IMPLEMENTING THE INDIAN CHILD WELFARE ACT

*by Bruce Davies**

Foreword

This paper has been developed pursuant to research fellowships between the Research Institute of the Legal Services Corporation and the author. Much of the preliminary research on Parts II and III were conducted by Alan Parker during the spring and summer of 1980. That portion of the paper and Part IV were subsequently updated by Bruce Davies as new information on court decisions and tribal implementation plans became available. A final report was completed in May 1981 and was subsequently edited extensively for publication. The section of this paper that addressed the peculiar legal status of Alaska Natives has been deleted. Persons interested in Alaska Native child welfare issues may contact the Indian Law Support Center, 1506 Broadway, Boulder, CO 80302, to obtain a complete version of this paper. The author would like to thank the many organizations and individuals who unselfishly shared their experiences, ideas and concerns about the Indian Child Welfare Act. Special thanks go to Jeanette, Kathy, and Gloria, who typed the bulk of this paper, and Craig Dorsay and Vicky Santana, who cogently reviewed its substance. In effect, this paper merely summarizes the efforts of those individuals who have worked so hard to make the Act a reality.

I. INTRODUCTION

The Indian Child Welfare Act (ICWA or Act)[1] was enacted by Congress in October 1978, but most provisions did not become effective until May 8, 1979.[2] Therefore, at the time this paper was written, the ICWA had been in effect for less than two years. However, the early returns have come in; therefore tentative projections can be made and potential problem areas can be identified.

When the Act was first passed, a good deal of confusion and misunderstanding arose. Many people working in non-Indian social services did not understand the unique status of Indian people within the American legal system. Others viewed the Act as a dramatic new law which would usher in a new age for Indian children. Some critics labeled the Act a backward movement in the emerging law of children's rights. These critics feared that the Act was reinstituting the discredited legal concept of "children as chattels" and granting tribes a property interest in children.[3]

In its attempt to balance the competing interests of the states, tribes, parents and children in ensuring that the best interests of Indian children are met when a family fails, the ICWA built upon existing child custody jurisdictional concepts the federal policy of tribal self-determination, recent research results and recommendations of child welfare experts. Novel elements were incorporated into the Act, but within preexisting policy guidelines, so that the Act builds upon the existing understanding of the children's needs.

Many states and tribes have recognized that the ICWA is a positive and necessary piece of legislation, and have moved quickly to implement the Act. The major stumbling blocks at present are lack of money, lack of expertise, and federal regulations which make tribal attempts to implement the Act more difficult.

Part II of this paper deals with preexisting law and the legislative history of the ICWA. Part III summarizes the major provisions of the ICWA and discusses the new policy framework established by the ICWA to resolve problems created under the state juvenile court systems. Parts IV and V describe what has happened since the Act was passed. This division in the paper between Parts IV and V is designed to highlight the fact that the ICWA itself applies to state and tribal governments in different ways. Part IV analyzes the portions of the ICWA which are applicable to state court proceedings, and Part V discusses funding and other problems that tribes face in trying to implement those portions of the Act directly relevant to their activities.

It should be noted that the ICWA lies at an uncomfortable intersection of law, medicine, psychiatry, child development, social work and anthropology. To do justice to many ramifications of the Act, commentators should have an in-depth

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1. 25 U.S.C. §§ 1901 *et seq.*
2. 25 U.S.C. § 1923.
3. For a discussion of both points of view, see Fischler, *Protecting American Indian Children* and Blanchard & Barsh, *What Is Best for Tribal Children, A Response to Fischler*, SOC. WORK (Sept. 1980).

knowledge of all those disciplines. The author's expertise pertains solely to the legal aspects of the Act. Therefore, the other areas of concern must be addressed by experts in those disciplines.

II. EVENTS LEADING TO PASSAGE OF THE ICWA

Early Supreme Court cases recognized the unique status of Indian tribes as semisovereign nations dependent upon the United States for protection.[4] Under the terms of this special relationship, tribes retained all powers of self-government not taken away by the federal government.[5]

Although the federal government often ruled Indian tribes in an autocratic manner during the late 19th and early 20th centuries by ignoring tribal sovereignty, the Indian Reorganization Act of 1934 reaffirmed the fact that tribes retained extensive powers of internal self-government.[6] A Solicitor's Opinion of October 25, 1934, interpreting a provision of the Indian Reorganization Act, 25 U.S.C. § 476, held that Indian tribes had the power

> 1. To define the conditions of membership within the tribe, to prescribe rules for adoption, to classify the members of the tribe and to grant or withhold the right of tribal suffrage, and to make all other necessary rules and regulations governing the membership of the tribe so far as may be consistent with existing acts of Congress governing the enrollment and property rights of members.
> 2. To regulate the domestic relations of its members.[7]

Subsequent to passage of the Indian Reorganization Act, Felix Cohen noted that the three fundamental principles developed by courts in determining the powers of Indian tribes are as follows:

> (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and in substance terminates the external powers of sovereignty of the tribe, e.g., its powers to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but save as thus expressly qualified, tribes have full powers of internal duly constituted organs of government.[8]

Early attempts by states to assert jurisdiction over Indian tribes within the reservation boundaries were rebuffed by the Supreme Court if the tribe's reservation had not been disestablished.[9] This was due in large part to the courts' interpretation of jurisdiction as a territorial concept closely linked with the concept of sovereignty.[10] This approach served to protect Indian children from state court proceedings during the period when the large majority of Indians lived on reservations, and states had not enacted child abuse and neglect legislation.

When the tribal land base was broken up under the General Allotment Act, and intercourse between Indians and non-Indians increased, the territorial concept of jurisdiction gave way to a more flexible doctrine.[11] This new approach, articulated in *Williams v. Lee*,[12] looked beyond "platonic concepts of sovereignty" to the applicable treaty and statutory law. The test established by *Williams v. Lee*[13] permitted states to intrude upon the territorial jurisdiction of Indian tribes only so long as the state action did not significantly infringe upon tribal self-government. According to one commentator, a three-tiered jurisdictional system developed on Indian reservations in response to *Williams v. Lee*. In this three-tiered system the states had jurisdiction over non-Indian versus non-Indian actions, the federal government had jurisdiction over large areas of Indian versus non-Indian relations, and tribes retained jurisdiction over intra-tribal relations.[14]

As these new jurisdictional tests were being refined, other unrelated social developments were bringing Indian children into state courts. Until the 1940's, social work standards had discouraged interracial adoptions. Instead, under the "matching" concept developed by organizations such as the Child Welfare League of America, children were placed in adoptive homes which reflected the racial, cultural, religious and intellectual characteristics of the child.[15] Transracial adoptions began in the 1940's and reached a high point in the 1950's and 1960's, declining in the 1970's when Indian and black organizations began to attack the practice. Transracial adoption apparently developed because the dropping white birth rate resulted in an increasing number of white couples wanting to adopt an ever-diminishing number of adoptable white babies. Apologists for transracial adoption argued that it was better to place minority children in white homes than to leave them in institutions when there were not enough minority adoptive homes willing to take unwanted minority children. Critics of interracial adoption argued that adoption agencies were responding to the needs of their white clientele rather than considering the needs of the children. Other critics charged that placing these children in white homes would effectively rob the children of their heritage, and that adoption agencies were not trying hard enough to find minority homes for the placement of minority children.

4. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).
5. United States v. Winans, 198 U.S. 371 (1905).
6. 25 U.S.C. § 476.
7. *Powers of Indian Tribes*, 55 I.D. 14.
8. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (1942).
9. *See* Kagama v. United States, 118 U.S. 375 (1886).
10. *See* White v. Califano, 437 F. Supp. 543 (D.S.D. 1977).
11. *Id.*
12. Williams v. Lee, 358 U.S. 217 (1959).
13. *Id.*
14. Collins, *The Implied Limits of Tribal Jurisdiction*, 54 WASH. L. REV. 479 (1979).
15. R. SIMON & H. ALTSTEIN, TRANSRACIAL ADOPTION, Chapter 1 (1977).

As part of its termination policy, the Bureau of Indian Affairs (BIA) began to encourage Indian families to relocate in off-reservation urban areas in the 1950's; this was meant to encourage the rapid assimilation of Indians into the mainstream culture. In a related move, the BIA set up an Indian Adoption Project after a 1957 study found that nearly 1,000 Indian children living either in institutions or foster care were available for adoption.[16] The Project, which lasted from September of 1958 to December of 1967, was under the joint sponsorship of the BIA and the Child Welfare League of America and was initially designed to promote both conventional and transracial adoptions nationwide. By 1968, when most of its activities were subsumed by the Adoption Resource Exchange of North America (ARENA), the Project had placed 395 children in 11 states.[17]

Although the proponents of transracial adoption asserted that such action was beneficial to Indian children, there were no studies, statistical or otherwise, regarding Indian adoption until 1972 when David Fanshell's *Far From the Reservation* was published.[18] The only other major study to apply social science methods to Indian transracial adoptions was *Transracial Adoption* by R. Simon and H. Altstein, published in 1977.[19] Unfortunately, both of these studies dealt only with young children who had been placed in adoptive homes for less than five years. No long-range studies of the cultural identification of these children in later years of their lives have been made.

In spite of the lack of social science justification for placing Indian children in non-Indian homes, the practice accelerated in the late 1960's and the 1970's due to another social development. Children involved in transracial adoptions up until the mid-1960's were apparently mostly children who had been abandoned, voluntarily placed for adoption, or whose parents were dead. Large-scale intervention into family affairs did not occur. States had exercised their *parens patriae* and police powers to remove children from dissolute or depraved environments. It was not until 1961, when Dr. Helfe presented medical evidence that many children seen by doctors were suffering from nonaccidental injuries inflicted by their parents (the Battered Child Syndrome), that states began to seriously address the problem of child abuse and neglect. Consequently, laws requiring the reporting of suspected cases of child abuse were passed by most states between 1963 and 1967,[20] and a social problem of immense proportions was subsequently revealed. Over 600,000 children have been reported victims of abuse or neglect annually since the laws were passed.[21]

The impact of the new child abuse and neglect legislation fell disproportionately on the poor. Indian families were and are still seriously affected, and a growing number of Indian children are subjected to state abuse-and-neglect proceedings involving removal from the home and termination of parental rights. It is this problem which the ICWA seeks to reverse.

