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The Indian Child Welfare Act of 1978: The Massachusetts Dilemma

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THE INDIAN CHILD WELFARE ACT OF 1978: THE MASSACHUSETTS DILEMMA

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INTRODUCTION

The Indian Child Welfare Act of 1978¹ (the "Act"), enacted November 8, 1978 and effective May 6, 1979, creates a series of special procedures in child custody proceedings for children who are members of, or eligible for membership in, a federally recognized Indian tribe or nation. The state courts and state child welfare agency must follow these procedures. Through the Act, Congress sought to reduce the high numbers of Indian children removed from their families. This paper will argue that, in the context of national Indian child welfare practices, the Act falls short of its goal. The Act leaves unprotected many Massachusetts Indians who are either not members of, or who are ineligible for membership in, federally recognized tribes. Without special protection similar to that afforded federally recognized tribes, non-federally recognized Indians remain vulnerable to discriminatory state child welfare practices.

Part I of this article will explain the nature of the problem and the purpose behind the Act. Part II will explore briefly the key provisions of the Act as it affects federally recognized Indians. Part III will discuss problems with the Act when it is applied to non-federally recognized Indians residing in Massachusetts. State efforts to solve the problem will also be discussed. This article will argue that the efforts by the legislature and the Department of Social Services ["D.S.S."] fall short of what is required to protect Native Americans living in Massachusetts who are not members of tribes recognized by the Secretary of the Interior. Part IV will examine a bill that seeks to fill the void created by the Federal Act. The proposed legislation recognizes not only the child's right to physical, mental, and moral health,² but also his or her right to cultural heritage.³ It is the author's position that this bill is an essential step toward solving the crisis that peculiarly affects Native American families. While this article is concerned primarily with the law of Massachusetts, it is equally applicable to non-federally recognized tribes in other states.

I. THE PROBLEM FACED BY AMERICAN INDIAN CHILDREN

With the enactment of the Indian Child Welfare Act,⁴ the federal government affirmatively responded to the plea of native Americans that their way of life be allowed to

¹ Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (Supp. 1979).

² MASS. GEN. LAWS ANN. ch. 210, § 5B (West 1982).

³ MASS. GEN. LAWS ANN. ch. 119A § 1 (Proposed official draft) (1980) [hereinafter cited as Proposed Legislation].

⁴ 25 U.S.C. §§ 1901-1963 (Supp. 1979).

continue.⁵ Congress found that the wholesale separation of Indian children from their families was perhaps the most tragic aspect of native American life.⁶ Surveys conducted in states with large Indian populations in 1969 and 1974 indicated that approximately twenty-five to thirty-five percent of all Indian children were separated from their families and placed in foster homes, adoptive homes, or institutions.⁷ In Massachusetts alone, where the total Indian population is 7,225, approximately 575 to 804 children under fourteen years of age are removed from their families.⁸

Prior to the oversight hearings in the United States Senate during 1974, federal and state government actions seemed to indicate that the children were better off if they were removed from their tribal environment, where conditions were assumed to be substandard.⁹ The decision to take Indian children from their natural homes has been frequently made without due process of law. For instance, it was rare in the past for either Indian children or their parents to be represented by counsel or to present testimony of expert witnesses.¹⁰ As the voluntary waiver of parental rights was a device widely employed by social workers to gain custody of children, many cases were never adjudicated.¹¹ Since Indian parents often depend on welfare payments, the welfare department has a great deal of leverage in coercing the parents to sign the readily available waivers.

⁵ Blanchard & Barsh, *What is Best for Tribal Children? A Response to Fischler* Soc. WORK 350, 351 (1980).

⁶ *Problems that American Indian Families Face in Raising Their Children and How These Problems Are Affected by Federal Action or Inaction: Hearings Before the Sub-Committee on Indian Affairs of the Senate Committee on Indian and Insular Affairs*, 93rd Cong., 2nd Sess. 9 (1979), reprinted in U.S. CODE CONG. AND AD. NEWS 7530, 7531 (Statement of William Byler, Executive Director of the Association on American Indian Affairs) (1978). [hereinafter cited as 1974 Hearings].

⁷ *Id.*

⁸ Figures derived as follows: [t]hrough a preliminary survey of 87 Boston Indian Community members, the project identified 92 incidences of Indian children placed outside the home. A telephone survey of public and private foster care and adoption agencies initiated by this project, on the other hand, identified only 40 such placements. Although neither statistic represents the frequency of the problem, we suspect that the discrepancy between the preliminary survey and the telephone survey is that ethnic background of many of the children was not accurately noted. For instance, Boston Indian Council's Title IV A program identified numerous incidences where the school department misclassified Indian children as Black, Hispanic, Oriental, or White and often times classifying children of the same family as members of different ethnic groups. Therefore, in order to calculate an estimate of the numbers of Indian children placed outside the home we took statistics from various sources: one, the 1975 census; two, the Urban Indian Specific Health Plan statistics on Indian children under the age of 14; and three, the Association of American Indian Affairs National Indian Child Welfare Study, which revealed a 25-35% removal rate of Indian children nation wide. $7,225$ (total population) \times 31.8% (under 14 years of age) \times 25-35% (removal rate) equals 575-804. Indian Family Support Project at 8. (1979-80) (Study prepared by Boston Indian Council).

