

HJR

73

**STATE OF ALASKA
1992 LEGISLATIVE SESSION**

Bill version: CSHJR 73(HES)

Publish Date: 3-11-92

Revision Date: _____ Department Affected: LEGISLATURE
 Title: REVIEW OF INDIAN CHILD WELFARE ACT BRU: _____
 Sponsor: REP. MACLEAN Component: _____
 Requestor: _____ COMPONENT SERIAL NO.

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EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	-0-					
TRAVEL	-0-					
CONTRACTUAL	-0-					
SUPPLIES	-0-					
EQUIPMENT	-0-					
LAND & STRUCTURES	-0-					
GRANTS, CLAIMS	-0-					
MISCELLANEOUS	-0-					
TOTAL OPERATING	-0-					

CAPITAL	-0-					
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REVENUE FUND SOURCE:	-0-					
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FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-					
FEDERAL FUNDS	-0-					
OTHER FUND SOURCE:	-0-					
TOTAL	-0-					

POSITIONS:

FULL-TIME	-0-					
PART-TIME	-0-					
TEMPORARY	-0-					

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: [Signature] Phone: 465-3732
 Division: HOUSE HEALTH EDUCATION & SOCIAL SERVICE Date: 3/9/92
 Approved by Commissioner: _____
 Agency: _____ Date: _____

ALASKA STATE LEGISLATURE

Representative Eileen Panigeo MacLean
Co-Chair House Finance Committee
P.O. Box 830
Barrow, Alaska 99723



WHILE IN JUNEAU
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Juneau, Alaska 99811
465-4525
465-4833

HOUSE REPRESENTATIVES

District 22

North Slope
Borough

Anaktuvuk Pass
Atkasuk
Barrow
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Nuiqsut
Point Hope
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Wainwright

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Kiana
Kivalina
Kobuk
Kolzebue
Noatak
Noorvik
Selawik
Shungnak

MEMORANDUM

TO: Senator Arliss Sturgulewski, Chair
Senate Health, Education and Social Services

FROM: Representative Eileen MacLean, Co-Chair
House Finance Committee

Rep. Eileen P. MacLean

DATE: March 26, 1992

RE: Request for scheduling - HJR 73

I respectfully request that HJR 73, "urging appropriate officials to review implementation of the Indian Child Welfare Act", be scheduled for a hearing in the Health, Education and Social Services Committee as soon as possible. HJR 73 received unanimous support on the House floor last Friday.

I introduced HJR 73 in reaction to concerns raised from individuals in my district about the protection of Native children in abusive family situations. The resolution urges that the review examine the strengths and weaknesses of the ICWA as they relate to the protection of Alaska Native children. No such review of the Act has ever taken place since its inception in 1978.

The study will pay particular attention to aspects of the ICWA which have made its implementation in Alaska problematic, such as jurisdictional disputes between the tribes and the state and the funding mechanism in the Act that has not kept pace with the needs in the area of child protection. The review will also examine the successful experiences of some Native organizations that have established a cooperative effort with the state for child protection.

Senator Arliss Sturgulewski

Page 2

March 26, 1992

I would be happy to provide you with additional information about the resolution. Please contact me if you have questions or concerns. I look forward to the committee's consideration of this important resolution.

SPONSOR STATEMENT

HJR 73

REP. EILEEN P. MACLEAN

HJR 73 recommends that the BIA, the General Accounting Office of the Congress and the Joint Federal-State Commission on the Policies and Programs Affecting Alaska Natives conduct a comprehensive review of the 1978 Indian Child Welfare Act (ICWA), with the full participation of Native organizations. The resolution urges that the review examine the strengths and weaknesses of the ICWA as they relate to the protection of Alaska Native children.

The study will pay particular attention to aspects of the ICWA which have made its implementation in Alaska problematic. These include jurisdictional disputes between tribes and the state and the funding mechanism in the Act that has not kept pace with the needs in the area of child protection. The review will also examine the successful experiences of some Native organizations that have established cooperative efforts with the state for child protection.

There has never been a comprehensive, empirical study of the ICWA, especially one which focuses on its implementation in Alaska. It is important to examine our experience with this Act based on the observations of the people involved in its implementation. Such an examination will help us enhance its effectiveness in Alaska. The review is especially important in light of the signing of state-tribal agreements authorized by AS 47.10.230 (g), which establishes the powers and responsibilities of tribes and the state when a Native child is taken into state custody.

Concerns have been raised that the review is an attempt to significantly alter the Act; however, this is not the intent of HJR 73. The resolution was introduced based on concerns raised about the state's system of child protection. Because the federal Act supersedes the state's law, examination of the ICWA is warranted. But within the context of examination of the ICWA, the state's role will be scrutinized.

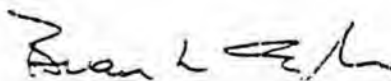
The underlying principle of the ICWA is to protect the best interests of Native children and to promote the stability and security of Native tribes and families. From this examination will emerge a complete package of recommendations for how this effort can be more successful.

POSITION PAPER
HJR NO. 73

The Division of Family and Youth Services has been the primary state agency responsible for the implementation of the Indian Child Welfare Act, since it is the agency responsible for child protection, child custody and adoption proceedings. Impacts of the Act include very close working relationships with Native social services agencies and village governments, not only for legal notice as required by ICWA, but to work together to find relative or tribal placements when children cannot remain safely at home. With the implementation of the State Tribal Agreements, policy and procedures are much clearer, and the Division supports ICWA in policy and in practice.

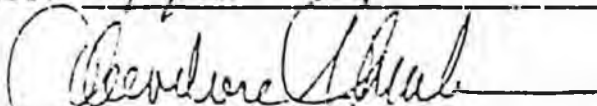
Nevertheless, problematic areas remain. The village governments were not adequately funded to implement ICWA, and those villages without staff have a difficult time participating with DFYS in locating resources and planning permanency for the child. Some DFYS staff require additional cultural competence training. The majority of Native children adopted through DFYS are now adopted within the Native culture, but there is still difficulty in recruiting enough Native foster homes to meet ICWA placement preferences. Private adoptions appear to have a high rate of placement out of ICWA preferences. Native children still are disproportionately represented in out of home care, and many village governments and Native agencies do not have sufficient resources to provide in home services to families in order to prevent removal.

For these reasons, the Division of Family and Youth Services supports passage of House Joint Resolution No. 73, Urging appropriate federal officials to review implementation of the Indian Child Welfare Act.



Brian Saylor, PhD, MPH
Deputy Commissioner
Department of Health and Social Services

Date: 3/5/92



Theodore A. Malx, MD, MPH
Commissioner
Department of Health and Social Services

Date: 18 March 1992

DON YOUNG
CONGRESSMAN FOR ALL ALASKA

WASHINGTON OFFICE
2331 RAYBURN BUILDING
TELEPHONE 202/225-5765

COMMITTEES:
INTERIOR AND INSULAR
AFFAIRS
MERCHANT MARINE AND
FISHERIES
POST OFFICE AND
CIVIL SERVICE



Congress of the United States
House of Representatives

Washington, D.C. 20515

March 19, 1992

DISTRICT OFFICES

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BOX 177
KODIAK, ALASKA 99615

P.O. BOX 1860
NCME, ALASKA 99762

Representative Eileen McLean
Alaska State Legislature
Box V
Juneau, Alaska 99811

Dear Representative McLean:

Thank you for your communication with regard to HJR 73, a bill introduced by you to review the implementation of the "Indian Child Welfare Act" (ICWA). I appreciate hearing from you on this important issue.

I commend your work on addressing some of the concerns with regard to the "Indian Child Welfare Act" program and agree that serious review of implementation is needed. I support your timely efforts on this in the state legislature and your intention to offer an amendment to the bill incorporating, in the review, that the involvement of the Joint Federal-State Commission on Policies and Programs affecting Alaska Natives be included. I believe the Commission can offer positive solutions towards addressing some of the problems with this program.

In addition, I believe that adequate funding has to be appropriated to fulfill Congress's intent with implementing ICWA. With this in mind, I have requested a meeting with Assistant Secretary Edie Brown to voice my grave concern with the Bureau's decision with regard to funding for Alaska's ICWA program. There is an inequity of funding allocations between Alaska and Tribes from the lower 48.

Please continue to keep me apprised of your concerns and please do not hesitate to contact me again with regard to this or any other issue of concern to you.

With my kindest personal regards,

Sincerely,

A handwritten signature in dark ink, appearing to read 'Don Young', written over a printed name.

DON YOUNG
Congressman for All Alaska

DY:caa

Ahtna, Inc.

GLENNALLEN OFFICE
P.O. BOX 649
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March 5, 1992

**Representative Eileen Paniego MacLean
Co-Chair House Finance Committee
PO Box 830
Barrow, Alaska 99723**

Dear Representative MacLean:

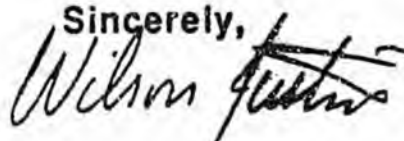
Thank you for keeping my office informed of legislative activities.

HJR 73 is timely and there are problems that should be looked at.

ICWA conceptually is a great idea, but woefully understaffed, underfunded and is primarily fueled by emotions on a personal level. I agree that the process can be improved in particular with the children.

Thanks.

Sincerely,



**Wilson Justin
President**

WJ:ele



BERING STRAITS NATIVE CORPORATION

March 11, 1992

Representative Eileen Panigeo MacLean
Co-Chair House Finance Committee
P.O. Box 830
Barrow, Alaska 99723

Dear Ms. MacLean

First of all, let me apologize for the delay in responding to your letter requesting comments on resolution HJR 73. I have been on personal leave for the last three weeks and was unable to respond to your letter until now.

Thank you for giving us the opportunity to review and comment on HJR 73. I only hope that our comments arrive in time before the House of Representatives make a decision on this resolution.

We agree, there definitely a need to have study done to determine whether the Indian Child Welfare Act has proven beneficial to our Native children. We also agree that the five (5) issues outlined in the resolution are very important to the success of the ICWA program and the well-being of our Native children.

The only additional comment that I would like to add is that the designated federal officials in Congress do cooperate to conduct and complete this comprehensive review in a timely manner, so as not to further delay in addressing issues, problems or making changes to better achieve the purposes of the ICWA for the protection of our Native children.

Sincerely,

Carol J. Piscoya
Director of Shareholder Relations

cc: file



MAR 1 1992

The Aleut Corporation

March 13, 1992

Representative Eileen Panigeo MacLean
Co-Chair House Finance Committee
Box V
Juneau, Alaska 99811

Dear Representative ^{*Eileen*} MacLean:

Thank you for requesting our comments concerning the Indian Child Welfare Act. The Aleut Corporation deals with ICWA only through our shareholder department and our knowledge is limited.

I contacted some of the non-profit organizations to solicit their comments for this letter, which is why it has taken me so long to respond.

It is apparent that the confidentiality which was mandated to protect the children works against the children. It becomes a long process to seek authorization and by the time authorization is received, it is too late for the children and the people involved with trying to help them are frustrated.

There were two suggestions made by those working with ICWA. The first is to create or form an informational pool or center where the red tape can be reduced and the long delays eliminated--through this center all of the ANCSA corporations would cooperate with each other for providing information. Second, technical assistance or training should be made available to the tribes and/or villages on the ICWA so that they know the authority or power is there to keep the children in their area. People seem to be afraid to involve themselves, which makes it difficult for getting information when needed.

I apologize for taking so long to respond. I do appreciate your involving us in the decision-making process.

Sincerely,

Alice Petrivelli
President

KONIAG, INC.

• 4300 B Street, Suite 407, Anchorage, AK 99503

(907) 561-2668 • FAX (907) 562-5258 •

March 3, 1992

Representative Eileen MacLean
Co-Chair, House Finance Committee
P.O. Box V
Juneau AK 99811

Dear Representative MacLean:

I am in receipt of your letter of February 24, 1992, regarding your proposed House Resolution 73 that urges a review of the Indian Child Welfare Act.


I agree with you that this act may not be working in the best interest of either Native children or parents. We have first hand experience whereby a Koniag region Native woman, who has not lived in Alaska since a few month's after birth, was caught in a vicious web, created by a village tribal council, when she chose to place her child (born in Los Angeles) with a well-to-do non-Native family. She litterally had to go into hiding, leaving the U.S. while the case was fought in court. Fortunately for her, a sympathetic judge ruled in her favor, however, we are not certain at this point that the case has been resolved.

I believe that this is probably not an isolated case. Parents must be free to exercise choice regardless of the wishes of the tribe. The placement of a child must be decided on the basis of the adopting family's desire and ability to provide the best possible up bringing, not anything else.

HJR 73 is timely and appropriate for I believe that a thorough investigation of the ICWA will reveal that it clearly does not always work in the best ~~int~~erest of the child.

Sincerely,

KONIAG, INC.


Frank Pagano
President

Mamilaq ASSOCIATION

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March 6, 1992

Representative Eileen MacLean
Alaska House of Representatives
P.O. Box V
Juneau, AK 99811

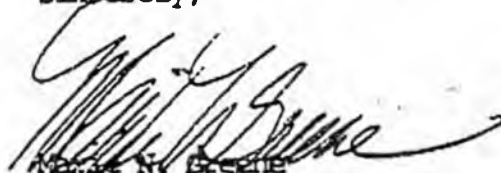
RE: Support for HJR 73

Dear Eileen,

Thanks for this opportunity to comment and support HJR 73, which urges a federal review of the implementation of ICWA in Alaska. As part of the review, we also recommend specific consideration be given to the State-Tribal Model Agreements adopted during the Cowper administration. The momentum generated by that effort to instill local relevance into ICWA's implementation in Alaska seems to be lost.

We fully support HJR 73 and are grateful for your efforts and those of Representative Lincoln in bringing this need to light.

Sincerely,



George N. Escamé
President

cc: Representative Georgianne Lincoln
Senator Al Adams

BKSPHJR/TWIMONA

MEMBER VILLAGES

Uluksuq, Okiatamuk, Nuvung, Nuurvik, Akuligaq, Isinnuq

Aleutian/Pribilof Islands Association, Inc.

401 E. Fireweed Lane, Suite 201
Anchorage, Alaska 99503-2111
Phone (907) 276-2700

March 20, 1992

Representative Eileen Panigao MacLean
Co-Chair House Finance Committee
P.O. Box V
Juneau, Alaska 99811

Dear Representative MacLean:

This is in response to your request regarding the Indian Child Welfare Act and problems encountered with implementation and issues in Alaska.

In our agency, one of the biggest hindrances encountered is trying to determine Tribal Affiliation of children when requests are received from Social Service agencies. A recent example of this was a request from an out-of-state child welfare office. The family was not listed in any of our records. The information we had was forwarded to the Bureau of Indian Affairs in Juneau and we requested their assistance in determining which tribe the children might be affiliated with. The paper work was returned to us, stating the following:

"Regarding the identity Alaska Native heritage, and tribal affiliation of individuals, enclosed is a copy of our recent memorandum outlining the documentation required for the issuance of Certificates of Indian Blood. For the ---- children, a copy of each child's Certificate of Live Birth, issued by the Bureau of Vital Statistics is required to document parentage. When/if Certificates of Indian Blood are to be released to a third party such as your office, a release of information statement, signed by the parent, must accompany the requests for Certificates of Indian Blood, to satisfy the considerations of the Privacy Act of 1974."

In regards to the above case, the Child Welfare agency was attempting to determine whether these children are subject to the Indian Child Welfare Act (the children's legal status).



Page two

Occasionally not enough information is known by the requesting Child Welfare agency and sometimes parents are not very cooperative in supplying necessary information to the agency (these are usually emergency situations when children have been removed from the home for some type of abuse). Sometimes under these circumstances, one cannot furnish birth certificates, etc.

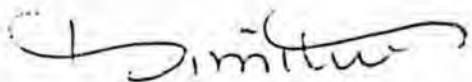
When receiving the requests to determine tribal affiliation, one needs to respond quickly in Child in Need of Aid (CINA) cases to ensure that the proper tribal entity is notified and has time to respond whether to intervene or not on behalf of the children.

In the above case example, our agency called another Bureau of Indian Affairs agency office and they agreed to look into the matter further and the paper work was forwarded to their office. All of this took precious time as the CINA case proceeded.

The case mentioned in my example is not an isolated incident. The requests are received by our agency on a regular basis as Child Welfare agencies try to comply with ICWA to "Notice" the proper tribal entity. Other individuals in the state that handle ICWA matters have indicated that they have encountered the same problem as described above in trying to determine tribal affiliation of children. I believe we all need to get together in Alaska to work out a plan on how to act quickly in determining children's tribal affiliation to ensure the correct tribe is "Noticed" in plenty of time to respond. It is my belief that children are being lost in the system, thus losing their link to families and their heritage.

Please let me know if I can be of further assistance to you regarding ICWA matters.

Sincerely,



Dimitri Philemonof
Executive Director

MR/cmh

PUBLIC LAW 95-608 [S. 1214]; Nov. 8, 1978

INDIAN CHILD WELFARE ACT OF 1978

For Legislative History of Act, see p. 7530

An Act to establish standards for the placement of Indian children in foster or adoptive homes, to prevent the breakup of Indian families, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Indian Child Welfare Act of 1978".

SEC. 2. 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;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

SEC. 3. 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.

SEC. 4. For the purposes of this Act, except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include—

(i) "foster care placement" which shall mean 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;

Indian Child Welfare Act of 1978.
25 USC 1901 note.
25 USC 1901.

Congress, responsibility for protection of Indians.

25 USC 1902.

Definitions.
25 USC 1903.

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean 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

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "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;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 7 of the Alaska Native Claims Settlement Act (85 Stat. 688, 689);

43 USC 1606.

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 3(c) of the Alaska Native Claims Settlement Act (85 Stat. 688, 689), as amended;

43 USC 1602.

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of title 18, United States Code and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

- (11) "Secretary" means the Secretary of the Interior; and
 (12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

TITLE I—CHILD CUSTODY PROCEEDINGS

Sec. 101. (a) An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

Indian tribes,
exclusive
jurisdiction over
Indian child
custody
proceedings.
25 USC 1911.

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

(c) 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.

(d) The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

Sec. 102. (a) 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 foster care placement of, or 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 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 foster care placement or 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.

Foster care
placement, court
proceedings.
25 USC 1912.

(b) In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court

shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to the Act of November 2, 1921 (42 Stat. 208; 25 U.S.C. 13).

(c) Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

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

(e) No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Parental rights,
voluntary
termination.
25 USC 1913.

SEC. 103. (a) Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

25 USC 1914.

SEC. 104. 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 com-

petent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 101, 102, and 103 of this Act.