After 1950 many cases involving Indian children began to appear in state courts. Cases were often appealed to state supreme courts by Indian parents struggling to keep their children. By 1978 a broad jurisdictional framework for the adjudication of Indian child custody issues had been established. The states often argued to no avail that Indians going beyond reservation boundaries were subject to state laws.[22] This result occurred because the courts did not take a strict territorial approach, but utilized a conflict of law approach and thereby recognized the asserted interest of the tribe in making jurisdictional determinations even when an Indian family was off-reservation at the time the action was brought by the state.

The Restatement Second, Conflict of Laws, § 79, outlined the complex nature of jurisdiction in child custody cases in the modern highly mobile American society. The problem of deciding which court should decide a child custody issue is heightened by the fact that a court's jurisdiction over a child custody decree is continuing while the decree itself is not res judicata but may be modified by another court. The Restatement notes three separate bases for jurisdiction: (1) domicile, (2) presence in the state, and (3) personal jurisdiction. Under these bases, there are situations in which three different states can assert concurrent jurisdiction; because of this problem of concurrent jurisdiction, a traditional conflict of law analysis when determining jurisdiction in child custody cases is inadequate. Statutory guidelines providing a resolution to this problem were needed desperately.

A series of decisions reflects the development of a jurisdictional framework which gave tribes the power to adjudicate family matters of tribe members. *Fisher v. District Court*[23] held that tribal courts have exclusive jurisdiction over child custody and domestic relations as part of the inherent retained sovereignty of tribal governments. Civil or criminal jurisdiction over the reservation in question had not been ceded to the state.[24] Other cases held that tribal courts have exclusive jurisdiction over custody matters involving Indian children who are off-reservation but maintain their domicile on-reservation or have close contacts with the reservation.[25] When a child is located off-reservation and the facts giving rise to the child custody action occurred off-reservation, states have asserted jurisdiction while at the same time recognizing that the tribes have concurrent jurisdiction over the proceeding.[26] This apparent respect accorded tribal decisions in the area of family matters arises from the recognition that family disputes involving tribal members domiciled on-reservation affect essential

16. D. FANSHELL, FAR FROM THE RESERVATION (1972).
17. R. SIMON & H. ALTSTEIN, *supra* note 15, at 57.
18. D. FANSHELL, *supra* note 16.
19. R. SIMON & H. ALTSTEIN, *supra* note 15.
20. D. BROSS, ADVOCACY FOR THE LEGAL INTERESTS OF CHILDREN 106 (1980).
21. *Id.* at 93.
22. Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).
23. Fisher v. District Court, 424 U.S. 382 (1976).
24. *See also In re* Lelah-Pu Ka-Chee, 98 F. 429 (N.D. Iowa 1899); State v. Superior Court, 57 Wash. 2d 818, 356 P.2d 985 (1960); *In re* Colwash, 57 Wash. 2d 196, 365 P.2d 998 (1960).
25. Wisconsin Potawatomies v. Houston, 393 F. Supp. 719 (W.D. Mich. 1973); Wakefield v. Little Light, 276 Md. 333, 347 A.2d 228 (Sup. Ct. 1975); *In re* Buehl, 87 Wash. 2d 649, 555 P.2d 1334 (Wash. Sup. Ct. 1976); *Accord In re* Greybull, 23 Or. App. 674, 543 P.2d 1079 (1975).
26. *In re* Doe, 89 N.M. 606, 555 P.2d 906 (Sup. Ct. 1976); *In re* Duryea, 115 Ariz. 86, 563 P.2d 885 (Sup. Ct. 1977); *In re* Greybull, 23 Or. App. 674, 543 P.2d 1079 (1975).

tribal relations, an area in which states do not possess jurisdictional authority and may not infringe on the tribal right of self-government.[27]

Courts also recognize that Congress can preempt state jurisdiction over Indian child custody and domestic relations matters,[28] and when determining which court has jurisdiction over child custody matters, off-reservation, state, parental and tribal interests must be balanced.[29] However, when Indians voluntarily submit their domestic relations questions to state courts, the state courts generally find that they have sufficient concurrent jurisdiction, unless Congress has preempted state jurisdiction. The state court rationale is that states cannot constitutionally deny access to state courts to Indian residents within state boundaries.[30]

In spite of the developing jurisdictional framework which gave credence to the right of tribes to their children and the right of Indian children to their own heritage, state courts continued to adjudicate a growing number of Indian children as dependent or neglected and to place these children in non-Indian foster homes, often in the face of criticism that the court was applying biased cultural standards.[31] Many of these Indian children were placed in non-Indian foster homes because many states believed that they could not license on-reservation foster homes because state courts did not have jurisdiction over reservation areas. To qualify for federal foster care support payments, foster homes were required to be licensed by the states. Therefore, Indian families living on reservations were forced to assume the entire financial cost of raising a child if they wished to act as foster parents of a child of a relative or other Indian. In contrast, a non-Indian family taking the same child as a foster child would qualify for monthly payments to cover the cost of raising the child.[32]

Congressional hearings in 1974 first revealed many of the basic facts concerning Indian child custody matters. Hearings on foster care and adoptive placement of Indian children were conducted in 1975 and 1976 by the American Indian Policy Review Committee.[33] A publication of the Association of American Indian Affairs released in 1977, *The Destruction of Indian Families*, heightened public concern, and hearings in 1977 before the Senate Select Committee on Indian Affairs and the Committee on Interior and Insular Affairs, House of Representatives, 95th Congress, refined the outlines of the ICWA.[34] The proposed bill, S. 1214, was completely rewritten twice on the Senate side and twice again in the House after it had been passed by the Senate.[35]

III. THE ICWA

A. Summary of the Major Provisions of the ICWA

The Act, at section 1902, makes clear that "the underlying principle of the bill is in the best interests of the child."[36] The ICWA was also designed 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."[37] This statement reflects the concern of many experts in the field that stricter limits be placed upon the states' exercise of *parens patriae* power over families.[38]

These principles are reflected in the Act's provisions. In summary form, the major provisions of the Act

1. Provide for exclusive Indian tribal jurisdiction over child welfare proceedings involving Indian children who reside or are domiciled on Indian reservations not otherwise subject to state jurisdiction by existing federal law, and authorize the transfer of proceedings involving Indian children not domiciled or resident on reservations from state to tribal courts.[39]
2. Establish a right of intervention in state court foster care and termination of parental rights proceedings on the part of an Indian child's tribe or Indian custodian.[40]
3. Require that full faith and credit be accorded to tribal laws, records and judicial proceedings applicable to Indian child custody proceedings by federal and state courts.[41]
4. Require in any involuntary proceeding in a state court when there is actual or constructive notice

27. Fisher v. District Court, *supra* note 23; Wakefield v. Little Light, *supra* note 25; Williams v. Lee, *supra* note 12.
28. State *ex rel.* Iron Bear v. District Court of the 15th Judicial District, 512 P.2d 1292 (Mont. 1973); Bad Horse v. Bad Horse, 517 P.2d 893 (Mont. 1974).
29. *In re* Cantrell, 159 Mont. 66, 495 P.2d 179 (1972); State *ex rel.* Cobell v. Cobell, 503 F.2d 790 (9th Cir. 1974).
30. Iron Bear v. District Court, 512 P.2d 1292 (Mont. 1973); Vermillion v. Spotted Elk, 85 N.W.2d 432 (N.D. 1957); Phillips v. Reynolds, 113 N.W. 234 (Neb. 1907); Bonnet v. Seekins, 243 P.2d 317 (Mont. 1952).
31. *In re* Duryea, *supra* note 26 (Dissent of Justice Gordon); Brokenleg v. Butts, 559 S.W.2d 859 (Tex. Civ. App. 1978), *cert. denied*, 47 U.S.L.W. 3814 (1978); Carle v. Carle, 503 P.2d 1050 (Alaska 1972).
32. *See* UNIVERSITY OF DENVER CENTER FOR SOCIAL RESEARCH AND DEVELOPMENT, LEGAL AND JURISDICTIONAL PROBLEMS IN THE DELIVERY OF SRS CHILD WELFARE SERVICES ON INDIAN RESERVATIONS (1975).
33. *See* H.R. REP. NO. 1386, 95th Cong., 2d Sess. 27-28 (1977).
34. *Problems That American Indian Families Face in Raising Their Children and How These Problems Are Affected by Federal Action or Inaction*, April 8-9, 1974: Hearings Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Consular Affairs, 93d Cong., 2d Sess. *See The Indian Child Welfare Act of 1977: Hearings Before the United States Senate Select Committee on Indian Affairs on S. 1214*, 95th Cong., 1st Sess.
35. *See* H.R. REP. NO. 1386, *supra* note 33.
36. H.R. REP. NO. 1386, *supra* note 33, at 19.
37. *Id.*
38. *See* Wald, *State Intervention on Behalf of "Neglected Children": Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care and Termination of Parental Rights*, 28 STAN. L. REV. 625 (1976); GOLDSTEIN, FREUD, SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD (N.Y. Free Press 1979).
39. 25 U.S.C. §§ 1911(a) and (b).
40. 25 U.S.C. § 1911(c).
41. 25 U.S.C. § 1911(d).

that an Indian child is involved that notice be provided to the parent or Indian custodian and tribe or that notice be provided to the Secretary of the Interior when the custodian or tribe is not known.[42]

5. Provide for a right to court-appointed counsel for indigent parents in any child removal, placement or termination of parental rights proceedings.[43]
6. Establish minimum federal evidentiary standards and procedures for state court proceedings involving the involuntary removal of Indian children from their homes or the termination of parental rights.[44]
7. Establish federal standards governing voluntary foster care placements, relinquishments or terminations of parental rights and adoptive placements.[45]
8. Establish placement preferences and standards governing foster care, preadoptive and adoptive placements of Indian children.[46]
9. Provide for a system of recordkeeping on the part of states placing Indian children, and authorize access to such records by Indian children when they reach the age of 18 years in the case of adoptive placements for the purpose of determining tribal affiliation and related rights.[47]
10. Authorize the Secretary of the Interior to award grants to Indian tribes and organizations for the purposes of establishing and operating Indian child and family service programs and preparing and implementing child welfare codes.[48]
11. Authorize the use of Interior Department funds as nonfederal matching shares in connection with HEW-administered Social Security Act funds, and provide that the licensing or approval of foster homes or institutions by an Indian tribe shall be deemed the equivalent to the licensing or approval by a state for purposes of qualifying for assistance under federally assisted programs.[49]

B. Policies of the ICWA

The policies of the ICWA, 25 U.S.C. §§ 1901 and 1902, were subjected to criticism by both the BIA and the Department of Justice,[50] but survived to be incorporated into the final bill that passed Congress. Among the major policy statements of the Act are

> (1) That Congress, through statutes, treaties and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources.
>
> (2) That there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or eligible for membership in an Indian tribe.

