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## Children: An Analysis of Cases Decided Pursuant to the Indian Child Welfare Act of 1978

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## NOTES

### CHILDREN: AN ANALYSIS OF CASES DECIDED PURSUANT TO THE INDIAN CHILD WELFARE ACT OF 1978

*Therese Buthod*

The congressional committee, in introducing the Indian Child Welfare Act, commented that there is no resource more vital to the continued existence and integrity of Indian tribes than their children.<sup>1</sup> This note will discuss the problems of Indian child placement that led to the passage of the Act, the Act itself, and an analysis of cases decided since the enactment of the Indian Child Welfare Act.

#### *Background of the Act*

An alarmingly high percentage of Indian families have been broken up by the often unwarranted removal of their children by nontribal public and private agencies. Many of these children are placed in non-Indian foster and adoptive homes and institutions,<sup>2</sup> a problem addressed by Russell Lawrence Barsh in his article "The Indian Child Welfare Act of 1978: A Critical Analysis."<sup>3</sup> Referring to statements made during the hearings before the Senate Select Committee on Indian Affairs,<sup>4</sup> Barsh states:

The costs of massive displacement of Indian children from their homes and tribes have been severe. Prolonged substitute care during youth has been associated with high alcohol abuse and suicide rates within the Indian population. Psychiatrists report that Indians raised in non-Indian homes tend to have significant social problems in adolescence and adulthood. According to a report prepared in 1975 for the American Academy of Child Psychiatry, "there is much clinical evidence to suggest that these Native American children placed in off-

1. 25 U.S.C. § 1901(3) (1976).

2. *Id.* § 1901(4).

3. Barsh, *The Indian Child Welfare Act of 1978: A Critical Analysis*, 31 HASTINGS L.J. 1287 (1980). For an in-depth analysis of the Act, see Note, *Conflict of Laws: The Plurality of Legal Systems: An Analysis of 25 U.S.C. §§ 1901-63, The Indian Child Welfare Act*, 8 AM. INDIAN L. REV. 333 (1980).

4. *Hearings on S. 1214 Before the Senate Select Comm. on Indian Affairs*, 95th Cong., 1st Sess., 1977.

reservation, non-Indian homes are at risk in their later development. Often enough they are cared for by devoted and well intentioned foster or adoptive parents. Nonetheless, particularly in adolescence, they are subject to ethnic confusion and a pervasive sense of abandonment." Frequently when these children become adults they find themselves being treated as Indians, but do not know how to behave as Indians.<sup>5</sup>

As stated in the above quotation, these foster or adoptive families may have been devoted and well intentioned. Even so, this does not alleviate the problem these Indian children have in accepting their identity as an Indian in a non-Indian environment. State courts and welfare agencies often believe that they are looking out for "the best interest of the child" by placing Indian children in non-Indian homes. This belief is the result of cultural bias on the part of the court and social workers involved in the removal of the children. The fallacious character of this bias was exposed in the legislative development of the Indian Child Welfare Act<sup>6</sup>:

In judging the fitness of a particular family, many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists.

For example, the dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights.<sup>7</sup>

Before passage of the Indian Child Welfare Act, a child's tribe had little or no impact on the decision as to placement of the child. Tribes were given very limited jurisdiction in child custody matters. If the child did not reside or was not domiciled on the reservation, there was very little opportunity for the tribe to exer-

5. Barsh, *supra* note 3, at 1287, 1290, quoting from *Hearings*, *supra* note 4, at 114 (Statements of Drs. Carl Mindell and Alan Gurwitt, American Academy of Child Psychiatry).

6. 1978 U.S. CODE CONG. & AD. NEWS 7530.

7. *Id.* at 7532.

cise any authority. The tide began to turn when in 1975 a case arose in Maryland dealing with VISTA volunteers assigned to the Crow Reservation in Montana. The Wakefields, who were non-Indians, were appointed legal guardians of an Indian child by the Crow Tribal Court. The Wakefields filed for permanent custody of the child in the state court of Maryland. In the meantime, the Crow Tribal Court in Montana terminated the guardianship over the child and returned legal custody to the mother. The mother moved to dismiss the Wakefields' claim for permanent custody on the ground that the state court lacked jurisdiction. The Maryland Court of Appeals decided in *Wakefield v. Little Light*<sup>8</sup> that the lower court's judgment granting the dismissal of the petition for want of jurisdiction was proper. The court adopted the rule enunciated by the Supreme Court in *Williams v. Lee*<sup>9</sup> stating that states may only act "where essential tribal relations were not involved and where the rights of Indians would not be jeopardized." The court ruled that child rearing is an "essential tribal relation" and that the Crow Tribe possessed the requisite judicial authority to protect this essential tribal relation.<sup>10</sup>

