

COMMENT

FAMILY GROUP CONFERENCING: AN ALTERNATIVE APPROACH TO THE PLACEMENT OF ALASKA NATIVE CHILDREN UNDER THE INDIAN CHILD WELFARE ACT

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The Indian Child Welfare Act establishes a cultural safeguard for Alaska Native children caught up in the child welfare system by requiring professionals to make “active efforts” toward reunifying the child with family members and their tribe. Complying with this standard has been a challenge because the adversarial system governing the child welfare proceedings does not fully recognize the Alaska Native belief that the family and tribe have a shared responsibility in the upbringing of children. In this Comment, the author discusses how utilizing Family Group Conferencing, a procedure originating in New Zealand that encourages family and community involvement and respects the unique values and customs of indigenous peoples, will assist child welfare professionals in meeting the “active efforts” standard.

I. INTRODUCTION

A child’s cultural background is a critical element in determining proper placement of the child after the State removes her from her parental home.¹ With ever-increasing numbers of minority children in the

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1. See Bo Eskay, Review, *H.B. 2168 - Codifying a Shift in Social Values Toward Transracial Adoption*, 28 ARIZ. ST. L.J. 711, 719 (1996) (arguing that “interests specific to transracial placement include: proper identity development, cultural transmission, and cultural preservation”) (footnotes omitted).

child welfare system, lawyers, child advocates, and social workers must reevaluate current methods that often ignore a child's interest in being placed in a similar cultural environment. The Indian Child Welfare Act² ("ICWA") was passed in 1978 to provide guidelines for child welfare proceedings concerning Indian and Alaska Native children. Two issues led to the passage of the Act: (1) Indian and Alaska Native children belong to a protected cultural group, and therefore placement preferences should be with the family or tribe; and (2) state governments have historically been unwilling to work with tribes in child welfare proceedings, premised on the understanding that tribal customs and values should prevail in child custody decisions.

This Comment proposes that Family Group Conferencing, a non-adversarial method originating in New Zealand, is a more appropriate method for ensuring that Alaska Native children are properly placed according to the requirements of ICWA. A Family Group Conference allows the immediate family, extended family, and various tribal community members to discuss the issues concerning the welfare of the child and to develop a plan in the child's best interest. The plan is then presented to and implemented by child welfare professionals. Family Group Conferencing is valuable because it mirrors the customs and values of indigenous peoples by incorporating an understanding that both the family and the community share responsibility for a child, a value that is sometimes neglected in the existing adversarial child welfare system. Family Group Conferencing is an applicable method to ICWA proceedings precisely because it allows the Alaska Native family and community to participate in the decision-making process of child welfare proceedings.

Part II of this Comment evaluates the principles, methods, and issues of Family Group Conferencing for Alaska Native families. The Tlingit and Haida tribes of Alaska are specified as examples of Alaska Native tribes that have benefited from the use of non-adversarial approaches, such as Family Group Conferencing, in child welfare proceedings.³ This Comment will demonstrate that the similarities between the Maori, the indigenous people of New Zealand, and Alaska Native tribes suggest Family Group Conferencing would be as effective in Alaska as it has proven to be in New Zealand.

2. 25 U.S.C. §§ 1901–63 (2000).

3. The proposal for implementing Family Group Conferencing is not limited to the Tlingit and Haida tribes. Many of the Alaska Native tribes share the same underlying values; thus, the result of using Family Group Conferencing would be similar. This Comment highlights the Tlingit and Haida because they have chosen, in conjunction with the Alaska court system, to offer Family Group Conferencing for families experiencing child welfare issues.

Part III of this Comment describes how ICWA provisions interact with various federal and state statutes that apply to child welfare proceedings involving Alaska Native or Indian children and how these provisions affect Family Group Conferencing. Since Family Group Conferencing is a relatively new method in the United States, and because it attempts to solve family issues in the early stages of child welfare proceedings before a judicial order is necessary, there is no specific case law addressing this method. However, an examination of the relevant statutory provisions and legislative history reveals that Family Group Conferencing is the type of method lawmakers envisioned when enacting ICWA to provide culturally relevant resources for Indian and Alaska Native families.

Part IV proposes that Family Group Conferencing is a valuable method for ensuring culturally appropriate placement of Alaska Native children and for promoting the reunification of Alaska Native families. In order for Family Group Conferencing to become a respected alternative method in child placement proceedings, there must be: (1) more funding specifically allocated to the program to ensure the long-term safety and stability of placement decisions, and (2) data and research to track the program's effectiveness and outcomes.

II. THE FAMILY GROUP CONFERENCE

A. Restorative Justice

The use of restorative, rather than adversarial, justice is not a new approach among Alaska Native tribes. Indeed, the idea of gathering extended family members and relying on their wisdom to resolve family matters is a trait shared not only by the Alaska Natives but also by virtually all indigenous peoples.⁴

The idea of restorative justice is reflected in the Tlingit and Haida tribes' use of circle peacemaking, a non-adversarial sentencing alternative available for criminal violations.⁵ In circle peacemaking, community members, including an elder, the criminal offender, and sometimes the victim, meet to devise a healing plan that incorporates tribal values with the underlying theme of transforming the offender and healing the

4. See MARIE CONNOLLY & MARGARET MCKENZIE, EFFECTIVE PARTICIPATORY PRACTICE: FAMILY GROUP CONFERENCING IN CHILD PROTECTION 43 (1999) (stating "[a]lthough Aboriginal communities are diverse, there are some values that are common across tribal nations. A holistic view of the universe is a notion that resonates across tribal boundaries, and child protection as a concern cannot, therefore, be viewed in isolation from all other aspects of Aboriginal life.").

5. Lisa Rieger, *Circle Peacemaking*, 17 ALASKA JUST. F. (Univ. of Alaska, Anchorage), Winter 2001, at 1.

victim and community.⁶ The focus of circle peacemaking is neither blame nor justice; it is a more “holistic approach” aimed at helping those who have committed the wrongful acts and their families to prevent the problem from reoccurring.⁷ Circle peacemaking was well-received by the Tlingit and Haida communities because it reminded participants of the way families traditionally gathered to discuss and solve problems.⁸ The concept underlying circle peacemaking, similar to the frequently used Tlingit-Haida phrase, “our children,” reflects the community’s goal of “protecting those who need it; helping those who can be helped; and sometimes banishing those who can’t be helped or protected.”⁹

The restorative justice or non-adversarial approach to problem-solving differs from the adversarial position because the dispute is not focused on one person, but rather shared among the family and community.¹⁰ Restorative justice emphasizes “restitution rather than retribution and on keeping harmonious relations among the members of their community.”¹¹ Indian law is intended “to bring honor and respect back to the family, clan and tribe of the offender and to live in harmony with nature.”¹² In order to live harmoniously, Alaska Natives and Indians do not insist that the offender carry sole responsibility for making the family whole.¹³ Family Group Conferencing embodies the same theme of

6. *Id.* at 7.

7. *Id.*

8. *Id.*

9. Lisa Rieger & Randy Kandel, *Child Welfare and Alaska Native Tribal Governance: A Pilot Project in Kake, Alaska*, REP. OF FINDINGS PREPARED FOR THE NAT’L SCIENCE FOUND. Oct. 1999, at 5.