The recognition of a trust relationship between Indian children and the federal government significantly expands the BIA's historical position on the limitations of the federal trust responsibility to Indians. Traditionally, the BIA has argued that the trust responsibility is limited to its property and is restricted to land areas on or near established Indian reservations. In contrast, the ICWA applies in both on-reservation and off-reservation settings and addresses all types of child custody determinations.

The Department of Justice warned:

> The use of such language has been relied upon by at least one court to hold the federal government responsible for the financial support of Indians even though Congress has not appropriated any money for such purposes.[51]

To date, however, no lawsuits attempting to enforce this trust have been instituted. The scope of judicial review and relief afforded by this declaration of trust therefore has not yet been determined. The extent of potential federal liability under this declaration also has not been ascertained.

ICWA policy is intended to encourage the placement of children in homes which will reflect the unique values of Indian culture. This policy reflects the concern that state practices which appear to be neutral in fact serve to suppress cultural and religious practices which diverge from mainstream values. The balance established by the Act reflects the concern that state powers not be used to oppress cultural minorities even if the state asserts that its policy is "beneficial" to those injured.[52]

The final policy objective of the ICWA is to provide assistance to Indian tribes in the operation of child and family service programs. This incorporates the recent more generalized federal policy of encouraging Indian tribes to reassume tribal self-government powers to the greatest extent feasible.[53]

IV. STATE IMPLEMENTATION

A. Application of ICWA Guidelines to State Courts: The ICWA Is Upheld as Constitutional

The ICWA standards for transfer of jurisdiction, removal of children from their families and placement of children in adoptive or foster homes were designed to apply to state court proceedings. Federal officials commenting on the proposed Act

42. 25 U.S.C. § 1911(a).
43. 25 U.S.C. § 1912(b).
44. 25 U.S.C. §§ 1912(c)-(f).
45. 25 U.S.C. § 1913.
46. 25 U.S.C. §§ 1915 and 1916.
47. 25 U.S.C. §§ 1915(e), 1917, and 1951.
48. 25 U.S.C. § 1931(a).
49. 25 U.S.C. § 1931(b).
50. H. REP. No. 1386, *supra* note 33, at 30-41..
51. H. REP. No. 1386, *supra* note 33. *See also* White v. Califano, *supra* note 10.
52. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972).
53. *See* The Indian Self-Determination and Educational Assistance Act of 1975, 88 Stat. 2203.

voiced concern over whether this sort of legislation was within the power of the federal government. Their concern was based on several constitutional considerations and on the well-established proposition that domestic relations matters are primarily the concern of states.[54]

A long discussion in the legislative history of the ICWA concluded that the plenary power of Congress over Indian affairs coupled with the Supremacy Clause of the Constitution granted the Congress authority to legislate in this area. Congress also noted that "the provisions of the bill do not oust the state from the exercise of its legitimate police powers in regulating domestic relations."[55] Instead, the ICWA established certain substantive federal rights which state courts must recognize and enforce in child custody proceedings, much as they must do for treaty or hunting or fishing rights when enforcing state hunting and fishing laws.

In their concern not to intrude upon states' rights under the standard established by *National League of Cities v. Usery*,[56] BIA officials, over the protests of tribal officials, narrowly construed their authority to establish binding ICWA regulatory standards for state courts.[57] The BIA *Guidelines for State Courts in Indian Child Custody Proceedings* were published November 26, 1979.[58] The BIA noted:

> Although the rulemaking procedures of the Administrative Procedure Act have been followed in developing these guidelines, they are not published as regulations because they are not intended to have binding legislative effect.[59]

The drafters of the Guidelines stated that the Secretary of the Interior had primary responsibility for interpreting some provisions of the Act (e.g., 25 U.S.C. § 1918), but:

> Primary responsibility for interpreting other language in the Act, however, rests with the Courts that decide Indian custody cases. For example, the legislative history of the Act states explicitly that the use of the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child.[60]

The position of the BIA, therefore, was that the Guidelines, as administrative interpretations of statutory terms, are to be given important but not controlling influence by state courts.[61] In spite of the federal solicitude expressed in the ICWA for state court powers, preliminary attempts to implement the Act were resisted in some states as unconstitutional intrusions upon state powers. As a result, constitutional questions relating to the ICWA were raised shortly after passage of the Act and resolved by at least two state courts.

Many of the constitutional concerns expressed by the Department of Justice[62] were raised in *In re the Guardianship of D.L.L. and C.L.L.*,[63] including the following: (1) whether the Act violates the tenth amendment by preempting existing state jurisdiction over Indians who are not reservation residents in the child welfare area, and by requiring state courts to apply federal procedures and standards of evidence in the adjudication and disposition of child custody proceedings involving Indian children; and (2) whether the Act violates the equal protection clause by denying access to state courts to Indian children and their parents in certain instances. The Supreme Court of South Dakota dismissed these arguments and found that the ICWA did not violate the tenth amendment and did not constitute invidious racial discrimination so as to deny the children due process and equal protection under the fifth amendment.

In addition to the questions raised in the South Dakota case, an unreported Oklahoma case, *In re M.T.*,[64] raised the issue of whether the Act violates the due process and equal protection clauses of the United States Constitution by denying Indian children rights equal to those of their parents (1) to object to petitions to transfer proceedings from state to tribal court and (2) to be represented by counsel in any case in which the court determines indigency. The case was argued on January 17, 1980, before a specially appointed three-judge appeals court which ruled orally after argument that it found no constitutional defects in the ICWA.

Although constitutional issues may arise in other states, the record to date seems to indicate that the ICWA will survive constitutional challenges. In fact, most states have accepted the constitutionality of the Act, and after an initial period of confusion, moved quickly to implement the provisions which apply to state court proceedings.

The recent Supreme Court holding in *Washington Fishing Vessel Assn.*[65] that the United States Congress can force a state agency, in order to actively support Indian treaty fishing rights, to change its regulations even if state law does not give Congress that authority adds support for congressional power to exercise regulatory supervision over state Indian child custody proceedings.

B. When Does the ICWA Apply?

Several state courts have addressed or are now considering the issue of when the ICWA applies. The Act, at section 1923, provides that the ICWA provisions affecting state court proceedings would not

54. DeSylva v. Ballentine, 351 U.S. 570 (1956); Labine v. Vincent, 401 U.S. 532 (1971). *See also* Popovici v. Alder, 280 U.S. 379 (1930); *Ex Parte* Burrus, 136 U.S. 586 (1890).
55. H.R. Rep. No. 1386, *supra* note 33, at 18.
56. National League of Cities v. Usery, 426 U.S. 833 (1976).
57. 44 Fed. Reg. 67584-85 (Nov. 26, 1979); 44 Fed. Reg. 45092-45097 (July 31, 1979).
58. BIA, *Guidelines for State Courts in Indian Child Custody Proceedings*, 44 Fed. Reg. 67584 (Nov. 26, 1979).
59. *Id.*
60. S. Rep. No. 95-597, 95th Cong., 1st Sess. 17 (1977).
61. *See* Batterton v. Francis, 432 U.S. 416, 424-25 (1977).
62. H.R. Rep. No. 1386, *supra* note 33, at 35-41.
63. *In re* the Guardianship of D.L.L. and C.L.L., 291 N.W.2d 278 (S.D. 1980).
64. *In re* M.T., No. JF-79-1121 (Okla. Mar. 6, 1980).
65. Washington Fishing Vessel Ass'n, 443 U.S. 658 (1979).

> . . . 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 child* (emphasis added).

The question of the applicability of the ICWA to new proceedings brought after May 8, 1979, is clear, and as time passes, the issue of proceedings that took place or started before this date will disappear. However, court interpretation of what is a "subsequent proceeding" will have an impact on the future disposition of the large number of children over whom the states had asserted jurisdiction prior to May 8, 1979. Many of these children may have undergone long-term foster care and lived under state custody for years. Therefore, the decision of whether any new action concerning their placements constitutes a "subsequent proceeding" subject to the ICWA will significantly affect such actions.

The legislative history states that the purpose of this section is to provide "for the orderly phasing in of the effect of the provisions of this title" and that "it is intended that the provisions would apply to any discrete phase of the same matter or with respect to the same child initiated after enactment."[66]

Some state officials, in attempting to get around the ICWA, have tried to limit the construction of "subsequent proceedings" by characterizing all steps from initiation of a petition to termination of parental rights as one proceeding. The Montana Supreme Court in *In re T.J.D.*[67] took this approach by stating:

> The State filed its petition for permanent custody on March 1, 1979, and because the Act did not go into effect until May 7, 1979, it is inapplicable to the State court proceedings.
>
> The parents make the additional argument that under the Act, the July 6 hearing on the father's right to custody of the infant son was a "subsequent proceeding in the same matter" and thus falls within the terms of the Act. The definition of child-custody proceeding under the Act includes "any action resulting in termination of the parent-child relationship. . . ." 25 U.S.C. § 1903(1)(ii). The July 6 proceeding, however, was not a separate proceeding under the action initiated by the State on February 24, 1979. This action or proceeding was not terminated until the parental rights of both parents had been adjudicated. It is clear, therefore, that the Indian Child Welfare Act did not apply to these proceedings.[68]

Washington State ruled, in *In re Matter of Adoption of Baby Nancy*,[69] that when a final adoption hearing was held before the effective date, a subsequent action to vacate the adoption was not a subsequent proceeding under the ICWA. This case indicates that Washington State courts will not review any adoptions of Indian children which occurred prior to the effective date of the ICWA to see if they conformed with the Act. The Washington State court, in arriving at its decision, noted its concern that

> if 25 U.S.C. § 1914 (Supp. 1979) applied to this case, all adoptions of Indian children could be upset even though they have been final for years. This could not have been the intent of Congress.

