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The Indian Child Welfare Act of 1978: A Practitioner's Perspective

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THE INDIAN CHILD WELFARE ACT OF 1978: A PRACTITIONER'S PERSPECTIVE

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I. INTRODUCTION

Federal authority over Indians and their property is so

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extensive and complete that it is frequently termed "plenary."[1] Tribal governments likewise possess broad governmental powers over both their members and their territory.[2] This federal and tribal authority, in many instances, acts to deprive or otherwise restrict state control over Indians and their property.[3] Domestic relations is one area in which federal and tribal laws have significantly affected state authority.[4]

Indians have the right to make their own laws and to be governed by them.[5] This right usually gives tribal courts exclusive jurisdiction over divorces between members who reside upon the reservation.[6] When both parties are Indians and live off the

1. *See* Colliflower v. Garland, 342 F.2d 369, 377 (9th Cir. 1965). The United States Constitution specifically gives Congress the power to "regulate commerce with . . . Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. Known as the "commerce clause," the Supreme Court has construed this constitutional provision as granting Congress the total and exclusive power over Indians and their affairs. *See* McClanahan v. State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973). Congress enjoys an additional source of control over many Indian reservations because the federal government holds title, in trust for the respective tribes or individual Indians, to a significant portion of many reservations. *Cf. id.* at 175 ("all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States"). This land is property of the United States and, therefore, comes under federal control because Congress has the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3.

2. United States v. Mazurie, 419 U.S. 544, 557 (1975).

3. *See, e.g.*, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 165 (1973) (State of Arizona could not impose tax on income of a Navajo Indian who resided upon and derived her income solely from reservation sources); Santa Rosa Band v. Kings County, 532 F.2d 655, 667-68 (9th Cir. 1975) (county lacked authority to enforce its zoning ordinance or building code on Indian reservation trusts land), *cert. denied*, 429 U.S. 1038 (1977); *see also* Williams v. Lee, 358 U.S. 217, 223 (1959) (a state cannot exercise its jurisdiction over reservation residents or affairs when to do so would undermine the tribe's right to make, and be governed, by its own laws). *But cf.* Washington v. Confederated Tribes, 447 U.S. 134, 156 (1980) (upholding State of Washington's authority to tax on-reservation tobacco sales to non-Indians and nonmember Indians).

4. *See, e.g.*, 25 U.S.C. § 181 (1982) (white men marrying Indian women acquire no interest in their wives' tribal property). Section 181, title 25 of the United States Code does not apply to Indian men marrying "white" women, nor to Indian men or women marrying persons other than Caucasians; but this probably does not render the law constitutionally defective. The United States Constitution grants Congress great latitude in treating Indians differently from other peoples. *See* Fisher v. District Court, 424 U.S. 382, 390-91 (1976).

5. Williams v. Lee, 358 U.S. 217, 220 (1959).

6. *See* Stewart v. District Court, 609 P.2d 290, 292 (Mont. 1980). Although tribal courts usually have exclusive jurisdiction over divorces between tribal members, Congress has permitted some states to acquire jurisdiction over divorces and other matters involving Indians domiciled on a reservation. *See* Act of Aug. 15, 1953, Pub. L. No. 83-280, §§ 6-7, 67 Stat. 588, 588 (conferring jurisdiction for particular crimes and claims).

Public Law 83-280 provided two means by which states could acquire jurisdiction over reservation Indians. First, to Alaska, California, Minnesota, Nebraska, Oregon, and Washington, Congress granted civil and criminal jurisdiction over some or all of the reservations located in these particular states. *See* 18 U.S.C. § 1162 (1982) (criminal jurisdiction); 28 U.S.C. § 1360 (civil jurisdiction). Jurisdiction was conveyed by Public Law 83-280 to these states because their respective tribal and state officials were in agreement over a transfer of authority. *See* S. TYLER, A HISTORY OF INDIAN POLICY 183 (1973).

Second, Public Law 83-280 authorized the rest of the states to amend their enabling acts and constitutions, and to assume such additional civil and criminal jurisdiction over Indians and Indian lands as the various state legislatures felt appropriate. *See* Act of Aug. 15, 1953, Pub. L. No. 83-280,

reservation, however, state courts may have concurrent jurisdiction with the tribal court.[7] If a state court has concurrent jurisdiction, then it has the authority to grant a divorce,[8] or award custody of minor children,[9] but the state court generally cannot dispose of the marital estate located on the reservation.[10] Nor can the state court enforce or modify its orders respecting an Indian party once that person returns to the reservation.[11] Marriages between Indians and non-Indians present similar limitations on state authority.[12]

Regardless of whether the husband or wife is Indian, state courts clearly have the right to grant a divorce,[13] decide child custody matters,[14] and enter support orders when the parties reside off the reservation.[15] If either the husband or wife is non-Indian, state courts probably have jurisdiction to grant a divorce even when the parties have a reservation domicile.[16] Yet notwithstanding the initial existence of subject matter jurisdiction to proceed in these

§§ 6-7, 67 Stat. 588, 590. Many states took advantage of this congressional offer and acquired jurisdiction over on-reservation activities, including divorce. *See, e.g.*, IDAHO CODE § 67-5101 (Supp. (1986) (assumption of jurisdiction in domestic relations cases); WASH. REV. CODE § 37.12.010 (1964) (acquisition of domestic relations jurisdiction pursuant to Public Law 83-280).

Regardless of whether a state is the beneficiary of a direct grant of authority from Congress, or assumed control, the jurisdiction conveyed by Public Law 83-280 is concurrent with that of the tribes. *See* AMERICAN INDIAN POLICY REVIEW COMMISSION, REPORT ON FEDERAL AND TRIBAL JURISDICTION 23 (1976) ("with all its imperfections, the limited concurrent jurisdiction under Public Law 83-280, which we have lived with for the past 15 years or so, has come close to working"). But in child custody matters, Congress has provided a mechanism for tribes otherwise subject to state jurisdiction to reassume their exclusive authority in this area. *See* 25 U.S.C. § 1918 (1982). To reacquire its exclusive jurisdiction over child custody proceedings, a tribe must petition the Bureau of Indian Affairs ("BIA") for a return of exclusive jurisdiction and receive the Secretary of Interior's approval. *See* 25 C.F.R. §§ 13.1-13.16 (1986). This petitioning procedure permits a tribe to reclaim unquestioned exclusive jurisdiction over child custody proceedings without protracted litigation with the state. *See id.* § 13.1(b).

7. *Cf.* DeCoteau v. District County Court, 420 U.S. 425, 449 (1975) (disestablishment of Lake Traverse Reservation vested South Dakota with the authority to terminate parental rights of an Indian mother residing within boundaries of former reservation).

8. *See* Malaterre v. Malaterre, 293 N.W.2d 139, 142-43 (N.D. 1980).

9. *See id.*

10. *Cf. id.* at 142-43.

11. *See id.* at 143.

12. *See infra* notes 13-18 and accompanying text. It is quite natural for one to think of Indians as a racial classification, but this would be incorrect. The Supreme Court has determined that being "Indian" is a political rather than racial classification. *See* Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974) (upholding a Bureau of Indian Affairs employment preference for Indians by stating that "[t]he preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes"). Tribes may become federally recognized through treaty, statute, or executive order, but so long as a tribe remains unrecognized, its members are legally indistinguishable from other non-Indian citizens. *See* Trentadue, *Tribal Court Jurisdiction Over Collection Suits by Local Merchants and Lenders: An Obstacle to Credit for Reservation Indians?*, 13 AM. INDIAN L. REV. ____, ____ n.17 (1986).

13. *See Malaterre*, 293 N.W.2d at 139.

14. *See id.*

15. *See id.; cf.* State *ex rel.* Dep't of Human Servs. v. Jojola, 99 N.M. 500, ____, 660 P.2d 590, 592 (when Indian putative father was properly served with process off reservation, state court had jurisdiction over paternity action involving non-Indian mother), *cert. denied*, 464 U.S. 803 (1983).

16. *See* Lonewolf v. Lonewolf, 99 N.M. 300, ____, 657 P.2d 627, 628-29 (1982) (in marriage between Indian and non-Indian domiciled on reservation, state court had jurisdiction in divorce proceeding).

cross cultural marriage cases, state courts normally lack the power to enforce their orders if an Indian spouse returns to the reservation.[17] State courts are also restricted in their ability to dispose of the marital estate in Indian and non-Indian divorces.[18] But perhaps the most important infringement upon state authority in the area of domestic relations law is that which was brought about by passage of the Indian Child Welfare Act of 1978.[19]

The Indian Child Welfare Act ("Act" or "ICWA") governs adoption, termination of parental rights, foster care, and preadoptive placements when the child is an Indian.[20] The ICWA refers to these actions as Indian child custody proceedings.[21] Indian child custody matters that do not come under the Act include parental custody disputes,[22] and placements necessitated by criminal acts of the child.[23] To avoid confusion, use of the phrase "custody proceedings" in this Article will refer only to those matters within the purview of the Indian Child Welfare Act.

In passing the ICWA, Congress established a national standard of practice for preadoptive and foster care placements, termination of parental rights, and adoptions involving Indian children. This Act sets certain procedures[24] that must be complied

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17. *See Malaterre*, 293 N.W.2d at 139.

18. *See, e.g.*, 25 U.S.C. § 181 (1982) (prohibiting a white man from acquiring any interest in his Indian wife's tribal property). Respecting a state court's property determinations in general, federal law provides that:

> In *all trials* about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

Id. § 194 (emphasis added). This statute has been applied in a divorce action. *See* Sheppard v. Sheppard, 104 Idaho 1, ____, 655 P.2d 895, 905 (1982).

19. *See* Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified mainly in 25 U.S.C. §§ 1901-1963 (1982)).

20. *See* 25 U.S.C. §§ 1902-1903(1) (1982). A "preadoptive placement" is the temporary placement of an Indian child in a foster home or other institution after the termination of parental rights, but prior to or in substitute of placement of that child in an adoptive home. *Id.* § 1903(1)(iii). The ICWA does not apply to voluntary foster care placements that allow the child's parents or custodian to demand his or her return at anytime. *See id.* § 1903(1)(i); *see also* D.E.D. v. State of Alaska, 704 P.2d 774, 781 (Alaska 1985) (voluntary foster care placements that do not operate to prohibit the parents from regaining custody of their child are not covered by the Act). Furthermore, by implication, the ICWA likewise does not cover nonremoval interventions in, or investigations of, Indian families by state agencies. *See* 25 U.S.C. §§ 1902-1903(1) (1982). For discussion of who qualifies as an Indian for purposes of the ICWA, see *infra* notes 105-08.

21. 25 U.S.C. § 1903(1) (1982).

22. *See id.; see, e.g., In re* Bertelson, 189 Mont. 524, ____, 617 P.2d 121, 125-26 (1980) (ICWA does not apply to child custody dispute between non-Indian mother and Indian paternal grandparents). *But see* A.B.M. v. M.H., 651 P.2d 1170, 1173 (Alaska 1982) (applying ICWA to custody dispute among members of extended family), *cert. denied*, 461 U.S. 914 (1983).

23. *See A.B.M.*, 651 P.2d at 1173 (ICWA does not apply to juvenile delinquency actions).

24. *See, e.g.*, 25 U.S.C. § 1913(a) (1982) (setting out strict procedures for obtaining a parent or custodian's consent to foster care placement of, or termination of, their parental rights to an Indian child). For a more detailed discussion of the ICWA's procedural requirements, see *infra* text accompanying notes 129-314.

with in Indian child custody proceedings. It further mandates that the courts accord the child, parents or Indian custodian, and the tribe certain statutory due process rights.[25]

The Act takes a nonadversarial approach to its observance. Any party petitioning for removal of an Indian child from his or her home, and the state courts, are required to implement the Indian Child Welfare Act's procedures.[26] Failure to comply with the strict requirements of the ICWA not only may void custody proceedings involving Indian children,[27] but the attorney or social worker who violates this law also runs considerable risk of incurring civil liability to his or her client, the tribe, or others.[28]

North Dakota has a considerable Indian population.[29] Indian

25. *See, e.g., id.* § 1911(c) (granting to an Indian child's tribe the right to intervene in an involuntary state court proceeding for the foster care placement of, or termination of, parental rights to that child). For an extensive discussion of the rights that the Act confers upon parents, Indian custodians, tribes and Indian children, see *infra* text accompanying notes 157-314.

The Act defines "Indian custodian" as any Indian person who has legal custody of an Indian child under tribal law or custom, or under state law, or to whom the temporary physical care, custody, and control of an Indian child has been transferred by the child's parent. *See id.* § 1903(6) (1982). However, mere presence of the child with an Indian family member does not make that family member an "Indian custodian" without proof that the parent either transferred, attempted to transfer, or intended to transfer the physical care, custody, and control of the child to that person. *See In re* Bird Head, 213 Neb. 741, ____, 331 N.W.2d 785, 789 (1983). Although non-Indians might not qualify as an Indian custodian under the ICWA, the non-Indian parent of an Indian child is fully entitled to the Act's protections. *See In re* G.L.O.C. & T.J.M., 668 P.2d 235, 238 (Mont. 1983).

26. *See, e.g.,* 25 U.S.C. § 1912(a) (1982) (requiring the state court, and the party seeking foster care placement of or termination of parental rights to an Indian child to give notice to the child's parents, Indian custodian, and tribe); *id.* § 1913(a) (mandating a judge's active participation any time a parent or Indian custodian consents to foster care placement or termination of parental rights). When applicable, the provisions of the ICWA must be observed; compliance is mandatory. *In re* K.A.B.E., 325 N.W.2d 840, 842 (S.D. 1982). Consequently, regardless of whether a particular provision of the Act directs the state court or petitioning party to give notice or initiate some other procedure, the authors of this Article strongly suggest that every person and governmental entity involved in an Indian child custody proceeding make whatever efforts are necessary in order to comply with this law. "Every person and governmental entity" includes judges, attorneys and the parties. The ramifications of noncompliance are so serious that everyone involved should ensure that the ICWA is observed. For a discussion of the ramifications of noncompliance, see *infra* notes 291-314 and accompanying text.

27. *See, e.g., In re* Appeal in Pima County Juvenile Action, 130 Ariz. 202, ____, 635 P.2d 187, 191 (Ct. App. 1981) (setting aside order terminating parental rights and returning child to natural mother because of trial court's failure to comply with the ICWA), *cert. denied,* 455 U.S. 1007 (1982); *In re* Morgan, 140 Mich. App. 594, ____, 364 N.W.2d 754, 758 (1985) (reversing termination of parental rights because trial court did not apply correct standards under ICWA). A state court's compliance with the ICWA provisions is mandatory. *In re* K.A.B.E., 325 N.W.2d 840, 842 (S.D. 1982). For a discussion of enforcing the ICWA, see *infra* notes 291-314.

28. In addition to ever present threats of liability for attorney malpractice, a much broader source of liability may exist against attorneys and caseworkers under the Civil Rights Act of 1875. *See* 42 U.S.C. § 1983 (1982) (providing for civil liability when a person's federal rights have been infringed under color of state law). Unless otherwise immune from suit, anyone who, while acting under color of state law, violates another's rights created by the ICWA would presumably be subject to § 1983 liability. *See, e.g.,* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'ns, 453 U.S. 1, 19-21 (1981) (unless the remedial devices provided in a federal statute are sufficiently comprehensive to show a congressional intent to foreclose recourse to § 1983, a remedy may be had under § 1983 for the violation of federal statutory rights).

29. Indians comprise 3.1% of the total North Dakota population. *See* U.S. BUREAU OF THE CENSUS, SUPPLEMENTARY REPORT AMERICAN INDIAN AREAS AND ALASKA NATIVE VILLAGES: 1980 CENSUS OF POPULATION 24 (1984). Nationally, persons of Indian, Eskimo or Aleut ancestry constitute

children are the frequent subjects of foster care or adoptive placement actions in North Dakota state courts.[30] Yet despite the applicability of the ICWA and the potential for civil liability for ignoring its provisions, this law goes largely uncomplied with by social agencies, attorneys, and judges.[31] This Article will attempt to remedy that situation, for it is intended to apprise judges and practitioners of the requirements of that law;[32] especially the

less than one-half of one percent (.0062%) of the total United States resident population. *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 31 (105th ed. 1985). Within the borders of North Dakota lie all or part of five separate Indian reservations. Table 1 gives the Indian population figures associated with each of these reservations.

TABLE 1
NORTH DAKOTA RESERVATION POPULATIONS*

RESERVATION	INDIANS LIVING ON RESERVATIONS	TOTAL INDIAN POPULATION INCLUDING THOSE LIVING OFF RESERVATION**
Fort Berthold	2640	3081
Fort Totten	2261	3109
Sisseton-Wahpeton	24	299
Standing Rock	2341	4017
Turtle Mountain	4021	9583

*North Dakota reservation population figures were extracted from data compiled during the 1980 national census. *See* U.S. BUREAU OF THE CENSUS, SUPPLEMENTARY REPORT, AMERICAN INDIAN AREAS AND ALASKA NATIVE VILLAGES: 1980 CENSUS OF POPULATION 24 (1984) (containing population statistics for identified reservations). These figures, however, only include Indians actually residing upon a North Dakota reservation. Omitted from this table are those Indians who happen to live upon portion of the Sisseton-Wahpeton or Standing Rock Reservations located in South Dakota.

**These totals represent Indians living either on the reservation or in nearby off-reservation communities. These figures were obtained from data collected by the Bureau of Indian Affairs. *See* U.S. BUREAU OF INDIAN AFFAIRS, INDIAN SERVICE POPULATION AND LABOR FORCE ESTIMATES (1983).

30. For recent data concerning the volume of Indian child custody proceedings in North Dakota state courts, see *infra* Tables 2 and 3, and notes 53-62 and accompanying text.

31. In 1984, Congress held a hearing on the ICWA to determine the effect of this law on the removal of Indian children from their families and to see what, if anything, could be done to improve the law. *See Oversight of the Indian Child Welfare Act of 1978: Hearing Before the Select Comm. on Indian Affairs*, 98th Cong., 2d Sess. 1 (1984) [hereinafter *1984 Indian Child Welfare Hearing*]. The evidence adduced at this hearing disclosed that in many states voluntary state compliance with the ICWA was the exception rather than the rule. *See id.* at 183 (statement of Tobias Robles, representative of the Native American Centers Child Welfare Program, Oklahoma City, Oklahoma); *see also id.* at 158-62 (statement of Eric Eberhard, Deputy Attorney General, Navajo Indian Nation, outlining state court efforts not to comply with the ICWA). Sometimes attorneys and social workers intentionally disobey the provisions of the ICWA. *See, e.g., In re* J.K.S., 356 N.W.2d 88, 91 n.2 (N.D. 1984) (a case in which the state admitted taking action to avoid application of the ICWA). But a more common reason for judges, attorneys, and social workers' disregard of the ICWA is undoubtedly ignorance; they are simply unaware of this law. The conclusion that many attorneys and judges are unaware of the ICWA is supported by the fact that, with one exception, the major family law casebooks do not mention the Act. *See* J. AREEN, FAMILY LAW (1985); I. ELLMAN, P. KURTZ & A. STANTON, FAMILY LAW (1986); C. FOOTE, R. LEVY & F. SANDER, FAMILY LAW (1985); H. KRAUSE, FAMILY LAW (1983). *But see* H. CLARK, JR., DOMESTIC RELATIONS 531 n.8 (1980) (covering the ICWA in a single casenote).