10. See Susan L. Brooks, *A Family Systems Paradigm for Legal Decision Making Affecting Child Custody*, 6 CORNELL J.L. & PUB. POL’Y 1, 19 (1996). Brooks argues that the justice system should concentrate on:

the family members’ strengths rather than their deficiencies. The implementation of this guideline, by itself, would contribute a great deal toward the effectiveness of interventions initiated through the legal system. From the instant a petition alleging abuse or neglect is filed in juvenile court, the legal system passes judgment on the competence of the family and, specifically the competence of parents. Parents are then supposed to prove that they are competent, while being treated as if they were not. Instead, courts and advocates need to empower parents—to assist them in drawing upon the mutual and collective strengths within their family systems.

Id.

11. Laurie A. Arsenalt, *The Great Excavation: “Discovering” Navajo Tribal Peacemaking Within the Anglo-American Family System*, 15 OHIO ST. J. ON DISP. RESOL. 795, 798 (2000) (quoting Sandra Day O’Connor, *Tribal Courts Are Vital Part of U.S. Justice System*, ANCHORAGE DAILY NEWS, Mar. 20, 1997, at C8).

12. Eric Fry, *Council: More Courts for Southeast?*, JUNEAU EMPIRE, Sept. 11, 2003, http://juneauempire.com/stories/091103/sta_secourts.shtml (last visited Feb. 26, 2005).

13. Arsenalt, *supra* note 11, at 819–20.

shared responsibility as circle peacemaking and will offer Alaska Native families many opportunities to restore the lost family ties and renew the bonds that will keep children safe and happy in their homes.

B. Family Group Conferencing's History and Origin

Family Group Conferencing is a non-adversarial approach to the placement of needy children in culturally relevant homes.¹⁴ Family Group Conferencing originated in the late 1980s in New Zealand in response to a number of challenging placement cases among the Maori, the indigenous people of New Zealand.¹⁵ The Maori families were overwhelmed and troubled by the idea of their children being raised by cultural strangers or in state institutions.¹⁶ Relying on their traditional methods of dispute resolution, the Maori people contended that the use of extended family and the reduction of state interference with family life would benefit their children.¹⁷ The theory behind Family Group Conferencing is that child welfare is a responsibility shared by many entities including government agencies, tribes, communities and families.¹⁸ Through the Family Group Conference, the family becomes the focal point of the decision-making process, thereby building and repairing the family's ability to care for and protect the child.¹⁹

Advocates in New Zealand and the United States share concern for the high number of children who are moved through various placements in their respective child welfare systems.²⁰ Like the United States, New Zealand had a high percentage of children experiencing lengthy terms in the child welfare system.²¹ In response to favorable outcomes in New Zealand,²² some states have begun to incorporate Family Group Confer-

14. Jolene M. Lowry, *Family Group Conferences as a Form of Court-Approved Alternative Dispute Resolution in Child Abuse and Neglect Cases*, 31 U. MICH. J.L. REFORM 57, 64 (1997).

15. *Id.*

16. *Id.*

17. MARK HARDIN ET AL., ABA CENTER ON CHILDREN AND THE LAW, FAMILY GROUP CONFERENCES IN CHILD ABUSE AND NEGLECT CASES: LEARNING FROM THE EXPERIENCE OF NEW ZEALAND 13 (1996).

18. ALASKA COURT SYSTEM ADMINISTRATIVE OFFICES, CINA MEDIATION AND FAMILY GROUP CONFERENCING PROGRAM (2002) [hereinafter FAMILY GROUP CONFERENCING PROGRAM].

19. *Id.*

20. Lowry, *supra* note 14, at 64–65.

21. *Id.* at 64.

22. *Id.* at 65; *see also* HARDIN, *supra* note 17, at 92 (indicating that in New Zealand the amount of children in foster and institutional care decreased from approximately 7,000 in 1979 to 2,654 in 1993 as a result of Family Group Conferencing).

encing into the child welfare system.²³ Alaska recently began offering Family Group Conferencing as a tool to determine a child's best interest.²⁴ To date, Family Group Conferencing has been regarded as an acceptable option for Alaska Native families and children.²⁵ More specifically, social workers find that Family Group Conferencing "resonates" with the Alaska Native tribes because it echoes the methods and values inherent in their cultures.²⁶ Family Group Conferencing in Alaska began in 2002 following the positive response to the use of mediation within the judicial system.²⁷ As of November 2003, children that were under the reach of ICWA comprised approximately fifty percent of all Family Group Conferences in Alaska.²⁸ Furthermore, the Alaska courts have approved approximately eighty-five percent of the plans created through Family Group Conferences.²⁹

C. Values and Beliefs

1. *Definition of Family.* Family Group Conferencing incorporates the intention of the drafters of ICWA by considering the traditional Alaska Native extended family in child welfare.³⁰ The Tlingit-Haida concept of family is very similar to that of the Maori people of New Zealand; both rely heavily on the extended family.³¹ The Maori call kinship *Whanaungatanga*, an expression incorporating the concepts of ancestral and spiritual ties that bind people together.³² Maori kinship is not limited to the nuclear family; this concept includes extended family and

23. Telephone Interview with Karen Largent, Dispute Resolution Coordinator, Alaska Court System Administrative Offices (Nov. 7, 2003) [hereinafter Largent].

24. *Id.*

25. Telephone Interview with Susanne Di Pietro, Staff Attorney, Alaska Judicial Council (Nov. 7, 2003).

26. Largent, *supra* note 23.

27. *Id.*

28. *Id.*

29. *Id.*

30. H.R. REP. NO. 95-1386, at 10 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7532; *see also* 25 U.S.C. § 1903(2) (2000). The relevant portion reads as follows:

"extended family member" shall be defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent

Id.

31. KIRK DOMBROWSKI, *AGAINST CULTURE: DEVELOPMENT, POLITICS, AND RELIGION IN INDIAN ALASKA* 46-47 (2001).

32. CONNOLLY & MCKENZIE, *supra* note 4, at 39.

even reaches into the “network of tribal affiliations.”³³ Family Group Conferencing in New Zealand includes the extended family in placement planning because the extended family is traditionally the source from which a Native family gathers its strength.³⁴

Like the Maori, the Tlingit and Haida tribes traditionally define family broadly. Alaska Native tribes do not limit the definition of family to blood-ties or marriage links; family includes communal relationships within the tribe.³⁵ A family’s size can be limited or expanded “as situations, opportunities, and problems arise.”³⁶ The Tlingit and Haida tribes incorporate the family into tribal structure not only as a kinship entity, but also as a political group.³⁷

In an effort to secure the best outcome for the child, the range of family members allowed at a Family Group Conference is very expansive.³⁸ According to New Zealand’s *The Children, Young Persons, and Their Families Act of 1989*,³⁹ a family group can consist of:

extended family; and family based on at least one person with a legal relationship to the child or young person (e.g., a familiar person with custody or guardianship); and a family based on a person having a significant psychological attachment (i.e., a bond) to the child or young person (e.g., non-familial caregivers, close friends of the fam-

33. *Id.* at 39–40.