The United States Supreme Court decided *Fisher v. District Court*<sup>11</sup> the following year. This case dealt with a child who was found to be neglected by her mother, Alva Fisher, a member of the Northern Cheyenne Tribe. After the tribal court found the child neglected, it awarded temporary custody to Josephine Runsabove, another tribal member. The tribal court later returned custody to the mother. However, before the new custody order was final, Josephine Runsabove initiated an adoption proceeding in the Montana court. The Montana Supreme Court held that the state court had jurisdiction to hear the matter and Fisher appealed. The United States Supreme Court ruled that state court jurisdiction would interfere with the power of self-government conferred upon the Northern Cheyenne Tribe.<sup>12</sup> The Court concluded that a tribal court has jurisdiction over a child domiciled on the reservation.

Both of these cases were steps toward enhancing the tribe's and the Indian family's power in matters concerning their children. Still, much more remained to be done to alleviate the problems

8. 347 A.2d 228 (Md. 1975).

9. 358 U.S. 217 (1959).

10. 347 A.2d 228, 234 (Md. 1975).

11. 424 U.S. 382 (1976).

12. *Id.* at 387.

encountered by many Indian families and children who had been separated by the children's placement outside the home.

### *The Act Itself*

The Indian Child Welfare Act of 1978<sup>13</sup> was signed into law by President Carter on November 8, 1978, after nearly four years of hearings and investigations conducted by Congress. In describing the purpose of the Act, Congress declared:

[I]t is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.<sup>14</sup>

The Act deals with the following child custody proceedings:

1. Foster care placement, which is an action removing a child from his parents or Indian custodian for temporary placement in a foster home or institution, where parental rights have not been terminated but the parent or Indian custodian may not have the child returned upon demand.
2. Termination of parental rights, which is any action terminating the parent-child relationship.
3. Preadoptive placement, which is the temporary placement of the child in a foster home or institution after the termination of parental rights.
4. Adoptive placement, which is the permanent placement of an Indian for adoption, including any action resulting in a final decree of adoption.<sup>15</sup>

An "Indian child" for purposes of the Act is any unmarried person who is under eighteen and is either a member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.<sup>16</sup> It should be noted that the Act does not cover delinquency proceedings involving an Indian child, nor does it cover child custody awards in divorce proceedings.

13. Pub. L. 95-608, 25 U.S.C. § 1901.

14. 25 U.S.C. § 1902 (1976).

15. *Id.* § 1903.1.

16. *Id.* § 1903.4.

As previously stated, Indian children often live with members of their extended family. The Act states that an extended family member should be defined by the law or custom of the Indian child's tribe, or in the absence of such law or custom, shall be a person at least eighteen years of age who is the child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or step-parent.<sup>17</sup> Other definitions will be discussed as they appear in the context of the cases.

One of the most difficult problems in many Indian law cases is determining who has jurisdiction of the matter. The Act has set forth procedures to follow in order to determine who has jurisdiction over Indian child custody proceedings. The jurisdictional requirements are divided into three categories.

First, the tribal court has exclusive jurisdiction over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the state by existing federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.<sup>18</sup>

Second, in a 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. This transfer should be made, unless there is 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 the child's tribe."<sup>19</sup>

Third, during any state proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have the right to intervene at any point in the proceeding.<sup>20</sup>

The United States, every state, every territory or possession of the United States, and every Indian tribe shall give full faith and

17. *Id.* § 1903.2.

18. *Id.* § 1911(a).

19. *Id.* § 1911(b).

20. *Id.* § 1911(c).

credit to the public acts, records, and proceedings of an Indian tribe applicable to Indian child custody proceedings.<sup>21</sup>

The Act further provides that in any involuntary proceeding in a state court, where the court knows or has reason to know an Indian child is involved, the court shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of the parties' right to intervene.<sup>22</sup> An indigent parent or Indian custodian has the right to court-appointed counsel in any removal, placement, or termination proceedings.<sup>23</sup> The parties are also given the right to examine relevant documents filed with the court.<sup>24</sup> Any party seeking foster care placement or termination of parental rights must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts were unsuccessful.<sup>25</sup>

In order for foster care placement to become effectuated there must be clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.<sup>26</sup> Termination of parental rights may only be ordered if the evidence is beyond a reasonable doubt that the continued custody of the child by the parent or legal custodian is likely to result in serious emotional or physical damage to the child.<sup>27</sup>

The Act also deals with the issue of a parent or Indian custodian voluntarily consenting to foster care placement or to termination of parental rights. Such consent will not be valid unless in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were explained in detail. The judge must also certify that the parent fully understood the explanation, which was given either in English or translated into a language the parent understood. Any consent given prior to or within ten days after the birth of an infant will not be valid.<sup>28</sup>

21. *Id.* § 1911(d).