32. Numerous articles and notes have been written on the Indian Child Welfare Act of 1978 but few, if any, approach the subject from a practitioner's perspective. *See, e.g.*, Barsh, *The Indian Child Welfare Act of 1978: A Critical Analysis*, 31 HASTINGS L.J. 1287 (1980); Guerrero, *Indian Child Welfare*

regulations and guidelines promulgated by the Department of the Interior.

The ICWA authorizes the Secretary of Interior ("Secretary") to promulgate "such rules and regulations as may be necessary to carry out the provisions" of the Act.[33] The Secretary, acting through the Bureau of Indian Affairs ("BIA"), has promulgated numerous mandatory rules and regulations.[34] The Secretary of Interior also published recommended procedures or guidelines ("guidelines") for state courts involved in Indian child custody proceedings.[35] Although these guidelines are not binding,[36] they do represent what the BIA believes is required to assure that the rights guaranteed in the ICWA are protected when state courts decide Indian child custody matters.[37]

Despite their nonbinding nature, state courts do consult the guidelines on matters of procedure under the ICWA.[38] Thus, all

Act of 1978: A Response to the Threat to Indian Culture Caused by Foster and Adoptive Placements of Indian Children, 7 AM. INDIAN L. REV. 51 (1979); Note, *Conflict of Laws: The Plurality of Legal Systems: An Analysis of 25 U.S.C. §§ 1901-53, The Indian Child Welfare Act*, 8 AM. INDIAN L. REV. 333 (1980); Note, *The Indian Child Welfare Act of 1978: Provisions and Policy*, 25 S.D. L. REV. 98 (1980); *In Re D.L.L. & C.L.L., Minors: Ruling on the Constitutionality of the Indian Child Welfare Act*, 26 S.D. L. REV. 67 (1981).

33. *See* 25 U.S.C. § 1952 (1982).

34. The regulations were not published until July 31, 1979. *See* 44 Fed. Reg. 45,092 (1979). The regulations are not comprehensive. Instead, the Secretary's regulations cover only narrow areas of the ICWA. *See, e.g.*, 25 C.F.R. §§ 13.1-13.16 (1986) (establishing procedures by which tribes may reassume jurisdiction over child custody proceedings); *id.* §§ 23.1-23.93 (1986) (ICWA regulations governing notice, appointment of counsel, funding, and the Secretary's assistance in identifying witnesses and locating biological parents and Indian interpreters).

35. *See* Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584-95 (Nov. 26, 1979) [hereinafter Guideline].

36. *See* Guideline, *supra* note 35, at 67,584. Of course, when convinced that the Secretary's guidelines are not necessary to comply with the ICWA, state courts are free to ignore them. *See id.*; State *ex rel.* Juvenile Dep't v. Charles, 70 Or. App. 10, ____, 688 P.2d 1354, 1360 n.5 (1984) (refusing to adopt guidelines on expert witnesses), *review dismissed*, 299 Or. 341, 701 P.2d 1052 (1985).

37. Guideline, *supra* note 35, at 67,584. State courts are free to establish rules that provide even greater protection for the rights guaranteed by the Act. *Id.* Congress has authorized states and Indian tribes to enter into agreements respecting the care and custody of Indian children and jurisdiction over child custody proceedings. 25 U.S.C. § 1919 (1982). Some states have taken advantage of this congressional consent to address the problem of state and tribal jurisdiction over Indian child custody matters. *See, e.g.*, OKLA. STAT. ANN. tit. 10, §§ 40-40.9 (West Supp. 1985-86) (Oklahoma Indian Child Welfare Act). North Dakota has apparently not negotiated a child custody agreement with any tribe, nor has it otherwise addressed the subject with legislation. *See 1984 Indian Child Welfare Hearing, supra* note 31, at 31.

38. *See, e.g., In re* J.R.H., 358 N.W.2d 311, 322 (Iowa 1984) (setting aside foster care placement of Indian child because the state trial court had based its decision on socio-economic considerations which the guidelines stated were improper); *see also* D.E.D. v. State of Alaska, 704 P.2d 774, 779 n.8 (Alaska 1985) (while not binding on state courts, the guidelines are instructive); *In re* Appeal in Maricopa County Juvenile Action No. A-25525, 136 Ariz. 528, ____, 667 P.2d 228, 232 n.4 (Ct. App. 1983) (the guidelines are a useful source of information for questions that frequently arise over implementation of the Act); *In re* Junious M., 144 Cal. App. 3d 786, 793, 193 Cal. Rptr. 40, 43 n.7 (1983) (guidelines are entitled to great weight); *In re* J.L.H., 299 N.W.2d 812, 815 (S.D. 1980) (guidelines represent the Department of Interior's interpretation of the ICWA).

When Congress expressly delegates to the Secretary of the Interior the primary responsibility for interpreting a statute, regulations have legislative effect. *See, e.g.*, Batterton v. Francis, 432 U.S. 416, 425 (1977) (when Congress entrusts Secretary with obligation to issue regulations, regulations have legislative effect). Courts are not free to set aside those regulations simply because they would have

applicable provisions of the guidelines are included in this Article's discussion of the Indian Child Welfare Act of 1978. The guidelines are also included because judicial interpretation of the ICWA is virtually nonexistent.[39] In fact, so little caselaw exists that in many instances the guidelines provide the only interpretation of what is required for compliance with the Act.[40]

II. BACKGROUND

Congress intended the ICWA to protect the best interests of Indian children and to promote the stability of Indian tribes and families.[41] Congress undoubtedly felt this law was necessary because of the number of Indian children being removed from their families and placed in non-Indian foster care or adoptive homes;[42] a process that was often facilitated by the manner in which the state legal system handled Indian child custody cases.[43] In order to fully comprehend how the ICWA functions, it is therefore necessary to have some understanding of the serious problems that this Act was designed to solve, and the state laws that it changed.

A. REMOVAL OF INDIAN CHILDREN: A NATIONAL CRISIS

The future of the Indian in American society is solely dependent upon the survival of tribalism.[44] Without tribes, which

interpreted the law in another manner. *See, e.g., id.* However, when the primary responsibility for construing a statute rests with the courts, as in the case of the suggested guidelines, administrative interpretation of the statute is given important, but not controlling, significance. *See, e.g., id.* at 424-25.

39. *See, e.g.*, 25 U.S.C.A. § 1914 (Supp. 1986) (although the Act has nationwide application and § 1914 is the main enforcement provision of that law, few cases appear in the United States Code Annotated under this particular statute). Each section of the guidelines is accompanied by commentary explaining why state courts should adopt them, and providing guidance in interpreting that provision. *See* Guideline, *supra* note 35, at 67,584. When relevant to the discussion of a particular guideline, the commentary is included in this Article.

40. One might argue that the lack of caselaw reflects a tendency on the part of judges, attorneys, and social workers to comply with the ICWA. The latest data, however, suggest this is not so. *See 1984 Indian Child Welfare Hearing, supra* note 31, at 159-62 (statement of Eric Eberhard, Deputy Attorney General, Navajo Indian Nation). In 1980, despite passage of the ICWA and the protections that it gives Indian parents, states were continuing to remove Indian children from their homes at a rate five times that of non-Indians. *Id.* at 14-15 (statement of Casimer Wichlacz, Deputy Commissioner, Administration for Native Americans, Department of Health and Human Services). Since Congress enacted the ICWA to combat the problem of state courts removing Indian children from their homes, this post-Act high removal rate for Indian children suggests that the law is not being observed.

41. *See* 25 U.S.C. § 1902 (1982); Guideline A.1, *supra* note 35, at 67,585-86.

42. *See* 25 U.S.C. § 1901(4) (1982).

43. *See id.* § 1901(5).

44. Membership in a tribe is the *sine qua non* of being Indian. *See generally* United States v. Rogers, 45 U.S. (4 How.) 567 (1846). Persons of Indian ancestry who are not members of a federally recognized tribe or group often have the same legal status as non-Indians in general. *See* Washington

are the focal point for Indian culture and religion, there will be no Indians.[45] Numerous tribes exist in the United States.[46] Each tribe is a separate political and cultural entity,[47] but they all have a common need for their survival: children; children who are enrolled in that tribe, and reared in that unique Indian culture.[48] When Indian children are removed from their tribe and reared as non-Indians, they often cease to be "Indian."[49]

Removal of Indian children from their respective tribes is not a new phenomenon.[50] Nor has removal necessarily been motivated out of a desire to harm either the Indian child or the tribe.[51] But

v. Confederated Colville Tribes, 447 U.S. 134, 161 (1980) (nonmember Indians were treated the same as non-Indians for purposes of state taxation).

45. Indian children who are reared in non-Indian homes lose their Indian identity. *See generally* Comment, *Custody Provisions of the Indian Child Welfare Act of 1978: The Effect on California Dependency Law*, 12 U.C. DAVIS L. REV. 647, 651-54 (1979).

46. *See* U.S. BUREAU OF THE CENSUS, 2 SUBJECT REPORTS, AMERICAN INDIANS, ESKIMOS, AND ALEUTS ON IDENTIFIED RESERVATIONS AND IN THE HISTORIC AREAS OF OKLAHOMA (EXCLUDING URBANIZED AREAS): 1980 CENSUS OF POPULATION 16-31 (1985). Congress has even provided a means by which identifiable but previously unrecognized Indian groups may become a federally recognized tribe and acquire a reservation. *See* 25 U.S.C. § 467 (1982) (authorizing Secretary of the Interior to proclaim new Indian reservations); 25 C.F.R. §§ 83.1-83.11 (1986) (procedures for becoming a federally recognized tribe).

47. Each of the North Dakota reservations, for instance, has its own separate government, including a tribal court system. *See, e.g.*, DEVILS LAKE SIOUX CONST. art. IV (1960); TURTLE MOUNTAIN BAND OF CHIPPEWA CONST. art. IV (1959).

48. *See* 25 U.S.C. § 1901(3) (1982).

49. *See generally* Comment, *supra* note 45, at 651-54.

50. In June 1744, commissioners from Maryland and Virginia negotiated a treaty with the Indians of the Six Nations (Mohawks, Onondagas, Senecas, Oneidas, Cayugas, and Tuscaroras). Guerrero, *supra* note 32, at 51. This treaty was concluded at Lancaster, Pennsylvania, at which time the tribes were invited to send their young men to William and Mary College, an offer that was not too good to refuse:

> We know that you highly esteem the kind of learning taught in those Colleges, and the Maintenance of our young Men, while with you, would be very expensive to you. We are convinced, that you mean to do us Good by your Proposal; and we thank you heartily. But you, who are wise must know that different Nations have different Conceptions of things and you will therefore not take it amiss, if our Ideas of this kind of Education happen not to be the same as yours. We have had some Experience of it. Several of our Young People were formerly brought up at the Colleges of the Northern Provinces; they were instructed in all your Sciences; but, when they came back to us, they were bad Runners, ignorant of every means of living in the woods . . . neither fit for Hunters, Warriors, nor Counsellors, they were totally good for nothing. We are, however, not the less oblig'd by your kind Offer, tho' we decline accepting it; and, to show our grateful Sense of it, if the Gentlemen of Virginia will send us a Dozen of their Sons, we will take Care of their Education, instruct them in all we know, and make Men of them.

DRAKE, 1 BIOGRAPHY AND HISTORY OF THE INDIANS OF NORTH AMERICA 27 (3d ed. 1834), *quoted in* Guerrero, *supra* note 32, at 51.

51. The federal government has, until recently, followed a policy of assimilating the Indian people. *See, e.g.*, General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-34, 336, 339, 341, 342, 348, 349, 381 (1982)) (this law was designed to break up reservations and to assimilate Indians into mainstream American culture); Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588-90 (codified at 18 U.S.C. § 1162 (1982)); 28 U.S.C. § 1360 (1982)) (an enunciated policy of assimilation by providing the means for states to assume control of reservation government). The practice of removing Indian children and rearing them in a non-Indian culture was complementary to this national policy of destroying tribalism and assimilating Indian people.

regardless of the policy or the intentions behind the practice, by the mid-1970s removal of Indian children and their placement in non-Indian homes had reached a crisis level.[52]

In 1969 and again in 1974, the Association on American Indian Affairs ("AAIA")[53] conducted surveys of the foster care and adoptive placement of Indian children.[54] These AAIA surveys were conducted in states that have significant Indian populations.[55] The survey results indicated that approximately twenty-five to thirty-five percent of all American Indian children were being separated from their families and placed in foster homes, adoptive homes, or institutions.[56] From 1971 to 1972, nearly one in every four American Indian children under the age of one was adopted.[57] Data from the Fort Totten Reservation in North Dakota discloses that, in 1968, twenty-five percent of the Devils Lake Sioux Indian children were either in foster care, adoptive homes, or institutions.[58]

The magnitude of this problem is aptly illustrated by the following tables, adapted from pre-Act data collected by the AAIA at the request of the American Indian Policy Review Commission.[59] Table 2 compares the number of foster placements per 1000 Indians and non-Indians in North Dakota and its neighboring states.[60] Table 3 presents an estimate of the number of adoptions per 1000 Indian children as compared with non-Indian children in this same four state region.[61]

TABLE 2

Foster Care Placements

State	Year	(Placements per 1,000 children)	
		Indian	Non-Indian
Minnesota	1972	58.1	3.5
Montana	1976	35.3	2.8
North Dakota	1976	36.1	1.8
South Dakota	1974	45.5	2.0

52. *See Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs*, 93d Cong., 2d Sess. 15 (1974) (statement of William Byler, Executive Director, Association on American Indian Affairs) [hereinafter *1974 Indian Child Welfare Hearing*].

53. The AAIA is a national nonprofit organization, founded to assist American Indian and Alaska Native communities with their efforts towards achieving full economic and social equality. *See id.* at 15.

54. *See id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 95.

59. *See Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the Senate Select Comm. on Indian Affairs*, 95th Cong., 1st Sess. 538 (1977) [hereinafter *1977 Indian Child Welfare Hearing*].

60. *See id.* at 540.

61. *See id.* at 539, 570, 572, 581, 592.

TABLE 3

Adoptions of Indian Children

State	Year	(Adoptions per 1,000 children)	
		Indians	Non-Indians
Minnesota	1964-1975	126.6	32.2
Montana	1973-1975	35.8	6.9
North Dakota	1975	32.6	11.6
South Dakota	1970-1975	55.5	30.9

A quick scan of the foregoing tables reveals that, prior to passage of the Indian Child Welfare Act, Indian children in this four state area were removed from their homes with unusual frequency. During this time period Indian children were placed in foster care, adoptive homes, and institutions in a far greater proportion than non-Indian children.[62] Some of these Indian children were undoubtedly abused or neglected and, as a consequence, they should have been removed from their parents or legal custodians. But it would be grossly inaccurate to justify the disproportionate numbers of Indian children in foster care or adoptive homes solely on the basis of a higher than usual incidence of neglect among Indian parents and custodians.

Critics of the practice of removing Indian children argue that the disproportionate number of Indian children being taken from their homes reflects a cultural bias against Indians.[63] Indian organizations criticize non-Indian caseworkers for their insensitivity to, or ignorance of, traditional Indian values.[64] Because they are not familiar with Indian customs and communities, state

62. By per capita rate, Indian children were being removed from their homes and placed with an adoptive or foster care family 520% more often than non-Indian children in Minnesota. *Id.* at 571. Montana's removal rate for Indian children was 730% greater than non-Indian children. *Id.* at 573. North Dakota's removal rate for Indian children was 520% greater than that of non-Indians. *Id.* at 582. State removal of South Dakota Indian children was 270% greater than non-Indian placements. *Id.* at 593. Ironically, several years after passage of the ICWA, states were continuing to remove Indian children from their homes at a rate 5 times that of non-Indians. *See 1984 Indian Child Welfare Hearing, supra* note 31, at 14-15 (statement of Casimer Wichlacz). North Dakota's 1980 per capita placement of Indian children was at a rate almost 13 times greater than the rate for non-Indian children. *See id.* at 21. Moreover, North Dakota was not alone in the continued disproportionate removal of Indian children from their homes. In 1980, for example, Minnesota's per capita removal rate for Indian children was 12 times greater than that for non-Indian children; Montana's removal rate for Indian children was 6 times higher than the rate for non-Indian children; and in South Dakota, state courts were removing Indian children at a rate almost 27 times that of non-Indians. *Id.* This continued high removal rate of Indian children is further evidence that state courts are apparently not observing the ICWA.

63. *See 1974 Indian Child Welfare Hearing, supra* note 52, at 17-21 (prepared statement of William Byler); *id.* at 95 (excerpt from the *Indian Affairs*, AAIA newsletter, June-Aug. 1968).

64. *See* 1977 *Indian Child Welfare Hearing, supra* note 59, at 281; AMERICAN INDIAN POLICY REVIEW COMMISSION, REPORT ON FEDERAL, STATE, AND TRIBAL JURISDICTION 180 (1976) [hereinafter 1976 POLICY REVIEW REPORT].

social workers are often accused of misinterpreting family and child behavior.[65] In addition, many state agencies and caseworkers refuse to recognize the concept of "extended family," a common Indian child rearing practice.[66]

An Indian's extended family includes not only grandparents, and aunts and uncles, but often distant relatives who, by custom, tradition, or necessity have definite responsibilities and duties in child rearing.[67] Although the nuclear family is the generally accepted standard of a basic family unit, the nuclear family concept is frequently inapplicable to Indians.[68] Yet it is the nuclear family standard by which many state courts determine that Indian children are neglected.[69] This built-in bias against Indian child rearing practices is further compounded by state laws, laws that frequently make it easy to remove Indian children.

B. STATE JURISDICTION PRIOR TO PASSAGE OF THE ICWA

Many Indian children were removed from their families during the mid-1970s and subsequently placed in foster care or adoptive homes with their parents' consent. In most cases, however, the child's removal was involuntary, a court ordered nonconsensual placement. State courts were the primary architects of this removal crisis, and they were aided in their task by three aspects of state law. First, the "best interest of the child" standard, so widely used in custody determinations, unfairly disadvantaged Indian parents.[70] This standard, with its heavy reliance upon subjective judicial conclusions concerning a child's welfare,

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65. *See* H.R. REP. NO. 95-1386, 95th Cong., 2d Sess. 10, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 7530, 7532; *1977 Indian Child Welfare Hearing, supra* note 59, at 140 (statement of Dr. Marlene Echohawk); *id.* at 155-56 (statement of National Tribal Chairmen's Association).