34. *Id.*

35. *Id.*

36. *Id.* at 47.

37. DOMBROWSKI, *supra* note 31, at 46–47.

38. See *Indian Child Welfare Act of 1978: Hearing Before the House Comm. on Interior and Insular Affairs, Subcomm. on Indian Affairs and Public Lands, 95th Cong. 96-42, at 69 (1978)* [hereinafter *Subcomm. Hearings*] (statement of LeRoy Wilder, representing Association of American Indian Affairs). Mr. Wilder, representing an Indian social and political rights group, noted:

[ICWA] will force State courts to recognize cultural and social standards of Indian tribes and require courts to inquire more deeply into Indian family relationships.

For example, Indian cultures universally recognize a very large extended family. Many relatives of Indian children are considered by tribal custom to be perfectly logical and able custodians of Indian children. This bill will require State agencies and courts to recognize this extended family when considering placements of an Indian child.

This bill does not condemn Indian children to abuse and neglect in the name of tribal sovereignty. It does, however, recognize the legitimate interest of the tribes in the welfare of their children under certain specified circumstances. Furthermore, it will make available to tribal governments and organizations resources that they need to strengthen Indian families.

Id.

39. *The Children, Young Persons, and Their Families Act, 1989 (N.Z.)*.

ily, neighbors); and a culturally recognized family group (e.g., the Samoan aiga).⁴⁰

For example, a significant psychological attachment might exist between a child in long-term foster care and her foster family. Under New Zealand law, the foster family would be entitled to attend the conference and offer input regarding the child's best interest.⁴¹ The purpose of defining the family broadly is to ensure that all of the persons important to the child are allowed to attend.

2. *Values and Beliefs of Child Welfare.* Family Group Conferencing is a successful alternative to the adversarial approach because it recognizes that families, no matter how imperfect, are important to a child's upbringing.⁴² To prevent more and more Alaska Native children from being removed from tribal care and to prevent further erosion of traditional Native family structure, it is especially important that child welfare participants respect and accommodate a tribe's family structure in the proceedings.⁴³ Family Group Conferencing works in practice because it values and empowers families and recognizes their strength.⁴⁴ Family Group Conferencing encompasses many principles, including family and community strength, cultural relevance, and self-determination.⁴⁵ In essence, it gives the family, not the government, an opportunity to decide the outcome of the case.

Traditional Alaska Native values are based on the principle of shared responsibility.⁴⁶ They include showing respect to others, sharing

40. HARDIN, *supra* note 17, at 126–27.

41. CONNOLLY & MCKENZIE, *supra* note 4, at 24.

42. *See, e.g.,* Lowry, *supra* note 14, at 65.

43. *See* H.R. REP. NO. 95-1386, at 10 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7532; *see also Subcomm. Hearings, supra* note 38, at 75 (statement of Mona Sheperd, Social Service Coordinator, Rosebud Sioux Tribe). Ms. Sheperd made the following testimony during a hearing before the Subcommittee on Indian Affairs and Public Lands:

The time wasted in battling with State courts only creates additional hardships for our young people. In addition, the fact that tribal courts, through [ICWA], would have jurisdiction over the placement of Indian children would mean that parents and extended families of the children involved would have their rights more clearly recognized and enforced. Often parents or extended family members are not fully aware of their rights or the court procedures and their meaning and this often results in Indian children being placed in foster or non-Indian adoptive homes which is not the tribe's ultimate goal.

Id.

44. *See generally* HARDIN, *supra* note 17, at 122; *see also* FAMILY GROUP CONFERENCING PROGRAM, *supra* note 18.

45. *See* FAMILY GROUP CONFERENCING PROGRAM, *supra* note 18.

46. *See* Alaska Native Knowledge Network, Alaska Native Values for the Curriculum, at <http://www.ankn.uaf.edu/Values/index.html> (last visited Feb. 22, 2005).

what you have, knowing who you are, accepting what life brings, having patience, living carefully, taking care of others, honoring elders, praying for guidance, and seeking connections.⁴⁷ These values are incorporated into the Family Group Conference as family members discuss proper placement for the child.⁴⁸

ICWA and Family Group Conferencing share many goals, including the improvement of child safety, an increase in permanency options, and greater access to family resources.⁴⁹ By incorporating Alaska Native values into child placement decisions rather than using outside solutions, social workers are able to assist in the development of intra-family plans.⁵⁰

D. The Family Group Conferencing Process

The process of conducting a Family Group Conference is generally divided into three phases: preparation, conference, and post-conference.⁵¹ The first phase of Family Group Conferencing is the preparation period in which the social worker investigates the child's case and gathers information about the potential family members who may participate.⁵² The social worker also consults with the family about the process of a Family Group Conference.⁵³ Currently in the United States, Family Group Conferences are voluntary proceedings; potential clients either call seeking help⁵⁴ or are referred to a social worker during an investigation of abuse.⁵⁵ By contrast, all cases in New Zealand arising out of allegations of child abuse and neglect are automatically referred to Family Group Conferencing.⁵⁶

Before a case is approved for Family Group Conferencing, the social worker typically conducts an assessment of all issues pertaining to

47. *Id.*

48. See FAMILY GROUP CONFERENCING PROGRAM, *supra* note 18 (listing self-sufficiency, care and provision for the family, unity, love for children, village cooperation, responsibility to village, practice of traditions, and respect for elders and others as relevant Native values that relate to the use of Family Group Conferences).

49. See Claudia Fercello & Mark Umbreit, *Client Evaluation of Family Group Conferencing in 12 Sites in 1st Judicial District of Minnesota* (Nov. 25, 1998).

50. See Lowry, *supra* note 14, at 66.

51. HARDIN, *supra* note 17, at 134.

52. *Id.* at 134–39.

53. *Id.*

54. Telephone Interview with Gloria Jack, Foster Care Home Adoption Recruiter, Tribal Family Youth Services for Central Council of the Tlingit and Haida Indian Tribes of Alaska (Dec. 2003) [hereinafter Jack Interview].

55. Lowry, *supra* note 14, at 66.

56. *Id.*

the case.⁵⁷ While the social worker does not influence the family's decision, it is important that she be aware of all the relevant issues so that no false or inaccurate information is given to the family during the meeting. Such an error could lead to an unsuccessful Family Group Conference.⁵⁸

After the social worker completes the investigation and consults with the family, the case is referred to a coordinator.⁵⁹ The coordinator is usually a social worker specializing in Family Group Conferencing, who has no prior connections to the case.⁶⁰ During the preparation phase, the coordinator organizes the conference by establishing the venue, making travel arrangements, and determining which persons will be invited.⁶¹ Participants are invited from the community and extended family and are selected with an emphasis on inclusion.⁶² Measures are taken to ensure that a child's safety is not jeopardized if an offender is present.⁶³ If child welfare professionals, such as mental health experts, school counselors, and drug/alcohol treatment providers, are already involved in the case, they may also be invited to attend.⁶⁴ Conferencing locations vary widely; in Alaska, some families elect to hold the meeting at home over a potlatch⁶⁵ and dancing, while others want it held at an office or church.⁶⁶ Ultimately, the coordinator acts as an impartial listener to the family's desires and ensures that the facilities for the conference are comfortable.⁶⁷

The second phase consists of holding the conference. The three components of a conference are generally (1) information and advice, (2) private family deliberations, and (3) negotiation of a plan.⁶⁸ Before the conference begins, the coordinator typically makes introductions, informs the family of the goals of the conference, and provides the family with all necessary information regarding the case.⁶⁹ The coordinator may not, however, offer advice on how the state would likely decide a

57. HARDIN, *supra* note 17, at 135.

58. *Id.*

59. Lowry, *supra* note 14, at 66.

60. HARDIN, *supra* note 17, at 6.

61. *Id.* at 134–39.

