

A Minnesota Lawyer's Guide to the Indian Child Welfare Act

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I. Introduction

In 1978, Congress passed the Indian Child Welfare Act ("ICWA")¹, in an attempt to remedy abuses in the placement of native children by courts and welfare agencies in states with native populations.

Parts of the ICWA reflect Congress' recognition that Indian tribes in the United States are sovereign nations which possess the inherent authority to decide matters relating to their childrens' interests. However, since the Supreme Court first recognized the sovereignty of native Americans 150 years ago,² United States policy towards tribal sovereignty has followed an erratic course. The utter failure of many of these policies has led to a gradual dimin-

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We wish to thank Kathleen Trihey for the tribal court chart, and our colleagues Renée J. Bergeron, Susan M. Cochrane, John M. Stuart and Janet C. Werness for their editorial help on this project. We hope this project will assist our colleagues and others who strive to help native families and their children.

1. Indian Child Welfare Act, 25 U.S.C. §§ 1901-1923 (1988).

2. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). The Court's decision in *Cherokee Nation* shows the decidedly one-sided nature of United States policy-making toward Native Americans. In this case, the Cherokee sued Georgia in the Supreme Court, to enjoin the state's interference with their Nation. Georgia neither filed a brief nor appeared for argument. Under the rules of civil procedure then in force, the Cherokee nation was entitled to a default judgment. Nevertheless, the Court held that, though sovereign, the Cherokee were really only qualifiedly sovereign. For that reason, and because it thought their cause too political, the Court declined to grant them any relief.

ishment of native sovereignty, and, eventually, to the abuses that the ICWA was later enacted to remedy.

Consequently, some native people regard the ICWA as nothing more than an incomplete effort by majority society to grant them the right to determine their childrens' upbringing: a right which they, as a sovereign people, feel they should never have lost. Their suspicions have been reinforced by several state court cases, decided after enactment of the ICWA, which still refuse native tribes permission to decide the fate of their children in custody proceedings.

In Minnesota, the ICWA nevertheless is a significant contribution to native sovereignty, especially when applied in tandem with related Minnesota statutes. This article is an effort to assist Minnesota lawyers who represent participants in child protection cases which involve native families. Minnesota lawyers on behalf of their clients must demand compliance with the ICWA and related Minnesota statutes; if they do so, the ICWA's goal of native self-determination will be fulfilled. We hope to provide them the tools they need, and to demonstrate how the ICWA can be used to assist in the development of native sovereignty.

Present-day Minnesota is home to thousands of native people, including two Ojibwe tribes, four Dakota tribes and some Winnebago. Until 1988, there were no more than a handful of Minnesota appellate cases dealing with the ICWA, and none of them treated any portion of the ICWA in particularly great depth.³ In 1990 and 1991, however, the Minnesota Court of Appeals alone issued six opinions which for the first time provided explicit guidance to Minnesota lawyers for practice under the ICWA.⁴

3. *In re Chosa*, 290 N.W.2d 766 (Minn. 1980)(ICWA inapplicable); *In re R.M.M.*, 316 N.W.2d 538 (Minn. 1982); *In re T.J.J.*, 366 N.W.2d 651 (Minn. Ct. App. 1985); *Desjarlait v. Desjarlait*, 379 N.W.2d 139 (Minn. Ct. App. 1985)(non-ICWA case containing constitutional law and conflicts analysis which will be developed *infra* note 329 and accompanying text); *In re W.R.*, 379 N.W.2d 544 (Minn. Ct. App. 1985); *In re R.I.*, 402 N.W.2d 173 (Minn. Ct. App. 1987); *In re C.C.T.L.*, No. C3-88-253 (Minn. Ct. App. May 31, 1988). *N.B.*: Unpublished opinions of the Minnesota Court of Appeals are not mandatory authority and are not precedential, see MINN. STAT. § 480A.08 (1990). We have included citations to unpublished opinions in this article so that local practitioners are fully informed of *all* interpretations of the ICWA by Minnesota appellate courts. Copies of all unpublished decisions cited here are on file with LAW & INEQUALITY.

4. *In re M.M.O.*, No. C6-89-1598 (Minn. Ct. App. Feb. 20, 1990)(ICWA applicability-tribal membership); *In re B.W.*, 454 N.W.2d 437 (Minn. Ct. App. 1990)(burden of proof, tribal court transfer); *In re M.S.S.*, 465 N.W.2d 412 (Minn. Ct. App. 1991)(burden of proof, provision of remedial services); *In re M.E.B.*, Nos. C6-90-2370, C6-90-2388 (Minn. Ct. App. Mar. 19, 1991)(burden of proof, remedial services, notice); *In re V.R.*, No. C2-90-1765 (Minn. Ct. App. Apr. 2, 1991)(burden of proof, remedial services, notice); *Sayers v. Beltrami County*, 472 N.W.2d 656 (Minn. Ct.

The ICWA has been implemented by state law or appellate decisions in varying ways in perhaps half of the United States. Most of these decisions come from states which have large native populations. Some states enacted into state law a local equivalent to the ICWA;⁵ implementation of the ICWA in most states, however, has been by judicial interpretation.

State appellate decisions, in Minnesota and elsewhere, exist on virtually every portion of the ICWA. Most state decisions, though, have been limited to questions of the ICWA's applicability, and its notice, adjudicatory and placement sections. There does not appear to be a nationwide state appellate court consensus on any aspect of the ICWA; rather, what consensus there is appears to be more regional than statute-based. Differences among state appellate court decisions range from fundamental philosophical discord concerning the essential purposes of the ICWA,⁶ to divergence of opinion on more technical issues such as statutory construction.⁷

Although a federal law, the ICWA is not a national substantive code for juvenile child protection proceedings; it is, rather, an evidentiary and procedural code which establishes *minimum* procedures for child protection proceedings in each state under each state's substantive law. The ICWA, therefore, does not entirely usurp the traditional role of state law in matters of child welfare and custody.

Until quite recently, there has been no generally available detailed periodical commentary on practice under the ICWA in Minnesota.⁸ For this reason, and because of the court of appeals' recent ground-breaking decisions on practice under the ICWA, we offer this guide for Minnesota lawyers.

App. 1991), *reversed*, 481 N.W.2d 547 (Minn. 1992))(ICWA and state law provisions on out-of-home placements).

5. See, e.g., OKLA. STAT. tit. 10, § 40.

6. Compare *In re N.L.*, 754 P.2d 863 (Okla. 1988)(tribal court transfer) with *In re Armell*, 550 N.E.2d 1060 (Ill. Ct. App.), *appeal denied*, 555 N.E.2d 374 (Ill.), *cert. denied*, 111 S.Ct. 345 (1990); compare *In re Kreft*, 384 N.W.2d 843 (Mich. Ct. App. 1986)(expert witnesses) with *In re J.L.H.*, 316 N.W.2d 650 (S.D. 1982)(expert witnesses).

7. Compare *D.E.D. v. State*, 704 P.2d 774 (Alaska 1985) with *In re K.L.R.F.*, 515 A.2d 33 (Pa. Super. Ct. 1986), *appeal dismissed*, 533 A.2d 708 (Pa. 1987).

8. Peter W. Gorman & Michelle T. Paquin, *Custody and Ethnicity: Placing Native Children in Minnesota*, 48 BENCH & BAR MINN. 22 (August 1991)(an abbreviated guide to the ICWA); see also Marcia L. Howell-Rom, Note, *The State of the Act: The Indian Child Welfare Act in Minnesota After In the Matter of the Welfare of B.W. and In the Matter of the Welfare of M.S.S.*, 14 HAMLIN L. REV. 427 (Spring 1991).

II. Where Does the Lawyer Working with Native Families in Juvenile Court Child Protection Cases Find the Law?

A Minnesota lawyer practicing in juvenile court in a child protection proceeding in which a native family is involved must not only be familiar with the ICWA, but also with the relevant state law and federal and state implementing regulations.

Minnesota has enacted several statutory schemes to complement the ICWA. The Minnesota Minority Heritage Act, for example, complements the ICWA's placement provisions.⁹ The Minnesota Indian Family Preservation Act applies the ICWA's notice and adjudicatory provisions to voluntary placements and enacts into state law certain jurisdictional provisions of the ICWA.¹⁰ Moreover, in 1989, the Minnesota legislature passed the "reasonable efforts" law, which includes provisions relating to notice, jurisdiction, health and welfare hold hearings, placements and remedial services.¹¹ These provisions complement the ICWA, and specifically incorporate some ICWA provisions into state law. In sum, a child protection proceeding in a Minnesota juvenile court involving a native family, will, at some point, be affected not only by the ICWA, but by each of these statutory schemes.

Shortly after the ICWA was enacted, the United States Department of the Interior Bureau of Indian Affairs published implementing guidelines for state courts.¹² These purport to offer the Bureau's view for applying the ICWA's provisions in state court proceedings. The Minnesota Department of Human Services followed suit, and its regulations apply not only to the ICWA, but also to the Minority Heritage Act and the Indian Family Preservation Act.¹³

A. *The Indian Child Welfare Act*

The ICWA was passed by the United States Congress in 1978, and went into effect in 1979. Congress heard extensive testimony between 1973 and 1977 which revealed that child protection practices in the states resulted in huge inequalities between the placement and adoption rates of native children and those rates for non-native children.¹⁴ Congress noted in its report "[t]he wholesale

9. See *infra* text accompanying notes 56-62.

10. See *infra* text accompanying notes 47-55.

11. See *infra* text accompanying notes 63-72.

12. See *infra* text accompanying note 73.

13. See *infra* text accompanying note 74.

14. See generally Russel L. Barsh, *The Indian Child Welfare Act of 1978: A Critical Analysis*, 31 HASTINGS L.J. 1287, 1287-92 & nn.3-31 (1980)[*hereinafter* Barsh]; *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 33-35 & nn.1-

separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today."¹⁵

The evidence before Congress showed "shocking"¹⁶ disparities in foster care placement rates. A survey conducted in 1967 and 1974 of several states, including Minnesota, found that native children were placed in foster care five times more often than non-native children.¹⁷ In 1972, another survey indicated that Minnesota native children were placed in foster care at the rate of 58.1 children per thousand, while non-native children were placed at a rate of 3.5 per thousand.¹⁸

The data Congress received regarding the disparity between adoptions of native children and adoptions of non-native children were equally discouraging. Adoption rates in Minnesota between 1964 and 1975 were 126.6 per thousand for native children as compared to 32.2 per thousand for non-native children.¹⁹ One native child in eight in Minnesota was in an adoptive home between 1969 and 1974; of those adopted, nearly one in four was under one year of age.²⁰ Perhaps most startling was the fact that ninety percent of unrelated adoptions of native children in Minnesota were by non-native families.²¹ Minnesota bore much of the criticism engendered by this testimony and statistics; however, Congress noted that Minnesota may have kept better statistics than most states whose practices were surveyed.²²

Testimony before Congress focused on the fact that white agency social workers traditionally had exercised enormous, but uninformed, discretion in deciding to place native children in foster care. These decisions were often based on the social workers' cultural biases which affected their perceptions of native peoples' use of alcohol, child rearing practices, and the use of multi-generational nuclear families for child care. These biases showed, of course, that the huge rates of foster placement were largely misguided.²³

4 (1989); H.R. REP. NO. 1386, 95th Cong., 2d Sess. 9-10 (1978), *reprinted in* 1978 USCCAN 7530, 7531 [*hereinafter* House Report]; *see also* Kathryn A. Carver, "The 1985 Minnesota Indian Family Preservation Act: Claiming A Cultural Identity," 4 LAW & INEQUALITY 327, 328-29 & nn. 7-8 (1986) [*hereinafter*, Carver].

15. House Report, *supra* note 14, at 9.

16. *Id.*

17. *Id.*

18. Barsh, *supra* note 14, at 1288 n.14.

19. *Id.*

20. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 33 (1989).

21. House Report, *supra* note 14, at 9.

22. *Id.*

23. House Report, *supra* note 14, at 10-11; Barsh, *supra* note 14, at 1294-96; *see*

Social psychologists demonstrated at the hearings that large removal rates resulted in significant problems for the children, their families and their tribes. Dr. Joseph Westermeyer of the University of Minnesota summarized his research on native adolescents who had difficulty coping in white society:

[T]hey were raised with a white cultural and social identity. They are raised in a white home. They attended, predominantly white schools, and in almost all cases, attended a church that was predominantly white, and really came to understand very little about Indian culture, Indian behavior, and had virtually no viable Indian identity. . . [D]uring adolescence, they found that society was not to grant them the white identity that they had. . . [T]hey were finding that society was putting on them an identity which they didn't possess and taking from them an identity that they did possess.²⁴

Other witnesses reported that native children subjected to long-term foster care had, as adults, higher rates of alcohol abuse and suicide.²⁵

The effect of a child's removal upon remaining family members was shown at the hearings to be equally destructive. Dr. Westermeyer reported that removal of a child "effectively destroyed the family as an intact unit. The parents invariably separated. It exacerbated the problems of alcoholism, unemployment, and emotional duress among the parents[.]"²⁶ and increased the likelihood that other children would be removed as well.²⁷

As the United States Supreme Court noted in *Mississippi Band of Choctaw Indians v. Holyfield*, there was also considerable emphasis at the hearings concerning the impact of the massive removal of their children upon the tribes themselves. Chief Calvin Isaac of the Mississippi Band of Choctaw Indians testified:

Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of tribal heritage, are to be raised in non-Indian homes and de-

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. at 34-35: "One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child." See also Carver, *supra* note 14 at 348 & nn.125-28.

24. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. at 33 n.1; see also Carver, *supra* note 14 at 349-50.

25. Barsh, *supra* note 14, at 1290.

26. *Id.* at 1291; see also *id.* at 1292 ("[I]f you lose your children, you are dead; you are never going to be rehabilitated, [and] you are never going to get well").

27. *Id.*

nied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities.²⁸

Based upon the testimony, Congress concluded that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children," and that "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children [and]. . . placed in non-Indian foster and adoptive homes. . ." ²⁹ Congress also found that the states, in exercising authority over child custody proceedings, often failed to recognize native peoples' social and cultural standards.³⁰ In the ICWA's declared policy, Congress stated that it intended to establish minimum federal standards for removal and placement of native children which would reflect the unique values of Indian culture.³¹ The ICWA's provisions, particularly those establishing burdens of proof and placement standards, are based on the testimony before Congress, and respond specifically to the statute's policy statement.

B. *The Minnesota Juvenile Court Act*

A Minnesota lawyer will find in the Minnesota Juvenile Court Act the substantive laws providing for child protection proceedings. The ICWA imposes certain procedural requirements upon these proceedings. The Juvenile Court Act contains the substantive provisions which authorize involuntary child protection proceedings: temporary Child in Need of Protection or Services ("CHIPS")³² suits, or the permanent termination of parental rights suits.³³ The Juvenile Court Act also contains procedural provisions governing preparation and filing of petitions,³⁴ removal of children from their homes,³⁵ and provisions relating to trial³⁶ and post-trial dispositions.³⁷ Portions of the Minnesota Minority

28. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34 (1989). "If tribal sovereignty is to have any meaning at all at this juncture of history, it must necessarily include the right, within its own boundaries and membership, to provide for the care and upbringing of its young, a *sine qua non* to the preservation of its identity." *Wisconsin Potawatomies of the Hannahville Indian Community v. Houston*, 393 F. Supp. 719, 730 (W.D. Mich. 1973).

29. 25 U.S.C. § 1901(3),(4) (1988).

30. 25 U.S.C. § 1901(5) (1988).

31. 25 U.S.C. § 1902 (1988).

32. MINN. STAT. § 260.015, subd. 2a (1990). Some lawyers use the terms "legal custody" interchangeably with CHIPS.

33. MINN. STAT. § 260.221 (1990).

34. MINN. STAT. §§ 260.131, 260.133, 260.135, 260.141 (1990).

35. MINN. STAT. §§ 260.165, 260.171-260.173 (1990).

36. MINN. STAT. §§ 260.155-260.156 (1990).

37. MINN. STAT. §§ 260.191, 260.231, 260.235, 260.241-260.242 (1990).

Heritage Act³⁸ and all of the 1989 "reasonable efforts" law³⁹ are in the Juvenile Court Act.

The CHIPS statute⁴⁰ authorizes a public agency or private petitioner to seek the juvenile court's jurisdiction over a child. It provides the juvenile court authority⁴¹ to obtain formal custody over a child for various reasons, such as environmental neglect or physical abuse.⁴² Prior to 1988, CHIPS proceedings were referred to as proceedings for dependency or neglect.⁴³

The Juvenile Court Act also provides the court with authority to terminate a person's parental rights to a child. While this is usually an involuntary procedure,⁴⁴ the statute permits a voluntary termination of parental rights.⁴⁵ The former usually involves a more aggravated situation, often one in which a prior CHIPS proceeding failed to correct conditions in the child's home. There are eight types of involuntary termination proceedings, which range from palpable unfitness of the parent to uncorrected conditions which had previously led to court jurisdiction.⁴⁶

C. *The Minnesota Indian Family Preservation Act*

The Indian Family Preservation Act was enacted by the Minnesota legislature in 1985.⁴⁷ It placed into state law many, but not all, of the provisions of the ICWA.⁴⁸ Most of its definitions correspond to those in the ICWA. The Indian Family Preservation Act is particularly useful to a Minnesota lawyer because it applies specifically to situations in which a parent voluntarily places a child in foster care, and imposes specific duties upon a local welfare agency or a private placement agency when a native child is volun-

38. See, e.g., MINN. STAT. §§ 260.181, subd. 3 (1990). For discussion of Minnesota Minority Heritage Act see *infra* notes 56-62 and accompanying text.

39. MINN. STAT. §§ 260.012; 260.015, subds. 1a, 11, 13, 14, 26, 27; 260.111; 260.135, subd. 2; 260.141, subd. 2a; 260.155, subds. 4, 7; 260.165, subd. 1; 260.171, subd. 1; 260.172, subds. 1, 4; 260.173, subd. 2; 260.181, subd. 2; 260.191, subds. 1a, 1e; 260.231, subd. 3 (1990). For discussion of the 1989 "reasonable efforts" law see *infra* notes 63-72 and accompanying text.

40. MINN. STAT. § 260.015, subd. 2a (1990).

41. Such authority must be alleged in a petition prepared under MINN. STAT. § 260.131 (1990).

42. As in other areas of the law, a juvenile court petition can allege and seek the court's jurisdiction under multiple statutory theories.

43. MINN. STAT. § 260.015, subds. 6, 10 (1986) (Many other portions of the Juvenile Court Act were amended with this provision in 1988.)

44. MINN. STAT. § 260.221, subd. 1(b) (1990).

45. MINN. STAT. § 260.221, subd. 1(a) (1990).

46. MINN. STAT. § 260.221, subd. 1(b)(4); § 260.221, subd. 1(b)(5) (1990).

47. MINN. STAT. §§ 257.351-257.3579 (1990); see generally Carver, *supra* note 14.

48. MINN. STAT. §§ 257.351, subds. 3, 5, 6-9, 11, 13-15; 257.354, subds. 1, 3-5 (1990).

tarily placed or even considered for placement.⁴⁹ The most important of those specific duties is that of notification to the tribe and its social services agency.⁵⁰

Application of the Indian Family Preservation Act to voluntary placements distinguishes it from the ICWA, since the federal statute may not apply to some types of voluntary placements.⁵¹ Although the ICWA's applicability to voluntary placements has been occasionally questioned in court decisions in other states, in Minnesota, the Indian Family Preservation Act's provisions will control because they provide a higher standard of protection to native families.⁵²

Aside from the definitions⁵³ and voluntary placement provisions, the other portions of the Indian Family Preservation Act which transfer ICWA provisions into state law are concerned with tribal court jurisdiction matters.⁵⁴ These provisions are not as essential to the Minnesota lawyer because the ICWA's rules will govern in any event.⁵⁵

D. *The Minnesota Minority Heritage Act*

The Minority Heritage Act was passed by the Minnesota legislature in 1983,⁵⁶ and is found throughout Chapters 257, 259 and 260 of Minnesota Statutes.⁵⁷ The Minority Heritage act requires the local welfare agency and the Department of Human Services

49. MINN. STAT. §§ 257.352; 257.353 (1990).

50. MINN. STAT. §§ 257.352, subds. 2-3; 257.353, subds. 2-3 (1990). The importance of this provision's role in filling a gap in the ICWA lies in the dynamics of the tribal-state relationship and the state agency-native family relationship. Carver notes that the "temporary" nature of foster care, especially for Minnesota minority children, is a myth and that the act's provisions for early notice to, and intervention by, the tribe serves to prevent unnecessary, and culturally-biased, placements. Carver, *supra* note 14 at 345-47.

51. See, e.g., 25 U.S.C. § 1912(a) (1988) and Carver, *supra* note 14 at 334-35, 345-47; see also *infra* text accompanying notes 113-16, discussing the definition of a foster care placement, which triggers applicability of the ICWA, and text accompanying notes 129-48, discussing whether and under which circumstances a voluntary placement in any form is subject to ICWA requirements.

52. 25 U.S.C. § 1921 (1988). See also text accompanying notes 97-99.

53. MINN. STAT. §§ 257.351, subds. 3, 5, 6-9, 11, 13-15 (1990).

54. MINN. STAT. § 257.354, subds. 1, 3-5 (1990).

55. See *infra* text accompanying notes 92-99.

56. 1983 MINN. LAWS ch. 278.

57. MINN. STAT. §§ 257.01; 257.065; 257.071, subds. 1a, 2, 6; 257.072; 259.255; 259.27, subds. 1, 2; 259.28, subd. 2; 259.455; 260.181, subd. 3; 260.191, subds. 1, 1a; 260.192; 260.242, subd. 1a (1990). The Minnesota Court of Appeals recently invalidated a portion of the Minority Heritage Act on equal protection grounds. *In re D.L.*, 479 N.W.2d 408 (Minn. Ct. App. 1991). This holding has little relevance to the lawyer representing native clients because of traditional equal protection analysis in Indian law. See *infra* text accompanying notes 107-108. In affirming the Court of Appeals, the Supreme Court did not address the constitutional issue. *In re D.L.*,

to recruit foster families and place children in accord with their racial, cultural, and religious preferences. The ICWA is silent on the issue of state recruitment of foster families and religious preferences, and therefore does not preempt the Minority Heritage Act's requirements.⁵⁸ A portion of the Minority Heritage Act permits a biological parent to specifically request that the preferences expressed in the statute be disregarded.⁵⁹ The corresponding provision of the ICWA merely requires that a child or parent's preference be considered.⁶⁰ This minor conflict between these two provisions is not sufficient to raise a Supremacy Clause issue.⁶¹

The Minority Heritage Act applies to adoptive placements, to foster care placements, and, unlike the ICWA, to all voluntary placements. Its preferences are less specific than those contained in the ICWA, but are compatible with the ICWA's.⁶²

E. 1989 "Reasonable Efforts" Legislation

In 1989, the Minnesota Legislature passed what has come to be known as the "reasonable efforts" law.⁶³ Extensive lobbying efforts by lawyers and legal services offices working with native and minority families contributed to this legislation. It is found throughout Chapter 260 of Minnesota Statutes.⁶⁴

The "reasonable efforts" law incorporates into state law additional portions of the ICWA not considered by the Indian Family Preservation Act.⁶⁵ Specifically, it requires the trial courts to

486 N.W.2d 375 (Minn. 1992). The legislature responded to the Court of Appeals' constitutional concerns, see 1992 Minn. Laws, ch. 557.

