CATHOLIC SOCIAL SERVICES, INC. V. C.A.A.: BEST INTERESTS AND STATUTORY CONSTRUCTION OF THE INDIAN CHILD WELFARE ACT*

I. INTRODUCTION

Statutory construction is an inexact science. Ideally, the legislature will have made its intentions clear in the language of the statute; where it has not, courts and practitioners must look to the underlying purpose of the statute, the legislative history and the case law to determine how to apply a statute in each case. In *Catholic Social Services, Inc. v. C.A.A.*,[1] the Alaska Supreme Court was presented with a question on which the governing statute, the Indian Child Welfare Act of 1978 ("ICWA" or "Act"),[2] is silent: are Indian tribes entitled to notification of voluntary proceedings to terminate parental rights to an Indian child? The court took a narrow view, refusing to extrapolate a right to notice where express statutory authority for such a right was lacking.[3] Despite a clear mandate that tribes be notified of involuntary terminations,[4] under *Catholic Social Services* Indian tribes in Alaska are not entitled to notice of voluntary relinquishment proceedings.[5]

Though the lack of a specific notice provision for voluntary relinquishments might seem dispositive of the notice question, the *Catholic Social Services* decision violates the overall language and fundamental purpose of the ICWA. As its title implies, the Act is designed to protect the welfare of Indian children by promoting the stability and integrity of Indian families and tribes.[6] The decision in this case works

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1. 783 P.2d 1159 (Alaska 1989) (per curiam).
2. 25 U.S.C. §§ 1901-63 (1988).
3. 783 P.2d at 1160.
4. As will be explained more fully, *infra* notes 45-48 and accompanying text, the Act clearly mandates that tribes receive notice of involuntary termination proceedings, *see* 25 U.S.C. § 1912(a) (1988), but says nothing about whether there must be notice of voluntary proceedings. The majority finds this distinction dispositive of Congress' view of the tribe's rights in this situation. *See also infra* note 81 for text of § 1912(a).
5. 783 P.2d at 1160.
6. 25 U.S.C. § 1902 (1988).

to the detriment of children and tribes, allowing parents and adoption agencies to avoid tribal participation in the proceedings and potentially subjecting the child to needless protracted litigation. By adhering to a superficial reading of the Act's language, the *Catholic Social Services* court emasculates the tribes' right to intervene in child custody proceedings.[7] More importantly, however, the court failed to apply the Act in a manner consistent with the best interests of Indian children being voluntarily relinquished.[8]

This case demonstrates with striking clarity a major difficulty with cases affecting the welfare of children in any context: the conflict between the actual parties — here the social service agency and the adoptive parents against the natural mother and the tribe — completely subsumes the real issue, which is who the child's family should be. The ICWA, like other statutes affecting children and families, has at its heart the best interests of the child. The ICWA is also concerned with advancing the best interests of Indian tribes. The Alaska Supreme Court's construction of the Act in *Catholic Social Services* shows an insufficient concern for the best interests of this child or her tribe. Had the Act's language or legislative history clearly provided that tribes were not to be notified of voluntary termination proceedings, there would be little doubt that the *Catholic Social Services* court had reached the correct result. Since reasons for the opposite conclusion are more compelling, the Alaska Supreme Court should have held that Alaska Indian tribes have the right to notice of voluntary proceedings to terminate the parental rights to an Indian child.[9]

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7. *See infra* notes 64-71 and accompanying text. Whether the tribes have an unqualified right to intervene is a point of some contention. The majority in *Catholic Social Services* held summarily that such a right does not exist. 783 P.2d at 1160. This holding directly contradicts 25 U.S.C. § 1911(c) (1988), which states that "in any state court proceeding for the . . . termination of parental rights to an Indian child, the . . . Indian child's tribe shall have a right to intervene at any point in the proceeding." *Id.* The majority similarly dispenses with any due process concerns raised by the combination of a right to intervene and no right to notice. 783 P.2d at 1160. Furthermore, the court's reading contradicts a previous case in which the court held that section 1911(c) applied to terminations of parental rights. *In re* J.R.S., 690 P.2d 10, 15 (Alaska 1984).

8. *See infra* notes 82-100 and accompanying text.

9. As will be discussed more fully, *infra* notes 49-52 and accompanying text, this is essentially the position taken by Justice Rabinowitz in his dissent, 783 P.2d at 1161-63.

II. *CATHOLIC SOCIAL SERVICES, INC. V. C.A.A.*

A. Background

The ICWA is a federal statute that applies to all state child custody proceedings[10] involving an Indian child.[11] The Act was designed to curb the wholesale removal of Indian children from their homes by social workers ignorant of Indian childrearing practices[12] by "establish[ing] minimum Federal standards for the removal of Indian children from their families . . . which will reflect the unique values of Indian culture. . . ."[13] These standards and procedures, as set forth in sections 1911-22, are grafted onto the state's child custody mechanisms and apply whenever an Indian child is the subject of a child custody proceeding. Under Alaska law, parents can voluntarily relinquish their parental rights either by giving their consent for someone else to adopt the child,[14] or by relinquishing the child to the custody of a placement agency.[15] When either procedure involves an Indian child, the court is required to determine which, if any, portions of the

10. *See* 25 U.S.C. § 1903(1)(i-iv) (1988) (defining the various types of child custody proceedings; voluntary terminations are included in section 1903(1)(ii)).

11. *See id.* § 1903(4) (defining Indian child).

12. *See* Comment, *The Indian Child Welfare Act of 1978: Protecting Essential Tribal Interests,* 60 U. COLO. L. REV. 131, 131-32 (1989); Barsh, *The Indian Child Welfare Act of 1978: A Critical Analysis,* 31 HASTINGS L.J. 1287, 1288-1305 (1980); *Hearings Before the U.S. Senate Select Committee on Indian Affairs on S. 1214,* 95th Cong., 1st Sess. 537 (1977) [hereinafter *Select Committee Hearings*] (Indian child welfare statistical survey showing the numbers of Indian children removed from their homes as compared to white children across a number of states).