66. *See* H.R. REP. NO. 95-1386, *supra* note 65, at 20. The ICWA provides that an "extended family member" is to be defined by tribal law and custom or, in the absence of such law or custom, the terms shall include "a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent. . . ." 25 U.S.C. § 1903(2) (1982). An extended family member can even be non-Indian. *See id.* While extended family members may not have custodial rights under state law, they do have such rights under tribal law and Congress intended to protect these rights when it enacted the ICWA. *See* H.R. REP. NO. 95-1386, *supra* note 65, at 20.

67. *See* H.R. REP. NO. 95-1386, *supra* note 65, at 20.

68. Some state social workers have concluded that leaving an Indian child with persons outside the nuclear family is evidence of neglect and, therefore, grounds for removing that child. *See 1977 Indian Child Welfare Hearing, supra* note 59, at 316-17 (statement of National Indian Health Board); H.R. REP. NO. 95-1386, *supra* note 65, at 10. *See generally* Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (extending constitutional protection of the sanctity of the family to multigenerational extended family).

69. *See 1977 Indian Child Welfare Hearing, supra* note 59, at 316-17.

70. *See* 1976 POLICY REVIEW REPORT, *supra* note 64, at 79; *1974 Indian Child Welfare Hearing, supra* note 52, at 57-58 (statement of Doctors Mindell and Gurwitt).

unavoidably involved "cultural and familial values which are often opposed to values held by the Indian family."[71]

Many times in deciding the best interest of Indian children, state courts would defer to the opinions of social workers, who often had a built-in cultural bias.[72] Economic considerations also came into play, and both caseworkers and judges usually agreed that an Indian child's best interest was better served by his or her placement with a more affluent non-Indian foster or adoptive home.[73] The net effect of the "best interest of the child" standard was to automatically shift the burden of proof on the issue of parental competency to the Indian parents, and these parents generally failed to meet their burden.[74]

A second aspect of state law that facilitated removal of Indian children was the willingness of state courts to assume jurisdiction in these cases. If the child was from a mixed marriage, state courts showed little hesitancy in proceeding to hear the custody matter. The presence of one non-Indian parent was considered sufficient to vest state courts with subject matter jurisdiction regardless of the fact that the child might be domiciled on an Indian reservation.[75] When both parents were Indian, state courts still exercised jurisdiction if the child was either domiciled or present off the reservation.[76] The only situation in which state courts regularly refused to hear custody proceedings involving an Indian child were those cases in which both parents were Indian, the child was domiciled on a reservation, and the matter was before a tribal court.[77]

The final aspect of state child custody law that contributed greatly to the pre-Act removal of Indian children was the failure to recognize tribal interests. With few exceptions, state custody proceedings gave little heed to the child's ethnic identity, or the

71. 1976 POLICY REVIEW REPORT, *supra* note 64, at 80. North Dakota employs a best interest of the child standard. *See In re* D.G., 246 N.W.2d 892, 895 (N.D. 1976).

72. *See 1977 Indian Child Welfare Hearing, supra* note 59, at 1 ("public and private welfare agencies seem to have operated on the premise that most Indian children would really be better off growing up non-Indian").

73. *See id.* at 77-78 (statement of Goldie Denny, Director of Social Services, Quinault Nation); *id.* at 187 (statement of Rena Uviller, Director, Juvenile Rights Project, American Civil Liberties Union).

74. *See 1974 Indian Child Welfare Hearing, supra* note 52, at 60-61 (statement of Doctors Mindell and Gurwitt).

75. *See, e.g., In re* Duryea, 115 Ariz. 86, ____, 563 P.2d 885, 887 (1977) (court had jurisdiction when Indian children were purposively and voluntarily removed from the reservation).

76. *See In re* Greybull, 23 Or. App. 674, 677, 543 P.2d 1079, 1080 (1979); *In re* Duryea, 115 Ariz. 86, ____, 563 P.2d 885, 887 (1977) (Indian children and parents were domiciled on an Indian reservation, but parents' voluntary placement of children in off-reservation foster care provided state court jurisdiction to terminate parental rights).

77. *See, e.g.*, Fisher v. District Court, 424 U.S. 382, 383 (1976) (holding that when all the parties are members and residents of the tribe, state court had no jurisdiction).

tribe's interest in that child.[78] State courts routinely placed Indian children with non-Indian families, and frequently the children became disassociated from their tribes.[79] This process was further aggravated by the state's tendency not to give tribal court judgments full faith and credit.[80]

A tribal court's determination of what was in a particular child's best interest could be easily circumvented if someone removed the child from the reservation. Once off the reservation, the child would come under state jurisdiction and a state court could decide the matter of custody anew.[81] Thus, a tribal court's findings and orders in a custody case were only enforceable while the child remained on the reservation. All of this changed, however, with the passage of the Indian Child Welfare Act of 1978.[82]

Congress passed the ICWA to combat the problem of state courts removing Indian children form their families and tribes.[83] To accomplish its announced goals of protecting Indian children and promoting tribal stability,[84] the Act established minimum federal standards for the removal of Indian children from their families.[85] The Act also established standards to facilitate the

78. *See, e.g., In re* Adoption of Doe, 89 N.M. 606, ____, 555 P.2d 906, 914-15 (Ct. App. 1976) (in placing an Indian child with a non-Indian family, the court minimized the importance of ethnic heritage and customs). *But cf.* Carle v. Carle, 503 P.2d 1050, 1055 (Alaska 1972) (reversing the trial judge's decision in a parental custody dispute for not recognizing the value of the child's tribal culture).

79. *See* 1976 POLICY REVIEW REPORT, *supra* note 64, at 179 (most of the Indian children separated from their natural parents are placed in some form of care supervised by a non-Indian); *see also 1974 Indian Child Welfare Hearing, supra* note 52, at 17 (statement of William Byler).

80. *See* 1976 POLICY REVIEW REPORT, *supra* note 64, at 86. The reason most often given by state courts for their refusal to give full faith and credit to judgments from Indian courts is that the full faith and credit clause does not apply to tribal governments. *See* U.S. CONST. art. IV, § 1; *see also* Annis v. Dewey County Bank, 335 F. Supp. 133, 136 (D.S.D. 1971); Brown v. Babbitt Ford, Inc., 117 Ariz. 192, 197, 571 P.2d 689, 694 (Ct. App. 1977). *But see In re* Adoption of Buehl, 87 Wash. 2d 649, ____, 555 P.2d 1334, 1341 (1976) (holding that tribal court decree was entitled to full faith and credit because Indian child was domiciled on that tribal reservation). Nor does § 1738 of title 28 of the United States Code, require state courts to give full faith and credit to tribal laws and judgments. *See* 28 U.S.C. § 1738 (1982); *accord* Malaterre v. Malaterre, 293 N.W.2d 139, 144 (N.D. 1980) (tribal courts are not bound to enforce state court orders because full faith and credit clause applies only to states). Of course, when appropriate, a state court could recognize and apply tribal law under the doctrine of comity. *See* Jim v. CIT Fin. Serv. Corp., 87 N.M. 362____, 533 P.2d 751, 752 (1975) (recognizing that full faith and credit should be applied to Indian laws although "full faith and credit is not a inexorable or unqualified command"). But the tribal government and its court, which normally function unfettered by either federal or state constitutional constraints, may not meet the due process prerequisite necessary for recognition of tribal law under a comity theory. *See Malaterre*, 293 N.W.2d at 145.

81. *See, e.g., In re* Cantrell, 159 Mont. 66, 71, 495 P.2d 179, 182 (1972) (declining to abide by a tribal court's prior determination of parental fitness).

82. *See* 25 U.S.C. § 1911(d) (1982) (granting full faith and credit to the public records, acts, and judicial proceedings of any Indian tribe that apply to an Indian child custody proceeding).

83. *See id.* § 1901(4); *1977 Indian Child Welfare Hearing, supra* note 59, at 1; Guideline A.1, *supra* note 35, at 67,585-86.

84. *See* 25 U.S.C. § 1902 (1982).

85. *See id.*

placement of removed children in foster care or adoptive homes that reflect the unique values of Indian culture.[86] Among other things, the Act changed state laws and procedures that had previously made it easy to remove an Indian child from his or her family and tribe.[87]

III. THE INDIAN CHILD WELFARE ACT OF 1978

Enacted into law on November 8, 1978,[88] the Indian Child Welfare Act contains three major groups of provisions. One subchapter provides a means for the Secretary of Interior to establish Indian child and family programs.[89] Unfortunately, the Act does not provide funding for these programs.[90] Given the

86. *See id.*

87. Removal of Indian children from their families frequently occurred in situations in which one or more of the following conditions existed:

> (1) The natural parent does not understand the nature of the documents or proceedings involved;
> (2) neither the child nor the natural parents are represented by counsel or otherwise advised of their rights;
> (3) the public officials involved are unfamiliar with, and often disdainful of, Indian culture and society;
> (4) the conditions which led to the separation are not demonstrably harmful or are remediable or transitory in character; and
> (5) responsible tribal authorities and Indian community agencies are not consulted about or even informed of the actions.

See 1977 Indian Child Welfare Hearing, supra note 59, at 539. Not surprisingly, these conditions were particular targets for the Indian Child Welfare Act of 1978. *See id.*

88. 25 U.S.C. § 1923 (1982). The ICWA was not, however, generally effective until 180 days after its enactment:

> None of the provisions of this subchapter, except sections 1911(a), 1918, and 1919 of this title, 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 November 8, 1978, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

See id. Section 1911(a) grants exclusive jurisdiction to the tribal court in child custody proceedings when the child is either domiciled upon or resides within an Indian reservation, or is a ward of the tribal court. *See id.* § 1911(a). For a discussion of the exclusive jurisdiction of tribal courts, see *infra* note 129-30 and accompanying text. Sections 1918 and 1919 refer, respectively, to tribal reassumption of jurisdiction from states, and agreements between states and tribes on child custody matters. *See id.* §§ 1918-1919. For a discussion of tribal reassumption of jurisdiction, see *supra* note 6 and accompanying text. For a discussion of agreements between states and tribes, see *supra* note 37 and accompanying text. Two other provisions of the Act are also made specifically applicable to pre-Act child custody proceedings. Retroactive application is given to an Indian adoptee's right to information about his or her natural parents and tribe. *See id.* § 1951(a). For a discussion of this retroactive application, see *infra* notes 93-99 and accompanying text. The other retroactive application relates to post-Act changes that modify a pre-Act child custody proceeding in any manner. *See id.* § 1916. For a discussion of this retroactive application of the ICWA, see *infra* notes 117-25 and accompanying text.

89. *See* 25 U.S.C. §§ 1931 to -34 (1982); 25 C.F.R. §§ 23.21-23.71 (1986).

90. Money for implementation of the Indian Child Welfare Act must be appropriated through the Snyder Act. See 25 U.S.C. § 13 (1982).

present federal budgetary concerns,[91] this absence of a specific funding source will undoubtedly retard the establishment of Indian child and family programs, as well as hinder the continued effectiveness of any programs that are established.[92]

A second subchapter requires any state court that enters a final decree or order in an Indian child adoptive placement to provide the Secretary of Interior with a copy of its decree or order,[93] together with the identity and location of the child's natural parents and adoptive parents.[94] The state court must also inform the Secretary of the child's name, birthdate, Indian blood quantum, tribal affiliation,[95] and the identity of any agency that has files or information relating to the adoption.[96]

Once the adopted child reaches the age of eighteen, he or she is entitled to obtain the information provided by the state court.[97] The

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91. *See* Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (1985) (to be codified at 2 U.S.C. §§ 901 to -22); *see also* 131 Cong. Rec. S17381 (daily ed. Dec. 11, 1985) (statement of Sen. Packwood) (discussing the Emergency Deficit Control Act of 1985, and the need to control the federal deficit), *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 1049-54.

92. When the ICWA was proposed, the Congressional Budget Office submitted a five year capital program for implementing the Act. *See* H.R. REP. No. 95-1386, *supra* note 65, at 29. This plan required an appropriation to build and staff 150 special Indian-controlled child development centers. *See id.* Although barely adequate to achieve the desired goals, the money was never appropriated for this plan. In fact, the ICWA programs have experienced "barebones" federal funding. *See 1984 Indian Child Welfare Hearing, supra* note 31, at 5 (statement of John W. Fritz, Deputy Assistant Secretary for Indian Affairs). At one time the present administration proposed to drop the funding of off-reservation programs (programs for Indians that are performed off Indian reservations) because these could conceivably receive funding from other sources. *Id.* at 7; *see also id.* at 75-77 (statement of Steven Unger, Executive Director, AAIA about Indian Child Welfare programs being underfunded).

93. 25 U.S.C. § 1951(a) (1982). The state court must provide a copy of this decree or order, together with all other required information, within 30 days after its entry of the decree or order. 25 C.F.R. § 23.81(a) (1986). This information and copies of any necessary documents must be transmitted by the state court to: Chief, Division of Social Services, Bureau of Indian Affairs, 1951 Constitution Avenue, N.W., Washington, D.C. 20245. *Id.* § 23.81(a)(3). A state can designate a state agency to be the repository for all state court Indian adoption information and if this is done, that agency may assume the responsibility for meeting the ICWA's reporting requirements. *See id.* But regardless of which state entity bears the reporting responsibilities in any particular case, the Secretary of Interior's regulations provide that all information on state Indian adoptions should be transmitted to the Division of Social Services in an envelope marked "Confidential." *Id.*

94. *See* 25 U.S.C. § 1951(a) (1982); 25 C.F.R. § 23.81(a)(2) (1986).

95. *See* 25 U.S.C. § 1951(a) (1982); 25 C.F.R. § 23.81(a)(1) (1986).

96. *See* 25 U.S.C. § 1951(a) (1982); 25 C.F.R. § 23.81(a)(3) (1986).

97. The Bureau of Indian Affairs' Division of Social Services is the agency authorized to receive all information on state Indian adoptions. 25 C.F.R. § 23.81(b). Division of Social Services' Indian adoption files are confidential and only designated persons may have access to them. *Id.* However, an adopted Indian individual over the age of 18, his or her adoptive or foster parents, or Indian tribe are all authorized to have access to the Division of Social Services information concerning that adopted individual. *Id.; see* 25 U.S.C. § 1917 (1982) (right to information from state); *id.* § 1951(b) (right to information from Secretary of Interior); 25 C.F.R. § 23.81(b) (1986). A state's disclosure of this information to an adult adoptee is covered by the following guideline:

> (a) Upon application by an Indian individual who has reached age 18 who was the subject of an adoptive placement, the court which entered the final decree must inform such individual of the tribal affiliations, if any[,] of the individual's biological parents and provide such other information necessary to protect any rights flowing from the individual's tribal relationship.

information is intended to enable the adopted Indian child to reestablish his or her tribal identity.[98] Of course, if the natural parent has requested anonymity, the Secretary is authorized to certify the child's tribal affiliation and other circumstances of the child's birth without disclosing the natural parent's identity.[99]

It is, however, the third major subdivision of the ICWA that should most concern social workers, practitioners, and judges. In this section, Congress established the standards for removal and placement of Indian children into preadoptive, adoptive, or foster homes.

Initially, it is important to emphasize that application of these federal standards is dependent upon the term "Indian child."[100] The Act only applies to Indian children.[101] An Indian child is defined as one who is unmarried, under the age of eighteen, and either: (1) an enrolled member of an Indian tribe;[102] or (2) if not

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(b) The section applies regardless of whether or not the original adoption was subject to the provisions of the Act.

(c) Where state law prohibits revelation of the identity of the biological parent, assistance of the Bureau of Indian Affairs shall be sought where necessary to help an adoptee who is eligible for membership in a tribe establish that right without breaching the confidentiality of the record.

Guideline G.2, *supra* note 35, at 67,595.

98. *See* Guideline G.2 commentary, *supra* note 35, at 67,595; 25 C.F.R. § 23.81(b) (1986).

99. *See* 25 U.S.C. § 1951(b) (1982). A biological parent's request for confidentiality is made by an "affidavit of confidentiality." *See* 25 C.F.R. § 23.81 (1986). When a biological parent has requested that his or her identity remain confidential, a copy of the affidavit of confidentiality shall be provided to the Secretary through the standard reporting channels. The affidavit should be transmitted in an envelope marked by the sender as "Confidential." *See* 25 C.F.R. § 23.81(a)(3) (1986). This affidavit is not subject to the disclosure requirements of the Freedom of Information Act, and the Secretary is specifically charged with the duty to insure that the affidavit remains confidential. *Id.* The Freedom of Information Act is located in § 552, title 5 of the United States Code. *See* 5 U.S.C. § 552 (1982). It should be noted, however, that a parent's affidavit of confidentiality is in addition to any state laws that may prohibit the disclosure of information about an adoptee's biological parents. *Compare* Guideline G.2 and commentary, *supra* note 35, at 67,595 (state laws against disclosure) *with* 25 C.F.R. § 23.81(b) (1986) (affidavit of confidentiality). For further discussion of the confidentiality the ICWA grants to a biological parent's identity, see *infra* notes 137-40 and accompanying text.

100. *See* 25 U.S.C. § 1902 (1982) (congressional declaration of policy); Guideline A, *supra* note 35, at 67,585-86.

101. The Indian Child Welfare Act does not expressly provide that the Act is limited to Indian children. The Act, however, refers only to Indian children. *E.g.*, 25 U.S.C. 1912(a) (1982). For a discussion of the definition of Indian children pursuant to the Act, see *infra* notes 102-03 and accompanying text.

102. The Act defines "Indian tribe" as: "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 1602(c) of Title 43." 25 U.S.C. § 1903(8) (1982). No definition for "Alaska Native" is contained in the ICWA. Instead, reference is made to the Alaska Native Claims Settlement Act, which established a permanent roll of Alaska Natives living in 1971. *See id.* The Alaska Native Claims Settlement Act is contained in § 1604, title 43 of the United States Code. *See* 43 U.S.C. § 1604 (1982). The ICWA does not apply to Canadian Indians, nor to Mexican Indians, but it has been suggested that non-United States tribes might come within the purview of the Act if they are affiliated with a federally recognized tribe. *See In re* Junious M., 144 Cal. App. 3d 786, 792, 193 Cal. Rptr. 40, 43 (1983). Congress has also terminated or dissolved a number of tribes. *See, e.g.*, Act of June 17, 1954, Pub. L. No. 83-399, 68 Stat. 250 (withdrawal of Menominee Tribe from federal jurisdiction); Act of Aug. 13,

enrolled, the biological child of a tribal member and the child is eligible for membership.[103] Applicability of the Indian Child Welfare Act is additionally complicated by the absence of a uniform national standard for tribal membership.