⁹ 1974 Hearings, *supra* note 6, at 2. Up to now, public and private welfare agencies seem to have operated on the premise that most Indian children would really be better off growing up non-Indian. The result of such policies has been unchecked, abusive child removal practices, the lack of viable, practical rehabilitation and prevention programs for Indian families facing severe problems, and a practice of ignoring the all-important demands of Indian tribes to have a say in how their children and families are dealt with. Officials would seemingly rather place Indian children in non-Indian settings where their Indian culture, their Indian traditions, and in general, their entire Indian way of life is smothered. H.R. REP. NO. 1386 95th Cong. 2nd Sess. pg. 11, reprinted in U.S. CODE CONG. AND AD. NEWS 7530, 7533 (1978) [hereinafter cited as H.R. REP. NO. 1386].

¹⁰ In the event that expert witnesses are called, they are often non-Indians whose expertise derives solely from their study and examination of Indian families.

¹¹ H.R. REP. NO. 1386, *supra* note 9, at 7533.

The Committee on Interior and Insular Affairs noted a growing crisis with respect to the breakup of Indian families and the placement of Indian children at an alarming rate in non-Indian homes.¹² The failure of state officials and agencies to consider 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 has contributed to this problem.¹³ The Committee found it necessary to establish minimum federal standards and procedural safeguards in state Indian child custody proceedings to protect the rights of the child, the Indian family, and the Indian tribe.

II. THE INDIAN CHILD WELFARE ACT OF 1978

The Act begins with sections citing the Congressional findings that led to the enactment of the legislation. Congress recognized its plenary power over Indian affairs and further recognized its responsibility for the protection and preservation of Indian tribes and their resources.¹⁴ Congress determined that no resource was more vital to the continued existence and integrity of Indian tribes than their children,¹⁵ and that an alarmingly high percentage of Indian families were broken up by the often unwarranted removal of their children by administrative and judicial bodies. These groups had frequently failed to recognize the essential tribal relationships of Indian people and the cultural and social standards prevailing in Indian communities and families.¹⁶

Pursuant to these findings, Congress declared that federal policy will:

[p]rotect the best interests of Indian children and 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 provid[e] for assistance to Indian tribes in the operation of child and family service.¹⁷

The next section defines a number of terms used within the Act.¹⁸ Within the scope of this article the definition of "Indian" as used in the Act is of critical significance. The Act defines "Indian" as "any person who is a member of an Indian tribe, or who is an Alaskan Native and a member of a Regional Corporation"¹⁹

¹² *Id.*

¹³ *Id.*

¹⁴ § 1901. Congressional findings:

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds:

- (1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power . . . To regulate Commerce . . . with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;
- (2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources[.]

25 U.S.C. § 1901 (1978).

¹⁵ 25 U.S.C. § 1901 (3).

¹⁶ 25 U.S.C. § 1901 (4) and (5) (1978).

¹⁷ 1974 Hearings, *supra* note 9, at 8, *reprinted in* U.S. CODE CONG. AND AD. NEWS at 7350; *see also* 25 U.S.C. § 1902 (1978).

¹⁸ 25 U.S.C. § 1903 (1978).

¹⁹ 25 U.S.C. § 1903 (3) (1978).

The Act further defines "Indian tribe" as "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for services provided to Indians by the Secretary because of their status as Indians including any Alaskan Native village."²⁰ The narrow definition of Indian used in the Act fails to cover the thousands of Indian people who do not fall within the parameters defined by the Secretary of the Interior.²¹

The remainder of the Act is divided into four titles. Title I²² is the most important subchapter, as it establishes the substance and procedures to which the states must conform in child custody proceedings²³ for Indian children from federally recognized tribes. It provides generally that the Indian tribes shall have exclusive jurisdiction over Indian child custody proceedings where the child is domiciled or resides on the reservation.²⁴ It further provides that unless there is a contrary compelling reason, the state courts shall transfer their jurisdiction to the tribal court for child custody cases relating to foster care placement or termination of parental rights of a nondomiciliary Indian child.²⁵ Additionally, in involuntary state court proceedings, a state agency seeking custody must notify the parent or Indian custodian and the Indian child's tribe of such proceedings.²⁶ An involuntary foster care proceeding often begins with the emergency removal of a child from his home.²⁷ The state is required to terminate emergency removal "immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child"²⁸ and must expeditiously initiate a child custody proceeding, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

Where the proper state court has jurisdiction in an involuntary state court proceed-

²⁰ 25 U.S.C. § 1903 (8) (1978).

²¹ The federal government has terminated the federal recognition status of many tribes. Many such tribes are recognized by states but not by the Secretary of the Interior.

²² 25 U.S.C. §§ 1911-1923 (1978).

²³ (b) "Child custody proceeding," which shall mean and include:

- (1) "Foster care placement" — any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;
- (2) "Termination of parental rights" — an action resulting in the termination of the parent-child relationship;
- (3) "Preadoptive placement" — the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and
- (4) "Adoptive placement" — the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.
- (5) Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime in the jurisdiction where the act occurred or upon an award, in a divorce proceeding, of custody to one of the parents. It does include status offenses, such as truancy, incorrigibility, etc.

Indian Child Welfare Act, 25 C.F.R. § 23 (1979).

²⁴ 25 U.S.C. § 1911(a) (1978).

²⁵ 25 U.S.C. § 1911(b) (1978).

²⁶ 25 U.S.C. § 1912(a) (1978).

²⁷ Wamser, *Child Welfare Under the Indian Child Welfare Act of 1978: A New Mexico Focus* 10 N.M. L. REV. 413, 424 (1980).