13. 25 U.S.C. § 1902 (1988) (congressional declaration of policy underlying the Act).

14. ALASKA STAT. § 25.23.060 (Supp. 1989). Consent to adopt can be revoked under the terms of section 25.23.070 of the Alaska Statutes which allows revocation within 10 days of consent or, after 10 days and up until the formal adoption decree, by a showing that revocation is in the child's best interests. ALASKA STAT. § 25.23.070 (Supp. 1989).

15. ALASKA STAT. § 25.23.180 (Supp. 1989). In this case parents have only 10 days to withdraw consent. *Id.* (1)(b). *See generally* Note, *Abandonment v. Adoption: Terminating Parental Rights and the Need for Distinct Legal Inquiries,* 7 ALASKA L. REV. 247 (1990) (discussing standards and procedures for termination of parental rights under Alaska law).

Act are relevant and how they alter the state's procedures.[16] Furthermore, the Act grants the Indian child's tribe certain rights if the proceeding remains in the state court.[17] Where the parent voluntarily relinquishes parental rights to an Indian child, the Act's consent and certification procedures govern rather than those of state law.[18]

Catholic Social Services, Inc. v. C.A.A. begins with a mother, C.A.A.,[19] and her daughter, C.M.F.,[20] who was born in 1980. Both C.A.A. and C.M.F.'s father are Indians enrolled in recognized tribes; there is no dispute that C.M.F. is an Indian child[21] and that any proceedings relating to her custody are governed by the ICWA.[22] Throughout the first six years of C.M.F.'s life, C.A.A. had chronic difficulties with alcohol which made it difficult for her to care for C.M.F. and caused her to physically, verbally and emotionally abuse C.M.F.[23]

In March 1986, C.A.A. contacted Catholic Social Services, Inc. ("CSS"),[24] stating that she wished to relinquish her parental rights to C.M.F. and to allow her daughter to be adopted.[25] Though C.A.A. changed her mind at one point and had C.M.F. returned to her,[26] she

16. For instance, if a child is domiciled on a reservation, the tribal court of the child's tribe generally has exclusive jurisdiction over the proceeding. 25 U.S.C. § 1911(a) (1988). Other sections of the Act alter the evidentiary standards for terminating parental rights, *id.* § 1912(f); establish separate consent and withdrawal periods, *id.* § 1913(a)-(c); allow collateral attack of termination orders, *id.* § 1914; and establish placement preferences once adoption or placement becomes appropriate, *id.* § 1915.

17. *E.g.*, 25 U.S.C. § 1911(c) (1988) (granting the tribe the right to intervene in any child custody proceeding); *id.* § 1912(c) (mandating that the tribe be notified of any involuntary termination of parental rights).

18. *See id.* § 1913.

19. Hearings in Alaska proceedings dealing with adoptions and relinquishments of parental rights are confidential. ALASKA STAT. § 25.23.150 (Supp. 1989). The names of the parties are abbreviated to protect the identities of the child and the biological and adoptive parents. *Id.* § 25.23.150(c).

20. C.A.A.'s other two children, M. and J., are not involved in these proceedings.

21. *See* 25 U.S.C. § 1903(4) (1988).

22. *See id.* § 1903(1)(ii).

23. *See* Opening Brief for Appellants at 3, Catholic Social Serv., Inc. v. C.A.A., 783 P.2d 1159 (Alaska 1989) (No. S-2879) [hereinafter Opening Brief for Appellants]; Brief for Appellees at 2, Catholic Social Serv., Inc. v. C.A.A., 739 P.2d 1159 (Alaska 1989) (No. S-2879) [hereinafter Brief for Appellees]; Brief for the Guardian *ad litem* at 2, Catholic Social Serv., Inc. v. C.A.A., 783 P.2d 1159 (Alaska 1989) (No. S-2879) [hereinafter Brief for Guardian *ad litem*].

24. By its own description, CSS is a non-profit social service agency which provides a range of services to Catholics and non-Catholics alike. It has served as a private adoption agency in Alaska for a number of years. Opening Brief for Appellants at 10 n.6.

25. Brief for Guardian *ad litem* at 3.

26. *Id.*; Brief for Appellees at 3.

appeared before a probate master on June 30, 1986, and signed a formal Relinquishment of Parental Rights.[27] The master explained the nature of the proceeding, questioned C.A.A. to ensure that the proceeding was voluntary and told her that she had a ten-day period in which to rescind the relinquishment before it would become final, all of which C.A.A. understood.[28] C.A.A. also indicated whom she wished to have adopt C.M.F.[29] On July 14, 1986, the superior court entered a decree terminating C.A.A.'s parental rights.[30] C.A.A. then surrendered C.M.F. to CSS, who gave physical custody of the child to the adoptive family.

B. The Proceedings Below

On March 26, 1987, the adoptive family formally petitioned to adopt C.M.F.[31] In the intervening eight months, however, C.A.A. had stopped drinking and had contacted her tribe, the Cook Inlet Tribal Council ("CITC" or "Tribe")[32] for help in regaining custody of C.M.F. That same day, C.A.A. filed a Revocation of Relinquishment.[33] CITC moved successfully to intervene,[34] and together with

27. *See* Brief for Appellees at 4 n.5.

28. Opening Brief for Appellants at 4. As described *supra* notes 14 and 15, relinquishment is not the only method of voluntary termination. C.A.A. argues that CSS failed to explain the consent to adoption option to her, thereby invalidating her consent to relinquish C.M.F. Brief for Appellees at 4-5. This issue was not before the Alaska Supreme Court, however, as C.A.A. concedes. *Id.* at 5 n.7. While she may not have understood the scope of available options, there is nothing indicating that C.A.A. did not understand what would happen as a result of the proceeding in which she participated. This is confirmed by the probate master's certification to that effect immediately preceding the Final Termination of Parental Rights. Master's Report, No. 3AN-86-394P/A (3d Dist. Super. Ct. Nov. 12, 1987); *see* Opening Brief for Appellants at 5.