Sec. 105. (a) In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

Adoptive
placement of
Indian children.
25 USC 1915.

(b) Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

- (i) a member of the Indian child's extended family;
- (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
- (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

Sec. 106. (a) Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 102 of this Act, that such return of custody is not in the best interests of the child.

Petition, return of
custody.
25 USC 1916.

(b) Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this Act, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

Removal from
foster care home.

Sec. 107. Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement,

25 USC 1917.

Reassumption,
jurisdiction over
child custody
proceedings.
25 USC 1918.
18 USC prec.
1151 note.
25 USC 1321.
28 USC 1360
note.

the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

SEC. 108. (a) Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) (1) In considering the petition and feasibility of the plan of a tribe under subsection (a), the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 101(a) of this Act are not feasible, he is authorized to ~~accept~~ partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 101(b) of this Act, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 101(a) over limited community or geographic areas without regard for the reservation status of the area affected.

(c) If the Secretary approves any petition under subsection (a), the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a), the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 109 of this Act.

States and Indian
tribes,
agreements.
25 USC 1919.

SEC. 109. (a) States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such

revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

SEC. 110. Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

Improper
removal of child
from custody.
25 USC 1920.

SEC. 111. In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this title, the State or Federal court shall apply the State or Federal standard.

25 USC 1921.

SEC. 112. Nothing in this title shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this title, 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.

Emergency
removal of child.
25 USC 1922.

SEC. 113. None of the provisions of this title, except sections 101 (a), 108, and 109, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after the enactment of this Act, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

Effective date.
25 USC 1923.

TITLE II—INDIAN CHILD AND FAMILY PROGRAMS

SEC. 201. (a) The Secretary is authorized to make grants to Indian tribes and organizations in the establishment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes. 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. Such child and family service programs may include, but are not limited to—

25 USC 1931.

- (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.

42 USC 620,
1397.

(b) Funds appropriated for use by the Secretary in accordance with this section may be utilized as non-Federal matching share in connection with funds provided under titles IV-B and XX of the Social Security Act or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized to be appropriated for use under this Act. The provision or possibility of assistance under this Act shall not be a basis for the denial or reduction of any assistance otherwise authorized under titles IV-B and XX of the Social Security Act or any other federally assisted program. For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State.

Additional
services.
25 USC 1932.

SEC. 202. The Secretary is also authorized to make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs which may include, but are not limited to—

(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.

Funds.
25 USC 1933.

SEC. 203. (a) In the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements with the Secretary of Health, Education, and Welfare, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health, Education, and Welfare: *Provided*, That authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

(b) Funds for the purposes of this Act may be appropriated pursuant to the provisions of the Act of November 2, 1921 (42 Stat. 208), as amended. 25 USC 13.

SEC. 204. For the purposes of sections 202 and 203 of this title, the term "Indian" shall include persons defined in section 4(c) of the Indian Health Care Improvement Act of 1976 (90 Stat. 1400, 1401). 25 USC 1934.
25 USC 1603.

TITLE III—RECORDKEEPING, INFORMATION AVAILABILITY, AND TIMETABLES

SEC. 301. (a) Any State court entering a final decree or order in any Indian child adoptive placement after the date of enactment of this Act shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show—
Final decree, information to be included.
25 USC 1951.

- (1) the name and tribal affiliation of the child;
- (2) the names and addresses of the biological parents;
- (3) the names and addresses of the adoptive parents; and
- (4) the identity of any agency having files or information relating to such adoptive placement.

Where the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained and such information shall not be subject to the Freedom of Information Act (5 U.S.C. 552), as amended.

(b) Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe.

SEC. 302. Within one hundred and eighty days after the enactment of this Act, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this Act. Effective date.
Rules and regulations.
25 USC 1952.

TITLE IV—MISCELLANEOUS

Day schools.
25 USC 1961.

Report to
congressional
committees.

Copies to each
State.
25 USC 1962.

25 USC 1963.

SEC. 401. (a) It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families.

(b) The Secretary is authorized and directed to prepare, in consultation with appropriate agencies in the Department of Health, Education, and Welfare, a report on the feasibility of providing Indian children with schools located near their homes, and to submit such report to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives within two years from the date of this Act. In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades.

SEC. 402. Within sixty days after enactment of this Act, the Secretary shall send to the Governor, chief justice of the highest court of appeal, and the attorney general of each State a copy of this Act, together with committee reports and an explanation of the provisions of this Act.

SEC. 403. If any provision of this Act or the applicability thereof is held invalid, the remaining provisions of this Act shall not be affected thereby.

Approved November 8, 1978.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 95-1386, accompanying H.R. 12533 (Comm. on Interior and Insular Affairs).

SENATE REPORT No. 95-597 (Comm. on Indian Affairs).

CONGRESSIONAL RECORD:

Vol. 123 (1978): Nov. 4, considered and passed Senate.

Vol. 124 (1978): Oct. 14, H.R. 12533 considered and passed House; passage vacated, and S. 1214, amended, passed in lieu.

Oct. 15, Senate concurred in House amendments.

The Indian Child Welfare Act of 1978: A Critical Analysis

By RUSSEL LAWRENCE BARSIE*

Enacted in 1978, the Indian Child Welfare Act¹ (Act) is the result of an attempt by Congress to promote the stability of Indian families and tribes.² Responding to a demonstrated risk of unwarranted removal of Indian children from their homes by state and private child welfare agencies,³ the Act was intended to impose strict procedural limitations on these agencies' activities.⁴ Unfortunately, the Act falls far short of achieving the goals set by Congress.

In addition to authorizing special grants for Indian child welfare services, the Act creates seven major procedural safeguards for Indian child custody proceedings. Exclusive tribal jurisdiction is established over reservation children, except where jurisdiction previously was lost to the states under federal law.⁵ Furthermore, tribes are authorized to petition the government to reassume such previously lost jurisdiction.⁶ The Act also provides that state jurisdiction over child custody proceedings may be transferred to tribal courts at the tribe's or the parents' request.⁷ Both the tribe and the parents are given the right to notice

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1. Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified in scattered sections of 25 U.S.C.).

2. 25 U.S.C. § 1902 (Supp. II 1978).

3. *Id.* § 1901(a). See generally *Indian Child Welfare Act of 1978: Hearing on S. 1712 Before the Senate Select Comm. on Indian Affairs, 95th Cong., 1st Sess. (1977)* [hereinafter cited as *1977 Hearing*]. Figures from three states relied on by the Senate indicate the proportion of Indian foster care placements in non-Indian homes: New York (97%), Maine (64%), and Utah (88%). *Id.* at 538. See also *id.* at 111 (statement of Dir. Carl E. Mundell and Alan Gutwirth, American Academy of Child Psychiatry) (85% of Indian children in foster care placed in non-Indian homes in survey of 16 states); AMERICAN INDIAN POLICY REVIEW COMMISSION, REPORT ON FEDERAL STATE AND TRIBAL FOSTER CARE SERVICES (Comm. Print 1976) [hereinafter cited as *1976 Report*] (Washington reports 80%, Wyoming 57% in non-Indian foster homes).

4. 25 U.S.C. § 1902 (Supp. II 1978).

5. *Id.* § 1911(a).

6. *Id.* § 1918.

7. *Id.* § 1911(b).

and the right to intervene in state proceedings involving Indian children.⁸ The Act requires that higher standards of proof be applied in Indian child custody proceedings⁹ and mandates that placement of Indian children by state agencies be subject to special preferences for Indian families and communities.¹⁰ It also stipulates that consent by Indian parents to adoption or placement must be informed and is revocable for extended periods of time.¹¹ Finally the Act secures both tribes' and parents' access to state records.¹²

Although these provisions are well intentioned, their effectiveness is limited by inconsistencies and ambiguities in the drafting of the Act. Consequently, the Act may confuse and even exacerbate the problems which prompted its passage.

This Article summarizes and evaluates the most severe shortcomings of the Indian Child Welfare Act, beginning with a summary of the problems that previously existed in Indian child custody proceedings. The congressional response to these problems, in the form of the Act, is then discussed and analyzed. The enforcement provisions of the Act and the guidelines promulgated thereunder by the Secretary of the Interior are reviewed in a separate section. Suggestions are made throughout for increasing the effectiveness of the Act, both in its implementation and by amendment.

A "National Crisis"

The Human Factor

I said that the tribe was concerned that if many more of their children were taken, because there's been quite a history of taking these kids from this reservation, that they were afraid that their very survival would be at stake.

And, the codirector of this county welfare office responded to that by shrugging his shoulders and saying, "So, what?"¹³

Nationwide, Indian children have been removed from their homes with unusual frequency.¹⁴ By conservative estimates, one out of five

8. *Id.* §§ 1911(c), 1912(a).

9. *Id.* § 1912(e)-(f).

10. *Id.* § 1915.

11. *Id.* § 1913.

12. *Id.* §§ 1912(c), 1951.

13. *Indian Child Welfare Program. Hearings Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 93rd Cong., 2d Sess. 70 (1974) [hereinafter cited as *1974 Hearings*] (statement of Bertram Hirsch, counsel for the Association on American Indian Affairs).

14. The following table, adapted from data collected by the Association on American Indian Affairs (AAIA) and appearing in *1977 Hearing, supra* note 3, at 538, 603, compares

Indian children has lived in a foster or adoptive home at some time.¹⁵

The number of foster placements per 1,000 of Indian and non-Indian children in a number of states:

Indian Children in Foster Care Placements		Placements per 1,000 Children	
State	Year	Indians	Non-Indians
Idaho	1976	77.5	12.1
Maine	1975	75.8	4.0
Minnesota	1972	58.1	3.5
Wisconsin	1973	53.5	4.0
South Dakota	1974	45.5	2.0
Utah	1976	37.2	2.5
North Dakota	1976	36.1	1.8
Oregon	1976	36.1	4.1
Montana	1976	35.3	2.8
Washington	1973	35.0	3.6
Wyoming	1976	34.6	1.1
Nevada	1976	19.5	2.8
Alaska	1973	13.9	4.6
New York	1976	13.4	4.0
Michigan	1973	11.1	1.6
Arizona	1976	[10.2]	1.8
California	1974	8.1	3.0
Oklahoma	1972	7.4	1.9
New Mexico	1976	6.9	2.9
<i>Weighted Average</i>		20.0	3.4

Arizona does not report placements by race; the figure here is an estimate. A random sample of county records suggests the actual figure may be greater.

An estimate of adoptions per 1,000 of Indian children as compared with non-Indian children in several states also may be derived from the AAIA data appearing in *1977 Hearing, supra* note 3:

Adoptions of Indian Children		Adoptions per 1,000 Children	
State	Year	Indians	Non-Indians
Minnesota	1964-1975	126.6	12.2
Michigan	1973	123.5	33.0
Wisconsin	1966-1970	71.9	4.0
Oregon	1975	58.8	52.1
South Dakota	1970-1975	55.5	30.9
Utah	1975	49.0	14.6
Washington	1972	46.3	2.5
California	1975	38.0	4.5
Montana	1973-1975	35.8	6.9
Alaska	1969-1972	33.8	3.4
North Dakota	1975	32.6	14.6
Oklahoma	1972	24.5	5.1
Arizona	1969-1972	19.0	4.5
<i>Weighted average</i>		41.1	11.1

and one out of six has lived in a non-Indian home.¹⁶ Compared with White children, Indian children tend to remain under foster care longer and tend to be moved from foster home to foster home more frequently.¹⁷ The public cost of this disproportionately high rate of substitute care is great; an average of approximately \$1,000 per year for each foster child.¹⁸

The costs of massive displacement of Indian children from their homes and tribes have been severe. Prolonged substitute care during youth has been associated with high alcohol abuse and suicide rates

Only four states have records of the percentage of adopted Indian children who are adopted by non-Indians: Alaska (93%); California (92%); Montana (87%); and North Dakota (75%). Of the thirteen states listed above, 80% of all adopted Indian children were adopted before their first birthdays. See also 1976 REPORT, *supra* note 3, at 81-85, 177-242, 1974 Hearings, *supra* note 13, at 72-94, 231-52.

15. Cf. 1976 REPORT, *supra* note 3, at 79 (25-30% raised by non-Indians in homes and institutions), 1977 Hearing, *supra* note 3, at 1 (minimum of 25% of Indian children in foster homes, adoptive homes, or boarding schools); *id.* at 113 (one out of nine in foster homes, adoptive homes, institutions or boarding facilities in three states), *id.* at 187 (25% separated from their families). In 1968, 25% of all Devil's Lake Sioux children were in foster homes, adoptive homes, or institutions. See 1974 Hearings, *supra* note 13, at 95. In 1971, 14% of children from the Warm Springs reservation were either in foster homes or under institutional care. See *id.* at 101. See also 1977 Hearing, *supra* note 3, at 360, 59% (Washington statistics), 1974 Hearings, *supra* note 13, at 146 (Minnesota statistics).

16. A 1969 Association on American Indian Affairs survey of 16 states found 65% of all Indian child placements were with non-Indian families. 1974 Hearings, *supra* note 13, at 17. Individual tribes vary from this average. In 1974, 85% of the foster placements of Yakima children were with non-Indian homes, as were 75% of the adoptions. *Id.* at 120, 123-24. At the Rosebud Sioux reservation in South Dakota, however, 61% of adoptions and 64% of foster placements were with non-Indians. *Id.* at 155-56. Placement rates in individual states also vary. Rates of foster placements with non-Indian families five years ago, were 95% in Washington and Oregon, 93% in California, 87% in Montana, and 75% in North Dakota. 1977 Hearing, *supra* note 3, at 303-18; Red Bird & Melendy, *Indian Child Welfare in Oregon* [hereinafter cited as *Red Bird & Melendy*], in THE DESTRUCTION OF AMERICAN INDIAN FAMILIES 45 (S. Unger ed. 1977) [hereinafter cited as Unger]. In a 1966 study of Child Welfare League of America records, 93% of adoptions of Indian children were by non-Indian families. Lyslo, *Adoptive Placements of Indian Children*, CATH. CHARITIES REVIEW, Feb. 1967, at 23-25. A high proportion of placements also are made out of state. In 1976 the Colville Tribe found that 85% of its foster children were placed with non-Indians, and 23% were removed to homes in other states. 1977 Hearing, *supra* note 3, at 271. Cf. 1976 REPORT, *supra* note 3, at 79 (25-35% of all Indian children raised by non-Indians in homes and institutions).

17. In a detailed study of Yakima children in foster care, for example, 88% had been in more than one foster home and 54% had been in more than two. 1974 Hearings, *supra* note 13, at 123-28. The ratio of foster placements to adoptive placements is significantly higher among Indians than among non-Indians. See, e.g., 1977 Hearing, *supra* note 3, at 385.

18. See 1974 Hearings, *supra* note 3, at 324-26 (statistics for New Mexico and Minnesota).

within the Indian population.¹⁹ Psychiatrists report that Indians raised in non-Indian homes tend to have significant social problems in adolescence and adulthood.²⁰ According to a report prepared in 1975 for the American Academy of Child Psychiatry,

[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.

Frequently, when these children become adults they find themselves being treated as Indians, but do not know how to behave like Indians.²¹

Prolonged substitute care thus creates a vicious cycle that works to break up and dissipate Indian families. Stricken by a "constant sense of not knowing where they will be or how long they'll be there,"²² young Indian adults may find it extremely difficult to establish permanent roots. Their fear of loss leads to the conclusion that close personal contact is impossible, perhaps seriously impairing their ability to be parents.²³

The removal of a child from his or her home also affects parents and remaining children. In a recent report of eight case studies, University of Minnesota psychiatrist Joseph Westermeyer observed that the removal of a child "effectively destroyed the family as an intact unit. The parents invariably separated. It exacerbated the problems of alcoholism, unemployment, and emotional duress among the parents."²⁴ Puyallup Tribal Chairperson Ramona Bennett succinctly

19. See 1977 Hearing, *supra* note 3, at 156-57 (statement of National Tribal Chairmen's Association), 1974 Hearings, *supra* note 13, at 6, 28 (statement of William Hyler, Association on American Indian Affairs, quoting National Institute for Mental Health).

20. 1974 Hearings, *supra* note 13, at 46-47 (statement of Dr. Joseph Westermeyer); see 1976 REPORT, *supra* note 3, at 87; 1977 Hearing, *supra* note 3, at 155 (statement of Don Milligan); 1974 Hearings, *supra* note 13, at 113-14 (statement of Dr. James Shore and William Nicolls), *id.* at 117-18 (statement of Mel Sampson, Northwest Affiliated Tribes).

21. 1977 Hearing, *supra* note 3, at 114 (statement of Drs. Carl Mundell and Alan Gutwirth, American Academy of Child Psychiatry); see also 1974 Hearings, *supra* note 13, at 56 (statement of Drs. Mundell and Gutwirth).

22. 1974 Hearings, *supra* note 13, at 49 (statement of Dr. Joseph Westermeyer), *id.* at 129 (statement of Dr. Robert Bergman, Indian Health Service).

23. *Id.* at 58 (statement of Drs. Carl Mundell and Alan Gutwirth).

24. *Id.* See also Teiley, *Acculturation, Child-rearing, and Self-esteem in Two Young American Indian Tribes*, 4 ETHNOS 185-201 (1976). Teiley found that children from relatively more traditional Florida Indian families had better self-concepts and motivation than children of more "acculturated" families, suggesting that a coherent and complete tribal experience is more healthy.

25. Westermeyer, *The Ravage of the Indian Families in Crisis*, in Unger, *supra* note 16, at 54.

stated the parents' perspective: "[I]f you lose your children, you are dead; you are never going to be rehabilitated, [and] you are never going to get well."²⁶ Furthermore, family breakup following the removal of a child increases the likelihood that any remaining children also will be removed from the home. Indeed, one psychologist has argued that the frequency and notoriety of Indian child placements has led Indian parents to expect the removal of their children as a matter of course.²⁷ The logical result in many cases is poor parental behavior and fear of emotional attachments.

Efforts by informal family support institutions in tribal communities to resolve these problems have been frustrated in recent years by the widespread fragmentation of Indian families and the economic conditions existing on many reservations.²⁸ Solutions aimed primarily at eliminating poverty as the cause of the problem, however, are likely to face poor results. Many observers consider the "shocking" disparity in placement rates for Indian and non-Indian children as a more significant factor in family breakups than poverty;²⁹ a cause of poverty rather than an effect.³⁰ Although no rule says poor families cannot provide good parental models,³¹ no family can provide good parenting under constant threat of losing the children. Hence, the human costs resulting from displaced Indian children not only are devastating to families today, but also perpetuate the problem in future generations.