58. 25 U.S.C. § 1915 (1988).

59. MINN. STAT. §§ 259.255; 260.181, subd. 3 (1990). See *In re M.M.*, 436 N.W.2d 827 (Minn. Ct. App. 1989), *rev'd*, 452 N.W.2d 236 (Minn. 1990).

60. 25 U.S.C. § 1915(c) (1988).

61. See *infra* text accompanying notes 92-99.

62. The portion of the Minority Heritage Act which applies to voluntary placements is MINN. STAT. § 257.071, subd. 1a. The ICWA preferences applying to involuntary placements are found in 25 U.S.C. § 1915 (b),(c),(d) (1988).

63. 1989 MINN. LAWS ch. 235. The legislature in the purposes clause used the term "reasonable efforts" to describe efforts required to prevent placement of children, and defined in the statute what it meant by "reasonable efforts." See MINN. STAT. § 260.012(b).

64. MINN. STAT. §§ 260.012; 260.015, subsd. 1a, 11, 13, 14, 26, 27; 260.111, subd. 5; 260.135, subd. 2; 260.141, subd. 2a; 260.155, subsd. 4, 7; 260.165, subd. 1; 260.171, subd. 1; 260.172, subsd. 1, 4; 260.173, subd. 2; 260.181, subd. 2; 260.191, subsd. 1a, 1e; 260.231, subd. 3 (1990). See also *infra* text accompanying notes 154 and 391-93 for a discussion of the meaning of "reasonable efforts."

65. MINN. STAT. §§ 260.012, subd. a; 260.015, subd. 13; 260.111, subd. 5; 260.135, subd. 2; 260.141, subd. 2a; 260.165, subd. 1(c)(2); 260.172, subd. 1 (1990). Other portions of the 1989 act repeat portions of the ICWA enacted into state law by the Indian Family Preservation Act. See, e.g., MINN. STAT. §§ 260.015, subsd. 11, 14, 26, 27 (1990).

make findings, both before and after adjudication, consistent with the burdens of proof imposed by the ICWA.⁶⁶ It also contains a preference for native guardians-ad-litem for native children.⁶⁷

The "reasonable efforts" law contains two provisions which complement the parallel provisions of the ICWA, and thus effectively transfer portions of the ICWA into Minnesota law. The first of these restricts pre-adjudicatory placements in three ways: a) it applies the ICWA's "reasonable efforts" proof requirement to placements made in connection with an emergency health and welfare hold hearing, *i.e.*, a pretrial placement;⁶⁸ b) it permits a parent to recommend at that hearing alternate placements to that chosen by the welfare agency;⁶⁹ c) it requires that placements of children at the health and welfare hold hearing stage be the least restrictive setting possible and in close proximity to the child's family or with a relative.⁷⁰

The second parallel between the reasonable efforts law and the ICWA incorporates the ICWA's "remedial efforts" section⁷¹ and establishes that a Minnesota trial court may not make a pre-adjudicatory or a post-adjudicatory decision on a child protection case without also considering the level of services provided the family, the appropriateness of those services, and their effectiveness.⁷²

F. Federal and State Implementing Regulations

Shortly after enactment of the ICWA, the Department of the Interior published implementing regulations for state court practice under the ICWA, which have become known as the Bureau of Indian Affairs (BIA) Guidelines.⁷³ The Minnesota Department of Human Services (MDHS) issued its own set of regulations ("MDHS Regulations")⁷⁴ after passage of the Indian Family Preservation Act and the Minority Heritage Act.

The BIA Guidelines and the MDHS Regulations both operate to fill gaps left by the ICWA, and provide practitioners and judges

66. MINN. STAT. § 260.012, subd. a; 260.172, subd. 1 (1990).

67. MINN. STAT. § 260.155, subd. 4(d) (1990).

68. MINN. STAT. § 260.012, subds. a, c; 260.172, subd. 1 (1990).

69. MINN. STAT. § 260.172, subd. 4 (1990).

70. MINN. STAT. § 260.173, subd. 2 (1990).

71. 25 U.S.C. § 1912(d) (1988).

72. MINN. STAT. §§ 260.012, subds. a, c; 260.155, subds. 7(6),7(7); 260.191, subds. 1a, 1e (1990).

73. BUREAU OF INDIAN AFFAIRS, U.S. DEP'T. OF THE INTERIOR, *Guidelines for State Courts*, 44 Fed. Reg. 67584-67595 (1979)[*hereinafter* BIA Guidelines].

74. MINNESOTA DEP'T OF HUMAN SERVICES, *Social Services Manual*, XIII-3500 to XIII-3630 (January 30, 1987)[*hereinafter* MDHS Regulations].

with guidance as to what Congress intended in particular situations. Many portions of the ICWA - in keeping with its original goal of establishing *minimum* standards - prescribe only bare outlines of recommended procedure, and leave the details to the guidelines, regulations and state court decisions.⁷⁵ Consequently, a Minnesota lawyer cannot practice under the ICWA and related Minnesota statutes without knowledge of both the BIA Guidelines and the MDHS Regulations.

The BIA Guidelines are interpretations of various provisions of the ICWA by the Department of the Interior. According to the Department of the Interior, they do not have binding legislative effect and are not mandatory authority.⁷⁶ However, the Department also mandates that, to the extent that it is correct in its interpretations, contrary determinations by state courts are violations of the ICWA.⁷⁷ Most courts which have considered the issue have held that the BIA Guidelines are not binding, but are entitled to considerable deference and great weight.⁷⁸

The Minnesota Court of Appeals, in *In re T.J.J.*, initially agreed that the MDHS Regulations, like the BIA Guidelines, were not mandatory and held that they did not "singularly control the trial court."⁷⁹ However, five years later, the court overruled *In re T.J.J.* in its 1990 decision *In re B.W.*⁸⁰ One of the issues before the court in *In re B.W.* was whether the MDHS Regulations controlled over the BIA Guidelines when the MDHS Regulations provided more protection to the native litigant. Basing its decision on section 1921 of the ICWA and the United States Supreme Court's decision in *Mississippi Band of Choctaw Indians v. Holyfield*,⁸¹ the court held emphatically that the state regulations controlled.⁸² No subsequent Minnesota case has suggested since *In re B.W.* that

75. See e.g., 25 U.S.C. § 1912 (e), (f) (1988).

76. BIA Guidelines, *supra* note 73, at 67584.

77. *Id.*

78. See, e.g., D.E.D. v. State, 704 P.2d 774, 779 n.8 (Alaska 1985); *In re K.L.R.F.*, 515 A.2d 33, 35 n.3 (Pa. Super. Ct. 1986), *appeal dismissed*, 533 A.2d 708 (Pa. 1987); *In re Holloway*, 732 P.2d 962, 970 (Utah 1986); *In re T.R.M.*, 525 N.E.2d 298, 307 (Ind. 1988); *In re Armell*, 550 N.E.2d 1060, 1065 (Ill. Ct. App.), *appeal denied*, 555 N.E.2d 374 (Ill.), *cert. denied*, 111 S.Ct. 345 (1990).

79. *In re T.J.J.*, 366 N.W.2d 651, 655 (Minn. Ct. App. 1985).

80. *In re B.W.*, 454 N.W.2d 437 (Minn. Ct. App. 1990).

81. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

82. *In re B.W.*, 454 N.W.2d at 443-44. "In light of the U.S. Supreme Court's analysis of the problem and the role of the state courts in *Holyfield* and applying § 1921 of the ICWA, we conclude that we cannot recognize the vitality of the holding in *T.J.J.* leaving application of the evidentiary standards in the DHS manual to the discretion of state trial courts. . . we feel it is essential to the recognition of the purposes of the ICWA that if a trial court does not apply the standards in the [M]DHS manual, that court should make explicit findings as to why it [did not]."

the federal and state regulations are anything but mandatory.⁸³

III. Threshold Issues: Statutory Construction, Preemption/Supremacy Clause, and the ICWA's Constitutionality

A. Statutory Construction

Statutory construction arguments usually relate to questions such as these:

- did the legislature really say that?
- if so, did the legislature really mean to say that?
- how literally should a statute be applied to a particular set of facts?
- how are two apparently conflicting statutes applied?

These types of questions will certainly arise in state court proceedings under the ICWA. The questions may be provoked by the ICWA's proof requirements which differ from Minnesota law, or by the differences between the BIA Guidelines and the MDHS Regulations.

Most lawyers are at least vaguely familiar with the standard rules of statutory construction contained in chapter 645 of Minnesota Statutes and in common law rules of construction. Some of the same rules and some different rules apply to construction of statutes in the area of Indian law. Lawyers who practice under the ICWA and related state statutes should keep these principles in mind.

The basic rules are simply summarized: To determine whether Indian rights exist, the statute is to be liberally interpreted; to determine whether Indian rights are to be abridged or abrogated, the statute is to be strictly construed.⁸⁴

The foremost of these principles is that statutes "passed for the benefit of dependent Indian tribes. . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians."⁸⁵ A related tenet is that remedial and humanitarian statutes are to be given a liberal construction.⁸⁶ Although no Minnesota court has ruled on the issue, a number of courts in other states

See *infra* text accompanying notes 98-99; see also *In re M.S.S.*, 465 N.W.2d 412, 417 (Minn. Ct. App. 1991):

83. *In re M.S.S.*, 465 N.W.2d 412, 417 (Minn. Ct. App. 1991).

84. See David H. Getches and Charles F. Wilkinson, *Federal Indian Law: Cases and Materials* 217 (2d Ed. 1986).

85. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 467 U.S. 138, 149 (1984); *State v. Forge*, 262 N.W.2d 341, 347 (Minn. 1977), *appeal dismissed*, 435 U.S. 919 (1978); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 935 (N.J. 1988).

86. *Harrison v. Schafer Constr. Co.*, 257 N.W.2d 336, 338 (Minn. 1977).

have held that the ICWA is, in fact, remedial legislation, and therefore should be liberally construed.⁸⁷

A second rule of construction is that of "express mention and implied exclusion." This rule holds that when a legislature specifies an item in a statute, other items not specified by the legislature are excluded from the statute.⁸⁸ Several areas of the ICWA suggest application of this rule.⁸⁹

The rules for construction of statutes in the area of Indian law are quite similar to those for construction of treaties,⁹⁰ and, in fact, the former derive from the latter.⁹¹

B. Preemption/Supremacy Clause

The ICWA was enacted by Congress under authority derived from the Indian Commerce Clause⁹² of the United States Constitution. Congressional enactments under the Indian Commerce Clause - by virtue of the Supremacy Clause⁹³ - preempt any contradictory state law,⁹⁴ for, "[w]hen Congress legislates pursuant to

87. See, e.g., *In re M.E.M.*, 635 P.2d 1313, 1317 (Mont. 1981); *In re K.L.R.F.*, 515 A.2d 33, 37 (Pa. Super. Ct. 1986), *appeal dismissed*, 533 A.2d 708 (Pa. 1987). See also BIA Guidelines, *supra* note 73, at 67586.

88. See *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 47 n.22 (1989); *In re Q.G.M.*, 808 P.2d 684, 688 (Okla. 1991). See also *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) ("Buy Indian" statute); *Bryan v. Itasca County*, 426 U.S. 373, 392-93 (1976); *Tom v. Sutton*, 533 F.2d 1101, 1104-05 (9th Cir. 1976) (Indian Civil Rights Act); *In re S.B.R.*, 719 P.2d 154, 156 (Wash. Ct. App. 1986) ("express mention, implied exclusion" rule applies to ICWA); *In re Baby Girl A.*, 282 Cal. Rptr. 105, 109 (Cal. Ct. App. 1991) (rule does not apply to ICWA to vary clear legislative intent); *Maytag Co. v. Commissioner of Taxation*, 17 N.W.2d 37, 39 (Minn. 1944) (business tax).

89. E.g., 25 U.S.C. § 1922 (1988). See note 120; see also 25 U.S.C. § 1903(1) (1988) and text accompanying notes 129-148 discussing types of voluntary proceedings subject to the ICWA.

90. *State v. Keezer*, 292 N.W.2d 714, 716 (Minn. 1980).

91. See David H. Getches, Daniel M. Rosenfelt & Charles F. Wilkinson, *Federal Indian Law: Cases and Materials* 200 (1979).

92. The Indian Commerce Clause is found in ART. I, SECTION 8, CLAUSE 3, and gives to Congress the power to regulate commerce with the Indian tribes. See 25 U.S.C. § 1901 (1988); *In re D.L.L. and C.L.L.*, 291 N.W.2d 278, 281 (S.D. 1980); *In re Armell*, 550 N.E.2d 1060, 1067-68 (Ill. Ct. App.), *appeal denied*, 555 N.E.2d 374 (Ill.), *cert. denied*, 111 S.Ct. 345 (1990). See House Report, *supra* note 14, at 13-19.

93. U.S. CONST. art. VI, § 2 reads as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

94. See David H. Getches and Charles F. Wilkinson, *Federal Indian Law: Cases and Materials* 332-33 (2d Ed. 1986) and House Report, *supra* note 14, at 17-19. See also *In re Halloway*, 732 P.2d 962, 966 (Utah 1986).

its delegated powers, conflicting state law and policy must yield.⁹⁵ As the Utah Supreme Court articulated:

Under general supremacy principles, state law cannot be permitted to operate as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. . . . [W]here Indian affairs are concerned, a broad test of preemption is to be applied.⁹⁶

In only one respect does the ICWA not preempt contradictory state law. Consistent with the goal of the ICWA to set *minimum* federal standards for the conduct of state court proceedings,⁹⁷ section 1921 of the ICWA states that state law standards providing better protection of native parental rights remain valid.⁹⁸ Under this section, the Minnesota Court of Appeals has twice held that the expert witness guidelines published by the Minnesota Department of Human Services prevail over the somewhat less explicit guidelines published by the Bureau of Indian Affairs.⁹⁹

C. Constitutionality of the ICWA

The principal constitutional challenges to the ICWA have been based on the Fifth and Tenth Amendments to the Constitution. The Fifth Amendment challenge is grounded in the equal protection guarantee which has been read into the amendment's Due Process Clause by judicial decision.¹⁰⁰ It is primarily addressed to the portion of the ICWA which establishes exclusive tribal court jurisdiction under certain circumstances,¹⁰¹ and posits that denial of access to state courts to certain classes of litigants on

95. House Report, *supra* note 14, at 13.

96. *In re Halloway*, 732 P.2d at 967.

97. 25 U.S.C. § 1902 (1988).

98. 25 U.S.C. § 1921 (1988). The Department of the Interior urged the Congress to add this language. See House Report, *supra* note 14, at 34.

99. *In re B.W.*, 454 N.W.2d 437, 442-44 (Minn. Ct. App. 1990); *In re M.S.S.*, 465 N.W.2d 412, 417 (Minn. Ct. App. 1991). See *infra* text accompanying notes 364-380 discussing the two sets of guidelines for expert witnesses. Minnesota lawyers should also note that Minnesota's best interests of the child standard in child protection cases should change under a 1990 Minnesota statute which specifically states that a native child's best interests must be determined consistently with the ICWA and the Indian Family Preservation Act. See MINN. STAT. § 260.011, subd. 2 (1990) and *In re M.T.S.*, No. FX-91-50419 (Minn. Dist. Ct., 7th Dist. filed January 16, 1992) a copy of which is on file with LAW AND INEQUALITY. The trial court's decision in *In re M.T.S.* was affirmed as this article was going to press by the Minnesota Court of Appeals, which held that Minnesota's best interests of the child rule is preempted by the ICWA. *In re M.T.S.*, — N.W.2d — (Minn. Ct. App. September 15, 1992).

100. *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954). See generally Edward S. Corwin, THE CONSTITUTION AND WHAT IT MEANS TODAY 330-31 (Harold W. Chase and Craig R. Ducat ed. 1973).

101. 25 U.S.C. § 1911 (a), (b) (1988).

account of race constitutes invidious discrimination.¹⁰² This view was one of the reasons the Department of Justice objected to the ICWA before its enactment.¹⁰³ As noted in the legislative history of the ICWA,¹⁰⁴ a long line of decisions of the United States Supreme Court,¹⁰⁵ and every state court which has considered this equal protection challenge has decisively refuted it.¹⁰⁶

A related claim holds that according native peoples privileges under federal law not made available to non-native peoples violates equal protection suspect class principles under traditional Fifth and Fourteenth Amendment analysis. This claim, which is not limited to complaints about the ICWA, has also been consistently rejected.¹⁰⁷ As an Illinois appellate court noted, "[f]ederal legislation with respect to Indian tribes is not based upon impermissible racial classifications, but derives from the special status of Indians as members of quasi-sovereign tribal entities."¹⁰⁸

The Tenth Amendment¹⁰⁹ challenge suggests that Congress, by dictating minimum federal procedural and evidentiary standards to the state courts concerning the operation of their juvenile courts, intrudes upon the residual rights left to the states by the Constitution. The Department of Justice objected to the ICWA, before its enactment, on this ground.¹¹⁰ A similar objection has been raised in at least two state court proceedings under the ICWA.¹¹¹

102. House Report, *supra* note 14 at 35-39.

103. *Id.*

104. House Report, *supra* note 14, at 13-19.

105. *See, e.g., Fisher v. Dist. Ct.*, 424 U.S. 382, 390-91 (1976), where the Court said, "The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the . . . Tribe under federal law. Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government."

106. *See, e.g., In re D.L.L. and C.L.L.*, 291 N.W.2d 278, 281 (S.D. 1980); *In re Appeal in Pima County Juvenile Action*, 635 P.2d 187, 193 (Ariz. Ct. App. 1981), *cert. denied*, 455 U.S. 1007 (1982); *In re Angus*, 655 P.2d 208, 213 (Or. Ct. App. 1982), *review dismissed*, 660 P.2d 683 (Or.), *cert. denied*, 464 U.S. 830 (1983).

107. *See, e.g., In re Armell*, 550 N.E.2d 1060, 1067 (Ill. Ct. App.), *appeal denied*, 555 N.E.2d 374 (Ill.), *cert. denied*, 111 S.Ct. 345 (1990)(ICWA); *State v. Forge*, 262 N.W.2d 341, 347-48 (Minn. 1977), *appeal dismissed*, 435 U.S. 919 (1978)(fishing treaty rights). *See also Carver, supra* note 14 at 349.

108. *In re Armell*, 550 N.E.2d at 1067.

109. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend X.

110. House Report, *supra* note 14, at 39-40.

111. *In re D.L.L. and C.L.L.*, 291 N.W.2d 278, 281 (S.D. 1980); *In re T.R.M.*, 525 N.E.2d 298, 303 n.1 (Ind. 1988).

The legislative history and at least one state-court decision conclusively rebuts the Tenth Amendment claim. Given the plenary power of Congress to regulate Indian affairs, the long-standing rule is that Congressional legislation on Indian affairs does not violate the Tenth Amendment as long as the power is not exercised arbitrarily.¹¹²

The law in this area appears to be settled: currently, there is no constitutional impediment to the ICWA.

IV. To Which Litigants Do These Laws Apply?

The ICWA does not apply to every native person in every juvenile court child protection proceeding across the state and country. Although a mother may consider herself a native person, and may have been raised in a native community and according to native customs, the ICWA does not necessarily apply to a particular juvenile court proceeding involving her and her children. Whether the ICWA applies depends upon factors such as the type of proceeding involved, the type of placement, and tribal enrollment criteria.

A. Which Types of Proceedings?

1. Child Custody Proceedings Under the ICWA

The key to applicability of the ICWA and the Indian Family Preservation Act is whether a juvenile court proceeding is a "child custody proceeding." If a proceeding is not a "child custody proceeding," most of the ICWA's provisions, such as those for transfer to tribal court, notice, intervention, proof requirements, placement preferences, and collateral attack may not apply.

Both the ICWA and the Indian Family Preservation Act define a "child custody proceeding" to include "foster care placements," termination of parental rights, "preadoptive placements," and "adoptive placements."¹¹³ Of these definitions, that of a "foster care placement" is the most important to the applicability of the ICWA. It is defined as "any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home. . .where the parent or Indian custodian cannot have the child returned on demand."¹¹⁴ This last clause of the defini-

112. House Report, *supra* note 14, at 17-19; *In re D.L.L. and C.L.L.*, 291 N.W.2d at 281.

113. 25 U.S.C. § 1903(1) (1988); MINN. STAT. § 257.351, subd. 3 (1990). See also MDHS Regulations, XIII-3513(2), discussing each term's definition.

114. 25 U.S.C. § 1903(1)(i) (1988)(emphasis added). The Indian Family Preservation Act, MINN. STAT. § 257.351, subd. 3(b) (1990), refers to this as an involuntary

tion of "foster care placement" bears particular emphasis because that language determines, in most cases, whether the ICWA, as a threshold matter, is even applicable.¹¹⁵ Some courts in other states have mistakenly held, based upon that language, that no part of the ICWA is applicable to voluntary placements.¹¹⁶

The other three definitions of "child custody proceedings," which Minnesota courts have not, as of yet, addressed are:

- a termination of parental rights means any action resulting in the termination of the parent-child relationship.¹¹⁷
- a "preadoptive placement" means the temporary placement of an Indian child in a foster home or institution after termination of parental rights but before adoption.¹¹⁸
- an "adoptive placement" is the permanent placement of an Indian child for adoption.¹¹⁹

Based on the definitions of "child custody proceedings," it is easy to see which analogous proceedings under Minnesota law would be covered by the ICWA and the Indian Family Preservation Act:

- a temporary placement after a child has been picked up by the police or otherwise on an emergency health and welfare hold, after a hearing has been held in juvenile court;¹²⁰

foster care placement to distinguish the situation from voluntary placements, which may not be subject to some ICWA requirements. *See also* text accompanying notes 129-48.

115. *See supra* note 114 and accompanying text. The ICWA will apply to proceedings as a result of which a child *could be* placed. Whether the child is actually placed is not the ICWA threshold. *State ex. rel. Juvenile Dep't of Multnomah County v. Cooke*, 744 P.2d 596, 597-98 (Or. Ct. App. 1987); *In re J.R.H.*, 358 N.W.2d 311, 321 (Iowa 1984).

116. *See* cases collected at notes 135-36, *infra*. We have argued *infra*, text accompanying notes 135-45, why we believe that parts of the ICWA should apply to some types of voluntary placements.