29. C.A.A. stated that she wished Mr. and Mrs. G., a Caucasian couple, to adopt C.M.F. The G.s are appellants in this case along with CSS. Whether or not C.M.F. should be placed permanently with the G.s is a separate inquiry to be decided at the adoption proceeding. C.A.A.'s preferences are to be considered where appropriate, 25 U.S.C. § 1915(c) (1988); but placement is ultimately determined according to the child's best interests within the Act's placement preferences, *id.* §§ 1915(a) and (b). At the time of the appeal to the Alaska Supreme Court, C.M.F. still resided with the G.s.

30. *In re* C.M.F., No. 3AN-86-394P/A (3d Dist. Super. Ct. June 24, 1988).

31. This complies with the six-month period between termination and adoption required by CSS. Opening Brief for Appellants at 5.

32. CITC is also an appellee, along with C.A.A.

33. Brief for Appellees at 6. It is not entirely clear what happened procedurally at this point. The termination proceeding had already been completed, but C.A.A.'s motion seems to have reopened it and stayed the adoption proceeding. Though no stay has formally been issued, no action has been taken on that matter since the conflict surrounding the termination resurfaced. Brief for the Guardian *ad litem* at 5 n.5. According to the appellees, the Tribe's participation caused the master to decide not

C.A.A. petitioned the superior court to set aside the termination decree.[35] The Tribe's memorandum in support of its motion listed ten reasons[36] why the decree should be set aside. C.A.A. filed a separate memorandum focusing both on the Tribe's right to notice of the proceedings and on whether or not she had been afforded due process.[37] The master then issued a report[38] recommending that C.A.A.'s motion be denied, stating explicitly that the Tribe had no right to receive notice of a voluntary proceeding, either on statutory or constitutional grounds.[39]

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to recommend that the superior court formally decree adoption. Brief for Appellees at 7.

34. Brief for Appellees at 7. The Tribe made its motion on May 7 and was conditionally allowed to intervene on June 29, upon submission within 30 days of objections to the termination decree.

35. The parties actually made two separate motions. C.A.A. moved to set aside the termination decree on July 16, while the Tribe moved to invalidate the termination under 25 U.S.C. § 1914 (1988) on August 24. Brief for Appellees at 7. See *infra* note 72 and accompanying text for discussion of section 1914.

36. These reasons were:

1. *The tribe was never given timely notice of the termination proceedings;*
2. The tribe was deprived of its right to intervene and of its right to request transfer [to a tribal court];
3. C.A.A. was deprived of her right to court-appointed counsel;
4. No evidence was ever presented that active efforts had been made to provide remedial services and rehabilitation programs to prevent the breakup of C.A.A.'s family;
5. The relinquishment was neither fully informed nor voluntary;
6. The "relinquishment" was in fact a consent to adoption which was revoked in a timely manner pursuant to 25 U.S.C. § 1913(c);
7. Even if the relinquishment was voluntary, it was invalid under ALASKA STAT. § 25.23.180(b) because no actual physical relinquishment occurred;
8. The final decree was void under ALASKA STAT. § 25.23.180 (b) because it was entered less than ten days after the relinquishment;
9. The termination proceedings were involuntary and thus commenced in violation of ALASKA STAT. § 47.10.010 et seq., the provisions of 25 U.S.C. § 1912 and the mandatory standards of proof set forth in 25 U.S.C. § 1912(f) and ALASKA STAT. § 47.10.080(c)(3);
10. The termination decree, whether or not based on a voluntary relinquishment, was reviewable for good cause under ALASKA STAT. § 47.10.080(f).

Opening Brief for Appellants at 6-7 (emphasis added). These assertions were shared by C.A.A. Brief for the Guardian *ad litem* at 6.

37. Opening Brief for Appellants at 7.

38. Master's Report, No. 3AN-86-394P/A (3d Dist. Super. Ct. Nov. 12, 1987). The report was issued on November 12, 1987, and was followed by an addendum on November 18.

39. *Id. See* Opening Brief for Appellants at 8; Brief for Appellees at 7; Brief for Guardian *ad litem* at 7.

The superior court heard the case and reversed, issuing an order to set aside the termination decree.[40] Although the court agreed that the Act did not specifically provide for tribal notice of voluntary proceedings, Judge Carlson found that the Tribe had the right to intervene under 25 U.S.C. § 1911(c),[41] and that:

> [t]he tribe's right to intervene as provided by the statute would be hollow and without practical effect if there was not a duty imposed upon the court to ensure that the tribe, in fact, had been notified and given the opportunity to respond as is required in an involuntary termination proceeding.[42]

Judge Carlson also held that the right of Indian parents to place their children without notifying the Tribe did not outweigh the Tribe's right to notice.[43]

C. The Supreme Court Appeal

CSS and the adoptive family appealed Judge Carlson's decision to the Alaska Supreme Court on the sole issue of whether tribes have the right to be notified of voluntary termination proceedings. After lengthy consideration, the court, *per curiam,* reversed the superior court and remanded the case for further proceedings, ostensibly to move forward with the adoption.[44] The majority concluded summarily that Congress explicitly granted tribes the right to intervene in involuntary terminations but not in voluntary ones.[45] The court held

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40. *In re* C.M.F., No. 3AN-86-394P/A (3d Dist. Super. Ct. June 24, 1988). *See* Opening Brief for Appellants at 9; Brief for Appellees at 7-8; Brief for Guardian *ad litem* at 8.

41. 25 U.S.C. § 1911(c) (1988) states, in relevant part:

> (c) State court proceedings; intervention.
>
> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

42. *In re* C.M.F., No. 3AN-86-394P/A (3d Dist. Super. Ct. June 24, 1988). *See* Brief for Guardian *ad litem* at 8-9.

43. *In re* C.M.F., No. 3AN-86-394P/A (3d Dist. Super. Ct. June 24, 1988); brief for Guardian *ad litem* at 9.