22. *Id.* § 1912(a).

23. *Id.* § 1912(b).

24. *Id.* § 1912(c).

25. *Id.* § 1912(d).

26. *Id.* § 1912(e).

27. *Id.* § 1912(f).

28. *Id.* § 1913(a).

If a parent voluntarily consents to foster care, that consent may be withdrawn at any time; at such time the child shall be returned to the parent or guardian.<sup>29</sup> A parent may withdraw consent for a voluntary proceeding for termination of parental rights at any time prior to the final decree of termination or adoption.<sup>30</sup> Even after the final decree of adoption the parent may withdraw consent for a period of up to two years if that parent can show that the consent was obtained through fraud or duress.<sup>31</sup>

The Act further provides that any child who is the subject of foster care placement or termination proceedings, or that child's parent or Indian custodian, may, like the child's tribe, petition any court of competent jurisdiction to invalidate such proceeding upon a showing that the action violated any provisions of sections 1911, 1912, and 1913 of the Act.<sup>32</sup>

Certain criteria have been established for the placement of Indian children. In an adoptive placement of an Indian child under state law, unless good cause to the contrary is shown, preference shall be given to placement with (1) a member of the child's extended family, (2) other members of the Indian child's tribe, or (3) other Indian families.<sup>33</sup>

In determining foster care or preadoptive placement for an Indian child, the least restrictive setting which most approximates a family and which meets the child's special needs should be used. The child should also be placed within reasonable proximity to his or her home. Preference shall be given, in the absence of good cause to the contrary, to placement with:

1. a member of the Indian child's extended family,
2. a foster home licensed, approved, or specified by the Indian child's tribe,
3. an Indian foster home licensed or approved by an authorized non-Indian licensing authority, or
4. 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.<sup>34</sup>

If an Indian child's tribe establishes a different order of preference, the court or agency effecting placement should follow

29. *Id.* § 1913(b).

30. *Id.* § 1913(c).

31. *Id.* § 1913(d).

32. *Id.* § 1914.

33. *Id.* § 1915(a).

34. *Id.* § 1915(b).



such preference. The preference of the parent or child may also be considered.<sup>35</sup> A record shall be maintained by the state and made available to the Indian child's tribe, or the Secretary of the Interior upon request, evidencing the efforts made to comply with the order of preference.<sup>36</sup>

Whenever a previous adoption of an Indian child has been vacated or adoptive parents consent to termination of their parental rights, the parent or prior Indian custodian may petition for return of custody. The petition should be granted unless there is a showing it would not be in the best interest of the child.<sup>37</sup>

The Act has made provisions for an Indian individual at least eighteen years of age, who has been adopted, to petition the court that entered the final decree for disclosure of his tribal affiliation, his biological parents, and other information that may be necessary to protect rights stemming from the individual's tribal relationship.<sup>38</sup>

An Indian tribe that has become subject to state jurisdiction pursuant to federal law may reassume jurisdiction over child custody proceedings. Before reassuming jurisdiction, the tribe must present to the Secretary of the Interior a petition that includes a suitable plan to exercise such jurisdiction.<sup>39</sup>

The Act authorizes Indian tribes and states to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody matters. It also provides for revocation of these agreements by either party.<sup>40</sup>

If an Indian child is improperly removed from the custody of the parent or Indian custodian by the petitioner in any child custody proceeding, the court shall decline jurisdiction over the matter and return the child to his parent or Indian custodian, unless the return would subject the child to a substantive and immediate danger or threat of such danger.<sup>41</sup>

If any state or federal law applies a higher standard of protection to the rights of the parent or Indian custodian than the Act requires, then the state or federal standard should apply.<sup>42</sup>

Nothing in the Act prevents the emergency removal of an

35. *Id.* § 1915(c).

36. *Id.* § 1915(e).

37. *Id.* § 1916(a).

38. *Id.* § 1917.

39. *Id.* § 1918(a).

40. *Id.* § 1919.

41. *Id.* § 1920.

42. *Id.* § 1921.