Institutional Causes

Many institutional factors are implicated in the frequency of Indian child placements, including the treatment afforded Indian families by social service professionals, state social welfare agencies, private

adoption services, state laws, and the courts. Evaluating the effectiveness of the Indian Child Welfare Act requires an examination of those attitudes and procedures that lead to excessive Indian child placements, many of which the Act does not address.

In the past, most Indian child placements went through state courts and state welfare agencies, largely because few tribal governments operated child protective services or family support programs. More recently, despite evidence that tribal programs and other culturally relevant, nontraditional services have succeeded in keeping Indian families intact where traditional state agencies have failed,³² federal funding for child welfare often has been distributed directly to state governments,³³ some of which may be reluctant to subcontract with tribes. Most tribal child welfare professionals have been funded, if at all, through temporary, nonformula federal sources.³⁴ Even where tribes have evolved effective, on-reservation child welfare services, tribal jurisdiction over reservation children has been ignored by state agencies,³⁵ and tribal court orders determining custody have not been recognized by state courts.³⁶

The treatment of Indian children by state courts is of critical importance because of the degree of state court involvement in Indian child custody proceedings. The Bureau of Indian Affairs, although funded for direct social services to Indian families,³⁷ refers about half

26. 1977 Hearing, *supra* note 3, at 164. See *id.* at 167.

27. Atineave, *The Wasted Strength of Indian Families*, in Unger, *supra* note 16, at 29-33. See also H.R. REP. NO. 95-1386, 95th Cong., 2d Sess. 12, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 7530 [hereinafter cited as H.R. REP. NO. 95-1386].

28. "Poor living conditions, unemployment on reservations, and other factors create a breakdown of the concept of the extended family. No longer is there a willing grandmother, aunt, or sister who will assume child care for a relative. Often a sick or distraught Indian mother seeks to place her children off the reservation in a non-Indian home because of alienation with her own relatives." 1974 Hearings, *supra* note 13, at 253 (statement of Robert Lewis, National Tribal Chairmen's Association).

29. H.R. REP. NO. 95-1386, *supra* note 27, at 9.

30. Compare 1974 Hearings, *supra* note 13, at 13, 26-27 (statements of William Byler) with Westermeyer, *The Ravage of Indian Families in Crisis*, in Unger, *supra* note 16, at 54.

31. "Because of poverty and discrimination Indian families face many difficulties, but there is no reason or justification for believing that these problems make Indian parents unfit to raise their children." 1977 Hearing, *supra* note 3, at 1 (statement of Senator James Abourezk).

32. See 1977 Hearing, *supra* note 3, at 79 (statement of Goldie Demya, *id.* at 114-15 (detailing Indian Adoption Program), 1974 Hearings, *supra* note 13, at 101-03 (statement of Dr. James Shore), *id.* at 109-12 (statement of Dr. James Shore and William Nicollet Ishisaka, *American Indians and Foster Care: Cultural Factors and Separation*, 51 CHILD WELFARE 299-308 (1978)).

33. See 1977 Hearing, *supra* note 3, at 230-35 (statement of Gregory Frazier), 1974 Hearings, *supra* note 13, at 24 (statement of William Byler). See also *Federal Domestic Assistance Programs: Hearing Before the Senate Select Comm. on Indian Affairs*, 95th Cong., 1st Sess. (1977).

34. See 1977 Hearing, *supra* note 3, at 163 (statement of Ramona Bennett).

35. This was the conclusion of the Department of Justice. H.R. REP. NO. 95-1386, *supra* note 27, at 35. The case law on this subject is examined in some detail at text accompanying notes 85-97 *infra*.

36. See 1976 REPORT, *supra* note 3, at 87. But see *id.* (some states do recognize determinations by tribal courts).

37. Funding is provided under the general authority of the Snyder Act, 25 U.S.C. § 15 (1976). Allocations to child welfare services have been relatively small, projected at a total level of \$3.3 million for the fiscal years 1978 to 1980. UNITED STATES OFFICE OF MANAGEMENT AND BUDGET, THE BUDGET OF THE UNITED STATES GOVERNMENT FOR FISCAL YEAR 1979, That allocation works out to about \$10 per Indian child. In 1971, a survey by the Fourth American Indian Women's Association located 115 Bureau of Indian Affairs social workers nationwide. 1974 Hearings, *supra* note 13, at 124.

of its on-reservation caseload to state programs.³⁸ Consequently, more than three-fourths of Indian child welfare matters have been managed by state agencies, although only about one-half of the nation's Indian population resides off-reservation.³⁹ In recent years the situation has been aggravated as an increasing number of young Indian families have sought temporary work or educational opportunities in urban areas, briefly exposing themselves to state jurisdiction.⁴⁰

Ignorance or Bias of Non-Indian Caseworkers

Non-Indian social workers have been criticized as being insensitive to or contemptful of traditional tribal values.⁴¹ Caseworkers unfamiliar with Indian communities, not surprisingly tend to misinterpret family and child behavior;⁴² healthy childhood environments differ widely among societies.⁴³ For example, non-Indian professionals have considered leaving a child with persons outside the nuclear family as evidence of neglect and as grounds for removal of the child.⁴⁴ This view ignores accepted conduct in Indian families where, "[b]y custom

38. 1974 Hearings, *supra* note 13, at 324.

39. See 1977 Hearing, *supra* note 3, at 112. For the demography of Indian families, see BUREAU OF THE CENSUS, 1970 CENSUS OF POPULATION, SUBJECT REPORT, AMERICAN INDIANS (1973).

40. See 1976 REPORT, *supra* note 3, at 86-87; 1977 Hearing, *supra* note 3, at 350 (statement of Don Milligan). Federal boarding schools constitute another factor in the Indian child welfare problem. Lacking public education opportunities in their own communities, approximately 17% of all Indian children spend most of their childhood boarded out at Bureau of Indian Affairs schools. H. R. REP. NO. 95-1386, *supra* note 27, at 9. For a discussion of the problem, see 1977 Hearing, *supra* note 3, at 112-13; 1974 Hearings, *supra* note 13, at 129, 131-32. The Act, however, merely calls for a study of the situation. 25 U.S.C. § 1961 (Supp. II 1978).

41. 1976 REPORT, *supra* note 3, at 281; see 1977 Hearing, *supra* note 3, at 155-56 (statement of National Tribal Chairmen's Association), *id.* at 281 (resolution of the Nez Perce Tribal Executive Committee); Unger, *supra* note 16, at iii.

42. See H. R. REP. NO. 95-1386, *supra* note 27, at 10; 1977 Hearing, *supra* note 3, at 140 (statement of Dr. Marlene Echohawk), *id.* at 155-56 (statement of the National Tribal Chairmen's Association); *id.* at 266 (statement of Virgil Gunn). See also 1 AMERICAN INDIAN POLICY REVIEW COMMISSION, 94TH CONG., 1ST SESS., FINAL REPORT 422 (Comm. Print 1977) "[Non-Indian social workers] are not equipped sufficiently in the knowledge of Indian cultural values . . . to know whether or not the behavior an Indian child or an Indian parent is exhibiting is, in fact, abnormal behavior in his own society." 1974 Hearings, *supra* note 13, at 4 (statement of William Byler). See 1976 REPORT, *supra* note 3, at 79-80.

43. "Some Navajos might find, for example, that breathing the polluted air of Washington, D.C., presents a far greater danger to a child's physical and emotional well-being than does being left alone in a hogan for several hours. Needless to say, residents of Washington, D.C. will find greater harm in the latter situation." 1977 Hearing, *supra* note 3, at 278 (statement of DNA-People's Legal Services, Inc.).

44. *Id.* at 316-17 (statement of National Indian Health Board). See H. R. REP. NO. 95-1386, *supra* note 27, at 10; 1974 Hearings, *supra* note 13, at 18 (statement of William Byler).

and tradition, if not necessity, members of the extended family have definite responsibilities and duties in assisting in childrearing."⁴⁵ In addition, state agencies often have refused to recognize the validity of customary adoptions within an extended family group;⁴⁶ Oregon had a regulation prohibiting foster placements within an extended family group,⁴⁷ and Mississippi rules forbid the adoption of a Choctaw child by a Choctaw family on the theory that it would violate the natal family's right to privacy.⁴⁸ Similarly, the lack of close parental supervision and avoidance of physical punishment of Indian children, although considered desirable parenting practices in Indian families,⁴⁹ have been cited as indications of parental neglect in state proceedings.⁵⁰

Factors other than parental practices also impact upon Indian child placements. Materialism often plays a role in professional judgments. A child's material possessions, or lack thereof, sometimes are regarded as more salient evidence of parental concern than is affection.⁵¹ Not the least of the factors affecting the decisions of non-Indian caseworkers has been the stereotyping of Indians as alcoholics. Although alcohol abuse has been a problem for many Indian families, non-Indian families with alcohol problems are more likely to be given supportive services as an alternative to removal of their children.⁵²

The prevalence of culturally inappropriate standards for the re-

This was precisely the situation in *DeCoteau v. District County Court*, 87 S.D. 555, 211 N.W.2d 843 (1973), *aff'd*, 420 U.S. 425 (1975).

45. H. R. REP. NO. 95-1386, *supra* note 27, at 20. Leonard Jimson provides an outline of Navajo custom governing extended family relationships in Jimson, *Parent-Child Relationships in Law and in Navajo Custom*, in Unger, *supra* note 16 at 67-78. The significance of extended families in the control and distribution of property is discussed in Shepardson & Hammond, *Navajo Inheritance Patterns: Random or Regular?*, 5 ETHNOLOGY 87 (1966).

46. See 1977 Hearing, *supra* note 3, at 115-16 (statement of Dis. Carl Mindell and Alan Gurwitt); 1974 Hearings, *supra* note 13, at 51-53 (statement of Mrs. Alex Bourmier).

47. Unger, *supra* note 16, at 46.

48. 1977 Hearing, *supra* note 3, at 175 (statement of Gloria York).

49. See H. R. REP. NO. 95-1368, *supra* note 27, at 10; 1974 Hearings, *supra* note 13, at 4. The philosophy of this childrearing approach is discussed in D. LEE, *FREEDOM AND CULTURE* 59-69 (1959). The infrequency of physical punishment results in few Indian children being removed from their families on the ground of physical abuse. H. R. REP. NO. 95-1386, *supra* note 27, at 10; 1976 REPORT, *supra* note 3, at 80 n.6; 1977 Hearing, *supra* note 3, at 117 (statement of Howard E. Tommie); 1974 Hearings, *supra* note 13, at 101 (statement of Dr. James Shore).

50. 1974 Hearings, *supra* note 13, at 101 (statement of Dr. James Shore).

51. See 1977 Hearing, *supra* note 3, at 77 (statement of Goldie Denny, now Director of Social Services for the Quinault Tribe).

52. See H. R. REP. NO. 95-1368, *supra* note 27, at 10. See generally *Red Bird & Melendy*, *supra* note 16, at 43-46. The prevalence of this problem led to the inclusion in the original Senate bill of a provision prohibiting the use of alcohol abuse as grounds for removing an Indian child. The rigidity of this rule was criticized by tribal governments, however

removal of Indian children has left many Indian families with a choice between raising their children as non-Indians or losing them.⁵³ As Senator James Abourezk remarked in 1977, "[p]ublic and private welfare agencies seem to have operated on the premise that most Indian children would really be better off growing up non-Indian."⁵⁴ There is evidence that state caseworkers, who often lack sufficient training and resources, have tended to remove Indian children to non-Indian homes without first attempting to provide remedial family services.⁵⁵ Because caseworkers lack, or are simply unaware of, alternatives such as family counseling, they often use the threat of removing children "to whip the family into shape when they experience difficulties."⁵⁶ A poorly trained caseworker may find it easier to force an Indian family into the outward appearance of normalcy than to help the family members actually cope with their problems.⁵⁷ This is simply poor social work, not bias.

State Licensing Standards

The widespread lack of resources and alternative modes of treatment provided troubled Indian families has been exacerbated by difficulties in licensing Indian families as foster homes:

[O]ne of the primary reasons for this extraordinary high rate of placing Indian children with non-Indian families . . . is that the standards for being licensed as a foster home are based upon middle-

and it was omitted from the Act. 1977 Hearing, *supra* note 3, at 259-60 (statement of Cheyenne River Sioux Tribe), *id.* at 278 (statement of DNA-People's Legal Services, Inc.).

53. See 1977 Hearing, *supra* note 3, at 301 (statement of National Tribal Chairmen's Association).

54. *Id.* at 1. See also *id.* at 155-56 ("In Alaska . . . placement agencies tend to favor placements in urban settings where they feel the child will receive more opportunities." *Id.* at 218. However, psychiatrists Mindell and Gurwitt told the House Indian Affairs Subcommittee that, "as a general rule," Indian children are best raised by Indians. 1974 Hearings, *supra* note 13, at 61.

55. See 1974 Hearings, *supra* note 13, at 47 (statement of Dr. Joseph Westermeyer); Westermeyer, *The Ravage of the Indian Families in Crisis*, in Unger, *supra* note 16, at 54.

56. 1974 Hearings, *supra* note 13, at 47. See also *id.* at 55 (statement of Drs. Carl Mindell and Alan Gurwitt).

57. "The policies and programs of the Bureau of Indian Affairs and state welfare departments are, for the most part, directed at crisis intervention. A family is rarely assisted until an acute crisis has arisen. Then, they feel, welfare agencies rapidly mobilize to provide the only remedy that seems practical to them—termination of parental rights." 1977 Hearing, *supra* note 3, at 318 (statement of the National Indian Health Board). In *Arizona State Dept. of Economic Security v. Mahoney*, 24 Ariz. App. 534, 540 P.2d 153 (1973), this practice was criticized in a situation involving the placement of several Pima children: "Termination of the parent-child relationship should not be considered a panacea but should be resorted to only when concerted effort to preserve the relationship fails." *Id.* at 537, 540 P.2d at 156.

class values; the amount of floor space available in the home, plumbing, income levels. Most of the Indian families cannot meet these standards and the only people that can meet them are non-Indians."⁵⁸

When removal is advisable, even a culturally sensitive social worker may find it impossible to place the Indian child in another Indian home temporarily. Generally, state licensing standards reflect an assumption that material comfort is a primary consideration in adequate nurturing. When the North American Indian Women's Association interviewed Indians who had grown up in foster care; however, they found that most of these individuals had not been as concerned with the physical attributes of the foster home as they were with the presence of the foster mother at home, firm rules, and a feeling of warmth.⁵⁹ Thus, cultural bias or misunderstanding affects not only the decision to remove an Indian child from his or her family but also affects the availability of stable Indian homes for temporary or permanent substitute care.

The "Best Interest of the Child" Rule

State courts also have suffered from ignorance, poor training, and, on occasion, cultural bias in deciding Indian child custody disputes. The "best interest of the child" standard, widely used in custody determinations, relies heavily on subjective judicial conclusions about child welfare and thus inevitably incorporates "cultural and familial values which are often opposed to values held by the Indian family."⁶⁰ In many cases, judges tend to defer to the opinions of social workers,⁶¹ shifting the burden of proof on the issue of parental competency to the child's parents.⁶² Advocates for the Act argued that "the abusive actions of social workers would largely be nullified if more judges were themselves knowledgeable of Indian life and required a sharper definition of the standards of child abuse and neglect."⁶³

58. 1974 Hearings, *supra* note 13, at 5 (statement of William Byles). See also H.R. REP. NO. 95-1386, *supra* note 27, at 11; 1977 Hearing, *supra* note 3, at 78 (statement of Goldie Denny), *id.* at 519-20 (statement of Howard E. Tommie); 1974 Hearings, *supra* note 13, at 30 (statement of Dr. Joseph Westermeyer); *id.* at 129-30 (statement of Dr. Robert Bergman); Red Bull & Melendy, *supra* note 16, at 45.

59. 1974 Hearings, *supra* note 13, at 322. Unfortunately, the Bureau of Indian Affairs copied state standards when licensing Indian homes on reservations. *Id.* at 318.

60. 1976 REPORT, *supra* note 3, at 79; see *id.* at 80; 1974 Hearings, *supra* note 13, at 57-58 (statement of Drs. Carl Mindell and Alan Gurwitt); Blanchard, *The Question of Best Interest*, in Unger, *supra* note 16, at 58-59.

61. H.R. REP. NO. 95-1386, *supra* note 27, at 10.

62. See 1974 Hearings, *supra* note 13, at 60-61 (statement of Drs. Carl Mindell and Alan Gurwitt).

63. *Id.* at 21. See also H.R. REP. NO. 95-1386, *supra* note 27, at 11; 1977 Hearing,

Fortunately, not all courts accept culturally inappropriate standards for removing Indian children from their homes.⁶³ In *Carle v. Carle*,⁶⁴ the child's father was a Haida villager and a seasonal fisherman. The mother, a Tlingit, was remarried to a non-Indian and was living in Juneau. An Alaska state trial judge found that there were some very valuable aspects of the village cultural environment, "including] a rapport with nature and with a community of people which is perhaps less characteristic of urban life" and "a sense of pride and self-worth in the Native child which a community such as Juneau could tend to suppress."⁶⁵ Nevertheless, he granted custody to the mother, reasoning that she could provide a more stable family environment than the father's extended family,⁶⁶ and observed:

Inevitably, the village way of life is succumbing to the predominate [sic] caucasian, urban society of the land, and of necessity the youth of the villages must confront and adjust to this new life style. That transition can more easily be accomplished in the case of this child at his young age than if delayed until his character and personality are more rigidly formed.⁶⁷

On appeal, the state supreme court remanded, stating: "We think it is not permissible in a bicultural context, to decide a child's custody on the hypothesis that it is necessary to facilitate the child's adjustment to what is believed to be the dominant culture It is not the function of our courts to homogenize Alaskan society."⁶⁸ Unfortunately, this position has been more frequently the exception than the rule.

Economic Incentives

Economic incentives occasionally have been another cause of unnecessary Indian child removals. State welfare agencies have been ac-

⁶³ *supra* note 3, at 355 (statement of Don Milligan), 1974 Hearings, *supra* note 13, at 56, 43 (statement of Drs. Carl Mondell and Alan Gurwitz). Other problems encountered in state court child custody proceedings are not unique to Indian children. For example, many caseworkers rely on whether a child looks "upset" when visited in a foster home by his or her natural parents. Blanchard, *The Question of Best Interest*, in Unger, *supra* note 16, at 59. Errors in interpreting this type of reaction can lead to the misplacement of Indian and non-Indian children alike.

⁶⁴ Frequent recourse to poverty as a reason for removal is a prime example. See generally 1977 Hearing, *supra* note 3, at 78 (statement of Goldie Denny), *id.* at 187 (statement of Rena Daviller), 1974 Hearings, *supra* note 13, at 20 (statement of William Byler); *id.* at 119 (statement of Mel Sampson).