117. 25 U.S.C. § 1903(1)(ii) (1988); MINN. STAT. § 257.351, subd. 3(d) (1990).

118. 25 U.S.C. § 1903(1)(iii) (1988); MINN. STAT. § 257.351, subd. 3(c) (1990).

119. 25 U.S.C. § 1903(1)(iv) (1988); MINN. STAT. § 257.351, subd. 3(a) (1990).

120. MINN. STAT. §§ 260.171-260.172 (1990). Since a placement made by the court hearing an emergency health and welfare hold proceeding is one in which, by definition, the parent cannot on demand have the child returned, it is, in fact, a "foster care placement" within the meaning of the ICWA. This means that the ICWA's notice, adjudicatory, expert witness and placement preference sections, at a minimum, apply. *See supra* text accompanying notes 50, 113-16. Although there is some disagreement on this point among Hennepin County Juvenile Court practitioners, that court recently accepted this view in *In re C.C.*, File 152933-94 (Minn. Juv. Ct. April, 1991). A copy of the memorandum of law supporting this position in that case is on file with LAW & INEQUALITY. This is not to say that there must be a contested hearing in compliance with the ICWA before the police can even pick up a child. It is to say, however, that the state-law health and welfare hold hearing which must take place after the child is picked up must comply with the ICWA. One foreign case disagrees with this analysis, holding that the notice requirements of 25 U.S.C. § 1912 (1988) do not apply to emergency health and welfare hold hearings. *D.E.D. v. State*, 704 P.2d 774, 779 (Alaska 1985). *See also State ex. rel. Juvenile Dep't of*

- a placement after the filing of a CHIPS petition in juvenile court, regardless of whether there has been an emergency health and welfare hold proceeding;¹²¹
- placements made after the juvenile court adjudicates, after trial or admission, a CHIPS petition;¹²²
- placements made in connection with a termination of parental rights.¹²³

All of these types of placements, at least those that remain in state court, will be subject to the notice, adjudicatory and placement preference sections of the ICWA, and the placements must also comply with the Minority Heritage Act.¹²⁴

Multnomah County v. Charles, 688 P.2d 1354, 1358 (Or. Ct. App. 1984), *review dismissed*, 701 P.2d 1053 (Or. 1985)(suggesting that some ICWA requirements might not apply to these hearings). The Minnesota Court of Appeals suggested, *in dicta*, that it might agree with this latter position in an opinion filed as this article went to press. *In re J.A.S.*, 488 N.W.2d 332 (Minn. Ct. App. 1992). We have demonstrated here why we believe that this view is mistaken.

A related issue is whether, under the ICWA, a Minnesota juvenile court even has jurisdiction to preside over a health and welfare hold proceeding involving a child not residing or domiciled on a reservation. The ICWA, 25 U.S.C. § 1922 suggests by negative implication that only children domiciled or residing on a reservation but temporarily off the reservation can be subject of a health and welfare hold proceeding in state court. A literal reading of § 1922 provides a state court, at best, no more than concurrent, emergency jurisdiction with the tribal court, over its domiciliaries. [This concurrent jurisdiction is usually called referral jurisdiction.] See *In re R.I.*, 402 N.W.2d 173, 176 (Minn. Ct. App. 1987). As noted earlier, the statutory construction canon of "express inclusion, implied exclusion" applies in Indian law, and would suggest that § 1922's specific grant of authority excludes all others. See *supra* text accompanying notes 88-89. Professor Barsh's article agrees with this interpretation, although he believes that it is a drafting error. Barsh, *supra* note 14, at 1318-19. One case suggests otherwise. *State ex. rel. Juvenile Dep't of Multnomah County v. Charles*, 688 P.2d 1354, 1358 n.2 (Or. Ct. App. 1984), *review dismissed*, 701 P.2d 1053 (Or. 1985)(citing legislative history). The Minnesota Legislature was urged in 1984 to close this apparent gap but did not do so. 1984 H.F. 1502. See Carver, *supra* note 14 at 338-44 for analysis of the history of H.F. 1502 in 1984. The 1989 "reasonable efforts" legislation, MINN. STAT. § 260.165, subd. 1(c)(2) (1990) enacted into Minnesota law 25 U.S.C. § 1922 without change notwithstanding the apparent gap which had been called to its attention in 1984. A copy of a memorandum of law filed in support of this position, which was not adopted by the Hennepin County Juvenile Court, in *In re M.G.*, File 120525-95 (Minn. Juv. Ct. Nov. 1984) is on file with LAW & INEQUALITY. At and before the time that motion was filed, we were advised that Arizona and New Mexico were taking the same position in an effort not to provide services to non-reservation children, and changed their position under threat of a lawsuit. Letter from Craig J. Dorsay (January 7, 1985) (on file with LAW & INEQUALITY).

In its decision in *In re J.A.S.*, 488 N.W.2d 332 (Minn. Ct. App. 1992), which was filed as this article went to press, the court of appeals assumed without deciding that § 1922 applies to children not domiciled or residing on a reservation. For the reasons discussed here, we believe that this view is mistaken.

121. MINN. STAT. § 260.173 (1990).

122. MINN. STAT. § 260.191 (1990).

123. MINN. STAT. § 260.242 (1990).

124. 25 U.S.C. §§ 1912, 1915 (1988); MINN. STAT. §§ 259.255, 259.28, 260.181, subd. 3, 260.191, subd. 1a, 260.242 (1990).

2. Some Types of Proceedings Are Excluded

Neither the ICWA nor the Indian Family Preservation Act applies to juvenile court delinquency prosecutions.¹²⁵ Both laws, however, do apply to juvenile court status delinquency proceedings, such as liquor, curfew and truancy violations.¹²⁶ Neither act applies to placements of children resulting from a divorce proceeding,¹²⁷ unless a person other than a parent seeks custody.¹²⁸

3. The Problem of Voluntary Proceedings

In recent years, Minnesota welfare agencies have attempted to reduce involuntary removals and placements of children by encouraging parents, sometimes with implied threats, to place their children with relatives or friends. Because of the frequency with which this practice occurs, it is important for Minnesota lawyers to understand the application of the ICWA to a variety of placements deemed "voluntary." Voluntary proceedings are those which involve a voluntary placement of a child with someone other than the parents, usually only temporarily, or which are a parent's voluntary termination of parental rights to a child.¹²⁹

The ICWA contains its own section on voluntary placements which imposes a number of requirements on voluntary proceedings.¹³⁰ Section 1913(a) provides that a parent or Indian custodian's consent to a foster care placement or termination of parental rights must be in writing and recorded before a district court judge, and may not be given within ten days after the child's birth. The judge must certify that a) the terms and consequences of the consent were fully explained and understood by the parent

125. 25 U.S.C. § 1903(1) (1988); MINN. STAT. § 257.351, subd. 3 (1990).

126. The Indian Family Preservation Act specifically includes status prosecutions. See MINN. STAT. § 257.351, subd. 3 (1990); MDHS Regulations, *supra* note 74, at XIII-3514. While the ICWA does not specifically include or exclude status prosecutions, the language in 25 U.S.C. § 1903(1) (1988) is "an act which, if committed by an adult, would be deemed a crime." By definition, status offenses are those that only a child can commit, for none are illegal conduct for an adult. Minnesota law treats status offenses as non-delinquent conduct, MINN. STAT. §§ 260.015, subds. 5(a), 19-23 & 260.195 (1990). The Ramsey County Juvenile Court held in 1986 that status prosecutions are subject to the ICWA. *In re R.G.B.*, File 84-D-0298 (Minn. Juv. Ct. 1986). The BIA Guidelines specifically apply the ICWA to juvenile status proceedings. See BIA Guidelines, *supra* note 73, at 67587.

127. 25 U.S.C. § 1903(1) (1988); MINN. STAT. § 257.351, subd. 3 (1990); BIA Guidelines, *supra* note 73, at 67587; MDHS Regulations, *supra* note 74, at XIII-3514.

128. This conclusion is based upon implication of the language "or upon an award, in a divorce proceeding, of custody to one of the parents." 25 U.S.C. § 1903(1) (1988)(emphasis added). See MDHS Regulations, *supra* note 74, at XIII-3514 (agreeing with this conclusion).

129. MINN. STAT. §§ 257.071, 260.221, subd. 1(a) (1990).

130. 25 U.S.C. § 1913 (1990).

or Indian custodian;¹³¹ and b) the parent or Indian custodian understood the explanation in English or that it was interpreted into a language the parent or Indian custodian understood. Section 1913(b) permits the parent or Indian custodian to withdraw consent to a foster care placement at any time. If a parent or Indian custodian withdraws consent, the child must be returned.

In proceedings for voluntary termination of parental rights and adoptive placements, the parent's consent may be withdrawn for any reason at any time prior to the entry of the court's final decree of termination and adoption.¹³² Within two years of a final decree of adoption, the parent may still withdraw consent and petition to vacate the decree if the consent was obtained by fraud or duress. Any state's law which permits such an action after more than two years continues to be valid under the ICWA. If the court determines that the consent was obtained through fraud or duress, it must vacate the decree and return the child to its parent.¹³³

The legislative history of section 1913 notes that Congress did not intend to prohibit a state welfare agency from commencing an involuntary proceeding (CHIPS or termination of parental rights), when consent to a foster care placement or termination of parental rights has been withdrawn under section 1913 (b), (c) and (d).¹³⁴

State courts across the country are divided on the issue of whether the ICWA applies in any respect other than the section 1913 requirements to voluntary proceedings.¹³⁵

Section 1913 itself contains none of the notice and other procedural and placement requirements found elsewhere in the ICWA. That fact, together with its use of the terms "foster care placement," "termination of parental rights," and "adoptive placement," which are the predicates for application of the rest of the ICWA, suggests that the ICWA notice, procedural and placement requirements apply to any voluntary proceedings which meet the definitions of "foster care placement," "termination of parental rights," and "adoptive placement."

131. Minnesota has a similar requirement. MINN. STAT. § 257.071, subd. 1 (1990).

132. 25 U.S.C. § 1913(c) (1988).

133. 25 U.S.C. § 1913(d) (1988).

134. House Report, *supra* note 14, at 23. In our experience, this commonly occurs.

135. See, e.g., D.E.D. v. State, 704 P.2d 774, 781-82 (Alaska 1985); Catholic Social Servs. v. C.A.A., 783 P.2d 1159, 1160 (Alaska 1989); Sayers v. Beltrami County, 472 N.W.2d 656, 661 (Minn. Ct. App. 1991), *reversed on other grounds*, 481 N.W.2d 547 (Minn. 1992)(dictum). But see Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 50 n.25 (1989)(Congress intended the ICWA to reach voluntary placements); *In re K.L.R.F.*, 515 A.2d 33, 36-38 (Pa. Super. Ct. 1986), *appeal dismissed*, 533 A.2d 708 (Pa. 1987); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988).

Those courts which have held that the ICWA does not apply to voluntary proceedings emphasize the section 1903(1)(i) definition of "foster care placement," a placement in which "the parent or Indian custodian cannot have the child returned on demand. . . ."136 They hold that, since a parent *can* have a child in a voluntary placement returned on demand, a voluntary placement is not covered by the ICWA's notice and placement requirements. These decisions point to the fact that the ICWA's notice provision limits its requirements to an "involuntary proceeding,"137 a term not defined elsewhere in the ICWA. A preliminary portion of the BIA Guidelines supports this view, stating, "[v]oluntary placements which do not operate to prohibit the child's parent or Indian custodian from regaining custody of the child at any time are not covered by the [ICWA]."138 The problem with the view adopted by these cases is that it essentially treats section 1913 as an orphaned provision which need not be enforced; those cases which hold that none of the ICWA's notice and placement provisions apply to voluntary placements are misguided. First, this restrictive view excludes from ICWA purview even voluntary proceedings under section 1913. If Congress intended that the ICWA's definition of "foster care placements" should operate to exclude from the ICWA's protections all voluntary placements and other voluntary proceedings, it would have said so and would not have enacted section 1913.

Second, a view that applies the restrictive view of "foster care placements" to exclude all voluntary proceedings from the ICWA's protections essentially nullifies section 1913. Such a result is certainly inconsistent with the canon of statutory construction which demands liberal interpretation of statutes designed to benefit native people.¹³⁹ This is contrary to the purposes of the ICWA, which are to restore to Indian tribes the right to make their own determinations as to the placements of their members and

136. 25 U.S.C. § 1903(1)(i) (1988). See, e.g., *In re Baby Boy L.*, 643 P.2d 168, 176 (Kan. 1982); *D.E.D. v. State*, 704 P.2d 774, 781-82 (Alaska 1985). Much of the litigation under 25 U.S.C. § 1913 (1988) concerns the timing of a parent's withdrawal of a voluntary termination. *In re J.R.S.*, 690 P.2d 10, 13-14 (Alaska 1984); *B.R.T. v. Social Servs. Bd.*, 391 N.W.2d 594, 599 (N.D. 1986); *In re Kiogima*, 472 N.W.2d 13, 14-16 (Mich. Ct. App. 1991), *cert. denied*, 112 S.Ct. 952 (1992).

137. 25 U.S.C. § 1912(a) (1988); see, e.g., *Catholic Social Servs. v. C.A.A.*, 783 P.2d 1159, 1160 (Alaska 1989).

138. BIA Guidelines, *supra* note 73, at 67587; voluntary placements are not done before a judge in Hennepin County.

139. See cases cited *supra* note 85 and *In re K.L.R.F.*, 515 A.2d 33, 37 (Pa. Super. Ct. 1986), *appeal dismissed*, 533 A.2d 708 (Pa. 1987). It is also inconsistent with Minnesota's canon of statutory construction that every law must be construed to give effect to all of its provisions. See MINN. STAT. § 645.16 (1990).

relatives.¹⁴⁰

Third, the courts that read sections 1903(1)(i) and 1913 to hold that no voluntary proceedings are subject to the ICWA's requirements necessarily exclude any right of notice to the tribe and thus tribal intervention. Both notice and intervention are regarded as significant to fulfillment of the ICWA's purposes: tribal adjudication of child care disputes and tribal placement of children needing placement. The ICWA's rights of tribal intervention and of involvement in placements¹⁴¹ are meaningless unless the tribe is notified that a child is being placed.¹⁴²

There is and should be recognized a distinction between the two types of voluntary placements, for purposes of ICWA applicability. It is one thing for a mother to call her sister and ask her to care for her son temporarily. It is quite another thing for a mother to be confronted by an agency social worker who comes to her home with a police officer and says, "Sign this voluntary placement or I will pick up your son and we'll see you next week in juvenile court." The latter, unfortunately, is a scenario enacted daily in Hennepin County since the agency began reducing non-relative out-of-home placements several years ago.

The former is a purely private, temporary placement, to which it appears that even section 1913 of the ICWA is inapplicable. The commentary to the BIA Guidelines agrees.¹⁴³ The latter situation is really an involuntary proceeding because if the parent seeks to rescind or fails to comply with the agency's demand for the placement, the agency will file an involuntary petition immediately. Since this type of placement is in reality involuntary, the notice, intervention, and placement sections of the ICWA should apply.¹⁴⁴

140. *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988). It is also contrary to the United States Supreme Court's observation that Congress intended for the ICWA to apply to voluntary placements, *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 50 n.25 (1989).

141. 25 U.S.C. § 1911(c) (1988).

142. Barsh, *supra* note 14, at 1312-13; *see generally* Carver, *supra* note 14 at 335, 347 (discussing the importance of the early tribal intervention in voluntary placements which is provided for in the Indian Family Preservation Act).

143. "The Act also excludes from its coverage any placements that do not deprive the parents. . .of the right to regain custody of the child upon demand. Without this exception. . .[c]ourt appearances would also be required for many informal caretaking arrangements that Indian parents. . .sometimes make for their children." BIA Guidelines, *supra* note 73, at 67588.

144. As to the "voluntary but not really voluntary" distinction, *see* Carver, *supra* note 14 at 337. As to whether the notice, intervention and placement sections of the ICWA should apply to this type of placement, *see In re K.L.R.F.*, 515 A.2d 33, 36-37 (Pa. Super. Ct. 1986), *appeal dismissed*, 533 A.2d 708 (Pa. 1987); Lisa McNaughton, *The Indian Child Welfare Act "Voluntary Terminations": The Act Must*

The Indian Family Preservation Act explicitly adopts this view, and calls for notice to the tribe even before a parent is likely to be asked to place a child, as well as notice of actual out-of-home placements, voluntary and involuntary.¹⁴⁵ Under the Indian Family Preservation Act, local agency involvement is assumed in a voluntary placement, which by definition assumes that the child and the parent will be reunited.¹⁴⁶ The Indian Family Preservation Act also provides a mechanism for a parent to rescind a voluntary placement, and demand the return of the child which is similar to section 1913(b) of the ICWA.¹⁴⁷

A Minnesota lawyer should be guided by the Indian Family Preservation Act when a voluntary placement is at issue. It provides better, and more certain, legal rights to native people on this point than does the ICWA. Given the national uncertainty concerning the ICWA's applicability to voluntary proceedings, the Indian Family Preservation Act should therefore control over the ICWA.¹⁴⁸

B. Which Parties?

1. Which Indian Children

The ICWA's protections apply to those Indian children who are unmarried, under eighteen years of age, and either a member of a tribe or eligible for membership in a tribe and a biological child of a member.¹⁴⁹ The Indian Family Preservation Act contains the same definition, but without the requirement that a child be a biological child of a member.¹⁵⁰

The BIA Guidelines and the MDHS Regulations provide that, when a court has reason to believe that a child involved in a proceeding before it is an Indian child, the court or the local welfare agency must seek verification from either the tribe or the Bureau

Be Applied (unpublished manuscript, on file with LAW & INEQUALITY). The Indian Family Preservation Act explicitly adopts this view. See MINN. STAT. §§ 257.352-257.353 and Carver, *supra* note 14 at 345-48.

145. MINN. STAT. §§ 257.352-257.353 (1990). See generally Carver, *supra* note 14.

146. MINN. STAT. § 257.351, subd. 17 (1990); *In re K.L.R.F.*, 515 A.2d 33, 36-37 (Pa. Super. Ct. 1986), *appeal dismissed*, 533 A.2d 708 (Pa. 1987)(emphasis on temporary nature of placement).

147. The MDHS Regulations extensively regulate this type of placement. MDHS Regulations, *supra* note 74, at XIII-3530 to -3543.

148. Because of 25 U.S.C. § 1921 (1988), use of the Indian Family Preservation Act instead of the ICWA in this situation does not create a Supremacy Clause problem; see *supra* text accompanying notes 92-98. See also Carver, *supra* note 14 at 334-38.

149. 25 U.S.C. § 1903(4) (1988); MDHS Regulations, *supra* note 74, at XIII-3513(6). See *In re M.M.O.*, No. C6-89-1598 (Minn. Ct. App. Feb. 20, 1990).

150. MINN. STAT. § 257.351, subd. 6 (1990).

of Indian Affairs.¹⁵¹ The Indian Family Preservation Act requires a court to determine whether a child is an Indian child,¹⁵² and imposes upon the welfare agency the duty of seeking verification of Indian status, whether or not the court is involved.¹⁵³ We believe that state law, including the "reasonable efforts" law, requires the welfare agency to assist in enrolling a child in its tribe.¹⁵⁴ Both sets of regulations list indicia of whether a child might be an Indian.¹⁵⁵ Whether a child is a member of a tribe is a decision made by the tribe, and the BIA Guidelines make that determination conclusive.¹⁵⁶ Most Minnesota tribes require that a prospective enrollee have at least 25 percent Indian blood. A lawyer representing a native parent may sometimes have to provide information to the tribe concerning her relatives, particularly if the relatives were themselves not enrolled. Absent a contrary determination by the tribe, the BIA's conclusion as to whether or not a child is an Indian child is conclusive.¹⁵⁷

The enrollment or membership determination occurs prior to, or contemporaneously with, the initiation of the proceeding in juvenile court. At this point, it is not too late for a lawyer to assist the native parent with enrollment. However, a number of decisions in other states have held that an adjudication or placement decision is not subject to collateral attack under section 1914 when, after the adjudication, a party became enrolled in an effort to apply ICWA requirements, to a completed proceeding.¹⁵⁸

151. BIA Guidelines, *supra* note 73, at 67586; MDHS Regulations, *supra* note 74, at XIII-3522.

152. MINN. STAT. § 257.354, subd. 2 (1990).

153. MINN. STAT. § 257.352, subd. 1 (1990).

154. MINN. STAT. §§ 260.012(b); 256F.07, subd. 3a (1990).

155. BIA Guidelines, *supra* note 73, at 67586; MDHS Regulations, *supra* note 74, at XIII-3522.

156. BIA Guidelines, *supra* note 73, at 67586. *But see In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 933 (N.J. 1988), in which the court suggested that if a tribe's refusal to enroll a child is based upon an incomplete ancestry, such a decision would not be determinative of the child's eligibility for treatment under the ICWA based upon its *actual* ancestry. Most regional tribes make membership determinations according to the prospective enrollee's percentage of Indian blood. In a few cases, that percentage must be of the prospective enrolling tribe. See Tribal Court Chart, appended. See also *People ex rel. J.J.*, 454 N.W.2d 317, 327-28 (S.D. 1990), which holds that, under § 25 U.S.C. 1911(d) (1988), the Full Faith and Credit provision, a state trial court must defer to a tribe's determination that it, and not another tribe, is the child's tribe.

157. BIA Guidelines, *supra* note 73, at 67586.

158. *Dep't of Social Servs. v. Johanson*, 402 N.W.2d 13, 15-16 (Mich. Ct. App. 1986); *In re Infant Boy Crews*, 803 P.2d 24, 29-30 (Wash. Ct. App. 1991). Minnesota courts might not take the same position. In *In re B.W.*, 454 N.W.2d 437 (Minn. Ct. App. 1990), the court of appeals reversed a termination of parental rights and directed the trial court on remand to permit a change in B.W.'s enrollment so that he would be considered for placement with tribal relatives.

The ICWA, the BIA Guidelines and the MDHS Regulations all have provisions concerning children who are members of more than one tribe.¹⁵⁹ When that occurs, the trial court must determine which tribe is the child's tribe, based upon several factors, one of which is the tribe with the more significant contact.¹⁶⁰ The Indian Family Preservation Act agrees.¹⁶¹ A tribe is defined for the purposes of ICWA eligibility as one recognized as eligible for the services provided Indians by the Department of the Interior, including Alaskan native villages. The Indian Family Preservation Act agrees.¹⁶² Under that definition, members of Canadian Indian tribes are not covered by the ICWA.¹⁶³

2. Which Indian Parents or Custodians?

The ICWA defines a parent as a biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child under tribal law or custom.¹⁶⁴ The Indian Family Preservation Act adopts this same definition.¹⁶⁵ Under both statutes, an unwed father who has neither acknowledged paternity nor been found to be the father is not a parent and is not eligible for the statutes' benefits.¹⁶⁶ The cases which have considered the issue hold that the paternity determination is one that is made according to state law or tribal law and custom.¹⁶⁷ The BIA Guidelines contain no commentary on this section, and the MDHS Regulations merely specify that a parent does not have to be mar-

159. 25 U.S.C. § 1903(5)(b) (1988); BIA Guidelines, *supra* note 73, at 67586-87; MDHS Regulations, *supra* note 74, at XIII-3523, -3571.