Indian child who is domiciled on the reservation, but temporarily located off the reservation, from his parent or Indian custodian, or the emergency placement of such child in a foster home in order to prevent imminent physical damage or harm to the child. This removal or placement shall terminate immediately when it is no longer necessary to prevent imminent physical damage or harm to the child.<sup>43</sup>

Most of the provisions of this Act did not apply to child custody proceedings that were initiated or completed prior to 180 days after November 8, 1978. The provisions would apply to any subsequent proceedings in the same matter or subsequent proceedings affecting the custody or placement of the same child.<sup>44</sup>

Subchapter II of the Act authorizes the Secretary of the Interior to make grants to Indian tribes and organizations to establish and operate Indian child and family service programs on or near reservations. The Act specifies that the objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in particular, to ensure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be utilized only as a last resort.<sup>45</sup>

Subchapter III directs the Secretary of the Interior to collect and maintain records of all Indian child placements from its enactment forward.<sup>46</sup>

### *Cases Decided Under the Act*

State courts must ask themselves a critical question in dealing with Indian children: Does the Indian Child Welfare Act apply? If so, to what extent should the state or tribal court be involved? To date most cases appealed on the grounds of the Indian Child Welfare Act deal specifically with whether the Act applies.

In *In re Appeal in Pima County Juvenile Action*,<sup>47</sup> the domicile of an Indian infant was placed in question by the parties in the case. A 15-year-old Assiniboine Indian living on the Fort Belknap Reservation in Montana had a baby on February 27, 1980. She voluntarily relinquished parental rights to the Nevada Catholic Welfare Bureau twenty days later; she had the option to withdraw this relinquishment any time prior to the final adoption

43. *Id.* § 1922.

44. *Id.* § 1923.

45. *Id.* § 1931(a).

46. *Id.* § 1951.

47. 635 P.2d 187 (Ariz. Ct. App. 1981).

decree. The girl withdrew her consent on October 2, 1980, but the adoptive family living in Arizona refused to return the child. A petition for termination of parental rights was filed in Arizona on October 27, 1980. The vice-chairman of the tribe requested the Arizona court to transfer the case to the tribal court in Montana. The state court refused and terminated the girl's parental rights on the grounds that she had abandoned the child and stated further that removal of the child from his preadoptive home and his return to his mother would result in serious emotional or physical damage to him.

The appellate court determined that the infant's domicile was that of his mother until it had been legally changed. It further stated that the jurisdictional standard should be based on the ethnic origin of the child rather than the geographic concept of presence or domicile since the tribe or parent can intervene and request that the case be transferred to tribal court. The court found that evidence concerning the mother's fitness was better able to be determined in tribal court because witnesses lacking knowledge of the tribal culture or values may not be qualified to give an opinion.

Another important issue that must be decided by the court is whether the child is an Indian or eligible to be a member of a tribe. The court failed to make this determination in *In re C.R.M.*<sup>48</sup> The child's mother's attorney asked that the case be dismissed at the outset because the trial court did not comply with the Act. The motion was denied; the child was adjudicated dependent and neglected and placed in the custody of the Department of Social Services. The mother informed the court that she was a member of the Oglala Sioux Tribe and her child was eligible for membership, but the court refused to acknowledge the child as Indian and refused to comply with the Act. The South Dakota Supreme Court remanded the case to determine whether the child was Indian and thus whether application of the Act was proper.

A similar case arose in Oklahoma in *In re J.B.*<sup>49</sup> An adjudicatory hearing was held before a jury to determine whether J.B. was a deprived child. The child's mother, who claimed to be an Indian, requested that the jury be instructed to use the standard of clear and convincing evidence to prove that her child

48. 307 N.W.2d 131 (S.D. 1981).

49. 643 P.2d 306 (Okla. 1982).

was deprived. The court refused to use this instruction and directed the jury to use the "preponderance of the evidence" standard. The Oklahoma Supreme Court upheld the lower court's decision, stating that the transcript did not sufficiently establish the mother's status as an Indian to provide her the benefits of the Indian Child Welfare Act.

In both of these cases it appears that the trial court chose to ignore the Act completely even after the Act had been brought to the court's attention. In the first case this led to the remand and retrial of a case that could have been disposed of more efficiently had the trial judge determined the child's eligibility for membership in the tribe. The upholding of the decision in the second case may have violated a right which the mother, if Indian, was guaranteed under 25 U.S.C. § 1912(e).

In *In re Adoption of Baby Boy L.*<sup>50</sup> the Kansas Supreme Court seems to have interpreted the Act in a manner much narrower than most courts in order to find that the case was not subject to the Act. The mother, a non-Indian, consented to adoption of the baby, specifying who the adoptive parents would be. The father, a five-eighths Kiowa Indian and an enrolled member of the tribe, did not consent to the adoption. The parents were not married, but paternity was not disputed. A hearing was held to determine whether the father was unfit and whether his parental rights should be terminated. The hearing was continued and notice was given to the Kiowa Tribe of the proceedings. The father filed an answer, claiming that the Indian Child Welfare Act applied and requested that the child be placed with a member of his extended family or other member of the tribe; the Kiowa Tribe filed a petition to intervene in the proceedings. The court determined that the father was unfit; thus his parental rights were terminated and the court stated that his consent was not necessary for the adoption. While these proceedings were pending the baby was enrolled as a member of the Kiowa Tribe.