Congress has provided a blood quantum ancestry definition of "Indian" in other contexts,[104] but chose not to do so in the ICWA. Instead, the Act's definition of Indian is synonymous with tribal membership, and the tribes themselves determine who may become a member.[105] While most of the North Dakota tribes require a significant quantum of Indian blood for membership,[106] this is not true of all tribes. Some tribes have set the percentage of

1954, Pub. L. Nos. 83-587, -588, -627, 68 Stat. 718, 724, 768 (termination of the Klamath Tribe, tribes located in western Oregon, and the Alabama and Coushatta Tribes of Texas). The ICWA does not affect child custody proceedings involving members of these terminated tribes. *See* 25 U.S.C. §§ 1902-03 (1982).

103. *See* 25 U.S.C. § 1903(4) (1982). Before any provisions of the ICWA apply, it must be established on the record that the child meets either or both of the definitional criteria for an Indian child. *See In re* Appeal in Maricopa County, 136 Ariz. 528, ____, 667 P.2d 228, 232 (Ct. App. 1983) (stating that the ICWA would not apply unless the child was Indian, defined as "(1) a member of an Indian tribe or (2) a biological child of a member and eligible for membership in a tribe"). When the pleadings do not contain allegations that the child is Indian, then the party asserting this bears the burden of proof. *See In re* K.A.B.E., 325 N.W.2d 840, 843 (S.D. 1982); *accord In re* J.B., 643 P.2d 306, 307-08 (Okla. 1982) (natural mother claiming benefit of ICWA had burden of proving that child was an Indian and thus entitled to the protections of that Act). If the allegation is in the pleadings, however, the court will assume that the ICWA applies. *See In re K.A.B.E.*, 325 N.W.2d at 843. A party's admission during the custody proceedings that the child is an Indian may be binding, and sufficient to trigger the state court's application of the ICWA. *See* A.B.M. v. M.H., 651 P.2d 1170, 1174 (Alaska 1982).

Once it is determined that the state proceedings involve an Indian child, the state court should make specific findings to that effect. Based upon these findings the court should conclude, as a matter of law, that the proceedings are governed by the ICWA. *See In re K.A.B.E.*, 325 N.W.2d at 843. It should be emphasized, however, that when there is a genuine issue of fact regarding the child's status as an Indian, this issue is not determined by the state court. *See In re* Junious M., 144 Cal. App. 3d 786, 790-93, 193 Cal. Rptr. 40, 41-43 (1983). Whether a child is an Indian can only be determined by the tribe to which he or she purportedly belongs, or the Bureau of Indian Affairs. For a discussion of the procedure for obtaining tribal or BIA determination of a child's Indian status, see *infra* notes 134-36 and accompanying text. In the case of a child born out of wedlock to a non-Indian mother, the ICWA does not apply until such time as the putative father either acknowledges or establishes his paternity. *In re* Appeal in Maricopa County, 136 Ariz. 528, ____, 667 P.2d 228, 233 (Ct. App. 1983).

104. *See, e.g.*, 25 U.S.C. § 479 (1982) (defining Indians under the Indian Reorganization Act to include "persons of one-half or more Indian blood").

105. *See id.* § 1903(3) ("'Indian' means any person who is a member of an Indian tribe"). The most common means of proving tribal membership is to show that a person is enrolled in a tribe, but the guidelines make it clear that enrollment is not the only means of establishing tribal membership. *See* Guideline B.1 commentary, *supra* note 35, at 67,586. Nor is it conclusive:

> Enrollment is not always required in order to be a member of a tribe. Some tribes do not have written rolls. Others have rolls that list only persons that were members as of a certain date. Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative.

Id.

106. *See, e.g.*, DEVILS LAKE SIOUX CONST. art. III, § 1(c) ("one-fourth or more degree Indian blood"); SISSETON-WAHPETON SIOUX CONST. art. II, § 1(d) ("one-eighth (1/8) degree or more Sisseton-Wahpeton Sioux Indian blood"); STANDING ROCK SIOUX CONST. art. IV, § 1 ("one-quarter (1/4) degree Yankton Sioux Indian blood"); TURTLE MOUNTAIN BAND OF CHIPPEWA CONST. art. III, § 1(b) ("one-fourth or more Indian blood").

Indian blood required for membership so low that a member's Indian blood is virtually nonexistent.[107] Other tribes extend membership to any descendent of a member regardless of Indian blood quantum.[108] The net effect of this variable standard for tribal membership is that many children considered to be Indian under the ICWA do not, by physical features, reveal their Indian heritage. Consequently, state judges, social workers, and attorneys often do not recognize that they are handling the case of a child who is subject to the Indian Child Welfare Act.

Many times those involved with the placement of an Indian child are working with the unwed mother, who happens to be non-Indian. This will not, however, excuse the practitioner for proceeding in violation of ICWA requirements. Ignorance of the child's Indian status is no excuse. The Act places the burden upon judges, lawyers, and caseworkers to insure compliance with its procedures,[109] and failure to do so may have rather onerous consequences for all involved.[110]

The ICWA procedures that judges, attorneys, and caseworkers must be concerned with fall into six fairly well defined categories: (1) tribal court jurisdiction;[111] (2) tribal intervention in state court proceedings;[112] (3) standards of proof;[113] (4) placement preferences;[114] (5) parental rights;[115] and (6) enforcement and post trial rights.[116] These procedures generally do not apply to child custody proceedings commenced or completed prior to May 7, 1979,[117] unless there has been a post-Act placement change.[118]

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107. *See, e.g.*, FORT INDEPENDENCE INDIAN COMMUNITY ARTICLE OF ASSOCIATION art. II, § 1(b) ("1/16 degree Indian blood"); MISSION CREEK BAND CONST. art. I, § 1(b) ("at least 1/16 degree Indian blood"); OTTAWA CONST. art. III, § 1(d) ("one-sixteenth or more degree of Indian blood").

108. *See, e.g.*, THREE AFFILIATED TRIBES CONST. art. II, § 1 ("all persons of Indian blood").

109. For a discussion of the court's and counsel's obligation to determine whether a child is an Indian within the meaning of the ICWA, see *infra* notes 131-33 and accompanying text.

110. For a discussion of the Act's remedies and enforcement procedures, see *infra* notes 291-314 and accompanying text.

111. *See* 25 U.S.C. § 1911(a) (1982).

112. *See id.* §§ 1911(b), (c), 1912(a).

113. *See id.* § 1912(e), (f).

114. *See id.* § 1915.

115. *See id.* §§ 1912(a), (b), 1913.

116. *See id.* §§ 1913(d), 1914, 1916.

117. *See id.* § 1923; *In re* R.N., D.N., L.N., H.N., & S.N., 303 N.W.2d 102, 103 (S.D. 1981). For a detailed discussion of the retroactive application of the ICWA, see *supra* note 88.

118. *See* 25 U.S.C. § 1916 (1982). Legislative history indicates that Congress intended the ICWA to apply to any "subsequent discrete phase of the same matter." *See* H.R. REP. No. 95-1386, *supra* note 65, at 26. The law does not apply to mere post-Act continuations of a pre-ICWA case. *See In re* T.J.D., J.L.D. & R.J.W., 189 Mont. 147, ____, 615 P.2d 212, 217 (1980). It is, however, sometimes difficult to determine whether the post-Act proceedings in a case commenced prior to the enactment of the ICWA or is a mere continuation or a subsequent discrete phase. *See, e.g.*, E.A. v. State, 623 P.2d 1210, 1215-16 (Alaska 1981) (post-Act physical placement of Indian child did not trigger ICWA, but mandatory post-Act hearing before adoption became final was an ICWA proceeding).

Thus, even though the initial placement was pre-Act, if a child is removed from a foster home and not returned to the parents or Indian custodian from whom the child was originally removed, any further foster care or adoptive placement is governed by the ICWA.[119] Likewise, in the event a pre-Act adoption is set aside for any reason, the Indian Child Welfare Act applies to all future placements of that child.[120]

Furthermore, in the unlikely event the adoption of an Indian child is either vacated or the adoptive parents consent to the termination of their parental rights, a biological parent or prior Indian custodian may petition for return of the child.[121] Moreover, the ICWA gives legal standing to a biological parent or prior Indian custodian to seek the return of a child if an adoption fails.[122] The state court must grant this request unless it finds that such action would not be in the child's best interest.[123] Also, all post adoption proceedings, from the setting aside of an adoption to the future placement of the Indian child, are governed by the ICWA.[124] The guidelines provide that an Indian child's biological parent or prior Indian custodian is entitled to notice of such

119. *See* 25 U.S.C. § 1916(b) (1982); *see also, e.g.*, State *ex rel.* J.L.G., 687 P.2d 477, 479 (Colo. Ct. App. 1984) (when initial placement was prior to effective date of Act, ICWA did not govern subsequent state proceedings involving that child unless the subsequent proceedings involved a different foster care home, an attempt to terminate parental rights, or a preadoptive or adoptive placement).

120. *See* 25 U.S.C. § 1916(a) (1982).

121. *See id.* The Bureau of Indian Affairs will assist in locating the biological parents or prior Indian custodian of an adopted Indian child whose adoption has been terminated. *See* 25 C.F.R. § 23.93 (1986). The North Dakota Child Placement Agency, state court, or tribe can request this assistance, and their request should be sent to: Aberdeen Area Director, Bureau of Indian Affairs, 115 - 4th Avenue, S.E., Aberdeen, South Dakota 57401. *Id.* §§ 23.11(b)(3), 23.93. The foregoing is also the address for South Dakota courts and agencies to request BIA assistance in locating the child's natural parents or prior Indian custodian. *See id.* For Minnesota proceedings, this request should be mailed by the state court, tribe, or agency to: Minneapolis Area Director, Bureau of Indian Affairs, Chamber of Commerce Building — 6th Floor, 15 South Fifth Street, Minneapolis, Minnesota 55402. *See id.* §§ 23.11(b)(2), 23.93. When it is a Montana adoption that has been terminated, requests for assistance should be directed to: Billings Area Director, Bureau of Indian Affairs, 316 N. 26th Street, Billings, Montana 59101. *See id.* §§ 23.11(b)(5), 23.93. Requests for assistance from Wyoming attorneys and judges can be sent to the Montana address. *See id.* For Idaho, Oregon, or Washington proceedings, persons seeking assistance must write to: Portland Area Director, Bureau of Indian Affairs, 1425 N.E. Irving Street, Portland, Oregon 97208. *See id.* §§ 23.11 (b)(11), 23.93. When the proceeding takes place in Utah, anyone seeking BIA help has two addresses with which to be concerned. If the action is in Utah's San Juan County, requests for assistance must be sent to: Navajo Area Director, Bureau of Indian Affairs, Window Rock, Arizona 86515. *See id.* §§ 23.11 (b)(9), 23.93. Elsewhere in Utah, requests from judges, attorneys, or social workers should be addressed to: Phoenix Area Director, Bureau of Indian Affairs, P.O. Box 7007, Phoenix, Arizona 85011. *See id.* §§ 23.11 (b)(10), 23.93. The foregoing addresses are extremely important, for they are the regional BIA Directors upon whom many of the notices required by the ICWA must be served. *See* 25 C.F.R. § 23.11(a) (1986).

122. *See* Guideline G.3 commentary, *supra* note 35, at 67,595.

123. *See* 25 U.S.C. § 1916(a) (1982).

124. *See id.*

proceedings.[125] The notice, however, may be waived, but the waiver is not absolute.[126]

The parent's or Indian custodian's ability to retract his or her waiver of the right to notice is further evidence of the protections given them by the ICWA. Although the Act allows the Indian child's parents or custodians to waive their rights created under this law, waivers of rights are not favored.[127] Hence, the Act provides parents and Indian custodians with the liberal right to revoke their waivers.[128]

A. TRIBAL COURT JURISDICTION

The tendency of state courts to ignore tribal court authority in Indian child custody cases is no longer permissible under the ICWA. State courts handling an ICWA proceeding are required to determine the residence and domicile of any Indian child before them.[129] If the Indian child either resides or is domiciled on an

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125. *See* Guideline G.3, *supra* note 35, at 67,595. The guidelines state the following with regard to an Indian child's biological parent's or prior Indian custodian's right to notice of a post adoptive proceeding:

> (a) Whenever a final decree of adoption of an Indian child has been vacated or set aside, or the adoptive parent has voluntarily consented to the termination of his or her parental rights to the child, or whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive placement, or adoptive placement, notice by the court or an agency authorized by the court shall be given to the child's biological parents or prior Indian custodians. Such notice shall inform the recipient of his or her right to petition for return of custody of the child.
>
> (b) A parent or Indian custodian may waive his or her right to such notice by executing a written waiver of notice filed with the court. *Such waiver may be revoked at any time by filing with the court a written notice of revocation, but such revocation would not affect any proceeding which occurred before the filing of the notice of revocation.*

Id. (emphasis added).

126. *See id.*

127. *See id.* The Act is silent on the question of whether a parent or Indian custodian can waive the right to future notice, but guideline G.3 recognizes that:

> Obviously, there will be cases in which the biological parents will prefer not to receive notice once their parental rights have been relinquished or terminated. This section provides for such waivers but, because the Act establishes an absolute right to participate in any future proceedings and to petition the court for return of the child, the waiver is revocable.

Id.

128. *See, e.g.*, 25 U.S.C. § 1913(c) (1982) (allowing parents to withdraw their consent anytime prior to entry of the final decree of termination or adoption). For a complete discussion of the withdrawal of parental consent to the adoption of or the termination of rights to an Indian child, see *infra* notes 279-82 and accompanying text. The Act even permits Indian tribes to withdraw any jurisdiction over child custody matters that was previously given to a state. For procedural details of a tribe's withdrawal of jurisdiction from the state in child custody matters, see *supra* note 6 and accompanying text.

129. *See* Guideline B.1, *supra* note 35, at 67,586. The Act does not contain a definition for the terms "residence" or "domicile." These definitions were not included because Congress was aware

Indian reservation, or is the ward of a tribal court, the Act, with few exceptions, vests that reservation court system with the exclusive jurisdiction in custody proceedings.[130]

Furthermore, the Act requires a state judge to initiate an inquiry whenever he or she has reason to believe that an Indian child is involved.[131] A judge is deemed to have reason to make this inquiry when:

> (i) Any party to the case, Indian tribe, Indian organization or public or private agency informs the court that the child is an Indian child.
>
> (ii) Any public or state licensed agency involved in child protection services or family support has discovered information which suggests that the child is an Indian child.
>
> (iii) The child who is the subject of the proceeding gives the court reason to believe he or she is an Indian child.
>
> (iv) The residence or the domicile of the child, his or her biological parents, or the Indian custodian is known by the court to be or is shown to be a predominantly Indian community.

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that they were well defined under existing state law, and there was no indication that these state law definitions undermined the ICWA. *See* Guideline, *supra* note 35, at 67,585. Under North Dakota law, the term "residence" is synonymous with "domicile," and the legal residence of the surviving, supporting parent is the domicile of an unmarried minor child. B.R.T. v. Executive Director of Social Serv. Bd., 391 N.W.2d 594, 598 (N.D. 1986).

130. *See* 25 U.S.C. § 1911(a) (1982). The exceptions to exclusive tribal jurisdiction are those states that acquired authority in this area pursuant to Public Law 83-280, and the emergency removal power which the ICWA specifically gives state courts. For a discussion of jurisdiction assumed pursuant to Public Law 83-280, see *supra* note 6. For a discussion of the emergency removal jurisdiction, see *infra* notes 143-51 and accompanying text. When the tribal court is given exclusive jurisdiction and the state proceedings do not involve an emergency removal, the state court is totally without jurisdiction. *See, e.g., In re* Appeal in Pima County Juvenile Action, 130 Ariz. 202, ____, 635 P.2d 187, 189 (Ct. App. 1981) (although the child was in Arizona with the adoptive parents, the child's domicile was that of the natural mother who resided on a Montana reservation; hence, even though the adoption had initially been consented to, the Arizona courts had no jurisdiction in the matter), *cert. denied*, 455 U.S. 1007 (1982); *In re* Baby Child, 102 N.M. 735, ____, 700 P.2d 198, 200-01 (Ct. App. 1983) (because the child was domiciled on an Indian reservation, the natural mother could not consent to a state court adoption).

The guidelines are very clear on the matter of exclusive jurisdiction. If the child is either a resident of or domiciled upon a reservation where the tribal court is vested with exclusive jurisdiction, or that child is a ward of the tribal court, then the state action must be dismissed. *See* Guideline B.4, *supra* note 35, at 67,588. This congressional grant of exclusive jurisdiction to tribal courts does not violate the tenth amendment, or otherwise result in a denial of due process or equal protection. *See In re* D.L.L. & C.L.L., 291 N.W.2d 278, 281 (S.D. 1980).

131. *See* 25 U.S.C. § 1912(a) (1982); Guideline B.1(a) and commentary, *supra* note 35, at 67,586. The guidelines recommend that state courts routinely inquire of participants in child custody proceedings whether the child is an Indian. *See* Guideline B.5(a) and commentary at 67,588-89.

(v) An officer of the court involved in the proceeding has knowledge that the child may be an Indian child.[132]

This is not a complete list of the circumstances in which both state courts and attorneys must inquire into a child's Indian status, but it does contain the most common occurrences that give rise to a reasonable belief that a child may be an Indian.[133]

Once the court has grounds to believe that the child is an Indian, it "shall seek verification of the child's status from either the Bureau of Indian Affairs or the child's tribe."[134] A determination by the tribe that the child is or is not a member of that tribe, *and* otherwise is or is not the biological child of a member and therefore eligible for membership, is conclusive on the issue.[135] In the absence of the tribe's determination on the question of membership, the Bureau of Indian Affairs has the power to conclusively decide whether a child is or is not an Indian for purposes of the ICWA.[136]

The Act generally applies to both voluntary and involuntary removal proceedings, but a parent's request for confidentiality is given much higher priority in a voluntary proceeding.[137] Subsection 1915(c) of the ICWA specifically directs that in voluntary placements state courts must respect parental requests for confidentiality.[138] If a parent requests anonymity the state court must seek information concerning the child's ancestry in a manner

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132. *See* Guideline B.1(c), *supra* note 35, at 67,586.

133. *See* Guideline B.1 commentary, *supra* note 35, at 67,586. Guideline B.1 gives circumstances under which a state court should notice that a child is an Indian child. Guideline B.1, *supra* note 35, at 67,586. These circumstances are not, however, exclusive. *See id.*

134. *See* Guideline B.1(a), *supra* note 35, at 67,586. An Indian child is defined under the ICWA as a child that is a member of a federally recognized tribe, or eligible for membership in such a tribe. *See* 25 U.S.C. § 1903(4) (1982). For a discussion of the definitions of "Indian child" and "Indian," see *supra* notes 101-08 and accompanying text. Tribal membership is a matter for the tribe or BIA to determine, not the state court. *See In re* Junious M., 144 Cal. App. 3d 786, 790-93, 193 Cal. Rptr. 40, 41-43 (1983).