The Alaska Supreme Court, in *In re C.L.T.*,[70] noted that the ICWA does not apply to a proceeding to terminate parental rights when judgment was entered prior to the effective date of the ICWA, but did not decide the question of whether the Act would be applicable to any further proceedings. A more recent Alaska Supreme Court case has held that the ICWA did not apply to a proceeding to terminate parental rights initiated before the effective date, but the ICWA would apply to a subsequent hearing on preadoptive placement of a child.[71]

The Minnesota Supreme Court, in *In re Welfare of C.*,[72] vacated a petition to terminate parental rights which had been filed before the effective date of the ICWA. The court stated:

> Having determined to vacate the termination order, we need not consider the question of the applicability of the Indian Child Welfare Act of 1978 to this case. We do observe that any further proceedings for termination will be subject to the provisions of the Act which require that termination of parental rights of Indian children must be supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

The position of the author of this article is that in interpreting "subsequent proceeding," the courts should consider the policy objectives of the Act and the fact that the ICWA was intended to benefit Indian tribes. This approach brings several canons of statutory construction into effect. First, since the statute is remedial in nature, it should be liberally construed to achieve its purpose.[73] The liberal construction required of remedial statutes is buttressed by the Indian canon of construction that "statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful

66. H.R. REP. NO. 1386, *supra* note 33, at 25-26.
67. *In re* T.J.D., 615 P.2d 212 (Mont. 1980).
68. *Id.* at 217.
69. *In re* Adoption of Baby Nancy, 616 P.2d 1263 (Wash. App. 1980).
70. *In re* C.L.T., 597 P.2d 518 (Alaska 1977).
71. E.A. v. The State of Alaska, *In re* C.A. and V.A. (Opinion No. 2289, Feb. 13, 1981).
72. *In re* Welfare of C., 290 N.W.2d 766 (Minn. 1980).
73. *See, e.g.*, Russell v. State Acc. Ins. Fund, 563 P.2d 738 (Or. App. 1977), *reversed on other grounds*, 574 P.2d 653, *on remand* 576 P.2d 376 (1978); *In re* Adoption of Anderson, 50 N.W.2d 278 (Minn. 1952); *Guidelines for State Courts, supra* note 58, at 67585-86.

expressions being resolved in favor of the Indians.''[74] Since the underlying policy of the Act is to ensure that the best interests of the child are served, the Act should be interpreted to ensure that Indian children have the stable and permanent home and cultural environment necessary for normal development.[75] Another policy objective of the Act is to promote the stability and security of Indian families.[76] Therefore, if a child is still living with an Indian family, the Act should be read to apply to any proceeding that occurs after the effective date, even though a petition to terminate may have been filed before the effective date of the ICWA, and then it should not permit the state to avoid the ICWA provisions when it tries to remove the child. The ICWA should apply whenever the state attempts to upset the child's current living arrangements when such state action would disrupt the permanency of the child's placement and undermine the stability of Indian families.[77]

In domestic relations cases, state courts have recognized that the continuing nature of child custody questions requires that the term ''proceeding'' be limited to each discrete decisional phase of the action in order to protect the rights of the parties. In *Jackson v. Jackson,*[78] a divorce was granted and appealed by the defendant. While the appeal was in progress, the plaintiff filed a petition for alimony and attorney's fees pending the appeal. The defendant requested a change of venue on this petition, asserting bias on the part of the judge. The plaintiff argued that the petition was filed in the original divorce proceeding and was a continuation of that proceeding, so that defendant's motion for change of venue was too late. The court noted:

> (T)he proceeding grows out of the suit for a divorce, and the decree therein rendered, yet it is nonetheless the demand of a right expressly awarded and given by the statute, . . .

Because it was for the purpose of redressing a supposed injury or for the establishment of a separate right expressly provided for by statute, the court held that it could be considered a separate proceeding.[79]

The internal sense of the legislative framework established by the ICWA indicates that the Act should apply to each discrete decisional phase of a state court proceeding which may alter the child's living arrangement or existing custody rights. In 25 U.S.C. § 1903, a child custody proceeding is defined as 1) foster care placement, 2) termination of parental rights, 3) preadoptive placement, and 4) adoptive placement. 25 U.S.C. § 1912(e) provides that foster care placement may be ordered only upon clear and convincing evidence that continued custody by the parent would result in serious emotional and physical damage to the child. The Act, at section 1912(f), provides that evidence beyond a reasonable doubt must be shown in the foster care placement proceeding. In 25 U.S.C. §§ 1915(a) and (b), different preference standards for foster care or preadoptive placements and adoptive placements were established. Under the ICWA, then, each of these proceedings is considered a discrete decisional phase with differing standards of proof.

Therefore, if a petition to terminate parental rights is filed before the effective date of the Act and the child is removed from the home, the Act might not apply to the termination phase of the proceeding but should apply to the dispositional phase. Even if the child were not moved from the original foster home, a disposition which arranged for that foster care to become a preadoptive placement would injure the tribe's right to determine placement under the ICWA, and the extended family's right to be considered for placement before a non-Indian family obtains custody of the child. The question of whether the Act applies to the dispositional phase of a proceeding initiated before the effective date is being considered in *Wardship of W.,*[80] which is currently being argued in the State Court of Appeals of Indiana, Third District.

C. When Does the ICWA Not Apply?

Once it has been established that state courts must recognize the substantive and procedural standards of the ICWA in general, a preliminary question faced by many courts is whether the Act applies to a particular child or a particular proceeding. The Act does not apply to all children who may be considered Indian nor does it apply to all proceedings involving children who qualify as Indians. The various issues raised within this context all arise from situations in which one of the parties to a proceeding is claiming the protections of the Act while the state or an opposing party is trying to construe the Act narrowly so as to avoid application of the ICWA.

One study has estimated that the Indian child proceedings occurring most frequently involve

> 1. intrafamily disputes over custody of a child that generally arise as a result of a divorce
>
> 2. prosecutions of juveniles for status or criminal offenses
>
> 3. proceedings for the involuntary removal of children from their caretakers under child abuse or neglect statutes[81]

All of the provisions of the ICWA apply only to child abuse and neglect proceedings. In other areas, the ICWA must be closely read to determine if it can be found to apply. The Act at section 1903(1) states that a child custody proceeding

74. Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976); Bryan v. Itasca County, 426 U.S. 373 (1976).
75. J. GOLDSTEIN, A. FREUD and A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (N.Y. Free Press 1973); and BEFORE THE BEST INTERESTS OF THE CHILD, *supra* note 38.
76. 25 U.S. § 1902.
77. *See e.g.*, 25 U.S.C. § 1916(b).
78. Jackson v. Jackson, 14 N.E.2d 276 (App. Ct. Ill. 1938).
79. *See also* Des Chatelets v. Des Chatelets, 11 N.E.2d 13 (App. Ct. Ill. 1937).
80. Wardship of W., No. 3-880 A 232 (Ind. App. 1981).
81. J. SWENSON, and G. ROSENTHAL, WARM SPRINGS, A CASE STUDY APPROACH TO RECOGNIZING THE STRENGTHS OF AMERICAN INDIAN AND ALASKA NATIVE FAMILIES (Wash. D.C., American Academy of Child Psychiatry 1980).

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

The Senate Report on the Act stated that the ICWA

> is intended to include proceedings against juveniles which may lead to foster care and proceedings against status offenders, i.e., juveniles who have not committed any act which would be a criminal act if they were an adult, such as truancy. It shall also include juveniles charged with minor misdemeanant behavior who would be covered by the prohibitions against incarceration in secure facilities by the Juvenile Justice and Delinquent Prevention Act of 1974 (Public Law 93-415, 41 U.S.C. 5601 et seq.) It is not intended that the definition of "child placement" in this subsection apply to juveniles who have committed serious offenses which are a threat to the public.[82]

A recent Oklahoma case, *C.M.G. v. State*,[83] held that a state court did not have jurisdiction to prosecute crimes committed by a juvenile within Indian country.

At least two states have held that the ICWA does not apply to intrafamily disputes. In *Malaterre v. Malaterre*,[84] the court held that the ICWA does not apply to the award of child custody as a result of a divorce proceeding. In *Application of Bertelson*,[85] the court held that the Act did not apply to a child custody dispute involving a non-Indian mother and Indian paternal grandparents. However, it could be argued that when a noncustodial parent removes a child from a custodial parent, the Act's improper removal provision, 25 U.S.C. § 1919, would apply. This provision in conjunction with 25 U.S.C. § 1911(D), which grants full faith and credit to tribal court proceedings, acts to grant tribal court orders the same status given state court orders under the Uniform Child Custody Jurisdiction Act. Therefore, if the person attempting to obtain state jurisdiction over an intrafamily custody dispute improperly removed the child from its custodian, the state court could not invoke its jurisdiction and would have to dismiss the action unless an emergency situation existed.[86] The legislative history explains that 25 U.S.C. § 1919

> established a "clean hands" doctrine with respect to petitions in State court for the custody of an Indian child by a person who improperly has such child in physical custody. It is aimed at those persons who improperly secure or improperly retain custody of the child without the consent of the parent or Indian custodian and without the sanction of law. It is intended to bar such person from taking advantage of their wrongful conduct in a subsequent petition for custody. The child is to be returned to the parent or Indian custodian by the court unless such return would result in substantial and immediate physical danger or threat of physical danger to the child.

The scope of the ICWA is also limited by the definition of "Indian child" and "Indian tribe." The Act, at section 1903(4), includes in its definition of "Indian child" a child that is either a member of a tribe or is eligible for membership and is the biological child of a tribal member. "Indian tribe" includes only federally recognized tribes and Alaskan Native villages. Therefore, state-recognized tribes and, arguably, Canadian Indians are not included in this definition. Terminated and unrecognized tribes are also not included, although Oregon has agreed to treat its terminated Indians the same as federally recognized tribes for purposes of the ICWA.

When a parent is involved in a proceeding, he or she usually identifies the child as Indian for the court. However, when such identification is not made, problems arise (e.g., the child has been abandoned, non-Indian relatives or fundamentalist Christians have taken an Indian child from its parents and do not identify the child as Indian). This problem of identification is exacerbated by the fact that until recently, many tribes had closed their rolls or had not kept their membership rolls up to date. The two aspects of this problem therefore are (1) identification by the state that a child is Indian and (2) certification of that identification by the tribe.