²⁸ 25 U.S.C. § 1922 (1978).

ing, notice must be given to the parent or Indian custodian and the Indian child's tribe by registered mail with return receipt requested.²⁹ The notice must apprise the parties of the pendency of the proceedings as well as their right to intervene.³⁰ In the event that the identity and location of the parent, Indian custodian, or the Indian child's tribe cannot be identified, similar notice must be given to the Secretary, who has fifteen days to contact the child's parent, Indian custodian, and the tribe.³¹

In any removal, placement, or termination proceeding at which the court makes a determination of indigency, the parent or Indian custodian shall have the right to court-appointed counsel.³² In any involuntary proceeding, the governing state agency is required to satisfy the court that "active efforts" were made to provide remedial services to prevent the breakup of Indian families, and that these services have proved unsuccessful.³³

The Act sets up two standards of proof with respect to foster care placement and termination of parental rights. With respect to foster care, no placement may be ordered in the absence of a determination, supported by clear and convincing evidence, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.³⁴ An order for termination of parental rights must be supported by evidence beyond a reasonable doubt that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.³⁵ Where a violation of the Act can be shown, a parent, Indian custodian, or the child's tribe may petition a court with proper jurisdiction to invalidate such action.³⁶

In any adoptive placement of an Indian child under state law, preference shall be given to placement of the child with a member of his or her extended family, other members of the Indian child's tribe, or other Indian families.³⁷ Such preference exists absent "good cause to the contrary."³⁸ Similar provisions apply to children accepted for foster care or preadoptive placement.³⁹ The order of preference provided in the Act for Indian children subject to adoptive placement is of extreme importance to the Indian tribes. The statute prevents the removal of orphaned Indian children from the reservation in situations where they would be raised by non-Indians.

Title II of the Act is the funding section. It authorizes the Secretary of the Interior to make grants to Indian tribes and organizations on and off the reservation for the purpose of establishing and operating Indian child and family services programs.⁴⁰ Title II is

²⁹ 25 U.S.C. § 1912(a) (1978).

³⁰ 25 U.S.C. § 1912(a) (1978).

³¹ 25 U.S.C. § 1912(a) (1978).

³² 25 U.S.C. § 1912(b) (1978).

³³ 25 U.S.C. § 1912(d) (1978).

³⁴ 25 U.S.C. § 1912(e) (1978).

³⁵ 25 U.S.C. § 1912(f) (1978).

³⁶ 25 U.S.C. § 1914 (1978).

³⁷ 25 U.S.C. § 1915 (1978).

³⁸ 25 U.S.C. § 1915 (1978).

³⁹ 25 U.S.C. § 1915(b) (1978).

⁴⁰ 25 U.S.C. § 1931. Grants for programs on or near reservation and child welfare codes — Statement of purpose; scope of programs:

(a) . . . The objective of every Indian child and family service program shall be to prevent the breakup of Indian families, and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be a last resort . . . [P]rograms may include . . .

significant because it provides the means for tribes to take over child welfare matters.⁴¹

Title III outlines the responsibilities of state courts for recordkeeping, information availability, and timetables. Title IV contains "miscellaneous provisions" covering education, day schools, and severability of provisions.⁴² One such provision directs the Secretary to prepare a study on the feasibility of providing Indian children with schools located near their home.⁴³

- (1) a system for licensing or otherwise regulating Indian foster and adoptive homes;
- (2) the operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children;
- (3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care;
- (4) home improvement programs;
- (5) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;
- (6) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;
- (7) a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs; and
- (8) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings. 25 U.S.C. § 1931 (1978).

25 U.S.C. § 1932. Grants for off-reservation programs for additional services:

[S]ervice programs which may include . . .

- (1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate State standards of support for maintenance and medical needs;
- (2) the operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children;
- (3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; and
- (4) guidance, legal representation, and advice to Indian families involved in child custody proceedings.

25 U.S.C. §§ 1931, 1932 (1978).

⁴¹ The House Report decries the fact that non-Indians continue to furnish almost all foster and adoptive care for Indian children, blaming it on "discriminatory standards." The states say the problem is caused by a lack of Indian placement resources. Title II of the Act could cure this lack of resources and end many of the statistical disparities that were the reason for enactment of the Act. Title II support systems and tribal welfare systems would insure against state abuses. *See generally*, H.R. REP. NO. 1386 *supra* note 9; *See also* Wamser, *supra* note 27, at 418.

⁴² 25 U.S.C. § 1961 (1978).

⁴³ (b) The Secretary is authorized and directed to prepare, in consultation with appropriate agencies in the Department of Health, Education, and Welfare, a report . . . In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades. 25 U.S.C. § 1961 (1978).

III. THE MASSACHUSETTS DILEMMA

The Federal Act affects all child custody proceedings for those who are members of, or eligible for membership in, a federally recognized Indian tribe or nation.⁴⁴ Since the Act applies only to these children, it does not protect children of Indian tribes not recognized by the American government.⁴⁵ The majority of the Indian population in Massachusetts consists of Indians from Canada and is not recognized by the federal government.⁴⁶ Without special protection, members of non-federally recognized tribes remain vulnerable to discriminatory state child welfare practices.⁴⁷ This result follows from the restrictive definition of "Indian" utilized in the Federal Act.⁴⁸

Efforts have been made to solve this problem.⁴⁹ The legislature has directed D.S.S. to adopt and organize area based social services to meet the needs of certain population groups, notably children and their families.⁵⁰ The Department is required to provide programs for "families, children, and unmarried parents, which shall serve to assist, strengthen, and encourage family life for the protection and care of children."⁵¹ Such programs "assist and encourage the use by any family of all available resources to this end, and provide substitute care of children only when preventive services have failed."⁵² The statute further provides that substitute care may be provided only when the family or its resources are unable to ensure the integrity of the family, or when the rights of any child to physical, mental, spiritual, and moral development cannot be guaranteed.⁵³ Further

⁴⁴ For a brief overview of the Indian Child Welfare Act and its effect on Indian Child Welfare in Massachusetts, see Hauck, *The Indian Child Welfare Act of 1978*, (An Issue Paper prepared for the Boston Indian Council) (Oct. 10, 1979).