135. *See* Guideline B.1(b)(i), *supra* note 35, at 67,586. *But see In re* Baby Boy L., 231 Kan. 199, ____, 643 P.2d 168, 174, 176 (1982) (refusing to apply ICWA provisions to adoption proceedings involving non-Indian mother's illegitimate child because that child had never been in the care or custody of his Indian father, nor otherwise part of any Indian family). The illegitimate children of non-Indian mothers are not subject to the ICWA's provisions until such time as their Indian putative father either acknowledges his paternity, or paternity is otherwise established. For a discussion of this and similar questions, see *supra* note 103 and accompanying text.

136. *See* Guideline B.1(b)(ii), *supra* note 35, at 67, 586.

137. *See* Guideline B.1 commentary, *supra* note 35, at 67,586. The Act mandates a tribal right of notice and intervention in involuntary proceedings, but not in voluntary ones. *Compare* 25 U.S.C. § 1912 (1982) (involuntary state actions) *with id.* § 1913 (voluntary state proceedings). A parent's request for confidentiality is made by an "affidavit of confidentiality," which is discussed *supra* note 99.

138. 25 U.S.C. § 1915(c) (1982). The most common voluntary placement is a newborn infant. *See* Guideline B.1 commentary, *supra* note 35, at 67,586. Confidentiality regarding the infant's natural parents has traditionally been a high priority in newborn placements, and the Act continues this tradition by:

that will not cause the parent's identity to become known.[139] Thus, even though tribal verification of a child's membership is preferred, a state court may want to seek verification from the BIA in those placement cases in which the parent has asked to remain anonymous *and* the tribe does not have a system for keeping paternity matters secret.[140]

When it is established that a child is Indian, and is either residing or domiciled on the reservation, or a ward of the tribal court, the state court has no jurisdiction to proceed.[141] This absence of jurisdiction is subject to one exception, however, which authorizes removal of Indian children in an emergency situation.[142] State courts are permitted to temporarily remove children from their parents or Indian custodian when the children are faced with the likelihood of serious emotional or physical damage.[143] This emergency removal authority only exists, however, when an endangered child, otherwise subject to exclusive tribal jurisdiction, is physically located off the reservation.[144] The tribal court usually will not be able to act quickly enough to protect the child in these emergency situations, and for that reason Congress has authorized states to take temporary protective custody.[145]

When counsel asks a state court for an order of emergency custody of an Indian child, the petition for that order should be accompanied by an affidavit containing detailed information concerning the child, the child's parents or Indian custodian, the child's tribe, and the proceedings.[146] Absent extraordinary

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> [R]equiring deference to requests for anonymity in voluntary placements but not in involuntary ones. This guideline specifically provides that anonymity not be compromised in seeking verification of Indian status. If anonymity were compromised at that point, the statutory requirement that requests for anonymity by respected in applying the preferences would be meaningless.

Id.

139. *See* Guideline B.1(a), *supra* note 35, at 67,586.

140. *See* Guideline B.1 commentary, *supra* note 35, at 67,586.

141. *See* 25 U.S.C. § 1911(a) (1982). For further discussion of a tribal court's exclusive jurisdiction, see *supra* note 130 and accompanying text.

142. *See id.* § 1922.

143. *See id.*

144. *See id.*; Guideline B.7 commentary, *supra* note 35, at 67,590.

145. *See* Guideline B.7 commentary, *supra* note 35, at 67,590.

146. *Id.* This accompanying affidavit must contain the following information:

> (i) The name, age and last known address of the Indian child.
>
> (ii) The name and address of the child's parents and Indian custodians, if any. If such persons are unknown, a detailed explanation of what efforts have been made to locate them shall be included.
>
> (iii) Facts necessary to determine the residence and the domicile of the Indian child and whether either the residence or domicile is on an Indian reservation. If either the residence or domicile is believed to be on an Indian reservation, the name of the reservation shall be stated.

circumstances, the temporary emergency custody is not to continue for more than ninety days without a determination by the state court "that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."[147] The state court's decision in this matter must be based upon "clear and convincing evidence and the testimony of at least one qualified expert witness."[148]

Placements under this emergency procedure are to be as short as possible.[149] If the emergency ends, the placement must end.[150] A state court's jurisdiction should likewise end as soon as the child's tribe is ready to take over the proceedings.[151]

The role of tribal courts in Indian child custody proceedings is significantly strengthened by the ICWA in several other ways. If a state court has reason to believe that an Indian child was improperly removed from a tribal court's jurisdiction, it is required to immediately stay its proceedings until a determination can be made on the question of improper removal.[152] If the court finds that

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(iv) The tribal affiliation of the child and of the parents and/or Indian custodians.

(v) A specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the child to take that action.

(vi) If the child is believed to reside or be domiciled on a reservation where the tribe exercises exclusive jurisdiction over child custody matters, a statement of efforts that have been made and are being made to transfer the child to the tribe's jurisdiction.

(vii) A statement of the specific actions that have been taken to assist the parents or Indian custodians so the child may safely be returned to their custody.

Id.

147. Guideline B.7(d), *supra* note 35, at 67,589. In its entirety, guideline B.7(d) provides that:

> Absent extraordinary circumstances, temporary emergency custody shall not be continued for more than 90 days without a determination by the court supported by clear and convincing evidence and the testimony of at least one qualified expert witness, that custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Id. at 67,589-90. This subsection recommends what is, in effect, a speedy trial requirement: "[C]ourt shall be required to comply with the requirements of the Act and reach a decision within 90 days unless there are 'extraordinary circumstances' that make additional delay unavoidable." *See* Guideline B.7 commentary, *supra* note 35, at 67,590. The guidelines state that, unless some time limit is placed upon the "emergency removal," the safeguards of the ICWA could be evaded by state courts' use of long term emergency placements. *Id.*

148. *See* Guideline B.7(d), *supra* note 35, at 67,589-90.

149. *See* H.R. REP. No. 95-1386, *supra* note 65, at 25; Guideline B.7 commentary, *supra* note 35, at 67,590.

150. *See* Guideline B.7(c), *supra* note 35, at 67,589.

151. *See id.*

152. *See* 25 U.S.C. § 1920 (1982); Guideline B.8(a), *supra* note 35, at 67,590. Guideline B.8(a) provides as follows:

> If, in the course of any Indian child custody proceeding, the court has reason to believe that the child who is the subject of the proceeding may have been improperly removed from the custody of his or her parent or Indian custodian or that the child has been improperly retained after a visit or other temporary relinquishment of custody, and that the petitioner is responsible for such removal or retention, the court shall

the petitioner in a state proceeding has improperly removed or retained the child,[153] that child must be immediately returned to his or her parent or Indian custodian unless doing so "would subject the child to a substantial and immediate danger or threat of such danger."[154] This provision of the ICWA certainly discourages anyone from manufacturing state court jurisdiction by improperly changing a child's domicile to an off-reservation address.

One of the most important aspects of the ICWA is the recognition that it grants to tribal court orders and decrees. Subsection 1911(d) of the Act requires the United States, states, territories, and even other Indian tribes to give full faith and credit to tribal custody proceedings and applicable tribal laws.[155] This provision should prevent courts from ignoring prior tribal court orders and decrees in custody proceedings simply because the Indian child is off the reservation and under state jurisdiction.[156]

B. TRIBAL INTERVENTION IN STATE COURT PROCEEDINGS

When an Indian child is residing off the reservation and is not a ward of the tribal court, state courts have concurrent jurisdiction with the tribe.[157] Of course, if the tribal court has previously

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immediately stay the proceedings until a determination can be made on the question of improper removal or retention.

Id. This guideline is designed to implement § 1920 of title 25 of the United States Code. *See* 25 U.S.C. § 1920 (1982) (ICWA's improper removal provision); *see also* Guideline B.8 commentary, *supra* note 35, at 67,590. Since a finding of improper removal goes to the heart of state jurisdiction, guideline B.8 requires state courts to decide the issue as soon as it arises and before proceeding to the merits. *See id.*

Neither § 1920 of the Act, nor the guidelines, address the matter of improper removal of an Indian child by a person other than the petitioning party in the state court proceedings. *See* 25 U.S.C. § 1920 (1982); Guideline B.8, *supra* note 35, at 67,590. Congress, however, considered § 1920 to be the equivalent of the "clean hands doctrine." *See* H.R. REP. No. 95-1386, *supra* note 65, at 25. Hence, state courts should have great latitude in declining jurisdiction in those cases in which the petitioning party did not actually remove the child from its reservation domicile, but that party's role in the affair was such that it would be unfair or unjust for the state proceedings to continue. *See id.*

153. 25 U.S.C. § 1920 (1982). A child is improperly retained when one who otherwise acquired lawful temporary custody of a child refuses to return that child to his or her rightful custodian. *See id.*

154. *See id.*; Guideline B.8(b), *supra* note 35, at 67,590.

155. 25 U.S.C. § 1911(d) (1982). Section 1911(d) requires that:

> 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.

Id.

156. *See* H.R. REP. No. 95-1386, *supra* note 65, at 21. It was Congress' intent that other jurisdictions give tribal public acts, records, and judicial proceedings full faith and credit to the same extent these jurisdictions extend full faith and credit in other circumstances. *See id.*

157. *See* 25 U.S.C. § 1911(a) (1982).

entered an order or decree regarding the child's adoptive or foster care placement, then the tribal court order is entitled to full faith and credit.[158] But even when the tribal court has not previously decided the issue, the ICWA provides that anyone who has legal custody of the child is entitled to intervene as a matter of right in the involuntary state child custody proceedings.[159] The Act also provides the Indian child's tribe with the right to intervene in involuntary proceedings.[160]

State courts are required to routinely inquire into a child's status as an Indian.[161] In any involuntary proceeding in which the court knows or has reason to know that the child is an Indian, either the court or the petitioning party must give notice to the child's natural parents, Indian custodian, and tribe.[162] This notice must advise the recipients of the nature of the state court proceedings and of their right to intervene.[163] Notice may be given by the court or counsel but, at a minimum, it must be served by registered mail with return receipt requested.[164] It should be written in clear and understandable language,[165] and should include specific information concerning the child, his or her tribe, the nature of the proceedings, and the rights of the parties involved.[166] Counsel

158. *See id.* § 1911(d).

159. *See id.* § 1911(c). The Act does not appear to recognize a right of intervention in voluntary child custody proceedings. *See id.*; *id.* § 1912(a). A right, however, may be found under state law. For a discussion of the applicability of state recognized rights to ICWA proceedings, see *infra* note 270 and accompanying text.

160. *See id.* §§ 1911(c), 1912(a).

161. For a discussion of when and how a court must inquire into a child's status as an Indian, see *supra* notes 131-33 and accompanying text. Guidelines B.5(a) also addresses the state's need to make this inquiry, and it specifies as follows:

> In any involuntary child custody proceeding, the state court shall make inquiries to determine if the child involved is a member of an Indian tribe or if a parent of the child is a member of an Indian tribe and the child is eligible for membership in an Indian tribe.

Guideline B.5(a), *supra* note 35, at 67,588.

162. *See* 25 U.S.C. § 1912(a) (1982). When the child's natural parents are deceased, at least one state court has held that the ICWA requires notice to the Indian grandparents. *See In re* Duncan v. Wiley, 657 P.2d 1212, 1213 (Okla. Ct. App. 1982). Such an interpretation of the Act is certainly in line with the guidelines' directive that this remedial law be liberally construed in favor of keeping Indian children within their own families and tribes. *See* Guideline A.1, *supra* note 35, at 67, 585-86.

Tribes are permitted to designate an agent for service of this notice. *See* 25 C.F.R. § 23.12 (1986). If no agent is designated, the petitioning party or state court should serve the tribal chairman. *See id.* When a tribe does have an agent designated for service, the Secretary maintains a current listing of such agents. *See id.* The names and addresses can be obtained by writing the appropriate BIA Area Director at the address given in *supra* note 121. Notice, however, is not required in voluntary placements. *Cf.* 25 U.S.C. § 1912(a) (1982) (not providing for a right to intervene in voluntary placements).

163. *See* 25 U.S.C. § 1912(a) (1982).

164. *Id.*; Guideline B.5(b), *supra* note 35, at 67,588. Personal service is also permitted. *See* Guideline B.5(e), *supra* note 35, at 67,588.

165. *See* Guideline B.5(b), *supra* note 35, at 67,588.

166. *Id.* Guideline B.5(b) recommends that the notice served upon natural parents, Indian custodian, and tribe include the following information:

should file the original or a copy of each notice sent pursuant to this section, and all return receipts or other proof of service, with the state court.[167]

If the state judge or petitioning party has reason to believe that a parent or Indian custodian is not likely to understand the contents of the notice because of the recipient's inability to read and comprehend written English, the notice should be sent to the BIA agency nearest the intended recipient.[168] Notice served by the state judge or counsel upon a BIA agency should be accompanied by a request that personnel from that agency arrange to have the notice explained to the parent or Indian custodian in the language he or she understands.[169] If the natural parents, Indian custodian, or tribe are either unknown or cannot be located, the ICWA requires either the petitioner or the court to serve this notice upon the

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(i) The name of the Indian child.
(ii) His or her tribal affiliation.
(iii) A copy of the petition, complaint or other document by which the proceeding was initiated.
(iv) The name of the petitioner and the name and address of the petitioner's attorney.
(v) A statement of the right of the biological parent or Indian custodians and the Indian child's tribe to intervene in the proceeding.
(vi) A statement that if the parents or Indian custodians are unable to afford counsel counsel will be appointed to represent them.
(vii) A statement of the right of the natural parents or Indian custodians and the Indian child's tribe to have, on request, twenty days (or such additional time as may be permitted under state law) to prepare for the proceedings.
(viii) The location, mailing address and telephone number of the court.
(ix) A statement of the right of the parents or Indian custodians or the Indian child's tribe to petition the court to transfer the proceeding to the Indian child's tribal court.
(x) The potential legal consequences of an adjudication on future custodial rights of the parents or Indian custodians.
(xi) A statement in the notice to the tribe that since child custody proceedings are usually conducted on a confidential basis, tribal officials should keep confidential the information contained in the notice concerning the particular proceeding and not reveal it to anyone who does not need the information in order to exercise the tribe's right under the Act.

Id. But state courts apparently do not require strict compliance with the informational content suggested in guideline B.5(b). *See, e.g., In re* S.Z., 325 N.W.2d 53, 55-56 (S.D. 1982) (although it did not specifically mention the right to intervene, notice served upon tribe was sufficient because it included affidavits about the parties and proceedings, and was termed as "notice to you under the Indian Child Welfare Act").

167. *See* Guideline B.5(d), *supra* note 35, at 67,588. It is particularly important that counsel file all pleadings, returns, and other matters in the state court proceeding. A state court can not base any decision in an ICWA proceeding on a report or document that is not filed. For a discussion of the requirement that documents be filed with the state court, see *infra* notes 178-202 and accompanying text.

168. Guideline B.5(g), *supra* note 35, at 67,588. This notice is served upon the BIA at the address provided in *supra* note 121. When requested by any party in a child custody proceeding or the state court, the BIA will provide assistance in identifying interpreters. *See* 25 C.F.R. § 23.92 (1986).

169. *See* 25 C.F.R. § 23.92 (1986). This procedure is intended to increase the likelihood that Indian parents and custodians understand their rights. *See* Guideline B.5 commentary, *supra* note 35, at 67,589.

Secretary of the Interior.[170]

Sometimes an Indian child may be eligible for membership in more than one tribe,[171] but only the tribe in which he or she is actually a member needs to be notified.[172] If the child is not a member of any tribe but is eligible for membership in more than one tribe, the law requires that the petitioner, his or her counsel, or the court serve this notice upon the tribe with the most significant contacts.[173] But the Secretary of Interior recommends that counsel or the court send notices to all tribes in which the child may be eligible for membership.[174] This notice should advise all tribal recipients that the court is considering them as the child's tribe, and invite each tribe's input concerning which tribe should be designated as the child's tribe.[175]

In making the determination of which tribe has the most significant contacts with the child, a state court can consider:

> (i) [L]ength of residence on or near the reservation of each tribe and frequency of contacts with each tribe;
> (ii) child's participation in activities of each tribe;
> (iii) child's fluency in the language of each tribe;
> (iv) whether there has been a previous adjudication with respect to the child by a court of one of the tribes;
> (v) residence on or near one of the tribes' reservation by the child's relatives;
> (vi) tribal membership of custodial parent or Indian custodian;

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170. 25 U.S.C. § 1912(a) (1982). In those states with a significant Indian population, the authors recommend that the Secretary of Interior be served with an ICWA notice in every child custody proceeding in which the child may be an Indian. Service upon the Secretary must be by registered mail, return receipt requested. 25 C.F.R. § 23.11(a) (1986). The notice served upon the Secretary must include the following information, if known:

> (1) Name of the Indian child, birthdate, birthplace,
> (2) Indian child's tribal affiliation,
> (3) Names of Indian child's parents or Indian custodians, including birthdate, birthplace, and mother's maiden name, and
> (4) A copy of the petition, complaint or other document by which the proceeding was initiated.

Id. § 23.11(c). This notice should be mailed to the BIA Area Director at the address given in *supra* note 121. Any potential participant in an anticipated Indian child custody proceeding may request and receive the BIA's help in identifying and locating the child's parents, custodian, or tribe. *See id.* § 23.11(f).

171. *See* 25 U.S.C. § 1903(4) (1982); Guideline B.2 commentary, *supra* note 35, at 67,587.

172. *See* 25 U.S.C. § 1912(a) (1982).

173. *See Id.* §§ 1903(4), 1912(a); Guideline B.2(b), *supra* note 35, at 67,586.

174. Guideline B.2(b), *supra* note 35, at 67,586.

175. *See id.*

(vii) interest asserted by each tribe in response to the notice specified in subsection B.2(b) of these guidelines;[176] and

(viii) the child's self identification.[177]

Once the state court reaches a conclusion on the matter of tribal membership, it is required to set out the reasons for its decision in a written document, which becomes part of the record in that proceeding.[178] Court or counsel must then serve this document on all parties to the proceeding and on every natural person or governmental entity that received notice of the proceeding.[179] Only the tribe determined to have the most significant contacts with the child, however, has the right to intervene in the state court action.[180]

To protect the right of intervention granted to the natural parents, tribe, and others, state custody proceedings cannot be held until "at least ten days after receipt of notice by the parent or Indian custodian and tribe or Secretary."[181] Upon their receipt of

176. Guideline B.2(c), *supra* note 35, at 67,586. Guideline B.2(c) specifies that "[t]he court shall send the notice specified in recommended guideline B.4 to each such tribe. The notice shall specify the other tribe or tribes that are being considered as the child's tribe and invite each tribe's views on which tribe shall be so designated." Guideline B.2(c), *supra* note 35, at 67,586-87.