160. BIA Guidelines, *supra* note 73, at 67586; MDHS Regulations, *supra* note 74, at XIII-3571. See also *People ex rel. J.J.*, 454 N.W.2d 317, 327 (S.D. 1990).

161. MINN. STAT. § 257.351, subd. 7 (1990). The Indian Family Preservation Act diverges from the implementation of the ICWA by permitting any Indian tribe expressing an interest in the child and in which the child could be enrolled to act as the child's tribe if the child's legitimate tribe does not express an interest.

162. 25 U.S.C. § 1903(8) (1988); MINN. STAT. § 257.351, subd. 9 (1990). See, e.g., *In re M.C.P.*, 571 A.2d 627, 632-34 & nn.2-3 (Vt. 1989).

163. *In re Wanomi P.*, 264 Cal. Rptr. 623 (Cal. Ct. App. 1989), *cert. denied*, 111 S.Ct. 57 (1990); *In re Stiarwalt*, 546 N.E.2d 44 (Ill. Ct. App. 1989), *cert. denied*, 550 N.E.2d 564 (Ill. 1990).

164. 25 U.S.C. § 1903(9) (1988). Regarding the status of an adoptive parent, see *In re K.L.R.F.*, 515 A.2d 33, 36 (Pa. Super. Ct. 1986), *appeal dismissed*, 533 A.2d 708 (Pa. 1987).

165. MINN. STAT. § 257.351, subd. 11 (1990).

166. 25 U.S.C. § 1903(9) (1988); MINN. STAT. § 257.351, subd. 11 (1990); *In re Appeal in Maricopa County Juvenile Action*, 667 P.2d 228, 232-33 (Ariz. Ct. App. 1983); *In re Baby Boy D.*, 742 P.2d 1059, 1064 (Okla. 1985), *cert. denied*, 484 U.S. 1072 (1988); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 933-36 (N.J. 1988). A person who is not a "parent" has no standing to attack a placement under 25 U.S.C. § 1914. *Id.* at 937.

167. See *In re Adoption of a Child of Indian Heritage*, 543 A.2d at 935.

ried to assert rights under the law.¹⁶⁸

A custodian is defined in the ICWA as an "Indian person who has legal custody of an Indian child under tribal law or custom or under State law, or to whom temporary physical care, custody and control has been transferred by the parent."¹⁶⁹ The Indian Family Preservation Act contains the same definition.¹⁷⁰

V. Tribal Court Jurisdiction v. State Court Jurisdiction: How Is This Determined?

A. Notice

Before any CHIPS or termination petition can be heard in state court, and assuming that there is some indication that an Indian child is at issue,¹⁷¹ the agency must provide notice to the parent or custodian and the child's tribe. The notice must be by registered mail, return receipt requested.¹⁷² The proceeding may not take place until at least ten days after the parent or custodian and the tribe receive notice.¹⁷³ Upon receipt, these parties must be given an additional twenty days to prepare upon request.¹⁷⁴ If the parents or custodian and the tribe cannot be identified, notice must then be given to the Secretary of the Interior by registered mail, who then has fifteen days to provide notice to the parties.¹⁷⁵

168. MDHS Regulations, *supra* note 74, at XIII-3513(12).

169. 25 U.S.C. § 1903(6) (1988); *In re Bird Head*, 331 N.W.2d 785, 789 (Neb. 1983). A person who has custody of children by a grant of custody from a court may not be an "Indian custodian" within the meaning of the ICWA. *People ex rel. J.J.*, 454 N.W.2d 317, 327 (S.D. 1990); *State ex. rel. Juvenile Dep't of Multnomah County v. England*, 640 P.2d 608, 613 (Or. 1982).

170. MINN. STAT. § 257.351, subd. 8 (1990). The BIA Guidelines are silent on this definition and the MDHS Regulations add no substantive comment. MDHS Regulations, *supra* note 74, at XIII-3513(8).

171. *See supra* text accompanying notes 152-56.

172. 25 U.S.C. § 1912(a) (1988).

173. *Id.* In our experience of eight years practice under the ICWA in Hennepin County, the juvenile court has not followed this provision with regard to health and welfare hold hearings. If one takes the position that such hearings are covered by the ICWA, *see* note 120, the advance notice and other ICWA requirements should apply. Although neither the ICWA nor the Indian Family Preservation Act say so, an alternative position is that the first health and welfare hold hearing, shortly after the child is picked up, is a summary hearing to be followed by a formal detention hearing, *see* MINN. R. JUV. P. 52.04, subd. 2, at which ICWA requirements apply. Those who take this position point out that some health and welfare hold petitions are not granted by the juvenile court at the summary hearing, meaning that such children are returned right away, and imposing the ICWA's formal requirements could prolong the separation for those families. The legislative history noted that some Indian parents do not want long periods after notice before the case begins. House Report, *supra* note 14, at 32.

174. 25 U.S.C. § 1912(a) (1988).

175. *Id.*

The BIA Guidelines provide that personal service is also acceptable, since it is superior to mailed service, and therefore provides better protection for the rights the ICWA is designed to enforce.¹⁷⁶ Other forms of substitute service, such as published notice,¹⁷⁷ and lesser forms of mailed service are improper, notwithstanding a recent unpublished decision of the court of appeals.¹⁷⁸ The 1989 "reasonable efforts" legislation added to Minnesota law the registered mail minimum requirement.¹⁷⁹

The cases diverge on the issue of what is the effect of improper or no notice. Some cases hold that improper notice or other procedural improprieties do not invalidate subsequent proceedings. Others hold that notice is a jurisdictional prerequisite which, when improper, requires invalidation of subsequent proceedings.¹⁸⁰ The ICWA itself suggests that the latter view is correct, because it contains a section which authorizes collateral attack on proceedings violating section 1912, which contains the notice requirement.¹⁸¹

The BIA Guidelines and the MDHS Regulations specify the

176. BIA Guidelines, *supra* note 73, at 67588-89. The 1989 "reasonable efforts" law allows personal service, MINN. STAT. § 260.141 (1990). See also *In re M.E.B.*, Nos. C6-90-2370, C6-90-2388 (Minn. Ct. App. Mar. 19, 1991)(personal service permissible as superior method).

177. *In re L.A.M.*, 727 P.2d 1057 (Alaska 1986) holds that published notice is not permissible under the ICWA, particularly where, as in that case, the agency knew how to reach the parties.

178. The Minnesota Court of Appeals recently approved notice to the tribe by first-class mail in circumstances where the tribe was already aware of the proceedings. *In re V.R.*, No. C2-90-1765 (Minn. Ct. App. April 2, 1991). This holding is not only improper under the ICWA, but also violates state law. MINN. STAT. § 260.141, subd. 2a (1990). Moreover, it relies upon a South Dakota decision which has not been followed in subsequent cases by that same court. Compare *In re S.Z.*, 325 N.W.2d 53, 55-56 (S.D. 1982) with *In re N.A.H.*, 418 N.W.2d 310, 311 (S.D. 1988); see also *In re D.M.J.*, 741 P.2d 1386, 1389 (Okla. 1985)(first-class mail notice permissible when tribe had actual notice and participated); *In re H.D.*, 729 P.2d 1234, 1240-41 (Kan. Ct. App. 1986)(no notice).

179. MINN. STAT. § 260.141, subd. 2a (1990).

180. Compare *In re M.E.M.*, 679 P.2d 1241, 1245 (Mont. 1984), D.E.D. v. State, 704 P.2d 774, 782 (Alaska 1985) and *In re S.A.M.*, 703 S.W.2d 603, 606 (Mo. Ct. App. 1986)(procedural failings are not jurisdictional) with *In re N.A.H.*, 418 N.W.2d 310, 311 (S.D. 1988) and *In re M.C.P.*, 571 A.2d 627, 634 (Vt. 1989)(procedural failings are jurisdictional).

181. 25 U.S.C. § 1914 (1988). See *In re H.D.*, 729 P.2d 1234, 1240-41 (Kan. Ct. App. 1986)(violation of the Indian Child Welfare Act notice provisions may be cause for invalidation of the proceedings under 25 U.S.C. § 1914). See also MDHS Regulations, *supra* note 74, at XIII-3594. Section 1914 also permits collateral attacks for violations of §§ 25 U.S.C. 1911 and 1913, but not for improper health and welfare hold hearings followed by procedurally-proper adjudicatory hearings. *In re M.E.M.*, 679 P.2d 1241, 1243 (Mont. 1984).

particular information which must be included in the notice.¹⁸² While their requirements are not identical, both demand that the notice include significant information about the child, its family, its tribe, the type of proceeding, and information about intervention and representation by appointed counsel.¹⁸³ Both regulatory schemes provide a detailed summary of the required time periods.¹⁸⁴ A Minnesota lawyer should always ensure at the health and welfare hold hearing that the agency has complied with the notice provisions.

The notice and other requirements of section 1912 and the placement preferences of section 1915 are to be applied not only at the initial placement proceedings, but also any time a child is moved between foster placements.¹⁸⁵ Hennepin County has not, in our experience, followed this latter provision of the ICWA when changing placements.

B. Transfer to Tribal Court From State Court

1. ICWA Presumes Transfer to Tribal Court

Recent decisions make it clear that Congress, by enacting the ICWA, intended that tribal courts be the preferred forum for adjudicating native childrens' placement decisions in child protection matters.¹⁸⁶ Section 1911(b) of the ICWA, according to the United States Supreme Court, creates a system which presumes transfer to tribal court.¹⁸⁷ Under section 1911(b), a proceeding for foster care placement or termination of parental rights involving a child not domiciled or residing upon the reservation *shall* be transferred to tribal court, absent good cause to the contrary, if either parent, the Indian custodian or the tribe requests.¹⁸⁸ The request can be

182. BIA Guidelines, *supra* note 73, at 67588-89; MDHS Regulations, *supra* note 74, at XIII-3561.

183. *Id.*

184. BIA Guidelines, *supra* note 73, at 67589; MDHS Regulations, *supra* note 74, at XIII-3562.

185. 25 U.S.C. § 1916(b) (1988); BIA Guidelines, *supra* note 73, at 67595; MDHS Regulations, *supra* note 74, at XIII-3592. None of the state statutes discussed here appear to address this issue.

186. *In re Appeal in Pima County Juvenile Action*, 635 P.2d 187, 188-89 (Ariz. Ct. App. 1981), *cert. denied*, 455 U.S. 1007 (1982)(only if a parent objects, the tribal court declines, or there is 'good cause' not to transfer the proceeding, may this referral jurisdiction be prevented); *In re Halloway*, 732 P.2d 962, 970 (Utah 1986)(ICWA designates tribal court as the exclusive forum); *In re T.R.M.*, 525 N.E.2d 298, 305 (Ind. 1988)(tribal jurisdiction unless the state court finds good cause).

187. 25 U.S.C. § 1911(b) (1988); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36, 49 (1989).

188. 25 U.S.C. § 1911(b) (1988)(emphasis supplied). The BIA Guidelines use the mandatory term "the court must transfer." BIA Guidelines, *supra* note 73, at

oral or written.¹⁸⁹

2. Tribe Or Parent May Decline Transfer

The tribe can decline, and many tribes have done so, for reasons relating to distance and expense or to enrollment and membership questions.¹⁹⁰ Either parent may object to the transfer,¹⁹¹ and there must be a hearing at which the parent can participate.¹⁹² Such an objection by either parent is conclusive—when a parent objects, the case will stay in state court.¹⁹³

There are a number of reasons which might cause a parent to object to transfer to tribal court. A principal objection might be the distance between the parent's residence and the reservation.¹⁹⁴

67590. The Indian Family Preservation Act contains the same language, MINN. STAT. § 257.354, subd. 3 (1990), and the MDHS Regulations, although using as well the mandatory term "shall transfer," add nothing to the federal standards discussed in this section. MDHS Regulations, *supra* note 74, at XIII-3573. See *In re B.W.*, 454 N.W.2d 437, 446 (Minn. Ct. App. 1990)(transfer is mandated by ICWA whenever possible).

189. The BIA Guidelines permit oral requests to transfer, although the ICWA itself is silent. BIA Guidelines, *supra* note 73, at 67590. The Indian Family Preservation Act is silent on the type of request to transfer, MINN. STAT. § 257.354, subd. 3 (1990), as are the MDHS Regulations. See, e.g., *In re Laurie R.*, 760 P.2d 1295, 1299 (N.M. Ct. App. 1988)(oral request permitted).

190. 25 U.S.C. § 1911(b) (1990). The BIA Guidelines recommend that the tribe be given twenty days to answer a request for transfer, and that it should inform the trial court, either orally or in writing, as to its decision. BIA Guidelines, *supra* note 73, at 67592. The MDHS Regulations merely state that the tribal court's refusal to accept a transfer is acceptable. MDHS Regulations, *supra* note 74, at XIII-3573. See, e.g., *In re Wayne R.N.*, 757 P.2d 1333, 1335 (N.M. Ct. App. 1988)(policy against transfers when all parties and evidence in another state); *People ex rel. J.J.*, 454 N.W.2d 317, 319 (S.D. 1990)(transfer declined because of ineligibility for membership); *In re J.L.M.*, 451 N.W.2d 377, 384-86 (Neb. 1990)(same). Tribes will more often decline intervention into state court proceedings, under 25 U.S.C. § 1911(c), than transfers to tribal court, for these reasons. See, e.g., *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 930 (N.J. 1988)(enrollment and financial restrictions); *In re Shawboose*, 438 N.W.2d 272, 273-74 (Mich. Ct. App. 1989)(enrollment restriction); *In re Robert T.*, 246 Cal. Rptr. 168, 173 (Cal. Ct. App. 1988)("we don't intervene unless we're asked"). Waivers of intervention rights under § 1911(c) must be specific and will not be implied. *In re Q.G.M.*, 808 P.2d 684, 689 (Okla. 1991).

191. 25 U.S.C. § 1911(b) (1988).

192. *In re G.L.O.C.*, 668 P.2d 235 (Mont. 1983).

193. See *In re R.I.*, 402 N.W.2d 173, 177 (Minn. Ct. App. 1987)(parental objection is conclusive, trial court has no discretion to transfer to tribal court over parent's objection); *In re C.C.T.L.*, No. C3-88-253 (Minn. Ct. App. May 31, 1988).

194. This is a particular concern for native people residing in Minneapolis and St. Paul. The Red Lake reservation is about five hours away, and reservations of other regional tribes whose members reside in the urban areas are a much greater distance. The Cheyenne River Lakota reservation, for example, is about twelve hours away, the Devil's Lake Lakota reservation is not less than eight hours, and the Standing Rock Lakota reservation is perhaps sixteen hours away.

A second objection might be one based on reservation politics.¹⁹⁵ A third objection might be based upon the finality of the tribal court transfer decision. Once a child becomes a domiciliary of the reservation, and a ward of the tribal court, the tribal court's jurisdiction is exclusive.¹⁹⁶

Moreover, most tribal court child placement decisions are certainly immune from collateral attack in state court¹⁹⁷, and are probably immune from collateral attack in federal court.¹⁹⁸ The tribal court itself is immune from suit in federal court, although its members and the individual administrators may not be.¹⁹⁹ Regional federal courts are divided over whether federal habeas corpus relief is available under either the general federal habeas corpus statute or the Indian Civil Rights Act and its habeas provision in an attack upon a tribal court's child placement decisions.²⁰⁰ No federal habeas relief, even if available, can be obtained unless tribal court appellate remedies are exhausted.²⁰¹ A lawyer should be sure to explore these issues with a native parent who is considering a transfer to tribal court.

3. Timing Of Transfer Request

The ICWA itself gives no indication concerning when the request for transfer to tribal court must be made.²⁰² However, the

195. See generally Donald L. Burnett, Jr., *An Historical Analysis on the 1968 Indian Civil Rights Act*, 9 HARV. J. ON LEGIS. 557, 577 (1972); David H. Getches and Charles F. Wilkinson, *Federal Indian Law: Cases and Materials* 367-68 (2d ed. 1986).

196. 25 U.S.C. § 1911(a) (1988). But see text accompanying notes 318-20. Nor will tribal court jurisdiction be exclusive if the child is not on the reservation and the court finds that the ICWA does not apply (*i.e.*, for reasons relating to membership, paternity, etc.).

197. There appears to be no state court remedy for mounting a collateral attack upon an order of a tribal court, and the only proceeding which attempted to do so in a Minnesota court, which was based upon the ICWA, was unsuccessful. *In re C.C.T.L.*, No. C3-88-253 (Minn. Ct. App. May 31, 1988)(based upon 25 U.S.C. § 1922 (1988)).

198. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Our research does not agree with the suggestion made in Carver, *supra* note 14, at 351-52, that the federal courts are readily available for collateral attacks upon tribal court decisions. See cases cited *infra* at notes 199-201.

199. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 59. See *DeMent v. Oglala Sioux Tribal Ct.*, 874 F.2d 510, 515 (8th Cir. 1989).

200. The general federal habeas corpus statutes providing for federal court relief from state and federal criminal confinements are found at 28 U.S.C. §§ 2254, 2255 (1988). The Indian Civil Rights Act has its own habeas provision, 25 U.S.C. § 1303 (1988). Compare *Wells v. Philbrick*, 486 F.Supp. 807 (D.S.D. 1980) and *Weatherwax v. Fairbanks*, 619 F.Supp. 294 (D. Mont. 1985) with *DeMent v. Oglala Sioux Tribal Ct.*, 874 F.2d 510.

201. *DeMent v. Oglala Sioux Tribal Ct.*, 874 F.2d at 516-17.

202. 25 U.S.C. § 1911(b) (1988).

BIA Guidelines suggest that the request should be made "promptly after receiving notice of the hearing."²⁰³ The BIA Guidelines discuss at some length the problems which can be created by late requests for transfer to tribal court but also suggest that the disruptive effect upon the litigation which would result from a late transfer request should make the agency more diligent in providing proper notice of the proceedings.²⁰⁴ The BIA Guidelines also point out that transfer requests do not have to be granted, and that a request for transfer made after the trial is underway is properly denied if it was deliberately delayed.²⁰⁵

4. Good Cause Not To Transfer

(i) ICWA And Legislative History

Aside from an objection by a parent, section 1911(b) suggests only one other reason why a case should not be transferred to tribal court. This is the existence of good cause to the contrary. The BIA Guidelines place the burden of establishing good cause to the contrary on the party opposing transfer, by at least clear and convincing evidence, because of the congressional policy advanced in the ICWA of making tribal court determinations the preferred course.²⁰⁶

The legislative history of the ICWA makes clear that Congress intended that the good cause to the contrary permitted by section 1911(b) must benefit the Indian litigant.²⁰⁷ The part of sec-

203. BIA Guidelines, *supra* note 73, at 67590.

204. *Id.*

205. *Id.* However, in *In re B.W.*, 454 N.W.2d 437 (Minn. Ct. App. 1990), the request for transfer to the tribal court was sent by facsimile machine from the father's tribe to the mother's tribe on the first day of trial. The administration of the father's tribe had changed in the three months between the first notice the agency provided and the trial, and the new administration decided to seek transfer. Although the court of appeals reversed the termination, it did not specifically reverse the trial court's decision to deny the transfer request. It strongly suggested, however, that the lateness of the request was not alone enough reason to deny the transfer. *Id.* at 446. *But see In re Wayne R.N.*, 757 P.2d 1333, 1335-36 (N.M. Ct. App. 1988)(request to transfer made on morning of trial too late); *In re Robert T.*, 246 Cal. Rptr. 168, 173 (Cal. Ct. App. 1988)(request to transfer should at least precede permanency planning stage of CHIPS proceeding). *See generally In re A.L.*, 442 N.W.2d 233, 236-37 (S.D. 1989); *People ex rel. J.J.*, 454 N.W.2d 317, 328-31 (S.D. 1990).

206. BIA Guidelines, *supra* note 73, at 67591. *See also* MDHS Regulations, *supra* note 74, at XIII-3573; *In re R.R.R.*, 763 P.2d 94, 101 (Okla. 1988). With regard to the burden which must be met to oppose transfer, *see, e.g., In re M.E.M.*, 635 P.2d 1313, 1317 (Mont. 1981)(clear and convincing evidence).

207. "The subsection is 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." House Report, *supra* note 14, at 21.

tion 1911(b) which permits a state trial court to refuse a request for transfer to a tribal court for good cause has been the subject of extensive commentary in the BIA Guidelines and a large number of state court cases.

(ii) *BIA Guidelines*

The BIA Guidelines contain only one factor which will always constitute good cause to the contrary. That is the absence of a tribal court.²⁰⁸ They also point out one factor which will never be good cause to the contrary, namely the state court's perception of socio-economic conditions on the reservation, and the adequacy of the tribal court system and its social services mechanism.²⁰⁹

One good cause factor - the best interests of the child - appears in a great many cases which discuss section 1911(b), but is not mentioned anywhere in the ICWA, the BIA Guidelines or in the Minnesota cases, statutes and regulations discussed to this point. Courts in other states are at odds over whether good cause to the contrary is shown if transfer to tribal court would be contrary to the appellate court's perception of the child's best interests.²¹⁰ We believe that the preservation of a child's relationship with its tribe is *always* in the child's best interests.²¹¹ Other common best interests concerns, such as the type of foster placement, the child's bonding with its present family, or the psychological effects of a change in placement are properly seen as post-transfer issues which relate to ultimate *placement*. They do not relate to the separate, *jurisdictional* issue of whether the transfer should be granted.²¹² The BIA Guidelines support this view by stating that socio-economic conditions on the reservation and the adequacy of

208. BIA Guidelines, *supra* note 73, at 67591.

209. *Id.* See also MDHS Regulations, *supra* note 74 at XIII-3573; *In re Armell*, 550 N.E.2d 1060, 1065, (Ill Ct. App.), *appeal denied*, 555 N.E.2d 374, (Ill.), *cert. denied*, 111 S.Ct. 345 (1990).

210. Compare *In re T.R.M.*, 525 N.E.2d 298, 307-308 (Ind. 1988); *Chester County Dep't of Social Servs. v. Coleman*, 372 S.E.2d 912, 915 (S.C. Ct. App. 1988), *reversed on other grounds*, 399 S.E.2d 773 (S.C. 1990), *cert. denied*, 111 S.Ct. 2017 (1991); *In re Robert T.*, 246 Cal. Rptr. 168, 174-75 (Cal. Ct. App. 1988); *In re M.E.M.*, 635 P.2d 1313, 1317 (Mont. 1981); *In re N.L.*, 754 P.2d 863, 869 (Okla. 1988) and *In re T.S.*, 801 P.2d 77, 80-81 (Mont. 1990), *cert. denied*, 111 S.Ct. 2013 (1991) with *In re Armell*, 550 N.E.2d at 1064-66; *In re C.W.*, 479 N.W.2d 105, 117-18 (Neb. 1992).