⁴⁵ *Id.*

⁴⁶ The fact that Massachusetts tribes do not come under the Act does not mean that the Act is inapplicable to Massachusetts generally. The criteria for applying the Act to a specific case are the Indian child's membership status in an Indian tribe and the federal recognition status of the tribe of membership. The child's state of residence, the state which the child is native to, and the state which the tribe of membership is native to have no bearing on the application of the law. Consequently, the Act does apply to Massachusetts with respect to resident children who are members of, or eligible for, membership in a federally recognized Indian Tribe. *Id.*

⁴⁷ Davis, *Report on an Act To Prevent The Breakup of American Indian Families and To Establish Standards For Removing And Placing Indian Children Away From Their Families* (May, 1980) prepared for the Boston Indian Council by the Boston University Legislative Services [hereinafter cited as Davis].

⁴⁸ See *supra* text accompanying notes 19-20.

⁴⁹ MASS GEN. LAWS, ch. 552 as enacted by the 1978 General Court and amended in the 1979 General Court established the Department of Social Services. Beginning July 1, 1980, the legislation mandates a comprehensive program of social services at the area level accessible to all regardless of income. MASS. GEN. LAWS ANN. ch. 18B, § 3 (West 1982).

⁵⁰ MASS. GEN. LAWS ANN. ch. 18B, § 3 (West 1982).

⁵¹ MASS. GEN. LAWS ANN. ch. 18B, § 3(1) (West 1982). D.S.S. Overview — *Mission and Philosophy*: Provision of all services is directed towards enabling adults and children to live in their own homes and with their own families. When there is a threat to the continuing integrity of the family unit, preventive services are required. When services provided have failed to support an individual in his or her own home or family, a greater degree of agency intervention is necessary. Such intervention should be within the least restrictive framework and consistent with the most effective services possible. If out-of-home placement of an adult or child is necessary, this should be considered an interim solution while permanent plans are developed and implemented. The Agency priority will be on returning the adult or child to their own home if possible or to a new permanent living arrangement when services to the family unit have failed. See generally MASS. GEN. LAWS ANN. ch. 18B, and ch. 119 (West 1982).

⁵² MASS. GEN. LAWS ANN. ch. 18B, § 3(1) (West 1982).

⁵³ MASS. GEN. LAWS ANN. ch. 18B, § 3(1) (West 1982).

evidence of the state's awareness of the crisis plaguing Indian families may be found in D.S.S. regulations.⁵⁴ Nevertheless, the response to the problem falls short of the explicit procedural and substantive guidelines required to prevent the "wholesale separation" of Indian children from their families. D.S.S. regulations and Mass. Gen. Laws ch. 188, section 3(1) rely on the good faith efforts of state officials, agencies, and procedure. Yet these are the very actors who contribute to the child welfare crisis.

While most state laws require public or private agencies involved in child placements to resort to remedial measures before initiating placement or termination proceedings, these services are rarely provided.⁵⁵ Similarly, in Massachusetts, the legislation requires D.S.S. to resort to preventive measures before a separation is recommended.⁵⁶ With respect to federal codifications, the Indian Child Welfare Act imposes a federal standard requiring the use of preventive measures before proceedings are begun involving an Indian family.⁵⁷ Nevertheless, in the absence of an affirmative act creating standards applicable to children of non-federally recognized Indians, the harm that the federal legislation seeks to remedy cannot be fully prevented. It is therefore necessary for the Massachusetts legislature to respond to this sensitive area of child welfare with a law, based at a minimum, on the Federal Act.

Massachusetts public welfare statutes address the child welfare issue in terms of the morals and values held by social workers and D.S.S. employees. It is within the Department's discretion whether a child is "without proper guardianship."⁵⁸ The Department also decides, in the first instance, the fitness of the parent or guardian to care for the child.⁵⁹ Although Mass. Gen. Laws ch. 119, section 23F,⁶⁰ when read together with ch. 18B section 1⁶¹ and regulations thereunder, could be construed to provide special protec-

⁵⁴ In 1981 the D.S.S. issued regulations addressing the Indian child welfare problem:

- (1) The department recognizes the special concerns of Indians in the Commonwealth. Accordingly, decisions affecting Indians will reflect the unique values of Indian culture.
- (2) The department shall adhere to the provisions of the Indian Child Welfare Act, 25 U.S.C. Section 1901 et. seq. Where procedures or rights under Massachusetts law or regulation afford more protection than the Act, then those procedures or rights shall apply.
- (3) In making a foster care or adoptive placement decision for an Indian child, whether or not he/she is a member of an Indian tribe as defined in 43 U.S.C. Sec. 1602(c), the department shall, consistent with its regulations on substitute care, 110 C.M.R. Sec. 5.00, give preference in the absence of good cause to the contrary, to placement with:
 - (a) a member of the child's extended family;
 - (b) an Indian home approved by the department;
 - (c) an institution for children operated by an Indian organization which has a program suitable to meet the needs of the child.

110 C.M.R. ¶ 1.09 (1981).

⁵⁵ H.R. REP. NO. 1386 *supra*, note 9, reprinted in U.S. CODE CONG. AND AD. NEWS 7530, 7545 (1978).

⁵⁶ MASS. GEN. LAWS ANN. ch. 18B, § 3(1) (West 1982).

⁵⁷ 25 U.S.C. § 1912(d) (1978).