The Kansas Supreme Court held that the Act did not apply to "this type" of case. It stated in part that:

The Act is concerned with establishing proper definitions and safeguards in the situation where Indian children are being removed from their families by reason of child neglect, abuse, or similar grounds. These issues are not present in an adoption proceeding instituted on the voluntary consent of a non-Indian

50. 643 P.2d 168 (Kan. 1982).

unwed mother of an illegitimate child, where that child's care and custody has, with the natural mother's permission, been with non-Indian proposed adoptive parents since the child's birth.<sup>51</sup>

The court goes on to justify its position by stating:

[T]he underlying thread that runs throughout the entire Act to the effect that the Act is concerned with the removal of Indian children from an existing Indian family unit and the resultant breakup of the Indian family. In this case Baby Boy L. is only 5/16th Kiowa Indian, has never been removed from an Indian family and so long as the mother is alive to object, would probably never become a part of the Perciado or any other Indian family. While it is true that this Act could have been more clearly and precisely drawn, we are of the opinion that to apply the Act to a factual situation such as the one before us would be to violate the policy and intent of Congress rather than uphold them.<sup>52</sup>

This reasoning could exclude Indian babies that were placed for adoption at birth as they would have never "been removed from an Indian family" in the terms this court uses. This is certainly not the intent behind the Act. If the trial court was opposed to transferring the case to the tribal court, it should have attempted to show good cause why the case should not be transferred.<sup>53</sup>

Most of the cases dealing with whether the Act should apply pertain to the effective date of the Act and the question of what is a subsequent procedure.<sup>54</sup>

In *E.A. v. State*<sup>55</sup> the Alaska Supreme Court held that when parental rights were terminated prior to the effective date of the Act and the children were placed in an adoptive home after the effective date, the Act did not apply. The children's grandmother claimed that the Act should have governed the adoption since the placement occurred after the effective date of the Act. The court stated the placement was merely the completion of the entire administrative process of locating and selecting an adoptive home.

51. *Id.* at 175.

52. *Id.*

53. 25 U.S.C. § 1911(b) (1976).

54. *Id.* § 1923.

55. 623 P.2d 1210 (Alaska 1980).

The Act would be applicable to any future adoptive proceedings, including the final decree of adoption, at which time the grandmother might assert her preference as to the placement according to the court.

By allowing the grandmother a right to be heard at the final adoption hearing, the Alaska court was much more lenient in its interpretation of the Act than most other jurisdictions. For example, in Montana the court refused to follow the Act in the following situation: A mother's parental rights to her three children were terminated, and she asked that the case be transferred to the Chippewa Cree Tribe. The court refused because the petition was filed on March 1, 1979, and the Act did not take effect until May 7, 1979. Two months after the effective date, the hearing was held on the father's parental rights. The court stated that it would not transfer this hearing because it was a continuation of the action initiated by the state previously. The proceeding was not terminated until the parental rights of both parents had been adjudicated.<sup>56</sup>

In *In re Adoption of Baby Nancy*,<sup>57</sup> a case where adoption proceedings were begun prior to the effective date of the Act and the parental consent was later withdrawn, the court again ruled that the Act did not apply. Its reasoning was that "Congress could not have intended any adoption of an Indian child, no matter when completed, to be upset by a subsequent action to vacate."<sup>58</sup>

The Act by its terms applies to "any subsequent proceeding in the same matter or subsequent proceeding affecting the custody or placement of the same child."<sup>59</sup> In the following two cases the courts did not find that the hearing was a subsequent proceeding, even though more than a year had passed since any prior hearings.

In *Birdhead v. Tail*<sup>60</sup> the child was found dependent and neglected on July 29, 1977 and parental rights were terminated at that hearing, but the appellate court vacated the termination order on December 22, 1977. A dispositional hearing was set for October 30, 1978, but continued sixteen months to February 12, 1980, and a decision was not rendered until June 16, 1980. The

56. *In re T.J.D.*, 615 P.2d 212 (Mont. 1980).

57. 616 P.2d 1263 (Wash. App. 1980).

58. *Id.* at 1266.

59. 25 U.S.C. § 1923 (1976).

60. 308 N.W.2d 837 (Neb. 1981).

appellant argued that the dispositional hearing was a subsequent proceeding and thus should have been covered by the Act. The Supreme Court of Nebraska held that it was a single action initiated upon filing of the petition on June 8, 1977.