211. *In re Appeal in Pima County Juvenile Action*, 635 P.2d 187, 189 (Ariz. Ct. App. 1981), *cert. denied*, 455 U.S. 1007 (1982).

212. *In re Armell*, 550 N.E.2d at 1064-66. While the best interests standard has always been an important consideration in Minnesota cases, the legislature in 1990 specifically ordered that a native child's best interests must be determined consistently with the ICWA and the Indian Family Preservation Act, MINN. STAT. § 260.011, subd. 2. See *In re M.T.S.*, — N.W.2d — (Minn. Ct. App. September 15, 1992) (best interests standard preempted by ICWA).

the tribal court and its social services mechanism are not, in fact, good cause.²¹³

The BIA Guidelines establish four discretionary factors which may, on the facts of each case, suggest that there exists good cause to the contrary.²¹⁴ Those four factors are:

- the party seeking the transfer to tribal court did not file the request to transfer promptly after receiving notice of the hearing, and the proceeding was at an advanced stage when the request to transfer was received; (this factor is directly related to the timeliness factor the BIA discusses two guidelines earlier);²¹⁵
- the child is over twelve and objects to the transfer;
- the child is over five, its parents are not available, and the child has had little contact with the tribe or its members; the BIA points out that, when the parents are unavailable, state judges should not make determinations about the extent of a child's contact with its tribe, and that, although parents can usually be expected to make such a determination, this guideline is for the benefit of those young children who are effectively or actually orphaned;²¹⁶
- the evidence necessary to decide the case could not be adequately presented in tribal court without undue hardship to the parties or witnesses.

This last of these four factors has been the most extensively discussed by the commentary to the BIA Guidelines²¹⁷ and in the state court cases.

The commentary to the BIA Guidelines explicitly adopts the discussion in the legislative history,²¹⁸ and concludes that this fourth factor was designed only *for the convenience of the Indian litigants*.²¹⁹ Notwithstanding this clear statement of the Guidelines, there are a number of cases which decline transfer to tribal court because of inconvenience to the county welfare agency, the foster parents, and the witnesses.²²⁰ These cases flatly misinterpret the Guidelines and completely misunderstand the whole pur-

213. BIA Guidelines, *supra* note 73, at 67591.

214. *Id.* The MDHS Regulations are the same. MDHS Regulations, *supra* note 74, at XIII-3573.

215. BIA Guidelines, *supra* note 73, at 67591; *see supra* text accompanying notes 202-205.

216. *Id.* Cases on this point include *In re Armell*, 550 N.E.2d at 1065 (lack of contact between young child and tribe not a reason not to transfer because tribe has transcendent interest in developing relationship with its members); *People ex rel. J.J.*, 454 N.W.2d 317, 329 (S.D. 1990)(lack of contact with tribe justifies failure to transfer); *In re T.S.*, 801 P.2d 77, 82 (Mont. 1990), *cert. denied*, 111 S.Ct. 2013 (1991)(lack of contact proper factor in considering transfer).

217. BIA Guidelines, *supra* note 73, at 67591.

218. House Report, *supra* note 14, at 21.

219. BIA Guidelines, *supra* note 73, at 67591.

220. *See infra* cases cited in notes 221-23.

pose of the ICWA, as recently stated by the United States Supreme Court in the *Mississippi Choctaw* case.

(iii) *Cases On Good Cause*

Typical of the cases which refuse to transfer to tribal court based upon inconvenience to the welfare agency is *In re N.L.*²²¹ In this case, an Oklahoma trial court refused to transfer a case to tribal court because the tribal court was located in one county and the witnesses and parties were located in another county in the same state.²²² While greater distances have been at issue in some of the state decisions which deny transfer to tribal court,²²³ there is nothing in the ICWA, its legislative history, or its implementing regulations which suggests that inconvenience to state agency witnesses should be dispositive.

Aside from the fact that the legislative history specifically suggests that transfer to tribal court should be refused only for inconvenience to Indian litigants,²²⁴ there are two principal problems with the cases which refuse to transfer for reasons related to state agency convenience. First, the purpose of the ICWA was to remove outmoded geographical concepts such as residence and domicile from the law of child custody jurisdiction, and replace them with a "jurisdictional standard based on the ethnic origin of the child."²²⁵ Second, those cases which adopt the

221. 754 P.2d 863 (Okla. 1988).

222. *Id.* at 869 (the two counties were less than 200 miles apart). See also *In re Bird Head*, 331 N.W.2d 785, 790 (Neb. 1983)(county of tribal court and county in which witnesses resided were adjacent counties separated only by the Nebraska-South Dakota state line); *People ex rel. J.J.*, 454 N.W.2d 317, 330 (S.D. 1990)(tribal court in North Dakota, a short distance from the state line with South Dakota, witnesses were in Rapid City, South Dakota, less than 200 miles from tribal court); *In re J.R.H.*, 358 N.W.2d 311, 317 (Iowa 1984)(Iowa to South Dakota).

223. See, e.g., *Chester County Dep't of Social Servs. v. Coleman*, 399 S.E.2d 773 (S.C. 1990), *cert. denied*, 111 S.Ct. 2017 (1991)(South Carolina to South Dakota). The court there reversed a finding by the court below that it would be more inconvenient for the tribe to participate in South Carolina than for the participants to go to South Dakota. *Id.* at 775-76. However, it has been persuasively argued that the party best able to pay these expenses, i.e., the state, ought to do so in order to comply with the goals of the ICWA. See *In re Appeal in Pima County Juvenile Action*, 635 P.2d 187, 192 (Ariz. Ct. App. 1981), *cert. denied*, 455 U.S. 1007 (1982); Mack T. Jones, *Indian Child Welfare: A Jurisdictional Approach*, 21 ARIZ. L. REV. 1123, 1143 (1979). One case suggested that the distance rationale is compounded by the fact that the tribal court would have no subpoena power in another state. *In re Wayne R.N.*, 757 P.2d 1333, 1336 (N.M. Ct. App. 1988). We know of no other reported case in which this objection is raised, and would point out that, under 25 U.S.C. § 1911(d) (1988) of the ICWA, a tribal court's process for obtaining witnesses and evidence should be enforceable in any state just as is process from sister states. See, e.g., MINN. STAT. § 548.26 *et seq.* (1990).

224. House Report, *supra* note 14, at 21.

225. *In re Appeal in Pima County Juvenile Action*, 635 P.2d at 189.

statements from the legislative history and the BIA Guidelines to support the notion that a tribal court is a *forum non conveniens* are actually turning that concept on its head. The rule of *forum non conveniens* was designed by courts in order to *refuse* jurisdiction over a matter, not to accept jurisdiction to the exclusion of another, better-suited forum.²²⁶ The better cases are the ones which recognize in the policy statements of the ICWA the presumption that the tribal court is the best adjudicator of this type of placement decision. Those cases accept that the best forum for the determination of a child's placement is that which is consistent with the child's ethnic identity, not that which is more convenient to witnesses and proof.²²⁷

Moreover, liberal construction of the *forum non conveniens* factor would mean that few, if any, cases would be transferred to tribal court unless the child lived on or near a reservation. That, in turn, would be contrary to Congress' purposes in enacting the ICWA.²²⁸ As the Montana Supreme Court noted, in one of the very first ICWA decisions:

Each individual is an amalgam of the predominant religious, linguistic, ancestral and educational influences existent in his or her surroundings. Indian people, whether residing on a reservation or not, are immersed in an environment which is in most respects antithetical to their traditions. Furthermore the cultural diversity among Indian tribes is unquestionably profound yet often not fully appreciated or adequately protected in our society. . . . Preservation of Indian culture is undoubtedly threatened and thereby thwarted as the size of any tribal community dwindles. In addition to its artifacts, language and history, the members of a tribe are its culture. Absent the next generation, any culture is lost and necessarily relegated, at best, to anthropological examination and categorization.²²⁹

C. Tribal Court Jurisdiction

Federal laws enacted during various periods of federal Indian

226. Mack T. Jones, *Indian Child Welfare: A Jurisdictional Approach*, 21 ARIZ. L. REV. 1123, 1142 (1979).

227. *In re Appeal in Pima County Juvenile Action*, 635 P.2d 187 (Ariz. Ct. App. 1981), *cert. denied*, 455 U.S. 1007 (1982) (transfer from Arizona to Montana); *In re M.E.M.*, 635 P.2d 1313 (Mont. 1981)(transfer from Montana to North Dakota); *In re Halloway*, 732 P.2d 962 (Utah 1986)(transfer from Utah to New Mexico); *In re Armell*, 550 N.E.2d 1060, 1066-67 (Ill. Ct. App.), *appeal denied*, 555 N.E.2d 374, (Ill.) *cert. denied*, 111 S.Ct. 345 (1990)(transfer from California to Kansas); *In re B.W.*, 454 N.W.2d 437 (Minn. Ct. App. 1990)(post-appeal transfer from Minnesota to Nebraska) (copy of the trial court's order is on file with LAW & INEQUALITY).

228. *In re Armell*, 550 N.E.2d at 1067.

229. *In re M.E.M.*, 635 P.2d 1313, 1316 (Mont. 1981).

policy have created a network of jurisdictional schemes. Portions of the ICWA address these. It is important for lawyers representing native families to know when tribal court jurisdiction exists.

Section 1911 permits tribes to exercise both exclusive and referral jurisdiction. An exception to this rule lies in situations in which ". . . jurisdiction is otherwise vested in the State by existing federal law."²³⁰ The ICWA does not automatically override existing federal legislation.

Public Law 83-280 (P.L. 280)²³¹, which is part of "existing federal law," has been the single most restrictive federal law regarding tribal exercise of exclusive or referral jurisdiction over child custody matters.²³² Most courts which have considered the issue have merely assumed that P.L. 280 divested tribes of all jurisdiction; they ask, "why else would Congress have provided for a jurisdiction reassumption clause in section 1918 of the ICWA?"²³³ But, because of their inherent sovereignty, tribes are *not* totally divested of jurisdiction by P.L. 280;²³⁴ the law merely removed exclusive and referral jurisdiction from some tribes, leaving residual tribal jurisdiction for domestic matters.²³⁵ For tribes located in states which were not subjected to P.L. 280, exclusive and referral jurisdiction already existed before passage of the ICWA.²³⁶

1. Public Law 280

Enacted during the "Termination Era" of federal Indian policy, P.L. 280 is typical of the assimilationist thinking of the 1950s.²³⁷ P.L. 280 gave some states jurisdiction over reservation

230. 25 U.S.C. § 1911(a) (1988). Exclusive jurisdiction is that which is vested in the tribe by virtue of its inherent sovereignty. *Id.* Referral jurisdiction, which is often referred to in the literature as concurrent jurisdiction, is that which is shared by the tribe and by the state court. *E.g.*, 25 U.S.C. §§ 1911(b), 1918, 1922.

231. Act of August 15, 1953, ch. 505, 67 Stat. 588-90, *codified at*, 18 U.S.C. § 1162 (1988), 28 U.S.C. § 1360 (1988).

232. *See, e.g., In re K.E.*, 744 P.2d 1173 (Alaska 1987)(Alaskan native village lacked authorization to terminate parental rights but in light of Pub. L. No. 280 the case was remanded to determine whether an application for reassumption under ICWA 25 U.S.C. § 1918 (1988) was filed).

233. *See Native Village of Venetie IRA Council v. Alaska*, 687 F.Supp. 1380, 1394 (D. Alaska 1988), *rev'd*, 918 F.2d 797 (9th Cir. 1990). This Ninth Circuit decision also calls into question the precedential value of *Native Village of Nenana v. State*, 722 P.2d 219 (Alaska), *cert. denied*, 479 U.S. 1008 (1986).

234. *See Bryan v. Itasca County*, 426 U.S. 373, 387 (1976). *See also Native Village of Venetie IRA Council v. Alaska*, 918 F.2d 797; Barsh, *supra* note 14, at 1302 n.90.

235. *Native Village of Venetie IRA Council v. Alaska*, 918 F.2d at 810-11.

236. *See* 25 U.S.C. § 1911(a) (1988) for the exclusive jurisdiction provision of the ICWA.

237. Federal policy towards the native peoples in the last 100 years has gone through four distinct phases. In the 1880's the dominant policy was assimilation, under which native peoples were expected to adapt themselves to white main-

criminal matters²³⁸ and civil causes of action²³⁹ without tribal consent.²⁴⁰ All areas of Indian country²⁴¹ of five original states were included in this Act: California, Minnesota (excluding the Red Lake Reservation), Nebraska, Oregon (excluding the Warm Springs Reservation) and Wisconsin (excluding the Menominee Reservation).²⁴² Alaska was subsequently added to these five.²⁴³ P.L. 280 gave states not included in the five above the authority to assume jurisdiction over Indian country without tribal consent, if permitted by state law.²⁴⁴ In almost all cases, states which had native populations, and which wanted to assume jurisdiction, enacted legislation which enabled them to do so.²⁴⁵

P.L. 280's goals were to legitimize state interests²⁴⁶ in reservations, to diminish federal government obligations to tribes, and to reduce the "lawlessness on the reservations and the accompany-

stream society, manifested in legislation such as the Allotment Act, 25 U.S.C. § 331 (1988). See generally *County of Yakima v. Yakima Indian Nation*, 112 S.Ct. 683, 685-86 (1992). The 1930's was the period of Indian reorganization, manifested in legislation such as the Indian Reorganization Act, 25 U.S.C. § 461, *et seq.* (1988). Federal policy in the 1950's followed a course of termination of Indian tribes in another effort to assimilate native peoples into majority society, and was manifested in legislation such as Pub. L. 280. In the 1970's federal policy returned to one of native self-determination, manifested in legislation such as the ICWA, the Indian Civil Rights Act, 25 U.S.C. 1301 *et seq.* (1988), and the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.* (1988).

238. 18 U.S.C. § 1162 (1988).

239. 28 U.S.C. § 1360 (1988).

240. See Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. REV. 535, 540-41 (1974-75) [*hereinafter*, Goldberg].

241. Indian Country is defined in 18 U.S.C. § 1151 (1988), which states:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation;

(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof and whether within or without the limits of a state; and

(c) all Indian allotments, the Indian titles to which have not been extinguished including rights of way running through the same.

242. The Menominee Reservation was included by Congressional Act of August 24, 1954.

243. Congressional Act of August 8, 1958, Pub. L. No. 85-615, § 2, 72 Stat. 545.

244. Goldberg, *supra* note 240 at 546-547.

245. *Id.* All surrounding states enacted legislation, with the exception of those states in which tribes had already lost jurisdiction under Pub. L. 280 (*i.e.*, Wisconsin and Nebraska). In 1957 and 1961, South Dakota enacted legislation to accept jurisdiction. S.D. CODIFIED LAWS ANN. §§ 1-1-12 to 1-1-21 (1992). In 1963 North Dakota also enacted such legislation. N.D. CENT. CODE ANN. §§ 27-19-01 to 27-19-13 (1991). In 1967, Iowa also followed suit. IOWA CODE ANN. §§ 1.12-1.14 (1989).

246. See Goldberg, *supra* note 240, at 540-41.

ing threat to Anglos living nearby."²⁴⁷

In 1883, the United States Supreme Court said in *Ex Parte Crow Dog*²⁴⁸ that native tribes were under the pupilage of the United States as dependent communities that regulate their own domestic affairs and are permitted to define law and order according to their own laws and customs.²⁴⁹ Although regarding its importance less rigorously than white society, native peoples did have law and order. But federal Indian policy beginning late in the nineteenth century hoped to transform the dependent native community into a self-supporting and self-governed society according to white eurocentric political and economic models.²⁵⁰

Not only did native people resist assimilation but, at the same time, the federal government utterly failed in its fiduciary duty to follow through in creating what it had set out to do. The federal government succeeded only in designing failure-prone tribal entities by providing limited resources to law enforcement on the reservations and remaining passive with respect to enhancement of tribal courts.²⁵¹ Ironically, reservation lawlessness became more of a problem after passage of P.L. 280.

With respect to tribal court jurisdiction over child custody matters, "lawlessness" was an even more questionable rationale for state assumption of civil jurisdiction.²⁵² Actually, legislative history on state assumption of civil jurisdiction is weak.²⁵³ The grant of civil jurisdiction:

seems to have been primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes [that is, civil laws which concern private rights and status, e.g. laws of contract, tort, marriage, divorce²⁵⁴] between reservation Indians, and between Indians and other private citizens, by permitting the courts of the State to decide such disputes.²⁵⁵

Prior to passage of P.L. 280, the Bureau of Indian Affairs decided most civil matters.²⁵⁶ Congress' rationale in granting civil jurisdiction to the states in P.L. 280, was based primarily on the fact that the BIA already controlled all civil matters.²⁵⁷ Realizing that

247. *Id.* at 541, *citing*, S.Rep. No. 699, 83rd Cong. 1st Sess. 5 (1953).

248. *Ex Parte Crow Dog*, 109 U.S. 556 (1883).

249. *Id.* at 568-69.

250. *Id.*

251. Goldberg, *supra* note 240, at 541 nn.29-30.

252. *Id.* at 542-43.

253. *Id.*

254. *Bryan v. Itasca County*, 426 U.S. 373, 384 n.10 (1976).

255. *Id.* at 384.

256. Goldberg, *supra* note 240, at 543.

257. *Id.*

tribes had undergone years of the BIA's paternalistic control over civil matters, the Senate was convinced that Indians ". . . [had] reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction. . ."²⁵⁸ However, this rationale for extension of state jurisdiction over civil matters expressly contradicts the rationale for state jurisdiction over criminal matters—namely "reservation lawlessness."²⁵⁹ It appears that civil jurisdiction was an afterthought consistent with the assimilationist policy of the time.²⁶⁰

Social and political developments by the 1970's changed the nature of federal dealings with Native Americans. Tribal autonomy and self-determination became the new theory in federal policy. Consistent with the new thinking,²⁶¹ P.L. 280's grant of authority to the states was limited by the Indian Civil Rights Act of 1968 ("ICRA"), which required tribal consent for states to assume jurisdiction if they had not already done so.²⁶² The ICRA did not affect the pre-1968 states. By then, however, a number of additional states had already assumed jurisdiction and the ICRA did little to change this effect of P.L. 280. The ICWA's section 1918 complements the ICRA by permitting tribes affected by P.L. 280 to reassume jurisdiction upon petition to the Secretary of the Interior, and thus nearly completes the circle around which tribal jurisdiction has travelled since P.L. 280 was enacted.²⁶³

In 1975, the United States Supreme Court held that P.L. 280 was "plainly not meant to effect total assimilation,"²⁶⁴ thus recognizing a continuing role for tribal sovereignty. However, subsequent cases addressing jurisdictional issues with respect to tribal reassumption never distinguished child custody proceedings from other private right cases.²⁶⁵ P.L. 280 continues to limit tribal jurisdiction over child custody matters even when children reside and are domiciled on the reservation. Courts have refused to consider inherent tribal sovereignty in light of P.L. 280, notwithstanding the fact that the ICWA permits tribal reassumption of child custody jurisdiction.²⁶⁶

The Ninth Circuit Court of Appeals in 1990, however, ruled

258. *Id.*

259. *Id.*

260. *Id.* at 543-44. See also Carver, *supra* note 14 at 332.

261. See *supra* note 237.

262. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1321-23 (1988).

263. 25 U.S.C. § 1918 (1988).

264. Bryan v. Itasca County, 426 U.S. 373, 387 (1976).

265. See *supra* notes 233-34. For a discussion of tribal reassumption of jurisdiction see *infra* notes 273-303 and accompanying text.

266. *Id.*

in favor of tribal autonomy and recognized native people's right of self-determination, to make their own laws and to be ruled by them.²⁶⁷ The court first held that Indian tribes which demonstrate historical sovereignty retain their inherent sovereignty to decide domestic issues.²⁶⁸ Second, it reiterated that P.L. 280 was never meant to be a tool for total divestiture.²⁶⁹ Third, the court concluded that tribal jurisdiction is shared with state courts, under certain circumstances, regardless of whether the children are on or off the reservation because "tribal sovereignty is not coterminous with Indian Country."²⁷⁰ Finally, since the ICWA's jurisdictional provisions and those of P.L. 280 are at best ambiguous, the court held that the canons of statutory construction dictate that any ambiguity must be resolved in favor of the Indians.²⁷¹ Consequently, ICWA sections 1911 (a) and (b) presumptively recognize inherent tribal sovereignty, and operate to broaden the tribes' existing jurisdiction to become exclusive or referral.²⁷² The Ninth Circuit's view, that P.L. 280 is no longer consistent with contemporary federal Indian policy, was earlier recognized in section 1918 of the ICWA.

2. Tribal Reassumption of Jurisdiction

Section 1918 of the ICWA seeks to return control of child custody matters to tribes which were forcibly divested of that jurisdiction by P.L. 280, or which were located in states which assumed jurisdiction by passage of state law after P.L. 280.²⁷³ All tribes in Minnesota,²⁷⁴ with the exception of the Red Lake Band of Chippewa, lost exclusive or referral jurisdiction under P.L. 280. Because of Minnesota's notorious history of placing a disproportionate number of native children with non-native families, it is essential for Minnesota tribes to reassume jurisdiction over child custody matters. Currently, Red Lake and Lake Mille Lacs are the only tribal courts in this state litigating child custody cases.²⁷⁵

267. *Native Village of Venetie IRA Council v. Alaska*, 918 F.2d 797 (9th Cir. 1990).

268. *Id.* at 807.

269. *Id.* at 809-10.

270. *Id.* at 808, n. 13.

271. *Id.* at 810; see also *supra*, text accompanying note 85.

272. See notes 187, 313-20 and accompanying text; 25 U.S.C. §§ 1911 (a) - (b) (1988). See note 230, *supra* for the distinction between exclusive and referral jurisdiction.

273. 25 U.S.C. § 1918(a) (1988).

274. See generally 28 U.S.C. § 1360 (1988).

275. The Lake Mille Lacs Band of the Minnesota Chippewa Tribe has recently established a tribal court which hears child custody matters. Some Minnesota counties have not honored that court's orders for placement and payment of place-

Under section 1918(a), tribes affected by P.L. 280 may petition the Secretary of the Department of the Interior for reassumption and present a suitable plan to exercise jurisdiction.²⁷⁶ By petitioning for reassumption, tribes are not acknowledging a complete and total loss of jurisdiction.²⁷⁷ Rather, petitioning is a process in which a tribe is merely reasserting other tiers of jurisdiction.²⁷⁸ Accepted principles of inherent tribal sovereignty recognize a tribe's inherent jurisdiction which can not be divested.²⁷⁹ P.L. 280 was not intended to "supplant tribal institutions, but to supplement them."²⁸⁰ Nevertheless, courts in other jurisdictions have refused to transfer cases to tribal courts when it was uncertain if petitions for reassumption had been filed or whether reassumption had been granted.²⁸¹

Section 1918(b) sets out the criteria the Secretary of the Interior must consider to determine whether a tribe may reassume jurisdiction over child custody disputes. Primarily, but not exclusively, the Secretary is concerned with the following factors: the number of persons enrolled with the tribe who will be affected by reassumption;²⁸² the size of the reservation;²⁸³ the total population of the tribe;²⁸⁴ and finally the feasibility of the plan, especially when a consortium of tribes is contemplated.²⁸⁵ The statute does not indicate how these requirements are weighed in the decision-making process.