⁵⁸ MASS. GEN. LAWS ANN. ch. 199, § 23 (West 1982).

⁵⁹ The author proposes through the new legislation that Indian experts in the field of social services as well as a decision-making board comprised of Indians should at a minimum be consulted regarding the fitness of the parent or Indian custodian to care for a child.

⁶⁰ MASS. GEN. LAWS ANN. ch. 119, § 23F (West 1982).

⁶¹ MASS. GEN. LAWS ANN. ch. 18B, §1 (West 1982); for regulations *see supra* note 54.

tion for Indian families and their children, D.S.S. and the legal community in Massachusetts have not been sensitive to the Indian problem.⁶²

Massachusetts law allows the judge on petition of *any* person to determine whether a child is properly cared for.⁶³ Conditions that a judge may find damaging to a child's sound character development may be an essential part of the Native American social upbringing.⁶⁴ A lack of "proper attention" or the unavailability of a parent may actually be evidence of the extended family concept⁶⁵ prevalent in Indian culture.

If it finds the allegations proven in a petition, the court may place the child in the custody of the Department until he is eighteen years old, or until the Department determines that its objectives have been accomplished.⁶⁶ The court is further given the authority to make any order regarding the care and custody of the child if it is in his or her best interests.⁶⁷ The judge has the authority to allow any agency or private organization, licensed or authorized by law to receive and provide care for children, to determine what is the best placement.

This is one of the few Massachusetts laws that looks to the specific needs of the individual.⁶⁸ The "best interests of the child" standard is the legislative effort to force D.S.S. employees and judges to consider the individual's culture. This standard as applied is defective because it is difficult for the mainstream decision-maker to separate his or her idea of the child's best interest from the Indian child's: the statute only requires that the *child's* best interest be taken into account and not the *tribe's*. This premise is based on the belief that state officials find it inherently difficult to cross cultural boundaries. An example of this difficulty is the extended family concept which may be misunderstood by non-Indians. As will be discussed, legislation designed to actively involve Indians in the decision-making process (either as qualified experts or as social workers) can make the "best interests" determination a workable standard. Massachusetts law does seek to prevent the separation of Indian families. Nevertheless, this separation cannot be adequately prevented without special legislation to protect Native American children and their families.

Under current Massachusetts practice, any person of full age may petition the probate court in the county where he or she resides for leave to adopt a child younger than himself.⁶⁹ Although a safety valve provided by law prevents the indiscriminate

⁶² Interview with Esther Leonelli and Cheryl Bezis, counsel to the Boston Indian Council in Boston (February 8, 1982).

⁶³ MASS. GEN. LAWS ANN. ch. 119, § 24 (West 1982).

⁶⁴ Judges, usually unknowledgeable about American Indian life, tend to rely on the testimony of social workers. Unfortunately, the latter are themselves unaware of American Indian cultural values and social norms. Through the imposition of the dominant "white" society's moral and value systems, neglect or abandonment is frequently postulated where none exists. Decisions are made which are wholly inappropriate in the context of American Indian life. Note, *American Indian Child Welfare Crisis: Cultural Genocide on First Amendment Preservation*, 7 COLUM. HUMAN RIGHTS L. REV. 529, 531 (1975).

⁶⁵ "Extended family member" shall be as 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. 25 C.F.R. § 23.2(e) (1979).

⁶⁶ MASS. GEN. LAWS ANN. ch. 119, § 26 (West 1982).

⁶⁷ MASS. GEN. LAWS ANN. ch. 119, § 26 (West 1982).

⁶⁸ MASS. GEN. LAWS ANN. ch. 119, § 26 (West 1982).

⁶⁹ MASS. GEN. LAWS ANN. ch. 210, § 1 (West 1982).

adoption of children without the consent of the child (if the child is over twelve) or the consent of the lawful guardians, this requirement can be waived under certain circumstances.⁷⁰ When a person having the care or custody of a child files a petition for adoption, the consent of persons named specifically by statute,⁷¹ other than that of the child, is not required if the person to be adopted is 18 years of age or older.⁷² No mention is made of a child's tribe. Consent of the child or the child's spouse, if any, consent of the lawful parents' surviving parents or consent of the mother of an illegitimate child, is neither required if the court hearing the petition determines that such allowance is in the best interests of the child. In this situation, the child's age is not considered.⁷³

In many cases, the "best interests of the child" standard is a disadvantage to an Indian child whose cultural and social background differs considerably from that of the majority of judges. Judges cannot help but consider their own values, and their moral and cultural background in reaching a decision in any given case.⁷⁴

In addition to the courts' authority to dispense with consent, D.S.S. or any licensed child care agency may commence a proceeding to circumvent the consent of any person named in Mass. Gen. Laws ch. 210, section 2.⁷⁵ In other words, when the Department or an agency believes that a parent or guardian may not consent to an adoption petition, the agency may, independently of the petition for adoption, commence a proceeding to dispense with the consent of persons whose consent is required by law. In the case of a child who has been in the care of the Department or a licensed child care agency for more than one year, there is a presumption that the best interests of the child will be served by granting a petition for adoption.⁷⁶ This occurs whether the separation was voluntary or involuntary.

The legislature's concern for the best interests of the child, especially Indian children, cannot be met through existing legislation. Whether a child under fourteen is a proper subject for adoption is initially determined by the Department of Social Services.⁷⁷ The Department determines whether the child's past makes him a proper subject for adoption, and whether the prospective home of the petitioner would be an environment more conducive to the best interests of the child.⁷⁸ The Department is further required to

⁷⁰ MASS. GEN. LAWS ANN. ch. 210, § 2 (West 1982).