The ICWA, 25 U.S.C. § 1914, holds that an Indian custodian or the tribe itself may invalidate any voluntary or involuntary removal of an Indian child from its custodian if a state does not conform with the procedural and substantive requirements of the Act. Therefore, if the state does not make an effort to identify Indian children, it risks having its child placement efforts ruled void unless it did not know or have a reason to know that the child was an Indian. The BIA Guidelines[87] delineate what conforms to such standard, and it can be argued that the state has an affirmative duty to inquire as to a child's Indian status before any action it took would be immune from invalidation.

Further, the recently passed Child Welfare and Adoption Assistance Act of 1980, 94 Stat. 500, Pub. L. No. 96-672, will encourage states to inventory all out-of-home child placements to qualify for federal adoption assistance in the future. This legislation should prod the states into identifying all children who come into state custody. Although all children will not be identified in this manner, a large proportion should be identified and become entitled to the protections of the ICWA.

States with large Indian populations could arguably be held to have constructive notice that a child is Indian if the child is found in a dependent Indian community, has Indian racial features and/or an Indian name, or if the child's home environment shows Indian cultural characteristics.[88] Under such an argument, wilful or negligent misrepresentation of an

82. H.R. REP. NO. 597, 95th Cong., 1st Sess. 16 (1977).
83. C.M.G. v. State, 594 P.2d 798 (Okla. 1979).
84. Malaterre v. Malaterre, 293 N.W.2d 139 (N.D. 1980).
85. Application of Bertelson, 617 P.2d 121 (Mont. 1980).
86. 25 U.S.C. § 1922. *See In re* Adoption of Buehl, 555 P.2d 1334 (1974).
87. BIA *Guidelines for State Courts in Indian Child Custody Proceedings*, *supra* note 58, at 67586.
88. *Id.*

Indian child's identity by state officials could subject that individual to liability under 25 U.S.C. § 1985. Whether such liability could be based on tort principles or violations of the Indian custodians' civil rights has not been decided by the courts.

D. State-Tribal Cooperation

Once a state court has reason to suspect that a child is Indian, the ICWA requires that notice be given to both the parent or Indian custodian and the child's tribe of the pending proceeding and their right to intervene.[89] Such notice must be given to the Secretary of the Interior if the identity of the Indian parent, custodian or tribe cannot be determined. The Secretary, in turn, shall have 15 days upon receipt of such notice to attempt to locate and inform the Indian parent, custodian or tribe of such proceeding. The proceeding cannot go forward until 10 days after receipt of such notice.

Some states have complained that tribes respond very late, if at all, to these notices, and consequently that state court proceedings are slowed down. The state, uncertain about its jurisdiction, is reluctant to proceed, and as a result, the child must remain in limbo. This lack of coordination is obviously detrimental to the child. It arises from the fact that the federal regulations do not identify specifically who should be designated to receive notice of state proceedings on behalf of the tribe or who or what entity can intervene in state proceedings on behalf of the tribe.

This problem will arise most often when a state and tribe can assert concurrent jurisdiction over Indians living off-reservation in the context of transfer proceedings under 25 U.S.C. § 1911. If the tribe has exclusive jurisdiction or the state lacks sufficient contact, the state will lack authority to proceed in any case unless the state court can establish emergency jurisdiction under 25 U.S.C. § 1922.[90]

In terms of notice deadlines, the BIA State Guidelines provide:

> 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) from the date upon which the notice was received to prepare for the proceeding.[91]

This indicates that state courts should provide at least 30 days, 10 days from receipt of notice and a 20-day delay to reply, for the tribe to respond before they proceed with the litigation.[92] Since most state courts take at least that long to hold even preliminary hearings, state resolution of Indian child custody matters should not be slowed down by the provision regarding notice to the tribe if the tribes make a good faith effort to keep track of notices and respond quickly. Serious problems should arise, then, only when a parent challenges state court jurisdiction. When this occurs, the state must determine whether or not the tribe is subject to Pub. L. No. 280. This legislation attempted to transfer civil and criminal jurisdiction over selected areas of Indian country from the federal government to the states. If the tribe is subject to Pub. L. No. 280, it may exercise concurrent jurisdiction over child custody matters or may have established an agreement with the state under 25 U.S.C. § 1919 making the state or an administrative agency or organization responsible for some child custody matters.

If the tribe is exercising exclusive jurisdiction, either under the retained sovereign powers or pursuant to secretarial approval under 25 U.S.C. § 1918, the state must ask the tribe if it will accept or decline jurisdiction. In these cases, it is certainly very important that the tribes respond quickly rather than remain silent and cause greater psychological injury to the child and family. If the child has been removed from his or her home, the state juvenile court will be very reluctant to return the child or adjudicate the matter until the tribe responds. Therefore, the child will remain in temporary foster care until the matter is resolved, a result which is counter to the purposes of the ICWA.

It should be noted that the ICWA does not give tribes all the due process rights to notice and participation granted to parents in child custody proceedings.[93] Therefore, if the state makes a good faith effort to comply with the ICWA notice requirement and the tribe does not respond, the state can proceed with its case so long as it can establish at least concurrent jurisdiction over the child. However, the tribe could later attack the validity of the state proceedings if it does not comply with the ICWA provisions.[94]

The tribe may intervene in the proceedings at any time and participate, but it may waive its rights to assume jurisdiction over the matter if it is late in responding to state notices. Among the circumstances permitting a state court to decline to transfer jurisdiction under 25 U.S.C. § 1911(b) is the fact that

> The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.[95]

In this instance, the drafters of the Guidelines, in attempting to balance the tribe's *parens patriae* power and the child's need for a speedy determination of custody, came out on the side of the best interests of the child. This provision also prohibits the

89. 25 U.S.C. § 1912(a).
90. *See also* Jarrett, *Jurisdiction in Interstate Child Custody Disputes*, 13 GONZAGA L. REV. 423 (Spring 1977); Mehren and Trautman, *Jurisdiction to Adjudicate: (A Suggested Analysis)*, 79 HARV. L. REV. 1121 (1978); *In re* Saucido, 538 P.2d 1219 (Wash. 1975).
91. BIA, *Guidelines for State Courts in Indian Child Custody Proceedings, supra* note 58, at 67588.
92. *Id.* at 67589.
93. *See* Martin v. New York State Dep't of Mental Hygiene, 588 F.2d 371 (2d Cir. 1978); Bethel v. Sturmer, 479 P.2d 131 (Wash. 1970).
94. 25 U.S.C. § 1914.
95. *See* BIA, *Guidelines for State Courts in Indian Child Custody Proceedings, supra* note 58.

filing of a transfer of jurisdiction petition after it is obvious that one side is going to lose in state court, thus preventing forum shopping.

The United States Attorney for South Dakota, in a letter to tribes in the state, discussed the problem of tribal response and stated:

> The reasons for calling for a prompt response to notice by the state are many. For the best interests of the child involved, child dependency and neglect matters should be promptly decided. They should not drag on over a period of months. Moreover, State courts are going to be more reluctant to transfer if they have many hours of time and many dollars spent adjudicating the matter....
>
> ...It is incumbent upon each of you to initiate a procedure within your court to ensure that you are informed of notices that are sent out by South Dakota Courts appraising you that an Indian Child Welfare matter is pending in State Court. It would seem eminently reasonable for one person within your tribal government to be given the responsibility of receiving notices sent by the state and ensuring that the notices are brought to the prompt decision of whoever in the tribe decides whether the tribe will or will not intervene in the action and/or request a transfer.[96]

Many of the tribes had difficulty arranging for start-up funding from the BIA for their child protective services programs. As these funding problems are resolved and the tribal programs are fully established, the problem of coordination with states over notice should disappear.

Two recent decisions indicate that states will increasingly look to tribal courts in the domestic relations area to enforce state orders or to see if tribes have orders to be enforced. *State ex rel. Stewart v. District of the Thirteenth Judicial District*[97] held that state courts should abstain from deciding divorce matters involving tribal members living on reservations. *Bourck v. Johnson*[98] held that a decree of adoption validly granted by a tribal court to one of its wards must be honored by the state department of health for the purpose of granting a new birth certificate to the adopted child. This case is in line with the full faith and credit provisions of the ICWA, 25 U.S.C. § 1911(d).

Some state officials have asked whether a state can be forced to pay foster home costs for Indian children placed off-reservation by tribal court. *White v. Califano,*[99] in discussing an analogous situation for tribes exercising exclusive jurisdiction, held that funding was the responsibility of the federal government and the tribe. The effect of this decision on the implementation of the ICWA is uncertain. Oregon has recently decided that a state agency may pay for foster care placements, but a tribal court cannot order a state agency to accept legal custody of an Indian child.[100]

A series of cases addressing the issue of Indian eligibility for state social security programs discussed in Part III A of this paper indicates that states may be required to pay such costs. It seems to be fairly well settled that a tribal or secretarial determination that a child qualifies for the protections of the ICWA cannot be contested in state courts. The tribe has been recognized as empowered to regulate questions of membership and domestic relations for members living outside the boundaries of a reservation.[101]

Whether the individual is duly enrolled is not crucial.[102] Membership is the key, and an Indian may qualify to participate as a member in tribal society without being enrolled. Some tribes may have closed their rolls at some period in the past so as to limit the number of people eligible to participate in the distribution of tribal monies, or may not have kept tribal rolls current. However for the purpose of invoking the protections of the ICWA, a tribe may determine that a non-enrolled child has sufficient ties with the tribal community to qualify as a tribal member even though that child may not exercise all the rights and privileges of an individual enrolled in the tribe.

The BIA State Guidelines state that a tribal or secretarial determination that a child comes under the Act is conclusive.[103] In practice, the states have accepted tribal membership determinations without questioning the decisions.

E. Transfer of Jurisdiction

One of the central provisions of the ICWA is the transfer of proceedings section, 25 U.S.C. § 1911(b). This section as a whole reaffirms the jurisdictional framework established by courts prior to the Act and also extends tribal powers to a certain extent. The Act, at section 1911(a), merely reaffirms cases such as *Wakefield v. Littlelight*[104] which recognized a tribe's exclusive jurisdiction over children who reside or are domiciled on the reservation. The Act, at section 1911(b), recognizes that states and tribes may assert concurrent jurisdiction and provides that the tribal court is the preferred forum when both the state and the tribe claim jurisdiction.

