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The Good Cause Exception to the Indian Child Welfare Act's Placement Preferences: The Minnesota Supreme Court Sets a Difficult (Impossible?) Standard—In re the Custody of S.E.G., 521 N.W.2D 357 (Minn. 1994)

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COMMENT—THE GOOD CAUSE EXCEPTION TO THE INDIAN CHILD WELFARE ACT'S PLACEMENT PREFERENCES: THE MINNESOTA SUPREME COURT SETS A DIFFICULT (IMPOSSIBLE?) STANDARD—*In re the Custody of S.E.G.*, 521 N.W.2d 357 (Minn. 1994).

I. INTRODUCTION

The Indian Child Welfare Act of 1978 (the Act or ICWA)[1] is a federal act that provides standards for foster care, adoptive, and other

1. Indian Child Welfare Act, 25 U.S.C. §§ 1901-1923 (1994) [hereinafter the Act or ICWA].

child placement proceedings involving Indian children.[2] The Act was passed to give Indian tribes more control of child placement proceedings involving their members and to reduce the destructive effects on tribes brought on by the removal of Indian children from their culture.[3] These goals are accomplished with several provisions including jurisdictional, notice, and placement requirements.[4] A critical provision of the Act requires that adoptive placements occur in an Indian home unless "good cause" is shown for a placement in a non-Indian home.[5]

In 1994, the Minnesota Supreme Court considered the Act's good cause exception in an adoption proceeding by a non-Indian couple wishing to adopt three Indian children. In *In re the Custody of S.E.G.*,[6] the court put forth a narrow standard for good cause that makes it very difficult for a non-Indian to adopt an Indian child. While commending the goals of the Act, this Comment criticizes the court's decision in this case. The supreme court, reversing well-reasoned trial court and appellate court decisions, made it almost impossible for a non-Indian family to show good cause to adopt an Indian child.

Part II of this Comment looks at the historical background and relevant provisions of the Act. It also examines a report by the Minnesota Supreme Court's Task Force on Racial Bias in the Judicial

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2. *See, e.g.*, ICWA § 1915 (stating the Act's adoption and foster care provisions).

3. ICWA §§ 1901-02. The U.S. Supreme Court has noted that "[s]tudies undertaken by the Association on American Indian Affairs in 1969 and 1974 . . . showed that 25 to 35% of *all* Indian children had been separated from their families and placed in adoptive families, foster care, or institutions." Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1989) (emphasis added). Congress believed that this separation of children from their tribes was destructive to the tribes because "there is no resource that is more vital to the continued existence of Indian tribes than their children . . . ." ICWA § 1901(3).

4. *See, e.g.*, ICWA §§ 1911, 1912, 1915 (relating to the Act's jurisdictional, notice, and placement provisions). These provisions accomplish the goals of giving tribes more control over child placement proceedings and of reducing the destructive effect that removing Indian children from their culture has on tribes. For example, the jurisdiction provisions normally give tribes exclusive jurisdiction over child custody proceedings involving Indian children residing or domiciled within the tribe's reservation. ICWA § 1911(a). The tribe also has transfer of jurisdiction and intervention rights in the case of foster care placement or termination of parental rights proceedings involving Indian children. ICWA § 1911(b), (c). Another provision requires notice to the tribe for foster care placements and terminations of parental rights "[i]n any involuntary proceeding in a State court, where . . . an Indian child is involved." ICWA § 1912(a). Also, the placement provisions normally require placement with Indian families or in foster homes licensed, approved, or specified by the tribe or in institutions approved by the tribe or operated by Indian organizations. ICWA § 1915.

5. ICWA § 1915(a).

6. *In re* the Custody of S.E.G., 521 N.W.2d 357 (Minn. 1994), *cert. denied*, 115 S. Ct. 935 (1995).

System, which found that serious problems associated with the placement of Indian children in Minnesota still exist. Part III discusses the facts of the case and the trial, appellate, and supreme court decisions. Part IV analyzes the supreme court's holdings. It criticizes the supreme court opinion for the court's mishandling of the facts and application of the law. Part IV concludes by presenting an alternative approach which more evenly balances the interests of the children in this case with those of the children's tribe.

II. THE INDIAN CHILD WELFARE ACT OF 1978

A. *History of the Act*

Over the course of this century, United States Indian policy has gone through four major periods:[7] (1) the assimilation period (1871-1934);[8] (2) the Indian Reorganization Act period (1934-1940);[9] (3) the termination period (1940-1962);[10] and (4) the current, self-determination period (1962-present).[11] During these periods, United States policy shifted back and forth between absorbing Indian culture (the assimilation and termination periods), and giving tribes greater powers over their affairs (the Indian Reorganization Act and self-determination periods).[12]

The assimilation period started with the passage of federal law which ended formal treaty making with Indian tribes.[13] Another statutory change during this period gave federal courts jurisdiction for the first time over intratribal affairs.[14] Other attempts at assimilation included the criminalization of many Indian cultural and religious practices,[15]

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7. *See* ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW, 147-64 (3d ed. 1991) (describing the history of federal Indian policy during the periods); *cf.* JAMES E. FALKOWSKI, INDIAN LAW/RACE LAW: A FIVE-HUNDRED YEAR HISTORY, 109-14 (1992) (giving another perspective on these periods).

8. CLINTON ET AL., *supra* note 7, at 147-52.

9. *Id.* at 152-55.

10. *Id.* at 155-58.

11. *Id.* at 158-64.

12. *See, e.g.*, Stan Watts, Note, *Voluntary Adoptions Under the Indian Child Welfare Act of 1978: Balancing the Interests of Children, Families, and Tribes*, 63 S. CAL. L. REV. 213, 219 (1989) (noting the inconsistency of policy during the four periods).

13. Appropriations Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566, (codified at 25 U.S.C. § 71).

14. Appropriations Act of Mar. 3, 1885, ch. 341, 23 Stat. 362, 385 (current version at 18 U.S.C. § 1153) (allowing federal courts to have jurisdiction over certain crimes committed by Indians on reservations).

15. CLINTON ET AL., *supra* note 7, at 151 (describing the Code of Indian Offenses, a regulatory scheme never explicitly authorized by statute, which proscribed traditional practices such as the destruction of a decedent's property, tribal dances, and payments to a woman's family upon marriage).

and a policy of dividing communally held tribal land into individually owned parcels under the Dawes General Allotment Act of 1887 (DGAA).[16] The result of the DGAA was a significant dispossession of Indians from tribal land which had been reduced by two-thirds.[17]

Concern over the direction of Indian policy brought about passage of the Indian Reorganization Act of 1934 (IRA).[18] This legislation ended the DGAA's allotment of Indian held land into the hands of individuals.[19] Keeping with the policy of giving Indian tribes more autonomy, the IRA also stated that "[a]ny Indian tribe, or tribes . . . shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws . . . ."[20] Tribes were also given the power to create charters of incorporation for tribal business corporations.[21] The IRA was arguably successful in giving Indian tribes more autonomy: within twelve years of passage, 161 constitutions and 131 corporate charters were adopted.[22]

A shift in policy away from protecting Indian autonomy started even before full implementation of the IRA.[23] During the 1940s, when what is known as the termination period began, several statutes were passed which gave certain states jurisdiction over particular tribes within those states.[24] In 1953, Congress passed House Concurrent Resolution 108 (HCR 108), which called for a large number of tribes to be "freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians."[25] Afterwards, Congress enacted separate statutes giving certain states jurisdiction over individual tribes.[26] By 1962, about 109 tribes had

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16. Dawes General Allotment Act of 1887, ch. 119 (codified as amended at 25 U.S.C. §§ 331-58) [hereinafter DGAA]; *see also* CLINTON ET AL., *supra* note 7, at 148-51 (describing the passage and implementation of the DGAA).

17. CLINTON ET AL., *supra* note 7, at 152.

18. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-79) [hereinafter IRA].

19. CLINTON ET AL., *supra* note 7, at 153.

20. IRA § 16 (codified at 25 U.S.C. § 476).

21. IRA § 17 (codified at 25 U.S.C. § 477).

22. Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 972 (1972), *excerpted in* CLINTON ET AL., *supra* note 7, at 360.

23. CLINTON ET AL., *supra* note 7, at 155.

24. *Id.* at 157 (citing legislation affecting tribes in California, Iowa, North Dakota, Kansas, and New York).

25. *Id.* at 157-58 (quoting Congress' language).

26. *Id.* at 158. During this period, Congress also enacted what is commonly known as Public Law 280 (PL 280). Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, §§ 2, 4, 67 Stat. 589, 590 (codified at 18 U.S.C. § 1620 and 28 U.S.C. § 1360). PL 280 gave Minnesota, and four other states (Alaska was added after it gained statehood), jurisdiction over criminal matters and civil causes of action involving Indians. 18 U.S.C. § 1620 (1994) (criminal matters); 28 U.S.C. § 1360 (1994) (civil causes of action). *See also* Peter W. Gorman & Michelle Therese Paquin, *A Minnesota Lawyer's Guide to the*

been terminated from federal supervision, from eligibility for federal benefits, and from coverage under federal Indian laws.[27] These tribes thus became fully subjected to state authority and lost their autonomy.[28]

Support for the policies of the termination period diminished in the 1960's.[29] The beginning of the self-determination period saw an end to the implementation of HCR 108.[30] In 1968, Congress passed the Indian Civil Rights Act of 1968 (ICRA), which contained provisions requiring tribal consent for future state court acquisition of jurisdiction over tribes and allowed states to relinquish previously acquired jurisdiction over tribes.[31] President Nixon continued the shift in the direction of self-determination by stating a policy of strengthening tribal sovereignty and of ending the termination of tribes.[32]

In 1978, Congress passed the Indian Child Welfare Act.[33] Congress heard considerable testimony before passage about the inequitable treatment of Indian as compared with non-Indian children.[34] The

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Indian Child Welfare Act, 10 LAW & INEQ. J. 311, 347-48 (1992) (explaining PL 280's relationship to the ICWA); Lynn Klicker Uthe, Note, *The Best Interests of Indian Children in Minnesota*, 17 AM. INDIAN L. REV. 237, 239-40 (1992) (giving a background to the passage of PL 280).