62. *Id.* at 135–36.

63. *Id.*

64. Lowry, *supra* note 14, at 69.

65. A potlatch is a term used by Native American tribes of the Pacific Northwest to describe a large feast at which family and tribal members gather and exchange gifts. THE OXFORD ENGLISH DICTIONARY 230 (2d ed. 1989).

66. Jack Interview, *supra* note 54; HARDIN, *supra* note 17, at 138.

67. Lowry, *supra* note 14, at 66–70.

68. HARDIN, *supra* note 17, at 139–40.

69. *Id.* at 140–44.

similar case.⁷⁰ The coordinator, social worker, and all other court officers then leave in order to give the family privacy as it deliberates the matter.⁷¹ In Alaska, some tribes elect to invite a peacemaker or a matriarch in order to facilitate discussion and minimize confrontation.⁷² Participants are often quiet at the outset because they are apprehensive about blaming others, but eventually the family members begin talking and are able to create a plan.⁷³ The plan may include placement of the child with family or tribal members, visitation, or goals for the parents, such as completion of a drug or alcohol rehabilitation program.⁷⁴ The plan is then reviewed by the social worker and the parties' attorneys; there may be further negotiation if the professionals feel the plan needs modification.⁷⁵

The third phase is the post-conference period.⁷⁶ In order to comply with the "active efforts"⁷⁷ requirement of ICWA and ensure that the plan is implemented effectively, the coordinator should inform the parties of the plan's contents, locate funding or arrange for the services identified, and monitor the status of its implementation.⁷⁸ While the goal of Family Group Conferencing is to strengthen the family's ability to correct a problem, state child welfare agencies must monitor the effects of the plan because these agencies are ultimately responsible for the protection of children.⁷⁹

III. ICWA PROVISIONS AND LEGISLATIVE HISTORY SUPPORT FAMILY GROUP CONFERENCING

In governing child welfare and placement cases of Alaska Native children, ICWA operates in conjunction with two federal statutes and one state statute: the federal Adoption and Safe Families Act of 1997 ("ASFA"),⁸⁰ the federal Multiethnic Placement Act of 1994 ("MEPA"),⁸¹ and Alaska's Children in Need of Aid ("CINA") statutes.⁸²

70. *Id.* at 143–44.

71. *Id.* at 144.

72. Jack Interview, *supra* note 54.

73. *Id.*; see also HARDIN, *supra* note 17, at 144.

74. Jack Interview, *supra* note 54; see also Lowry, *supra* note 14, at 90–92 (providing an example of a Family Group Conferencing plan).

75. See Lowry, *supra* note 14, at 72.

76. HARDIN, *supra* note 17, at 145.

77. See discussion *infra* section III.A.2.

78. See HARDIN, *supra* note 17, at 146–48; Lowry, *supra* note 14, at 73.

79. See Lowry, *supra* note 14, at 73.

80. 42 U.S.C. §§ 671–75 (2000).

81. Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, Pt. E, Subpt.1, 108 Stat. 4056 (1994), amended by Small Business Job Protection

The common purpose of these statutes is to provide Alaska Native children with safe, stable, and loving environments that reflect the characteristics and values of their cultures.⁸³

In order to succeed in placing children in culturally relevant homes, Alaska is required to assist with family reunification when appropriate.⁸⁴ Currently, however, if the child is in the foster care system for more than fifteen of the last twenty-two months, termination of parental rights (“TPR”) proceedings begin.⁸⁵ In many instances, unfortunately, the extended family and tribe are not taken into consideration when terminating the parental rights of an Alaska Native.⁸⁶ This is a tragic loss, as the extended family is very important in the development and rearing of Alaska Native children.⁸⁷

Such termination of parental rights is not a culturally sensitive action when it places the child in a non-Alaska Native home. The adversarial system that governs TPR proceedings essentially cuts off the only

Act of 1996, Pub. Law 104-188, 110 Stat. 1755 (1996) (current version at 42 U.S.C. § 1996(b) (2000)).

82. ALASKA STAT. §§ 47.10.005–.990 (Michie 2004).

83. See 25 U.S.C. § 1902 (2000). The relevant language reads as follows:

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

Id.; see also S. REP. NO. 95-597, at 1, 9–11 (1977); H.R. REP. NO. 95-1386, at 19 (1978), reprinted in 1978 U.S.C.C.A.N. 7530, 7541.

84. 25 U.S.C. § 1912(d) (2000); ALASKA STAT. § 47.10.086 (Michie 2004).

85. ALASKA STAT. § 47.10.088(d)(1) (Michie 2004).

86. See *Subcomm. Hearings, supra* note 38, at 75 (statement of Mona Sheperd, Social Service Coordinator, Rosebud Sioux Tribe); see also Brooks, *supra* note 10, at 17. Brooks argues the following:

There are two problems with the termination of parental rights in many instances: (1) it fails to recognize the importance to children’s healthy development of maintaining the continuity of family ties wherever possible and (2) it does not fit with the reality of the lives of most children whose families are involved in the legal system.

Id.

87. See Brooks, *supra* note 10, at 18–19 (arguing that “the legal system needs to accept that maintaining the continuity of family ties is equally important for children who are separated from their biological families as a result of legal proceedings related to foster care and adoption” because “[s]evering such ties is also traumatic for children, who remain attached to biological parents and other adult figures who share, or seek to share, intimate relationships with them”).

link the Alaska Native child has with the tribe⁸⁸ and aggravates the harm already done to the child. Such harm may be avoided by providing Alaska Native families with the option to have a Family Group Conference instead of handling the child welfare proceedings exclusively in the state's adversarial system. The Family Group Conference better meets the needs of the Native child by providing a process that engages tribes and the child's extended family early in order to provide a loving and stable environment that better reflects and considers the child's culture.

A. The Indian Child Welfare Act

1. History. Alaska Native and Indian children were born into a cultural survival struggle that unfortunately still exists today.⁸⁹ After finding widespread disruption of families and the placement of American Indian children with non-Indian families, Congress passed the Indian Child Welfare Act in 1978 in order to protect the existence of the Indian and Alaska Native families and tribes.⁹⁰ Many Alaska Native families were confronted with culturally insensitive social workers and other judicial personnel who ignored Native culture and traditions when placing children in non-Native foster and adoptive homes.⁹¹ Some Alaska Native families were torn apart as their children were sent to boarding schools operated by non-tribal organizations.⁹² The purpose of these

88. See *C.L. v. P.C.S.*, 17 P.3d 769, 775–77 (Alaska 2001).

89. Jack Interview, *supra* note 54.

90. See 25 U.S.C. § 1901(3) (2000); see also S. REP. NO. 95-597, at 1–2 (1978):

The separation of Indian children from their natural parents, especially their placement in institutions or homes which do not meet their special needs, is socially and culturally undesirable. For the child, such separation can cause a loss of identity and self-esteem, and contributes directly to the unreasonably high rates among Indian children for dropouts, alcoholism and drug abuse, suicides, and crime. For the parents, such separation can cause a similar loss of self-esteem, aggravates the conditions which initially gave rise to the family breakup, and leads to a continuing cycle of poverty and despair.