This section is the heart of the portion of the ICWA addressing state child custody proceedings because it permits Indian parents or custodians threatened by a state court proceeding for both the foster care placement or termination of parental rights to their children to request transfer of the proceeding to tribal court. This allows parents or custodians to have their cases judged by their peers and by a court system which is aware of the socio-economic and cultural pressures on the family rather than by a state system which often applies socio-economic standards in an unequal manner and which is

96. Letter from Terry Pechota to South Dakota tribes (Dec. 22, 1980).
97. State *ex rel.* Stewart v. District Court of the Thirteenth Judicial District, 609 P.2d 290 (Mont. Sup. Ct. 1980).
98. Bourck v. Johnson, 286 N.W.2d 523 (S.D. 1979).
99. White v. Califano, 581 F.2d 697 (8th Cir. 1978).
100. *See* Oregon Attorney General's Opinion No. 7899 (May 13, 1980).
101. Ruff v. Burney, 168 U.S. 218 (1897); United States v. Quiver, 241 U.S. 602 (1918).
102. *See Ex Parte* Pero, 99 F.2d 28 (7th Cir. 1938); United States v. Ives, 509 F.2d 935 (9th Cir. 1974); United States v. Antelope, 430 U.S. 641 (1977).
103. BIA, *Guidelines for State Courts in Indian Child Custody Proceedings, supra* note 58, at 67586.
104. Wakefield v. Littlelight, *supra* note 25.

often seen by the parents as inherently biased by the cultural background of the decisionmaker.[105]

This section is also important for those who see the actual aspects of litigation as a way to respond in a dramatic fashion to societal values and norms. An Indian who rejects mainstream values will not be very responsive to a finding by a non-Indian that he is not doing a good job of parenting. Such a parent would more readily accept that sort of judgment from his peers and would also respond more readily to their suggestions that parenting practices be changed.

The legislative history indicates that the transfer of jurisdiction section

> (I)s intended to permit a state court to apply a modified doctrine of forum non conveniens, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected.[106]

In the regulations implementing the ICWA, the Bureau of Indian Affairs noted that the state court "must transfer" if the parents desire transfer and the tribe accepts jurisdiction unless good cause to the contrary exists.[107] In establishing what constitutes good cause not to transfer, the Bureau stated:

> (d) The burden of establishing good cause to the contrary shall be on the party opposing transfer.[108]

Some state agencies have asserted that a child's lack of contact with the tribe is enough to establish state court jurisdiction. The regulations specifically state that lack of contact is good cause only if the parents are not available, the child is over five, and the child has had little or no contact with his or her tribe or its members.[109]

In determining whether a state court should assert jurisdiction under this section, judges should not look to the best interests of the parties concerned or to other matters which are more properly addressed once jurisdiction is established. To do so would be to improperly consider the merits of the case as a basis for asserting jurisdiction.[110] The Act, at section 1911(b), expressly states that the case must be transferred "in the absence of good cause to the contrary." Therefore, under the jurisdictional framework established by 25 U.S.C. § 1911(b), the tribal court is the preferred forum for adjudicating child custody proceedings under the ICWA.

The *forum non conveniens* language adopted in the legislative history of H.R. Rep. No. 1386[111] unfortunately may have created more problems than the use of other terms might have created. This doctrine usually gives a judge wide-ranging discretion to transfer, and judicial decisions in this regard are rarely overturned. Judges therefore need only make a finding that their courts are the proper forums in order to circumvent the ICWA. It is important to note, however, that the legislative history establishes a *modified forum non conveniens* doctrine, seemingly conditioned on costs.[112] Creative solutions such as having the tribal court convene in the city in which the state proceeding is taking place are also contemplated before a state court refuses to transfer.[113]

Although, under this provision, the burden of proof is on the party opposing transfer, at least one judge in practice placed the burden on the Indian requesting transfer. In this case the judge ruled that the case should remain in state court because it would be difficult for the non-Indian custodians to travel to the reservation. The judge ignored the fact that under his ruling, the Indian reservation residents would be forced to undergo the expense he did not wish the non-Indians to assume.[114]

It is arguable that because, under conflict of law principles, jurisdiction in child custody cases may be predicated on a best interest of the child determination,[115] and such a determination would be a finding on the merits of the case before establishing jurisdiction and therefore impermissible, problems in this area can only be resolved by turning to the ICWA. Because Congress declared that the best interests of the child are served by the ICWA, and transfer to tribal court is presumed to be in the best interests of the child, state courts should adhere to the federal presumption and not consider the merits of the case unless the party opposing transfer overturns the presumption that transfer is proper.[116]

F. Disposition Issues

After the evidentiary standards of the ICWA have been met, 25 U.S.C. § 1912(e), and an Indian child has been adjudged dependent or neglected, the next issue faced by state courts is where to place the child. The emerging conflict in this area arises out of the question of whether a relative has standing to intervene and have the child placed in the home of an extended family member. Unfortunately, in some cases state social service agencies have attempted to narrowly construe "Indian custodian" or other terms to avoid the placement provisions of the ICWA. If these arguments are upheld by the state courts, the placement provisions of the Act may be rendered illusory by judicial sleight of hand.

In one case, not published or yet resolved, the native mother died and the non-native father was in prison; consequently, the state assumed custody of the child. An aunt of the child learned of the proceeding and asked that the court place the child with her. The guardian *ad litem* opposed the aunt by arguing that the aunt did not qualify as an Indian custodian

105. *See* H.R. Rep. No. 597, *supra* note 82, at 45; H.R. Rep. No. 1386, *supra* note 33, at 10.
106. H.R. Rep. No. 1386, *supra* note 33, at 21.
107. 44 Fed. Reg. 67590 (Nov. 26, 1979).
108. *Id.* at 67591.
109. *Id.*
110. *See generally* 20 Am. Jur. 2d *Courts* § 92 (1965).
111. H.R. Rep. No. 1368, *supra* note 33, at 21; 44 Fed. Reg. 67591.
112. 44 Fed. Reg. 67591.
113. *Id.*
114. Best v. Begay, Dist. Ct. No. 22408 (now on appeal to the New Mexico Court of Appeals).
115. Application of Bertelson, *supra* note 85, at 126.
116. *See, e.g.*, 44 Fed. Reg. 67591, § C, 3(b)(iii).

because the aunt never had custody of the child in the past, and that because she was not an Indian custodian, she had no standing to intervene and alter the child's placement in a non-Indian foster home. The guardian *ad litem* also argued that placement of the child with the aunt did not satisfy the "good cause" requirement under 25 U.S.C. § 1915(b). Apparently, the guardian *ad litem* felt that the burden was on the aunt to show why the child should be placed in her home. This approach, of course, turns the ICWA on its head; beneficiaries of the ICWA need not show good cause. Those opposing operation of the placement provision must show why 25 U.S.C. § 1915 should not apply once the Indian family member shows that he or she qualifies for placement under the ICWA.

As a member of the extended family, the aunt in this case has a placement preference under the ICWA. Therefore the burden is on the guardian *ad litem* to show why the child should not be placed with the aunt. Under the other provisions in the Act employing the "good cause language," transfer of termination proceedings to tribal court under 25 U.S.C. § 1911(b) and foster care placements under 25 U.S.C. § 1915(b), the lack of ties with the Indian community might be a ground for showing good cause not to return the child. Under the regulations for adoptive placement, however, lack of prior ties with the Indian community is not a ground for showing good cause not to return the child. The child's present location is irrelevant.

Section 1915(b) permits a tribe to establish its own placement preference order. The distinction between being allowed to change the preference, as tribes are permitted, and being allowed to assert a preference, as parents are permitted, could be crucial in determining whether a noncustodial parent can determine whether a child may be raised as an Indian at all, or whether he or she can say only to which person within a particular preference order the child may go. In this case, the tribe could decide that all children threatened with foster care or preadoptive placement be placed within a tribal context. Then the only argument the opposing party could raise would be the "special needs" exception cited in 25 U.S.C. §§ 1915(b) and (c).

The applicable standard then would be substantially identical to the guidelines issued by the BIA for adoptive placements. This standard provides good cause to ignore the ICWA Placement Provisions

> (1) if parents or the child, if of sufficient age, so request,
>
> (2) if the extraordinary physical or emotional needs of the child, as established by testimony of a qualified witness, require an alternative placement, or
>
> (3) if suitable families are unavailable after a diligent search is conducted.

In this instance, the guardian *ad litem's* good cause argument can be based only on the fact that there are no suitable families of the same tribe or culture, or that the child has extraordinary needs. If expert testimony controverts these two arguments, the burden of producing contradictory evidence will be increased considerably.

Under the ICWA only the tribe or Indian custodian has standing to intervene in a child custody proceeding. The Act at section 1912 permits the tribe or custodian to intervene in foster care placement or termination of parental rights proceedings. The Act at section 1914 permits substantially the same intervention authority to invalidate proceedings where the ICWA was violated. The aunt in this instance probably could not qualify as a custodian under those sections and therefore would lack standing. The tribe or village, however, in its role as *parens patriae* could intervene and under 25 U.S.C. § 1915(b) argue that its preference is placement of the child with the aunt.

As the general rule, the guardian *ad litem* should support the ICWA and present the arguments that the aunt in this instance wished to present. If the state and the guardian *ad litem* conspire to suppress arguments on the ICWA placement provisions, the court itself should recognize and apply the ICWA placement provisions on its own motion.