⁶⁵ 503 P.2d 1050 (Alaska 1972).

⁶⁶ *Id.* at 1054 n.8.

⁶⁷ *Id.*

⁶⁸ *Id.* at 1053.

⁶⁹ *Id.* at 1054.

⁷⁰ *Id.* at 1055.

cused of conditioning the availability of social services on Indian parents' voluntary relinquishment of parental rights.⁷¹ Consequently, many Indian families are fearful of seeking services that they are entitled to by law.⁷² Although typically this has been a matter of local administrative practice, federal laws may ultimately be responsible. For example, state agencies managing federally subsidized state aid programs have been encouraged to force able-bodied single parents to take jobs; with the parent out of the house during the day, the children are more vulnerable to removal on a theory of neglect.⁷³ Furthermore, federal programs have provided greater subsidization for foster care than for the retention of children by their natural parents, making it easier for children of poor families to be supported in substitute households.⁷⁴ Indeed, the Bureau of Indian Affairs' foster home licensing program, which has attempted to use Indian foster homes, has paid significantly less foster care support than some private foster care agencies, which have tended to place Indians in non-Indian homes.⁷⁵

Another economic factor accelerating the removal of Indian children has been growth in the private adoption market. In this era of birth control and abortions there has been a decreasing supply of healthy white children available for adoption. As a result, many parents seeking to adopt have sought Indian children instead.⁷⁶ Moreover, as tribal members, these children often are entitled to annuities and other per capita payments out of tribal funds, possibly making them

⁷¹ H.R. REP. NO. 95-1386, *supra* note 27, at 11, 1977 Hearing, *supra* note 3, at 141-42 (statement of Dr. Marlene Echolawak), *Red Bird & Melendy*, *supra* note 16, at 45.

⁷² 1977 Hearing, *supra* note 3, at 362 (statement of Don Milligan). See also 1974 Hearings, *supra* note 13, at 5 (statement of William Byler).

⁷³ See generally 1974 Hearings, *supra* note 13, at 95.

⁷⁴ Cf. 1977 Hearing, *supra* note 3, at 60-61 (statement of Nancy Amidet) (children too often taken from their homes when supportive and preventative services might have allowed them to stay with their families). This discrimination between foster and natural or adoptive parents was challenged unsuccessfully in *Ramos v. Montgomery*, 313 F. Supp. 1179 (S.D. Cal. 1970), *aff'd mem.*, 400 U.S. 1003 (1971). A further federal incentive for removal of Indian children was established by the enactment of the Child Abuse Prevention, and Treatment and Adoption Reform Act of 1978, Pub. L. No. 95-266, 92 Stat. 205 (codified in scattered sections of 42 U.S.C.). This statute was designed "to facilitate interstate placement of children." S. REP. NO. 95-167, 95th Cong., 2d Sess. 16, reprinted in [1978] U.S. CONG. & AD. NEWS 557, 561, by streamlining placement procedures.

⁷⁵ 1974 Hearings, *supra* note 13, at 157 (statement of Richard Lone Dog).

⁷⁶ 1977 Hearing, *supra* note 13, at 359 (statement of Don Milligan, Washington State Department of Social and Health Services). See also *id.* at 187 (statement of Rena Daviller), 1974 Hearings, *supra* note 13, at 5 (statement of William Byler), *id.* at 70 (statement of Bertram Hirsch), *id.* at 116 (statement of Mel Sampson).

even more attractive to some potential adoptors.⁷⁷

Procedural Problems

Many observers have blamed the frequency of Indian child removals in part on procedural irregularities in state courts. Indian parents, who often are ignorant of state procedures,⁷⁸ have not always been notified of court dates.⁷⁹ In *DeCoteau v. District County Court*,⁸⁰ a child was held in substitute care for seven months under an ex parte "emergency" removal order. When a hearing finally was scheduled, the mother was notified only by publication, although she had lived continuously at the address from which the child originally had been removed. This case is not unique.⁸¹ Procedural irregularities and errors of this type that go undetected initially are especially serious because state appellate judges tend to believe subsequent reversals of custody orders are not in the interest of the children involved.⁸²

Even when notified, Indian parents frequently have appeared without representation.⁸³ Although tribes have an interest in these matters and ordinarily have counsel of their own, typically they have not been notified; even when aware of custody proceedings, tribes have not been permitted to intervene.⁸⁴ As a result, the special cultural interests of Indian children and their unique needs and resources tend not to be presented to the courts.

Jurisdictional Conflicts

Since the foregoing criticisms of Indian child placement practices

77. Furthermore, these payments are not taxable. See 1974 Hearings, *supra* note 13, at 118, 121, 124 (statement of Mel Sampson).

78. See 1977 Hearing, *supra* note 3, at 115 (statement of Drs. Carl Mindell and Alan Gurwitt), *id.* at 281 (statement of the Nez Perce Tribal Executive Committee); 1974 Hearings, *supra* note 13, at 55 (statement of Drs. Carl Mindell and Alan Gurwitt).

79. See 1974 Hearings, *supra* note 13, at 8 (statement of William Byler).

80. 87 S.D. 555, 211 N.W.2d 843 (1973), *aff'd*, 420 U.S. 425 (1975). For a discussion of the facts of the case, see 1974 Hearings, *supra* note 13, at 65-69 (statement of Cheryl DeCoteau).

81. See, e.g., 1974 Hearings, *supra* note 13, at 21-23 (statement of William Byler); *id.* at 221-25 (statement of Mel Tonasket).

82. See 1977 Hearing, *supra* note 3, at 358 (statement of Don Milligan), Blanchard, *The Question of Best Interest*, in Unger, *supra* note 16, at 59.

83. 11 R. REP. NO. 95-1386, *supra* note 27, at 11, 1977 Hearing, *supra* note 4, at 281 (statement of Nez Perce Tribal Executive Committee); 1974 Hearings, *supra* note 13, at 56 (statement of Drs. Carl Mindell and Alan Gurwitt), Unger, *supra* note 16, at iii.

84. See 1976 Report, *supra* note 3, at 80, 1977 Hearing, *supra* note 3, at 281 (statement of Nez Perce Tribal Executive Committee), *id.* at 355 (statement of Don Milligan), Unger, *supra* note 16, at iii.

generally were directed at state agencies, the extent of state jurisdiction over child placements may be the single most important factor in high placement rates. In the past, there has been no clear rule delineating the extent of state and tribal jurisdiction. Some states have exercised jurisdiction over children residing on reservation lands; others have deferred to tribal courts even in cases involving off-reservation children.⁸⁵ The controversy was complicated in 1953 with the enactment of Public Law 83-280⁸⁶ (Public Law 280), requiring some states and authorizing others to assume civil and criminal jurisdiction over reservations.⁸⁷

The earliest consideration of jurisdiction in Indian child custody proceedings was in *In re Lelah-Puc-Ka-Chee*,⁸⁸ decided in 1899. The Indian agent for the Sac and Fox tribes of Iowa was anxious to enroll Indian children in an off-reservation manual training school but had been frustrated by parental resistance. He obtained legal guardianship of all of the children from an Iowa state court and removed them from their homes. The parents succeeded in obtaining habeas corpus for the children's release. The Iowa federal district court concluded that only courts of the United States could determine the custody of an Indian

85. See notes 94-100 *infra*.

86. Act of August 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified in scattered sections of 18, 28 U.S.C.) (amended by Indian Civil Rights Act, Pub. L. No. 90-284, §§ 401-02, 82 Stat. 78-79 (1968) (codified in scattered sections of 18, 25, 28 U.S.C.)).

87. Section 4 of Public Law 280, as amended, conditionally offered states "jurisdiction over civil causes of action between Indians or to which Indians are parties." 28 U.S.C. § 1360(a) (Supp. II 1978). State "civil laws . . . of general application to private persons or private property" were to have "the same force and effect" on affected reservations as elsewhere under state control, *id.*, preventing statutory discrimination against Indian communities. At the same time, no state law could tax or regulate the possession or use of property held in trust for Indians by the United States, or reserved by treaty. 28 U.S.C. § 1360(b) (1976). Tribal legislation not inconsistent with states' general civil laws was to remain in "full force and effect." *Id.* § 1360(c). Six states (Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin (with the exception of three named reservations)) were granted reservation civil jurisdiction unilaterally and automatically. *Id.* § 1360(a). Other states were authorized to assume jurisdiction, with or without tribal consent. Five states used this option to enter the field of Indian child welfare. Florida and Nevada (subsequently retroceded) assumed full reservation civil jurisdiction. Idaho, Montana, and Washington assumed reservation civil jurisdiction only of enumerated subjects, including juvenile delinquency, child abuse and neglect, and domestic relations. See generally AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 201-02 (1977). Tribes have argued unsuccessfully that "partial assumption" of civil jurisdiction allows states to gain power while avoiding responsibility and was not intended by the 83rd Congress. *Washington v. Confederated Tribes & Bands*, 439 U.S. 463 (1979). Contests to Washington's compliance with Public Law 280 procedures also have been unsuccessful. *E.g.* *Washington v. Confederated Bands & Tribes*, 440 U.S. 940 (1979); *Comenout v. Hurdman*, 84 Wash. 2d 192, 525 P.2d 217 (1974). See generally Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. REV. 535 (1975).

88. 98 F. 429 (N.D. Iowa 1899).

child who resides on a reservation and whose tribal relations have not been severed.⁸⁹

More recent decisions generally have recognized exclusive tribal jurisdiction over the custody of Indian children actually residing within a reservation⁹⁰ or domiciled within a reservation but brought off-reservation under a prior valid tribal custody order.⁹¹ Jurisdiction in these cases cannot be delegated to state courts by a tribal court.⁹² When the child is taken off-reservation by one or both of his or her parents for the

89. *Id.* at 433. This did not end the matter. The Indian agent subsequently prosecuted an adult member of the tribe for having helped some of the children escape from the boarding school. After his acquittal, the tribal member successfully sued the agent for false imprisonment. *Peters v. Malin*, 111 F. 244 (N.D. Iowa 1901).

90. *In re Whitesield*, 124 N.W.2d 694 (N.D. 1963) (adoption, all parties Indians residing within Devil's Lake Sioux reservation); *In re Colwash*, 57 Wash. 2d 196, 356 P.2d 994 (1960) (dependency petition brought by state agency involving abandoned child residing at all times within Yakima reservation). Perhaps the greatest problem has been determining when a child is "within" a reservation. Washington state courts have declined jurisdiction over individual trust allotments not within the recognized boundaries of any reservation. The General Allotment Act, ch. 119, 24 Stat. 388 (1887), and related special acts assigned reservation lands to individual Indian families, issuing them patents "in trust" subject to the continuing control of the United States. For some jurisdictional purposes these trust allotments, located within extant or former reservations, must be distinguished from lands held by the United States for the tribe as a whole. See *also* 18 U.S.C. § 1151 (Supp. II 1978) (statutory definition of "Indian country"). See *Washington v. Superior Court*, 57 Wash. 2d 181, 356 P.2d 985 (1960) (abandoned children living at all times on off-reservation allotments). South Dakota has exercised jurisdiction over trust allotments within a reservation by applying a century-old homestead act. *DeCoteau v. District Court*, 87 S.D. 555, 211 N.W.2d 843 (1973), *aff'd*, 420 U.S. 425 (1975). The South Dakota Supreme Court found that the "facts" of parental neglect had occurred about equally on trust allotments and on fee lands, but avoided the problem of deciding which situs was controlling by concluding that the reservation as a whole no longer existed. *Id.* at 557-61, 211 N.W.2d at 844-46. The United States Supreme Court agreed in an opinion that wholly overlooked an eighty-year history of legislative and administrative recognition of the tribal government after the date of the federal act that allegedly terminated it.

Moreover, under Public Law 280, state child custody jurisdiction within an affected reservation may not preclude concurrent tribal jurisdiction. The Act itself expressly saved all tribal laws "not inconsistent with any applicable civil law of the State." 28 U.S.C. § 1360(c) (Supp. II 1978), discussed in *Bryan v. Itasca County*, 426 U.S. 373 (1976). The effect of this phrase remains debatable. See *Goldberg, Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. Rev. 535 (1975).

91. *Wakelief v. Little Light*, 276 Md. 333, 347 A.2d 228 (1975) (non-Indian foster parents under Crow tribal court order seeking adoption in Maryland state court, no jurisdiction); *In re Adoption of Buehl*, 87 Wash. 2d 649, 555 P.2d 1334 (1976) (non-Indian foster parents under Blackfeet tribal court order seeking adoption in Washington state court after tribal court revoked custody).

92. *Blackwolf v. District Court*, 158 Mont. 523, 493 P.2d 1293 (1972) (relying on *Kearney v. District Court*, 400 U.S. 423 (1971), to hold referral by tribal court to Montana state court improper).

purpose of surrendering the child to a state child welfare agency⁹³ or to litigate custody in a state forum,⁹⁴ state courts generally have accepted jurisdiction. State courts also have asserted jurisdiction over reservation-resident Indian children in some cases in which they have been abandoned by their parents or removed from parental custody during an off-reservation trip,⁹⁵ reasoning that "the 'fact' of neglect . . . occurred off the reservation."⁹⁶ In other cases, state courts have declined to exercise jurisdiction over Indian children who, although residing for some time off-reservation with their parents, once resided on a reservation and have maintained some social and institutional ties with it.⁹⁷ Both the situs of the facts upon which the change of custody is sought and the residence of the child have been advanced as tests of jurisdiction. This uncertainty makes it difficult to summarize state court jurisdiction over Indian children and creates inconsistencies nationwide in the treatment of Indian children.

Congressional Response

A great variety of recommendations for protecting Indian children and families reached Congress.⁹⁸ Tribal witnesses were emphatic

93. *In re Adoption of Doe*, 89 N.M. 606, 555 P.2d 906 (1976). See *Printz, Navajo Grandparents—"Parent" or "Stranger"—Custody Determination*, 9 N.M. L. Rev. 187 (1978).

94. *United States ex rel. Cobell v. Cobell*, 503 F.2d 790 (9th Cir. 1974) (modification of custody decree in divorce, both Indian parents having originally agreed to a state forum). At least some state courts will recognize a tribal court decree of divorce. E.g., *In re Red Fox*, 23 Or. App. 393, 542 P.2d 918 (1975).

95. *In re Duryea*, 115 Ariz. 86, 563 P.2d 885 (1977); *In re Cantrell*, 159 Mont. 66, 495 P.2d 179 (1972). Most of the children in these cases simply were abandoned while the parents were travelling off-reservation, but one child involved in the *Duryea* appeal was placed in foster care when her parents were jailed. 115 Ariz. at 87, 563 P.2d at 886.

96. *In re Cantrell*, 159 Mont. 66, 71, 495 P.2d 179, 182 (1972).

97. In *Wisconsin Potawatomes v. Houston*, 391 F. Supp. 719 (W.D. Mich. 1973), a custody contest between children's white maternal and Indian paternal relatives following the death of both parents, the children had lived on the reservation and had continuing contacts with the reservation. The court concluded they had remained domiciled on the reservation notwithstanding residence elsewhere. *Id.* at 732. In *In re Greybull*, 23 Or. App. 674, 543 P.2d 1079 (1975), the court distinguished *Wisconsin Potawatomes*, noting that the children had lived all their lives in Portland.

A second case involving Wisconsin Potawatomes also illustrates an important risk in this type of case, in this case, while litigation was pending, Michigan authorities placed the children with relatives in Florida, and the Florida district court blocked their return to the successful Indian relatives. *Wisconsin Potawatomes v. Wiley*, 377 F. Supp. 1153 (M.D. Fla. 1974).

98. See, e.g., 1976 REPORT, *supra* note 1, at 87-88; 1977 HEARING, *supra* note 1, at 161 (statement of National Tribal Chairmen's Association), *id.* at 218 (statement of Don Reeves); *id.* at 237 (statement of Alaska Legal Services Corporation), *id.* at 259-60 (statement of Central Maine Indian Association, Inc.), *id.* at 258-60 (statement of Cheyenne River

about the need for culturally appropriate family programs to provide alternatives to removal. There was general agreement on authorizing specialized federal funding through the Department of Health, Education, and Welfare rather than the Bureau of Indian Affairs.⁹⁹ Furthermore, there was agreement that state participation in existing federal funding should be conditioned on evidence of appropriate support services and licensing criteria for Indian homes.¹⁰⁰ Recruitment of Indian professionals¹⁰¹ and eligibility for members of an Indian child's extended family for financial support to provide temporary child care also were recommended.¹⁰² In 1977, the American Indian Policy Review Commission introduced two additional recommendations of a procedural nature: exclusive tribal child custody jurisdiction within reservations¹⁰³ and state notification to tribes of off-reservation proceedings.¹⁰⁴ Because of stiff administration opposition to new funding authorizations,¹⁰⁵ these procedural devices ultimately replaced funded services as the major feature of the bill.¹⁰⁶

The identifiable causes of a problem dictate the nature of effective solutions. Congress found that frequent unnecessary removals of In-

Sioux Tribe of South Dakota), 1974 Hearings, *supra* note 13, at 57 (statement of Drs. Carl Mindell and Alan Gurwitt), *id.* at 328-29 (statement of North American Indian Women's Association, Inc.)

99. 1977 Hearing, *supra* note 3, at 246 (statement of Mike Ranco, Central Maine Indian Association, Inc.); *id.* at 327-28 (statement of Beatrice Gentry); 1974 Hearings, *supra* note 13, at 59 (statement of Drs. Carl Mindell and Alan Gurwitt).

100. 1976 REPORT, *supra* note 3, at 87-88; 1977 Hearing, *supra* note 3, at 287. It generally was agreed that Indian children should be placed, where possible, with Indian families, 1976 REPORT, *supra* note 3, at 87-88; 1974 Hearings, *supra* note 13, at 328-29 (statement of North American Indian Women's Association), and that materialistic foster home licensing criteria be eliminated. 1974 Hearings, *supra* note 13, at 328-29.

101. See 1974 Hearings, *supra* note 13, at 216 (statement of Evelyn Blanchard); *id.* at 328 (statement of North American Indian Women's Association).

102. *Id.* at 328.

103. See 1976 REPORT, *supra* note 3, at 87-88; 1977 Hearing, *supra* note 3, at 118-19 (statement of American Academy of Child Psychiatry); *id.* at 274-75 (statement of the Yakima Indian Nation).

104. 1976 REPORT, *supra* note 3, at 87-88.