27. CLINTON ET AL., *supra* note 7, at 158.

28. *Id.*

29. *Id.* at 158-59.

30. *Id.* at 159 (quoting Stewart L. Udall, Secretary of the Interior during the Kennedy administration, as saying that HCR 108 had "died with the 83rd Congress and is of no legal effect at the present time").

31. Pub. L. No. 90-284, 82 Stat. 77 (codified in part at 25 U.S.C. §§ 1301-41).

32. *Message from the President of the United States Transmitting Recommendations for Indian Policy*, H.R. DOC. NO. 363, 91st Cong., 2d Sess. (1970).

33. Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-23 (1994)).

34. H.R. REP. NO. 1386, 95th Cong., 2d Sess. 9-10 (1978) *reprinted in* 1978 U.S.C.C.A.N. 7530, 7531 [hereinafter 1978 HOUSE REPORT]; *see also* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 33-37 (1989) (discussing an extensive amount of the relevant testimony behind the Act). Several articles have been written on different aspects of the Act that give a good background on the passage of the act. *See, e.g.*, Toni Hahn Davis, *The Existing Indian Family Exception to the Indian Child Welfare Act*, 69 N.D. L. REV. 465, 467-68 (1993) (arguing against a judicially created exception to the applicability of the Act when an Indian child has not previously been a part of an existing Indian family); Gorman & Paquin, *supra* note 26, at 314-17 (providing a guide to the application of the Act in light of relevant Minnesota law, federal and state regulations, and threshold issues); Uthe, *supra* note 26, at 240-42 (praising the Act's emphasis on an Indian child's cultural identity and the adherence to the Act by Minnesota's legislature and courts); Diane Allbaugh, *Tribal Jurisdiction Over Indian Children:* Mississippi Band of Choctaw Indians v. Holyfield, 16 AM. INDIAN L. REV. 533, 536-37 (1991) (analyzing a U.S. Supreme Court decision interpreting portions of the Act); Ester C. Kim, Comment, Mississippi Band of Choctaw Indians v. Holyfield: *The Contemplation of All, the Best Interests of None*, 43 RUTGERS L. REV. 761, 763-65 (1991) (presenting a negative analysis of the U.S. Supreme Court decision); Watts, *supra* note

testimony showed that Indian children were removed from their families at alarmingly high rates and were usually placed in non-Indian homes.[35] For example, during the early 1970s in Minnesota, one in eight Indian children was in an adoptive home and approximately ninety percent of Indian placements were in non-Indian homes.[36]

The Act was passed partly because "[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today."[37] According to testimony before Congress, the separation of Indian children from their culture subjected these children to serious adjustment problems caused by growing up in a white culture that was not willing to accept them as part of that culture.[38] In addition, the tribes themselves suffered because "the chances for Indian survival are significantly reduced if [Indian] children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People."[39]

B. *Relevant Provisions of the Act*

The ICWA was enacted

> to protect the best interest of Indian children and to promote the stability and security of Indian tribes and families by the establishment of *minimum Federal standards* for 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 . . . .[40]

Implicit in this language is the idea that achieving the best interests of an Indian child is consistent with the application of the Act's "mini-

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12 at 220-24 (proposing a model that allows adoption by non-Indian families in voluntary placements and that maintains the Indian child's cultural identity).

35. 1978 HOUSE REPORT, *supra* note 34, at 9. Minnesota was one of the states specifically criticized for its child placement practices. *See* Gorman & Paquin, *supra* note 34 at 315 (noting also that Minnesota may have kept better statistics than other states).

36. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 33 (1989) (citing *Indian Child Welfare Program, Hearings Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs*, 93d Cong., 2d Sess., 75-83 (1974) [hereinafter *1974 Senate Hearings*]). The U.S. Supreme Court also pointed out that "[t]he adoption rate of Indian children was eight times that of non-Indian children." *Id.*; *cf.* Allbaugh, *supra* note 34 at 537 n.23 (showing an Indian adoption rate of approximately four times that of non-Indians in Minnesota).

37. 1978 HOUSE REPORT, *supra* note 34, at 9 (quoting *1974 Senate Hearings*, *supra* note 36 at 3 (statement of William Byler)).

38. *1974 Senate Hearings*, *supra* note 36, at 46.

39. 1978 HOUSE REPORT, *supra* note 34, at 193.

40. ICWA § 1902 (emphasis added).

mum Federal standards."[41] In Minnesota, the "best interests of the child" are defined in section 518.17 of the Minnesota Statutes.[42] But, in child custody proceedings[43] involving an Indian child,[44] the ICWA

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41. *See, e.g.*, State *ex rel.* Juvenile Dep't of Lane County v. Tucker, 710 P.2d 793, 799-800 (Or. Ct. App. 1985) (agreeing with the lower court that considering the best interests of the child and applying the ICWA's minimum federal standards are consistent obligations); *see also* Davis, *supra* note 34, at 468 (stating that the two purposes of the ICWA—protecting the child's best interests and promoting the tribe's stability and security—are intertwined). *But see* Kim, *supra* note 34, at 793 (concluding that the goals of the ICWA can be unattainable when the interests of the children, tribes, and parents are not identical).

42. The statute defines the "best interests of the child" as:

> all relevant factors to be considered and evaluated by the court including:
>
> (1) the wishes of the child's parent or parents as to custody;
>
> (2) the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference;
>
> (3) the child's primary caretaker;
>
> (4) the intimacy of the relationship between each parent and the child;
>
> (5) the interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly affect the child's best interests;
>
> (6) the child's adjustment to home, school, and community;
>
> (7) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;
>
> (8) the permanence, as a family unit, of the existing or proposed custodial home;
>
> (9) the mental and physical health of all individuals involved; except that a disability, as defined in section 363.01, of a proposed custodian or the child shall not be determinative of the custody of the child, unless the proposed custodial arrangement is not in the best interest of the child;
>
> (10) the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion or creed, if any;
>
> (11) the child's cultural background;
>
> (12) the effect on the child of the actions of an abuser, if related to domestic abuse, as defined in section 518B.01, that has occurred between the parents; and
>
> (13) except in cases in which a finding of domestic abuse as defined in section 518B.01 has been made, the disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child.
>
> The court may not use one factor to the exclusion of all others. The primary caretaker factor may not be used as a presumption in determining the best interests of the child. The court must make detailed findings on each of the factors and explain how the factors led to its conclusions and to the determination of the best interests of the child.

Minn. Stat. § 518.17, subd. 1 (1994); *see also* Schumm v. Schumm, 510 N.W.2d 13, 14 (Minn. Ct. App. 1993) (holding that the statutory factors for a child's best interests must be considered in custody decisions); Nazar v. Nazar, 509 N.W.2d 163, 165 (Minn. Ct. App. 1993) (noting that in a custody modification, consideration of the statutory factors is "absolutely required").

43. "'[C]hild custody proceeding' shall . . . include—(i) 'foster care placement' . . . (ii) 'termination of parental rights' . . . (iii) 'preadoptive placement' . . . and (iv) 'adoptive placement' . . . ." ICWA § 1903(1).

preempts state law and section 518.17 of the Minnesota Statutes would not apply.[45]

State courts also must follow other applicable provisions of the Act since it preempts state law. For example, in placing Indian children in foster care,[46] preadoptive homes,[47] or adoptive homes,[48] certain preferences must be followed.[49] In the case of adoptions, the Act lists three placement preferences. The child must be adopted by: "(1) a member of the child's extended family;[50] (2) other members of the Indian child's tribe; or (3) other Indian families."[51] These preferences "shall be given in the absence of *good cause* to the contrary."[52] The child's tribe may establish a different order of preference by resolution.[53] Also, "[w]here appropriate, the preference of the Indian child or parent shall be considered . . . ."[54] In other words, under these preferences, an Indian child could only be adopted by an Indian family. An exception to this rule can be made if "good cause" is shown

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44. The Act defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." ICWA § 1903(4).

45. *In re* the Custody of S.E.G., 507 N.W.2d 872, 880 (Minn. Ct. App. 1993) (citing *In re* Adoption of M.T.S., 489 N.W.2d 285, 288 (Minn. Ct. App. 1992)). However, "where State or Federal law . . . provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under [the Act], the . . . court shall apply the [higher] State or Federal standard." ICWA § 1921.

46. Foster care placement is defined as:

> any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated . . . .

ICWA § 1903(1)(i).

47. Preadoptive placement is defined as "the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement . . . ." ICWA § 1903(1)(iii).

48. Adoptive placement is defined as "the permanent placement of an Indian child for adoption . . . ." ICWA § 1903(1)(iv).

49. ICWA § 1915.

50. "'[E]xtended family member' shall be as defined by the law or custom of the Indian child's tribe or . . . the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent . . . ." ICWA § 1903(2).

51. ICWA § 1915(a).

52. *Id.* (emphasis added); *see also* John Robert Renner, *The Indian Child Welfare Act and Equal Protection Limitations on the Federal Power over Indian Affairs*, 17 AM. INDIAN L. REV. 129, 164-65 (1992) (discussing the placement preferences and good cause provisions of section 1915).

53. ICWA § 1915(c).

54. *Id.*

to not follow the preferences. Thus, only with a showing of "good cause" can a non-Indian family adopt an Indian child.

C. *A Note on Minnesota State Law*

Generally, the Act preempts state law.[55] The exception to this general rule is where state law provides enhanced protection "to the rights of the parent or Indian custodian of an Indian child."[56] The Minnesota Legislature has enacted several statutes that are relevant to adoption proceedings. For example, the Minnesota Indian Family Preservation Act (MIFPA)[57] was enacted in 1985 and incorporates the ICWA's principles into state law.[58] The MIFPA generally follows the provisions of the ICWA, but also provides higher tribal protection by requiring earlier tribal notification and additional provisions for tribal intervention.[59] In effect, the ICWA is the governing law for adoption proceedings of Indian children in Minnesota except for the higher

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55. *See* U.S. CONST. art. VI, § 2 (Supremacy Clause); *see also supra* note 45 and accompanying text. The Act's preemption of state law was explicitly recognized by the Minnesota Supreme Court in the case that is the subject of this Comment. *In re* the Custody of S.E.G., 521 N.W.2d 357, 362 (Minn. 1994) (noting that child placement decisions in Minnesota courts must meet the Act's minimum requirements).