44. Catholic Social Servs., Inc. v. C.A.A., 783 P.2d 1159, 1160 (Alaska 1989).

45. *Id.* As will be discussed *infra* in text accompanying note 65, the basis for the Alaska Supreme Court's conclusion that this right does not exist is unclear, particularly in light of *In re* J.R.S., 690 P.2d 10 (Alaska 1984). In *J.R.S.,* the court allowed a tribe to intervene in an adoption proceeding absent a specific authorization in the Act. "If Indian tribes are to protect the values Congress recognized when it enacted the Indian Child Welfare Act, tribes must be allowed to participate in hearings at which those values are significantly impaired." *Id.* at 15. This right was granted even though the court held that section 1911(c) did not apply to adoption proceedings at all, but does apply to terminations of parental rights. *Id.* The court's application of section 1911(c) to some child custody proceedings but not to others is puzzling in its own right, given the language of the section. *See supra* note 41. Nevertheless, the

that Congress did not extend the tribe's rights, as created by the ICWA, to include participation in voluntary proceedings, and that Congress' failure to do so is not fundamentally unfair.[46] The court found the Act's silence on this issue dispositive: "Congress explicitly granted intervention rights to tribes in involuntary termination proceedings, but did not do so in voluntary termination proceedings. . . . The legislative history of the Act demonstrates that this was a considered choice by Congress."[47] Based on this lack of evidence, as bolstered by similar language in the Bureau of Indian Affairs' Guidelines for State Courts,[48] the majority held that tribes are not entitled to any notice of voluntary termination proceedings.

Justice Rabinowitz wrote a vigorous, albeit solitary, dissent, based on his view that 25 U.S.C. § 1911(c) gives tribes an absolute right to intervene in all child custody proceedings,[49] regardless of the parents' consent. He argued that the majority decision, by failing to recognize this right, permits parents to circumvent the Tribe's "equal interest in the Indian child."[50] From this right to intervene, it follows

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Catholic Social Services court's reading of § 1911(c), and the intervention right in general, runs directly counter to *J.R.S.*, and the court neither cites nor reconciles it.

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

47. *Id.*

48. Department of the Interior, Bureau of Indian Affairs, Guidelines for State Courts, 44 Fed. Reg. 67584, 67586 (1979). These guidelines, which represent the Department's interpretations of the Act and have no binding legislative authority, Batterton v. Francis, 432 U.S. 416, 424 (1977), state that "[t]he Act mandates a tribal right of notice and intervention in involuntary proceedings but not voluntary ones. *Cf.* 25 U.S.C. § 1912 with 25 U.S.C. § 1913." 44 Fed. Reg. at 67586.

49. *Catholic Social Servs.*, 783 P.2d at 1162 (Rabinowitz, J., dissenting). See *supra* note 41 for the text of section 1911(c).

50. *Id.* (citing Mississippi Band of Choctaw Indians v. Holyfield, — U.S. —, 109 S. Ct. 1597 (1989)).

At the time of publication of this note, the Tribe planned to file a petition for *certiorari* to the United States Supreme Court. Catholic Social Servs., Inc. v. C.A.A., 783 P.2d 1159 (Alaska 1989) (per curiam), *petition for cert. filed* (Mar. 29, 1989). The petition argues that the *Catholic Social Services* decision is in conflict with the *Mississippi Choctaw* decision. In *Mississippi Choctaw,* an Indian woman, ready to give birth to twins, purposely went to a hospital 200 miles from her home on the reservation. The woman was attempting to avoid having her domicile on the reservation attach to the children, and thus prevent the tribal court from asserting jurisdiction over the placement under section 1911(a). — U.S. at —, 109 S. Ct. at 1602-03. The *Mississippi Choctaw* majority held explicitly that the ICWA "was not meant to be defeated by the actions of individual members of the tribe," *id.* at —, 109 S. Ct. at 1608, and that the Act's provisions must be seen "as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves," *id.* at —, 109 S. Ct. at 1609.

By withholding notice to the tribes, parents and adoptive families may be able to prevent the tribe from intervening, inter alia, under section 1911(c), or from asserting the placement preferences under section 1915, a situation that the Tribe argues is directly analogous to the actions of the parents in *Mississippi Choctaw.*

that "a tribal right to notice is necessarily implicit in the tribe's fundamental and unqualified intervention right under section 1911(c),"[51] and that "the powers given tribes by virtue of sections 1911 and 1915 prove illusory unless the tribe is given notice of a voluntary termination proceeding."[52]

D. A Closer Look at the Case and the Interests at Stake

This case presented the Alaska Supreme Court with a difficult task. The lack of legislative guidance combined with the unique interests of the Tribe, the child and the parents left the court with an awkward balancing act to perform.

The ICWA is silent as to whether tribes have a right to be notified of voluntary termination proceedings. Notice is explicitly required when parental rights to an Indian child are involuntarily terminated, and the Act details the procedure for providing notice in those situations.[53] By omitting any mention of tribal notice of voluntary relinquishments from the language of the statute, Congress created confusion regarding how far the express right to notification of involuntary proceedings extends. Consequently, the court was forced to balance the privacy interests of the relinquishing parent against the concurrent interest in tribal survival and integrity.

The legislative history of the Act, another source of authority for resolving this confusion, is similarly unclear on what notice the tribes are entitled to receive. As the *Catholic Social Services* court noted, Congress heard testimony on both sides of the notice issue.[54] This testimony dealt primarily with involuntary removals rather than voluntary relinquishments, though periodic references to relinquishment-type fact patterns suggest that the removals and relinquishments were

51. *Catholic Social Servs.*, 783 P.2d at 1662-63.

52. *Id.* at 1663.

53. 25 U.S.C. § 1912(a) (1988) (*see infra* note 78 for the text of § 1912(a)).

