome of the actions with respect to the child, any other tribe that expresses an interest in the outcome and with whom the child is eligible for membership may act as the Indian child's tribe), with 25 U.S.C. § 1903(5) (stating only that the Indian child's tribe is the one with whom the child has more significant contacts and disregarding interest in the outcome as a factor). Reference to voluntary placements is found in Minnesota Statutes section 260.765, subdivision 2 (requiring that parents, tribal social services agency and Indian custodian be notified within seven days).

137. Most significantly, MIFPA failed to incorporate ICWA's provisions for heightened burdens of proof and required remedial services in ICWA cases as required by 25 U.S.C. §§ 1912(d) and (e). See MINN. STAT. §§ 260.751-260.835 (Supp. 1999).

138. See *id.* § 260.012 (1998); see also Gorman & Paquin, *supra* note 92, at 320-21 (discussing Reasonable Efforts Legislation).

139. See MINN. STAT. § 260.012, subd. (a).

140. See *id.* § 260.012, subds. (a), (c).

141. See *id.* § 260.155, subd. 4(e).

governments in Minnesota signed the Tribal/State Agreement.¹⁴² This agreement contains six major provisions. First, the agreement sets forth a summary of ICWA and MIFPA provisions and requires that the state provide adequate training to its employees, including revision of an outdated Procedures Manual used by state agencies.¹⁴³ Second, the agreement reaffirms the state's obligation to make determinations of Indian heritage in child custody cases and to give appropriate tribal notices and referrals.¹⁴⁴ Third, DHS and the tribes have agreed to cooperate regarding the recruitment of Indian foster and adoptive families.¹⁴⁵ Fourth, the agreement establishes a framework in which the state is encouraged to purchase from the tribes services that address the cultural needs of Indian children and their families.¹⁴⁶ Finally, the Tribal-State Agreement creates an ICWA Compliance Review Team to review Indian child custody proceedings and report on ICWA and MIFPA noncompliance.¹⁴⁷

B. Practical Implementation of ICWA and MIFPA Obligations

The counties of Minnesota appear to have taken three routes in complying with ICWA. The first approach is taken by Hennepin County and other metropolitan regions with large Indian populations. The second approach is that of counties neighboring Indian reservations. Finally, counties with neither a large Indian population nor proximity to a reservation have taken yet a different approach.

A relatively large Native American population in Hennepin County has given the county ample practice in implementing the provisions of ICWA and MIFPA.¹⁴⁸ This wealth of experience and

142. See Tribal/State Agreement, *supra* note 131; DEP'T OF HUMAN SERVICES, NEWS RELEASE, June 15, 1998 <<http://www.dhs.state.mn.us/aboutdhs/news/-adopt.htm>>.

143. See Tribal/State Agreement, *supra* note 131, at 11-12, 15, 19-21.

144. See *id.* at 23.

145. See *id.* at 27.

146. See *id.* at 14.

147. See *id.* at 16-19. Eight people have been appointed as members of the ICWA Compliance Review Team. Interview with Paul Minehart, ICWA Review Team member, in Minneapolis, Minn. (Nov. 18, 1999). This group is currently in the latter stages of drafting implementation procedures. *Id.* The Review Team is currently investigating two incidents of reported ICWA and MIFPA noncompliance. *Id.*

148. According to the U.S. Census Bureau, 16,229 American Indians were living in Hennepin County in 1998. See <<http://www.mnplan.state.mn.us/demo>>

resources allows Hennepin County to follow a model of ICWA best characterized as one of specialization. Hennepin County's social services department includes a specialized ICWA unit to address child protection and custody matters in which ICWA will apply. Likewise, attorneys who prosecute ICWA cases usually are part of a specialized ICWA team in the Hennepin County Attorney's Office. When an ICWA case is docketed, the courts usually call attorneys from the Indian Child Welfare Law Center to defend those in need of representation. Finally, ICWA child custody proceedings in Hennepin County usually are heard in front of one judge who specializes in ICWA cases. The system of specialization used in Hennepin County ensures that child custody, termination and adoption proceedings involving Indian participants fully comply with the requirements of ICWA and MIFPA.

ICWA implementation in the state courts neighboring Indian reservations appears to be far less orderly than the process used in Hennepin County. This approach usually involves a continuous relationship between the same state courts and reservations. This constant relationship has the potential to foster much needed cooperation between the state and tribes in implementing ICWA. However, distrust on both sides creates what best may be described as a tenuous relationship. In a personally conducted telephone survey of reservation social service directors and administrators, most of those polled indicated that the relationship between Minnesota's tribes and neighboring counties is poor.¹⁴⁹ Tribal social service workers also widely suspect that ICWA and MIFPA procedural requirements are not being satisfied by neighboring state courts.¹⁵⁰

The last model commonly used in implementing ICWA in Minnesota is that used by state courts with few ICWA cases. These courts have adopted a "take-it-as-they-come" approach to ICWA compliance. These areas may post the biggest challenge for effective ICWA compliance. First, if adequate knowledge regarding ICWA exists, these state courts and social services may have difficulty in assessing whether ICWA will apply. Second, once an ICWA case is accurately identified, courts using this model of implementation are forced to learn rarely used procedures. Such

graphy/demog_3a_97.html#96population>.

149. Telephone survey of Minnesota reservation social service coordinators (Jan. 14-21, 2000).

150. *See id.*

perpetual reinvention may make an improvement in ICWA compliance difficult in these counties.