105. Both the Bureau of Indian Affairs and the Department of Health, Education and Welfare went on record in opposition to the bill as unnecessarily costly and duplicative of existing funding to state agencies. H.R. REP. NO. 95-1386, *supra* note 27, at 34; 1977 Hearing, *supra* note 3, at 50-65 (statement of Raymond Butler, Bureau of Indian Affairs). In addition, the Justice Department feared the broad declaration of federal policy in the bill would imply a legal obligation of the United States to bear the costs of tribal child welfare programs. H.R. REP. NO. 95-1386, *supra* note 27, at 38 n.4, 40.

106. The original bill, S. 3777, was introduced in the 94th Congress and re-introduced as S. 1214 in the 95th Congress. Subsequently, S. 1214 was amended to contain the complete text of the House bill, H.R. 12533. H.R. REP. NO. 95-1386, *supra* note 27, at 28, *see also* H.R. REP. NO. 95-597, 95th Cong., 1st Sess. (1978).

dian children had been the result of *professional and judicial attitudes towards Indians, state judicial procedures, and the design and accessibility of federal child welfare programs.* State judicial procedures and federal funding can be addressed by appropriate legislation. Optimistically, decisionmakers' attitudes can be altered by training. Conceivably, however, some of these attitudes can be avoided only by removing the decision to another forum. It is in this light that the following discussion summarizes the legislation, as enacted, and critically analyzes the Act and the regulations promulgated to implement its goals.

Scope of the Act

The key operational definitions in the Indian Child Welfare Act are "child custody proceeding" and "Indian child." These two phrases determine the general scope of the Act's safeguards. Unfortunately, many of the problems that have been reported by Indian communities do not qualify for Indian Child Welfare Act protection because they do not involve child custody proceedings or Indian children as defined in the Act.

"Child Custody Proceeding"

Under the Act, a child custody proceeding may be either a foster care placement, a preadoptive placement, an adoption, or a termination of parental rights.¹⁰⁷ In all four categories, the common element is the parents' loss of control over the child. Involuntary investigations and home interventions by social welfare agencies implicitly are excluded.

Expressly excluded from the definition of child custody proceeding are placements based on acts of a child that are essentially criminal in nature,¹⁰⁸ such as the institutionalization of a minor for theft or joyriding. Also expressly excluded are custody awards in divorce proceedings.¹⁰⁹ Thus, the Indian Child Welfare Act does not disturb the power of states to intervene in Indian homes as a preventive measure, to remove or institutionalize Indian children on grounds of juvenile delinquency, or to determine the custody of Indian children when their parents seek a divorce. The Act principally applies to cases where a state court attempts to remove an Indian child from his or her home on grounds of the alleged incompetence or brutality of the parents.

107. 25 U.S.C. § 1903(1) (Supp. II 1978), *discussed in* 44 Fed. Reg. 67,587-88 (1979).

108. 25 U.S.C. § 1903(1) (Supp. II 1978).

109. These exemptions are based on a recommendation by the Department of the Interior, which argued that additional procedural safeguards were necessary in these exempted areas. H.R. REP. NO. 95-1386, *supra* note 27, at 31.

This limited scope of applicability suggests that Congress may have mistaken the real nature of the problems facing Indian families. The preamble to the Act states that the purpose of the Act is "to promote the stability and security of Indian tribes and families."¹¹⁰ To achieve that purpose the target for legislation should have been the general causes of Indian family breakups. Unquestionably, divorce is a cause, and juvenile delinquency a symptom, of family disintegration. The Act could have been much more effective in its stated purpose if these types of proceedings had been included within the Act's protection.

Furthermore, prevention of family breakup necessitates tribal intervention before removal of the child becomes imminent. A child becomes subject to the Act's provisions, however, only after being removed from the home. Absent life-threatening conditions, effective social welfare agencies monitor cases and offer supportive services for weeks, months, or years before concluding that removal of a child is unavoidable.¹¹¹ It is during this preremoval period of investigation, case planning, and family services that family breakup is prevented or hastened. Once a case reaches the stage of proposed removal, breakup of the family may be inevitable.

The Act addresses this problem only indirectly, by requiring a showing prior to removing an Indian child from his or her home that "active efforts have been made" to prevent family breakup.¹¹² This requirement, however, does not mandate formal participation in case planning by tribal or urban Indian social welfare agencies. Hence, tribal input still need not be obtained during the critical preremoval period. Moreover, state courts alone are left to determine whether efforts to prevent family breakup have been "adequate." The result is a real potential for uninformed decisions and inconsistent results. The Act could have been far more effective if it had required sharing casework responsibility with the tribe from the moment of initial state contact with the family. Indian interests in preventing family disintegration would have been protected more uniformly and the Act would have encouraged a cooperative, rather than an adversarial, relationship between state and Indian caseworkers. The present system of crisis intervention will do little to enable tribes to prevent child removals.¹¹³

¹¹⁰ 25 U.S.C. § 1902 (Supp. II 1978).

¹¹¹ See notes 55-56 & accompanying text *supra*.

¹¹² 25 U.S.C. § 1912(d) (Supp. II 1978).

¹¹³ Public intervention in a family crisis ideally is a continuing process of evaluation, action, and assessment. Coordinating intervention with goals is the function of "case plan-

"Indian Child"

Unenrollable Children

The scope of the Indian Child Welfare Act is further restricted by its definition of "Indian child." An "Indian child" is defined under the Act as "any unmarried person under age eighteen" who is either "(a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."¹¹⁴

This definition excludes a tribal member's biological child who is not eligible for membership in that, or any other, tribe.¹¹⁵ The minimum blood quantum requirement set forth in tribal constitutions was insisted upon by the federal government to limit its service responsibilities,¹¹⁶ and has the effect of denying membership to many children of tribal members, regardless of a child's residence, language, cultural affiliation, or tribal allegiance. The Indian Child Welfare Act conforms to this fifty year old policy by treating these "unenrollable" children as non-Indians.

Difficulties with this exclusion may be illustrated by an example of a tribal member with one-fourth Indian blood who resides on the reser-

ving" by participating agencies and professionals. When a child's life or health are not imminently threatened, child welfare agency intervention may be limited to support services designed to help the family overcome problems and function successfully. Support services should include direct financial assistance, advocacy in obtaining assistance from other sources, individual and family counseling, and respite (brief voluntary removal of a family member while the crisis is being resolved). If support services fail, indefinite removal of the child may be necessary, with or without parental consent. Removal of a child does not terminate the case planning process. Especially in emergency situations, removals typically are made to temporary receiving homes. An appropriate foster home must then be found. Foster placements change frequently in the first six to eight weeks after removal, requiring close supervision by the case planning team until some relatively stable arrangement is achieved by the agencies involved or by final judicial decree.

¹¹⁴ 25 U.S.C. § 1903(4) (Supp. II 1978) (emphasis added). The question of whether the decision of tribal agencies are conclusive as to eligibility is left unresolved by the Act.

¹¹⁵ See *id.* § 1901(3) (declaring Congress' interest to be limited to children who are members of, or eligible for membership in, recognized tribes). This limitation was criticized by the National Congress of American Indians, 1977 Hearing, *supra* note 3, at 128. See also *id.* at 294 (statement of Phoenix Indian Center), *id.* at 327-28 (statement of Beatrice Gentry). On the other hand, the National Tribal Chairmen's Association, American Civil Liberties Union, and Department of Justice argued that the application of the Act even to enrolled children would be unconstitutional unless restricted to those residing on a reservation or maintaining "close family ties" to one. H.R. REP. NO. 95-1386, *supra* note 27 at 37-40, 1977 Hearing, *supra* note 3, at 158 (statement of the National Tribal Chairmen's Association), *id.* at 189 (statement of the American Civil Liberties Union). The Act may yet be challenged on that basis.

¹¹⁶ See R. BAKSH & J. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 244-48 (1980).

vation and is active in community affairs. Her first child, by a tribal member also with one-fourth Indian blood, is enrollable in the tribe. If she remarries another Indian, with only one-eighth Indian blood, her second child is unenrollable. The Indian Child Welfare Act treats these two children differently, even if raised in the same home, sharing the same language and culture.

The Act also excludes children of "terminated" tribes, *i.e.*, tribes not administratively recognized by the United States, and Canadian tribes.¹¹⁷ The exclusion of Canadians will be a significant problem in New England; Micmaes, from reserves in the maritime provinces, account for three-fourths of Indian child placement proceedings in the greater Boston area.¹¹⁸

Admittedly, with limited resources, lines must be drawn and some individuals and groups excluded from the Act's protection. The difficult question is where the lines should be drawn and by whom. The Act makes an arbitrary exclusion based not on the aims and goals of the legislation but on anachronistic and irrelevant classifications. The purposes of the Act could have been better achieved by allowing many of the exclusionary decisions to be made at the tribal level, based on a number of factors, including, for example, the child's relative needs and the tribe's available resources.

Alaska Natives

Some children of Alaska natives do not qualify as "Indian children" under the Indian Child Welfare Act. Furthermore, the Act is unclear as to which Alaska native children are covered and which are not. To determine their status, one must read together the Act's definitions of "Indian," "Indian tribe," and "Indian child." These three definitions, however, are both inconsistent and circular, and may lead to anomalous results.

An Alaska Native child may be an Indian child under the Act if

117 Following enactment of Public Law 280, see note 86 *supra*, a number of tribal governments were dissolved by Congress without tribal consent. Act of Jun. 14, 1954, Pub. L. No. 83-399, 68 Stat. 250; Act of Aug. 23, 1954, Pub. L. Nos. 83-587, -588, -627, 68 Stat. 711, 724, 768; Act of Sept. 1, 1954, Pub. L. No. 83-762, 68 Stat. 1099 (codified in 25 U.S.C. §§ 741-760); Act of Aug. 1, 1956, Pub. L. No. 84-887, 70 Stat. 893 (codified in 25 U.S.C. §§ 791-807); Act of Aug. 2, 1956, Pub. L. No. 84-921, 70 Stat. 937 (codified in 25 U.S.C. §§ 821-826); Act of Aug. 3, 1956, Pub. L. No. 84-943, 70 Stat. 963 (codified in 25 U.S.C. §§ 841-853).

118 1977 Hearing, *supra* note 3, at 242 (statement of Boston Indian Council, Inc.); *See also* *ibid.* at 246-47 (statement of Mike Ranco, Central Maine Indian Association, Inc.); *Id.* at 343-47 (statement of Indian Task Force of the Federal Regional Council of New England).

that child is "a member of an Indian tribe."¹¹⁹ An "Indian tribe," in turn, is defined as any organized community of Indians recognized by the Secretary of the Interior, "including any Alaska Native village."¹²⁰ The question remains, however, whether the word "member," as used here, refers to a *shareholder* in an Alaska Native village corporation (organized under the Alaska Native Claims Settlement Act¹²¹ (ANCSA)) or to an *enrolled member* of an Alaska Native Village (incorporated under the provisions of the 1934 Indian Reorganization Act¹²² (IRA)). Shareholdership and enrollment in a village are not synonymous. Not all IRA villages are ANCSA corporations and not all ANCSA village corporations have IRA constitutions. The Act may encompass either type of membership, or both. The effect of this ambiguity may be to exclude children from the Act's protection unnecessarily. For example, suppose that "member of . . . or eligible for membership in . . . any Alaska Native Village" is read to mean "shareholder in or eligible for shareholdership in any ANCSA village corporation." Village shares may be inherited like other personalty, hence a legal heir of a living shareholder is "eligible for shareholdership" and would be considered a member under the Act. If such a child is disinherited, however, the child could be deprived of shareholdership by reason of events that normally would not terminate tribal membership. The result could be unjustified exclusion from the scope of the Act.

Just as the native child of an Alaska Native might not be considered an "Indian child" under this interpretation, a non-Native child could be considered an "Indian child" and qualify for the Act's protection. After 1991, anyone may buy and vote village shares.¹²³ Village shareholders after that date may include non-Natives. Consequently, children of these shareholders could be "Indian children" under the Indian Child Welfare Act.

It is not enough under the Act, however, for a child to be *eligible* for membership in a tribe or village; the child also must be "the biological child of an Indian."¹²⁴ The Act defines "Indian" as "a member of

119. 25 U.S.C. § 1903(4) (Supp. II 1978).

120. *Id.* § 1903(8).

121. See Alaska Native Claims Settlement Act, §§ 8(a), 11(d), 43 U.S.C. §§ 1607(a), 1610(b) (1976).

122. 25 U.S.C. § 476 (1976). Forty-eight Alaska Native villages had adopted Indian Reorganization Act constitutions by 1946. Haas, *Ten Years of Tribal Government Under I.R.A.*, 1 TRIBAL RELATIONS PAMPHLETS 29-30 (United States Indian Service 1947).

123. See Alaska Native Claims Settlement Act, §§ 7(h), 8(c), 43 U.S.C. §§ 1606(h), 1607(c) (1976).

124. 25 U.S.C. § 1903(4) (1976).

an Indian tribe or . . . an Alaska Native *and* a member of a Regional Corporation."¹²⁵ Reading this together with the Act's definition of "Indian tribe," it appears that an "Indian child" must be the biological child of a member of a village (as defined by either ANCSA or IRA) or of an Alaska Native member of a regional corporation. Because a non-Native can be a shareholder of an ANCSA village after 1991, as discussed, the biological child of a non-Native may, in fact, come under the Act's protection.

A further problem arises because a "member of a Regional Corporation" must be a shareholder, and an Alaska Native born after 1971 can become a regional or village shareholder only by inheritance or purchase.¹²⁶ Therefore, the children of Alaska Natives born after 1971 would not be considered the biological children of an Indian, for the purposes of the Act, until their parents purchase or inherit shares in the village corporation.

These conflicts among the Act's many overlapping definitions of "Indian child" are caused by ambiguity in the statutory wording. Clarification of the Act's applicability is essential if unreasonable and unfortunate results are to be avoided.

Exclusive Tribal Jurisdiction

Congress typically leaves the delineation of tribal powers and jurisdiction to the courts.¹²⁷ The Indian Child Welfare Act breaks with this tradition. Although it was intended to confirm prior case law,¹²⁸ the Act actually may narrow the scope of exclusive tribal child welfare jurisdiction.

The Act confirms exclusive tribal jurisdiction only over "child custody proceedings."¹²⁹ By implication, jurisdiction over juvenile delinquency proceedings, divorce, and investigative and preventive actions taken by social welfare agencies is at best concurrent with state jurisdictions, even where these actions occur totally within the reservation. Although this implication does not follow necessarily from the Act, it is a

125 *Id.* § 1903(3) (1976) (emphasis added). The term "Alaska Native" is not defined by the Indian Child Welfare Act. The Alaska Native Claims Settlement Act, § 5, 43 U.S.C. § 1604 (1976), established a permanent roll of Alaska Natives living in 1971.

126 See authorities cited note 122 *supra*.

127 R. BAKSHI & J. HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* 117-40 (1980).

128 H.R. REP. NO. 95-1386, *supra* note 27, at 21.

129 Tribal jurisdiction was the subject in *United States ex rel. Cobell v. Cobell*, 403 F.2d 790 (9th Cir. 1974) (divorce), and *Blackwell v. District Court*, 158 Mont. 523, 493 P.2d 1293 (1972) (juvenile delinquency). Both cases ruled that the state courts lacked jurisdiction.

plausible enough interpretation, and may invite fresh state challenges to the jurisdiction of tribal courts.¹³⁰

Ordinarily, a state can exercise child protective jurisdiction over any child found within its borders, subject only to the continuing jurisdiction of the courts of other states.¹³¹ The Indian Child Welfare Act confirms exclusive tribal child welfare jurisdiction over Indian children who are "wards" of a tribal court or "who reside or are domiciled" on the tribe's reservation.¹³² This extends the tribes' reach to domiciliaries found off-reservation. On the other hand, an Indian family could not, under the Act, avoid state law by bringing a child to the reservation solely to allow the tribal court to order a new child placement.

This poses a problem where an Indian parent takes a child off-reservation and, subsequently, through the parent's neglect or inability to care adequately for the child, the child's on-reservation extended family brings the child back and tries to establish custody. In many states the domicile of the child is the domicile of the parent or legal guardian.¹³³ If the extended family retrieves a child from an off-reservation parent, the state is likely to continue to treat the child as domiciled off-reservation. Consequently, the Indian Child Welfare Act would support exclusive state jurisdiction, despite the possibility that in at least some cases a more appropriate determination could be made in the tribal court.

Congress, aware that exclusive tribal jurisdiction would be meaningless without interstate recognition and enforcement, included a provision in the Act to require state court recognition of tribal child custody judgments.¹³⁴ The meaning of the provision, however, is somewhat ambiguous; the United States, states, territories, and tribes are to give full faith and credit to tribal child custody proceedings and laws "to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of *any other entity*."¹³⁵

130 In any event, it is clear that a tribe which *lost* exclusive jurisdiction of child custody matters under some prior federal law can reassume jurisdiction only over "child custody proceedings" as restrictively defined by the Indian Child Welfare Act, 25 U.S.C. § 1911(d) (Supp. II 1978), 44 Fed. Reg. 45,093-94 (1979).

131 B. Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems*, 65 CALIF. L. REV. 978, 981-85 (1977); B. Bodenheimer, *The Uniform Child Custody Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1224-29 (1969).

132 25 U.S.C. § 1911(a) (Supp. II 1978).

133 25 AM. JUR. 2d *Domicile* § 64 (1966), RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8 (1969).

134 25 U.S.C. § 1911(d) (Supp. II 1978).

135 *Id.* (emphasis added).

Although the provision mentions full faith and credit, it does not expressly state that tribal judgments are to be accorded the same weight as other state court judgments. The phrase "any other entity" could be misinterpreted to allow application of a supremacy or comity standard. Although the likelihood of misinterpretation may be insignificant, individual court decisions may not be consistent, creating a potential for lack of uniformity. Confusion could have been avoided by an express statement that tribal judgments are to be accorded the same recognition as state court judgments.

The Indian Child Welfare Act also confirms the effect of Public Law 280,¹¹⁶ *i.e.*, granting some states concurrent and superior jurisdiction over reservations located within their boundaries. To reacquire this lost jurisdiction over child custody proceedings, tribes must petition the Secretary of the Interior, who has unlimited discretion to deny the petition.¹¹⁷ The Act suggests factors that the Secretary may consider, but provides no reviewable standards. Two of the factors suggested in the Act, the territorial area and population of the tribe,¹¹⁸ indicate that small tribes may be discriminated against notwithstanding their ability to exercise reassumed jurisdiction effectively. It would have been more appropriate for Congress to advise the Secretary not to consider the size of the tribe, but its financial and technical resources. Unfortunately, as written, the Act may deny the reassumption of jurisdiction by capable and qualified tribes.¹¹⁹

Notice and Intervention in State Proceedings

The Indian Child Welfare Act guarantees the right of an Indian child's parents or tribe to intervene at any point in specified state child custody proceedings.¹⁴⁰ This right of intervention appears not to apply,

¹¹⁶ See note 86 *supra*.