⁷¹ A decree of adoption shall not be made, except as provided in this chapter, without the written consent of the child to be adopted, if above the age of twelve; of the child's spouse, if any; of the lawful parents, who may be previous adoptive parents, or surviving parent; or of the mother only if the child was born out of wedlock and not previously adopted. MASS. GEN. LAWS ANN. ch. 210, § 2 (West 1982).

⁷² MASS. GEN. LAWS ANN. ch. 210, § 3 (West 1982).

⁷³ In determining whether the best interests of the child will be served by granting a petition for adoption without requiring certain consent as permitted under paragraph (a), the court shall consider the ability, capacity, fitness and readiness of the child's parents or other persons named in section two to assume such responsibilities.

In determining whether the best interests of the child will be served by issuing a decree dispensing with the need of consent as permitted under paragraph (b), the court shall consider the ability, capacity, fitness and readiness of the child's parents or other person named in section two of chapter two hundred-ten to assume parental responsibility, and shall also consider the plan proposed by the department or other agency initiating the petition. MASS. GEN. LAWS ANN. ch. 210, § 3 (West 1982).

⁷⁴ See generally Holmes, *The Path of the Law* 10 HARV. L. REV. 50, 50-76 (1978).

⁷⁵ MASS. GEN. LAWS ANN. ch. 210, § 3(b) (West 1982).

⁷⁶ MASS. GEN. LAWS ANN. ch. 210, § 3(c) (West 1982).

⁷⁷ MASS. GEN. LAWS ANN. ch. 210, § 5(a) (West 1982).

⁷⁸ MASS. GEN. LAWS ANN. ch. 210, § 5(a) (West 1982).

file a report to allow the court to determine the desirability of the proposed adoption.⁷⁹ Before an adoption decree can be entered, the child must have resided with the petitioner for at least six months. Under certain conditions, however, this may be waived.⁸⁰ After both a hearing and a report is filed with the court, the judge may order the removal of the child from the proposed adoption home if, in the opinion of the court, such removal is in the best interests of the child.⁸¹

Under the procedures described above for the adoption of a child under the age of fourteen, the decision as to what is in the best interests of the child is almost totally within the discretion of non-Indians. The statute detailing the criteria for determining the best interests of the child is not specific.⁸² It requires the court to consider all factors relevant to the physical, mental, and moral health of the child without making specific reference to the cultural background of the child.⁸³ Although case law construing the statute requires agencies and courts to focus on various factors unique to the individual child for whom they must act,⁸⁴ it accords too much discretion to the decision-maker.⁸⁵

IV. A PROPOSED SOLUTION

A bill sponsored by the Boston Indian Council⁸⁶ addresses the problems faced by non-federally recognized Indians residing in Massachusetts. The bill was drafted by a member of the Boston University Legislative Service.⁸⁷ The proposed legislation⁸⁸ would extend the substantive and procedural protection of the federal law to all non-federally recognized Indians in Massachusetts. The purpose of the bill is to prevent the breakup of American Indian families and to establish standards for removing and placing Indian children away from their families.⁸⁹ The proposed legislation recognizes that a child's

⁷⁹ MASS. GEN. LAWS ANN. ch. 210, § 5(a) (West 1982).

⁸⁰ MASS. GEN. LAWS ANN. ch. 210, § 5(a) (West 1982).

⁸¹ MASS. GEN. LAWS ANN. ch. 210, § 5(a) (West 1982).

⁸² MASS. GEN. LAWS ANN. ch. 210, § 5(b) (West 1982); see also *Petition of New England Home for Little Wanderers*, 367 Mass. 631, 646, 328 N.E.2d 854, 863 (1975).

⁸³ MASS. GEN. LAWS ANN. ch. 210, § 5B (West 1982).

⁸⁴ Indeed, we agree that the State is required to make every effort to strengthen and encourage family life before it may proceed with plans to sever family ties permanently. Nevertheless, we have long held that, where State intervention is shown to be required, [t]he paramount consideration [must be] the welfare of the child." In this context, the "best interests" determination required by G.L. c. 210, § 3, must reflect much more than the needs of administrative convenience. It requires the departments, the agencies, and the courts "to focus on the various factors unique to the . . . individual for whom it must act." The State must proceed in a manner reflecting, as closely as possible, the precise needs of the individual child.

Petition of Dept. of Welfare, 376 Mass. 252, 266, 381 N.E. 2d 565, 573 (1978) (citations omitted).

⁸⁵ "Under our statutes, the basic standard for adoption cases is what will serve the 'best interests of the child.' Such a standard presents the department and the trial judge with a classic example of a discretionary decision. Standards of mathematical precision are neither possible nor desirable in this field; much must be left to the trial judge's experience and judgment." *Adoption of a Minor (No. 2)*, 367 Mass. 684, 688, 327 N.E.2d 875, 878-79 (1975).

⁸⁶ MASS. GEN. LAWS ANN. ch. 119A (proposed official draft 1980).

⁸⁷ Davis, *supra* note 47, at 1.

⁸⁸ On March 24, 1983 the proposed legislation was billed out favorably from the Human Services and Elderly Affairs Committee.