56. ICWA § 1921.

57. MINN. STAT. §§ 257.35-.3579 (1994) [hereinafter MIFPA]. The Minnesota Legislature has also adopted other provisions which relate to the placement of minority children. *See, e.g.*, 1983 MINN. LAWS ch. 278 (the Minnesota Minority Heritage Act (MMHA) which provides guidelines for considering race and ethnic origin in foster care and adoption placements). Although these provisions and others are not directly relevant to the discussion in this Comment, they serve to point out the emphasis given to the placement of minority children by the Minnesota Legislature.

58. For example, both the MIFPA and the ICWA define "adoptive placement" as "the permanent placement of an Indian child for adoption." MINN. STAT. § 257.351, subd. 3(a)(1994); ICWA § 1903(1)(iv). The MIFPA also uses the same language as the ICWA to define an "Indian child" as an "unmarried person who is under age 18 and is: (1) a member of an Indian tribe; or (2) eligible for membership in an Indian tribe." MINN. STAT. § 257.351, subd. 6 (1994). *But cf.* ICWA § 1903(3) (requiring a child who is "eligible for membership in an Indian tribe" to also be "the biological child of a member of an Indian tribe"). The MIFPA also states a similar tribal jurisdiction provision as the ICWA. *Compare* MINN. STAT. § 257.354, subd. 1 (1994) ("An Indian tribe with a tribal court has exclusive jurisdiction over a child placement proceeding involving an Indian child who resides within the reservation of such tribe at the commencement of the proceedings") *with* ICWA § 1911(a) ("An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law"). *See also* Uthe, *supra* note 26, at 247 (comparing the MIFPA with the ICWA).

59. *See* MINN. STAT. §§ 257.352-.354 (1994); *see also* Uthe, *supra* note 26, at 247 (discussing the MIFPA's provisions); Michele K. Bennett, Comment, *Indian Children: Caught in the Web of the Indian Child Welfare Act*, 16 HAMLINE L. REV. 953, 956 (1993) (same).

tribal protection found in provisions such as the notification and intervention requirements of the MIFPA.[60]

D. *The Minnesota Supreme Court's Task Force on Racial Bias in the Judicial System*

In 1993, the Minnesota Supreme Court's Task Force on Racial Bias in the Judicial System (Task Force) published a report on its findings and recommendations.[61] The Task Force, chaired by Minnesota Supreme Court Justice Rosalie E. Wahl (now retired), considered the issue of racial bias in Minnesota's judicial system by investigating substantive, procedural, and personnel issues in the legal system.[62] The Task Force set up several committees to look at specific areas of the judicial system such as criminal and civil processes.[63]

The Juvenile and Family Law Committee's function was to "investigat[e] whether or not there are race-related differences in the area of children in need of protective services (CHIPS), foster care policies and procedures, and issues related to juvenile delinquency."[64] Through this committee, the Task Force found that minority children were statistically over-represented in the foster care system.[65] For example, Indian children were in out-of-home placements at a rate more than ten times that of white children.[66]

In addition to studying existing data from the Minnesota Department of Human Services (DHS), the Task Force used focus groups,

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60. Note, however, that the ICWA is not by nature substantive. As one commentator has pointed out, "[a]lthough a federal law, the ICWA is not a national substantive code for juvenile child protection proceedings; it is rather an evidentiary and procedural code which establishes *minimum* procedures for child protection proceedings in each state under each state's substantive law." Gorman & Paquin, *supra* note 26, at 313.

61. *Minnesota Supreme Court Task Force on Racial Bias in the Judicial System*, 16 HAMLINE L. REV. 477 (1993) [hereinafter *Task Force on Racial Bias*]. The report was the culmination of a two-and-a-half-year study by the Task Force. Hon. A.M. Keith, *The State of the Judiciary*, 50 BENCH & B. MINN., Aug. 1993, at 21.

62. *Task Force on Racial Bias*, *supra* note 61, at 488.

63. *Id.* at 480.

64. *Id.* at 488. For a discussion of the historical background and recent developments of Minnesota's CHIPS statutes, see Wright S. Walling & Gary A. Debele, *Private CHIPS Petitions in Minnesota: The Historical and Contemporary Treatment of Children in Need of Protection or Services*, 20 WM. MITCHELL L. REV. 781 (1994). *See also* Act of Apr. 26, 1988, ch. 673, 1988 MINN. LAWS 1031 (codified at MINN. STAT. § 260.015 (1994)) (designating all dependent and neglected children as "Children in Need of Protection or Services" under the Minnesota CHIPS statutes).

65. *Task Force on Racial Bias*, *supra* note 61, at 628. The study noted that "children of color were over-represented by 3 to 12% of their representation in the general population." *Id.* at 629.

66. *Id.*

public hearings, and surveys of attorneys and judges.[67] These data, the Task Force concluded, demonstrated that some racial bias existed in the foster care system.[68] Based on some of the survey results, the Task Force believed that the problem partly stemmed from a lack of familiarity with the basic provisions of the ICWA, the MIFPA, and Minnesota's Minority Heritage Preservation Act (MHPA).[69] The Task Force also blamed the "cultural insensitivity" of many social workers, court-intake personnel, and judges for much of the bias.[70] The Task Force's conclusion of cultural insensitivity was based on statistical survey results of attorneys and judges and some open-ended responses to the surveys.[71]

While the Task Force considered all minority placements, it specifically criticized the handling of Indian children in the foster care system.[72] The Task Force noted that according to one survey, with an admittedly very small sample size, Indians encountered problems and

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67. *Id.* at 630.

68. *Id.*

69. *Id.* at 632-34 (noting a widespread level of ignorance of the ICWA's and the Minority Heritage Protection Act's (MHPA) provisions by judges, social workers, court-intake personnel, and attorneys). For example, 26% of all attorneys responding and 20% of all judges responding said that judicial decisions sometimes, rarely, or never apply the ICWA or MHPA. *Id.* (Note: The MHPA recognized the extended nature of many minority families. Act of Apr. 28, 1988, ch. 689, art. 2, § 218, MINN. LAWS 1435.)

70. *Task Force on Racial Bias, supra* note 61, at 640-42.

71. *Id.* For example, the Task Force report stated that "[o]ne-third of all judges and nearly 70% of the metropolitan area judges say that [social workers and court-intake personnel] demonstrate cultural insensitivity sometimes, often or always in working with minority families [and n]early 50% of all attorneys and over 60% of public defenders agree." *Id.* at 641 (citations omitted). The report goes on to say that "[n]early 25% of all judges and 63% of Hennepin and Ramsey County judges report that judges, also, demonstrate cultural insensitivity always, often or sometimes in working with minority families." *Id.* at 642 (citations omitted). The survey question used for these statistics asked respondents to answer "always," "often," "sometimes," "rarely," "never," or "no basis for judgment" to the following:

> Cultural insensitivity is demonstrated in working with minority families by:
> a. social workers and court intake personnel.
> b. guardians ad litem.
> c. attorneys.
> d. judges.

Id. at 729 (attorney questionnaire); *id.* at 745 (judge questionnaire). The report also noted some open-ended responses that the Task Force believed demonstrated the type of cultural insensitivity in the foster care system. *Id.* at 640-41. For example, a judge related an incident where he asked an Indian boy's probation officer about the boy's fond recollections of his grandfather. The probation officer responded, "yeah, he does talk about those things [his tribe's culture and spiritual beliefs], but we know the reality, which is that the grandfather was just an old drunk." *Id.* at 641.

72. *Id.* at 634-35, 640-42.

frustrations when dealing with Social Services or the courts.[73] Also, all of the examples of open-ended responses which the Task Force said showed cultural insensitivity involved the Act.[74] The emphasis on alleviating the problems encountered by Indians in the foster care system is evident in the Task Force's recommendations.[75] Although for the most part the recommendations are relevant to the problem of racial bias generally, several of the recommendations are specific to the problems encountered by Indians.[76]

The Minnesota Supreme Court has made a public effort to treat all the Task Force's findings and recommendations seriously. The Honorable A.M. "Sandy" Keith, Chief Justice of the Minnesota Supreme Court, confined his address to the 1993 annual convention of the Minnesota State Bar Association to remarks about the Task Force's report.[77] The Chief Justice's remarks show that the judiciary plans on implementing the Task Force's recommendations through education, policies, programs, and legislation.[78] With this as a backdrop, it is noteworthy that the case this Comment explores was decided in the court of appeals just a few months after the Task Force's report was published.[79] The supreme court opinion (which was authored by the Chief Justice) was handed down the following year.[80] The justices on the court must have had the Task Force's report in mind while this case was being decided.

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73. *Id.* at 634-35 (noting problems such as lack of inquiry into tribal membership, lack of written notice of rights under the Act, and lack of notice about the movement of children in placement).

74. *Id.* at 640-41 (quoting (1) a response from an attorney about a Human Services official who said that "the ICWA was getting in the way of [a] case," (2) the opinion of a white judge that the Act is unconstitutional, and (3) a response from a judge about a probation officer's remark that an Indian grandfather "was just an old drunk").

75. *Id.* at 647-49.

76. The Task Force's eighteen recommendations on children in the foster care system included five that are at least partially related to Indians: (1) training in the provisions of the Act for judges, attorneys, social workers, guardians ad litem, and other court personnel; (2) funding of the Indian Child Welfare Center; (3) inquiry into tribal membership and requesting tribal intervention or jurisdiction; (4) recruitment and certification of community experts under the Act; and (5) sanctions and penalties against agencies that fail to follow the requirements of the Act. *Task Force on Racial Bias*, *supra* note 61, at 647-49 (recommendations 4, 6, 9, 15, and 18).

77. Keith, *supra* note 61, at 21.

78. *Id.* at 23.

79. *In re* the Custody of S.E.G., 507 N.W.2d 872, 872 (Minn. Ct. App. 1993).