¹¹⁷ 25 U.S.C. § 1918(b) (Supp. II 1978).

¹¹⁸ *Id.* § 1918(b)(ii), (iii).

¹¹⁹ The Indian Child Welfare Act's provision for reassumption is its only remedy for the problem of concurrent civil jurisdiction under Public Law 280. See note 86 *supra*. As long as both the tribe and the state assert concurrent child protective jurisdiction, the outcome of a child custody contest may depend on a "race to the courthouse." Rather than declare as a general matter whether state Public Law 280 jurisdiction is exclusive or concurrent, resolving the controversy in the case law, the Act simply leaves it to dissatisfied tribes to take action individually.

¹⁴⁰ 25 U.S.C. § 1911(c) (Supp. II 1978). In response to fears expressed at the hearings, the Act's procedural requirements were drafted in language intended to avoid any implication of applicability to proceedings in tribal courts. See 1977 Hearing, *supra* note 3, at 78 (statement of Goldie Denny), *id.* at 118 (statement of Marlene Echohawk), *id.* at 185 (statement of Rena Uviller).

however, to voluntary actions.¹⁴¹ Nonetheless, the Indian child's tribe should be entitled to intervene in voluntary adoptions. Given that the tribe's participation in an involuntary placement is desirable to assure the best possible placement for an Indian child, there is no apparent reason to distinguish voluntary proceedings. Simply because an Indian parent gives up a child willingly to a state or private agency does not mean that the agency will do a better job of placing that child in an appropriate home.¹⁴²

The right to intervene would be of little value without notice of pending proceedings. The duty of giving notice under the Act falls on the party seeking custody, ordinarily a state agency. Under the Act, the rights of notice and intervention extend to "the parent or Indian custodian and the Indian child's tribe."¹⁴³ The Act's definition of "Indian child's tribe" allows the child to have only one tribe.¹⁴⁴ If a child is a member, or is eligible for membership, in more than one tribe, that child is treated as a member of the tribe with which he or she has "more significant contacts."¹⁴⁵ Therefore, in a proceeding involving a multi-tribal Indian child, the party seeking custody only need notify the tribe with the more significant contacts. The Act, however, fails to define "significant contacts," so that the party seeking custody must determine alone which tribe to notify. Evaluation of "significant contacts" thus becomes a threshold question to be determined by private parties before any of the potentially affected tribes have had an opportunity to appear.¹⁴⁶ This problem is compounded by the likelihood that a potentially affected tribe will be entirely unaware of the proceedings; a tribe cannot challenge lack of notice unless it learns of the proceeding by some other means.¹⁴⁷

¹⁴¹ See 25 U.S.C. §§ 1911(c), 1912(a) (Supp. II 1978).

¹⁴² Voluntary adoptions may account for as many as one-third of the total number of adoptions. 1977 Hearing, *supra* note 3, at 356-59. The National Congress of American Indians raised this point unsuccessfully in an attempt to expand the tribes' right of intervention. *Id.* at 136. Voluntary actions may have been exempted from the Act because of vigorous lobbying by the Mormon church, which feared complications for its educational placement program, *id.* at 192-216, 431-74, which was strongly criticized by the tribes. *Id.* at 219, 250.

¹⁴³ 25 U.S.C. § 1912(a) (Supp. II 1978). The Act defines "Indian custodian" as a parent or Indian legal guardian. *Id.* § 1903(6). Similarly, "parent" is defined as a biological parent or an Indian person who lawfully adopts an Indian child. *Id.* § 1903(9).

¹⁴⁴ *Id.* § 1903(5).

¹⁴⁵ *Id.*

¹⁴⁶ "It is assumed that the appropriate official can make a reasonable judgment about which Indian tribe the Indian child has the more significant contacts [sic]." H.R. REP. NO. 95-1386, *supra* note 27, at 20.

¹⁴⁷ A hypothetical situation will illustrate the point. Suppose a child is eligible for enrollment in Tribe A and Tribe B. Tribe A is nearby, has an active interest in the child and

Clearly, jurisdiction over a child custody proceeding cannot be transferred to more than one tribe at a time. Although a single eligible transferee tribe must be identified in each case, there is no compelling reason why all tribes with an interest in a child should not be entitled to notice of the proceeding and be given an opportunity to intervene on the child's behalf. Rather than the limited and exclusionary "significant contacts" test, Congress could have required notification of all tribes having *minimum* contacts with the child, thereby increasing the likelihood of tribal participation in the proceeding.

The right to intervene also is virtually meaningless unless notice of proceedings is prompt and reliable and unless placements that have been made without adequate notice can be reversed. The Act expressly provides for reversal. If denied notice or the opportunity to intervene, the child's parent or tribe may petition for new proceedings.¹⁴⁸ For the welfare of the child, however, problems should be avoided *before* a placement has been made.

The party seeking custody must "notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested."¹⁴⁹ If the "identity or location of the parent or Indian custodian and the tribe cannot be determined,"¹⁵⁰ the party seeking custody must notify the Secretary of the Interior.¹⁵¹ Strictly construed, however, the Secretary need be notified only when the party seeking custody can identify *neither* the legal guardian *nor* the tribe. If that party does not know the address of the child's tribe, then it lawfully may notify the parents alone. The Act would have been more effective at insuring the participation of all concerned if it required that the Secretary be notified *whenever* the identity of the parent, the Indian custodian, *or* the tribe "cannot be determined."

Additional problems arise in working out the impact of the notice provisions on the custody proceeding itself. To protect the rights of parents and tribes, the Act prohibits holding a child custody proceeding until "at least ten days after receipt of notice by the parent or Indian

facilities to provide support, but the state agency determines that Tribe B has the more significant contacts. If only Tribe B is notified, and then declines to intervene, Tribe A may receive no notice of the proceeding despite the benefits available to the child from its intervention.

148. 25 U.S.C. § 1914 (Supp. II 1978).

149. *Id.* § 1912(a).

150. *Id.* (emphasis added). The House Committee read this phrase as meaning "Indian custodian or the tribe." H.R. REP. NO. 95-1386, *supra* note 27, at 21.

151. 25 U.S.C. § 1914 (Supp. II 1978).

custodian and the tribe or Secretary."¹⁵² This ambiguous phrase may lead to interesting problems if it is interpreted to mean, as Congress probably intended, that the proceedings not begin until *all* parties have had notice for ten days. If, ten days after the parents in a child custody proceeding have acknowledged receipt of notice the tribe has not acknowledged notice, what is the court to do?¹⁵³ Furthermore, the Act implies that parties seeking custody may notify either the parents or the tribe, if only one can be identified. The state courts, on the other hand, apparently cannot proceed unless both the parents and the tribe have received notice.

This problem may encourage state agencies to avoid notifying parents and tribes by routinely sending notice to the Secretary. Once notified, the Secretary has only fifteen days to identify, locate, and notify "the parent or Indian custodian and the tribe."¹⁵⁴ This limited time and the lack of any funding for this additional responsibility¹⁵⁵ may mean that parental and tribal input will be avoided. Indeed, even if the Secretary makes the required "diligent efforts to relay such notice,"¹⁵⁶ a state court need only wait ten days after the Secretary receives notice to begin proceedings. Hence, the child may be placed or adopted before the Secretary's fifteen day period to notify the parents or the tribe has elapsed.¹⁵⁷

152. *Id.* § 1912(a). The Department of the Interior succeeded in getting this time limit reduced from 30 days. H.R. REP. NO. 95-1386, *supra* note 27, at 32. Presumably this poorly-punctuated phrase was intended to mean "receipt of notice by the parent or Indian custodian and the tribe [,] or by the Secretary."

153. The regulations avoid this problem by use of the disjunctive "or" rather than the conjunctive "and." 44 Fed. Reg. 45,096, 45,103 (1979) (to be codified at 25 C.F.R. § 23.11(a)), as do the suggested "guidelines" for state courts, *id.* at 67,584, 67,588.

154. 25 U.S.C. § 1912(a) (Supp. II 1978) (emphasis added).

155. This is significant in light of past criticism of the Bureau of Indian Affairs' management of Indian child welfare services, and recommendations that the Department of Health, Education, and Welfare be given oversight of any new programs. See note 99 *supra*. See also 1977 Hearing, *supra* note 3, at 104-05, 109 (statement of Virginia Bausch).

156. H.R. REP. NO. 95-1386, *supra* note 27, at 21.

157. Section 104 of the Act, 25 U.S.C. § 1914 (Supp. II 1978), permits reversal of placements made in violation of its provisions for notice, but routine notification of the Secretary is not, strictly speaking, a violation. A case might be made that the child's parents and tribe were identifiable and therefore should have been notified directly. However, proving that a state or private agency knew, or should have known, of the identity and whereabouts of the parents and tribe would be difficult. To further complicate matters, the Act also may be interpreted as requiring notice and delay of proceedings each time an Indian child is moved from one placement to another. If a child must be moved several times during the pendency of court proceedings, there is a danger of indefinitely postponing final disposition of a case. It also would be possible for agencies to frustrate the Act by deliberately moving Indian children to force postponements. States and tribes could try to resolve this problem by agreeing to waive the statutory delay (but not the requirement of notice) for secondary

Transfers of Proceedings to Tribal Court

Eligible Children

Notice is important, in part, because an intervening parent or tribe can petition the state court to transfer the proceeding to a tribal court.¹⁵⁸ This right is limited, however, to proceedings involving "an Indian child not domiciled or residing within the reservation of the Indian child's tribe."¹⁵⁹

An Indian child who resides on a reservation ordinarily would be subject to exclusive tribal jurisdiction.¹⁶⁰ States, on the other hand, have exclusive jurisdiction over children that do not reside on a reservation and children who reside on a reservation subject to Public Law 280.¹⁶¹ The Indian Child Welfare Act makes all proceedings involving children in the former group transferable, but excepts out of the latter group children who are members of a particular tribe but reside on another tribe's reservation, e.g., a child enrolled in the mother's tribe but living on the father's reservation.

A hypothetical case illustrates the problem. Two children, *A* and *B*, are members of Tribe *X*, a Public Law 280 tribe in Washington. *A* lives on the reservation of Tribe *S*; *B* lives in Chicago. In a state proceeding in Illinois, *B* can be transferred to the courts of Tribe *X*. In a state proceeding in Washington, however, *A* cannot be transferred to the courts of Tribe *X*. Ironically, in cases like this, the Indian Child Welfare Act gives Public Law 280 tribes a greater interest in their off-reservation children. Apparently, the drafters of the Act did not fully consider the territorial implications of this provision. Confusion could have been avoided simply by stating that where tribal jurisdiction is not exclusive, jurisdiction may, nonetheless, be transferred to the tribe.

Denial of Petition for Transfer

An otherwise proper petition for transfer involving an eligible Indian child and an eligible tribal court may be denied if either of the

placements pending final court action. Such agreements might not survive challenge by aggrieved Indian parents, however.

158. *Id.* § 1911(b).

159. *Id.*

160. *Id.* § 1911(a). The Act's definition of "reservation," *id.* § 1903(10), includes all fee lands within a reservation, and all trust allotments wherever located, deliberately reversing the result in *DeCoteau v. District Court*, 420 U.S. 425 (1975). 11 R. REP. NO. 95-1386, *supra* note 27, at 21.

161. See note 86 & accompanying text *supra*.

parents¹⁶² or the tribe objects, or if the state court finds "good cause" not to make the transfer.¹⁶³ These limitations could operate to frustrate many proposed transfers.

Obviously, the proposed transferee tribe must be given an opportunity to object. Many tribes lack the interest or resources to place and support foster care children. Because the party seeking custody effectively chooses the eligible transferee by determining the "Indian child's tribe" for notice purposes,¹⁶⁴ however, there is a considerable potential to have uninterested transferees deliberately selected, who then will object. Problems also arise from the Act's failure to specify how long a state court must wait before concluding that a proposed transfer has not been accepted by the tribe.¹⁶⁵ A state court might require a written response from the tribe within an unreasonably short period of time after having received notice. The practical effect would be to inhibit or defeat a tribe's opportunity to accept.

Either parent, Indian or non-Indian, may veto a proposed transfer regardless of the opinion of the tribe or the state social service agency. Whenever there is parental disagreement over the proper forum, state courts thus will prevail. Given the goals of the Act, a presumption in favor of tribal jurisdiction would have been preferable to this effective presumption for state court jurisdiction. Moreover, the state court itself may veto a transfer to a tribal court for "good cause." The Act does not define this term and hence leaves to the discretion of state trial

162. 25 U.S.C. § 1911(b) (Supp. II 1978). This limitation was recommended by the National Tribal Chairmen's Association 1977 Hearing, *supra* note 3, at 158 (statement of Calvin Isaac). The Department of the Interior further recommended that any child over the age of twelve years be able to object to transfer. 11 R. REP. NO. 95-1386, *supra* note 27, at 32. Although this was not included in the Act, the Department of the Interior inserted it in the guidelines for state courts. 44 Fed. Reg. 67,584, 67,591 (1979).

163. 25 U.S.C. § 1911(b) (Supp. II 1978). This is consistent with the House Committee's contention, 11 R. REP. NO. 95-1386, *supra* note 27, at 21, that this provision of the Act is merely "a modified doctrine of *forum non conveniens*." See also *id.* at 40. As was noted in the Senate Report: "Good cause" was intended to preserve the state courts' "flexibility." S. REP. NO. 95-597, 95th Cong., 2d Sess. 17 (1978).

164. See notes 143-46 & accompanying text *supra*. With respect to transfers of jurisdiction some states that have adopted Public Law 280 maintain the statute grants exclusive child welfare jurisdiction on reservations. 25 U.S.C. § 1322 (1976). It remains unresolved whether a tribe in a Public Law 280 state that lacked any subject matter jurisdiction over child custody proceedings prior to the Act now has sufficient subject matter jurisdiction to accept a transfer of jurisdiction. The Act saves prior state authority under Public Law 280, *id.* § 1911(b) (Supp. II 1978), and there is legislative history to the effect that tribes gain no jurisdiction under the Act except by reassumption. See 11 R. REP. NO. 95-1386, *supra* note 27, at 31-32.

165. The Department of the Interior suggests that state courts give tribes at least twenty days. 44 Fed. Reg. 67,584, 67,592 (1979).

judges the decision to transfer a proceeding. Judges opposed to transfers to tribal courts in general are unlikely to relinquish state court jurisdiction. Ironically, the Act, which was to remove Indian children from the hands of state judges who "often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families,"¹⁶⁶ places the remedy, transfer to tribal courts, in the virtually unlimited discretion of state judges. This potential problem might have been prevented by including a short, clear list of criteria for denying transfer and by creating a presumption in favor of tribal jurisdiction rather than against it.

Emergency Placements

Once an Indian child has been placed in a foster care or adoptive home, any subsequent change of placement must follow the Act's notice and transfer procedures.¹⁶⁷ There is a loophole, however, permitting "emergency" removal of Indian children from Indian homes without meeting the notice or transfer requirements. While true emergency situations may well require some streamlined removal procedures, the Act fails to limit these procedures sufficiently to protect parental and tribal interests. Emergency placements "to prevent imminent physical damage or harm to the child"¹⁶⁸ may be made by agencies on their own authority, without notice to the Indian child's tribe, and may last until the state agency determines that the removal is no longer necessary.¹⁶⁹ The Act contains no time limit on when the state agency must commence a child custody proceeding with the concomitant safeguards of notice, intervention, and transfer.

The Act's provision on emergency placements apparently is limited to cases involving "an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation."¹⁷⁰ Strictly construed, the Act's emergency removal provision apparently does not cover Indian children domiciled off the reservation. Although this distinction probably was not intended by the drafters of

166. 25 U.S.C. § 1901(5) (Supp. II 1978).

167. *Id.* § 1916.

168. *Id.* § 1922. This provision was criticized by the American Civil Liberties Union, 1977 *Hearing*, *supra* note 4, at 184, 181-83, and by the Department of the Interior, H.R. REP. NO. 95-1386, *supra* note 27, at 32, which suggested a 72-hour limit. The House Committee assumed state agencies could be trusted to keep emergency removals to "a reasonable length of time." *Id.* at 25.

169. 25 U.S.C. § 1922 (Supp. II 1978).

170. *Id.* (emphasis added).

the section, the ambiguous language could severely restrict the reach of the emergency placement provision.

Standards of Proof and Placement Preferences

Many Indian child custody proceedings will continue to be heard in state courts. The Act therefore attempts to protect Indian families by establishing stricter standards for the removal of children and for the choice of alternative placements. The Act's standards, however, are often vague and may be circumvented easily.

Initially, removal of an Indian child is not to be authorized by a state court unless the judge is satisfied 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."¹⁷¹ This standard is likely to prove no real barrier to removal, however, given that Congress has found that state programs have been inadequate and ineffective, and that state social workers and judges often are ignorant of, or biased against, Indian family values.

In assessing the need for removal, the dispositive question under the Act is whether remaining in the home "is likely to result in serious emotional or physical damage to the child."¹⁷² This is to be proved by "clear and convincing evidence" in the case of foster care placement¹⁷³ and "beyond a reasonable doubt" in the case of termination of parental rights.¹⁷⁴ Although both of these standards are familiar legal terms of art, they are likely to be of limited usefulness in child custody proceedings.¹⁷⁵ Much of the testimony in these proceedings will consist of the opinions and judgments of physicians, psychologists, and social workers, making it extremely difficult to develop any consistency in the application of the standards of proof. Moreover, appellate courts traditionally have deferred to trial court discretion in applying these standards. Thus, although the Act's standards may increase the fie-

171. *Id.* § 1912(d).

172. *Id.* § 1912(e).

173. *Id.*

174. *Id.* § 1912(f). "[T]he committee feels that the removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty." H.R. REP. NO. 95-1386, *supra* note 27, at 22.

175. The bill originally provided for "overwhelming evidence," but Navajo legal services lawyers suggested "clear and convincing" would be less vague and more familiar to judges. 1977 *Hearing*, *supra* note 3, at 278, 295 (statements of Eric Herbert Syd Beaune, and Ruth Houghton). The Department of the Interior thought even "clear and convincing" too high a standard. H.R. REP. NO. 95-1386, *supra* note 27, at 32-33.

quency of appeals, it is doubtful that the judgment of many trial court judges will be disturbed by higher courts.