54. 783 P.2d at 1160. *See Indian Child Welfare Act of 1978: Hearings on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the House Comm. on Interior and Insular Affairs,* 95th Cong., 2d Sess. 62, 191-92 [hereinafter *House Hearings*] (testimony of Chief Calvin Isaac supporting notice to tribes when Indian children are removed from homes); *id.* at 87-90 (testimony of Sister Mary Clare claiming that notice to tribes deprived parents of choices of adoptive homes).

considered to be the same.[55] The Alaska Supreme Court read this ambiguity to mean that Congress intended that tribes not be notified.[56] In light of the basic purpose of the Act,[57] however, it is more plausible to interpret the Act as containing a right of notice in all termination proceedings. On balance, the legislative history provides no direct guidance on the issue of tribal notice concerning voluntary termination proceedings, leaving the court to interpret the equivocal testimony on its own.

Whether tribes have a right to notice of voluntary termination proceedings is an issue of first impression nationwide. There are numerous cases upholding a tribe's right to be notified of involuntary terminations,[58] but none that have addressed the distinction, if any, between voluntary and involuntary terminations. Therefore, there was no other judicial analysis of the relevant issues available to guide the Alaska Supreme Court as it broke new doctrinal ground.

This issue, like others relating to children, affects the lives of people beyond the actual parties to the litigation. Though this conflict exists ostensibly between two sets of parents, an agency and an Indian tribe, it is in reality a case about where a child should live and who his or her parents should be. Consequently, and particularly since the

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55. *House Hearings, supra* note 54. The testimony of Sister Mary Clare discusses relinquishments exclusively, not removals. Similarly, H.R. REP. NO. 1386, 95th Cong., 2d Sess. 11 (1978), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 7530, 7533, discusses the due process concerns both in terms of removals and relinquishments:

> Many cases do not go through an adjudicatory process at all, since the voluntary waiver of parental rights is a device widely employed by social workers to gain custody of children. Because of the availability of the waivers . . . they are exposed to the sometimes coercive arguments of welfare departments.

56. 783 P.2d at 1160.

57. Section 1902 of Title 25 of the United States Code enunciates the congressional policy underlying the Act:

> 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.

25 U.S.C. § 1902 (1988) (emphasis added).

58. *In re* L.A.M., 727 P.2d 1057, 1060 (Alaska 1986); *In re* H.D., 11 Kan. App. 2d 531, 532, 729 P.2d 1234, 1237-38 (Ct. App. 1986); *In re* Adoption of R.R.R., 763 P.2d 94, 101 (Okla. 1988); *In re* N.A.H., 418 N.W.2d 310, 311 (S.D. 1988); *but see In re* B.J.E., 422 N.W.2d 597, 600 (S.D. 1988) (holding that the failure to send tribe a copy of amended petition naming child did not violate the ICWA where the child was mentioned in several other documents).

best interests of Indian children is a stated policy underlying the Act,[59] the court must factor the needs and best interests of this child into its construction of the statute. Where there are ambiguities, they should be resolved in favor of those whom this statute seeks to protect, namely Indian children and their tribes.[60]

Even in the context of these complications, the Alaska Supreme Court's decision is difficult to understand. Were section 1911(c), the "right to intervene" provision, missing from the Act,[61] the court's reading of the rest of the statute would make more sense. The outcome would still frustrate the purpose of the Act, but at least the court could legitimately decide that it lacked the basis for inferring any right to notice. It is hard to imagine how Congress could have stated a comprehensive right to intervene any more clearly, however; and once that right is recognized the court's decision is no longer logical. In order to protect the best interests of both Indian children and Indian tribes, Congress decided that the tribes must be able to intervene in child custody proceedings involving their members.[62] By failing to consider the needs of those most directly affected by the application of the ICWA, the Alaska Supreme Court's decision in *Catholic Social Services* is detrimental to both the tribes and the children.

III. HOW THE *CATHOLIC SOCIAL SERVICES* DECISION HURTS THE TRIBES

A stated purpose of the ICWA is to "promote the stability and security of Indian tribes and families,"[63] yet the *Catholic Social Services* decision makes it more difficult for tribes to protect their interest in the welfare and cultural heritage of children being voluntarily relinquished. In failing to recognize the tribes' right to intervene in voluntary termination proceedings, the court removed any special consideration created by the Act and relegated the tribes to the same status as any other party seeking to intervene. In most cases, the

59. 25 U.S.C. § 1902 (1988); *see supra* note 57 for the text of § 1902.

60. This proposition creates another delicate balancing act for the courts: What disposition will serve the best interests of both child and tribe in a given case? When the interests of the tribe and child conflict, the balance should be struck in favor of the child. The Act is, at bottom, a regulation of child custody proceedings, which are designed to protect the child's best interests. By factoring the tribes' interests into relevant child custody proceedings, the Act enforces a general policy against removal of children from the tribal environment. Where it can be shown that it would be detrimental to the child in a given case for the court to act in the tribe's interest, the court should err on the side of protecting the child.

61. *See supra* note 41.

62. H.R. REP. NO. 1386, 95th Cong., 2d Sess. 21 (1978), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 7530, 7544.

63. 25 U.S.C. § 1902 (1988). *See also supra* note 57.

tribes will have trouble intervening in a timely manner and will be forced to resort to collateral attacks on the termination decree in order to be heard. Besides contravening congressional intent to allow the tribes greater participation, this decision will inevitably lengthen and complicate the resolution of voluntary relinquishment situations.

As potential intervenors in a civil proceeding, Indian tribes are in a uniquely difficult position. On one hand, there is no question that tribes have a sufficient interest in a relinquishment proceeding to justify intervention as of right or by discretion. The plain language of section 1911(c) grants tribes the "right to intervene at any point in [any State court] proceeding . . . for the . . . termination of parental rights to an Indian child. . . ."[64] The Alaska Supreme Court has previously distinguished adoption proceedings from termination proceedings in this context: "The Act . . . distinguishes between 'adoptive placement' and 'termination of parental rights;' only in the latter case does section 1911(c) support intervention."[65]

Even if section 1911(c) is read as not granting an absolute right to intervene, as the Alaska Supreme Court interpreted that statute in *Catholic Social Services,* tribes have a sufficient interest in their member children to warrant intervention as of right in a termination proceeding.[66] The tribe's interest in survival and stability is tied directly to the welfare of its member children, and there is no other party that can protect this interest in a termination proceeding; indeed, some parties will affirmatively seek to avoid tribal participation in child custody

64. 25 U.S.C. § 1911(c) (1988).