80. *In re* the Custody of S.E.G., 521 N.W.2d 357, 357 (Minn. 1994), *cert. denied* 115 S. Ct. 935 (1995).

III. *IN RE THE CUSTODY OF S.E.G.*

A. *Fact*

In re the Custody of S.E.G. involved the petition of a non-Indian couple (Petitioners) to adopt three Indian children.[81] The three children were biological sisters born in 1984, 1985, and 1987 to a Chippewa woman and a Caucasian man.[82] All three were enrolled members of the Leech Lake Band of Chippewa Indians (the Band).[83]

Throughout most of their lives the children had been in foster care with frequent moves from home to home.[84] The middle child was the first to be moved away from the parents. She was placed in a foster home in January 1986 while still an infant.[85] Her older sister joined her at a different home eight months later.[86] The two children were returned to their parents in December 1986, but less than a year later were living with their maternal grandmother.[87] After the birth of the youngest child in November 1987, the mother voluntarily placed all three children in foster care.[88] They continued to be moved from home to home over the next three-year period,[89]

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81. *Id.* at 358. The courts referred to the individuals in the case by initials to protect their identities. For readability, this Comment refers to E.C. and C.C. (the couple petitioning for custody) as "Petitioners," and to the children (S.E.G., A.L.W., and V.M.G.) by their birth order, i.e., "oldest," "middle," and "youngest" respectively.

82. *Id.* at 359; *S.E.G.*, 507 N.W.2d at 875.

83. *S.E.G.*, 507 N.W.2d at 875. The Band was appellant at both the court of appeals and supreme court phases of this case.

84. *S.E.G.*, 521 N.W.2d at 359. The oldest and youngest of the children were suspected of being victims of sexual or physical abuse. *S.E.G.*, 507 N.W.2d at 876. Also, all three children had a history of parental abandonment. *Id.*

85. *S.E.G.*, 521 N.W.2d at 359.

86. *S.E.G.*, 507 N.W.2d at 876.

87. *Id.* During the time they were with their parents, the family moved out of state, violating a court order against such a move (the family was under Cass County supervision). *S.E.G.*, 521 N.W.2d at 359. Subsequently, the family returned to Minnesota, at which time the children moved in with their grandmother. *Id.*

88. *S.E.G.*, 521 N.W.2d at 359. The youngest child has never lived with her parents. *S.E.G.*, 507 N.W.2d at 876.

89. *S.E.G.*, 521 N.W.2d at 359. The court of appeals detailed the frequency of the moves:

> All three children were placed in the H. foster home in February 1988. [The youngest child] was placed in the R. foster home in March 1988 and [the two older children] were also placed [there] in April 1988. . . . [T]he Rs asked to have the children removed.
>
> The children were moved to the W. foster home in February 1989 where they stayed until October 1990. The children were abruptly removed from this home after sexual abuse allegations [of which] the foster parents were cleared . . . .
>
> In October 1990, the children were placed in the L. foster home. Due to a marriage dissolution, the children were abruptly returned to the home

ending with their placement in Petitioners' foster home.[90]

However, the children's moves had not yet ended. In January 1992, the children were moved into a preadoptive home which technically fit within the Act's preferences.[91] Unfortunately, this move was not well planned (there was little prior preparation and no overnight visits) and lasted only nine days.[92] Then, the children were returned to Petitioners' home.[93] Although Petitioners had a good track record meeting the children's physical, emotional, and intellectual needs,[94] the children were moved to a home fitting the Act's guidelines, i.e., an Indian home, in October 1992.[95] This move lasted less than two months, however, and the children were moved yet again to another Indian home.[96]

In November 1992, Petitioners filed a custody petition seeking to adopt all three children.[97] The Band opposed the adoption and the matter went to trial in district court at Beltrami County.[98] The trial court, finding good cause to deviate from the Act's placement preferences provisions, granted the custody petition.[99] The court of appeals affirmed.[100] The Minnesota Supreme Court reversed.[101] In January 1995, the United States Supreme Court denied Petitioners' request for certiorari.[102]

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of their uncle.

> [The oldest child] was placed in the . . . foster home of [Petitioners] in April 1991. Meanwhile, [the two younger children] were placed in the L. foster home until the Ls asked to be relieved of their duties. [These two children] were then also placed with [Petitioners] in August 1991.

S.E.G., 507 N.W.2d at 876.

90. *S.E.G.*, 521 N.W.2d at 359. Petitioners' home was a PATH (Professional Association of Treatment Homes) foster home. *Id.* Although the home does not fit into the Act's preferences for foster care placement, no Indian PATH homes were available at the time the children were placed in Petitioners' home. *S.E.G.*, 507 N.W.2d at 876.

91. *S.E.G.*, 521 N.W.2d at 359. The home fit within the Act's preferences only because "Mrs. L. was 1/16 Chippewa and an enrolled member of the Fond du Lac Band of Chippewa." *S.E.G.*, 507 N.W.2d at 876.

92. *S.E.G.*, 521 N.W.2d at 359-60.

93. *Id.* at 360.

94. *Id.*; *S.E.G.*, 507 N.W.2d at 883.

95. *S.E.G.*, 521 N.W.2d at 360.

96. *Id.* The foster mother in the first Indian PATH home was "emotionally not ready to handle the children." *Id.*

97. *S.E.G.*, 507 N.W.2d at 876. The parental rights of the biological parents had been terminated in December 1991. *Id.*

98. *Id.*

99. *S.E.G.*, 521 N.W.2d at 358.

100. *S.E.G.*, 507 N.W.2d at 885 (2-1 decision).

101. *S.E.G.*, 521 N.W.2d at 366 (en banc) (holding that good cause to deviate from the Act's preferences had not been established).

102. Campbell v. Leech Lake Band of Chippewa Indians, 115 S. Ct. 935 (1995).

B. *The Trial Court's Decision*

The trial court found that the children had extraordinary emotional needs that would be improved by an adoptive placement.[103] The children's emotional needs were brought on by several factors. The two older children were suspected of having been victims of sexual or physical abuse.[104] Both had a need for therapy to deal with their behavioral, emotional, and social problems.[105] The oldest child had special educational service needs and was diagnosed with a "severe adjustment disorder."[106] The middle child, with arguably the worst problems of the three children, exhibited destructive acting out behavior and was diagnosed with "an extreme case of posttraumatic stress disorder."[107] The youngest child also had behavioral and emotional needs "resulting from neglect and instability."[108] The court based its finding of extraordinary emotional needs on these facts and concluded that the children's needs resulted "from multiple placements, neglect, [and] changes in family and school environments."[109]

The trial court also found that there was an unavailability of suitable Indian families for adoption after an extensive search.[110] The Band had searched for an Indian adoptive home for fifteen months.[111] During that time, one adoptive placement was attempted but failed after only nine days.[112] Although the Band's adoption worker testified about having an active file of forty-eight Indian adoptive homes, only one of these was offered as a potential home for the children.[113] But, the family in that home, which was in Missouri, was not told about the children's specific problems.[114] Also, the children's guardian ad litem had been told by the adoption worker that the children were no longer on the national adoption registry and would not be put back on it for five years.[115]

The trial court concluded that the children's needs and the unavailability of suitable families provided good cause to deviate from

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103. *S.E.G.*, 521 N.W.2d at 358.
104. *S.E.G.*, 507 N.W.2d at 881 (quoting the trial court record).
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *S.E.G.*, 521 N.W.2d at 358.
111. *S.E.G.*, 507 N.W.2d at 881.
112. *Id.* at 876.
113. *Id.*
114. *Id.*
115. *Id.* at 881.

the Act's placement preferences provisions.[116] The court awarded custody of the children to the non-Indian Petitioners.[117] The Band appealed.[118]

C. *The Court of Appeals' Decision*

The Minnesota Court of Appeals listed six issues for its review of the trial court's finding of good cause to deviate from the Act's preferences: (1) the trial court's standard of proof for determining good cause;[119] (2) the appellate standard of review;[120] (3) the applicable factors in determining good cause; (4) the fact of a child's need for permanence in determining extraordinary emotional needs; (5) support of the evidence by qualified expert testimony; and (6) state court deference to the child's tribe's recommendations.[121] After analyzing these issues, the court of appeals affirmed the trial court's decision to allow Petitioners to adopt the children.[122]

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116. *S.E.G.*, 521 N.W.2d at 358.

117. *Id.*

118. *S.E.G.*, 507 N.W.2d at 875.

119. The Act does not specify a standard of proof for determining good cause. The court of appeals stated that ordinarily, legislative silence indicates an intention to apply a "preponderance of the evidence" standard. *S.E.G.*, 507 N.W.2d at 878. But, since the "good cause to the contrary" language of section 1915(1) is the "most important substantive requirement imposed on state courts," a higher standard must be applied. *Id.* (quoting Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36-37 (1989)). The court also considered a "beyond a reasonable doubt" standard, but rejected it as too high because it takes away state courts' flexibility in determining good cause. *Id.* at 877-78 (rejecting the standard proposed by two amici, the Minnesota Chippewa Tribe and the Minneapolis American Indian Center). The court of appeals ended up applying a "clear and convincing evidence" standard. *Id.* at 878 (agreeing with the trial court).

120. The Band argued that the trial court's decision is subject to de novo review. *Id.* at 878 (explaining that the Band saw the case as involving statutory interpretation which as a matter of law is subject to de novo review). The court, however, agreed with Petitioners' contention that an "abuse of discretion" standard of review applies. *Id.* at 878-79 (pointing out that custody proceedings under Minnesota state law are reviewed under this standard). The court also noted other states' application of this standard of review in child placement matters under the Act. *Id.* at 879 (citing *In re* Adoption of F.H., 851 P.2d 1361, 1363 (Alaska 1993); *In re* Appeal in Maricopa County Juvenile Action No. A-25525, 667 P.2d 228, 234 (Ariz. Ct. App. 1983); *In re* Adoption of M., 832 P.2d 518, 522 (Wash. Ct. App. 1992)). Having adopted this standard, the court of appeals explained that it "will find an abuse of discretion only if the trial court's factual findings are clearly erroneous or the trial court considered improper factors in making its determination." *Id.* at 879; *accord* Cooter & Gell v. Hartmax Corp., 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence").