In child custody cases, state court judges are likely to rely heavily on expert testimony. Therefore, the quality of expert testimony and the cultural background of the experts are more important than the quantum of proof. The Act directs state courts to seek the opinions of "qualified expert witnesses,"¹⁷⁶ without further definition. Since one of the underlying premises of the Act is that state courts have generally misunderstood Indian cultural and family organization,¹⁷⁷ Congress should have made the cultural and sociological testimony of tribal members and tribal professionals an essential element of the proceedings. As the Act now reads, it allows state courts to consider the testimony of anthropologists, social caseworkers, and sociologists in establishing tribal kinship and childrearing patterns, without confronting the experts of the tribe itself.¹⁷⁸

Once the decision to remove a child has been made, a suitable home must be found. Generally, the Act gives first preference to other members of the child's "extended family,"¹⁷⁹ then to other families in the child's tribe, and last to other Indian homes and institutions.¹⁸⁰ A state court can circumvent these preferences, however, by finding "good cause to the contrary."¹⁸¹ This undefined phrase allows state court judges to exercise broad discretion to continue prior practices. Judges who previously applied culturally inappropriate standards to Indian child placements and who therefore were the targets of the Act, may, under the guise of "good cause," continue to apply inappropriate standards.

The Act empowers tribes to establish by resolution their own preferences for state-ordered child placements, and state courts are directed to follow tribally-established preferences as long as they result in "the

176. 25 U.S.C. § 1912(c)-(1) (Supp. II 1978). This means "expertise beyond the normal social worker qualifications." H.R. REP. NO. 95-1386, *supra* note 27, at 22.

177. 25 U.S.C. § 1901(5) (Supp. II 1978).

178. The possible exclusion of laymen was criticized in the hearings. 1977 *Hearing*, *supra* note 3, at 295 (statements of Syd Beaune and Ruth Houghton). The Secretary of the Interior has released a regulation on this matter. See notes 242-43 & accompanying text *infra*.

179. "Extended family" is to be defined by tribal law and custom, 25 U.S.C. § 1903(2) (Supp. II 1978), and might include non-Indian relatives. 1977 *Hearing*, *supra* note 3, at 160 (statement of Calvin Isaac). It is unclear whether tribal court decisions or the testimony of tribal members will be conclusive, or whether state judges will resort instead to "expert" anthropological reports which may be in conflict with tribal views.

180. 25 U.S.C. § 1915(a)-(b) (Supp. II 1978).

181. *Id.*

least restrictive setting appropriate to the particular needs of the child."¹⁸² Although state courts are advised to respect "the prevailing social and cultural standards of the child's Indian community" in making such judgments,¹⁸³ "least restrictive setting," like "good cause," is discretionary and may be too vague a standard for effective appellate review.

Although it establishes placement standards that are compatible with Indian goals, the Act leaves state courts relatively free to choose whether or not to follow them. Thus, the opinions of state court judges as to what is best for the child in individual child custody proceedings ultimately may take precedence over both the preferences set forth in the Act and any preferences legislated by the tribes.

Special Rights of Parents

Parent

Throughout the Act, the phrase "parent or Indian custodian" is used to identify individuals who are entitled to notice, intervention, and the right to petition for the invalidation of proceedings.¹⁸⁴ An "Indian custodian" under the Act is any Indian who has legal custody of the child through tribal law or custom or "to whom temporary physical care, custody, and control have been transferred by the parent."¹⁸⁵ This definition is broad enough to include the Indian representative of a child placement agency who obtains the child temporarily or under duress. The Act speaks of "transfer" but not of *voluntary* transfer or of the *purpose* of the transfer. In principle, an Indian caseworker, with only temporary custody of an Indian child, can be the beneficiary of the Act's provisions for notice and intervention.¹⁸⁶

A "parent" is defined as "any biological parent or parents of an Indian child" or an Indian adoptive parent of an Indian child.¹⁸⁷ A non-Indian, therefore, can be the parent of an Indian child through birth, but not through adoption. If an Indian woman marries a non-

182. *Id.* § 1915(c). This section was suggested by the National Tribal Children's Association. 1977 *Hearing*, *supra* note 3, at 159-60, 258-59.

183. 25 U.S.C. § 1915(c) (Supp. II 1978). The House Committee felt this would suffice to end the application of "white, middle-class values" to child placement decisions. H.R. REP. NO. 95-1386, *supra* note 27, at 24. This section does not apply explicitly to foster homes licensing, however.

184. 25 U.S.C. §§ 1911(c), 1912(a), 1914 (Supp. II 1978).

185. *Id.* § 1903(6).

186. The Act directs notice to the "parent or Indian custodian" in the alternative. *Id.* § 1912(a) (emphasis added).

187. *Id.* § 1903(9).

Indian and they have a child, the non-Indian man is a parent under the Indian Child Welfare Act. If the non-Indian father subsequently dies and the woman remarries another non-Indian, this second spouse is *not* considered a parent under the Act and cannot become the child's "Indian custodian," even after his wife's death. He has no rights under the Act and he cannot protect the interests of the child.¹⁸⁸ This discrimination can lead to serious and unfortunate consequences.

Court-Appointed Counsel

Parents and Indian custodians are given the right to court-appointed counsel if they cannot afford counsel of their own.¹⁸⁹ If the appointment and payment of counsel in such cases is not already provided for by state law, the Secretary of the Interior, "upon certification of the presiding [state] judge, shall pay reasonable fees and expenses."¹⁹⁰ However, no special appropriations for this purpose are authorized by the Act. The Secretary is to draw on general appropriations for Indian welfare authorized by the 1921 Snyder Act.¹⁹¹ Furthermore, use of the phrase "reasonable fees" indicates that there is some discretion on the part of the Secretary to approve or otherwise regulate counsel fees. Consequently, with little money available and the possibility of arbitrary rulings on the reasonableness of fees, attorneys may be extremely hesitant to accept appointment in these cases.

"Higher Standards of Protection"

The Indian Child Welfare Act cautiously provides that whenever "State or Federal law applicable to a child custody proceeding . . . provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this [Act], the State or Federal Court shall apply the State or Federal standard."¹⁹² The Act does not specify what constitutes a "higher stan-

188. Because the Act directs notice to the "parent or Indian custodian," problems also may arise when there are *no* parents, separated perhaps, and an Indian custodian. All have an interest, but it is not clear which of them must be notified before state proceedings can lawfully begin.

189. 25 U.S.C. § 1912(b) (Supp. II 1978). The state court in its discretion also may appoint counsel for the child. Both the National Congress of American Indians and Department of the Interior, however, opposed affording Indian children a right to court-appointed counsel. H.R. REP. NO. 95-1386, *supra* note 27, at 32; 1977 *Hearing*, *supra* note 3, at 144.

190. 25 U.S.C. § 1912(b) (Supp. II 1978).

191. *Id.* See note 17 *supra*.

192. 25 U.S.C. § 1921 (Supp. II 1978).

dard" of protection, a decision that often depends on one's point of view.¹⁹³ Although this provision of the Act probably was meant to allow Indian parents to argue under whichever law they preferred, it provides broad discretion for the courts to continue to apply state standards to Indian child custody proceedings.

Enforcement and Implementation

Standards are meaningless unless enforced. Consequently, failure to apply statutory standards must be either reversible, punishable, or both. Furthermore, all parties must be aware of the right to invoke the remedies provided by law to insure a statute's effectiveness.

The Indian Child Welfare Act authorizes the parent, child, or tribe to "petition any court of competent jurisdiction to invalidate" a child custody proceeding that violates the Act's provisions on exclusive tribal jurisdiction, transfer, notice, rights of intervention, consent to adoption, or standards of proof.¹⁹⁴ The implication is that the Act bars invalidation of a child custody proceeding for violation of its other provisions, e.g., placement preferences. There is no justification for limiting enforcement to those violations listed, as other violations could be equally damaging to Indian children.

An additional enforcement problem arises because, under the terms of the Act, the child's parents and tribe are to be notified of a custody proceeding only if "the court knows or has reason to know that an Indian child is involved."¹⁹⁵ To invalidate a child placement for lack of notice, the parents or tribe must prove not that the child is in fact an Indian, but that the state court *knew or had reason to know* that the child is an Indian. If the child's Indian status is not discovered until after the placement, the Act does not mandate reversal.¹⁹⁶ Abandoned children may be placed irreversibly in non-Indian homes, simply because their status as Indian children is revealed too late.

193. Washington is one state that adopted special Indian child placement rules prior to enactment of the Indian Child Welfare Act. WASH. ADMIN. CODE §§ 388-70-091 to -095, 388-70-450, 388-70-600 to -640. From some tribes' viewpoint these rules go farther than the Act to protect Indian children's and families' special needs, e.g., by including unenrollable children.

194. 25 U.S.C. § 1914 (Supp. II 1978). As drafted, this section applies only to §§ 101-103 of the Act, 25 U.S.C. §§ 1911-1913 (Supp. II 1978).

195. *Id.* § 1912(a).

196. As a practical matter, a caseworker can do little to identify an abandoned child absent the report of the child or some other person at the scene, followed by a check with the appropriate tribal office, there is only the child's appearance to go on. If a worker simply believes a child is Indian, it is still difficult to determine which tribe is to be notified.

Regulatory Implementation

The bare statutory language of any major new law is likely to provide little guidance for those seeking to enforce or implement its provisions. The Indian Child Welfare Act certainly is no exception; consequently, the Act directs the Secretary of the Interior to promulgate regulations to carry out its provisions.¹⁹⁷ Generally, implementing regulations expand the general terms and requirements of a statute and reconcile superficially inconsistent statements. Most of the regulations promulgated under the Indian Child Welfare Act by the Interior Department, however, are expressly limited in effect. The regulations were called "guidelines" and were "not intended to have legislative effect."¹⁹⁸ They were published, the Department said, only because many judges expressed interest in the Department's views.¹⁹⁹ In discussing the purpose of the guidelines, the Department has argued that it was not authorized to mandate state court procedures and that the primary responsibility for interpreting the Act must rest with state court judges.²⁰⁰ The Department nonetheless predicts that "[c]ourts will take what the Department has to say into account,"²⁰¹ while remaining "free to act contrary . . . if they are convinced that [the guidelines] are not required by the statute itself."²⁰² The guidelines would help solve a number of the Act's shortcomings if followed. At the same time, the

197. 25 U.S.C. § 1952 (Supp. II 1978). The deadline for implementation was May 7, 1979. The first Interior draft was released February 26, 1979, almost four months after the Act's approval, and dealt primarily with the Act's as yet unfunded grant provisions. This draft was distributed to tribal chairmen under cover letter from Forrest Gerard, Assistant Secretary of the Interior, and was accompanied by a Department of Interior News Release dated February 28, 1979. As a result, a great deal of time and energy was dissipated in field hearings conducted to the National Congress of American Indians and National American Indian Tribal Court Judges Association before the Act's most sensitive and significant provisions could be addressed. At least two other inconsistent drafts (one dated April 3 and another April 19, without further identification) were circulated informally prior to publication of the official proposal in the Federal Register on April 23, 44 Fed. Reg. 23,992, 23,993, 23,000 (1979). Final regulations were not published until July 31, 44 Fed. Reg. 45,092 (1979) (to be codified in 25 C.F.R. §§ 13, 23), covering only reassumption, payment of court-appointed counsel, notification of the Secretary, and grants. Supplemental, non-binding "recommended guidelines" were published November 26, 44 Fed. Reg. 67,584 (1979), covering placement proceedings. The Secretary of the Interior waived, 44 Fed. Reg. 23,992, 23,993, 24,000 (1979), the provisions of Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (1978). These provisions call for pre-publication review by all affected parties and for an extended sixty-day comment period.

198. 44 Fed. Reg. 24,000, 67,584 (1979).

199. *Id.*

200. *Id.* at 67,584. See also *id.* at 45,096, 45,097, 45,099.

201. *Id.* at 67,584.

202. *Id.*

guidelines themselves raise new problems; hence their effectiveness in addressing each major area of the Act warrants discussion.

Applicability: "Indian Child"

The Department's guidelines attempt to clarify the application of the Act to Indian children in a number of ways. First, they suggest that state courts inquire into the status of every child involved in a custody proceeding.²⁰³ In assessing a child's status, tribal determinations of membership or eligibility for membership are meant to be conclusive.²⁰⁴ Absent a tribal decision or a decision by the Bureau of Indian Affairs, the guidelines offer five factors indicating "reason to believe" that a child is an Indian child.²⁰⁵ Of these, only one may be readily verified on appeal: whether someone has told the court that the child is an Indian. The remainder are not so easily established or reviewed on appeal. They include *knowledge* by an officer of the court that the child may be an Indian, *knowledge* by the court or a showing to the court that the child's or parent's domicile is in a predominantly Indian community, or indications from the child itself which give the court reason to believe he or she is an Indian.²⁰⁶ These guidelines fail to consider, moreover, the situation in which the child's status is not discovered until after the proceeding is begun, an error for which there is no remedy. In addition, there is no remedy for intentional misrepresentation of a child's status.

Exclusive Tribal Jurisdiction

The regulations also attempt to clarify the Act's provisions conferring exclusive tribal jurisdiction over child custody proceedings. Because the Act conditions jurisdiction on the residence or domicile of the Indian child, several concerns arise. Courts must first determine which lands are subject to tribal jurisdiction and which are governed by the state. The regulations authorize reassumption of jurisdiction over acquired tribal lands which were never actually lost to a state.²⁰⁷ They exclude from tribal jurisdiction lands that once were part of a reservation but subsequently were lost, not from express statutory language such as that in Public Law 280, but rather from judicial interpretations

203. *Id.* at 67,588.

204. *Id.* at 67,586. As originally proposed, the guidelines subjected tribal determinations to "independent verification" by state courts. *Id.* at 24,000.

205. *Id.* at 67,584, 67,586.

206. *Id.*

207. *Id.* at 45,092-93.

of statutes silent as to tribal government.²⁰⁸ The regulations can be criticized in this regard for conflicting with the Act's attempt to limit judicial disestablishment of reservations.²⁰⁹

Another concern is the standard to be applied by the Secretary in evaluating a petition. Expanding at length on the Act's provisions for tribes' reassumption of exclusive child welfare jurisdiction, the Interior Department's regulations establish criteria for secretarial approval of reassumption petitions. Four of the criteria are broadly discretionary, involving consideration of: whether the tribal "constitution or other governing document, if any" authorizes the tribe to adjudicate child custody proceedings;²¹⁰ whether the tribe's courts comply with the procedural requirements of the Indian Civil Rights Act;²¹¹ whether the tribe's child care services are adequate;²¹² and whether the tribe has a way of "clearly identifying" its members.²¹³

The first of these criteria allows the Secretary to sit as a tribal supreme court, interpreting the tribe's constitutional provisions. Constitutionality under tribal law should be adjudicated, at least in the first instance, by tribal courts.²¹⁴ The second and fourth criteria also allow secretarial judgment on questions of tribal law, while the third places the Secretary in the position of an expert on child welfare, superior to the tribe's own child welfare professionals. The Secretary's decisions will not be readily subject to reversal on appeal as abuses of discretion.

To qualify for reassumption of jurisdiction,²¹⁵ a tribe must show that it has sufficient child care services and competent juvenile court facilities. To obtain funding to start these institutions, however, tribes may have to show that they have jurisdiction. The regulations are helpful in that they attempt to avoid a "Catch-22" situation by permit-

208. *Id.* at 45,092, 45,093.

209. See note 160 *supra*.

210. *Id.* at 45,092, 45,096. As originally proposed, this provision lacked the words "if any," although many large tribes, including Yakima and Navajo, operate under customary, unwritten constitutions. *Id.* at 23,992. See also *id.* at 45,092, 45,096.

211. *Id.* at 45,092, 45,096 (citing 25 U.S.C. § 1302 (1976)). The regulations are intentionally broad enough to include unconventional decision-making bodies. See 44 Fed. Reg. 45,092-93, 45,095 (1979).

212. *Id.* at 45,096. The facilities need be adequate only for "most" children. *Id.* at 45,093.

213. *Id.* at 45,096.

214. This appeared to be the ruling of the Supreme Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). However, the Interior Department feels it has a responsibility "not [to] exercise its approval power in a manner that authorizes violations of civil rights." 44 Fed. Reg. 45,092, 45,094 (1979).

215. Petition for reassumption is not an admission that the tribe lacked jurisdiction in the first instance. 44 Fed. Reg. 45,092, 45,092-93 (1979).

ting tribes to base reassumption petitions on the funds and facilities they *will* be eligible to receive *if* they reassume jurisdiction.²¹⁶ The other side of the problem—tribes that reassume jurisdiction, but do not receive funds—remains.

Finally, the guidelines address the issue of whether state, federal, or tribal law will establish the domicile or residence of Indian children. The Department declined to make tribal law dispositive or to establish a single uniform federal rule. Instead, the Department has reasoned that residence and domicile "are well defined under existing state law."²¹⁷ Although not conclusive, this guideline signals state courts that in the event of a conflict between state and tribal law, the Department probably would recognize state law. The result is likely to be inconsistent treatment of mobile Indian children and families.

Notification

The Act suspends state proceedings until ten days after "receipt of notice by the parent or Indian custodian and the tribe or the Secretary."²¹⁸ In an attempt to provide clarification of the practical meaning of this provision, the Department of the Interior has suggested that state courts begin counting after the *last* of these parties has been notified.²¹⁹ In addition, state courts are encouraged to notify *both* the parents and the Indian custodian; "[e]ven where only custody is an issue, noncustodial parents clearly have a legitimate interest in the matter."²²⁰ Although notice problems remain, the import of the regulations is to increase tribal participation through notice.

Transfer of Proceedings to Tribal Courts

The guidelines address the problems of transferring proceedings to tribal courts extensively, if not always constructively. They limit the transfer option to instances "where the child is not domiciled or residing on an Indian reservation,"²²¹ thereby preserving an apparently accidental distinction in the Act.²²² This is likely to exacerbate problems in racing-to-the-courthouse, where a state and tribe share concurrent jurisdiction over a reservation: if a child who resides on a reservation

216. *Id.* at 45,095.

217. *Id.* at 67,585 (emphasis added).

218. 25 U.S.C. § 1912(a) (Supp. II 1978).

219. 44 Fed. Reg. 67,584, 67,589 (1979).

220. *Id.*

221. *Id.* at 67,590.

222. See notes 158-60 & accompanying text *supra*.

happens to be seen first in state court, the regulations do not provide authority for the court to transfer jurisdiction to a tribal court.