South Dakota ruled similarly in the case of *In re R.N.*<sup>61</sup> A petition was filed for the termination of parental rights to five children on March 22, 1978. The father's rights were terminated soon thereafter, but the petition for terminating the mother's rights was held in abeyance specifying conditions for the mother to follow. The mother returned to court December 10, 1979 and her parental rights were terminated without the benefit of the Act because, the court stated, the hearing was a continuance rather than a subsequent proceeding.

The Interior and Insular Affairs Committee of the House of Representatives gave the following examples of actions that would be considered subsequent proceedings:

For instance, if the foster care placement of an Indian child was initiated or completed prior to enactment and then, subsequent to enactment, the child was replaced for foster care or an action for termination of parental rights was initiated, or the child was placed in a preadoptive situation, or he was placed for adoption, the provisions of the Act would be applicable to those subsequent actions.<sup>62</sup>

It would appear that the cases cited should have fallen under the Act. By the reasoning used in the cases, the example given by Congress would not have been a subsequent proceeding because it all would have stemmed from the initial adjudication of the child as "dependent and neglected." Especially would this be true if the child was placed in an adoptive home because the court would probably reason that the foster home placement was an intermediate step between the initiation of the action and the culmination at the final adoption.

Another problem arises in deciding if the Act is applicable to cases where there is a dispute about a child's custody among family members. Two cases have dealt with this and have reached opposite conclusions.

The Alaska Supreme Court held in *A.B.M. v. M.H.*<sup>63</sup> that the Act should be followed even if the custody dispute is between

61. 303 N.W.2d 102 (S.D. 1981).

62. 1978 U.S. CODE CONG. & AD. NEWS 7548.

63. 651 P.2d 1170 (Alaska 1982).

members of the same family. In this case A.B.M. had a baby and gave up the baby for adoption to her sister M.H. and her husband. This adoption was vacated on a motion by the Department of Health and Social Services on the grounds that the Department had not made an evaluation of the adoptive home. A.B.M. petitioned the court to return custody to her under 25 U.S.C. § 1916. The court stated that the Act did not control and decided it was in the best interest of the child that custody remain with M.H. On appeal the Native American Rights Fund submitted an amicus curiae brief and argued along with A.B.M. that she was entitled to the safeguards of the Act. The adoptive parents, along with the state of Alaska, filing an amicus curiae brief, reasoned that the Act only applies in the removing of Indian children from their homes by nonfamily public or private agencies. They contended that adoption by members of a child's extended family will not deprive the child of exposure to Indian cultural or social values the Act is designed to safeguard.

The appellate court ruled that the lower court erred by not following the Act. They stated that the protection of the Act was not intended to apply to prospective adoptive parents against whom an adoption decree was vacated when the natural parent is seeking custody.

Montana held in *In re Bertleson*<sup>64</sup> that the Act did not apply because the case involved an internal family dispute between the non-Indian mother and paternal grandparents of the child.

Another case concerning a relative caring for the child is *State ex rel. Juvenile Dep't v. England*.<sup>65</sup> This case dealt with the question of whether the maternal aunt acting as a foster parent was considered an "Indian custodian" and thus entitled to notice prior to termination of foster care placement. An "Indian custodian" as defined by the Act is "any Indian person who has legal custody of an Indian child under tribal law or custom or under state law, or to whom temporary physical care, custody and control has been transferred by the parent of such child."<sup>66</sup> The Oregon court ruled that the aunt was not an Indian custodian because "as a general matter foster parents who are paid for their temporary provision of room and board to children of others have no statutory rights on termination of their status."<sup>67</sup> The

64. 617 P.2d 121 (Mont. 1980).

65. 640 P.2d 608 (Or. 1982).

66. 25 U.S.C. § 1903(b) (1976).

67. *State ex rel. Juvenile Dep't v. England*, 640 P.2d 608, 613 (Or. 1982).



court also pointed out that Indian foster parents are not included in the definition of "Indian custodian."

It is ironic that if the child's aunt was not acting as a foster mother, but the child was still living with her, she would receive notice and have an opportunity to intervene in matters dealing with the child. Indian foster homes are a limited resource in every tribe and decisions such as this do little to encourage the development of more foster homes. Further, the purpose behind the protection of the rights of the child's legal custodian in most provisions of the Act was explained by Congress as follows:

Because of the extended family concept in the Indian community, parents often transfer physical custody of the Indian child to such extended family member on an informal basis, often for extended periods of time and at great distances from the parents. *While such custodian may not have the rights under state law, they do have rights under Indian custom which this bill seeks to protect including the right to protect the parental interests of the parents.*<sup>68</sup>

Cases may also be appealed on the grounds that the state did not transfer jurisdiction to the tribe when requested or for other grounds dealing with the tribe's extraterritorial jurisdiction. In *In re M.E.M.*,<sup>69</sup> the Standing Rock Sioux Indian Tribe requested jurisdiction be transferred from state court in Billings, Montana, to the tribal court. The welfare worker wrote the tribe and informed it that the welfare office would resist transfer of jurisdiction unless the tribal court's plans for disposition of the case were first stated. The case was not transferred and the mother's parental rights were terminated.