177. Guideline B.2(c), *supra* note 35, at 67,587.

178. Guideline B.2(d), *supra* note 35, at 67,587. Each party to a foster care placement or termination of parental rights proceeding in a state court has the right to examine any reports or other documents filed with the state court and upon which any decision of that court was based. *See* 25 U.S.C. § 1912(c) (1982); Guideline D.1, *supra* note 35, at 67,592. More importantly, though, the state court may not base any decision in an Indian child custody proceeding upon matters not part of the court record. *See id.*

179. *See* Guideline B.2(d), *supra* note 35, at 67,587.

180. *See* 25 U.S.C. § 1911(c) (1982); Guideline B.2 commentary, *supra* note 35, at 67,587. The Secretary suggests, however, that:

> A right of intervention could be accorded a tribe with which a child has less significant contacts without undermining the right of the other tribe. A state court can, if it wishes and state law permits, permit intervention by more than one tribe. It could also give a second tribe preference in placement after attempts to place a child with a member of the first tribe or in a home or institution designated by the first tribe had proved unsuccessful. So long as the special rights of the Indian child's tribe are respected, giving special status to the tribe with the less significant contacts is not prohibited by the Act and may, in many instances, be a good way to comply with the spirit of the Act.

Id.

A state court's determination that one tribe is the child's tribe does not serve as precedent for other situations not arising under the ICWA proceedings. *See id.* Furthermore, the fact that an Indian child changes tribal membership does not influence any action based on membership taken by the state court prior to the child's change of membership. *See* Guideline B.2(e), *supra* note 35, at 67,587.

181. 25 U.S.C. § 1912(a) (1982). The Secretary recommends that state courts begin counting after the last party is notified. *See* Guideline B.6 and commentary, *supra* note 35, at 67,589.

this notice, the Indian child's parents or custodian and the tribe may request a stay of up to twenty additional days in order to prepare for the custody proceeding.[182] When the child's parents, legal custodian, and tribe are unknown, and notice is served upon the Secretary of Interior, the Secretary is given fifteen days after receipt to identify, locate, and notify the natural parents or Indian custodian and tribe.[183]

Congress undoubtedly felt that a waiting period was necessary in order to protect the right of intervention; otherwise the state custody proceeding would be concluded before the Indian parents, custodian, or tribe could exercise their right.[184] It is clear that state courts must comply with the time limits in the Act, and that the state custody matter cannot proceed until the passing of the waiting periods to which parent or custodian and tribe are entitled.[185]

This notice and waiting period requirement is somewhat confusing because two independent rights of intervention are involved — the right of the parents or Indian custodian,[186] and the right of the tribe.[187] In an attempt to clarify any confusion surrounding the automatic stay of state court proceedings, the guidelines recommend that the state court take no action until all of the following dates have passed:

> (i) [T]en days after the parent or Indian custodian (or Secretary where the parent or Indian custodian is unknown to the petitioner) has received notice;
>
> (ii) ten days after the Indian child's tribe (or the Secretary if the Indian child's tribe is unknown to the petitioner) has received notice;
>
> (iii) thirty days after the parent or Indian custodian has received notice if the parent or Indian custodian has requested an additional twenty days to prepare for the proceeding; and

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182. *See* 25 U.S.C. § 1912(a) (1982). Guideline B.5(c) specifies:

> The tribe, parents or Indian custodians receiving notice from the petitioner of the pendency of a child custody proceeding has the right, upon request, to be granted twenty days (or such additional time as may be permitted under state law) from the date upon which the notice was received to prepare for the proceeding.

Guideline B.5(c), *supra* note 35, at 67,588.

183. 25 U.S.C. § 1912(a) (1982).

184. *See* Guideline B.6, *supra* note 35, at 67,589.

185. *See id.*

186. *See* 25 U.S.C. § 1911(c) (1982); Guideline B.6 commentary, *supra* note 35, at 67,589.

187. *See* 25 U.S.C. § 1911(c) (1982); Guideline B.6 commentary, *supra* note 35, at 67,589.

> (iv) thirty days after the Indian child's tribe has received notice if the Indian child's tribe has requested an additional twenty days to prepare for the proceeding.[188]

Of course, both the time limits contained in the Act and the Secretary's recommended guidelines are the minimum time periods required by law.[189] A court may grant more time when state procedures permit or because of the circumstances of a particular case.[190] In these circumstances, the notice sent to the parents or custodian and tribe should advise the recipient that additional time is available.[191]

In addition to the right to intervene in involuntary state custody proceedings, the Act provides that the Indian child's parents or custodian have the right to remove the matter to tribal court.[192] Either of the parents, the Indian custodian, or the tribe may ask the state court, orally or in writing, to transfer the Indian child custody matter to the tribal court of the child's tribe.[193] If the request is oral, the guidelines require the state court to reduce it to writing and make that document a part of the record in the case.[194]

Upon receipt of a request to transfer, the state court must transfer the case unless: (1) a biological parent objects; (2) the tribal court declines to hear the matter; or (3) the state court determines that good cause exists for denying the request.[195] Since the ICWA gives either parent an absolute veto over the transfer request, if a

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188. Guideline B.6(b), *supra* note 35, at 67,589.

189. Guideline B.6(c), *supra* note 35, at 67,589.

190. *See* Guideline B.6 commentary, *supra* note 35, at 67,589.

191. Guideline B.5(b)(vii), *supra* note 35, at 67,586.

192. *See* 25 U.S.C. § 1911(b) (1982). The ICWA specifically provides that:

> 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.

Id.

193. *Id.;* Guideline C.1, *supra* note 35, at 67,590. Guideline C.1 only deals with transfers in which the Indian child is not domiciled or residing on an Indian reservation or the ward of a tribal court. *See* Guideline C.1 commentary, *supra* note 35, at 67,590. When the child is domiciled or resides on an Indian reservation, or is otherwise the ward of a tribal court, the tribal court generally has exclusive jurisdiction over the matter. For a discussion of tribal court jurisdiction, see *supra* notes 129-56 and accompanying text.

194. *See* Guideline C.1, *supra* note 35, at 67,590.

195. *See* 25 U.S.C. § 1911(b) (1982); Guideline C.2(a), *supra* note 35, at 67,590. Even a non-Indian parent can veto the transfer to tribal court by his or her objection. *See In re* Baby Boy L., 231 Kan. 199, ____, 643 P.2d 168, 178 (1982).

parent raises an objection no need for an advisary hearing exists; the state court merely enters an order denying the transfer request.[196] The same thing is true for the tribal court's right to decline jurisdiction. Should the tribal court decline jurisdiction, the state court need not hold a hearing; it can simply enter an order denying the transfer request.[197]

When a transfer petition is filed, the state court must notify the tribal court in writing.[198] The notice must advise the tribal court of how long it has to make a decision on whether to accept or decline jurisdiction.[199] The tribal court has at least twenty days from receipt of the notice to accept or decline jurisdiction,[200] and its decision to decline jurisdiction may be made either orally or in writing.[201] If an oral declination of jurisdiction is received, the state court should reduce the tribal court's nonacceptance of jurisdiction to writing, and make that document part of the record in the state court case.[202] Absent a parental veto or tribal court declination of jurisdiction, the state court must transfer the case to tribal court unless it finds good cause for not doing so.[203]

When a state court is asked to deny the transfer for good cause, the court must conduct an adversary proceeding in order to afford all concerned the opportunity to present their views.[204] The party opposing transfer has the burden of proof on the issue of good cause.[205] In resolving the question, a state judge may base a finding of good cause not to transfer on the following:

> (i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did

196. Guideline C.2, *supra* note 35, at 67,591.

197. *See id.*

198. Guideline C.4(b), *supra* note 35, at 67,592.

199. *See id.*

200. *See id.* During this time period the parties are required to file with the tribal court any arguments that they wish to make either for or against a tribal declination of transfer. Guideline C.4(c), *supra* note 35, at 67,592. These arguments may be made orally before the tribal court, or presented in written pleadings that are served by the submitting party on all other parties to the action. *Id.*

201. *See* Guideline C.4(c), *supra* note 35, at 67,592.

202. *Cf.* Guideline C.1, *supra* note 35, at 67,590 (suggesting that oral transfer requests be reduced to writing and made part of the record). For a discussion of guideline C.1, see *supra* note 192 and accompanying text. For a discussion of the importance of filing matters in the state proceeding, see *supra* note 178 and accompanying text.

203. *See* 25 U.S.C. § 1911(b) (1982); Guideline C.2(a), *supra* note 35, at 67,590. Good cause not to transfer is actually a modification of the "*forum non conveniens* doctrine," which Congress intended state courts to exercise when necessary to insure that the rights of the child, parent or Indian custodian, and tribe are fully protected. *See* H.R. Rep. No. 95-1386, *supra* note 65, at 21.

204. Guideline C.2 commentary, *supra* note 35, at 67,591. The state court must resolve the transfer question before it can proceed on the merits. *See In re* M.E.M., 195 Mont. 329, ____, 635 P.2d 1313, 1317 (1981).

205. Guideline C.3(d), *supra* note 35, at 67,591.

not file the petition promptly after receiving notice of the hearing.

(ii) The Indian child is over twelve years of age and objects to the transfer.

(iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.

(iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.[206]

While the Act permits intervention at any point in the state court proceeding, it does not authorize untimely transfer requests.[207] Late intervention is not as disruptive as is a transfer to tribal court.[208] The state judge cannot, however, base his or her decision not to transfer on socio-economic conditions or the adequacy of BIA and tribal social services.[209] Nor can a state court's finding of good cause not to transfer be grounded on perceived inadequacies in the tribal court system.[210] Of course, the absence of a tribal court, as defined by the Act, is good cause for a state judge to deny the transfer.[211]

206. Guideline C.3(b), *supra* note 35, at 67,591. Undue hardship as good cause for the state court not to grant the transfer request is the equivalent of *forum non conveniens*. *See In re* J.R.H., 358 N.W.2d 311, 317 (Iowa 1984).

207. *See* Guideline C.1, *supra* note 35, at 67,590 (the request shall be made promptly after receiving notice of the proceedings); Guideline C.1 commentary, *supra* note 35, at 67,590. According to the guidelines:

> Although the Act does not explicitly require transfer petitions to be timely, it does authorize the court to refuse to transfer a case for good cause. When a party who could have petitioned earlier waits until the case is almot complete to ask that it be transferred to another court and retried, good cause exists to deny the request.

Id.

208. *See* Guideline C.1 commentary, *supra* note 35, at 67,590. The commentary to guideline C.1 specifies that:

> Timeliness is a proven weapon of the courts against disruption caused by negligence or obstructionist tactics on the part of counsel. If a transfer petition must be honored at any point before judgment, a party could wait to see how the trial is going in state court and then obtain another trial if it appears the other side will win. Delaying a transfer request could be used as a tactic to wear down the other side by requiring the case to be tried twice. The Act was not intended to authorize such tactics and the "good cause" provision is ample authority for the court to prevent them.

Id.

209. Guideline C.3(c), *supra* note 35, at 67,591.

210. *Id.*

211. Guideline C.3(a) and commentary, *supra* note 35, at 67,591. The Act defines "tribal court" as follows:

> [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

If the state court transfers the case to tribal court, the guidelines require the state tribunal to provide the tribal court with all available information concerning the case.[212] Once the matter is transferred, the applicable procedures and rights of the litigants are determined by tribal law, not state or federal law.[213] Except for a couple of minor instances, neither the ICWA nor the Secretary of Interior's guidelines apply to tribal courts.[214]

If the child custody proceeding is not transferred to a tribal court, the state court may proceed to terminate parental rights, or place the Indian child in a foster care, preadoptive, or adoptive home.[215] But in doing so, the state court must comply with the other provisions of the Act establishing standards of proof;[216] providing a preference for placement of the child in an Indian home;[217] and creating certain parental and custodial rights.[218] Failure to comply with these additional requirements of the Indian Child Welfare Act may leave a state court's custody decision vulnerable to collateral attack[219] and provide strong grounds for

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Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

25 U.S.C. § 1903(12) (1986). It is very important to determine whether the tribal court is a Court of Indian Offenses or a court established and operated under tribal law. Courts of Indian Offenses are actually federal courts, created by federal law. *See* 25 C.F.R. §§ 11.1-11.37 (1986). Because they are federal courts, the Constitution applies to proceedings before a Court of Indian Offenses. *See* Colliflower v. Garland, 342 F.2d 369, 378-79 (9th Cir. 1965). Tribal courts created under tribal law, rather than federal law, function beyond constitutional constraints. *See, e.g.*, Trans-Canada Enter., Ltd. v. Muckleshoot Indian Tribe, 634 F.2d 474, 476 (9th Cir. 1980). For a discussion of the application of state and federal constitutional protections to tribal court proceedings, see *infra* note 213 and accompanying text.

212. Guideline C.4(d), *supra* note 35, at 67,592.

213. *See In re* D.L.L. & C.L.L., 291 N.W.2d 278, 282 (S.D. 1980) (when tribal court has jurisdiction, rights of all concerned are those outlined by that court). If the tribal court is a Court of Indian Offenses, constitutional safeguards apply to proceedings before that court. *See supra* note 211. Most tribal courts, however, are organized and created under tribal rather than federal law. North Dakota reservations, for example, have court systems created under tribal law and custom. Tribal courts created by tribal law are not subject to constitutional limitations. *See Muckleshoot*, 634 F.2d at 476-77. The United States Constitution does not apply to proceedings before these tribally formed courts. *See id.* (unless they are made expressly binding by the Constitution or otherwise imposed by Congress, constitutional rights do not apply to the exercise of governmental powers by an Indian tribe); *accord* Settler v. Lameer, 507 F.2d 231, 241 (9th Cir. 1974) (prior to Congress' enactment of the Indian Civil Rights Act of 1968, constitutional rights were not applicable to Indian tribes). The only federal rights and safeguards available to protect the parties against abuses by tribal authorities are those contained in the Indian Civil Rights Act of 1968. *See* Indian Civil Rights Act of 1968, §§ 201-701, 82 Stat. 77 (current version codified at 25 U.S.C. §§ 1302-1326 (1982)). Furthermore, the rights and protections contained in the Indian Civil Rights Act do not include the complete panoply of federal constitutional rights normally accorded United States citizens. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 63 n.14 (1978).

214. The ICWA's full faith and credit provisions apply to tribal governments. *See* 25 U.S.C. § 1911(d) (1982). Likewise, the guidelines enlist tribal assistance in determining who is qualified to be an expert witness. *See infra* note 240 and accompanying text.

215. *See* 25 U.S.C. § 1912 (1982).

216. *See infra* notes 221-35 and accompanying text.

217. *See infra* notes 243-67 and accompanying text.

218. *See infra* notes 268-90 and accompanying text.

219. *See* 25 U.S.C. § 1914 (1982).

reversal if the decision is appealed.[220]

C. STANDARDS OF PROOF

A state court cannot remove an Indian child from his or her parents or legal custodian unless the court is satisfied that active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, *and* that these efforts have proven unsuccessful.[221] The burden of demonstrating these remedial efforts, and their failure, lies with the party that is petitioning the state court for foster care placement of an Indian child or termination of the parents' rights to that child.[222] This requirement may affect state court jurisdiction.[223] Hence, it would be wise for a state court to support its decision to remove an Indian child with specific findings of fact and conclusions of law concerning the rehabilitative efforts made to avoid the breakup of that child's family, and how those efforts have proven unsuccessful.[224]

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220. *See, e.g., In re* M.E.M., 635 P.2d 1313, 1316-17 (Mont. 1981) (even though mother never requested appointed counsel to represent her in termination hearing, district court erred in not doing so); *In re* J.L.H., 299 N.W.2d 812, 814 (S.D. 1980) (reversing trial court's termination of Indian mother's parental rights for failure to use the ICWA's "beyond a reasonable doubt" standard of proof).

221. Guideline D.2, *supra* note 35, at 67,592. It is not clear from the language of § 1912(d) whether this remedial services provision applies to both voluntary and involuntary proceedings, but the legislative history suggests that Congress only intended it to apply to involuntary proceedings. *See* H.R. REP. 95-1386, *supra* note 65, at 22. Relying upon this legislative history, the North Dakota Supreme Court has held that the ICWA only requires family rehabilitative efforts in involuntary Indian child custody proceedings. *See* B.R.T. v. Executive Director, 391 N.W.2d 594, 600 (N.D. 1986).

222. *See* 25 U.S.C. § 1912(d) (1982). The guideline specifies that:

> Any party petitioning a state court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court that prior to the commencement of the proceeding active efforts have been made to alleviate the need to remove the Indian child from his or her parents or Indian custodians. These efforts shall take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. They shall also involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian care givers.

Guideline D.2, *supra* note 35, at 67,592.

223. *Cf.* 25 U.S.C. § 1912(a) (1982) (delineating other requirements of state courts in Indian child custody proceedings that may have jurisdictional consequences).

224. The state or petitioning party must prove these rehabilitative efforts by the same standard of proof as required in the overall proceeding. *In re* S.R., 323 N.W.2d 885, 887 (S.D. 1982). This means that in foster care placements the petitioning party must show by clear and convincing evidence that rehabilitative efforts were made, and that the efforts have failed; beyond a reasonable doubt is the standard in a termination of parental rights case. *See id.* Standards of proof are discussed in more detail commencing *infra* note 226 and accompanying text. But regardless of which standard of proof applies, it is a simple matter for attorneys and judges to comply with § 1912(d).

The petitioning party can, for example, meet this remedical and rehabilitative services requirement by proving that efforts have been made to enroll the parent in child care, chemical dependency, or similar social programs, and that the parent has spurned them. *See In re* P.B., 371

Once the state court is satisfied with these preliminary matters, it can remove the child from the parents or Indian custodian, *but* only if leaving the child in that home "is likely to result in serious emotional or physical damage to the child."[225] In the case of foster care placement, the party attempting to remove a child must establish the likelihood of serious emotional or physical damage to that child by "clear and convincing evidence."[226] If the objective of the proceedings is to terminate parental rights, the standard of proof is "beyond a reasonable doubt."[227] In other words, before the court can terminate the parent's or custodian's rights, it must be convinced beyond a reasonable doubt that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to that child.

The standard of proof required for foster care placement and termination of parental rights under the ICWA is markedly different from that employed under state law. State standards

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N.W.2d 366, 372 (S.D. 1985). Section 1912(d) does not require a never ending effort or a futile effort at rehabilitating the Indian family. The law is satisfied if the state or petitioning party shows that active efforts have been made to provide familial remedial services, and that they have failed. *See* State *ex rel.* Juvenile Dep't v. Charles, 70 Or. App. 10, ____, 688 P.2d 1354, 1359 (1984); *accord In re* T.J.J., 366 N.W.2d 651, 656 (Minn. Ct. App. 1985) (remedial efforts requirement met by showing that services were made available, but parent or Indian custodian did not follow through with effort to help himself). The proof of remedial or rehabilitative efforts must result in specific findings by the state court that the parent or Indian custodian was provided with assistance, but failed to exhibit any interest in help, that efforts to rehabilitate the parent or Indian custodian have proven unsuccessful, that the parent or Indian custodian will not respond to future offers of assistance, and that any additional remedial efforts would be fruitless. *In re* S.R., 323 N.W.2d at 887.