65. *In re* J.R.S., 690 P.2d 10, 15 (Alaska 1984).

66. *See, e.g.,* ALASKA R. CIV. P. 24(a); FED. R. CIV. P. 24(a). The Alaska Rule states:

> Upon timely application anyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The Federal Rule is identical, but adds that a party shall be permitted to intervene "when a statute of the United States confers an unconditional right to intervene." FED. R. CIV. P. 24(a)(1). The statement of policy accompanying the ICWA is significant evidence that tribes were intended by Congress to participate in termination proceedings. *See* 25 U.S.C. § 1902 (1988) (*See supra* note 57 for text of section 1902.).

proceedings.[67] Without some means of ensuring that tribes can intervene, their ability to protect their interests as Congress intended will be significantly impaired.[68]

On the other hand, tribes have no way of knowing that a voluntary termination is under way unless they are notified or find out about it independently.[69] Whereas most parties whose interests intersect closely enough with the litigants' will be in a position to know when their rights will be affected by the proceeding, the tribes' interests are abstract and intangible. No money or property is lost when an Indian child is removed, voluntarily or not, from his or her native environment: the child's cultural ties and the tribe's human resources are relinquished instead. Nothing inherent in the proceeding will alert the tribe to the fact that its interests are involved, and the confidential nature of child custody proceedings in Alaska prevents a tribe from discovering that an Indian parent is a party through any publicly available means.[70] Without notification, a tribe runs a substantial risk of being unable to intervene successfully in a termination proceeding.[71]

Consequently, tribes may have to resort to collateral attacks on termination decrees in order to be heard. One such possibility is an action under 25 U.S.C. § 1914, which allows tribes to move to invalidate decrees that violate the Act;[72] this is in fact how the *Catholic*

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67. *See* Brief for the Guardian *ad litem* at 4 (C.A.A. sought to avoid tribal participation in placing C.M.F. for adoption). *See also* Mississippi Band of Choctaw Indians v. Holyfield, — U.S. —, —, 109 S. Ct. 1597, 1602-03 (1989) (mother gave birth to twins 200 miles from reservation to avoid Indian reservation domicile attaching to children).

68. *See In re* J.R.S., 690 P.2d at 15 ("If Indian tribes are to protect the values Congress recognized when it enacted the Indian Child Welfare Act, tribes must be allowed to participate in hearings at which those values are significantly implicated.").

69. In fact, the only reason that CITC knew of this termination proceeding was that C.A.A. contacted it herself when she sought to reverse the relinquishment. Brief for Appellees at 6; *see supra* notes 32-33 and accompanying text.

70. *See supra* note 19.

71. Whether or not a motion is timely is not easily determined:

> The timeliness of a motion to intervene does not depend solely on "the amount of time which has elapsed since the litigation began [but also on] . . . the related circumstances, including the purpose for which intervention is sought . . . and the improbability of prejudice to those already parties in the case."

National Wildlife Fed'n v. Burford, 878 F.2d 422, 433 (D.C. Cir. 1989) (quoting Hodgson v. United Mine Workers, 473 F.2d 118, 129 (D.C. Cir. 1972)). It is difficult to determine the likelihood that a tribe's motion would be granted in a given case. Even if it is granted, however, intervening late in the case may limit the tribe's effectiveness.

72. Section 1914 states:

> Any Indian child who is the subject of any action for . . . termination of parental rights under State law, any parent or Indian custodian from whose custody the child was removed, and the Indian child's tribe may petition any

Social Services case came about.[73] Whether or not the inability to intervene constitutes a violation of the Act is unclear in light of the court's treatment of the right to intervene in *Catholic Social Services.* There are numerous potential violations that can be alleged in a given case, as C.A.A. and CITC did here,[74] but the success or failure of such an action would be highly unpredictable.[75]

Another alternative is to mount a due process challenge, alleging that the failure to recognize a right to notice unreasonably prevents the tribe from adequately protecting its interests as recognized by Congress. While the *Catholic Social Services* majority maintains that no due process questions arise from its conclusion, its assertion is premised on its claim that "[t]he provisions of the Act which give tribes the right to notice of certain proceedings and not to others, define the scope of tribal rights."[76] This analysis reads the Act backwards: a stated right to notice does not define a tribe's rights, but is the procedure through which the tribe can protect its rights under the Act. Congress clearly sought to allow tribes a more active role in child custody proceedings involving Indian children, as indicated in 25 U.S.C. §§ 1902 and 1911.[77] The notice provision in 25 U.S.C. § 1912(a)[78] serves only to notify parents, Indian custodians and tribes of their "right of intervention,"[79] a right granted elsewhere in the Act (for example, in section 1911(c)). Therefore, interpretation of the procedures incorporated within the Act to protect these rights should reflect this intent, and determination of what constitutes due process should follow accordingly.

These potential avenues of attack are only speculative. Short of reversal by the United States Supreme Court,[80] or the Alaska Legislature,[81] Indian tribes in Alaska will have great difficulty participating in

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court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

25 U.S.C. § 1914 (1988).

73. *See supra* note 35.

74. *See supra* note 36.

75. The tribes also have to be careful to file their section 1914 action within the one-year statute of limitations for actions to vacate an adoption decree. ALASKA STAT. § 25.23.140 (Supp. 1989). *In re* T.N.F., 781 P.2d 973, 981 (Alaska 1989).

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

77. *See supra* notes 57, 41, respectively.

78. 25 U.S.C. § 1912(a) (1988) (See *infra* note 81 for text of section 1912(a)).

79. 25 U.S.C. § 1912(a) (1988).

80. *See supra* note 50.