S. REP. NO. 95-597, at 1–2

91. See 25 U.S.C. §§ 1901(4)–(5) (2000).

92. See H.R. REP. NO. 95-1386, at 9 (1978) reprinted in U.S.C.C.A.N. 7530, 7541; see also Sheri L. Hazeltine, *Speedy Termination of Alaska Native Parental Rights: The 1998 Changes to Alaska's Child in Need of Aid Statutes and Their Inherent Conflict with the Mandates of the Federal Indian Child Welfare Act*, 19 ALASKA L. REV. 57, 59 (2002) (“Studies conducted in 1969 and 1974 showed that [nationwide,] twenty-five to thirty percent of Indian children were separated from their families and tribes by placement in foster homes, adoptive homes or institutions.”); Lorie Graham, *Reparations and the Indian Child Welfare Act*, 25 LEGAL STUD. F. 619, 624–25 (2001) (arguing that the goal of placing one-third of all Native American children in non-Indian foster care, adoptive

boarding schools was to assimilate Indian children into mainstream culture, resulting in the children forgetting their native culture and, as children were allowed to speak only English at the boarding schools, their native language as well.⁹³ However, with congressional recognition of the trend toward the destruction of tribal families and communities, states are now required to observe and consider the special needs and circumstances of the Indian and Alaska Native family.⁹⁴

2. “*Active Efforts.*” Several safeguards exist under ICWA that guide child welfare workers toward the best outcome for Indian children. Under ICWA, states are required to make “active efforts” to institute culturally relevant services and programs to keep the Alaska Native family together.⁹⁵ Active efforts have been interpreted to include working with the parents through each step of the reunification plan rather than requiring the parents to navigate the child welfare system on their own.⁹⁶ By regulation, active efforts must reflect the cultural conditions and re-

homes, and educational institutions was to destroy the “indigenous familial structures through forced assimilation”).

93. Hazeltine, *supra* note 92, at 60.

94. See H.R. REP. NO. 95-1386, at 19. The relevant text states that:

[c]ontributing to this [breakup of Indian families and the placement of children with non-Indian foster or adoptive homes] problem has been the failure of State officials, agencies, and procedures to take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future.

While the committee does not feel that it is necessary or desirable to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits, it does feel the need to establish minimum Federal standards and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe.

Id.

95. 25 U.S.C. § 1912(d) (2000). The text states in pertinent part:

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

Id.; see also H.R. REP. NO. 95-1386, at 22.

96. Mark Andrews, “*Active*” Versus “*Reasonable*” Efforts: The Duties to Reunify the Family Under the Indian Child Welfare Act and the Alaska Child in Need of Aid Statutes, 19 ALASKA L. REV. 85, 93 (2002) (citing *A.M. v. State*, 891 P.2d 815, 826 n.12 (Alaska 1995)).

sources of the Indian tribe and family.⁹⁷ Only when those active efforts have been unsuccessful may a child be considered for placement with a non-Indian family.⁹⁸ ICWA imposes high burdens of proof. Before an Indian child is placed in non-Indian foster care, there must be clear and convincing evidence must demonstrate that allowing the parents to retain physical custody will damage the child.⁹⁹ Furthermore, evidence beyond a reasonable doubt that the child will be endangered if parental rights are not terminated is required before a motion for a TPR is granted.¹⁰⁰

Fortunately, ICWA's active efforts requirement authorizes Family Group Conferencing for Alaska Native children in the state child welfare system.¹⁰¹ Currently, Family Group Conferencing is provided to families in the Alaska court system and in tribal courts, such as the Central Council of the Tlingit and Haida Tribes.¹⁰² This option is voluntary and begins when a parent informs the judge or caseworker of his interest in the program.¹⁰³

3. *ICWA and Tribal Sovereignty.* According to ICWA, state governments are authorized to cooperate with tribes in providing child welfare programs.¹⁰⁴ However, the ability of Alaska Native tribes to govern matters in their own courts has been the source of much confusion, statutory interpretation, and judicial debate.¹⁰⁵ The primary source of confusion regarding tribal sovereignty in judicial matters originated with the passage of Public Law 280 ("PL-280").¹⁰⁶ PL-280 grants Alaska state

97. *Id.* at 94 (citing Bureau of Indian Affairs, Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,592 (Nov. 26, 1979)) (Active efforts "shall involve and use the available resources of the extended family, the tribe, Indian social services agencies, and individual Indian care givers . . . [which includes traditional healers and other tribal members who have special skills] that can be used to help the child's family succeed.").

98. 25 U.S.C. § 1912(d) (2000).

99. *Id.* § 1912(e).

100. *Id.* § 1912(f).

101. *Id.* § 1912(d).

102. Jack Interview, *supra* note 54.

103. ALASKA COURT SYSTEM ADMIN. OFFICE, A PARENT'S GUIDE TO THE CHILD IN NEED OF AID MEDIATION AND FAMILY GROUP CONFERENCING PROGRAM (2002) (unpublished)(on file with author).

104. *See* 25 U.S.C. § 1919(a) (2000); *see also* H.R. REP. NO. 95-1386, at 24-25 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7547-48.

105. *See, e.g., In re C.R.H.*, 29 P.3d 849 (Alaska 2001).

106. Pub. L. No. 53-280, § 4, 67 Stat. 588 (1953) ("[Alaska] shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country . . ."), *amended by* Pub. L. No. 85-615, § 2, 72 Stat. 545 (1958) (codified at 28 U.S.C. § 1360 *et seq.* (2000) (expanding statute to include Alaska)).

courts civil jurisdiction over private causes of action involving Indians in Indian country.¹⁰⁷ States interpreted this language to give them exclusive jurisdiction over Native child custody matters.¹⁰⁸

However, PL-280 did not eliminate the jurisdiction of Alaska tribal courts over child custody matters. On the contrary, tribes are inherently sovereign governments whose powers are limited only by restrictions in specific treaties, federal statutes, or if the tribe exercises a power that conflicts with its status as a “domestic dependent nation subordinate to the sovereignty of the United States.”¹⁰⁹ The Alaska Supreme Court decided that tribal courts and state courts have concurrent jurisdiction over Alaska Native children.¹¹⁰ If a case originating in state court involves an Alaska Native child who does not reside in an Alaska Native village,¹¹¹ but has tribal affiliation, the state courts may only refuse to transfer the case to the tribal court when good cause exists.¹¹²

Even though tribes have the right to be notified of proceedings involving children of the tribe and to remove the proceedings to tribal court, the underlying philosophy that governs these proceedings is adversarial and culturally insensitive.¹¹³ The tribe may be empowered to

107. *Id.*; see also DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 143 (2002) (analyzing the impact of PL-280 on state and Indian jurisdiction).