In 1979, the BIA promulgated rules to establish procedures by which a tribe may reassume jurisdiction over child custody proceedings.²⁸⁶ The BIA Guidelines permit three reassumption schemes. Tribal entities may be granted: (1) total reassumption;²⁸⁷

ment costs, relying on an opinion by the Field Solicitor of the Bureau of Indian Affairs that the establishment of that tribal court does not comport with the requirements of the Constitution of the Minnesota Chippewa Tribe. Some Minnesota counties do, however, recognize the court and honor its orders.

276. 25 U.S.C. § 1918 (1988).

277. *Native Village of Venetie IRA Council v. Alaska*, 918 F.2d 797 (9th Cir. 1990).

278. *Id.*

279. *Bryan v. Itasca County*, 426 U.S. 373 (1976).

280. *Native Village of Venetie IRA Council v. Alaska*, 918 F.2d at 810.

281. See *In re K.E.*, 744 P.2d 1173 (Alaska 1987); *Native Village of Nenana v. State*, 722 P.2d 219, 222 (Alaska), *cert. denied*, 479 U.S. 1008 (1986) (both courts rejected transfer of jurisdiction to the tribe where where the tribe had not petitioned for reassumption and where it was unknown whether the petition had been approved).

282. 25 U.S.C. § 1918(b)(1)(i) (1988).

283. 25 U.S.C. § 1918(b)(1)(ii) (1988).

284. 25 U.S.C. § 1918(b)(1)(iii) (1988).

285. 25 U.S.C. § 1918(b)(iv) (1988).

286. 25 C.F.R. 13.01-16 (1992).

287. 25 C.F.R. 13.1(a) & (b).

(2) the right to form a consortium with other tribes or bands that will exercise jurisdiction over all the tribes desiring to be part of the consortium;²⁸⁸ or (3) limited jurisdiction.²⁸⁹

Prior to the petitioning process there must be authority for the tribe to undertake such an action within the tribal constitution authorizing the tribal government to exercise jurisdiction over Indian child custody matters.²⁹⁰ Additionally, there must be support in the form of a resolution by the governing body authorizing or legitimizing the tribe's assertion of jurisdiction.²⁹¹ Tribes should supply a description of existing or proposed tribal courts²⁹² to the Secretary, along with the tribal ordinances or court rules which establish procedure or rules for the exercise of such jurisdiction.²⁹³ Other requirements for the petition include membership information,²⁹⁴ a time line for reassumption,²⁹⁵ child and family support services to be available,²⁹⁶ expected number of child custody cases²⁹⁷ and any tribal-state agreements already entered.²⁹⁸

Technical assistance to enable a tribe to meet criteria for petition approval shall be provided by the Bureau of Indian Affairs and Area Offices if the tribe requests it.²⁹⁹ In the event the Secretary of the Interior disapproves the petition, the BIA must offer technical assistance to overcome any defects in the plan or petition.³⁰⁰

At present, we have no information of any pending petitions for Minnesota tribes. Tribes in the surrounding states have pursued establishment of tribal court authority more vigorously. For example, in North and South Dakota, which assumed jurisdiction after passage of P.L. 280, tribes have successfully applied for and re-

288. 25 C.F.R. 13.1(c).

289. 25 C.F.R. 13.1(d).

290. 25 C.F.R. 13.11(a)(7).

291. 25 C.F.R. 13.11(a)(2).

292. 25 C.F.R. 13.11(a)(8) requires compliance with 25 U.S.C. § 1903(12) (1988), which mandates that a tribal court have jurisdiction over child custody proceedings and must be either a Court of Indian Offenses, a court established and operated under the code or custom of a tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings. A description shall include an organizational chart and budget. If non-tribal funds will be used, sources and amounts should be included.

293. 25 C.F.R. 13.11(a)(9).

294. 25 C.F.R. 13.11(a)(4)-(6).

295. 25 C.F.R. 13.11(a)(3).

296. 25 C.F.R. 13.11(a)(10).

297. 25 C.F.R. 13.11(a)(11).

298. 25 C.F.R. 13.11(a)(12).

299. 25 C.F.R. 13.13(a) & (b).

300. 25 C.F.R. 13.16.

ceived full jurisdiction to hear child custody matters.³⁰¹ About half of the tribes in Wisconsin³⁰² have reassumed civil jurisdiction to hear child custody matters. The Omaha Tribe of Nebraska exercises jurisdiction over child custody matters,³⁰³ but the Sac and Fox Tribe of Iowa does not. There has been no reported litigation in Minnesota under section 1918 nor in surrounding states.

3. Tribal-State Agreements

Section 1919 authorizes tribes to enter into³⁰⁴ and revoke³⁰⁵ agreements with states limited to care and custody of children and jurisdiction over child custody proceedings.³⁰⁶ In Minnesota, the Commissioner of Human Services is the state official authorized to enter into such agreements with the tribes,³⁰⁷ although prior agreements have been entered into by the governor.³⁰⁸ These agreements are not mandatory,³⁰⁹ and tribes which exercise exclusive jurisdiction are not precluded from entering into such agreements.³¹⁰ Tribes acting in a consortium may also enter into these types of agreements. For example, during 1980 and 1981, the State of Minnesota entered into two such agreements with the Minnesota Chippewa Tribe³¹¹ and the Minnesota Sioux Tribe.³¹² Each agreement was tailored to the needs of that specific community. The agreements basically provided that the state shall have exclusive jurisdiction over the child custody proceedings, consistent with ICWA, and the state shall provide proper notice to each tribe of any such proceeding and assume costs.

301. See Tribal Court Chart, appended.

302. *Id.*

303. *Id.*

304. 25 U.S.C. § 1919(a) (1988).

305. 25 U.S.C. § 1919(b) (1988).

306. 25 U.S.C. § 1919(a) (1988).

307. MINN. STAT. § 257.354, subd. 5 (1990).

308. Copies of these agreements between the state and the Minnesota Chippewa Tribe and the Minnesota Sioux communities are on file with LAW & INEQUALITY. The current status of these agreements is in flux and may soon change.

309. *Native Village of Stevens v. Smith*, 770 F.2d 1486, 1489 (9th Cir. 1985), *cert. denied*, 475 U.S. 1121 (1986).

310. See, e.g., *Sayers v. Beltrami County*, 472 N.W.2d 656 (Minn. Ct. App. 1991), *reversed on other grounds*, 481 N.W.2d 547 (Minn. 1992)(dictum).

311. The Minnesota Chippewa Tribe is a consortium of tribes organized under the Indian Reorganization Act of 1934, and consists of these reservations: Bois Forte, Fond du Lac, Grand Portage, Lake Mille Lacs, Leech Lake and White Earth. 25 U.S.C. § 461, *et. seq.* (1988)

312. The Minnesota Sioux Tribe consists of the following communities: Upper Sioux (Granite Falls), Lower Sioux (Morton), Prairie Island and Shakopee Mdewakanton.

4. Tribal Court Exclusive Jurisdiction

The ICWA recognizes the tribe's inherent exclusive jurisdiction over children who are its wards.³¹³ Case law suggests that this jurisdictional determination may be complex, and depend upon when the child becomes a ward of the tribe.³¹⁴ For example, a mother may not be presently domiciled on a reservation because she is neither currently enrolled as a member nor residing on the reservation proper. It may prove troublesome if the child becomes the subject of a CHIPS proceeding. If the mother enrolls herself and the child, then the question arises whether the tribal court will have exclusive jurisdiction when domicile has already been established in the state. Case law in other states suggests that the timing of domicile may offset tribal jurisdiction.³¹⁵ Nevertheless, the tribe may exercise presumptive jurisdiction over nondomiciliaries³¹⁶, or exercise its right to intervene in all other state court proceedings.³¹⁷

The tribal court retains exclusive jurisdiction over any child custody proceeding³¹⁸ involving an Indian child who resides or is

313. 25 U.S.C. § 1911(a) (1988). See *In re C.C.T.L.*, No. C3-88-253 (Minn. Ct. App. May 31, 1988).

314. See, e.g., *In re R.I.*, 402 N.W.2d 173 (Minn. Ct. App. 1987). After her divorce, a mother from Red Lake was awarded legal custody of her children, who were all enrolled at their father's reservation, the Confederated Tribes of the Warm Springs in Oregon. The children lived there with their father after the divorce. During this time, the Warm Springs tribal court issued emergency custody orders making them wards of that court. The following year, the mother returned to Warm Springs to bring the children to the Leech Lake reservation in Minnesota. There, a dependency petition was filed in state court. In *In re R.I.*, the court held that when the dependency proceeding was commenced, the children were residents of and domiciled in Cass County, Minnesota. The court ignored the fact that the children were already wards of the Warm Springs tribal court and rationalized that, since the children had changed their domicile and were found temporarily off the reservation, the court had authority to remove them under 25 U.S.C. § 1922 (1988) of the ICWA.

315. *In re T.R.M.*, 525 N.E.2d 298, 306 (Ind. 1988) holds that 25 U.S.C. § 1911(a) (1988) wardship orders are valid only if entered while the child is residing or domiciled on the reservation. This holding's precedential value was seriously undermined the following year by *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989), permitting a tribe to enter wardship orders regardless of residence.

316. 25 U.S.C. § 1911(b) (1988).

317. 25 U.S.C. § 1911(c) (1988). See also notes 190, 336-42 and accompanying text.

318. As these are defined in 25 U.S.C. § 1903(1) (1988), except in the limited circumstances in which § 1922 grants state courts limited authority over reservation domiciliaries, and except in Pub. L. No. 280 states. See notes 120, 230-72 and accompanying text. Because Minnesota is a Pub. L. No. 280 state, it appears that the state may exercise its jurisdiction on all reservations with the exception of that of the Red Lake Band of Chippewa, which was specifically exempted from P.L. 280. See *In re R.I.*, 402 N.W.2d 173 (Minn. Ct. App. 1987). See also MDHS Regulations, *supra* note 74, at XIII-3550(1), which specifically denounce local agency interven-

domiciled³¹⁹ within the reservation.³²⁰ Notwithstanding this rule, not all tribes exercise exclusive jurisdiction for two reasons: first, existing federal law, such as P.L. 280, deprives them of the right to do so; and second, the tribe may not have a legal body or a juvenile code to adjudicate child custody proceedings. In Minnesota, the Red Lake Band of Chippewa and the Lake Mille Lacs Band of the Minnesota Chippewa Tribe are the only tribes currently exercising exclusive jurisdiction over child custody matters involving their wards and domiciliaries. Remaining tribes fall into either of two categories: 1) those which exercise no jurisdiction and 2) those which exercise limited jurisdiction over non-child custody proceedings.³²¹

In Wisconsin, almost all tribes and bands have created tribal courts and codes, with about half of the tribes adjudicating juvenile (child custody cases) proceedings.³²² In North and South Dakota, most tribes have tribal courts and codes. Here tribes vigorously exercise jurisdiction in all cases.³²³ In Iowa, the state's only federally recognized tribe, the Sac and Fox Tribe, does not exercise jurisdiction over child custody matters.³²⁴ However, the Omaha Tribe of Nebraska does exercise such jurisdiction over child custody matters.³²⁵

If a child custody case is transferred to tribal court, practitioners must follow the tribal or juvenile code with respect to professional admission to tribal court and substantive and procedural codes. Practitioners should be aware that tribal court development, in Minnesota and all surrounding states, is a dynamic area and one which is currently undergoing rapid evolution and change.

tion when the child is on the reservation and the tribal court has exclusive jurisdiction.

319. Domicile is not defined within the ICWA. However, the Court has tried to define this term as noted in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989):

For adults, domicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there. . . One acquires a "domicile of origin" at birth, and that domicile continues until a new one (a "domicile of choice") is acquired. . . Since most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is determined by that of their parents.

320. 25 U.S.C. § 1911(a) (1988).

321. See chart at end of article for a listing of individual tribes and jurisdiction of their courts, and note 275, *supra* concerning the Lake Mille Lacs tribal court.

322. *Id.*

323. *Id.*

324. We were unable to gather specific information concerning the Sac and Fox Tribe of Iowa.

325. See *supra* note 321.

5. Full Faith and Credit Clause

Section 1911(d), the Full Faith and Credit Clause,³²⁶ is a significant step towards whittling away the paternalistic relationship between the federal government and tribal entities. Basically section 1911(d) places the tribal entity in parity with other states. One commentator has suggested that the words "any other entity" in this clause are more ambiguous and leave less certainty as to whether a tribal court decision is followed equally.³²⁷ In Minnesota, courts have followed the Full Faith and Credit Clause of the ICWA³²⁸ except in one case where the children were found off the reservation while under another tribe's wardship.³²⁹

VI. If the Case Stays in Court, How Is It Adjudicated?

A. Introduction

If the CHIPS or termination case stays in state court, it will be tried before a judge of juvenile court in the same manner as any non-ICWA case. The ICWA does not displace substantive state law.³³⁰ The proceeding will therefore be an ordinary adjudication

326. 25 U.S.C. § 1911(d) (1988) provides:

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

327. Barsh, *supra* note 14, at 1312.

328. See, e.g., *In re C.C.T.L.*, No. C3-88-253 (Minn. Ct. App. May 31, 1988)(deference given to Standing Rock Sioux tribal court's decision to award custody of child to father).

329. See, e.g., *In re R.I.*, 402 N.W.2d 173, 176 (Minn. Ct. App. 1987) (court justified the emergency removal of children on the ground that they were temporarily off the reservation, and, in fact, changed domicile and residence, thereby refusing to acknowledge the jurisdiction of the Warm Springs tribal court. *But cf.* *Desjarlait v. Desjarlait*, 379 N.W.2d 139 (Minn. Ct. App. 1985) (husband voluntarily invoked state court jurisdiction, thereby denying tribal court jurisdiction). One court has held that, notwithstanding the Full Faith and Credit Clause, a receiving court may always examine whether the transmitting court had jurisdiction to act in the way it did. *In re T.R.M.*, 525 N.E.2d 298, 306 (Ind. 1988). See also *Desjarlait v. Desjarlait*, 379 N.W.2d at 144 (court suggested that a state court may decline to extend comity to a tribal court order if the tribal court deprived a litigant due process) and *Carver*, *supra* note 14 at 342-43. By citing these principles, we do not necessarily agree with them.

330. The ICWA sets minimum procedural and evidentiary standards, but does not purport to recodify for the 50 states their substantive juvenile codes. A recently released article misunderstands this point when it says, "the ICWA mandates terminating parental rights when continued custody is likely to result in harm to a child." Marcia L. Howell-Rom, Note, *The State of the Act: The Indian Child Welfare Act in Minnesota After In the Matter of the Welfare of B.W. and In the Matter of the Welfare of M.S.S.*, 14 *HAMLIN L. REV.* 427, 441 (Spring 1991)(emphasis added). This statement is not only wrong in terms of what the ICWA actually says,

of an ordinary state law petition,³³¹ subject, however, to the ICWA's procedural and proof requirements. The ICWA will control where state law rules provide a lesser degree of protection to a native litigant in state court than does the ICWA.³³² Conversely, any state law rule providing more extensive rights to a native litigant will control, notwithstanding the ICWA.³³³ State law rules compatible with the ICWA will remain in effect.³³⁴ At trial, the rules of civil procedure and the rules of evidence will usually apply.³³⁵

B. Pretrial Procedure

The ICWA contains several pretrial requirements of importance to the Minnesota practitioner.

The first requirement provides that Indian tribes which do not request transfer to tribal court are permitted to intervene³³⁶ at any stage of the proceeding.³³⁷ The tribe typically will be notified by the agency pursuant to the ICWA's section 1912(a) that it can intervene and participate, seek a transfer to tribal court, or not participate at all.³³⁸ As previously noted,³³⁹ some tribes do not

but it also misunderstands the role the ICWA plays in operation of each state's substantive juvenile law.

331. The petition will be brought under the so-called CHIPS law, MINN. STAT. § 260.015, subd. 2a (1990), or will be a termination of rights petition brought under MINN. STAT. § 260.221 (1990).

332. For example, state law requires that most termination of parental rights proceedings be proven by clear and convincing evidence. Minn. R. Juv. P. 59.05; *In re Rosenbloom*, 266 N.W.2d 888, 889-90 (Minn. 1978). By contrast, the ICWA requires such a petition to be proven beyond a reasonable doubt. 25 U.S.C. § 1912(f) (1988).

333. 25 U.S.C. § 1921 (1988). See *In re B.W.*, 454 N.W.2d 437, 443-46 (Minn. Ct. App. 1990), (more protective "Indian expert witness" requirement of the MDHS Regulations should be followed). See also *supra* notes 80-82, 97-99 and accompanying text.

334. See e.g. MINN. R. JUV. P. 57 (discovery rules).

335. Minnesota law indicates that the rules of evidence apply only to "CHIPS" cases which involve certain status offenses. MINN. STAT. 260.155, subd. 1 (1990). However, the rules of juvenile procedure indicate that the rules of evidence apply in juvenile proceedings. MINN. R. JUV. P. 59.04. Furthermore, the Minnesota rules of evidence do not exclude CHIPS or termination trials in juvenile court from application of the rules. MINN. R. EVID. 1101.

336. 25 U.S.C. § 1911(c) (1988).

337. BIA Guidelines, *supra* note 73, at 67590 point out that untimely interventions do not have the same disruptive effect as untimely requests to transfer to tribal court. See, e.g., *People ex rel. J.J.*, 454 N.W.2d 317, 330 (S.D. 1990); *In re Q.G.M.*, 808 P.2d 684, 689 (Okla. 1991)(tribe may intervene at any time); *In re M.E.M.*, 725 P.2d 212, 214 (Mont. 1986)(late intervention permissible when intervenor denied information about proceeding). See also *supra* notes 202-205 and accompanying text; MDHS Regulations, *supra* note 74, at XIII-3581.

338. BIA Guidelines, *supra* note 73, at 67588; MDHS Regulations *supra* note 74, at XIII-3561.

seek a transfer to tribal court, for reasons related to membership eligibility, finances, or distance, and some tribes decide not to intervene for the same reasons.³⁴⁰ Courts have suggested that tribes must intervene to protect the placement preferences under section 1915.³⁴¹ The Minneapolis American Indian Center has for some years provided courtesy representation for distant tribes.³⁴²

The second pretrial requirement instructs the court to provide counsel to indigent parents and custodians upon request.³⁴³ This is consistent with Minnesota law.³⁴⁴

A third pretrial provision of the ICWA relates to examination of reports.³⁴⁵ The statute provides that any party to a foster care placement or termination proceeding involving an Indian child has the right to examine all reports filed with the court. The BIA Guidelines provide that no adjudicatory decision may be made by a trial court based upon a document not filed.³⁴⁶ The Indian Family Preservation Act is broader and requires that the welfare agency provide the tribe with access to all its files concerning the child whenever a child is placed or likely to be placed in foster care.³⁴⁷

The fourth and last pretrial procedural provision of the ICWA precludes a state court from hearing any matter involving a native child in which the petitioner has improperly removed the

339. See *supra* note 190 and accompanying text.

340. *Id.*

341. *In re J.R.S.*, 690 P.2d 10, 18 (Alaska 1984). The decision notes that a petition to invalidate a placement cannot be made for a violation of 25 U.S.C. § 1915 (1988); see also *In re Q.G.M.*, 808 P.2d 684, 688 (Okla. 1991); *In re Baby Girl A.*, 282 Cal. Rptr. 105, 108-109 & n.6 (Cal. Ct. App. 1991). But *J.R.S.* and other cases note that the right of intervention under 25 U.S.C. § 911(c) (1988) may not extend to adoption proceedings. See *infra* notes 411, 418 and accompanying text.

342. The Minneapolis American Indian Center has an ICWA court monitor program. On occasion, the center is contacted by tribes which have received notice, and would like to appear but are unable to do so. The center's personnel will occasionally appear and inform the court of the prospective intervening tribe's position. This helps to implement 25 U.S.C. § 1911(c) (1988).

343. 25 U.S.C. § 1912(b) (1988). See, e.g., *State ex. rel. Juvenile Dep't of Multnomah County v. Charles*, 688 P.2d 1354, 1358 (Or. Ct. App. 1984), *review dismissed*, 701 P.2d 1053 (Or. 1985) (counsel must be appointed as soon as the court knows an Indian child is at issue and the parents are indigent); *In re G.L.O.C.*, 668 P.2d 235, 237-38 (Mont. 1983); *In re M.E.M.*, 635 P.2d 1313, 1316-17 (Mont. 1981).

344. See MINN. R. JUV. P. 40.01, subd. 3; MINN. STAT. § 260.155, subd. 2 (1990). See MDHS Regulations, *supra* note 74, at XIII-3584. Under Minnesota law, a grandparent with whom the child has lived within the last two years has a right to participate. MINN. STAT. § 260.155, subd. 1(a) (1990). The presiding judge of the Hennepin County Juvenile Court prior to 1990 routinely appointed counsel not only for this type of participant but often for other relatives, many times resulting in four or more public appointments in the same case.

345. 25 U.S.C. § 1912(c) (1988).

346. BIA Guidelines, *supra* note 73, at 67592; MDHS Regulations *supra* note 74, at XIII-3582.

347. MINN. STAT. § 257.352, subd. 2 (1990).

child from the parent or custodian.³⁴⁸ In those circumstances, the court must decline to exercise jurisdiction and must return the child to the parent or custodian unless doing so would subject the child to "substantial and immediate danger."³⁴⁹ The legislative history indicates that such a showing of immediate danger cannot be made by or on behalf of the wrongful petitioner.³⁵⁰ This provision, section 1920, does not accord relief to a parent complaining about the actions of the local welfare agency.³⁵¹ The BIA Guidelines state that pursuant to section 1920 the trial court must make a threshold determination of whether an improper removal occurred before proceeding on the merits.³⁵²

C. Adjudicatory Procedures and Burden of Proof

The ICWA imposes two adjudicatory burdens upon a petitioner, one with regard to its petition, the other with regard to the services offered to the family.