81. At the time of publication of this note, there is a bill before the Alaska Legislature that would effectively overrule *Catholic Social Services.* H.R. 414, 16th Leg., 2d Sess. (1990). This bill would, inter alia, amend ALASKA STAT. § 25.23.060 (1988) by adding the following:

proceedings voluntarily terminating the parental rights to Indian children after this decision. Neither late intervention nor collateral attack will effectively allow the tribe to protect its own interests or those of the Indian child. At the same time, collateral attacks needlessly add to the cost and length of litigation. This is an excessive price to pay to protect the privacy of the relinquishing parent, especially considering that the tribe's right to participate in the proceeding is intended regardless of the parents' desire to exclude it. Even were the statute construed to require the same procedures for notifying tribes of voluntary relinquishments as for involuntary terminations,[82] the administrative burden on the court and the parties would be minimal. More importantly, though, recognizing a right to notice would ultimately reduce litigation by rendering unnecessary the collateral challenges a tribe might mount to ensure participation.

IV. HOW THE *CATHOLIC SOCIAL SERVICES* DECISION HURTS THE CHILD

Lost in all of this analysis is any consideration of what is best for the child, C.M.F. Courts traditionally determine the child's best interests in the last stages of a child placement proceeding.[83] It is usually a

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(d) In the case of an Indian child the representative of the person or agency assuming custody of the child shall send notice of the execution of the consent to adoption to the Indian child's tribe within 10 days after the consent is executed.

In addition, it would amend ALASKA STAT. § 25.23.100(a) (1988) to require notice of hearings on petitions to adopt, and ALASKA STAT. § 25.23.180(c) (1988) to provide that tribes be notified within 10 days of the agency's taking custody and that no termination of parental rights could take place earlier than 10 days after notice to the tribe. This bill would also amend ALASKA R. CT., Adoption Rule 10(e), again to require that notice of adoption or relinquishment proceedings involving Indian children be given to the tribe at the time of petition.

82. Section 1912(a) describes these procedures as follows:

> In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the . . . termination of parental rights to an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary [of the Interior] in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No . . . termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided,* That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

25 U.S.C. § 1912(a) (1988).

83. *See* ALASKA STAT. § 25.23.120(c) (Supp. 1989) (court must determine that adoption is in the best interest of person to be adopted before adoption order can

finding of fact made by a trial court that determines the proper outcome for that child at that point in his or her life. In a case such as *Catholic Social Services,* where an appellate court is in the position of interpreting a statute intended to benefit children, a determination of the best interests of the collective "child," in this case Indian children in Alaska, is no less relevant than when the trial court makes the determination of the best interest of an individual child in a particular case. Since protecting the best interests of children is an avowed aim of the Act,[84] any attempt to interpret the rights created under the ICWA should include serious consideration of the impact that the interpretation will have on the affected children. In deciding that tribes are not entitled to notice of voluntary termination proceedings, the Alaska Supreme Court overlooked the needs of the children being voluntarily relinquished on two levels: first, by hindering tribal participation and depriving children of their cultural heritage, and second, by subjecting children to additional litigation and unnecessarily delaying the permanent resolution of placement decisions.

A. Cultural Deprivation

The primary factor motivating the adoption of the ICWA was the discovery in the mid-1970s that grossly inordinate numbers of Indian children were being removed from their tribal homes and being placed with Caucasian families.[85] In order to prevent the cultural biases within the state's child protection systems from continuing to pillage the Indian community, Congress created a series of policies and procedures that became the Act.[86] While the bulk of the testimony before Congress revolved around involuntary removals of children from their homes and tribes,[87] the dangers facing families as a result of unscrupulously obtained "consent" to relinquish are no less real.[88] C.A.A. claims that CSS failed to explain the full range of relinquishment options to her, causing her to consent to relinquish rather than to consent for adoption, as a means of getting her to surrender C.M.F. to the agency as quickly as possible.[89] Whether or not CSS actually had such motives is not important; the potential for abuse and deception exists with voluntary terminations as well as with involuntary terminations.

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issue); ALASKA STAT. § 47.10.082 (1984) (court shall consider best interests of child in making involuntary termination order).

84. *See supra* note 57.

85. *See* Comment, *supra* note 12, at 131-32; Barsh, *supra* note 12, at 1288-1305; *Select Committee Hearings, supra* note 12.

86. *See Select Committee Hearings, supra* note 12.

87. *Id.* at 537.

88. *See supra* note 55.

89. Brief for Appellees at 4-5.

Children being voluntarily relinquished have as much at stake as those being removed from their homes by the state and are equally in need of protection. When wrongly relinquished from their homes and tribes, they too are deprived of the opportunity to be raised in their native culture and often suffer serious psychological and emotional setbacks.[90] It is impossible to infer from the purpose and policy of the Act that Congress contemplated different standards for protecting the cultural heritage of Indian children being relinquished voluntarily than for those being removed involuntarily. The explicit notice requirement for involuntary terminations[91] is more likely a means of protecting the rights of the parents, mirroring the normal procedure for instituting involuntary termination proceedings,[92] than a measure to ensure full consideration of the child's needs. If the focus of this inquiry is properly reoriented toward the best interests of the children, the need for any distinction between the two types of proceedings disappears.

The *Catholic Social Services* decision makes it more difficult for tribes to make tribal counseling services and other resources available to Indian children and families at the stage of the termination process when these resources might be most effective.[93] C.A.A.'s contact with her tribe did not occur until after her rights to C.M.F. had been formally terminated, past the point where the tribe could have helped.[94] She argues in her brief that had tribal support services been offered at the time of the initial proceeding, with an eye specifically toward keeping her Indian family together, her family might not have been separated.[95] Though the argument is speculative, and, even if true, might not reflect C.M.F.'s best interests, it shows how the *Catholic Social Services* decision runs counter to the Act's general purposes by not allowing tribes the opportunity to help their members at the outset. If tribes participate in relinquishment proceedings from the beginning,

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90. Barsh, *supra* note 12, at 1290-92.

91. 25 U.S.C. § 1912(a) (1988); *see supra* note 81.

92. ALASKA STAT. § 47.10.030(a),(b) (1984) (providing notice of involuntary termination proceedings to parents, minors and guardians interested in the action). *See also* RLR v. State, 487 P.2d 27, 40 (Alaska 1971) (citing *In re* Gault, 387 U.S. 1, 33 (1967)) ("The child and his parents must receive notice which would be deemed adequate in a civil or criminal proceeding.").