225. *See* 25 U.S.C. § 1912(e), (f) (1982). In selecting an Indian child's foster care or preadoptive home, the state court must place the child in the least restrictive setting that most approximates a family, and one in which the child's special needs, if any, can be met. *See id.* § 1915(b). The least restrictive alternative is viewed from the child's, rather than the parents', perspective. *See In re P.B.*, 371 N.W.2d at 373.

226. 25 U.S.C. § 1912(e) (1982). Guideline D.3(a) concerns the standard of proof required for foster care placement, and specifies as follows:

> The court may not issue an order effecting [sic] a foster care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody with the child's parents or Indian custodian is likely to result in serious emotional or physical damage to the child.

Guideline D.3(a), *supra* note 35, at 67,592.

227. 25 U.S.C. § 1912(f) (1982). Congress selected the "beyond a reasonable doubt" standard for termination of parental rights because Congress believed that taking a child from the parents was a penalty as great, if not greater, than a criminal penalty. *See* H.R. REP. 95-1386, *supra* note 65, at 22. The following guideline, which deals with termination of parental rights, mirrors the statutory language on the matter of proof:

> The court may not order a termination of parental rights unless the court's order is supported by evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Guideline D.3(b), *supra* note 35, at 67,592.

typically permit removal or termination of parental rights for reasons other than a likelihood of serious physical and emotional harm. North Dakota, for example, allows a parent's rights to be terminated by "clear and convincing evidence" that "the child is suffering or will probably suffer serious physical, mental, moral, or emotional harm."[228] North Dakota law also allows a child to be removed from his or her parents or legal custodian and placed in a foster home when there is clear and convincing proof that the child is deprived.[229] A child is deprived under North Dakota law when the child:

> Is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for the child's physical, mental, or emotional health, or morals, and the deprivation is not due primarily to the lack of financial means of the child's parents, guardian, or other custodian. . . .[230]

Removal proceedings under state law also differ from removal proceedings under the ICWA in the type of evidence a court may consider. The ICWA does not allow a state court to consider generic poverty, alcohol abuse, or nonconforming social behavior as evidence that an Indian child should be removed from his or her home.[231] Emphasis under the guidelines is on whether any particular condition is likely to cause serious damage to the child, not that a potentially harmful condition exists.[232] The party seeking removal must prove a cause and effect relationship between the poverty or nonconforming social behavior, and the likelihood of serious physical and emotional damage to the child.[233] A child may not be removed simply because his or her family does not conform to some stereotypical notion of what a family should be.[234] Nor will removal be authorized simply because there exists other parental behavior or familial conditions considered to be "bad."[235]

Another major difference between the nature of proof required under the ICWA and that required under state law is the need for expert testimony on the issue of serious physical or emotional

228. N.D. CENT. CODE § 27-20-44 (1974).
229. *Id.* §§ 27-20-29(3),-30 (1974 & Supp. 1985).
230. *Id.* § 27-20-02(5)(a) (Supp. 1985).
231. *Cf.* Guideline D.3(c), *supra* note 35, at 67,593.
232. *See* Guideline D.3 commentary, *supra* note 35, at 67,593.
233. *See id.*
234. *See id.*
235. *See id.*

damage.[236] The ICWA specifically provides that a state court order for termination of parental rights, or foster care placement, must be supported by testimony from qualified expert witnesses.[237] The expert must be qualified to testify "specifically to the issue of whether continued custody by the parents or Indian custodians is likely to result in serious physical or emotional damage to the child."[238] An expert witness is one who is "qualified by reason of educational background and prior experience to make judgments on those questions that are substantially more reliable than judgments that would be made by nonexperts."[239]

The guidelines set out the characteristics of persons likely to be qualified as an expert witness in an Indian child custody proceeding.[240] But this list is not exhaustive. For purposes of the ICWA, anyone who is knowledgeable about tribal culture and childrearing practices may qualify as an expert witness.[241] Indian tribes and the BIA frequently know of persons who are

236. *Compare* 25 U.S.C. § 1912(e), (f) (1982) (testimony from expert witness required for both foster care placement and termination of parental rights) *with* N.D. CENT. CODE §§ 27-20-29(3), -30, -44 (1974 & Supp. 1985) (permitting foster care placement and termination of parental rights without testimony of qualified expert witnesses).

237. *See* 25 U.S.C. § 1912(e), (f) (1982). The statute speaks in terms of "expert witnesses," but only one expert witness is required for custody proceedings under the ICWA. *See* D.A.W. v. State of Alaska, 699 P.2d 340, 342 (Alaska 1985); *see also* Guideline D.4(a), *supra* note 35, at 67,593 (requiring competent testimony from *one or more* experts qualified to speak directly to the issue of whether continued custody by the parents or Indian custodian is likely to result in serious physical or emotional damage to the child).

238. Guideline D.4(a), *supra* note 35, at 67,593. Congress meant the phrase "qualified expert witnesses" to refer to expertise beyond that of the normal social worker. *See* H.R. REP. 95-1386, *supra* note 65, at 22; *see also* State *ex rel.* Juvenile Dep't v. Charles, 70 Or. App. 10, ____, 688 P.2d 1354, 1360 (1980) (social worker did not possess specialized knowledge of social and cultural aspects of Indian life and therefore was not qualified as an expert witness under the ICWA). Furthermore, the party presenting the expert has the burden of proving that the witness is an expert. *See* Guideline D.4 commentary, *supra* note 35, at 67,593.

239. Guideline D.4 commentary, *supra* note 35, at 67,593. The trial court should specifically find that the witness qualifies as an expert under the ICWA. *See In re* K.A.B.E. & K.B.E., 325 N.W.2d 840, 844 (S.D. 1982).

240. Guideline D.4(b), *supra* note 35, at 67,593. According to the guidelines, an expert witness may be:

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

Id.

241. *See* Guideline D.4 commentary, *supra* note 35, at 67,593. The trial judge does have, however, tremendous discretion in deciding who qualifies as an expert witness in an ICWA proceeding. *See In re* T.J.J. & G.L.J., 366 N.W.2d 651, 655 (Minn. Ct. App. 1985). *Compare, e.g., In re* J.L.H. & P.L.L.H., 316 N.W.2d 650, 651 (S.D. 1982) (social worker competent expert witness in ICWA case) *with* State *ex rel.* Juvenile Dep't v. Charles, 70 Or. App. 10, ____, 688 P.2d 1354, 1360 (1984) (social worker declared incompetent to be ICWA expert witness).

knowledgeable concerning a tribe's customs and culture. Consequently, the guidelines authorize the state judge or any other party to the proceedings to request the assistance of the Indian child's tribe and the BIA in locating qualified expert witnesses.[242]

D. PLACEMENT PREFERENCES

If an Indian child has been removed from his or her home, it is necessary for the state court to find another suitable home for that child. This process is governed by the ICWA.[243] Whether the removal was consented to or involuntary, any Indian child accepted for foster care or preadoptive placement must be placed in the "least restrictive setting which most approximates a family in which his [or her] special needs, if any, may be met."[244] The ICWA further provides that, in placing an Indian child into a foster care situation, state courts must give preference to a placement with the child's extended family, or an Indian home or institution.[245]

In the adoptive placement of an Indian child, a state court is required to give first preference to members of the child's extended family,[246] next to other families in the child's tribe,[247] and

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242. *See* Guideline D.4(c), *supra* note 35, at 67,593. In an involuntary proceeding, either the parties or the state court may request BIA assistance in locating expert witnesses. *See* 25 C.F.R. § 23.91 (1986). Any requests for assistance should be directed to the appropriate Area Director listed in *supra* note 121. Expert testimony, however, is not required in voluntary proceedings. *See* 25 U.S.C. § 1913 (1982).

243. *See* 25 U.S.C. §§ 1912, 1915 (1982).

244. *Id.* § 1915(b).

245. *See id.* The ICWA's statutory foster care placement preferences are as follows:

> (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.

Id.; see also Guideline F.2(b), *supra* note 35, at 67,594 (mirroring the statutory foster care placement preferences).

246. 25 U.S.C. § 1915(a) (1982). Guideline F.1(a), which covers adoptive placements, specifies that:

> In any adoptive placement of an Indian child under state law preference must be given (in the order listed below) absent good cause to the contrary, to placement of the child with:
> (i) A member of the child's extended family;
> (ii) Other members of the Indian child's tribe; or
> (iii) Other Indian families, including families of single parents.

Guideline F.1(a), *supra* note 35, at 67,594.

247. 25 U.S.C. § 1915(a) (1982).

then to other Indian families.[248] Both the Act and the guidelines make clear that the child's extended family has the primary role in helping to rear that child.[249] Therefore, state courts should look first to the child's extended family when it becomes necessary to remove a child from the custody of his or her parents.[250] Moreover, unless a parent requests anonymity, the state court or petitioner's counsel must make an effort to notify the child's extended family and tribe that their members will be given preference in the adoption decision.[251] The guidelines also permit adoption by single parent families.[252]

Absent the existence of good cause to do otherwise, state courts are required to adhere to the ICWA's preferences in placing Indian children in foster care or adoptive homes.[253] If the child's tribe has established its own placement preference by tribal resolution then, absent good cause, the state court must follow the tribal order of placement so long as it is the least restrictive setting appropriate to the child's needs.[254] Placement with non-Indian families and institutions is not provided for in either the Act or guidelines, but this does not render the preferences provided for in the Act constitutionally defective.[255] However, absent a specific finding of good cause for doing so, a state court's placement of an Indian child contrary to the Act or tribe's preferences is both unlawful and subject to attack.[256]

A state court may base its finding of good cause for ignoring the ICWA or tribal placement preferences upon one or more of the following considerations:

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248. *Id.*

249. *See id.* (providing that the extended family is first on the list of alternatives for placing Indian children); Guideline F.1(a), *supra* note 35, at 67,594 (same).

250. *See* Guideline F.1 commentary, *supra* note 35, at 67,594.

251. *See* Guideline F.1(c), *supra* note 35, at 67,594. A parent's request for anonymity would be submitted via an "affidavit of confidentiality." *See supra* note 99 and accompanying text. While the parent's request for anonymity must be given weight in determining the statutory preference, this right to confidentiality does not outweigh an Indian child's rights under the ICWA. *See* H.R. REP. No. 95-1386, *supra* note 65, at 24.

252. *See* Guideline F.1 commentary, *supra* note 35, at 67,594. Congress intended child custody decisions to be made on the present or future custodian's ability "to provide the necessary care, supervision, and support for the child, rather than on preconceived notions of proper family composition." *Id.*

253. *See* 25 U.S.C. § 1915(a), (b) (1982). The ICWA does not require that an Indian child be placed with a statutorily preferred person or agency. It only requires that state courts give preference to placing the child with those persons or agencies in the absence of good cause to the contrary. *See In re* Bird Head, 213 Neb. 741, ____, 331 N.W.2d 785, 791 (1983). Neither did Congress intend to establish a federal policy against placing Indian children with non-Indian families. *See* H.R. REP. 95-1386, *supra* note 65, at 23.

254. 25 U.S.C. § 1915(c) (1982).

255. *See In re* Angus, 60 Or. App. 546, ____, 655 P.2d 208, 213 (1983) (the ICWA does not provide for placement with non-Indian families and institutions, but the Act survives constitional equal protection analysis), *cert. denied*, 464 U.S. 830 (1983).

256. Apparently, no collateral attack is permitted for placements in violation of the preference of the Indian child's family. *See infra* notes 299-300 and accompanying text.

> (i) The request of the biological parents or the child when the child is of sufficient age.
>
> (ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.
>
> (iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.[257]

The burden of proving the existence of good cause not to follow the established order of preference is upon the party who is urging the court to deviate from the stated placement preference.[258]

Neither the Act nor the guidelines preclude the use of socio-economic considerations to deviate from the placement preferences.[259] But a state court should not base its decision to place an Indian child into a non-Indian foster or adoptive home upon the mere advantage that may accrue to that child from life in a more affluent non-Indian home setting.[260] The state court could, however, consider the foster or adoptive parents' wealth as a factor in meeting some extraordinary physical or emotional need of the child, and this may constitute good cause for the nonpreferred placement.[261]

Any state court that enters a final decree or order in an Indian child adoptive placement is required to provide the Secretary of Interior with a copy of the decree or order and any other information concerning the proceeding and parties.[262] State courts

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257. Guideline F.3(a), *supra* note 35, at 67,594.

258. *See* Guideline F.3(b), *supra* note 35, at 67,594; *see also In re* Bird Head, 213 Neb. 741, ____, 331 N.W.2d 785, 791 (1983) (reversing and remanding because trial court failed to make findings of good cause to deviate from ICWA placement preferences).

259. *See* 25 U.S.C. § 1915 (1982); Guidelines F.1-F.3, *supra* note 35, at 67,594.

260. *Cf.* Guideline C.3(c), *supra* note 35, at 67,591 (general socio-economic conditions do not constitute "good cause" for the failure to transfer the proceedings to a tribal court).

261. *See* Guideline F.3 commentary, *supra* note 35, at 67,594. In some cases a child may need highly specialized treatment or other services that are not available in the community where a preferred family lives. In such cases, the Secretary recommends that the needs of the child be considered good cause to place that child in a nonpreferred home. *See id.*

262. 25 U.S.C. § 1951 (1982). The state court must provide the Secretary with the following specific information, if known:

> (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.

Id. For a more detailed discussion of this reporting requirement, see *supra* notes 93, 97.

are also required to keep records evidencing the efforts that were made to comply with the placement preferences specified in the ICWA.[263] The state must make these records available, at any time, upon the request of the Secretary or Indian child's tribe.[264]

The law does not require the state to keep records from state placement proceedings in a single location,[265] but the guidelines do recommend that the state establish a particular location where all records of foster care and adoptive placement of Indian children can be obtained within seven days of their request.[266] It is the Secretary of Interior's position that the state has complied with the law if the placement records can be retrieved by a single state office and promptly made available to the requester.[267]

E. PARENTAL RIGHTS

When the state removal proceedings are nonconsensual, the Indian child's parents or Indian custodians are entitled to notice,[268] intervention, and the right to petition for transfer of the proceedings to tribal court.[269] As an additional safeguard, the Act provides that whenever state or other federal law provides for a higher standard of protection of the rights of Indian parents or custodians, then the court must apply the more protective law.[270] Yet these are not the only procedural safeguards extended to Indian parents and custodians in involuntary child custody proceedings. If the parent or custodian cannot afford counsel, he or she is entitled

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263. 25 U.S.C. § 1915(e) (1982).

264. *See id.*

265. *See id.* (not requiring that records from state placement proceedings be stored in one location, but providing that the state maintain these records).

266. Guideline G.4, *supra* note 35, at 67,595. Guideline G.4 addresses the requirement that state records be maintained, and it recommends that:

> The state shall establish a single location where all records of every foster care, preadoptive placement and adoptive placement of Indian children by courts of that state will be available within seven days of a request by an Indian child's tribe or the Secretary. The records shall contain, at a minimum, the petition or complaint, all substantive orders entered in the proceeding, and the complete record of the placement determination.

Id.

267. *See* Guideline G.4 commentary, *supra* note 35, at 67,595.

268. *See supra* notes 162-75 and accompanying text.

269. For a discussion of the transfer procedure, see *supra* notes 192-220 and accompanying text.

270. 25 U.S.C. § 1921 (1982); Guideline A.2, *supra* note 35, at 67,586; *see also In re* J.R.S., 690 P.2d 10, 15-16 (Alaska 1984) (recognizing a right of intervention under state law for the tribe even though ICWA provided no such right in a voluntary adoption proceeding). Because the parents, Indian custodian, and tribe have the benefit of both state and federal law, in all ICWA governed proceedings a state court should make findings sufficient to comply with both state and federal law. *See, e.g., In re* R.M.M., 316 N.W.2d 538, 541 (Minn. 1982) (trial court terminated parental rights with findings sufficient to satisfy both Minnesota state law and the ICWA).

to a court appointed attorney.[271] The court may likewise appoint counsel for the child if it finds that such an appointment is in the child's best interest.[272]

When provided for by state law, appointed counsel's fees will be paid by the state.[273] But if state moneys are not available, the Secretary of the Interior is required to pay reasonable fees and expenses.[274] The Secretary's obligation to pay attorney's fees, however, is contingent upon notification by the state court that counsel has been appointed pursuant to the ICWA, and certification by the presiding state judge of the nature and amount of those fees.[275]

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271. 25 U.S.C. § 1912(b) (1982). If the biological parents or Indian custodian appear in court without an attorney, the guidelines mandate that:

> [T]he court shall inform him or her of the right to appointed counsel, the right to request that the proceeding be transferred to tribal court or to object to such transfer, the right to request additional time to prepare for the proceeding and the right (if the parent or Indian custodian is not already a party) to intervene in the proceedings.

Guideline B.5(f), *supra* note 35, at 67,588. One state court has construed the ICWA to require appointment of counsel for indigent parents even if they do not request it. *See In re* M.E.M., 635 P.2d 1313, 1317 (Mont. 1981). *But see* B. R. T. v. Executive Director, 391 N.W.2d 594, 600 (N.D. 1986) (indicating that right to counsel not violated when parent is advised of right but fails to request the appointment). The right to counsel under the ICWA is dependent upon the state court's finding that the child is an Indian, and that the parent is indigent. *See* State ex rel. Juvenile Dep't v. Charles, 70 Or. App. 10, ____, 688 P.2d 1354, 1358 (1984). Moreover, right to appointed counsel does not mean counsel of one's choice, nor the right to reject a court appointed attorney without good cause. *See* V.F. v. State of Alaska, 666 P.2d 42, 45-46 (Alaska 1983). The right to appointed counsel is, however, restricted to involuntary proceedings. *See* H.R. REP. No. 95-1386, *supra* note 65, at 22.

272. 25 U.S.C. § 1912(b) (1982).

273. *See id.*

274. *See id.*

275. 25 C.F.R. § 23.13 (1986). This notice from the state court should be sent to the Area Director at the address provided in *supra* note 121, and it must include the following information:

> (1) Name, address and telephone number of attorney who has been appointed.
> (2) Name and address of client for whom counsel is appointed.
> (3) Relationship of client to child.
> (4) Name of Indian child's tribe.
> (5) Copy of the petition or complaint.
> (6) Certification by the court that state law makes no provision for appointment of counsel in such proceedings.
> (7) Certification by the court that the client is indigent.