1. Burden of Proof As To The Petition

(i) Introduction: Non-ICWA Burden

A Minnesota CHIPS petition must be proven by clear and convincing evidence, whether or not it involves a native family and the ICWA.³⁵³ A Minnesota termination petition involving a non-native family must also be proven by clear and convincing evidence.³⁵⁴ By contrast, a termination petition involving a native family under the ICWA must be proven beyond a reasonable doubt.³⁵⁵

(ii) Introduction: ICWA Burden

The ICWA provides that before either foster care placement or termination of parental rights may be ordered, there must be a finding that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical

348. 25 U.S.C. § 1920 (1988). See generally *In re C.C.T.L.*, No. C3-88-253 (Minn. Ct. App. May 31, 1988).

349. 25 U.S.C. § 1920 (1988).

350. House Report, *supra* note 14, at 25. See *D.E.D. v. State*, 704 P.2d 774, 782 (Alaska 1985).

351. *D.E.D. v. State*, 704 P.2d at 782.

352. BIA Guidelines, *supra* note 73, at 67590. The MDHS Regulations do not have the divided inquiry required by the BIA Guidelines. MDHS Regulations, *supra* note 74, at XIII-3591.

353. 25 U.S.C. § 1912(e) (1988); MINN. R. JUV. P. 59.05.

354. MINN. R. JUV. P. 59.05; *In re Rosenbloom*, 266 N.W.2d 888 (Minn. 1988).

355. 25 U.S.C. § 1912(f) (1988).

damage to the child.”³⁵⁶ Although the language “continued custody” suggests that before the burden can be met, the child has to be living with the parent, the cases do not agree.³⁵⁷ Occasionally a parent facing a CHIPS petition is living with the child but that is quite unlikely to occur in a termination situation. Many state law termination petitions allege that the child is “neglected and in foster care.”³⁵⁸ In those circumstances, it is impossible for the parent to be living with the child. In fact, in most termination situations the child and the parent are living apart. It appears that the “continued custody” language requires the court to make a hypothetical judgment - based upon the record before it - concerning what the child’s status would be if the child were returned to its parent immediately.³⁵⁹

The BIA Guidelines specifically note that the burden of demonstrating harm to the child is not met merely by evidence of alcoholism in the family or by socio-economic conditions. This provision probably responded to testimony heard by Congress which suggested that Indian families suffered from the cultural bias of non-Indian social service agencies which assumed that all Indians were drunkards and conformed their services to these families accordingly.³⁶⁰

The BIA Guidelines suggest that the trial court should undertake a two-part inquiry to determine whether the ICWA’s burden requirement has been met: first, is it likely that the conduct of the parents will result in serious physical or emotional harm to the child? second, if such conduct will likely cause such harm, can the parents be persuaded to modify their conduct?³⁶¹

356. 25 U.S.C. § 1912(e) & (f) (1988).

357. *In re W.R.*, 379 N.W.2d 544, 549 (Minn. Ct. App. 1985). See also *In re S.A.M.*, 703 S.W.2d 603, 607 (Mo. Ct. App. 1986); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 937-38 (N.J. 1988)(discussing varying usages of the term “custody” in the ICWA). The point is developed further in a recently-released article, Marcia L. Howell-Rom, Note, *The State of the Act: The Indian Child Welfare Act in Minnesota After In the Matter of the Welfare of B.W. and In the Matter of the Welfare of M.S.S.*, 14 *HAMLIN L. REV.* 427, 441-43 (Spring 1991).

358. MINN. STAT. §§ 260.221, subd. 1(b)(8); 260.155, subd. 7; 260.015, subd. 18 (1990).

359. BIA Guidelines, *supra* note 73, at 67593; MDHS Regulations, *supra* note 74, at XIII-3585.

360. BIA Guidelines, *supra* note 73, at 67593; House Report, *supra* note 14, at 10. But see *In re M.E.B.*, Nos. C6-90-2370, C6-90-2388 (Minn. Ct. App. March 19, 1991)(chronic alcohol abuse, along with other problems, can meet the proof requirements of 25 U.S.C. § 1912(1988)).

361. BIA Guidelines, *supra* note 73, at 67593; *In re T.O.*, 759 P.2d 1308, 1310 (Alaska 1988).

(iii) *ICWA Burden: Qualified Expert Witnesses*

The proof supporting this two-part inquiry must not only meet the clear-and-convincing or proof-beyond-reasonable-doubt³⁶² standards, but it also must be supported by the testimony of qualified expert witnesses.³⁶³ Despite the use of the plural form, a number of cases have held that only one expert witness is necessary.³⁶⁴ A few courts have also held that the two-part inquiry noted in the BIA Guidelines and section 1912's proof requirements can effectively be answered by a tag-team of experts, each of whom is qualified to answer a portion.³⁶⁵

The ICWA does not define the term qualified expert witnesses. The BIA Guidelines, however, have done so, and several dozen cases throughout the country have further fleshed out the BIA's definitions.³⁶⁶ The legislative history suggests that a qualified expert witness must have more than the usual social worker training.³⁶⁷ The BIA Guidelines provide that a qualified expert witness could be:

- [i] A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs

362. The choice of the reasonable doubt standard, used primarily in criminal cases, was a deliberate one. The Congress noted that "removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty[.]" House Report, *supra* note 14, at 22. As the Supreme Court notes, "a standard of proof. . .instruct[s] the factfinder concerning the degree of confidence. . .society thinks [s]he should have in the correctness of factual conclusions. . ." *Addington v. Texas*, 441 U.S. 418, 423 (1979). The choice of a standard of proof serves as a societal judgment about how the risk of error should be distributed between the litigants. *Santosky v. Kramer* 455 U.S. 745, 755 (1982). See *In re B.W.*, 454 N.W.2d 437, 445 (Minn. Ct. App. 1990); see also *In re J.B.*, 643 P.2d 306, 308 (Okla. 1982).

363. A failure to comply with the 25 U.S.C. 1912(e) & (f) (1988) proof requirements will subject a subsequent placement to collateral attack under 25 U.S.C. § 1914. *In re Morgan*, 364 N.W.2d 754, 758 (Mich. Ct. App. 1985). However, 25 U.S.C. § 1914 does not entitle the moving party to a *de novo* review of the evidence. *In re Roberts*, 732 P.2d 528, 531 (Wash. Ct. App. 1987). See also MDHS Regulations, *supra* note 74, at XIII-3594.

364. The BIA Guidelines use the language "one or more." BIA Guidelines, *supra* note 73 at 67593. See also *In re M.E.B.*, Nos. C6-90-2370, C6-90-2388 (Minn. Ct. App. March 19, 1991); *In re T.O.*, 759 P.2d 1308, 1310 (Alaska 1988); *In re Roberts*, 732 P.2d at 533; *In re Kreft*, 384 N.W.2d 843, 847 (Mich. Ct. App. 1986); *D.A.W. v. State*, 699 P.2d 340, 342 (Alaska 1985).

365. *In re T.O.*, 759 P.2d at 1310; *In re Kreft*, 384 N.W.2d at 847-48.

366. The BIA Guidelines suggest that the expert must be qualified by reason of educational background and prior experience to make judgments on the two-part inquiry that are substantially more reliable than judgments that would be made by non-experts. BIA Guidelines, *supra* note 73, at 67593. An expert who lacks knowledge about tribal culture and values is not qualified to give an opinion on the 25 U.S.C. § 1912(e) and (f) issues. *In re Appeal in Pima County Juvenile Action*, 635 P.2d 187, 192 (Ariz. Ct. App. 1981), *cert. denied*, 455 P.2d 1007 (1982).

367. House Report, *supra* note 14, at 22. See *In re B.W.*, 454 N.W.2d 437, 444 (Minn. Ct. App. 1990).

as they pertain to family organization and childrearing practices.

- [ii] A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.
- [iii] A professional person having substantial education and experience in the area of his or her specialty.³⁶⁸

The Minnesota MDHS Regulations add to the third alternative the requirement that the professional person have: ". . . substantial knowledge of prevailing social and cultural standards and child rearing practices within the Indian community."³⁶⁹

(iv) Minnesota and Foreign Decisions

Although the cases throughout the country run the gamut from approving highly qualified people as qualified expert witnesses to approving minimally qualified or unqualified people,³⁷⁰ a canvass of these cases is not particularly helpful to Minnesota lawyers. The Minnesota Court of Appeals has recently dealt exhaustively with the issue of expert witnesses under the ICWA and has provided all the guidance on this point that is needed.

In *In re B.W.*,³⁷¹ the Minnesota Court of Appeals explicitly adopted the expanded MDHS Regulations concerning professional persons as qualified expert witnesses. Basing its decision on that

368. BIA Guidelines, *supra* note 73, at 67593. Basically, what the BIA Guidelines try to do is to require that the expert be "someone with special knowledge of and sensitivity to Indian culture." *State ex. rel. Juvenile Dep't of Multnomah County v. Cooke*, 744 P.2d 596, 597 (Or. Ct. App. 1987). That same court indicated that the witness must possess special knowledge of social and cultural aspects of Indian life. *State ex. rel. Juvenile Dep't of Multnomah County v. Charles*, 688 P.2d 1354, 1359 n.3 (Or. Ct. App. 1984), *review dismissed*, 701 P.2d 1053 (Or. 1985).

369. MDHS Regulations, *supra* note 74, at XIII-3586.

370. Compare *In re T.O.*, 759 P.2d 1308, 1309 n.4 (Alaska 1988); *In re Kreft*, 384 N.W.2d 843, 847-48 (Mich. Ct. App. 1986)(experts acceptable) and *In re N.L.*, 754 P.2d 863, 868 (Okla. 1988); *In re M.E.M.*, 635 P.2d 1313, 1317-18 (Mont. 1981)(experts not acceptable) with *Long v. State Dep't. of Human Resources*, 527 So.2d 133, 136 (Ala. Civ. App. 1988); *D.W.H. v. Cabinet for Human Resources*, 706 S.W.2d 840, 843 (Ky. Ct. App. 1986); *In re L.N.W.*, 457 N.W.2d 17, 18 (Iowa Ct. App. 1990)(unqualified experts acceptable). The South Dakota cases are particularly troublesome for the native citizens of that state. See, e.g., *In re K.A.B.E.*, 325 N.W.2d 840, 843 (S.D. 1982); *In re J.L.H.*, 316 N.W.2d 650, 651 (S.D. 1982).

Although nothing in the ICWA, its legislative history or the BIA Guidelines so indicates, some courts hold that the qualified expert witness requirement may be applied less rigorously when the matter before the court does not involve cultural bias. *State ex. rel. Juvenile Dep't of Lane County v. Tucker*, 710 P.2d 793, 798-99 (Or. Ct. App. 1985), *review dismissed*, 717 P.2d 1182 (Or. 1986); *D.W.H. v. Cabinet for Human Resources*, 706 S.W.2d at 843; *Long v. State Dep't of Human Resources*, 527 So.2d at 136; *Matter of N.L.*, 754 P.2d at 868. These statements are flatly contradicted by the ICWA, its legislative history and the BIA Guidelines.

371. 454 N.W.2d 437 (Minn. Ct. App. 1990).

part of the ICWA which permits state law according a higher standard of protection to native litigants to control,³⁷² the court held both that the termination petition had not been proven beyond a reasonable doubt and that the petitioner's witnesses were not qualified expert witnesses within the meaning of the ICWA, the BIA Guidelines and the MDHS Regulations.³⁷³ The petitioner's social worker in this case had never been on a Minnesota reservation and had spent only a few hours on the Flathead reservation in Montana during graduate school.³⁷⁴ She held a Masters of Social Work degree and had been a social worker for several years. However, she was unable to name the principal Minnesota Indian tribes, the location of the reservations, the constituent bands of the Minnesota Chippewa Tribe confederation, and was unfamiliar with Minnesota Indian history, literature and ceremonies. Moreover, she was unfamiliar with Indian child-rearing practices, culture and Indian-based programs.

The guardian ad litem, like the social worker, was qualified by the trial court. Although he was part-Ojibwe, he spent most of his life in the urban areas of the state, returning only occasionally to the reservation. One of the parents' expert witnesses testified that the guardian was not known on the reservation. He was an undergraduate student and a foster parent for Indian children. He also could not answer questions in the same areas of inquiry put to the social worker.

The Minnesota Court of Appeals held that neither of these witnesses could be qualified as an expert under the "professional person" portion of the MDHS Regulations, which it adopted for future practice under the ICWA in Minnesota.³⁷⁵ In so holding, the court overruled an earlier decision which suggested that the usual state law evidentiary rules regarding expert testimony would control.³⁷⁶

The court of appeals, noting the equivocal nature of the guardian's testimony and the disqualification of the social worker, held that the petitioner had not proven its case beyond a reason-

372. *Id.* at 443-44; 25 U.S.C. § 1921 (1988).

373. *In re B.W.*, 454 N.W.2d at 444-45.

374. To the extent that some of these details do not appear in the court's opinion, one of the writers was both trial and appellate counsel for the mother in *In re B.W.* and is quite familiar with the trial record and the course of the appeal. We do not mean to imply by the descriptions of the witnesses in the *B.W.* case that a "qualified expert witness" is defined by one monolithic experience. The native experience in this country is influenced by regional differences, distinctions having to do with rural and urban life, and is Nation specific.

375. *In re B.W.*, 454 N.W.2d at 443-45.

376. *In re T.J.J.*, 366 N.W.2d 651 (Minn. Ct. App. 1985).

able doubt as required by section 1912(f). The parents had introduced the testimony of four expert witnesses, at least two of whom were conceded to be qualified expert witnesses by the petitioner.³⁷⁷

In *In re M.S.S.*,³⁷⁸ the Minnesota Court of Appeals followed its decision in *In re B.W.* in two respects. First, it again found that the evidence offered by the petitioner did not meet the requirements of section 1912(f), but for a different reason than that in *In re B.W.*³⁷⁹ Second, it adhered to its rule from *In re B.W.* that the MDHS Regulations control the issue of qualified expert witnesses.³⁸⁰

These cases likely stand for the proposition that, in Minnesota, an ordinary social worker from a county agency with an M.S.W. degree will no longer be able to qualify as an expert witness. In light of *In re B.W.*, and because it is an essential part of the agency's burden of proof, a lawyer should always be prepared to examine the agency social worker in detail at trial concerning her qualifications in this area.

Assuming that to be true, Hennepin County has used two other methods in its attempts to satisfy the ICWA's requirements for expert witnesses. The first method was employed in the first few years after passage of the ICWA. The county attorney would subpoena a reservation's social services worker to trial, hand the worker the family's agency file, and attempt to qualify the witness on that basis as an expert. Although the case in which this technique was used did not ultimately go to trial, the technique itself is suspect. It basically requires a witness who does not know the family or its circumstances to answer hypothetical questions about likely future physical or emotional harm to the child. Given the reasoning of *In re M.S.S.*, if the witness is unfamiliar with the fam-

377. *In re B.W.*, 454 N.W.2d at 445-46. See also *State ex. rel. Juvenile Dep't of Multnomah County v. Charles*, 688 P.2d 1354, 1360 (Or. Ct. App. 1984), *review dismissed*, 701 P.2d 1053 (Or. 1985) (holding that the standard of proof was not met in light of the parent's contrary expert testimony).

378. 465 N.W.2d 412 (Minn. Ct. App. 1991).

379. One of the issues in *In re M.S.S.* was whether the children could be placed with a paternal uncle and aunt. The court held that, given the availability of that placement, the 25 U.S.C. § 1912(f) (1988) requirement that termination could not occur unless there was proof beyond a reasonable doubt that continued custody by an Indian custodian was likely to result in serious emotional or physical damage to the child had not been met. *Id.* at 417.

380. *Id.* See also *In re W.R.*, 379 N.W.2d 544, 547 (Minn. Ct. App. 1985); *In re R.L.*, 402 N.W.2d 173, 177-78 (Minn. Ct. App. 1987); *In re M.E.B.*, Nos. C6-90-2370, C6-90-2388 (Minn. Ct. App. Mar. 19, 1991); *In re V.R.*, No. C2-90-1765 (Minn. Ct. App. Apr. 2, 1991). These cases also discuss the qualified expert witness requirement.

ily, she may be unfamiliar with potential custodians in the extended family, and may also be unfamiliar with which types of programming should be used to assist the family to avoid placement. She therefore would not be able to testify in the manner required by section 1912.

The second method tried in Hennepin County in the last ten years to meet the expert witness requirement is the development of a special unit within the welfare agency called the "Indian Advocate" unit. That unit is composed of a half-dozen native people who advocate for the family within the agency, and assist the social worker in providing services to the family. Those who developed this plan assumed that this type of agency employee would be easily qualified as an expert if the case were to be tried, and thus these employees would ease the difficulty faced by the agency in meeting the proof requirements. However, the advocates often differ with both the methods used and the programming offered by the social worker. They often even disagree with the need for placement. Moreover, by advocating for the family within the agency and with the court, these workers often develop a special relationship with the family which makes it impossible for them to testify in favor of termination in court. The Hennepin County agency has recently, for the third time since 1984, forbidden its advocates to speak with the native families' defense counsel without county attorney permission. The county attorney has concurrently adopted a policy under which it will not issue child protection petitions unless the field worker, the advocate and the placement unit agree on the need for the petition and placement. It remains to be seen what effect these new policies will have on the effectiveness of the Indian Advocate unit.

2. Burden As To Remedial Services

The second adjudicatory burden imposed upon the petitioner by the ICWA is a showing that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that the efforts were unsuccessful.³⁸¹ The requirement applies to foster care place-

381. 25 U.S.C. § 1912(d) (1988). The legislative history noted that, while most states have such a requirement, it is rarely enforced, and the ICWA would therefore "impose[] a Federal requirement in that regard. . . ." House Report, *supra* note 14, at 22. The first Minnesota case to apply the ICWA ignored this requirement, and instead focused upon state law requirements for services. *In re R.M.M.*, 316 N.W.2d 538 (Minn. 1982). It has been held that when, due to the prior termination of parental rights of one parent, and the fact that the other parent had never acknowledged paternity, there is no "Indian family" within the meaning of 25 U.S.C. § 1912(d). *In re S.A.M.*, 703 S.W.2d 603, 608 (Mo. Ct. App. 1986).

ments and terminations of parental rights.³⁸² As previously noted,³⁸³ this and other adjudicatory provisions of the ICWA apply to the entire proceeding, including the initial health and welfare hold hearing. Both the BIA Guidelines and Minnesota law support this view.

The BIA Guidelines specifically state that the provision of remedial services must take place before the commencement of the proceeding.³⁸⁴ The 1989 "reasonable efforts" legislation explicitly codified this position into Minnesota law.³⁸⁵

The BIA Guidelines specify that the services offered must take into account prevailing social and cultural conditions and the way of life of the child's tribe, which includes the use of the child's extended family.³⁸⁶ Minnesota law conforms with the BIA Guidelines, but provides much greater detail.³⁸⁷ This aspect of the "reasonable efforts" law applies to health and welfare hold hearings, disposition hearings after a finding on a CHIPS petition, and to termination trials.³⁸⁸

Decisions in Minnesota and elsewhere have agreed that the petitioner must prove that remedial services were offered beyond a reasonable doubt in a termination case, and by clear and convincing evidence in a CHIPS case.³⁸⁹ As the Minnesota Court of Ap-

382. 25 U.S.C. § 1912(d) (1988). Section 1912(d) has been held inapplicable to voluntary placement proceedings, *B.R.T. v. Social Serv. Bd. of N.D.*, 391 N.W.2d 594, 600 (N.D. 1986). This approach is consistent with the ICWA's prerequisite for provision of remedial services. No part of the "reasonable efforts" law appears to require provision of remedial services in voluntary placement cases, see MINN. STAT. § 260.012, subs. (a) & (c) (1990), although the Indian Family Preservation Act does make a brief reference to provision of services in voluntary situations. MINN. STAT. § 257.352, subd. 2 (1990).

383. See *supra* text accompanying note 120.

384. BIA Guidelines, *supra* note 73, at 67592; MDHS Regulations, *supra* note 74, at XIII-3583 (refers to "prior to the petition") See *B.R.T. v. Social Serv. Bd. of N.D.*, 391 N.W.2d at 600 (provision of services must occur before initiation by the agency of the placement proceeding). *But see State ex. rel. Juvenile Dep't of Multnomah County v. Charles*, 688 P.2d 1354, 1358 (Or. Ct. App. 1984), *review dismissed*, 701 P.2d 1053 (Or. 1985)(showing of provision of services need only be made at the hearing on the merits of the petition).

385. MINN. STAT. § 260.172, subd. 1(c) (1990) (specifically applying its requirements to detention hearing proceedings.)

386. BIA Guidelines, *supra* note 73, at 67592. In *In re M.S.S.*, 465 N.W.2d 412, 418-19 (Minn. Ct. App. 1991) the court recently noted the mandatory term "shall" in this Guideline, and held that the requirement of 25 U.S.C. § 1912(d) (1988) is not met when the agency refused to explore placement with the brother of one of the parents. For a discussion of "extended family" see *infra* note 395.

387. MINN. STAT. § 260.012, subs. (b) & (c) (1990). One of the six requirements of subdivision (c) is cultural appropriateness. *Id.*

388. MINN. STAT. § 260.012, subs. (a)-(c) (1990).

389. *In re M.S.S.*, 465 N.W.2d at 418; *In re M.E.B.*, Nos. C6-90-2370, C6-90-2388 (Minn. Ct. App. Mar. 19, 1991); *In Re L.N.W.*, 457 N.W.2d 17, 19 (Iowa Ct. App.

peals recently stated:

Logically, this seems to be compelled: If termination of parental rights of Indian parents to their children can be ordered only upon a factual basis shown beyond a reasonable doubt [section 1912(f)], and if termination cannot be effected without a showing of active efforts to prevent the breakup of the Indian family and a failure thereof [section 1912(d)], then the adequacy of efforts and futility of them, as predicates to termination, must likewise be established beyond a reasonable doubt.³⁹⁰

There are only a handful of decisions in other states discussing what level of services must be provided and when the services are to be deemed unsuccessful.³⁹¹ Three Minnesota ICWA cases have addressed the issue, and these cases coupled with the Minnesota "reasonable efforts" statutes make the ICWA's section 1912(d) remedial services requirements quite clear.³⁹² Testimony must be specific concerning the provision of services.³⁹³

1990); *People ex rel S.R.*, 323 N.W.2d 885, 887 (S.D. 1982); *In re Kreft*, 384 N.W.2d 843, 848 (Mich. Ct. App. 1986).

390. *In re Welfare of M.S.S.*, 465 N.W.2d at 418.

391. *In re Kreft*, 384 N.W.2d 843, 848-49 (Mich. Ct. App. 1986)(unsuccessful attempt to teach parenting techniques to psychiatric patient); *In re S.D.*, 402 N.W.2d 346, 351 (S.D. 1987)(nomadic family did not contact agency); *Long v. Dep't of Human Resources*, 527 So.2d 133, 135 (Ala. Civ. App. 1988)(not specified); *People ex rel J.J.*, 454 N.W.2d 317, 325 (S.D. 1990)(refusal to acknowledge need to treat sex offender).