93. This contravenes the clear language of section 1912(d):

> Any party seeking to effect a . . . 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.

25 U.S.C. § 1912(d) (1988).

94. Brief for Appellees at 6.

95. *Id.* at n.10.

their resources are available to the court and can be used in the disposition of the case. Without notification, however, tribes' ability to participate in the proceeding at that stage is significantly impaired.

Tribal notification has two important benefits. First, it presents a wider range of alternatives for the parents and child involved. In this case, a tribal program might have been more successful in helping C.A.A. to control her drinking and abusive behavior and may have been able to prevent the family's problems from reaching the point where relinquishment becomes an issue. When it is in the best interests of the child, a court might prefer to pursue avenues available through the tribe rather than defaulting to a removal, voluntary or otherwise. Second, tribal participation increases the likelihood that the child will remain in an Indian environment, which not only protects the tribe's survival and stability but minimizes the psychological trauma that often befalls Indian children who are removed from their culture.[96] Since the language of the Act clearly supports a tribal right of intervention, the Alaska Supreme Court should have interpreted the Act to protect these important interests of the child.

B. Excessive Litigation

Another aspect of the child's best interest that should have been considered by the Alaska Supreme Court is the effect of protracted litigation on the child's well-being. The present case was first brought into court in June 1986, and this appeal was decided in December 1989 with directions to remand for further proceedings.[97] Fully three-and-a-half years later, there is no resolution to the termination proceeding, let alone the adoption. This is far too long to hold a child's placement in limbo.

A child's sense of time is very different from an adult's.[98] The time necessary to resolve placement disputes judicially seems much

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96. *See* Barsh, *supra* note 12, at 1291. A report by the American Academy of Child Psychiatry cited within the text states:

> [t]here is much clinical evidence to suggest that these Native American children placed in off-reservation non-Indian homes are at risk in their later development. Often enough they are cared for by devoted and well-intentioned foster or adoptive parents. Nonetheless, particularly in adolescence, they are subject to ethnic confusion and a pervasive sense of abandonment.

Id.

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

98. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 40-45 (1979). The effects, both in terms of severity and in the type of problems that may arise, will depend on the child's age as well as on other factors. In a model child placement statute, the authors propose the following:

> Trials and appeals shall be conducted as rapidly as is consistent with responsible decisionmaking. The court shall establish a timetable for hearing, decision, and review on appeal which, in accord with the specific child's sense of

longer to children than it does to adults. Delays in determining the status of a child's relationships, whether with biological or adoptive parents, can be psychologically harmful and can complicate adjustment to the child's new environment. It is therefore vital for children that placement decisions be made as quickly and permanently as possible:

> The child's-sense-of-time . . . require[s] decisionmakers to act with "all deliberate speed" to maximize each child's opportunity either to restore stability to an existing relationship or to facilitate the establishment of new relationships to "replace" old ones. Procedural and substantive decisions should never exceed the time that the child-to-be-placed can endure loss and uncertainty.
>
> The courts, social agencies, and all of the adults concerned with child placement must greatly reduce the time they take for decision. . . . Whatever the cause of the time-taking, the costs as well as the benefits of the delay to the child must be weighed. . . . [T]o avoid irreparable psychological injury, placement, whenever in dispute, must be treated as the emergency that it is to the child.[99]

Instead, the *Catholic Social Services* decision will only prolong the process of resolving the child's placement. Whether or not section 1911(c) grants an absolute right to intervene, tribes that are not notified of voluntary termination proceedings can move to intervene, as can all potentially interested parties,[100] and this will add new issues to the trial. If they are not allowed to intervene, tribes can, as CITC did here, move to invalidate the termination decree under section 1914.[101] In effect, this decision may have foreclosed tribes from participating in voluntary termination proceedings altogether; failing that, it will contribute to the possibility that any such proceeding in the future could be subject to the same collateral attacks, protracted appeals and chaotic uncertainty as in *Catholic Social Services.* In light of the Act's purpose to protect Indian children from unnecessary harm stemming from cultural biases in the child removal and adoption procedures, the court should have looked more carefully at the impact on Indian children when interpreting the ICWA. When considered alongside the minimal burden created by providing notice of voluntary relinquishment proceedings to the tribe, the *Catholic Social Services* decision is difficult to understand.

> time, shall maximize the chances of all interested parties to have their substantive claims heard while still viable, and shall minimize the disruption of parent-child relationships.

Id. at 101.

99. *Id.* at 42-43. The authors add the following note at the same point in their text: "Three months may not be a long time for an adult decisionmaker. For a young child it may be forever." *Id.*

100. *See supra* note 66.

101. *See supra* note 72.

V. CONCLUSION

Catholic Social Services, Inc. v. C.A.A. presented the Alaska Supreme Court with a situation that had never before been litigated. This decision is not likely to affect the lives of many children directly and by itself does not represent a severe breakdown in the protections the Act affords children and tribes in the majority of cases. It does, however, demonstrate how courts focus on the wrong concerns when deciding issues affecting children. As much as this case purports to be a battle between the rights of the appellants and the appellees, it is in reality a proceeding to determine who will be C.M.F.'s parents. The Indian Child Welfare Act is designed to protect the child and her tribe to the extent stated by Congress, and it is that goal that should frame any interpretation of the Act's language.

It is difficult to understand what motivated the Alaska Supreme Court to summarily refuse tribes notice of termination proceedings. Without addressing section 1911(c), the court dismissed the tribe's right to intervene, and consequently reduced the tribe's ability to participate to that of any other citizen. Though it did not make explicit provision for tribal notice of voluntary termination proceedings, there is no reading of the Act consistent with its purposes that achieves the result reached by the majority in *Catholic Social Services.* This overly narrow reading of the Act's language could not have been what Congress intended, and ironically, makes more vulnerable the parties that the Act explicitly intends to protect.

Douglas R. Nazarian