Id. § 23.13(a). Within 10 days after receipt of the notice of appointment, the Area Director is required to give written notice to the state court, client, and attorney concerning whether the client has been certified as eligible to have his or her attorney fees and expenses paid by the BIA. *Id.* § 23.13(c). If the certification is denied, the Area Director must include written reasons for denying the certification. *Id.* Certification may be denied for the following reasons only:

> (1) The litigation does not involve a child custody proceeding as defined in 25 U.S.C. 1903(1);
> (2) The child who is the subject of the litigation is not an Indian child as defined in 25 U.S.C. 1903(4);
> (3) The client is neither the Indian child who is the subject of the litigation, the Indian child's parent as defined in 25 U.S.C. 1903(9), or the child's Indian custodian as defined in 25 U.S.C. 1903(6);
> (4) State law provides for appointment of counsel in such proceedings;

If the child's removal or the termination of parental rights is consensual, the Act likewise includes certain procedures for the parents' protection. To be effective, the parents' consent must be "executed in writing and recorded before a judge of a court of competent jurisdiction."[276] The judge must also certify that he or she fully explained the terms and consequences of the consent to each consenting parent or Indian custodian, and that they understood this explanation.[277]

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(5) The notice of the Area Director of appointment of counsel is incomplete; or
(6) No funds are available for such payments.

Id. § 23.13(b), (c).
If the Area Director certifies payment of attorney fees, the state court shall:

(1) Determine the amount of payments due appointed counsel by the same procedures and criteria it uses in determining the fees and expenses to be paid appointed counsel in juvenile delinquency proceedings.
(2) Submit approved vouchers to the Area Director who certified eligibility for Bureau payment together with the court's certification that the amount requested is reasonable under the state standards and considering the work actually performed in light of the criteria that apply in determining fees and expenses for appointed counsel in juvenile delinquency proceedings.

Id. § 23.13(d). The Area Director must authorize payment of the attorney fees set out in the state court approved voucher unless:

(1) The court has abused its discretion under state law in determining the amount of the fees and expenses; or
(2) The client has not been previously certified as eligible under paragraph (c) of this section; or
(3) The voucher is submitted later than ninety (90) days after completion of the legal action involving a client certified as eligible for payment of legal fees under paragraph (b) of this section.

Id. § 23.13(e). The Area Director then has 15 days after receipt of the voucher within which to approve or deny payment, and to give the state court, client, and attorney, written notice of the decision. *Id.* § 23.13(f). If payment is denied or the amount authorized is less than that requested in the state court approved voucher, the Area Director must also include in this notice a written statement of the reasons for the decision. *See id.*

An appeal is permitted whenever the Area Director refuses to certify appointment of counsel, or refuses to authorize payment of attorney fees in the amount requested on an approved state court voucher. *See id.* § 23.13(c), (f). The Area Director's failure to comply with the deadlines specified for deciding certification of appointed counsel or payment of fees is treated as a denial for purposes of appeal. *See id* § 23.13(g).

276. *See* 25 U.S.C. § 1913 (1982). When confidentiality is requested, parental consent need not be executed in open court. *See* H.R. REP. No. 95-1386, *supra* note 65, at 23. The guidelines also provide that the term "judge" is not a term of art; hence, it can certainly be construed to include judicial officials such as magistrates. *See* Guideline E.1 commentary, *supra* note 35, at 67, 593.

277. *See* 25 U.S.C. § 1913(a) (1982). Concerning the form of the parental consent, the guidelines recommend that:

(a) The consent document shall contain the name and birthdate of the Indian child, the name of the Indian child's tribe, any identifying number or other indication of the child's membership in the tribe, if any, and the name and address of the consenting parent or Indian custodian.
(b) A consent to foster care placement shall contain, in addition to the information specified in (a), the name and address of the person or entity by or through whom the placement was arranged, if any, or the name and address of the prospective foster parents, if known at the time.

Parental consent given prior to or less than ten days after the child's birth is invalid as a matter of law.[278] Indian parents and custodians may withdraw their consent to foster care at any time,[279] and the child must be returned to them.[280] Consent to a termination of parental rights or to adoption can be withdrawn by the parent or Indian custodian anytime up until entry of the final decree of termination or adoption.[281] The consenting party may withdraw his or her consent for any reason prior to entry of the final decree.[282] Once withdrawn, the child must be returned to the parent.[283]

After entry of the final decree of adoption or termination of

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> (c) A consent to termination of parental rights or adoption shall contain, in addition to the information specified in (a), the name and address of the person or entity by or through whom any preadoptive or adoptive placement has been or is to be arranged.

Guideline E.2, *supra* note 35, at 67,593. It is the Secretary's position that when the parental consent complies with the foregoing guideline, it contains enough basic information about the placement or termination to insure that the consent was knowning, and to document what took place. Guideline E.2 commentary, *supra* note 35, at 67,594.

278. 25 U.S.C. § 1913(a) (1982).

279. *See id.* § 1913(b).

280. *See id.* The Secretary of the Interior's recommended procedure for withdrawing consent to foster care placement is as follows:

> Where a parent or Indian custodian has consented to a foster care placement under state law, such consent may be withdrawn at any time by filing, in the court where consent was executed and filed, an instrument executed by the parent or Indian custodian. When a parent or Indian custodian withdraws consent to foster care placement, the child shall as soon as is practicable be returned to that parent or Indian custodian.

Guideline E.3, *supra* note 35, at 67,594. The guidelines do not recommend any particular form for the withdrawal of consent, only that it be filed in the same state court in which the consent document itself was executed. *Id.*

281. 25 U.S.C. § 1913(c) (1982). The ICWA does not permit parents to withdraw their consent once the final state court order terminating parental rights is entered. *See In re* J.R.S., 690 P.2d 10, 13 (Alaska 1984); B.R.T. v. Executive Director, 391 N.W.2d 594, 599 (N.D. 1986). When the child is domiciled on an Indian reservation, the parents cannot consent to a state court termination of rights, and any consent they give is void. *See* Appeal in Pima County Juvenile Action, 130 Ariz. 202, ____, 635 P.2d 187, 191 (Ct. App. 1981), *cert. denied*, 455 U.S. 1007 (1982).

282. *See* 25 U.S.C. § 1913(c) (1982). The guideline on withdrawal of consent to termination of parental rights or adoption states that:

> A consent to termination of parental rights or adoption may be withdrawn by the parent at any time prior to entry of a *final decree of voluntary termination or adoption* by filing in the court where the consent is filed an instrument executed under oath by the parent stipulating his or her intention to withdraw such consent. The clerk of the court where the withdrawal of consent is filed shall promptly notify the party by or through whom any preadoptive or adoptive placement has been arranged of such filing and that party shall insure the return of the child to the parent as soon as practicable.

Guideline E.4, *supra* note 35, at 67,594 (emphasis in original). Having the clerk of court notify the parties about the withdrawal of parental consent may be necessary, especially when the biological parents are not told the identity of the adoptive parents. *See* Guideline E.4 commentary, *supra* note 35, at 67,594. Involving the court in this process likewise reduces the chance of confrontation over the return of the Indian child.

283. *See* 25 U.S.C. § 1913(c) (1982).

parental rights, a parent cannot withdraw his or her consent without a finding that it was induced by fraud or duress.[284] Subsection 1913(d) of the Act allows parents to commence a collateral suit to vacate any adoption consented to under fraud or duress,[285] and if such a suit is successful the court must order the child returned to the parents.[286] No adoption, however, that has been effective for at least two years may be attacked by Indian parents under subsection 1913(d).[287] But when state law permits the adoption to be vacated by the parents or others beyond this two year period, then the ICWA authorizes application of the more liberal state law.[288]

It must be emphasized that this two year "statute of limitations" for vacating an adoption applies only to cases in which parental consent was obtained by fraud or duress.[289] The ICWA has a separate procedure for collaterally attacking Indian child custody orders and decrees entered by state courts in violation of its other provisions.[290]

F. ENFORCEMENT AND POST TRIAL RIGHTS

Failure of a state court to comply with the provisions of the Indian Child Welfare Act can form the basis of an appeal and, in many instances, will mandate reversal of the lower court's final custody decision.[291] But the Act also provides for other post trial remedies and rights which are designed to insure that state judges, social service agencies, and attorneys comply with the law. These matters should concern everyone involved in a state court Indian child custody proceeding, for they are the vehicles by which state, federal, and tribal courts may vacate many existing foster care and adoptive placements of Indian children.

As previously noted, when the Indian parent's consent to adoption was obtained by either fraud or duress, the Act permits that parent to petition a court to vacate the adoption within two years after its final decree was entered, or within any longer period

284. *See id.* § 1913(d).
285. *See id.*
286. *See id.*
287. *Id.* For a discussion of remedies, see *infra* notes 291-314 and accompanying text.
288. *See* 25 U.S.C. §§ 1913(d), 1921 (1982).
289. *See id.* § 1913(d).
290. *See infra* text accompanying notes 294-314.
291. *See, e.g., In re* M.E.M., 635 P.2d 1313, 1316 (Mont. 1981) (reversing a state trial court because it failed to appoint counsel for an Indian parent); *In re* J.L.H., 299 N.W.2d 812, 814 (S.D. 1980) (trial court reversed when it erroneously terminated parental rights under a state "clear and convincing evidence" standard instead of the "beyond a reasonable doubt" ICWA standard of proof).

of time authorized by state law.[292] Although the Secretary recommends that the parent file his or her petition to vacate in the same court in which the decree was entered, the ICWA does not require this.[293]

In addition to the specific remedy provided for vacating adoptions predicated upon parental consent obtained through fraud or duress, the Act also allows collateral suits to set aside state foster care placements or termination of parental rights obtained in violation of certain provisions of the ICWA.[294] This authorization is contained in section 1914 of the Act.[295]

Section 1914 has been construed to permit collateral suit in federal court,[296] a forum traditionally hostile to domestic actions.[297]

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292. *See supra* notes 284-86 and accompanying text. The guidelines suggest that:

> Upon the filing of such petition, the court shall give notice to all parties to the adoptive proceedings and shall proceed to hold a hearing on the petition. Where the court finds that the parent's consent was obtained through fraud or duress, it must vacate the decree of adoption and order the consent revoked and order the child returned to the parent.

Guideline G.1(b), *supra* note 35, at 67,595.

293. *Compare* 25 U.S.C. § 1914 (1982) ("parent . . . may petition any court of competent jurisdiction") *with* Guideline G.1, *supra* note 35, at 67,595 (same court in which the decree was entered is the proper court for the parent's petition). The Secretary recommends filing the petition to vacate in the same court because that court clearly has jurisdiction, and the witnesses on fraud or duress are likely to be within its jurisdiction. *See* Guideline G.1 commentary, *supra* note 35, at 67,595. There may be, however, other forums available, including tribal court. This possibility is discussed *infra* note 296.

294. *See, e.g.*, 25 U.S.C. § 1914 (1982); *In re* Angus, 60 Or. App. 546, 547, 655 P.2d 208, 209, *cert. denied*, 464 U.S. 830 (1982) (parents of an Indian child successfully brought habeas corpus action for return of their child from adoptive parents).

295. *See* 25 U.S.C. § 1914 (1982). Section 1914, title 25 of the United States Code provides as follows:

> Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

Id.

296. *See* Kiowa Tribe v. Lewis, 777 F.2d 587, 591 (10th Cir. 1985), *appeal docketed*, No. 83-2481 (collateral attack on state court judgment allowing non-Indian couple to adopt a child who the Kiowa Tribe contended was Indian). The *Kiowa Tribe* case is significant for reasons other than its implicit recognition of federal court jurisdiction over violations of the ICWA; it defines the parameters within which a collateral attack can be made in federal court upon a state court decision. *Id.* A state court determination that the ICWA does not apply is binding on a federal court unless the state court determination does not satisfy "the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause." *Id.*

A more interesting forum possibility under § 1914 is tribal court. This section permits the child, parents, custodian, and tribe to petition "any court of competent jurisdiction" to invalidate certain improper state court removals. 25 U.S.C. § 1914 (1982). This "any court" language of the statute would certainly include a tribal court. *Cf. Kiowa Tribe*, 777 F.2d at 592 (§ 1914 was basis of federal court action to invalidate state removal order). Moreover, if the tribal court had jurisdiction, its order and decisions in a child custody matter would be entitled to full faith and credit. *See* 25 U.S.C. § 1911(d) (1982). A tribe should have subject matter jurisdiction in § 1914 cases involving its members. *Cf.* Montana v. United States, 450 U.S. 544, 565-67, *reh'g denied*, 452 U.S. 911 (1981) (tribes have civil authority over non-Indian activities which threaten or have some direct effect on the

This section, however, only applies to violations of sections 1911 (exclusive tribal court jurisdiction), 1912 (involuntary proceedings), and 1913 (voluntary proceedings).[298] It does not authorize collateral suits to set aside state court placements that violate section 1915, which relates to foster care and adoption preferences.[299] Presumably then, any state court foster care or adoptive placement contrary to the Act's stated preference for Indian families and homes can only be challenged by a direct appeal.[300] This is apparently so because section 1914 does not specifically include a violation of section 1915 as a subject for collateral suit. But this omission is of little consequence since the violations that can be challenged by parents, Indian custodians, and tribes under section 1914 constitute the bulk of the rights created by the ICWA.

Under section 1914 a state court's failure to recognize a tribe's exclusive jurisdiction in Indian custody proceedings,[301] its refusal to permit the parents, Indian custodian, or tribe to intervene,[302] and the court's decision not to transfer the proceedings to tribal court[303] are all reviewable in a collateral suit. If the state court does not give full faith and credit to tribal law, this too is reviewable by another state court, a federal court, or perhaps even a tribal court.[304] Violation of the notice and stay provisions of section 1912 are also proper subject for collateral attack, as are violations of the

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political integrity, economic security, or health and welfare of the tribe); United States v. Wheeler, 435 U.S. 313 (1978) (tribes have the broadest of powers over their members). Besides, whether jurisdiction exists is a proper question for the tribal court to decide, subject only to limited review by a federal district court. *See* National Farmers Union Ins. Co. v. Crow Tribe, 105 S. Ct. 2447, 2454 (1985) (whether a tribal court has jurisdiction should first be determined by that court).

297. *See* 13B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 3609 (2d ed. 1984).

298. *See* 25 U.S.C. § 1914 (1982). For a discussion of a tribal court's exclusive jurisdiction, see *supra* notes 129-30 and accompanying text. For a discussion of rights involved in involuntary proceedings, see *supra* notes 157-91 and accompanying text. For a discussion of a consensual termination proceeding, see *supra* notes 276-90 and accompanying text.

299. *See id.*; B.R.T. v. Executive Director, 391 N.W.2d 594, 601 (N.D. 1986) ("invalidation of a parental rights termination may not be accomplished by showing a violation of the placement preferences in a proceeding brought pursuant to 25 U.S.C. § 1914").

300. Appellate courts that have considered placements of Indian children in violation of the Act's stated preference for Indian families have reached different results. *Compare In re* J.R.S., 690 P.2d 10, 14-15 (Alaska 1984) (setting aside adoption for trial court's disregard of ICWA's placement preferences) *with In re* Adoption of Baby Boy L., 231 Kan. 199, ____, 643 P.2d 168, 176 (1982) (holding that the Act's placement preferences did not apply to adoption proceedings involving illegitimate child of non-Indian mother because that child had never been in any care or custody of the putative father, nor part of any Indian family relationship).

301. *See* 25 U.S.C. § 1911(a) (1982) (tribal court has exclusive jurisdiction over a child custody proceeding when an Indian child resides or is domiciled within the reservation, or the Indian child is a ward of the tribal court).

302. *See id.* § 1911(c).

303. *See id.* § 1911(b).

304. *See id.* §§ 1911(d), 1914. Review by tribal court is also a possibility. For a discussion of tribal courts as remedial forums, see *supra* note 296.

right to counsel,[305] access to records,[306] preremoval efforts to rehabilitate the Indian family,[307] and standards of proof governing Indian child custody proceedings.[308] Finally, any alleged noncompliance with the procedures for voluntary termination of parental rights contained in section 1913 can be reviewed by another court and, if proven, will justify setting aside the order for foster care placement or termination of parental rights.[309]

No specific federal statute of limitations is provided for suits brought pursuant to section 1914.[310] It is thus possible that in many instances a parent's collateral attack upon the state decree would be barred by a state statute of limitations.[311] However, with respect to decrees entered in violation of two particular provisions of the ICWA, there may be no time limit on the bringing of a suit. In those child custody proceedings in which the tribal court had the exclusive jurisdiction pursuant to subsection 1911(a), any state court orders or decrees would be void *ab initio*.[312] Similarily, since parental consent obtained in violation of the ICWA is invalid as a matter of law,[313] any subsequent state court order for foster care or adoptive placement predicated on that defective consent should likewise be void. It would seem, therefore, that if these particular violations of the Act render the state court orders or decrees void, such void orders and decrees could be vacated by another court at any time.[314]

IV. CONCLUSION

Provisions of the Indian Child Welfare Act of 1978 are not being followed in many state Indian child custody proceedings. Hopefully, this disregard for the law is premised upon the court and counsel's ignorance, rather than intentional disrespect.

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305. *See id.* § 1912(b).

306. *See id.* §1912(c).

307. *See id.* § 1912(d).

308. *See id.* § 1912(e), (f).

309. *See id.* § 1914. For a discussion of the limitations on the collateral attacks permitted under the ICWA, see *supra* text accompanying note 296.

310. *See id.*

311. Federal statutory remedies frequently borrow an applicable state statute of limitations. *See, e.g.*, Fomby v. City of Calera, 575 F. Supp. 221, 223 (N.D. Ala. 1983) (state statute of limitations applied to an action brought under § 1983 of title 42); Miller v. City of Overland Park, 231 Kan. 557, ____, 646 P.2d 1114, 1117 (1982) (same).

312. *See* 25 U.S.C. § 1911(a) (1982).

313. *See id.* § 1913(d).

314. *See* Cooper v. United Dev. Co., 122 Ill. App. 3d 850, ____, 462 N.E.2d 629, 632 (1984) (a void judgment may be attacked and vacated anytime); Adoption of Baby Child, 102 N.M. ____, ____, 700 P.2d 198, 200 (1985) (setting aside state court order in child custody proceeding for a lack of jurisdiction because reservation domicile of child precluded mother from consenting to state court adoption).

But regardless of the reason or reasons for disregard of this law by state judges, social workers, and attorneys, the ICWA has widespread application to custody proceedings in North Dakota and other western states.

The Indian Child Welfare Act was enacted by Congress to preserve the Indian family and to protect tribal existence. Yet this law is not so inflexible that it attempts to attain these goals at the expense of the Indian child. Neither is it difficult for judges and attorneys to comply with the Act. If the court and counsel recognize and apply the ICWA, they can, with the proper showing and findings, arrive at a valid, enforceable decision that serves the best interest of the Indian child. Conversely, ignoring this law will most likely render the final state court decision in an Indian child custody proceeding vulnerable to attack, and expose social workers and attorneys to potential civil liability.