V. THE CONTINUED NEED FOR ICWA

Although ICWA was enacted more than twenty years ago, its positive effects are slow to be realized. Removal of Indian children still is disproportionately high compared with children in general.¹⁵¹ For example, Indian children in Minnesota continue to be removed from their homes ten times more frequently than Caucasian children.¹⁵² Similarly, Indian children represent less than one percent of the children in Minnesota, but comprise nearly twelve percent of the state's out-of-home placements.¹⁵³

The precise reasons for the lack of improvement in the out-of-home placement rate of Indian children probably are unknown. However, a few major reasons are readily apparent. First, officials do not follow ICWA as strictly as they should. Better adherence to the requirements is needed.¹⁵⁴ Second, continued disdain for protecting Indian culture appears prevalent among those expected to be most instrumental in preservation.¹⁵⁵ Finally, there is a lack of knowledge regarding ICWA and the need for cultural preservation.¹⁵⁶ The true potential of ICWA will not be realized until these problems are overcome.

A January 1992 study in Hennepin County, Minnesota, makes clear that greater attention to ICWA is necessary in many areas in order to comply with federal law.¹⁵⁷ In particular, the study revealed that efforts to keep Indian children with their families were minimal in forty-eight percent of the cases examined.¹⁵⁸ Also of concern is the continued failure of the courts to follow ICWA's placement preferences once an initial custody determination is

151. See TASK FORCE ON RACIAL BIAS, *supra* note 15, at 79 (citing MINNESOTA DEP'T OF HUMAN SERV., MINNESOTA MINORITY FOSTER AND ADOPTIVE CARE, 1989 (1991)).

152. See *id.*

153. See *id.* at 83; BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, 1990 CENSUS OF POPULATION AND HOUSING, SUMMARY POPULATION AND HOUSING CHARACTERISTICS, MINNESOTA, at 85 (1991); MINNESOTA DEP'T OF HUMAN SERV., NEWS RELEASE, June 15, 1998.

154. See TASK FORCE ON RACIAL BIAS, *supra* note 15, at 94-95.

155. See *id.* at 94.

156. See *id.* at 94-95.

157. See MONITORING, *supra* note 123, at 14.

158. See TASK FORCE ON RACIAL BIAS, *supra* note 15, at 91 (citing MONITORING, *supra* note 123, at 14).

made.¹⁵⁹ Finally, the study noted that noncompliance with laws respecting cultural heritage is more prevalent with Indian child custody proceedings than with any other ethnic group.¹⁶⁰

A recent open-ended survey conducted by the Minnesota Supreme Court Task Force on Racial Bias in the Judicial System confirms that misperceptions and bias continue to exist in child custody proceedings.¹⁶¹ For example, one metropolitan area judge recalled questioning an Indian child's probation officer about ICWA compliance and contact with the child's family. The officer responded that "yeah, [the child] does talk about [his Indian heritage], but we know the reality, which is that the grandfather was just an old drunk."¹⁶² Similarly, a social worker recalled being told that "ICWA was getting in the way of this case."¹⁶³

Finally, there appears to be insufficient knowledge about ICWA for it to fully realize its potential. A large number of attorneys believe that ICWA and its state law counterparts are not being applied to cases in which they are required.¹⁶⁴ Also, a large number of attorneys throughout Minnesota believe that a sizeable number of attorneys, in general, do not understand even the most basic aspects of ICWA.¹⁶⁵ Finally, a fair number of attorneys believe that social workers "sometimes, rarely or never" are knowledgeable about ICWA.¹⁶⁶

VI. CONCLUSION

Many of the adverse impacts of the historical suppression of Indian culture may be impossible to completely cure. However, the strict preservation of Indian culture must be given first priority to avoid the any additional harm. Also, allowing tribal culture to influence decisions affecting Indian children will cause problems

159. *See id.*

160. *See id.*

161. *See id.* at 81-91.

162. *Id.* at 90.

163. *Id.*

164. *See id.* at 85 (citing survey of attorneys throughout Minnesota showing that 26% of attorneys questioned believed that ICWA and its state law counterparts were not being applied in judicial decisions that required them).

165. *See TASK FORCE ON RACIAL BIAS, supra* note 15, at 86 (citing survey results showing that 47% of attorneys believe that attorneys, on the whole, are ignorant of ICWA).

166. *See TASK FORCE ON RACIAL BIAS, supra* note 15, at 85 (citing survey results that show that 32% of attorneys in Minnesota (50% of public defenders) believe that social workers lack the appropriate knowledge of ICWA).

that must be solved to be approached by those most able to fix them.

The Indian Child Welfare Act has established a framework that has the potential to preserve Indian culture through maintenance of its families and tribes. When children must be removed from their current home environment, ICWA acts to maintain as much familial contact as possible. ICWA also ensures that Indian children that must be removed from their homes continue to be raised in their culture.

ICWA also allows for more informed court decisions regarding Indian child custody. Only through the involvement of Indian people will many of these difficult problems be solved. ICWA allows Indian children's tribes to provide a much-lacking tribal perspective to state court child custody proceedings. The guidance that these tribes bring to the problem will help Indian families and the courts when both parties need it the most.

Great care must be taken not to allow the tragedy of Brenda Swearingen to alter the path of progress that has been and continues to be made in matters of Indian child custody. Brenda's death should not be seen as a failure of current Indian child custody legislation when compared with child custody in general. Unfortunately, similar tragedies occur in child custody matters involving children of all races. From the ruinous beginnings of Indian child custody to the present day, it is evident that great improvements have been made in solving problems of Indian child custody. Continued adherence to ICWA will further the goals for which it was originally enacted.