⁸⁹ MASS. GEN. LAWS ANN. ch. 119A (proposed official draft 1980).

right to sound health and normal physical, mental, spiritual, and moral development, and includes a right to cultural heritage.⁹⁰

The proposed legislation varies from the federal legislation in a number of respects. First, the bill broadens the definition of "Indian" to include all Indians. The proposed act takes the definition of Indian from the final regulations implementing the Native American Programs Act ["NAPA"].⁹¹

"Indian" means any individual who is a member or descendant of a member of a North American tribe, band, or other organized group of native people who are indigenous to the continental United States or a state through treaty, agreement, or some other form of recognition. This includes any individual who claims to be an Indian and who is regarded as such by the Indian community in which he or she lives or by the Indian community of which he or she claims to be part.⁹²

In addition to broadening the definition of Indian to include all Indian children residing in Massachusetts, the bill provides strict notice requirements upon the initiation of a child custody proceeding.⁹³ These requirements are more stringent than those in Mass. Gen. Laws ch. 210, section 4. Under the proposed legislation, a party bringing a child custody proceeding is required to notify a child's parent(s) or custodian and a child's tribe of the pending action.⁹⁴ This is similar in scope to the Federal Act. The notice must be sent by registered mail with return receipt requested. It should be written in the language the sender knows will apprise the receiver of the notice and shall inform the recipient of the rights specified in the proposed legislation.⁹⁵

In the event that the party initiating a child custody proceeding is unable to locate a guardian of the child or the child's tribe, the party shall request assistance from an Indian organization (such as the Boston Indian Council) to provide the required notice.⁹⁶ The cohesiveness of the Indian community on a national scale makes almost any Indian organization the proper vehicle to provide notice to a child's parent, custodian, or tribe.

After the instituting party has fulfilled the notice requirements, active efforts must be made to keep the family together.⁹⁷ The party and the court may receive recommenda-

⁹⁰ MASS. GEN. LAWS ANN. ch. 119A, § 1 (proposed official draft 1980).

⁹¹ Headstart, Economic Opportunity and Community Partnership Act of 1974. Pub. L. No. 93-644, Jan. 4, 1975. Title VIII, the Native American Programs Act of 1974 authorizes development assistance to American Indians, Hawaiian Natives, and Alaskan Natives.

⁹² MASS. GEN. LAWS ANN. ch. 119A, § 2 (proposed official draft 1980).

⁹³ MASS. GEN. LAWS ANN. ch. 119A, § 4 (proposed official draft 1980).

⁹⁴ MASS. GEN. LAWS ANN. ch. 119A, § 4 (proposed official draft 1980).

⁹⁵ MASS. GEN. LAWS ANN. ch. 119A, § 4 (proposed official draft 1980).

⁹⁶ MASS. GEN. LAWS ANN. ch. 119A, § 4 (proposed official draft 1980).

⁹⁷ Upon satisfaction of notice requirements, a party instituting child custody proceedings and the court shall make active efforts to prevent the breakup of an Indian family. The party and the court may receive from Indian organizations recommendations about appropriate available family support services. Family support services may include, but are not limited to, community or government programs for child care, homemaker assistance, counselling, rehabilitation, or education. Where appropriate, the court may direct the party instituting a proceeding to assist in establishing a program to keep the family together. When support services continue for an extended time, the court may request monthly progress investigations by an appropriate Indian organization. Upon finding a stable family situation, the court may terminate the monthly investigations.

MASS. GEN. LAWS ANN. ch. 119A, § 4(2) (proposed official draft 1980).

tions from Indian organizations about the appropriate forms of support services available. Indian organizations should thus establish a liaison with the family court in order to ensure that they will be consulted with respect to family services.⁹⁸ The petitioning party must satisfy the court by clear and convincing evidence that active efforts to keep the family together will not succeed.

Although special regulations dealing specifically with the Indian problem were adopted by D.S.S.,⁹⁹ the Department made specific reference only to the federal legislation. The regulations do provide, however, that any Massachusetts law or regulation that affords more protection than the Federal Act shall control.

The proposed legislation gives greater protection to non-federally recognized Indians by requiring the court, in removal or placement proceedings, to consider evidence of the prevailing social and cultural conditions, customs, and traditions of the Indian child's tribe and community.¹⁰⁰ Where active efforts have failed, the court may order termination of parental rights. But the evidence must establish beyond a reasonable doubt that continued custody by the parent or custodian would be detrimental to the child's well-being.¹⁰¹

If a parent or custodian voluntarily consents to termination of parental rights, the bill requires such consent to be an informed choice.¹⁰² The presiding judge explains to the consenting party the terms and consequences of consent. Furthermore, the explanation given by the judge is put into the record by requiring the judge to certify in writing the nature of the explanation given to the consenting parent or guardian.¹⁰³ Current Massachusetts practice requires the consent of certain persons named by statutes,¹⁰⁴ but a subsequent section of the same chapter, ch. 210,¹⁰⁵ dispenses with the required consent under particular circumstances delineated by statute.¹⁰⁶ Under current Massachusetts practice, consent is not required in the following circumstances: if the child is over eighteen; if the court feels that the petition for foster care placement or termination of parental rights is in the best interests of the child; or if D.S.S. initiates an independent proceeding requesting the court to dispense with consent.¹⁰⁷ Although the parent or Indian custodian may withdraw consent on his own initiative, any indication that fraud or duress was used to obtain consent will make any adoption decree null and void.

The proposed legislation provides for an order of placement if adoptive placement, foster care, or preadoptive placement is in the child's best interest. The order of prefer-

⁹⁸ The Boston Indian Council ["BIC"] sponsors a program known as the Indian Family Support Project. Since the commencement of the program, the Indian Family Support staff has assisted 208 clients, ninety percent of whom lived in single parent households. An analysis of client records reveals the examination disclosed the following:

- 31% — family reunification
- 19% — alleged child abuse and/or neglect
- 18% — foster care
- 13% — behavior problem of child

See *supra* note 8 at 7.

⁹⁹ See *supra* note 54.