392. *In re Welfare of M.S.S.*, 465 N.W.2d at 417-19; *In re M.E.B.*, Nos. C6-90-2370, C6-90-2388 (Minn. Ct. App. Mar. 19, 1991); *In re V.R.*, No. C2-90-1765 (Minn. Ct. App. Apr. 2, 1991). We think that MINN. STAT. § 260.012 (1990) creates a distinction between efforts deemed "reasonable" in a *post-hoc* analysis, and "active efforts." "Reasonable efforts" are those which a social worker might employ when she merely dictates services to a client, but does no more, and which efforts a court might later find adequate. However, "active efforts," which we think this statute requires, are those made by a social worker who assists her native client in enrolling in and successfully completing services, and in taking advantage of the protections accorded the client by the law. The latter might be assistance to a native family in enrolling its children with their tribe, *see* text accompanying note 154, or in identifying and locating extended family members, if it becomes necessary to place the children, as required by §§ 257.352, subd. 4 and 257.353, subd. 5 of the Indian Family Preservation Act, *see* Carver, *supra* note 14 at 347 and *In re Crews*, 803 P.2d 24, 36 (Wash. Ct. App. 1991)(dissenting opinion). Minnesota cases agree with this analysis. *See In re M.A.*, 408 N.W.2d 227, 235-36 (Minn. Ct. App. 1987); *In re J.A.*, 377 N.W.2d 69, 73 (Minn. Ct. App. 1985); *In re K.P.C.*, 366 N.W.2d 711, 714-15 (Minn. Ct. App. 1985); *In re M.G.*, 407 N.W.2d 118, 122-23 (Minn. Ct. App. 1987); *In re A.H.*, 402 N.W.2d 598, 603-604 (Minn. Ct. App. 1987). Minn. Stat. § 260.172, subd. 1(a) recognizes § 260.012's distinction in the types of efforts.

393. *State ex. rel. Juvenile Dep't of Multnomah County v. Charles*, 688 P.2d 1354, 1359 (Or. Ct. App. 1984), *review dismissed*, 701 P.2d 1053 (Or. 1985).

VII. Post-Adjudicatory Proceedings—What Happens?

A. Placements

The ICWA contains two regimens for placing a child after an adjudicatory finding by the trial court under section 1912.

1. Placements Other Than Adoptions

Placements after a health and welfare hold hearing, before and during trial, and after trial of a CHIPS case are controlled by section 1915(b) of the ICWA. Section 1915(b) contains three provisions. First, the child must be placed in the least restrictive setting which most approximates a family, and in which its special needs, if any, will be met. Second, the child must be placed within reasonable proximity to its home, taking into account any special needs. Third, a preference shall be given, absent good cause to the contrary, to placements in this order:³⁹⁴

- a member of the child's extended family;³⁹⁵
- a foster home licensed, approved or specified by the child's tribe;³⁹⁶
- an Indian foster home licensed or approved by an authorized non-Indian licensing agency;³⁹⁷
- an institution for children approved by the child's tribe or operated by an Indian organization, and which meets the child's needs.³⁹⁸

These preferences are to be met by applying the prevailing

394. 25 U.S.C. § 1915(b) (1988); BIA Guidelines, *supra* note 73, at 67594; MDHS Regulations, *supra* note 74, at XIII-3611. A child's special needs may override the requirement of placement close to home. *In re Oscar C.*, 559 N.Y.S.2d 431, 435 (N.Y. Fam. Ct. 1990). Section 1915 of the ICWA has been called its "most important substantive requirement." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989).

395. 25 U.S.C. § 1915(b)(i) (1988). The reference to the child's extended family relates to 25 U.S.C. § 1903(2) (1988), which defines an extended family member according to law or custom of the tribe, including the following relatives over 18 years of age: grandparent, aunt, uncle, brother, sister, brother-in-law, sister-in-law, niece, nephew, first cousin, second cousin, stepparent. The legislative history discusses the reason for the references to extended family members. House Report, *supra* note 14, at 10, 20; *see also In re Q.G.M.*, 808 P.2d 684, 686 n.3 (Okla. 1991) and *In re Baby Boy D.*, 742 P.2d 1059, 1076 (Okla. 1985)(dissenting opinion), *cert. denied*, 484 U.S. 1072 (1988). Although the BIA Guidelines are silent on extended family members, the MDHS Regulations track the ICWA. MDHS Regulations, *supra* note 74, at XIII-3513(4). The BIA Guidelines under placement preferences emphasize the importance of the extended family: "The Act clearly recognizes the role of the child's extended family in helping to raise children. The extended family should be looked to first when it becomes necessary to remove the child. . . ." BIA Guidelines, *supra* note 73, at 67594.

396. 25 U.S.C. § 1915(b)(ii) (1988).

397. 25 U.S.C. § 1915(b)(iii) (1988).

398. 25 U.S.C. § 1915(b)(iv) (1988). *See also* BIA Guidelines, *supra* note 73, at 67594; MDHS Regulations, *supra* note 74, at XIII-3611.

social and cultural standards of the community in which the parent and extended family live or maintain social ties.³⁹⁹ The tribe is permitted to establish a different order of preferences,⁴⁰⁰ however, and the preference of the child or parent must be considered.⁴⁰¹ Congress indicated in the ICWA's legislative history that, although section 1915 establishes a federal policy of keeping Indian children within the Indian community, it does not mean that the child can never be placed with a non-Indian family.⁴⁰²

The good cause to the contrary exception to section 1915 has generated far less discussion and many fewer appellate decisions than the similar exception to transferring a case to tribal court. The BIA Guidelines provide that the burden of establishing good cause to the contrary, at least with regard to non-adoptive placements, is with the party seeking to avoid the preferences.⁴⁰³ The Guidelines establish three types of good cause:

- the request of the parent, or of the child if the child is of sufficient age;⁴⁰⁴
- the child's extraordinary physical or emotional needs, if established by qualified expert testimony;⁴⁰⁵
- the unavailability of suitable families for placement after a diligent search.⁴⁰⁶

The MDHS Regulations add two other types of good cause: the request of an older sibling and a lack of necessary specialized treatment services. Good cause in this context does not include the child's best interests.⁴⁰⁷ The preferences contained in the Minne-

399. 25 U.S.C. § 1915(d) (1988); MDHS Regulations, *supra* note 74, at XIII-3610.

400. 25 U.S.C. § 1915(c) (1988); BIA Guidelines, *supra* note 73, at 67594; MDHS Regulations, *supra* note 74, at XIII-3613.

401. 25 U.S.C. § 1915(c) (1988); MDHS Regulations, *supra* note 74, at XIII-3614. See *In re Oscar C.*, 559 N.Y.S.2d 431, 434 (N.Y. Fam. Ct. 1990).

402. House Report, *supra* note 14, at 23.

403. BIA Guidelines, *supra* note 73, at 67594. See *In re Bird Head*, 331 N.W.2d 785, 790-91 (Neb. 1983).

404. *Id.* See *In re C.W.*, 479 N.W.2d 105, 116 (Neb. 1992).

405. *Id.* Although this guideline requires qualified expert testimony only to show the child's extraordinary physical and emotional needs, *In re J.R.H.*, 358 N.W.2d 311, 321 (Iowa 1984) suggests that expert testimony is needed not only for the three types of "good cause" listed in the BIA Guidelines, but also for the consideration of cultural adjustments; see also *In re C.W.*, 479 N.W.2d 105, 117 (Neb. 1992); *In re M.T.S.*, — N.W.2d — (Minn. Ct. App. September 15, 1992).

406. BIA Guidelines, *supra* note 73, at 67594.

407. MDHS Regulations, *supra* note 74, at XIII-3611. While the reported cases on good cause to contrary are sparse, some courts have held that the best interests of the child constitute good cause, despite the fact that it is not mentioned in the BIA Guidelines. *In re Appeal in Maricopa County Juvenile Action*, 667 P.2d 228, 234 (Ariz. Ct. App. 1983); *In re N.L.*, 754 P.2d 863, 870 (Okla. 1988); *In re T.R.M.*, 525 N.E.2d 298, 311-12 (Ind. 1988); see also *In re T.S.*, 801 P.2d 77, 81 (Mont. 1990), *cert. denied*, 111 S.Ct. 2013 (1991). As we have already noted, *supra* note 212, in the discussion of good cause not to transfer to tribal court, both the ICWA and a new Minnesota statute specifically override, insofar as native children are concerned,

sota Minority Heritage Act are not nearly as specific, though they are compatible with those of the ICWA.⁴⁰⁸ They also contain a provision for honoring a parent's request not to follow them.⁴⁰⁹

2. Adoptive Placements

Adoptive placements are controlled by section 1915(a), which does not contain the language of section 1915(b) regarding the least restrictive setting and proximity to the child's home. Adoptive placements must be arranged in the absence of good cause to the contrary according to these preferences:⁴¹⁰

- a member of the child's extended family;⁴¹¹
- other members of the child's tribe;⁴¹²

the traditional best interests of the child standard. MINN. STAT. § 260.011, subd. 2, enacted in 1990, states that the child's best interests must be determined consistent with the ICWA and the Indian Family Preservation Act. The only Minnesota decision on this point that we know of specifically held that the ICWA preempts Minnesota's best interests of the child standard. *In re M.T.S.*, No. FX-91-50419 (Minn. Dist. Ct., 7th Dist., filed January 16, 1992), *affirmed*, — N.W.2d — (Minn. Ct. App. September 15, 1992). A copy of the decision is on file with LAW & INEQUALITY. Good cause may include cultural adjustments, but does not include socioeconomic considerations. *In re J.R.H.*, 358 N.W.2d at 321-22; *but see In re Coconino County Juvenile Action*, 736 P.2d 829, 832 (Ariz. Ct. App. 1987). The "good cause" requirement has been held to provide state courts with flexibility in determining placements. *In re T.R.M.*, 525 N.E.2d 298, 311 (Ind. 1988). One court has implied that the same *forum non conveniens* rule that it invoked to prevent transfer of a case to tribal court under § 1911(b) (*see text accompanying notes 221-28 supra*) may also be good cause under § 1915. *Chester County Dept. of Social Services v. Coleman*, 399 S.E.2d 773, 776 (S.C.1990), *cert. denied*, 111 S.Ct. 2017 (1991).

408. MINN. STAT. § 260.181, subd. 3 (1990) establishes three preferences: a relative, a person of the same racial or ethnic heritage, a person who is knowledgeable and appreciative of the child's racial and ethnic heritage. There are not many Minnesota decisions on this statute. *See, e.g., In re M.M.*, 436 N.W.2d 827 (Minn. Ct. App. 1989), *rev'd*, 452 N.W.2d 236 (Minn. 1990). As we have already noted, *supra* note 57, the Minnesota Court of Appeals recently invalidated a portion of the Minority Heritage Act on equal protection grounds. *In re D.L.*, 479 N.W.2d 408 (Minn. Ct. App. 1991). The Minnesota Supreme Court affirmed that decision, but did not address the constitutional issue. *In re D.L.*, 486 N.W.2d 375 (Minn. 1992). After the appellate court's decision, the Legislature amended the Minority Heritage Act to address the court's concerns, and specified that preferences must be given to relatives, irrespective of race. 1992 Minn. Laws, ch. 557.

409. MINN. STAT. § 260.181, subd. 3 (1990).

410. 25 U.S.C. § 1915(a) (1988). *See In re M.E.M.*, 725 P.2d 212, 214 (Mont. 1986); *In re Coconino County Juvenile Action*, 736 P.2d 829, 832 (Ariz. Ct. App. 1987).

411. 25 U.S.C. § 1915(a)(1) (1988). An extended family member has the right to intervene in an adoption placement proceeding, notwithstanding the fact that the intervention section, 25 U.S.C. 1911(c) (1988) is limited on its face to foster placements and terminations. *In re M.E.M.*, 725 P.2d 212, 213-14 (Mont. 1986). *See also In re J.R.S.*, 690 P.2d 10, 15-16 (Alaska 1984); *In re Baby Girl A.*, 282 Cal. Rptr. 105, 108-109 (Cal. Ct. App. 1991); *E.A. v. State*, 623 P.2d 1210, 1215-16 (Alaska 1981).

412. 25 U.S.C. § 1915(a)(2) (1988).

- other Indian families.⁴¹³

As is the case with the other placements, the tribe can establish a different order of preference and the court must consider the preferences of the parent and child.⁴¹⁴ The social and cultural standards requirement also applies to adoptive placements.⁴¹⁵ The good cause to the contrary exception is the same as that for non-adoptive placements under both the BIA Guidelines and the MDHS Regulations.⁴¹⁶

The Minority Heritage Act contains the same provision for adoptive placements as that for other placements.⁴¹⁷ Application of the Minority Heritage Act to placement proceedings is especially important to the Minnesota lawyer. Although a person aggrieved by a wrongful placement has the same right of appeal to the appellate courts as does any other litigant, the ICWA does not permit the type of collateral attack upon a placement under 1915 that it permits for other violations of the ICWA under 1914.⁴¹⁸

Although no Minnesota appellate cases have squarely addressed the section 1915 issues, a recent decision of the Court of Appeals which applied the requirement of extended family placement to section 1912(d) suggests that section 1915 will be enforced in the same manner.⁴¹⁹

413. 25 U.S.C. § 1915(a)(3) (1988). The BIA approves single-parent families. BIA Guidelines, *supra* note 73, at 67594.

414. 25 U.S.C. § 1915(c) (1988). See *In re Baby Girl A.*, 282 Cal. Rptr. 105, 110 (Cal. Ct. App. 1991).

415. 25 U.S.C. § 1915(d) (1988).

416. BIA Guidelines, *supra* note 73, at 67594; MDHS Regulations, *supra* note 74 at XIII-3611.

417. MINN. STAT. § 260.242, subd. 1(a) (1990). See also MINN. STAT. § 259.28, subd. 2 (1990); MDHS Regulations, *supra* note 74, at XIII-3612. See note 407, *supra*.

418. See 25 U.S.C. § 1914 (1988); *In re J.R.S.*, 690 P.2d 10, 15-16 (Alaska 1984); *B.R.T. v. Social Servs. Bd.*, 391 N.W.2d 594, 601 (N.D. 1986); *State ex. rel. Juvenile Dep't v. Woodruff*, 816 P.2d 623, 625 (Or. Ct. App. 1991); *In re Baby Girl A.*, 282 Cal. Rptr. 105, 108-109 (Cal. Ct. App. 1991). For this reason, the J.R.S. court held that the tribe has the right to intervene in the adoption proceeding despite language in 25 U.S.C. § 1911(c) (1988) restricting interventions to foster care placements and terminations. *In re J.R.S.*, 690 P.2d at 15-19. See also *E.A. v. State*, 623 P.2d 1210, 1215-16 (Alaska 1981)(grandparents have same right of intervention in adoptions); *In re M.E.M.*, 725 P.2d 212, 213-14 (Mont. 1986)(paternal aunt).

419. *In re M.S.S.*, 465 N.W.2d 412 (Minn. Ct. App. 1991). See also note 407, *supra* for a discussion of the recent decision in *In re M.T.S.*. It will not be long before more 25 U.S.C. § 1915 (1988) issues are before Minnesota courts. A recent report of the Department of Human Services suggests that Minnesota's compliance with the placement preferences of the ICWA and Minority Heritage Acts leaves a great deal to be desired. See Minn. Dep't. of Human Services, "Monitoring of Hennepin County Compliance With Laws Respecting Cultural Heritage," (January, 1991) (on file with LAW & INEQUALITY). Enforcement actions are being considered by local ICWA litigators.

VIII. Conclusion

Minnesota lawyers hold the key to enforcement of their native clients' rights under both the ICWA and the Minnesota statutes discussed in this article. These statutes were not enacted in a vacuum; the circumstances demanded their enactment. As the legislative history of the ICWA illustrates, the rights of native parents and their tribes have been traditionally abridged by state courts and state child protection agencies. We hope we have provided Minnesota lawyers the tools they need to claim and enforce the rights provided by these statutes.

JURISDICTION	TRIBAL COURT			P.L. 280 STATUS			TRIBAL COURT PROCEDURES				
	Tribal Court?	Juv. Cases?	Juv. Code	P.L. 280 State?	1918 Retro.?	Enrollment Requirement	1911(c) Interv.	May State Lawyers Appear?	Tribal Court Admission?		
Tribe											
M	Yes	Yes	Yes	Yes-1	N/A	1/4 -2	Yes	Yes	Yes		
I	Yes	Yes	Yes	Yes	3	1/4 -MCT	Yes	N/A	N/A		
W	No	No	No	Yes	N/A	1/4 -4	No	N/A	N/A		
M	No	N/A	N/A	Yes	N/A	1/4 -MCT	Yes	N/A	N/A		
K	Yes	Yes	Yes	Yes	3	1/4 -MCT	Yes	Yes	Yes		
E	No	N/A	N/A	Yes	N/A	1/4 -MCT	Yes	N/A	N/A		
S	No	N/A	N/A	Yes	N/A	1/4 -MCT	Yes	N/A	N/A		
O	No	N/A	N/A	Yes	N/A	5	No	N/A	N/A		
T	No	N/A	N/A	Yes	No	6	No	Yes	Yes		
A	No	7	No	Yes	N/A	8	Yes	N/A	N/A		

KEY:

MCT: Refers to the six-band Minnesota Chippewa Tribe Confederation, composed of the Bois Forte, Fond du Lac, Grand Portage, Lake Mille Lacs, Leech Lake, and White Earth bands.

N/A: Not Applicable

- 1: Although these tribes were located in P.L. 280 states, they were specifically exempted from P.L. 280 and therefore section 1918 does not apply to them.
- 2: Except where noted, the percentage is of that tribe's blood.
- 3: We were unable to precisely ascertain whether these two tribal courts were established in compliance with 1918.
- 4: Fond du Lac requires 1/4 MCT blood, among other criteria.
- 5: Membership in these tribes depends on lineal descent
- 6: Membership is by 1/4 blood or lineal descent
- 7: Juvenile cases are heard by the tribal court of a neighboring tribe.
- 8: Membership depends upon which of the three Upper Sioux tribes

JURISDICTION	TRIBAL COURT		P.L. 280 STATUS		TRIBAL COURT PROCEDURES				
	Tribal Court?	Juv. Cases?	Juv. Code	P.L. 280 State?	1918 Metro.?	Enrollment Requirement	1911(c) Interv.	May State Lawyers Appear?	Tribal Court Admission?
M Devils Lake - Lakota	Yes	Yes	Yes	Yes	Yes	1/4	Yes	Yes	Yes
D Ft. Berthold	Yes	Yes	Yes	Yes	Yes	1/4	Yes	Yes	Yes
A Arikara									
K Hidatsa									
O Mandan									
T Standing Rock - Lakota	Yes	Yes	Yes	Yes	Yes	1/4	Yes	Yes	Yes
A Turtle Mountain - Ojibwe	Yes	Yes	Yes	Yes	Yes	1/4	Yes	Yes	Yes
S Cheyenne River - Lakota	Yes	Yes	Yes	Yes	Yes	12	Yes	Yes	Yes
D Crow Creek - Lakota	Yes	Yes	Yes	Yes	Yes		Yes	Yes	Yes
A Plandreau - Santee Dakota	Yes	Yes	Yes	Yes	Yes	14	Yes	Yes	Yes
K Lower Brule - Lakota	Yes	Yes	Yes	Yes	Yes	5	Yes	Yes	Yes
O Pine Ridge - Lakota	Yes	Yes	Yes	Yes	Yes	5	Yes	Yes	Yes
T Rosebud - Lakota	Yes	Yes	Yes	Yes	Yes	1/4	Yes	Yes	Yes
O Sisseton Wahpeton- Dakota	15	15	15	Yes	15	16	15	15	15
A Standing Rock - Lakota	Yes	Yes	Yes	Yes	Yes	1/4	Yes	Yes	Yes
A Yankton - Dakota	Yes	Yes	Yes	Yes	Yes			Yes	Yes

KEY

- 5: Membership in these tribes depends on lineal descent
- 12: Membership is by 1/4 blood and lineal descent
- 14: Requirements for membership include blood, lineal descent, and one parent who is a member.
- 15: The Sisseton-Wahpeton Dakota tribe had a tribal court for juvenile and ICWA matters until October, 1991, when it lost its funding; it has been replaced, as to some matters, by a regulatory court established under federal rules; its intervention practices in state court, which were extensive in the past, are now uncertain.
- 16: Membership is by 1/4 blood of any Sioux (Dakota, Lakota) tribe or 1/4 blood of any tribe

JURISDICTION	TRIBAL COURT		P. L. 280 STATUS		TRIBAL COURT PROCEDURES				
	Tribal Court?	Juv. Cases?	Juv. Code	P. L. 280 State?	1918 Retro.?	Enrollment Requirement	1911(c) Interv.	May State Lawyers Appear?	Tribal Court Admission?
Tribes									
W Bad River - Ojibwe	Yes	9	9	Yes	Yes	5	Yes	Yes	Yes
X Lac du Flambeau - Ojibwe	Yes	Yes	Yes	Yes	Yes	5	Yes	Yes	Yes
I Lac Crte. Oreilles-Ojibwe	Yes	Yes	Yes	Yes-1	Yes	10	Yes	Yes	Yes
S Menominee	Yes	Yes	No	Yes	N/A	5	Yes	Yes	Yes
C Mole Lake - Ojibwe	Yes	9	Yes	Yes	No	5	Yes	Yes	Yes
O Oneida	Yes	N/A	Yes	Yes	N/A	1/4	Yes	N/A	N/A
M Potawatomi	11	N/A	N/A	Yes	11	6	Yes	Yes	Yes
S Red Cliff- Ojibwe	Yes	Yes	Yes	Yes	Yes	5	Yes	Yes	Yes
I St. Croix - Ojibwe	Yes	No	N/A	Yes	No	12	Yes	Yes	Yes
M Stkbrdg. Munsee - Mohican	No	N/A	N/A	Yes	N/A	12	Yes	N/A	N/A
Winnabago	No	N/A	N/A	Yes	N/A	1/4	Yes	Yes	Yes
M	Yes	Yes	Yes	Yes	Yes	12	Yes	Yes	Yes
E	No	N/A	N/A	Yes	N/A	12	Yes	N/A	N/A
B	Yes	Yes	Yes	Yes	Yes	13	Yes	Yes	No
R Santee - Dakota	Yes	Yes	Yes	Yes	Yes				
A Winnebago									
S									
K									
A									

KEY

N/A: Not Applicable

1: Although these tribes were located in P. L. 280 states, they were specifically exempted from P. L. 280 and therefore section 1918 does not apply to them.

5: Membership in these tribes depends on lineal descent

6: Membership is by 1/4 blood or lineal descent

9: Establishment of a tribal court and/or code for juvenile cases is in process.

10: The Menominee tribe requires residence for enrollment, rather than blood or lineal descent.

11: Establishment of a tribal court and compliance with 1918 is in process.

12: Membership is by 1/4 blood and lineal descent

13: Membership is by 1/4 Nebraska Winnebago blood