The regulations do, however, promote notification of all potential transferee tribes by suggesting that state courts notify *each* tribe that might be the "Indian child's tribe."²²³ All of those notified are then encouraged to assist in determining which tribe has the most significant contacts with the child.²²⁴ As factors to be used in evaluating significant contacts, the Interior Department has suggested that the child's length of residence on the reservation and frequency of contacts with the tribe be considered, along with the child's participation in tribal activities and fluency in the language. The Department also has recommended that consideration be given to the residence of the child's relatives, the child's expressed self-identification, and whether the tribe has asserted an interest in the child, either in the past or when notified of the custody proceeding.²²⁵ Between two tribes, actual membership is considered conclusive by the Department, because "[t]he Act itself and the legislative history make it clear that tribal rights are to be based on the existence of a *political* relationship between the family and the tribe."²²⁶ Overall, this approach considerably improves the approach implied by the Act itself, as discussed previously.²²⁷

The guidelines go on to suggest that state courts retain jurisdiction over a custody proceeding unless the child's parents, Indian custodian, or tribe make a "prompt" request for transfer after having received notice of the proceeding.²²⁸ Consequently, judges are encouraged to decide, on a case by case basis, the relative promptness of transfer requests. The Interior Department has defended this guideline as an antidote to wait and see tactics, arguing that state judges would have treated the lateness of requests as "good cause" not to transfer anyway.²²⁹ It may effectively limit the right of families and tribes to intervene if judges exercise broad power to deny transfer requests for lack of promptness.

²²³ 44 Fed. Reg. 67,584, 67,586-87 (1979).

²²⁴ *Id.* This suggestion was added in response to comments of the April 23 proposal. *Id.* at 24,000.

²²⁵ 44 Fed. Reg. 67,584, 67,587 (1979).

²²⁶ *Id.* (emphasis added).

²²⁷ 25 U.S.C. §§ 1903(5), 1912(a) (Supp. II 1978). See notes 143-46 & accompanying text *supra*.

²²⁸ 44 Fed. Reg. 67,590 (1979). The original proposal, *id.* at 24,000, 24,001, spoke of a "timely" request for transfer. The Department of the Interior apparently believes "promptly" is less vague than "timely." *Id.* at 67,584, 67,590.

²²⁹ *Id.* at 67,584, 67,590.

Once a timely request is filed, the Interior Department has suggested that tribal courts be given at least twenty days to respond to a proposed transfer of jurisdiction.²³⁰ Because tribal courts must know what time limit to observe, some time limit is necessary to protect their right to accept transfer of jurisdiction. However, the twenty day minimum is merely advisory, and individual state judges remain free to accept or reject it. Consequently, tribal courts must poll each state court judge to ascertain his or her position and should not, rely on the timeframe recommended in the guidelines.

Finally, the guidelines attempt to clarify the broad concept of "good cause" the Act adopts as a basis for refusing to transfer jurisdiction to a tribal court.²³¹ Unfortunately, the clarification raises new problems. Listed as examples of good cause are the absence of a tribal court system, lateness of the request for transfer, objection by the child (if over twelve years of age), and "undue hardship to the parties or witnesses."²³² The guidelines suggest that state courts consider the closeness of the child's relationship to the tribe only if the child is older than five years and has no living parents to accept or reject the proposed transfer.²³³ The Department has suggested that "socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems" should not be considered good cause to deny a transfer.²³⁴

²³⁰ *Id.* at 67,592. A ten day waiting period originally was proposed. *Id.* at 24,000, 24,001. To avoid a proposed transfer, the tribal court must affirmatively decline. Unless the state court hears from the tribe to the contrary within the time limit, it is supposed to dismiss the proceeding.

²³¹ See notes 162-66 & accompanying text *supra*.

²³² 44 Fed. Reg. 67,584, 67,591 (1979). This differs significantly from the original proposal, *id.* at 24,000, 24,001, which included: "child's biological parents are deceased or unavailable"; "an Indian custodian or guardian has not been appointed"; and "child has had little or no contact with his Indian tribe, or members of his tribe, for a significant period of time." The element of "significant time" invited abuse by state judges, the policy basis for the other factors is unfathomable. The fact that a child has been orphaned or abandoned is no evidence that the tribe lacks an interest in his or her future. Suppose, for example, a school-age child accompanies his or her Indian parents on an employment related move to a city. If the parents were killed enroute, there would have been good cause to keep the child's custody in state court. "Unavailable" also was an overly ambiguous word. The rationale was perhaps that a dead or "unavailable" parent has no interest in avoiding transfer for the courts to protect. However, the term might possibly have been construed to include a parent hospitalized with a chronic ailment, thereby requiring foster care for the child.

²³³ This is on the theory that the parents, in exercising their right to object to a transfer, are the best judges of a child's relationship to the tribe. If they are not in court, or the child is too young for contacts with the tribe to be a significant issue, state courts are advised to disregard this factor altogether. *Id.* at 67,584, 67,591.

²³⁴ *Id.*

The Interior Department apparently considered transfer to be a privilege rather than a right, similar to the common law doctrine of *forum non conveniens*. This would explain the inclusion of "undue hardship" as a factor. The Department admits that this criteria will "limit transfers to cases involving Indian children who do not live very far from the reservation,"²³⁵ suggesting that tribal courts should send their judges to the cities to avoid the denial of transfer. The Department's position is unreasonable. A transfer cannot be made over the parents' or child's objections or without tribal cooperation. Only the public or private agency that initiated the proceeding could be inconvenienced by a transfer.

Emergency Removals

The Department recommends that emergency removals end either as soon as the emergency ends or when the tribe exercises jurisdiction over the case.²³⁶ In any event, "[a]bsent extraordinary circumstances," emergency removals are to end within ninety days.²³⁷ Allowing the child's tribe to end an emergency removal by exercising jurisdiction can help to limit abuses of the emergency removal provision. The guidelines, however, do not require notification of the tribe that there has been an emergency removal. Without notice, the tribe cannot act to terminate the removal.

Standards of Proof and Placement Preferences

The guidelines recommend that pre-removal attempts by public or private agencies to prevent family breakups should "involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian care givers,"²³⁸ i.e., medicine men and other traditional curers. This departure from the Act's general language, emphasizing Indian community resources, certainly will be welcomed by most tribes. It remains to be seen, however, whether this recommendation will be adopted by state courts.

The guidelines also add to the Act's provision on the standards of proof in child custody proceedings. The Department suggests that "poverty, crowded or inadequate housing, alcohol abuse,"²³⁹ or non-

235 *Id.*

236 *Id.* at 67,589.

237 *Id.*

238 *Id.* at 67,592.

239 The inclusion of alcohol abuse as a forbidden element of proof is interesting because a similar rule was deleted from the Indian Child Welfare Act bill

conforming social behavior" does not constitute "clear and convincing" evidence for removal.²⁴⁰ The commentary accompanying the guidelines notes that "[t]he legislative history of the Act makes it pervasively clear that Congress attributes many unwarranted removals of Indian children to cultural bias on the part of the courts and social workers."²⁴¹ The standard of proof used by the courts hopefully will reflect this manifestation of congressional and departmental intent to mitigate bias. Insofar as the use of experts to meet this standard is concerned, the Interior Department suggests that state courts regard as experts tribal members who are recognized within their communities as being knowledgeable of family matters, lay persons with substantial experience in tribal social services, and specialized professionals.²⁴² While this too is a welcome refinement, no priority for tribal members is recommended by the Department.²⁴³

Finally, according to the guidelines, good cause not to follow the Act's child placement preferences includes the parents' and child's wishes, the lack of available suitable homes, and any "extraordinary physical or emotional needs" of the child.²⁴⁴ Remembering that the Act effectively limits involuntary child custody proceedings to instances of parental abuse or neglect, it is questionable whether parents' choice of a substitute home for the child should be given great weight.

Rights of Parents: Payment of Court-Appointed Counsel

The Interior Department believes that it must have broad discretion to reduce, or refuse to pay, the fees of court-appointed counsel in state child custody proceedings, to "assur[e] they are spent only for a Congressionally-authorized purpose."²⁴⁵ Departmental regulations authorize Bureau of Indian Affairs area directors to exercise this discretion by anticipating the rulings of state judges on questions of *federal* law, in particular on whether a case is a child custody proceeding

240. 44 Fed. Reg. 67,584, 67,593 (1979). See notes 172-75 & accompanying text *supra*.

241. 44 Fed. Reg. 67,584, 67,593 (1979).

242. *Id.*

243. The originally proposed text of the guidelines suggested that a child welfare professional, Indian or non-Indian, be preferred over a person recognized within the Indian child's tribe as an authority on tribal social and cultural organization. *Id.* at 24,000, 24,001. The uniqueness of each tribe's culture is a strong argument for according tribal members preferred credibility. Otherwise, state courts would tend to continue to rely on the same "experts" they relied on prior to the Act—presumably with the same results.

244. *Id.* at 67,584, 67,594. The original proposal referred simply to the child's "special needs," a much weaker test. *Id.* at 42,000, 42,002 (emphasis added).

245. *Id.* at 45,096, 45,100 (1979).

within the meaning of the Indian Child Welfare Act,²⁴⁶ and on whether the child is an Indian child within the meaning of the Act.²⁴⁷ In addition, area directors have discretion to consider questions of *state* law, including whether "state law provides for appointment of counsel in such proceedings,"²⁴⁸ and whether the state court "has abused its discretion under state law in determining the amount of fees and expenses."²⁴⁹ Under the authority to determine whether a child is an Indian child, for example, the *state judge* and the tribe may agree that a child is an Indian, but an *area director* could disagree and withhold counsel fees.

The area director is placed in the unique position of being a supreme interpreter of state law. For example, if a state court determines that, under state law, certain indigent Indian parents are not entitled to state-compensated counsel in child custody proceedings and appoints counsel in accordance with the provisions of the Indian Child Welfare Act, the area director can nonetheless refuse to pay counsel, stating that in his or her opinion, state law *does* provide for state-compensated counsel. Bound by its own interpretation of state law, the state court cannot pay counsel. As a result, lawyers apprehensive of such a risk may be hesitant to represent indigent Indian parents.

The Department concluded that to develop its own rules for setting fees would have been less "orderly" and less reliable than leaving the matter to state courts.²⁵⁰ Departmental regulations direct state judges to pay Indian parents' counsel according to the same procedures and criteria they use in juvenile delinquency proceedings.²⁵¹ Juvenile delinquency proceedings, however, are based on a criminal model; child custody proceedings, on the other hand, involve largely different questions of fact and different procedures. Accordingly, the comparison is neither reasonable nor useful.

Higher Standards of Protection

The Interior Department suggests that state courts choose the law

246. *Id.* at 45,105.

247. *Id.*

248. *Id.*

249. *Id.* The original proposal included a third category of state law for secretarial review: whether the state court "has abused the discretion accorded it under State law to determine that the client is indigent." *Id.* at 23,993, 23,995. On reconsideration, the Department of the Interior concluded that "Congress has left this determination for the courts." *Id.* at 45,096, 45,100.

250. *Id.* at 45,096, 45,100.

251. *Id.* at 45,105.

that is more protective of parents' rights only where doing so "does not infringe any right accorded by the Indian Child Welfare Act to an Indian child or tribe."²⁵² This limits the danger that the "higher standards" provision will overcome the Act's departures from state law.²⁵³ However, interpretation of the term "infringe" may prove as fertile a source of litigation as the phrase "higher standard."

Funding

The major threat to successful implementation of the Indian Child Welfare Act is a lack of funding for tribal courts and family services. The Congressional Budget Office planned a five year capital program for implementing the Act. The plan called for appropriation of \$125,000,000 to build and staff 150 special Indian-controlled child welfare centers.²⁵⁴ Although barely adequate to achieve the desired goals, this plan was never funded; Congress has not provided the tribes with any new funds.²⁵⁵

Finding themselves financially unable to provide adequate child services, tribes will face a dilemma. Providing poor services opens tribes to criticism and jeopardizes their retention of child welfare jurisdiction. On the other hand, failing to exercise fully the rights and powers offered by the Act opens the tribes to the charge that they lack interest in child welfare and should not have been offered responsibility in this area. The result, in either case, could be a clamor for the return of all child welfare authority to the states.

The shortage of federal financial assistance to tribal courts and services is particularly unfortunate because states continue to receive substantial, formula-type federal grants-in-aid for social services, for which tribes are ineligible.²⁵⁶ The Act does not offer tribes direct access to these funds nor does it require states to share them. Although the Department of the Interior recognizes that, based on equal protection, individual Indians remain entitled to share in federally-subsidized state services notwithstanding the Indian Child Welfare Act,²⁵⁷ tribes, in

252. *Id.* at 67,584, 67,586.

253. See note 192 & accompanying text *supra*.

254. H.R. REP. NO. 95-1386, *supra* note 27, at 29.

255. Funds for implementation of the Indian Child Welfare Act must be appropriated through the Snyder Act, 25 U.S.C. § 13 (1976). See note 17 *supra*. Snyder Act funding for child welfare was not increased following adoption of the Indian Child Welfare Act.

256. *Federal Domestic Assistance Programs: Hearings Before the Senate Select Committee on Indian Affairs*, 95th Cong., 1st Sess. (1977).

257. 44 Fed. Reg. 45,092, 45,091 (1979). However, the Eighth Circuit recently held that South Dakota could continue to receive Public Health Service Act formula subsidies without

their governmental capacity, have no power to control the disposition of these funds. For example, state foster care is federally subsidized. Consequently, an individual Indian family has a right to be given equal consideration for licensing as a state foster home, and an Indian child may be entitled to state foster care support while in the custody of a state-licensed home. A tribe cannot demand control of a percentage of the state program or its budget, however.²⁵⁸

Conclusion

The Indian Child Welfare Act does little to alter the conditions that Congress held responsible for the unwarranted breakup of Indian families. The Act does not mandate tribal participation in case planning or early family intervention. Instead, it assigns tribes to an adversary role after proceedings to remove the child have been initiated. This limits tribes' ability to prevent family problems. The Act's emphasis is on removal and placement, not prevention.

Most of the major procedural safeguards are entrusted to the child welfare agencies and state courts, which Congress had considered responsible for the problem initially. State and private agencies determine who to notify, which Indian tribe is eligible to intervene or to accept a transfer or jurisdiction, and how long an Indian child can be kept in an emergency placement without notice or hearing. State courts have unlimited and unreviewable discretion to deny a transfer of jurisdiction to tribal courts and to observe or reject the Act's placement preferences, irrespective of the Interior Department's guidelines. The Act does not direct state judges to emphasize tribal over state law in making determinations essential to protection of tribal jurisdiction. No practical standards are established for state judges' evidentiary use of cultural materials. The provisions for notice and timing are confusing and impractical.

Of great concern to some Indian communities, the Act appears to except children residing on Public Law 280 reservations from its transfer provisions, and to except altogether unenrollable children and many Alaska Native children. Of even greater concern, the Act makes no provision for increasing tribes' federal financial support commensurate with their increased responsibility. It is meaningless to have a

making the subsidized health services available to Indians from South Dakota reservations. *White v. Calitano*, 581 F.2d 697 (8th Cir. 1978).

²⁵⁸ 44 Fed. Reg. 67,584, 67,585 (1979).

right to adjudicate cases and provide services unless there are sufficient funds to exercise this right.

Many of the Act's protective provisions require an assertion of parental, tribal, or children's rights *by petition*.²⁵⁹ Therefore, for the effective enforcement of the Act, it is essential that Indian parents and children understand their federal rights. Because the Act's procedures are complex and confusing, some effort at public education is essential. Informational packages could be included with notice of proceedings. Furthermore, a program of information for state social welfare caseworkers would be reasonable to avoid unnecessary and unwitting instances of non-compliance.

In its current state, the Indian Child Welfare Act will do little to change the situation in states not already committed to its policy. New legislation will be necessary to assure realization of the Act's purpose. In the meantime, however, agreements between states and tribes can be used to clarify and strengthen procedures. Agreements could provide for cooperative, pre-removal home intervention and support services, clarification of jurisdiction, and choice of law. Stipulations may eliminate ambiguities in the language of the Act and modify vague or impractical time limits, as well as provide for cost-sharing formulas. Both states and tribes have important incentives to bargain: protection of each government from fruitless litigation, and protection of children from delayed or inappropriate attention.

Unfortunately, the Act's weaknesses in drafting and execution could frustrate even this solution. Although the Act expressly authorizes agreements governing the "care and custody of Indian children and jurisdiction over child custody proceedings,"²⁶⁰ the Act does not indicate whether such agreements may supercede its terms. Consequently, agreements may be invalidated by subsequent litigation or legislative action.

In a sense, the Indian Child Welfare Act is a time-bomb. Social workers and agencies may be tempted to overlook its inconsistencies, sincerely believing that its policy is plain. But following the noble

²⁵⁹ See, e.g., 25 U.S.C. § 1911(b) (Supp. II 1978).

²⁶⁰ *Id.* § 1919(a). Although not specifically addressed by this section, agreements among tribes, between tribes and Indian organizations, and between states and tribes, are not prohibited. Agreements between tribes and urban Indian organizations are of special concern because reservations are often at a considerable distance from urban areas where Indian children are temporarily subject to state jurisdiction. The expense of sending representatives to urban child custody proceedings may discourage tribes from participating. One alternative is for tribes to designate urban Indian centers as their agents in state proceedings.

spirit, rather than the obscure letter, of this law is dangerous, because the Act provides for reversal of any placements made in violation of many of its requirements.²⁶¹ Many technical procedural errors may be made in pursuit of the law's spirit. In a year or two, when disappointed litigants renew their complaints with increasingly sophisticated lawyers, many of these placements may be challenged and ultimately reversed. Indian children do not deserve this uncertain fate.

Rediscovering the Rooker Doctrine: Section 1983, Res Judicata and the Federal Courts

By WILLIAMSON B.C. CHIANG*

One of the visible concerns of the Supreme Court in recent years has been the delicate balancing of interests expressed by the concept of "our federalism."¹ The competing concerns of state judicial sovereignty and federal power that are embodied within this concept typically come into sharp conflict in federal court actions brought in response to alleged deprivations of constitutional rights by state courts. Such actions are generally brought under the authority of section 1983 of Title 42 of the United States Code,² which provides a right of action for persons deprived under color of state law "of any rights, privileges, or immunities secured by the [federal] Constitution and laws."³ The role of the federal district courts has been central in this confrontation, for often these are the courts that intervene in state court proceedings.⁴

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Although I represent the State of Hawaii in three cases discussed herein, *Sutomua v. County of Hawaii*, 460 F. Supp. 473 (D. Hawaii 1978), *Robinson v. Ariyoshi*, 441 F. Supp. 559 (D. Hawaii 1977) (*amicus curiae*), and *Zimring v. Hawaii*, Civ. No. 79-0054 (D. Hawaii, filed June 25, 1979), the views expressed in this Article are strictly my own.

1. "This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This . . . is referred to by many as 'Our Federalism' . . ." *Younger v. Harris*, 401 U.S. 37, 44 (1971).

2. 42 U.S.C. § 1983 (1976).

3. *Id.*

4. The Supreme Court has stated: "The very purpose of [42 U.S.C. § 1983 (1976)] was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state