In an Oregon case, *State of Oregon, ex rel. Juvenile Department, Multnomah County v. England,*[117] currently before the Oregon Court of Appeals, the circuit court denied an Indian aunt's motion that her niece be placed in her custody. The state had previously placed the child with the aunt as a foster care placement. At a later hearing held without notice to the aunt, the child was removed. When the aunt asserted that she was an Indian custodian and entitled to the protection of the ICWA, the circuit court ruled that because Oregon law does not give foster parents technical legal custody but vests it in the state, the aunt was not an Indian custodian and was not entitled to ICWA protections. The court based this ruling on its decision that the definition of an Indian custodian as "any Indian person having legal custody of an Indian child under state law" is to be decided according to the laws of Oregon. If this ruling is allowed to stand, Indians who wish to serve as foster parents under state laws will be unable to avail themselves of the protections of the ICWA. Although this ruling may be in line with recent cases such as *Smith v. Organization of Foster Families,*[118] it certainly goes against the ICWA policy establishing:

> 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.[119]

In Minnesota, a similar dispute has arisen in *In re E.J.,*[120] which is currently on appeal. In this Minnesota case, the grandmother had essentially raised the child from birth until the child was removed from her home and placed in foster care. Subsequent to termination of the parents' rights, the grandmother invoked the ICWA and filed a petition for adoption of the child. The trial court admitted that the ICWA applied but found that the grandmother had no standing to seek custody because she did not qualify as a person protected by the Act. On a second issue, the court ruled that placement of the child with the grandmother would be detrimental to the child's emotional and physical well-being. This issue will be the first

117. State of Oregon, *ex rel.* Juvenile Department, Multnomah County v. England, No. CA 18918 (Or. App. 1981).
118. Smith v. Organization of Foster Families, 431 U.S. 816 (1977).
119. 25 U.S.C. § 1902.
120. *In re* E.J., No. 21265 (D. Minn. 1980).

to deal with the question of the standard of proof sufficient to override the placement preferences of the Act.[121]

G. Voluntary Proceedings

In a significant number of cases, Indian parents relinquish custody of their children in voluntary proceedings. In early versions of the ICWA, placement and other provisions of the ICWA were applied to voluntary proceedings. However, religious groups with large foster home programs opposed this and were successful in excluding most voluntary proceedings from the ICWA. For voluntary proceedings, 25 U.S.C. § 1913 only requires certification by a judge that the parent understands the consequences of his or her act. This consent may be withdrawn prior to entry to a final decree, but once the decree is final, it can be collaterally attacked only on the grounds of duress or fraud.

After entry of a decree, the only further requirement established by regulation and 25 U.S.C. § 1951 is that notice of the proceeding be provided to the Secretary of Interior within 30 days, together with the following information: (1) the name of the child, the tribal affiliation of the child, and the Indian blood quantum of the child; (2) names and addresses of the biological parents and the adoptive parents; and (3) the identity of any agency having relevant information pertinent to said adoption placement.[122]

The major problems arising in this area are contacting either a parent who in some cases has had no contact with the child or contacting a parent who has wished to relinquish custody since the birth of the child but whose whereabouts are unknown. Without the necessary consent, the proceeding, in which all involved parties are in agreement, is of questionable validity because the consent of the long-absent parent is not obtained. Some state courts have found abandonment of the child under state law by the absent parent and have permitted voluntary relinquishment without the consent of the absent parent. This type of proceeding is involuntary and subject to the ICWA. The tribe of the abandoning parent could then possibly intervene in the abandonment proceeding and attempt to halt the voluntary relinquishment by the remaining parent. However, the regulations on dispositional placement[123] note that good cause to modify the ICWA placement preferences exists when either the biological parents or a child of sufficient age claims a different preference.

V. TRIBAL IMPLEMENTATION

Many tribes lacking a social service infrastructure before passage of the ICWA moved quickly to implement their side of the ICWA. The success or failure of efforts to create effective tribal child welfare programs should be seen in light of preexisting conditions and the many obstacles in the way of tribal programs. This section will describe the delivery system for social services in existence before the ICWA and examine how the ICWA may interrelate with other recent federal legislation.

A. Preexisting Social Services

Only during the 1960's did tribes obtain the resources to begin development of legal talent to adequately staff tribal court systems and to provide legal guidance for newly established tribal social programs. At the same time, tribes began to seek funds from a range of new federal programs but in many instances could not qualify for funding because the applicable federal grants legislation did not take into account the existence of tribal governments. Quite often, the federal statutes and regulations permitted funding only for state programs or local units of government established by the state. In 1974 tribes were utilizing only 86 of 600 existing federal domestic assistance programs.[124]

The Indian Self-Determination and Educational Assistance Act of 1975 moved a step in the direction of tribal assumption of control over some federal programs by permitting tribes to contract to administer BIA and Indian Health Service (IHS) programs offered on reservations. However, most of the federal funding supporting child welfare services did not go through either the BIA or the IHS. Instead, most federal monies supported state-county welfare service programs under the Social Security Act including the following: Title IV-A, Aid to Families with Dependent Children; Title IV-B, Child Welfare Services; Title XIX, Grants to States for Medical Assistance; and Title XX, Grants to States for Social Services.

The BIA provided some child welfare services, but it considered its programs to be residual. That is, BIA services would be provided only when other services had been exhausted or were unavailable. BIA services were generally restricted to use by Indians residing on the reservation.[125] In theory, four different entities were responsible for providing child welfare services to Indians: (1) the federal government through the BIA, (2) the state-county welfare service programs, (3) tribal governments, and (4) private agencies. In reality few services were provided because of jurisdictional and funding problems.

In Pub. L. No. 280 states, in which the states obtained civil jurisdiction over reservations,[126] the BIA did not provide

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121. The appellant's brief discusses some of the burden of proof factors relevant to placement.
122. This information should be sent to the following address:
Chief
Division of Social Services
Bureau of Indian Affairs
1951 Constitution Avenue, N.W.
Washington, D.C. 20245
123. *See* BIA, *Guidelines for State Courts in Indian Child Custody Proceedings, supra* note 58.
124. LEGAL AND JURISDICTIONAL PROBLEMS IN THE DELIVERY OF SRS CHILD WELFARE SERVICES ON INDIAN RESERVATIONS, *supra* note 32, at 21.
125. *See* Ruiz v. Morton, 915 U.S. 199 (1974).
126. 25 U.S.C. §§ 1321 *et seq.*

any services. The states, lacking tax revenues from Indian lands, were often reluctant to provide on-reservation services even though they had civil and criminal jurisdiction over reservations within the state. This often resulted in a vacuum in services.

In states not subject to Pub. L. No. 280, most counties engaged in only limited on-reservation activity in the field of protective services on the ground that they lacked jurisdictional authority over Indian lands. One study found:

> Those protective "services" actually provided apparently often consist of a complicated chain of referrals and interagency dialogue between the BIA and the County with few tangible services provided.[127]

On most non-Pub. L. No. 280 reservations, the BIA did recruit and approve on-reservation foster care homes for their own use and referred families to the state for state foster care licensing. Each BIA agency had its own budget for foster care payments to on-reservation foster care homes. The BIA and the counties divided responsibility for foster children based on whether the children were eligible for AFDC. If the children were eligible for AFDC, the counties would take charge because they could be reimbursed by the federal government for those children. If the children were not eligible, the BIA would cover their costs with its residual funds. The BIA also contracted with many state departments of social services or state institutions for the off-reservation placement of non-AFDC children. The BIA and the counties offered only limited adoption services to reservation Indians.[128]

Tribal children's services came into existence in the 1960's when tribes took the initiative in developing day care centers with federal Office of Education and CETA grants. In the 1970's a few tribally run child welfare programs were funded with child welfare research and development grants from HEW. However, these grants were generally short-term and did not provide a stable source of funding for tribal governments.

Litigation has occurred between Indians affected by state social services programs over the years before the passage of the ICWA and the social services agencies. The court rulings in these cases, summarized below, continue to have significance for present social services programs. *In re Whiteshield*[129] involved a petition brought by state authorities to terminate parental rights to children because of acts occurring on the reservation. The court held that because the parents had not consented to state jurisdiction, the state court lacked authority to decide on the petition.

State ex rel. Williams v. Kemp[130] held that Indians are entitled to social security benefits disbursed by the states. *Arizona v. Hobby*[131] and *Acosta v. San Diego County*[132] supported the holding that Indians are entitled to state welfare benefits. In dicta, the Supreme Court in *Ruiz v. Morton* noted:

> Any Indian, whether living on a reservation or elsewhere, may be eligible for benefits under the various social security programs in which this state participates and no limitation may be placed on social security benefits because of an Indian claimant's residence on a reservation.[133]

Other cases have interpreted the "statewideness" requirement of the Social Security Act at 42 U.S.C. § 301, as well as many other provisions in the Act, to mean that a state may not exclude from AFDC benefits a class of potential recipients who are eligible under federal AFDC standards.[134] This litigation generally established that states could not deny most benefits provided by the Social Security Act to individuals on the ground that they resided on a reservation. The development of social services on reservations was, however, slowed by state concerns about jurisdictional issues.

In *Black Wolf v. District Court,*[135] a tribal court transfer of jurisdiction of a child to state court to facilitate placement in an off-reservation institution was declared void on the ground that the state court lacked jurisdiction to accept such an order. The Arizona and North Dakota attorneys general both similarly decided that their states lacked jurisdiction on Indian reservations and therefore could not license child care, either foster or day care, on reservations.[136] Another area of legal and jurisdictional concern was whether other domestic relations tribal court orders would be recognized and enforced by state courts and agencies. Several cases had recognized the validity of tribal court orders as a matter of comity.[137] The Indian Child Welfare Act resolves this problem by providing that states must grant tribal court orders full faith and credit.[138]

This provision legislatively approves efforts made by HEW in the 1970's to encourage county social service agencies to work through tribal courts. HEW, by program instruction, had stated that tribal court placements satisfied the federal regulation requiring placements by a "court" before AFDC foster care payments could be made.

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127. LEGAL AND JURISDICTIONAL PROBLEMS IN THE DELIVERY OF SRS CHILD WELFARE SERVICES ON INDIAN RESERVATIONS, *supra* note 32, at 31.
128. *Id.* at 35.
129. *In re* Whiteshield, 124 N.W.2d 694 (N.D. 1965).
130. State *ex rel.* Williams v. Kemp, 78 P.2d 585 (Mont. 1935).
131. Arizona v. Hobby, 221 F.2d 498 (1954).
132. Acosta v. San Diego County, 126 Cal. App. 2d 455, 272 P.2d 92 (1954).
133. Ruiz v. Morton, *supra* note 125, at 207.
134. King v. Smith, 392 U.S. 390 (1968); Townsend v. Swank, 404 U.S. 282 (1971); Carleson v. Remillard, 406 U.S. 598 (1972).
135. Black Wolf v. District Court, 493 P.2d 1293 (Mont. 1972).
136. LEGAL AND JURISDICTIONAL PROBLEMS IN THE DELIVERY OF SRS CHILD WELFARE SERVICES ON INDIAN RESERVATIONS, *supra* note 32, at 63.
137. Mehlin v. Ice, No. 56F 12 (8th Cir. 1893); Begay v. Miller, 222 P.2d 624 (Ariz. 1956); Jim v. CIT Fin. Servs., 533 P.2d 751 (N.M. 1975).
138. 25 U.S.C. § 1911(d).