¹⁰⁰ MASS. GEN. LAWS ANN. ch. 119A, § 4(3) (proposed official draft 1980).

¹⁰¹ MASS. GEN. LAWS ANN. ch. 119A, § 4(3) (proposed official draft 1980).

¹⁰² MASS. GEN. LAWS ANN. ch. 119A, § 5 (proposed official draft 1980).

¹⁰³ MASS. GEN. LAWS ANN. ch. 119A, § 5 (proposed official draft 1980).

¹⁰⁴ MASS. GEN. LAWS ANN. ch. 210, § 2 (West 1982).

¹⁰⁵ MASS. GEN. LAWS ANN. ch. 210, § 3 (West 1982).

¹⁰⁶ MASS. GEN. LAWS ANN. ch. 210, § 3 (West 1982).

¹⁰⁷ MASS. GEN. LAWS ANN. ch. 210, § 3 (West 1982).

ence governing placement of Indian children in the proposed bill parallels the D.S.S. regulations,¹⁰⁸ and the Federal Act.¹⁰⁹ The order of preference ensures that placements will reflect Indian cultural values.

Regardless of the provisions of the proposed legislation, the Commonwealth or an appropriate agency thereof is given the authority to make an emergency removal or placement of an Indian child in order to prevent imminent physical damage to the child.¹¹⁰ This is consistent with the state's interest in protecting the welfare of children.¹¹¹ When it is determined in any proceeding under the proposed legislation that the parents or custodian are indigent, they would be afforded the right to court-appointed counsel.¹¹² If a decree ordering foster care placement or termination of parental rights is made in violation of the proposed act, the decree may be invalidated.¹¹³ The Federal Act permits an Indian child, parent, Indian custodian, or the Indian child's tribe to petition a court to invalidate an improper decree.¹¹⁴ In addition to the above named persons, the proposed state act gives Indian organizations the right to petition a court to invalidate a voidable decree.¹¹⁵ Since violations are far more likely to be known to staff attorneys of the Boston Indian Council, this provision provides a deterrent to those who may seek to violate the proposed act. D.S.S. or any state authority involved in placing Indian children away from their families is required to keep records of the Indian child's placement.¹¹⁶ The records must demonstrate that efforts have been made to comply with the placement preferences outlined in the proposed act.¹¹⁷

To maintain communication and cooperation with D.S.S. and to ensure that the goals of the state legislation are fully realized, the proposed act authorizes the establishment of an Indian Child Welfare Advisory Board. Such Board would be composed of five members appointed by the Governor of Massachusetts from the various tribes and Indian organizations within the state.¹¹⁸ A key purpose of the Board is to make recommendations on policy affecting Indians on both state and regional levels.¹¹⁹ Within ninety days of the enactment of the proposed act, D.S.S. would be required to formulate written regulations that fully comply with the spirit of the act.¹²⁰ Should any provisions of the proposed act be found invalid, the final section states that the provisions are severable.¹²¹

V. CONCLUSION

Legislative efforts to remedy the plight of Indian children fall short of what is required to protect their best interests. The Indian Child Welfare Act is the first affirma-

¹⁰⁸ See *supra*, note 54.

¹⁰⁹ 25 U.S.C. § 1915 (1978).

¹¹⁰ MASS. GEN. LAWS ANN. ch. 119A, § 7 (proposed official draft 1980).

¹¹¹ *Petition of the Dept. of Public Welfare*, 376 Mass. 252, 264-65, 381 N.E.2d 565 (1978).

¹¹² MASS. GEN. LAWS ANN. ch. 119A, § 8 (proposed official draft 1980).

¹¹³ MASS. GEN. LAWS ANN. ch. 119A, § 10 (proposed official draft 1980).

¹¹⁴ Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any 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 (1978).

¹¹⁵ MASS. GEN. LAWS ANN. ch. 119A, § 10 (proposed official draft 1980).

¹¹⁶ MASS. GEN. LAWS ANN. ch. 119A, § 11 (proposed official draft 1980).

¹¹⁷ MASS. GEN. LAWS ANN. ch. 119A, § 6 (proposed official draft 1980).

¹¹⁸ MASS. GEN. LAWS ANN. ch. 119A, § 12 (proposed official draft 1980).

¹¹⁹ MASS. GEN. LAWS ANN. ch. 119A, § 12 (proposed official draft 1980).

¹²⁰ MASS. GEN. LAWS ANN. ch. 119A, § 13 (proposed official draft 1980).

¹²¹ MASS. GEN. LAWS ANN. ch. 119A, § 14 (proposed official draft 1980).

tive step taken by the federal government to protect Indian children from inadequate and discriminatory state practices. But it fails to provide safeguards for those Indians recognized only by states and not the federal government.

In Massachusetts, the statute particularly fails to account for the large Indian population that has migrated from Canada to Boston. This situation is a result of the narrow definition of "Indian" used in the Federal Act. With respect to state law, Massachusetts has only recently begun to provide procedural safeguards that consider the unique circumstances of its Indian population. Current Massachusetts law continues to rely on the good faith efforts of the very actors — social workers and judges — whom Congress cited as responsible for the abnormally high removal of Indian children from their families. Without a narrow framework within which state officials may apply the best interests standard, Indian children in Massachusetts will continue to be harmed.

The D.S.S. regulations fail to take into account the Indian child as a person with a unique culture. The Massachusetts legislature should respond to this sensitive problem by enacting legislation that is, at the minimum, modelled on the Federal Act. This legislation would involve Indian people in the decision-making process, thereby acquainting both social workers and the legal community with the unique circumstances of American Indian children. More importantly, it would allow Indian children and their people to continue their way of life.

Robert F. Mills