121. *S.E.G.*, 507 N.W.2d at 879.

122. *Id.* at 885 (holding that the trial court did not abuse its discretion in determining that good cause to deviate from the Act's preferences had been

1. Factors for Good Cause

After establishing a "clear and convincing" standard of proof and an "abuse of discretion" standard of review, the court of appeals went on to the issue of good cause to deviate from the Act's preferences for adoptive placements.[123] The term "good cause" is not defined in the Act. The court relied on three sources for a meaning: (1) the Department of the Interior's Bureau of Indian Affairs' guidelines (BIA Guidelines) for applying the Act;[124] (2) case law from other states; and (3) the Act's legislative history.[125]

The BIA Guidelines give three considerations for determining good cause:

> (i) The request of the biological parents or the child when the child is of sufficient age.
>
> (ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.
>
> (iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.[126]

One or more of these considerations should be present to establish good cause.[127]

Case law from other states added other factors to consider, such as "the best interests of the child, the wishes of the biological parents, the suitability of persons preferred for placement and the child's ties to the tribe."[128] Finally, although the Act presumes the interests of the child are best served by applying the preferences, the court of appeals noted that the Act's legislative history confirms that the presumption should "not be read as precluding the placement of an Indian child with a

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established) (2-1 decision). The dissenting opinion concluded that "the trial court abused its discretion in finding 'good cause' to deviate from the adoption placement preferences in the Act." *Id.* at 888 (Schumacher, J., dissenting).

123. *Id.* at 879-82.

124. Bureau of Indian Affairs Guidelines, 44 Fed. Reg. 67,583 (1979) [hereinafter BIA Guidelines].

125. *S.E.G.*, 507 N.W.2d at 878.

126. BIA Guidelines, *supra* note 124, at 67,594. The court noted that the guidelines are not regulations and do not have binding legislative effect. *S.E.G.*, 507 N.W.2d at 879 n.2. However, they are given important but not controlling significance. *Id.*; *see also* BIA Guidelines, *supra* note 124, at 67,584.

127. *S.E.G.*, 507 N.W.2d at 879.

128. *Id.* at 879-80 (citing *In re* Adoption of F.H., 851 P.2d 1361, 1363-64 (Alaska 1993)); *In re* Adoption of M., 832 P.2d 518, 522 (Wash. 1992) (also stating the additional factor: the child's ability to make any cultural adjustments necessitated by a particular placement); *In re* Interest of J.R.H., 358 N.W.2d 311, 321-22 (Iowa 1984) (consideration should be given to the child's heritage)).

non-Indian family."[129]

The trial court applied factors (ii) (extraordinary physical and emotional needs) and (iii) (unavailability of suitable families) of the BIA Guidelines[130] in addition to the best interests of the children in deciding that the adoption petition should be granted.[131] The court of appeals determined that the evidence supported the trial court's findings that (1) suitable families to meet the Act's preference criteria were not available, and that (2) the children had extraordinary emotional needs.[132] Nevertheless, the court of appeals reasoned that the children's extraordinary emotional needs, except for their need for permanence, could be met in the Indian foster home where they were residing at the time of trial.[133] Consequently, under the court of appeals' analysis, the children's need for permanence became the critical factor.[134]

2. *The Need for Permanence*

Several experts for both sides testified that the children needed a permanent home.[135] This was necessary not just for the current placement, but "for the duration of their childhood and adolescence."[136] In other words, although the children's other extraordinary emotional needs were being met at that time, continuing to move them from one foster home to another would not be conducive to their well-being.[137]

The Band and Beltrami County[138] argued that the trial court had erroneously elevated permanence to a new good cause basis.[139] The court of appeals, however, stated that "the [trial] court merely considered permanence to be a necessary factor in meeting the

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129. *S.E.G.*, 507 N.W.2d at 880 (quoting 1978 HOUSE REPORT, *supra* note 34, at 23).

130. *See supra* text accompanying note 126.

131. *S.E.G.*, 507 N.W.2d at 880. Factor (i) of the BIA Guidelines (request of the parent or child) was not used because the biological parents did not express a preference and because the trial court made no findings on the children's preferences. *Id.* at 880 n.3. However, the children's guardian ad litem, an Indian woman, did testify that the children preferred to live with Petitioners. *Id.* Also, although the suitability of persons preferred for placement was not directly addressed, this was not a factor since the court determined that there was an unavailability of suitable families within the Act's preferences. *Id.* at 880-81.

132. *Id.* at 880-82.

133. *Id.* at 881-82.

134. *Id.* at 882.

135. *Id.*

136. *Id.*

137. *Id.*

138. Beltrami County appeared in the case as the county of financial responsibility. *Id.* at 875 n.1.

139. *Id.* at 882.

extraordinary emotional needs of *these particular children in this particular case.*"[140]

The court acknowledged that an Indian child's need for permanence would be strengthened through tribal and cultural ties;[141] however, the court believed adoption by Petitioners would not completely sever these connections to their heritage.[142] Petitioners had "testified that . . . they would follow through with culturally appropriate activities for the three children."[143] The court felt that although these ties would not be as strong as day-to-day living in an Indian setting, the unique needs of the children take precedence over the incremental advantages such a setting would provide.[144]

The court of appeals concluded that a child's need for permanence was a factor in determining the child's extraordinary emotional needs.[145] This was true even though permanence by itself cannot constitute good cause to deviate from the Act's placement preferences.[146] Therefore, the court of appeals concluded that the trial court correctly established a good cause exception to the Act's preferences by considering the children's need for permanence as a factor in determining their extraordinary emotional needs.[147]

3. Qualified Expert Testimony

According to the court of appeals, a child's extraordinary emotional or physical needs must be established by qualified expert testimony.[148] The court noted that under the BIA Guidelines, a person needs to meet certain qualifications to testify as an expert during a child placement proceeding.[149]

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140. *Id.* (emphasis added). These children had extraordinary emotional needs which were partially the result of the many failed placements through the foster care system. *See id.* (distinguishing this case from other placements where permanence would not suffice to establish good cause).

141. *Id.* at 883.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 884.

146. *Id.*

147. *Id.*

148. *Id.* (agreeing with BIA Guidelines, *supra* note 124, at 67,594).

149. The trial court used the Department of Human Services (DHS) manual which follows the BIA's guidelines for qualifying expert witnesses. *Id.* at 884-85. Under the guidelines, an expert witness should be:

> (i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.
> (ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the child's tribe.

The Band argued that the findings were not supported by testimony of properly qualified experts.[150] Some of the witnesses for both sides were not expressly qualified by the trial court despite appearing to meet the necessary criteria.[151] Conversely, the court of appeals noted that other witnesses called by both sides *were* expressly qualified as experts.[152] The trial court explicitly noted that it relied on "qualified experts" in its conclusions and in its memorandum.[153] The court of appeals concluded that the trial court did not abuse its discretion in relying on their testimony.[154] The court of appeals noted that it was not required to examine the qualified expert issue because the scope of review was "limited to whether the record supports the findings of fact and whether those findings support the conclusions of law and the judgment."[155]

4. Deference to the Tribe's Recommendations

Another challenge to the trial court's decision was raised by two amici: the Minnesota Chippewa Tribe and the Minneapolis American Indian Center.[156] The amici argued that if the Indian tribe has formally intervened in a child placement proceeding, the state court must completely defer to the tribe's recommendation.[157] The court of appeals rejected this argument pointing out that it would render a state court's child placement proceeding meaningless and, further, that it was contrary to the Act's legislative history.[158]

(iii) A professional person having substantial education and experience in the area of his or her specialty and having substantial knowledge of prevailing social and cultural standards and childrearing practices within the Indian community.

Id. at 884 n.5 (quoting BIA Guidelines, *supra* note 124, at 67,593).

150. *Id.* at 884.

151. *Id.*

152. *Id.* at 885. In other words, the Band and Petitioners both presented witnesses who were not expressly qualified and witnesses who were expressly qualified as experts by the trial court. *Id.*

153. *Id.*

154. *Id.* The court of appeals noted that it was not required to examine the qualified expert issue because the scope of review was "limited to whether the record supports the findings of fact and whether those findings support the conclusions of law and the judgment."

155. *Id.* at 884 (limiting the scope of appeal when there has been no motion for a new trial or for amended findings) (citing Beasley v. Medin, 479 N.W.2d 95, 98 (Minn. Ct. App. 1992); Kuchenmeister v. Kuchenmeister, 414 N.W.2d 538, 541 (Minn. Ct. App. 1987)). Nevertheless, the court felt the issue was important, and used its discretionary power to review any matter as the "interest of justice may require." *Id.* (citing MINN. R. CIV. APP. P. 103.04).

156. *Id.* at 885.

157. *Id.*

158. *Id.*

The court stated that if the tribe's recommendation was conclusive, there would be nothing for the trial court to decide and the taking of other evidence would be an idle exercise.[159] Equally important, the Act's legislative history indicates that Congress did not believe it "necessary or desirable to oust the States of their traditional jurisdiction over Indian children . . . ."[160] Moreover, the Act gives state courts discretion in determining good cause; and, although "[t]he tribe's wishes are certainly an important factor," the court rejected the argument that complete deference must be given to the tribe's recommendation.[161]

D. The Supreme Court's Decision

The Minnesota Supreme Court stated the main issue in the case as "whether there is good cause not to follow the preference provisions of [section] 1915(a) [of the Act]."[162] Specifically, the court had to decide whether there was good cause to allow a non-Indian couple to adopt three Indian children in contravention of the Act's adoption preferences. In determining whether the lower court's findings and conclusions supported the result that good cause existed, the supreme court examined the following: (1) the factors to use in establishing good cause; (2) the standard of review of the trial court's decision; (3) the trial court's finding that no suitable families for placement could be located; and (4) the trial court's finding that good cause existed because of the children's extraordinary emotional needs.