The appellate court reversed and remanded the case with instructions that the trial court must first decide the jurisdictional issue. It further directed the lower court that the burden of showing "good cause to the contrary" must be carried by the state with clear and convincing evidence that the best interest of the child would be injured by transfer.

Good cause to the contrary includes but is not limited to the following circumstances:

1. The child's biological parents are unavailable;
2. No Indian custodian has been appointed;

68. 1978 U.S. CODE CONG. & AD. NEWS 7543 (emphasis added).

69. 635 P.2d 1313 (Mont. 1981).

3. The child has little contact with the tribe for a significant period of time;

4. The child has not resided on the reservation for a significant period of time;

5. The child, being over twelve years of age, has indicated opposition to the transfer.<sup>70</sup>

The matter of a tribe's right to intervention and to extraterritorial jurisdiction was discussed in *In re S.Z. & C.Z.*<sup>71</sup> In this case proceedings were held to adjudicate S.Z. and C.Z., two dependent and neglected children. The mother was a member of the Rosebud Sioux Tribe, the father was non-Indian. The parents waived the right to counsel, did not want the matter transferred to tribal court, and consented to foster care placement. The following notice was sent to the tribe. "Enclosed please find 2 Affidavits regarding the above children. These affidavits are notice to you under the Indian Child Welfare Act."

Parental rights were terminated; the parents later petitioned the court to set aside the decree, alleging that the Act was violated due to improper notice given to the tribe. The decree was set aside, the tribe gave notice of intervention, and the parents consented to the transfer of jurisdiction to the tribe. The state surrendered custody of the children to the tribe.

The state appealed, claiming that the notice given complied with the requirements of 25 U.S.C. § 1912(a). The South Dakota Supreme Court ruled that although the notice was "not as artfully drafted as it could have been," it was sufficient and overruled the appellate court. The court appears to have believed that notice was not very important since the parents had objected to a transfer of the case to tribal court. It should be noted that even if a parent objects to transfer, the tribe continues to have a right to intervene. In his dissent in *In re S.Z. & C.Z.*, Justice Henderson states:

We must all remember that, in these ICWA cases, there are the rights of the parents to consider, the rights of the Indian children to consider, and the rights of the tribe which, by Congressional edict, is to protect and preserve the Indian culture and family. *If an Indian child is removed from an Indian home without an opportunity for cultural input by that child's tribe, the entire purpose of the ICWA has been frustrated.*<sup>72</sup>

70. 44 Fed. Reg. 24,000, 24,001 RG(i) (1979).

71. 325 N.W.2d 53 (S.D. 1982).

72. *Id.* at 58 (emphasis added).

The burden of proof requirement in Indian child welfare proceedings is more stringent than in non-Indian proceedings. The standard to be used in termination of parental rights is that of beyond a reasonable doubt continued custody will result in severe or physical harm to the child.<sup>73</sup>

In *In re J.L.H. & P.L.L.H.*,<sup>74</sup> the trial court used the standard of "clear and convincing evidence" in a termination proceeding and the case was reversed. On a second appeal after rehearing, the lower court used the beyond a reasonable doubt standard and the case was upheld.<sup>75</sup>

*In re R.M.M. III*<sup>76</sup> was upheld on appeal after the court determined that the lower court had proved beyond a reasonable doubt that the mother's dependency on alcohol and drugs, her many suicide attempts, and her continual short abandonments of the children caused a serious threat to the children's emotional and physical well-being.

The "clear and convincing" evidence test is to be used in determining if a child should be placed in foster care.<sup>77</sup> In two cases this has been interpreted to mean that at the adjudicatory stage to determine if a child is dependent and neglected, the clear and convincing standard of proof is sufficient. Both cases involved the termination of parental rights at the dispositional hearing at which time the beyond a reasonable doubt standard was used.

One of these cases was *State ex rel. S.R.*<sup>78</sup> In that case both parents were Sioux Indians; the mother's rights were terminated and the father was given sole custody.

In *In re K.A.B.E. & K.B.E.*,<sup>79</sup> both the adjudicatory and dispositional hearings were held on the same day and the court utilized both standards of proof. The clear and convincing standard should not have been used because the court was adjudicating the children with the purpose of terminating parental rights, rather than placing them in foster care. In addition, the court never made a finding that the children were Indian. There was no mention in the case of notifying the tribe concerning its right to intervene or taking any other special measures required under the Act.