108. ALASKA JUDICIAL COUNCIL, RESOLVING DISPUTES LOCALLY: A STATEWIDE REPORT AND DIRECTORY 7 n.19 (1993), available at <http://www.ajc.state.ak.us/download/rjdir.pdf> (last visited Mar. 2, 2005) [hereinafter ALASKA JUDICIAL COUNCIL].

109. CASE & VOLUCK, *supra* note 107, at 432 (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978)).

110. See *In re C.R.H.*, 29 P.3d at 852–54; see also *John v. Baker*, 982 P.2d 738, 765 (Alaska 1999), cert. denied 528 U.S. 1182 (2000) (“Tribal courts in Alaska have jurisdiction to adjudicate custody disputes involving tribal members. This jurisdiction is concurrent with that of the state courts.”).

111. See CASE & VOLUCK, *supra* note 107, at 11 (discussing how Alaska Natives were first organized as villages that were then recognized by the federal government as Indian reservations as long as the village was an area of land reserved for the use and occupancy by Alaska Natives).

112. ICWA provides in pertinent part:

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child’s tribe, the court, in absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child’s tribe: Provided, that such transfer shall be subject to declination by the tribal court of such tribe.

25 U.S.C. § 1911(b) (2000).

113. See ALASKA JUDICIAL COUNCIL, A GUIDE TO ALASKA CHILD IN NEED OF AID CASES 23 (1999), available at <http://www.ajc.state.ak.us/reports/cinaguideframe.htm> (last visited Mar. 2, 2005) (suggesting that tribal social workers bridge the gap between

assert jurisdiction in these matters, but when the tribe lacks the resources necessary to effectively manage the case, the child is returned to the non-Indian adversarial child welfare system.¹¹⁴ Instead, government and tribal courts should deal with the jurisdictional issues by sharing responsibility with the family and tribe. Family Group Conferencing distributes responsibility among family and tribal members and ensures that the child is ultimately placed according to the cultural standards and concerns of Indian and Alaska Native tribes in compliance with ICWA's active efforts standard.

B. ICWA and the Children in Need of Aid Statute Provisions

With Family Group Conferencing incorporated into the child welfare proceedings in Alaska, child welfare professionals work within the framework of the federal government's ICWA and Alaska's Children in Need of Aid Statutes. In order to comply with the governing federal law, the Adoption and Safe Families Act of 1997,¹¹⁵ Alaska revised its child protection laws in 1998.¹¹⁶ ASFA was intended to address the problem of reunifying children with their biological parents despite the potential danger of the situation.¹¹⁷ ASFA represented a federal policy shift toward giving priority to the needs of the child rather than to the needs of the family.¹¹⁸ Two important goals of this legislation were (1) to create a "reasonable efforts" standard that encourages expeditious termination of parental rights,¹¹⁹ and (2) to require the states to conduct permanency hearings to determine a permanency plan no later than twelve months after a child enters foster care.¹²⁰ Subject to narrow exceptions, ASFA provides a potentially speedy method to terminate pa-

the tribe and the Department of Family and Youth Services in situations where the tribe intervenes in the state court proceedings by having the tribal social worker testify as to the tribal court's position).

114. *In re* C.R.H., 29 P.3d at 854 (concluding that ICWA authorizes transfer of jurisdiction from state to tribal courts notwithstanding PL-280).

115. Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

116. ALASKA STAT. § 47.10.005 *et seq.* (Michie 2004); *see also* ALASKA JUDICIAL COUNCIL, *supra* note 108, at 7–8.

117. *See* 143 CONG. REC. 2012, 2014 (1997).

118. *See* 42 U.S.C. § 671(a)(15) (2000) (requiring that a child's health and safety be the "paramount concern" in a reunification plan). Other authors have provided more detailed analysis of the impact of ASFA and CINA on ICWA proceedings. *See, e.g.*, Hartzeltine, *supra* note 92, at 64–70; Andrews, *supra* note 96, at 110–11.

119. 42 U.S.C. § 671(a)(15) (2000).

120. *Id.* § 675(5); *see also* Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. LEGIS. 1, 3 (2001) (discussing the goals of ASFA).

rental rights by mandating that the state petition for a TPR if a child has been in foster care for fifteen of the last twenty-two months.¹²¹

ASFA essentially overruled the previous governing federal law, the Adoption Assistance and Child Welfare Act of 1980 (“AACWA”), which developed the idea of permanency planning.¹²² Under AACWA, states were encouraged to make reasonable efforts to preserve families and, when necessary, enable their reunification.¹²³

Under Alaska law, CINA requires that the state make reasonable efforts to place needy children in stable environments, with an eye toward reunification of the family.¹²⁴ The reasonable efforts standard of the CINA statute is lower than that of ICWA, which requires that the state take *active* efforts toward reunification of the family.¹²⁵ This discrepancy in the level of effort required is a great source of debate among child welfare workers trying to ensure the safest and most culturally relevant environment for Alaska Native children.¹²⁶ However, when state or federal laws conflict with ICWA, courts are required to implement the law that offers the highest standard of protection for the Alaska Native child.¹²⁷ By emphasizing cultural significance as well as family values and beliefs, Family Group Conferencing allows the state to satisfy ICWA’s stricter active efforts requirement.

C. Multiethnic Placement Act of 1994

In response to the disproportionate number of minority children left permanently in the foster care system, Congress passed another federal law, the Multiethnic Placement Act of 1994.¹²⁸ The primary purpose of MEPA was to prevent discrimination in the placement of children on the basis of race, ethnicity, or culture.¹²⁹ However, the requirements of

121. 42 U.S.C. § 675(5)(E) (2000).

122. Pub. L. No. 96-272, 94 Stat. 500 (1980).

123. *Id.*; see also Adler, *supra* note 120, at 3.

124. See ALASKA STAT. § 47.10.086 (Michie 2004).

125. 25 U.S.C. § 1912(d) (2000).

126. See generally Andrews, *supra* note 96 (analyzing the distinction between “reasonable efforts” and “active efforts”).

127. 25 U.S.C. § 1921 (2000); see also *Crimes Against Children/Foster Care: Hearing on H.B. 375 before the House Health, Education, and Social Services Committee*, 1998 Leg., 2d Sess. 20, at 1636 (Alaska 1998) (statement of Linda Haim, court-appointed special advocate) (discussing the need for greater accountability in child welfare proceedings).

128. Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, Pt. E, Subpt.1, 108 Stat. 4056 (1994), amended by Small Business Job Protection Act of 1996, Pub. L. 104-188, 110 Stat. 1755 (1996) (current version at 42 U.S.C. § 1996(b) (2000)).

129. 42 U.S.C. § 1996(b)(1)(A).