1. Factors for Good Cause

The supreme court relied on the BIA Guidelines to establish the criteria for good cause.[163] The BIA Guidelines state that "a determination of good cause not to follow the order of preferences [of the Act] *shall* be based on [the factors listed]."[164] Because of this language, the court held "that a determination that good cause exists . . . should be based upon a finding of *one or more* of the factors described in the guidelines."[165]

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159. *Id.*

160. *Id.* (quoting 1978 HOUSE REPORT, *supra* note 34, at 19).

161. *Id.*

162. *S.E.G.*, 521 N.W.2d at 361.

163. *Id.* at 361-63.

164. BIA Guidelines, *supra* note 124, at 67,594 (emphasis added); *see supra* text accompanying note 126 (listing the BIA factors).

165. *S.E.G.*, 521 N.W.2d at 363 (emphasis added) (stating that "[t]hough the BIA guidelines are not binding on the courts, the use of the word 'shall' . . . strongly suggests that a consideration of whether good cause exists should be limited to the factors described in the guidelines").

The supreme court noted that the trial court correctly used two proper factors.[166] Since the factors were appropriate, the task for the supreme court was to "carefully review the trial court's findings to determine whether they were adequately supported by the record."[167]

2. Standard of Review

Before reviewing the record, the supreme court addressed the standard of review. The supreme court agreed with the court of appeals that an "abuse of discretion" standard of review is the proper standard for a trial court's findings of good cause.[168] But, the court also clarified that "considering improper factors" or "improperly weighing factors" are issues of law and are reviewed using a de novo standard.[169] This is an important point because by framing the standard of review issue in this way, the supreme court was able to ignore some of the lower court's factual findings. Unfortunately, the court did this by mixing together two independent sets of facts which the trial court had analyzed separately.[170]

3. Reversing the Finding of No Suitable Families for Placement

The supreme court analyzed the issue of the availability of suitable families for placement by mixing in the facts relating to the children's need for permanence. The facts relating to permanence had been considered by the trial court to be relevant in evaluating the children's extraordinary emotional needs, and not as the basis for a search for suitable families.[171]

The supreme court acknowledged that a child's need for permanence could, in certain cases, be considered in determining whether good cause exists.[172] However, the court believed that permanence has a different meaning in Indian culture.[173] In support of this contention, the court noted the Task Force's findings[174] of problems with "a system that is largely white, with middle-class values . . . evaluat[ing] cultural and racial norms which are neither

166. *Id.* (noting the trial court's findings that the children had extraordinary emotional needs and that no suitable family was available).

167. *Id.*

168. *Id.*; *see also supra* notes 120 and accompanying text (discussing the court of appeals' handling of the standard of review issue).

169. *S.E.G.*, 521 N.W.2d at 363.

170. *See infra* part III.D.3.

171. *S.E.G.*, 507 N.W.2d at 884.

172. *S.E.G.*, 521 N.W.2d at 363 (citing *In re* Adoption of F.H., 851 P.2d 1361, 1365 (Alaska 1993)).

173. *Id.* at 364 (accepting the Band's argument).

174. *See supra* part II.D.

white nor necessarily middle-class."[175]

The supreme court also believed the trial court had erroneously found the need for permanence *alone* to be an extraordinary emotional need.[176] The children's needs, other than the need for permanence, were being met at their current Indian foster home.[177] Thus, the supreme court reasoned, the trial court must have improperly assumed that the need for permanence could only be met by an adoptive placement.[178]

The supreme court, however, did not address the actual search conducted by the Band for an Indian adoptive home.[179] Instead, the court concluded that the children's need for permanence did not require a search for an adoptive home.[180] Consequently, the court reversed as a matter of law the holding that no suitable family for placement had been found.[181] In effect, the court took the issue of permanence and applied it to the finding that no suitable family existed. The trial court had used the issue of permanence as a factual issue supporting its finding of extraordinary emotional needs.

4. *Reversing the Finding that Extraordinary Emotional Needs Were Sufficient to Show Good Cause*

The supreme court agreed with the court of appeals about establishing extraordinary emotional needs through qualified expert testimony.[182] It also agreed on the characteristics of qualified expert witnesses as described in the BIA Guidelines.[183]

Having noted the criteria for qualifying expert witnesses, the court implied that Petitioners' expert witnesses were not properly qualified

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175. *S.E.G.*, 521 N.W.2d at 364 (quoting *Task Force on Racial Bias*, *supra* note 61, at 631).

176. *Id.*

177. *Id.*

178. *Id.*

179. *See S.E.G.*, 507 N.W.2d at 880 (describing the failed efforts to find an Indian adoptive home).

180. *S.E.G.*, 521 N.W.2d at 364.

181. *Id.*

182. *Id.*; *see also supra* part III.C.5 (describing the court of appeals' handling of this issue).

183. *Id.* at 364-65 (restating the BIA Guidelines for qualifying expert witnesses); *see supra* note 152 (listing the BIA Guidelines' criteria). The supreme court also noted that the Minnesota Department of Human Services Social Services Manual adds the requirement of expertise about Indian childrearing practices to paragraph (iii) of the BIA Guidelines. *S.E.G.*, 521 N.W.2d at 365 (quoting *In re* Welfare of B.W., 454 N.W.2d 437, 442 (Minn. Ct. App. 1990); also citing Minnesota Department of Human Services, *Minnesota Social Services Manual*, XIII-3586 (1987)).

and that the Band had presented more expert witnesses.[184] One of Petitioners' expert witnesses and the children's guardian ad litem testified that the children's cultural needs could be met in Petitioners' home, but the court focused on other expert testimony presented by the Band.[185] This testimony concerned the notion that the children's emotional needs, other than the need for permanency, were being met in their current foster home.[186] Consequently, the supreme court believed the finding of extraordinary emotional needs was not established by qualified expert testimony and thus the finding was clearly erroneous.[187]

5. *The Supreme Court's Conclusion*

The supreme court concluded that neither of the factors used by the trial court were supported by the findings.[188] This conclusion was based on two lines of thought. First, there was no support for the finding of an unavailability of suitable families for placement. According to the supreme court, the finding was not supported because the trial court improperly assumed that adoption is the only way to satisfy the children's need for permanence. Second, the finding that the children had extraordinary emotional needs was not supported by qualified expert testimony. Therefore, the court felt that the record did not show good cause to deviate from the Act's placement preferences.[189] Thus, the supreme court reversed the decisions of the lower courts.[190]

IV. ANALYSIS

A. *Introduction*

The Minnesota Supreme Court went out of its way to reverse the trial court and the court of appeals. It emphasized certain testimony while it ignored or gave little credibility to other testimony, including

184. *S.E.G.*, 521 N.W.2d at 365. Although the trial court based its decision on qualified expert testimony, the supreme court said "[Petitioners] presented *only* two witnesses whom they *attempted* to qualify as expert witnesses." *Id.* (emphasis added). Yet, in the next paragraph, the court refers to both of these witnesses as qualified experts. *Id.* at 365 & n.8.

185. *Id.* at 365.

186. *Id.*

187. *Id.*

188. This was so even though the supreme court applauded the trial court for its "careful decisions . . . and [its] thorough findings of fact and thoughtful memorandum." *Id.* at 366.

189. *Id.*

190. *Id.*

that of expert witnesses.[191] The court also emphasized the Act's historical underpinnings and the Task Force's findings.[192] Both the Act's history and the Task Force's work revealed problems facing Indian tribes in state court proceedings.[193] While the existence of these problems is an important factor to consider, the court should have more heavily weighed the interests of the individual children whose well-being was at stake.

The proximity in time between the end of the Task Force's work, which was initiated by the Minnesota Supreme Court, and the court's decision in this case probably influenced the result. Even the Executive Director of the Indian Child Welfare Law Center in Minneapolis, who praised the Supreme Court's decision, believed the result would have been different without the Task Force's conclusions.[194] It is hard to reconcile the court's decision with the facts of the case if only the governing law is considered.[195]

Another factor conflicting with the supreme court decision was the trial court's handling of the case. The supreme court praised "that court's careful decision at trial . . . and the court's thorough findings of fact and thoughtful memorandum."[196] Yet, the supreme court reversed the trial court because of what it thought to be clearly erroneous findings of fact.[197] The court also ignored other facts to conclude that certain rulings were based on improper assumptions.[198]

The *In re the Custody of S.E.G.* decision is undesirable for three

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191. *Id.* at 365.

192. *Id.* at 358-59, 364.

193. *Id.*

194. Donna Halverson, *Court Sides with Tribes on Adoption: Justices Find No 'Good Cause' to Let Non-Indian Pair Adopt*, STAR TRIB. (Minneapolis), Sept. 2, 1994, at 1A.

195. While the supreme court was properly concerned with implementing the Task Force's report, it should be noted that the handling of this matter was in conformity with the report's recommendations. For example, the Band, as is proper, intervened in the case from the outset. *See Task Force on Racial Bias*, *supra* note 61 at 647-48 (recommendations 3 and 9 relating to the tribal right of intervention). Also, an Indian guardian ad litem was appointed to represent the children's interests. *S.E.G.*, 521 N.W.2d at 361 n.2; *see Task Force on Racial Bias*, *supra* note 61 at 648 (recommendation 10, advocating the recruitment and retention of minority guardians ad litem). The Minnesota Rules of Juvenile Procedure require the appointment of a guardian ad litem "to protect the interest of the child." MINN. R. JUVENILE P. 41.01; *see also* MINN. STAT. § 259.33 (1994) (allowing court appointment of a guardian ad litem for the person being adopted). For a description of the guardian ad litem's role in Minnesota, see Deborah A. Randolph & Susanne K. Smith, *Advocates for Children: The Role of the Guardian ad Litem*, 48 BENCH. & B. MINN., Aug. 1991, at 30. With these safeguards in place, the supreme court should have taken a more balanced approach to considering both the Band's and the children's interests.

196. *S.E.G.*, 521 N.W.2d at 366.

197. *Id.* at 365.