An SRS Program Instruction of December 30, 1974, stated that as a condition of reviewing Title IV monies, states must provide services to Indian persons and find a way to approve foster homes on reservations. Otherwise, the states would be in violation of the fourteenth amendment and the equal protection clause. Section 402 of the Social Security Act requires that AFDC be provided on a statewide basis. Regulations implementing AFDC foster care require that payments be made through an appropriate court. Thus, the SRS instruction clarified that tribal court orders would satisfy this regulation and urged county social workers to work through tribal courts.

The ICWA was designed to resolve many of these problems by providing, at 25 U.S.C. § 1911(d), that states grant full faith and credit to tribal child custody provisions. At 25 U.S.C. §§ 1931-1934 in Title II of the Act, separate federal funding sources for Indian child welfare programs are authorized. The funding provisions of the ICWA, at 25 U.S.C. § 1931(b), also provide for the use of ICWA funds as nonfederal matching funds for social security and other federal financial assistance programs.

B. The Adoption Assistance and Child Welfare Act of 1980 (Pub. L. No. 96-272)

Enacted June 17, 1980, Pub. L. No. 96-272 amended, among other provisions, Title IV of the Social Security Act, creating a new part IV-E and modifying the existing Part IV-B. The new Part IV-E, Federal Payments for Foster Care and Adoptive Assistance, replaces the former Part IV-A provisions for federal matching grants to states for the foster care of AFDC eligible children. Part IV-E also creates a new entitlement program authorizing matching grants to states which make available adoption assistance payments to families that adopt children with special needs. Indian tribes do not qualify for direct federal grants under Part IV-E. Part IV-B, which consolidates and modifies in a significant manner the standards for existing state child welfare services programs funded with federal dollars, does contain authority for direct federal-tribal contracting.

Many of the new standards that state systems must meet are not mandatory until federal funding under Title IV-B exceeds $141 million a year. The existing law authorized appropriations of $266 million; however, annual appropriations have never exceeded $56.5 million, and there is a question of when the funding figure triggering the federal standards will be reached. In any case, many states will probably begin to implement the various procedures and programs to be prepared for the time that figure is reached. These requirements are of interest to Indian tribes because, under the proposed Part IV-B regulations, tribes will be required to meet many of the state standards to qualify for initial funding and to obtain increased funding in the future.

To place these standards in perspective, it is useful to note that the policy objectives of the Child Welfare and Adoption Assistance Act are

> (1) to provide financial and technical assistance to states to invoke changes in their child welfare services systems
>
> (2) to reduce the number of children entering foster care by placing emphasis on the use of preplacement preventive services to help solve or alleviate the family problems that would otherwise result in the child's removal from the home
>
> (3) to reduce the number of children in the foster care system
>
> (4) to encourage the placement of foster children in permanent homes through adoption or other permanency planning[139]

Under IV-B, the definition of "child welfare services" that can be supported with federal funds is amended to include public social services which are directed toward the accomplishment of the following purposes:

> (a) preventing, or remedying or assisting in the prevention of, neglect, abuse, exploitation or delinquency of children
>
> (b) protecting and promoting the welfare of all children, including handicapped, homeless, dependent or neglected children
>
> (c) preventing the unnecessary separation of children from their families
>
> (d) restoring to their families children who have been removed
>
> (e) placing children in suitable adoptive homes while restoration to the biological family is not possible or appropriate
>
> (f) assuming adequate care, away from their homes, of children who cannot be returned home or placed for adoption[140]

The federal matching rate for Title IV-B funds is 75 percent. That is, the tribe or state need only raise 25 percent of the funding from another source to qualify for 75 percent federal funding.

The provision for direct federal-tribal funding in Title IV-B is section 428 of The Adoption Assistance Act. It provides that

> (a) The Secretary may, in appropriate cases (as determined by the Secretary) make payments under this part directly to an Indian tribal organization within any State which has a plan for child welfare services approved under this part. Such payments shall be made in such manner and in such amounts as the Secretary determines to be appropriate.
>
> (b) Amounts paid under subsection (a) shall be deemed to be a part of the allotment (as determined under section 421) for the State in which such Indian tribal organization is located.
>
> (c) For purposes of this section

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139. *See* Notice of Proposed Rule Making, 45 Fed. Reg. 86817 (Dec. 31, 1980).
140. *HHS Fact Sheet on the Adoption Assistance and Child Welfare Act of 1980.*

> (1) the term "tribal organization" means the recognized governing body of any Indian tribe, or any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body, and
>
> (2) the term "Indian tribe" means any tribe, band, nation, or other organized group or community of Indians (including any Alaska Native village or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (Pub. L. 92-203; 85 Stat. 688) which (A) is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or (B) is located on, or in proximity to, a Federal or State reservation or rancheria.

Proposed regulations for this section were published in the *Federal Register* on December 31, 1980. These regulations provide for federal grants to cover costs of tribal organizations in "establishing, extending and strengthening child welfare service."[141]

To qualify for grants, tribal organizations must assume responsibility for ongoing BIA child welfare services by contracting to perform those services under the Indian Self-Determination Act.[142] Tribal organizations then must develop, in coordination with the Secretary of HHS, a plan for delivery of child welfare services. The tribal plan under the proposed rules must meet the same programmatic and administrative requirements as state plans. These requirements are not particularly onerous. They include, for instance, arrangements for the training and use of paraprofessional staff, plans for staff recruitment and training, and the establishment of advisory committees. Central to all tribal plans would be coordination of services with other federal and tribal programs to ensure maximum utilization of resources.

Once a certain appropriation figure is reached, tribes, like states, will be obligated to implement an information system to document the status of each child in foster care, a case review system for each child under tribal supervision, and a program of services designed to reunify children with their families or to place them in another permanent setting.

The proposed rules state that grants will be made available beginning in October of 1982 and that only one tribal organization within a reservation would be eligible for a grant. The money granted to tribes would be taken from the state allotment on the basis of the percentage of Indian population in the state.

Several drawbacks in utilizing this new funding source are readily apparent. Because the amount of available money is small, perhaps 1 percent of the current $50 million, few tribes would have a large enough population base to bother applying. The language of the proposed rules limits the program's usefulness to on-reservation child welfare services. Additionally, although it is not spelled out, tribes may be dependent upon state efforts for obtaining tribal funds. Since the tribe's money is taken from the state allotment, a tribe may not be able to obtain funding if the neighboring states decide not to participate in the program or do not implement the various improvements required by regulation to qualify for higher funding. This program also would not help those tribes that are able to assume only partial responsibility for child welfare services.

For the larger tribes that have assumed control over all child welfare services on a reservation, the new funding could be very helpful in covering the administrative costs of coordinating existing programs, developing a recordkeeping capability, and initiating programs aimed at improving preventive services.

On the positive side, the policy objectives of the Child Welfare Adoption Assistance Act reflect and reaffirm the policy objectives of the ICWA. The focus is on both preventive treatment and the placement of children in permanent settings only when necessary. Tribes, such as the Blackfoot, which have focused their child protective services on these two practices have reported significant success in reducing the number of children in out-of-the-home placements. This approach deals with the greatest Indian child development problem, lack of proper parenting skills, in a positive manner. Rather than intervening in a destructive or punitive fashion after a family has collapsed, this approach attempts to identify families at risk of failure and to work with those families from the time the child is born to avert future problems.

Warren Weller, director of the Indian Child Abuse and Neglect Center in Tulsa, Oklahoma, has noted that a significant factor in Indian child abuse and neglect incidents is the fact that a large number, perhaps 25 percent, of Indian children in the past have been raised in institutional settings. The institutionalization process has deprived these children of both parental role models and the experience of living in a family. As a result, when they mature, they often do not know how to properly care for a child, interpret a child's actions in a nonhostile manner, and deal with the stresses of family life.

The ICWA recognized the possible deleterious effects of institutionalization and mandated a study of the feasibility of providing a convenient day school system for Indian children. At present, many students must attend BIA boarding schools. In some instances, these schools serve as institutional settings for abandoned children or children with social and developmental problems. Unfortunately, many of these schools do not have sufficient specialized staff or services to meet the needs of these children.

C. Roadblocks to Tribal Implementation

As originally envisioned, this article was intended to provide much broader coverage of funding and other problems tribes must face in creating effective child abuse prevention programs. However, between this article's genesis and its publication, greater events have occurred. A new president was elected, and funding mechanisms which would have helped to create effective tribal programs are now in jeopardy. BIA officials, in discussions with the Indian Child Welfare Administration, have suggested new reduced funding criteria which would reduce funding levels for the larger tribal programs so that smaller programs could be maintained at minimal levels.

In some parts of the country, such as Alaska, BIA

141. 45 Fed. Reg. 86847 (Dec. 31, 1980).
142. The Indian Self-Determination Act, 25 U.S.C. §§ 450 *et seq.*

officials have warned child welfare workers that after Fiscal Year 1983 no more funds would be available. The Department of Interior's Fiscal Year 1982 budget proposal for Congress would eliminate the nonreservation portion of the program and reduce the rest by 12 percent on the grounds that the "program is of recent origin" and "phased elimination of the program is a feasible alternative to continued funding."[143]

The sad irony is that now that tribes have an opportunity to assure control over their children's lives, they may be denied the funds to make the promise of the ICWA a reality. However, in a more optimistic vein, it may be noted that money has not been a crucial element in the survival of Indian cultures in the past. Tribes will rise to this most recent challenge and attempt to create child welfare programs to deal with the serious problems that Indian families face as a result of the pressures of contemporary society.

VI. CONCLUSION

The first returns indicate that the ICWA is a successful mechanism for ameliorating the societal pressures which encourage the breakup of Indian families. Title I, which was intended to blunt state action against Indian families, has been generally accepted and followed by state courts. Litigation over the next few years will tend to clarify the more complex aspects of Title I. Although funding problems under Title II have developed, tribes have shown a willingness to do whatever is necessary to protect their children through the creation of effective child welfare programs. In the author's opinion the most positive impacts of the ICWA are still to be revealed. The hopeful vision is for a future reality in which the states, tribes and federal government work together, with a minimum of bureaucratic duplication, to protect Indian children and to reaffirm the value of Indian family life.

143. Memorandum on the Indian Child Welfare Act (Oct. 2, 1981, N.Y., Association on American Indian Affairs).