MEPA do not preempt ICWA's requirement of maintaining cultural relevancy in foster care and adoption placement.¹³⁰ Moreover, state child welfare service programs are still required to "provide for the diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children in the State for whom foster and adoptive homes are needed."¹³¹

Although the subject of transracial adoption and placement is debated with respect to Indian and Alaska Native children, Congress recognizes that race is a factor worth considering in placing the child.¹³² That MEPA does not specifically apply to ICWA proceedings demonstrates Congress's belief in the importance of placing an Indian or Alaska Native child with his or her family or a member of the tribal community as an opportunity for cultural preservation.¹³³ Through ICWA and MEPA, the tribe is given an opportunity to ensure that the social and emotional development of the child is culturally relevant. By incorporating Family Group Conferencing into child welfare proceedings, Alaska Native tribes will have the primary role in deciding the future of their children because decisions are made by tribal members rather than by non-tribal professionals.¹³⁴ Whether or not judges and social workers agree with the values of Alaska Native culture, the tribe has a right to have its voice heard in the placement decisions of its children.

130. *Id.* § 1996(b)(3).

131. 42 U.S.C. § 622(b)(9) (2000).

132. 139 CONG. REC. S8712 (daily ed. Jul. 14, 1993) (statement of Sen. Metzenbaum). Senator Metzenbaum stated:

The Government's goal for most children in foster care should be reunification with their families . . . I believe that every child who is eligible for adoption should have the right to be adopted by parents of the same race if that is possible. Teaching a child to embrace his or her racial and cultural heritage is more easily accomplished when parents and children are the same race or ethnic group. I strongly support efforts to recruit prospective adoptive parents of all races.

Id.

133. See Eskay, *supra* note 1, at 732 (arguing that "[t]ransracial placement of Indian children may threaten the very existence of tribes. . . . Cultural extinction may represent the one circumstance in which value preferences distinct from a particular child's interests are weighty enough to override the best interests standard.").

134. See Laura Beresh Taylor, Note, C.R.B. v. C.C. and B.C.: *Protecting Children's Need for Stability in Custody Modification Disputes Between Biological Parents and Third Parties*, 32 AKRON L. REV. 371, 386-87 (1999) (arguing for parental preference over third parties in custody disputes because it (1) "creates predictability and judicial economy," (2) "acts as a crucial safeguard that prevents a judge from utilizing extremely broad judicial discretion to make decisions based on personal biases," and (3) "mitigates the risk that a judge's class biases and lifestyle biases will determine the outcome of a custody dispute").

Family Group Conferencing is a step toward making Alaska Native tribes the ultimate decision-makers in determining the best interests of Alaska Native children.

D. Legislative History Indicates the Need for Culturally Relevant Programs

The legislative history of ICWA indicates that Congress discovered that decisions made by social workers for Indian and Alaska Native children did not always incorporate the values and beliefs of the children's tribes and families.¹³⁵ Congress realized that despite ICWA's laudable recognition of the importance of maintaining cultural ties with the tribe, the problem of displaced Indian and Alaska Native children would continue as long as the underlying practices and methods failed to incorporate the beliefs of the tribe.¹³⁶ In hearings before Congress, tribal members and advocates reiterated that the tribe should be included in the placement decision and in providing the active efforts toward reunification.¹³⁷ For the tribe's opinions and values to be meaningfully imple-

135. See H.R. REP. NO. 95-1386, at 10 (1978), *reprinted in* 1978 U.S.C.A.N. 7530, 7532 ("In judging the fitness of a particular family, many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists.").

136. S. REP. NO. 95-597, at 12 (1978) ("[Indian] people and child welfare experts stressed the need for adequately funded, tribally controlled family development programs which would function at the local level and would be able to exhibit a deeper cultural sensitivity toward the Indian people they serve."); *see also Subcomm. Hearings, supra* note 38, at 66 (statement of Goldie Denny, Director of Social Services, Quinault Nation, also representing National Congress of American Indians) ("General child welfare legislation, no matter how well meaning, does not address the unique legal, cultural status of Indian people. Rather, they tend to promulgate the existing problems. . . . The NCAI continues to go on record as supporting the concept that child welfare services to Indian families can best be provided by Indians.").

137. *Subcomm. Hearings, supra* note 38, at 66 (statement of Dr. Blandina Cardenas, Commissioner for the Administration for Children, Youth, and Families). Dr. Cardenas stated:

All of [the child welfare] activities, are intended to reflect the Department's belief that Indian child welfare services must be based not only on the best interest of the child and support the family unit—however they may be defined—but also on a recognition of the need to involve Indians themselves in the provision of services.

Id. See also *id.* at 62 (statement of Chief Calvin Isaac, Mississippi Band of Choctaw Indians).

mented in placement proceedings, tribes need an active voice early in the case to ensure that the final plan will suit the lifestyle of the tribe.¹³⁸

In enacting ICWA, Congress recognized the value of considering Indian cultural norms and the role of the extended family in determining child placement. Currently, however, it is the non-Indian adversarial system that makes the ultimate child placement decision.¹³⁹ Congress designed ICWA to ensure that both tribal and state governments work to keep Indian children in their own cultural surroundings.¹⁴⁰ ICWA gives importance to the extended family and the prevailing social and cultural standards of the Indian community.¹⁴¹ ICWA relies on the extended family as a valuable resource in preserving the child's cultural ties.¹⁴²

Unlike the adversarial system, Family Group Conferencing allows tribal members to have significant input in placement decisions that better meet ICWA's goals. Because Family Group Conferencing's non-adversarial approach may produce innovative child placement plans, Alaska may require some time to adjust to and respect the outcomes and decisions that arise from the conferences.¹⁴³ Family Group Conferencing is a way in which Alaska Native tribes can utilize their jurisdiction

138. *Id.* at 99 (statement of Donald Reeves, Legislative Secretary, Friends Comm. on National Legislation) ("I hope that the decisions about the kinds of services that are needed by particular families will be made by the communities that they are part of, and not imposed on by rule makers from some other quarter.").

139. *See, e.g.,* C.L. v. P.C.S., 17 P.3d 769, 773–74 (Alaska 2001); J.J. v. State, 38 P.3d 7, 11 (Alaska 2001).

140. S. REP. NO. 95-597, at 12 (1978).

141. 25 U.S.C. §§ 1901–02 (2000).

142. *Id.* § 1915(a) ("In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; (3) other Indian families."); *see also* H.R. REP. NO. 95-1386, at 20 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7532 ("The concept of the extended family maintains its vitality and strength in the Indian community. By custom and tradition, if not necessity, members of the extended family have definite responsibilities and duties in assisting in childrearing.").

143. *See generally* William C. Bradford, *Reclaiming Indigenous Legal Autonomy on the Path to Peaceful Coexistence: The Theory, Practice, and Limitations of Tribal Peacemaking in Indian Dispute Resolution*, 76 N.D. L. REV. 551, 604 (2000). Bradford makes the following argument:

[I]f the dominant society will undertake to shed assumptions of Indian inferiority, recognize indigenous jurisprudence as worthy of respect, and accord Indian tribes the status of coequal negotiating partners, a dialectic may develop and lead to greater legal diversity, greater mutual cultural respect, and above all a more peaceful coexistence.