73. 25 U.S.C. § 1912(f).

74. 299 N.W.2d 812 (S.D. 1980).

75. *In re J.L.H. & P.L.L.H.*, 316 N.W.2d 650 (S.D. 1982).

76. 316 N.W.2d 538 (Minn. 1982).

77. 25 U.S.C. § 1912(e) (1976).

78. 323 N.W.2d 885 (S.D. 1982).

79. 325 N.W.2d 840 (S.D. 1982).

Another case that completely ignored the Act is *In re Chosa*.<sup>80</sup> The mother's parental rights were terminated when she was eighteen years old and the Minnesota Supreme Court vacated the order on the ground that there was no indication that the mother's parenting skills would not improve if given child-rearing services. The trial court did not take the Act into account even though the baby was eligible for membership in the tribe. The supreme court said it would not consider the applicability of the Act since the order had been vacated.

Another proposition of error often made on appeal is that witnesses are not qualified as experts under the Act. In the case of *In re Fisher*,<sup>81</sup> the father contended the witnesses were not qualified after his parental rights were terminated. Both witnesses were deemed qualified; one was the casework supervisor of an Indian Center foster care program for three years. The other witness was a mental health counselor for a tribe and a caseworker for the Seattle Indian Center for two years.

The Department of Interior Guidelines on qualified witnesses provide:

b. Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:

(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 child-rearing 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 child-rearing practices within the Indian child's tribe.

(iii) A professional person having substantial education and experience in the area of his or her specialty.<sup>82</sup>

Ordinarily when a non-Indian appeals a case that has utilized the Indian Child Welfare Act, he does so on the grounds that the Act is unconstitutional. That was the ground used by the operator of a group foster home who attempted to get permanent custody of several members of an Indian family who had resided at the group home with parental consent and on a tribal order. In *In re D.L.L. & C.L.L.*,<sup>83</sup> the petitioner claimed the denial of ac-

80. 290 N.W.2d 766 (Minn. 1980).

81. 643 P.2d 887 (Wash. Ct. App. 1982).

82. 44 Fed. Reg. 67,593 (1979).

83. 291 N.W.2d 278 (S.D. 1980).

cess to state court was based upon "invidious racial discrimination." The appellate court said this was incorrect, that the denial of access to state court was based solely upon the political status of the parents and children and the quasi-sovereign nature of the tribe. This is a discriminatory classification that is not prohibited by the United States Constitution.<sup>84</sup>

In *In re Angus*,<sup>85</sup> the parents of an Indian child successfully brought a habeas corpus proceeding for the return of their baby from a couple attempting to adopt the child. The adoptive parents appealed the trial court's granting of the habeas corpus proceeding, charging that the Indian Child Welfare Act was unconstitutional as a denial of equal protection under the fifth amendment of the Constitution. The appellate court found the Act constitutional and held the protection of the integrity of Indian families to be a permissible goal that is rationally tied to the fulfillment of Congress' unique guardianship obligation toward the Indians.

### Conclusion

There have not been a great number of appellate cases decided pursuant to the Indian Child Welfare Act. Viewing this fact optimistically could lead one to believe the Act is being followed closely, and that, as a result, there are not many appeals from the decisions of state courts. It is much more likely that there continue to be problems with large numbers of Indian children placed in foster and adoptive homes of non-Indians. Trial judges, attorneys, and social workers, as well as tribal officials, must take a vital interest in this problem and attempt to work together to develop tribal courts and Indian foster and adoptive homes that are willing and able to help their Indian children.

It would be a great step forward if more judges shared the concern for Indian children and their placement expressed by the Montana judge deciding the case of *In re M.E.M.*,<sup>86</sup> who stated:

Each individual is an amalgam of the predominant religious, linguistic, ancestral and educational influences existent in his or her surroundings. Indian people, whether residing on a reservation or not, are immersed in an environment which is in

84. *Id.* at 281.

85. 655 P.2d 208 (Or. Ct. App. 1982).

86. 635 P.2d 1313 (Mont. 1981).

most respects antithetical to their traditions. Furthermore the cultural diversity among Indian tribes is unquestionably profound yet often not fully appreciated or adequately protected in our society. Our Constitution recognizes "the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity." Preservation of Indian culture is undoubtedly threatened and thereby thwarted as the size of any tribal community dwindles. In addition to its artifacts, language and history, the members of a tribe are its culture. Absent the next generation, any culture is lost and necessarily relegated, at best, to anthropological examination and categorization. In applying our state law and the Indian Child Welfare Act we are cognizant of our responsibility to promote and protect the unique Indian cultures of our state for all future generations of Montanans.<sup>87</sup>

87. *Id.* at 1316.