198. *Id.* at 364.

reasons. First, the supreme court distorted the qualified expert issue.[199] Second, the court misconstrued the lower courts' handling of the permanence issue.[200] And third, the court ignored the search for suitable families.[201] This section criticizes the supreme court's handling of the case by analyzing the three main weaknesses in the court's opinion. This section also suggests a more balanced judicial approach to meeting the Act's goals in adoptive placement proceedings.[202] This type of approach is more likely to meet the interests of both the tribe and the child in such proceedings than the approach announced by the court in *In re the Custody of S.E.G.*

B. The Qualified Expert Issue

The Act does not explicitly require the testimony of qualified expert witnesses to determine the existence of extraordinary physical or emotional needs.[203] However, the BIA guidelines contain such a requirement, and this requirement is sensible.[204] The trial, appellate, and supreme courts all quite properly applied this standard. However, the supreme court mischaracterized the trial record on the qualified expert issue by stating: "Most of the testimony in this case which tended to establish that the children had extraordinary physical or emotional needs was *not* presented by qualified expert witnesses."[205] This statement is misleading in two ways.

First, the finding of the children's extraordinary emotional needs *was* established by qualified experts testifying for both the Petitioners and the Band. For example, experts testified about how to treat the oldest child's emotional needs, about the middle child's extraordinary need for an immediate permanent placement, and about the youngest child's needs for a "secure, calm, consistent environment."[206] The court of appeals specifically acknowledged the trial court's reliance on qualified expert testimony when it reviewed this issue.[207] Moreover, by finding "[m]ost of the testimony . . . was not presented by qualified expert witnesses," the supreme court's above-quoted statement shows

199. *See infra* part IV.B.
200. *See infra* part IV.C.
201. *See infra* part IV.D.
202. *See infra* part IV.E.
203. *Cf.* ICWA § 1912(e), (f) (requiring qualified expert witness testimony for foster care and termination of parental rights proceedings).
204. *See supra* note 126 and accompanying text.
205. *S.E.G.*, 521 N.W.2d at 365.
206. *S.E.G.*, 507 N.W.2d at 882.
207. *Id.* at 885 (noting the trial court's explicit statements showing reliance on the testimony of qualified expert witnesses in establishing the children's extraordinary emotional needs).

that *some* qualified expert testimony supported the finding.[208]

Second, the supreme court implied that Petitioners' experts were not properly qualified. The court stated that "[Petitioners] presented *only two* witnesses whom they *attempted* to qualify as expert witnesses."[209] This implication is wrong. Although the court said that Petitioners only attempted to qualify their expert witnesses, the court referred to these same witnesses as "qualified experts" in the next paragraph.[210] Both of these witnesses testified about the children's needs and the ability of Petitioners to meet those needs.[211] In any case, even if these witnesses had not been qualified properly, the trial court based its decision on the testimony of qualified expert witnesses regardless of whether those witnesses testified on behalf of Petitioners or the Band.[212]

In addition, the court's criticism of the number of experts proffered by Petitioners is unsound. The credibility and weight of expert testimony should be left to the trier of fact short of an abuse of discretion, and should not simply depend on the number of witnesses presented at trial.[213] As the court of appeals stated, "[t]he weight and credibility afforded conflicting testimony is not to be determined by the number of witnesses one produces. The trial court, sitting without a jury, is the sole judge of credibility of witnesses and may accept all or only part of any witness' testimony."[214]

Ignoring this well-settled matter of court trials, the supreme court concluded that the trial court's finding of extraordinary emotional need was clearly erroneous.[215] According to the court, this conclusion was warranted due to the following: "Of the experts qualified by

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208. *See supra* text accompanying note 205. If only "most" of the testimony was not presented by qualified expert witnesses, then "some" of it must have been presented by qualified expert witnesses.

209. *S.E.G.*, 521 N.W.2d at 365 (emphasis added).

210. *S.E.G.*, 521 N.W.2d at 365 (referring to both of Petitioners' witnesses as "qualified experts").

211. *Id.*

212. *S.E.G.*, 507 N.W.2d at 885.

213. *Id.* at 883 n.4.

214. *Id.* (citations omitted); *see also In re* Welfare of T.J.J., 366 N.W.2d 651 (Minn. Ct. App. 1985) (holding that the trial court's determination of the qualifications and competency of expert witnesses will not be disturbed unless there is an abuse of discretion); Teslow v. Minneapolis-Honeywell Regulator Co., 273 Minn. 309, 312, 141 N.W.2d 507, 509 (1966) (stating that it is "axiomatic in this state that the sufficiency of the foundation to qualify a witness as an expert is a question left almost entirely to the trial court, and [the appellate court] will not reverse unless it is clearly apparent that the trial court was wrong"). In addition, the Minnesota Rules of Civil Procedure require that in non-jury trials, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." MINN. R. CIV. P. 52.01.

215. *S.E.G.*, 521 N.W.2d at 365.

the trial court, none testified that the children had extraordinary emotional needs which were not being met in their *current* placement."[216] However, the current placement was a foster home, which by definition is temporary.[217] Although the court referred to "permanent foster care" as a possibility,[218] this term refers to keeping the children in (multiple) foster homes throughout their childhoods, and not to placing them permanently in a single foster home. The foster home the children were in at the time of the decision will not satisfy the children's need for permanence since it is a temporary placement. Because the children's behavioral, emotional, and social problems were partly caused by their previous moves,[219] these problems will most likely recur when they are moved again.[220] In fact, as of this writing, the foster parent in this home had moved out of Minnesota.[221] The children are now living with a great-uncle and aunt who sought custody after the Petitioners had filed their petition.[222]

The trial court relied on qualified expert testimony to establish the children's extraordinary emotional needs. Some of this testimony was proffered by Petitioners' experts who were properly qualified. Since the credibility and weight of this testimony is for the trier of fact to judge, the supreme court should not have reversed the trial court on this issue.

C. *The Permanence Issue*

The supreme court stressed the idea that "permanency is defined differently in Native American cultures."[223] This definition involves a view of an extended family that can include "scores[, or] perhaps more than a hundred, relatives who are counted as close, responsible

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216. *Id.* (emphasis added).

217. *See* ICWA § 1903 (1)(i), (iii) (defining "foster care placement" and "preadoptive placement" as temporary placements in a foster home).

218. *S.E.G.*, 521 N.W.2d at 363-64 (describing the Commissioner of Human Services' argument that adoption is not the only permanent placement option).

219. *See S.E.G.*, 507 N.W.2d at 881 (attributing the children's needs to multiple moves within the foster care system).

220. Ironically, the Act explicitly requires that

> [n]o foster care placement may be ordered . . . in the absence of a determination, supported by clear and convincing evidence, 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.

ICWA § 1912(e). No such determination was made in this case as to the children's then-current foster care placement.

221. Donna Halverson, *Siblings Can't Be Adopted by White Family, Court Rules*, STAR TRIB. (Minneapolis), Jan. 24, 1995, at 1B, 2B.

222. *Id.*

223. *S.E.G.*, 521 N.W.2d at 364.

members of the family."[224] Because the need for permanency using this definition could possibly be met by an attachment to the tribe, the court felt that an adoptive placement was unnecessary. But, this analysis missed the point made by the lower courts. The point was that the evidence adduced supported a need for permanence that could only be met by an adoptive placement.[225] The Band itself had initiated the search for an adoptive home.[226] This fact seems to indicate that even the Band at one point believed an adoptive placement was necessary.

The supreme court acknowledged that a need for permanence may be considered in determining whether good cause existed.[227] However, it distinguished an Alaska Supreme Court decision involving a voluntary adoption. In *In re Adoption of F.H.*, the Alaska Supreme Court considered permanency as a factor in establishing good cause to deviate from the Act's preferences.[228] In this case, the child was born to a mother who abused alcohol.[229] The child's prenatal exposure to alcohol caused medical problems and "placed her at risk for developmental delay and learning and behavioral problems."[230] This case is similar to *In re the Custody of S.E.G.* as the child lived in several foster homes, including the home of white foster parents who petitioned to adopt her.[231] Also, the biological mother was willing to give up custody voluntarily but only on the condition that the petitioning couple be allowed to adopt the child.[232] The court found that the child had a need for a permanent placement and further reasoned that the child's future was uncertain if the adoption by the

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224. *Id.*

225. *S.E.G.*, 507 N.W.2d at 882 (listing the testimony of "numerous witnesses," including experts and the children's guardian ad litem, that indicated a need for a permanent home for each of the children).

226. *Id.* at 881.

227. *S.E.G.*, 521 N.W.2d at 363. Thus, the supreme court implicitly rejected the argument that the trial court and the court of appeals had wrongly raised permanence alone to a new good cause standard. The Band had argued that allowing permanence as a factor would place "nearly every Indian child currently in an out-of-home foster placement . . . at risk for adoption in a non-Indian home." *S.E.G.*, 507 N.W.2d at 882. The court of appeals rejected that argument noting that the trial court had

> merely considered permanence to be a necessary factor in meeting the extraordinary emotional needs of these particular children in this particular case. The many failed placements and resultant extraordinary emotional needs experienced by the children here serve to distinguish this case . . . from the cases of other Indian children presently in foster care.

Id.

228. *In re* Adoption of F.H., 851 P.2d 1361, 1364 (Alaska 1993).

229. *Id.* at 1362.

230. *Id.*

231. *Id.*

232. *Id.*

white foster parents were not allowed.[233] The Alaska Supreme Court affirmed the lower court's decision to grant the white couple's petition to adopt the child.[234]

The Minnesota Supreme Court distinguished this case based on the Alaska Supreme Court's finding that the child's future would be uncertain if the adoption were not allowed.[235] It is unclear though, how the child's future was any less certain in the Alaska case than the children's future in the Minnesota case. In both cases, the children involved had a need for permanence and there was a concern that foster care would not satisfy that need.[236]

Also, in the Alaska case, the court did not directly address the child's cultural needs.[237] At least the trial court in the Minnesota case was concerned with this point and noted Petitioners' willingness to maintain the children's cultural ties.[238] The testimony showed that the children's cultural needs could be met by an adoptive placement with Petitioners.[239] For example, Petitioners testified that they would involve the children in culturally appropriate activities.[240] One of the qualified experts testified that the children's cultural needs could be met in a non-Indian home.[241] In addition, the trial court added a safeguard to the award of custody to Petitioners by ordering them to submit an appropriate racial and cultural education plan for the children.[242]

The trial court weighed the children's cultural needs in arriving at its decision. It also properly considered the children's need for permanence as a factor in determining good cause to deviate from the Act's preference provisions. Therefore, the trial court's holding was not based on an improper assumption and should not have been reversed.[243]

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233. *Id.* at 1364.