Id.; *see also* HARDIN, *supra* note 17, at 124–26; Rieger & Kandel, *supra* note 9, at 5.

as “opportunities, not obstacles, to the delivery of justice in rural Alaska.”¹⁴⁴

IV. PROPOSAL FOR IMPLEMENTING FAMILY GROUP CONFERENCING

Family Group Conferencing is a recent approach to child placement proceedings. Therefore, I propose the following: (1) that funds be set aside for Alaska Native villages and tribal courts to institute effective Family Group Conferencing programs, and (2) that there be institutionalized research conducted and reported on the outcomes and effectiveness of Family Group Conferencing.

Alaska Native and Indian tribes face financial challenges in pursuing their own measures for determining child placement. It takes a considerable amount of money to operate a successful foster care and adoption program.¹⁴⁵ In order for tribes to conduct Family Group Conferencing with minimal adversarial and non-Native influence, it is imperative that Alaska Native tribes receive enough funding to operate the program independently and efficiently.

The Title IV-E Foster Care and Adoption Assistance Act of 1980 (“Title IV-E”)¹⁴⁶ currently does not grant tribes the authority to administer funds directly for children that are placed with families under their jurisdiction.¹⁴⁷ Funds administered by Alaska under Title IV-E are used to support the out-of-home placement of children in foster homes and the creation and operation of child placement programs and services.¹⁴⁸ While some states have formed agreements with tribes to operate portions of the Title IV-E program, this practice is not mandatory.¹⁴⁹ The

144. Tlingit-Haida Judiciary Comm., *AFN White Paper, Alaska: Does “Indian Country” Matter?* (Oct. 2003), at <http://www.tlingit-haida.org/pdf/tribalcourtreports/TC-WP-Tribal%20Jurisdiction10-2003.pdf> (last visited Feb. 23, 2005).

145. See Barbara Ann Atwood, *Flashpoints under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 675 (2002) (arguing that increased federal funding would “significantly strengthen the ability of tribes to operate their child welfare programs, to develop family-preservation systems, and to recruit prospective foster and adoptive homes from among their membership”).

146. Pub. L. No. 96-272, 94 Stat. 500 (codified as amended at 42 U.S.C. § 673 (2000)).

147. See Nat’l Indian Child Welfare Assoc., *Regarding Title IV-E Foster Care and Adoption Assistance for Indian Children in the Context of Welfare Reform Authorization* (May 10, 2002), at http://www.nicwa.org/policy/legislation/S331_HR443/T24103-4.htm (last visited Feb. 26, 2005) [hereinafter Nat’l Indian Child Welfare Assoc.].

148. *Id.*

149. DEP’T OF HEALTH AND HUMAN SERVS. OFFICE OF INSPECTOR GEN., OPPORTUNITIES FOR ACF TO IMPROVE CHILD WELFARE SERVICES AND PROTECTIONS FOR NATIVE AMERICAN CHILDREN 5–6 (Aug. 1994), available at <http://oig.hhs.gov/oei/reports/oei-01-93-00110.pdf> (last visited Feb. 26, 2005).

Office of Inspector General Department of Health and Human Services reported in 1994 that one of the reasons that many states, including Alaska, do not form Title IV-E agreements with tribes is that potential tribal non-compliance could jeopardize the state's ability to receive funding.¹⁵⁰ Under the Act, foster and adoptive families in need of child care assistance may receive the Title IV subsidy to pay for "clothing, school supplies, transportation, and other daily needs of the child."¹⁵¹ Under the current law, however, many Alaska Native and Indian children are excluded from receiving benefits, while non-Native income-eligible children receive the funds.¹⁵² Since the tribes have not been granted the authority to administer their own Title IV-E programs, they face challenges in trying to implement effective child placement programs with the limited state funds that they do receive.¹⁵³

Insufficient funding hinders the effectiveness of Family Group Conferencing in placing Alaska Native children in Alaska Native homes. With marginal Title IV-E funding, it is a steep challenge for tribes to place children in long-term and stable environments. Alaska Native tribes often must resort to unsubsidized methods; for example, many tribes must rely on the compassion of families to use their own limited personal resources to act as foster parents, legal guardians, or pre-adoptive placements for children.¹⁵⁴ This can often be troublesome because the financial burden of bringing a child into one's home can be a source of enormous stress.¹⁵⁵ Moreover, the financial benefits given to relatives who care for children are not comparable to the more generous foster care payments.¹⁵⁶ However, if families that open their homes were offered financial assistance, they would likely be more willing and able to act as permanent placements for children, including those with multiple siblings or special needs.¹⁵⁷ Therefore, Alaska Native tribes are left with no alternative but to continue to place children in unsubsidized foster care homes, with the hope of being able to shift "scarce child protection funds from one account to another in order to meet emergency and other pressing needs."¹⁵⁸

150. *See id.* at 6.

151. *See* Nat'l Indian Child Welfare Assoc., *supra* note 147.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. HARDIN, *supra* note 17, at 6.

157. *See* Susan L. Brooks, *The Case for Adoption Alternatives*, 39 FAM. CT. REV. 43, 51 (2001) (suggesting that if guardianships were subsidized, families would have an easier experience in providing permanency for children who would otherwise be difficult to place).

158. Nat'l Indian Child Welfare Assoc., *supra* note 147.

Currently, members of Congress are attempting to increase the disproportionately low allocation of funding to Alaska Native and Indian tribes in child welfare proceedings through the Indian and Alaska Native Foster Care and Adoption Services Amendments of 2003, which would amend Part E of Title IV of the Social Security Act.¹⁵⁹ These amendments would provide Alaska Native and Indian tribes the flexibility to operate their own placement programs, such as Family Group Conferencing, with assurance that they will be able to provide placement families with the necessary assistance.¹⁶⁰ Family Group Conferencing would thrive with the aid of this legislation because operators of the program would be far less limited by financial constraints. Financial independence and freedom from Title IV-E's current restrictions would protect children from being returned to state custody simply because a caring and willing extended family member is unable to financially support the child.

Secondly, I propose that there be an institutional entity developed to track the outcomes of the participants in Family Group Conferencing. By analyzing empirical data, Alaska Native villages, families, advocates, lawmakers, and judges can decide whether Family Group Conferencing is an effective means of complying with ICWA's active efforts requirement. Such data could further encourage funding initiatives and demonstrate the viability of the process to other Alaska tribes.

V. CONCLUSION

Legislative and judicial authority under the Indian Child Welfare Act grants Alaska Natives the right to have their tribal voice heard and to have a strong influence in child welfare proceedings. Family Group Conferencing is an appropriate means of ensuring culturally relevant and stable placement of Alaska Native children under the active efforts requirement of ICWA. Through Family Group Conferencing, Alaska will gain insight into the invaluable indigenous principle of relying on and incorporating the extended family into child welfare proceedings. Furthermore, Family Group Conferencing will assist Alaska Native tribes in passing on traditions to their children, and surviving as sovereign entities, by placing more children in culturally reflective homes.

159. Indian and Alaska Native Foster Care and Adoption Services Amendments of 2003, S. 331, 108th Cong. (2003).

160. *See id.* at § 2 (amending Part E of Title IV of the Social Security Act, 42 U.S.C. §§ 670 *et seq.* (2000), to include: "in no case shall an Indian tribe receive a lesser proportion [for administrative expenditures] than the corresponding amount specified for a State in [section 474(a)(3)]").