234. *Id.* The Alaska Supreme Court also considered maternal preference, the bond between the adoptive mother and the child, and the openness of the adoption in allowing the adoption outside the Act's preferences. *Id.* at 1364-65.

235. *S.E.G.*, 521 N.W.2d at 365.

236. *S.E.G.*, 507 N.W.2d at 882-84; *F.H.*, 851 P.2d at 1365.

237. The Alaska Supreme Court only indirectly addressed the child's Indian heritage. *F.H.*, 851 P.2d at 1363 (noting that an open adoption would allow the biological mother access to the child which would possibly give the child exposure to her Indian heritage).

238. *S.E.G.*, 507 N.W.2d at 883.

239. *S.E.G.*, 521 N.W.2d at 365.

240. *S.E.G.*, 507 N.W.2d at 883.

241. *S.E.G.*, 521 N.W.2d at 365.

242. *S.E.G.*, 507 N.W.2d at 883.

243. Because of the supposed improper assumption, the supreme court reversed the trial court's holding as a matter of law. *S.E.G.*, 521 N.W.2d at 364.

D. The Search for Suitable Families

The trial court had used the issue of permanence to determine the children's extraordinary emotional needs and thus to establish good cause.[244] By putting a reverse twist on this issue, the supreme court was able to ignore the trial court's finding that there were no suitable Indian families available to adopt the children.[245] The supreme court observed that the findings on a diligent search for a suitable home must be carefully reviewed "to determine whether they were adequately supported by the record."[246] But, it ignored the fact that all efforts to keep the children in an Indian home had failed miserably.[247] Instead, the court impliedly concluded that no search was necessary because a permanent home was not necessary.

There are two things wrong with this conclusion. First, it glosses over the fact that the *Band* had conducted a search for an adoptive placement and then had argued against such a placement during the case.[248] The Band's efforts to locate an adoptive home seem to indicate that the Band believed adoption was appropriate. This is not meant to imply that a search for an adoptive home is always required. But, the BIA Guidelines acknowledge that when a search *is* conducted and proves to be fruitless in finding a family meeting the Act's preferences, a factor for establishing good cause has been met.[249]

Second, and more importantly, "the unavailability of suitable families" factor is *independent* from the "extraordinary emotional needs" factor.[250] Put another way, the children's extraordinary emotional needs, including the need for permanence, were part of a distinct factor to be used in establishing good cause; the BIA Guidelines do not require a showing of extraordinary emotional needs before a fruitless search for suitable families may be considered as grounds for good cause to deviate from the Act's placement preferences.[251]

The trial court's findings show that a diligent search for an adoptive placement was conducted by the Band.[252] Since the search did not yield a suitable placement, the trial court correctly established good cause to deviate from the Act's preferences on this factor alone

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244. *S.E.G.*, 507 N.W.2d at 882.

245. *S.E.G.*, 521 N.W.2d at 364.

246. *Id.* at 363 (noting that a search for suitable families is one of the factors allowed by the BIA Guidelines).

247. *S.E.G.*, 507 N.W.2d at 880.

248. *Id.* at 881.

249. BIA Guidelines, *supra* note 124, at 67,584.

250. *S.E.G.*, 521 N.W.2d at 363; *S.E.G.*, 507 N.W.2d at 879; *see also* BIA Guidelines, *supra* note 124, at 67,584.

251. BIA Guidelines, *supra* note 124, at 67,584.

252. *S.E.G.*, 507 N.W.2d at 880.

(regardless of whether the children had extraordinary emotional needs).[253] Thus, the supreme court erred by not reviewing the factual findings on this point.[254]

E. Balancing the Act's Goals

The Act has two goals: (1) protecting the best interests of Indian children; and (2) promoting the stability and security of Indian tribes and families.[255] State courts should make every effort to achieve both of these goals in proceedings involving the placement of Indian children. In certain circumstances, such as those presented by *In re the Custody of S.E.G.*, realizing both goals simultaneously is difficult, if not impossible. In such cases, courts should ensure that individual children's interests are examined with extreme care. As the court of appeals stated, "the Act does not change the cardinal rule that the best interests of the child are paramount."[256]

The good cause exception to the Act's placement preferences provisions was designed to give courts the flexibility to make placement decisions that are in the best interests of the children.[257] Such decisions should be made even when the children's interests are contrary to tribal interests in the short run. By opposing the adoption

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253. It is a well-settled legal concept that if a court bases its decision on independent factors, and at least one of those factors is supported by the record, the appellate court should affirm the lower court's decision. For example, in a case from the 1950s the Minnesota Supreme Court stated:

> The trial court has placed decision on a number of grounds, some of which are wholly unrelated, and, if any of these grounds are tenable, the judgment should be affirmed. We shall accordingly consider separately each ground upon which the trial court placed its decision.

Starkweather v. Blair, 245 Minn. 371, 376, 71 N.W.2d 869, 873 (1955).

254. In addition, there is one other factor that the BIA Guidelines state in establishing good cause: "[t]he request of the biological parents or the child when the child is of sufficient age." *See* BIA Guidelines, *supra* note 124, at 67,594. The Act also states that "[w]here appropriate, the preference of the Indian child or parent shall be considered." ICWA § 1915(c). The biological parents did not state a preference. *S.E.G.*, 507 N.W.2d at 880 n.3. However, the guardian ad litem testified that the children expressed a desire to live with Petitioners. *Id.* Also, the oldest child's therapist testified that "[the oldest child] hoped [Petitioners] would 'fight for her.'" *S.E.G.*, 521 N.W.2d at 361. Nevertheless, the trial court made no findings of fact on this factor. *S.E.G.*, 507 N.W.2d at 880 n.3. Minnesota courts, applying state law, have considered young children's preferences in custody proceedings. *See, e.g.*, Mowers v. Mowers, 406 N.W.2d 60, 64 (Minn. Ct. App. 1987) (seven-year, ten-month old child); Peterson v. Peterson, 394 N.W.2d 586, 588 (Minn. Ct. App. 1986) (eight-year old child).

255. ICWA § 1902.

256. *S.E.G.*, 507 N.W.2d at 880 (citing *In re* Interest of Bird Head, 331 N.W.2d 785, 791 (Neb. 1983)).

257. *S.E.G.*, 507 N.W.2d at 878 (relying on the flexibility given to state courts to determine good cause (1) to establish a standard of proof, and (2) to reject the argument that complete deference should be given to the tribe's recommendations).

in this case, the Band may even have been acting contrary to its interests in the long run. The Band's active role in opposing the adoption in spite of the children's best interests may have planted the seed of resentment within the children. The fruits of this action may be adults who are not willing to interact, or who at least minimize their interaction with the Band.

This is not to say that courts should place Indian children in non-Indian homes whenever they feel like it. Maintaining Indian cultural integrity is a worthy goal and a narrow construction of "good cause" is an appropriate way to achieve this goal.

However, the Minnesota Supreme Court could have narrowly construed "good cause" by limiting the types of situations where the good cause exception would be allowed to those similar to this case. That is, placement in a non-Indian home could be allowed in situations where multiple failed placements have contributed to the children's extraordinary emotional needs, and where there is an unavailability of suitable Indian families for placement. These conditions meet two of the BIA Guidelines' three criteria for establishing a good cause exception to the Act's preferences: "The extraordinary physical or emotional needs of the child . . . [and t]he unavailability of suitable families for placement after a diligent search has been completed . . . ."[258]

Once good cause is established, an independent analysis should be done that examines the proposed adoption in light of the statutory definition of a child's best interests.[259] The adoption should be allowed only if both (1) good cause to deviate from the Act's preferences, and (2) the best interests of the child have been established. In this way, courts would not have to risk future failed placements that are contrary to the children's best interests. At the same time, the interests of Indian tribes would continue to be protected in a meaningful way.

V. CONCLUSION

The Indian Child Welfare Act is an important piece of legislation which protects Indian tribal interests. The Act does this with an emphasis on tribal integrity by seeking to keep Indian children connected to their culture whenever possible.[260] It also has the stated goal of realizing the best interests of Indian children.[261] Usually, tribal interests and a child's best interests can be achieved

258. BIA Guidelines, *supra* note 124, at 67,584.

259. *See* MINN. STAT. § 518.17, subd. 1 (1994) (defining "best interests of the child"); *see also supra* note 42 (quoting the statute).

260. *See supra* notes 46-54 and accompanying text.

261. *See supra* notes 40-41 and accompanying text.

simultaneously by application of the Act's provisions. In some cases though, a child's best interests may be inconsistent with the interests of the tribe.

S.E.G. is one such case. The children in this case had extraordinary emotional needs brought about by abuse, abandonment, and multiple moves within the foster care system. Their needs could only be met by a permanent, adoptive placement with a caring family. An adoptive placement could not be achieved within the Act's provisions, which require placement with an Indian family.[262] This set of facts justified the trial court's application of the "good cause" exception to the Act's placement preference provisions. The trial court was correct in awarding custody of the children to the white foster couple who had petitioned the court. Similarly, the court of appeals was correct to affirm.

The Minnesota Supreme Court ignored some of the trial court's factual findings, misconstrued other facts, and reversed the lower courts' decisions. By doing so, the high court made it practically impossible for a non-Indian family to adopt an Indian child. This case presented an extreme set of facts in which the children's well-being and futures were at stake. The Act's goal of achieving the best interests of the children should have been given more weight.

The Minnesota Supreme Court could have affirmed the decision to award the white couple custody without significantly diminishing the Act's tribal protection. By limiting its holding to the facts of this case, future decisions under the Act's good cause exception would still need to pass the stringent requirements of the BIA Guidelines and a proper level of protection for tribal interests would be maintained.

Hassan Saffouri

262. *See supra* notes 110-115 and accompanying text.